

The Origins, Evolution and Puzzling Irrelevance of Jury Recommendations in Second-Degree Murder Sentencing

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Section 745 of the Criminal Code is currently the only area of Canadian sentencing law that contemplates a role for juries. It grants juries the ability to recommend periods of parole ineligibility immediately following a guilty verdict in second-degree murder cases. This power is a remnant of a 1961 amendment to the Criminal Code that empowered juries to recommend clemency in capital murder cases. Although capital punishment has long since been repealed, jury involvement in sentencing persists—at least on paper. This article demonstrates that despite the codification of jury recommendations, Canadian courts have shown remarkable reluctance to give them meaningful weight in sentencing. A survey of the jurisprudence reveals that courts have several concerns related to jury recommendations, including the jury's limited understanding of the legal principles of sentencing and the undue burden that the additional responsibility places on the already exhausted jurors. Although some courts pay lip service to jury recommendations, it is evident from the jurisprudence that the courts consider the power to be irrelevant. After weighing the potential benefits of retaining jury recommendations, this article argues that they have been judicially repealed for sound reasons of principle and policy, and accordingly should be formally removed from the Criminal Code.

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Introduction

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Introduction

The ability of jurors to recommend periods of parole ineligibility immediately following a guilty verdict is one of the most remarkable features of Canada's second-degree murder sentencing regime.¹ Indeed, with the exception of the recently repealed "faint hope" clause,² no other provision of the *Criminal Code* contemplates jurors' involvement in sentencing. Yet in spite of the uniqueness of section 745.2 of the *Criminal Code*, little has been written on jury recommendations in Canada.³ For the most part, scholars interested in murder sentencing have focused on the overall magnitude of a sentence, and not on the unusual procedural machinery associated with second-degree murder sentencing.⁴ This article

1. *Criminal Code*, RSC 1985, c C-46, ss 745(c), 745.2.

2. Under the former section 745.61(5) of the *Criminal Code*, a jury could be empanelled to consider whether an offender's "number of years of imprisonment without eligibility for parole ought to be reduced". However, this was substantially repealed in 2011. See *An Act to amend the Criminal Code and another Act*, SC 2011, c 2 [*Criminal Code Amendment 2011*].

3. This is doubly surprising given the large body of academic literature on jury sentencing in the United States, much of which focuses on capital punishment and so-called "death qualified jurors". See e.g. Charles W Webster, "Jury Sentencing: Grab-Bag Justice" (1960) 14:2 Sw LJ 221; Bryan A Stevenson, "The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing" (2003) 54:4 Ala L Rev 1091; Erik Lillquist, "The Puzzling Return of Jury Sentencing: Misgivings About Apprendi" (2004) 82:2 NCL Rev 621; Nancy J King, "Origins of Felony Jury Sentencing in the United States" (2003) 78:3 Chi-Kent L Rev 937; Nancy J King, "How Different Is Death?: Jury Sentencing in Capital and Non-capital Cases Compared" (2004) 2:1 Ohio St J Crim L 195. The idea of involving jurors in sentencing was also the subject of a recent Australian study. See Kate Warner et al, "Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study" (2011) 407 Trends & Issues in Crime & Criminal Justice 1 at 1-6.

4. For some of the leading contributions, see Gary Trotter, "*R v Shropshire*: Murder, Sentencing and the Supreme Court of Canada" (1996) 43 CR (4th) 288; John Norris, "Sentencing for Second-Degree Murder: *R v Shropshire*" (1996) 1:1 Can Crim L Rev 199;

helps fill this gap by exploring the jury's role in second-degree murder sentencing and assessing its successes and failures.

Despite being an unusual feature of the *Criminal Code*, jury recommendations have had little influence in murder sentencing because judges have been reluctant to give them much, if any, weight. The ambivalence of judges is perhaps understandable; after all, one of the most elemental divisions in criminal law is between the jury's role as finders of fact and the judge's role in fixing punishment. Yet the apparent irrelevance of jury recommendations is puzzling; no other sentencing process contemplates the involvement of the jury, which must surely suggest that Parliament intended for jury recommendations to be given weight in sentencing.

It is not, however, the aim of this article to argue in favour of jury recommendations. On the contrary, my claim is that the fifty-year experiment with formalized jury recommendations has been an abject failure. For sound reasons of principle and policy, judges have ignored jury recommendations. Jury recommendations not only impose an unfair burden on jurors, but also lead to an unprincipled comingling of juristic functions. For these reasons, jury recommendations should be abolished.

Part I of this article discusses jury recommendations in their historical context. Common law juries have long had the privilege of attaching a "recommendation to mercy" to their verdicts. However, the procedure for soliciting such recommendations at common law was an informal one. Whereas judges were precluded from commenting on the jury's ability to offer a recommendation, juries were permitted to spontaneously add them to their verdicts. This informal practice was in place in Canada until 1961 when Parliament introduced amendments to the *Criminal Code*, formalizing and institutionalizing the jury's power to recommend

Tim Quigley, "New Horizons in Sentencing" (1996) 1:1 Can Crim L Rev 277; Allan Manson, "The Supreme Court Intervenes in Sentencing" (1996) 43 CR (4th) 306; John Norris & Suzanne Jarvie, "Developments in Criminal Procedure and Sentencing: The 1995-96 Term" (1997) 8 SCLR (2d) 233; Isabel Grant, "Sentencing for Murder in Canada" (1997) 9:5 Federal Sentencing Reporter 266; Isabel Grant, "Rethinking the Sentencing Regime for Murder" (2001) 39:2&3 Osgoode Hall LJ 655; Nathan Gorman, "The Effects of *Shropshire* on Parole Ineligibility for Second Degree Murder" (2002) 1 CR (6th) 324; Isabel Grant, "Intimate Femicide: A Study of Sentencing Trends for Men Who Kill Their Intimate Partners" (2010) 47:3 Alta L Rev 779.

clemency if they convicted an offender of capital murder.⁵ The jury's statutory power to recommend clemency was later replaced with a power to recommend parole ineligibility when capital punishment was abolished in 1976.⁶

After placing the jury recommendation power in its historical context, Part II of the article examines the post-1976 jurisprudence on jury recommendations. This jurisprudence is characterized by both profound skepticism about jury recommendations and a near total disregard for their value. Although courts occasionally pay lip service to jury recommendations, they more often emphasize their non-binding character. While no firm empirical conclusion about the influence of jury recommendations is offered in this article, the case law adequately demonstrates that courts do not give meaningful weight to jury recommendations. Although the parole ineligibility period fixed by a sentencing judge sometimes corresponds to the jury's recommendation, judges often and readily depart from juries' recommendations, frequently imposing parole ineligibility periods that are far greater than the ones recommended by the jury. This judicial ambivalence toward jury recommendations has also affected the procedural rules associated with the solicitation of recommendations.

Part III of the article returns to the question of whether Parliament should retain jury recommendations in second-degree murder sentencing. While there are arguments that can be advanced in favour of maintaining a role for juries in sentencing, the stronger arguments weigh in favour of abolishing the involvement of juries completely. The article concludes that the jury recommendation is a legal anachronism whose original purpose disappeared with the abolition of capital punishment.

I. The Jury and Mercy Recommendations

The formal involvement of juries in murder sentencing is a relatively recent innovation in Canadian law. The existing provisions on second-degree murder sentencing⁷ were first introduced into the *Criminal*

5. *An Act to amend the Criminal Code (Capital Murder)*, SC 1960–61, c 44 [*Capital Murder Amendment*].

6. *Criminal Law Amendment Act (No 2)*, 1976, SC 1974–75–76, c 105 [CLAA].

7. *Criminal Code*, *supra* note 1, ss 745(c), 745.2.

Code in 1976 as part of a raft of reforms associated with the abolition of capital punishment.⁸ Before discussing the current provisions in the *Criminal Code*, it is worth touching upon the role of juries in sentencing at common law since this has undoubtedly influenced the statutory jury recommendation procedures.

Juries have long had the privilege of recommending mercy, leniency or clemency.⁹ However, these recommendations were not formally recognized at common law. Instead, a mercy recommendation was considered by courts to be a “rider” that juries could attach to their verdict.¹⁰ The recommendation, therefore, had moral but not legal force,¹¹ and any words offered by the jury to explain the basis for a recommendation “were no part of the verdict, and had nothing to do with

8. *CLAA*, *supra* note 6 (abolishing the death penalty for offences committed in contravention of the *Criminal Code*). The death penalty for military offences was repealed in 1999 and amended to mandatory life imprisonment. See *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35.

9. I will refer to all of these as the “recommendation to mercy” or “mercy recommendations”. Clemency, leniency and mercy are often used interchangeably. That being said, they are distinct concepts. Clemency generally refers to the exercise of the power to pardon or commute a sentence of death to life imprisonment, and occurred through the exercise of the Royal Prerogative of Mercy. Although the focus of this article is on murder sentencing, it is important to bear in mind that mercy recommendations were not limited to capital crimes. See *R v Carr*, [1937] OR 600, [1937] 3 DLR 537 (CA) (involving a jury recommendation made upon a conviction for criminal negligence causing death); *R v Fushtor*, [1946] 2 DLR 627, 1 CR 351 (Sask CA) (involving a jury recommendation made in relation to the offence of rape); *R v Kaplansky* (1922), 51 OLR 587, 69 DLR 625 (SC (H Ct J)) (involving a jury recommendation made in relation to an armed robbery).

10. Richard G Fox, “When Justice Sheds a Tear: The Place of Mercy in Sentencing” (1999) 25:1 *Monash UL Rev* 1 at 9. On the other hand, it does not appear that the verdict and “rider” were severable. See “Is a Rider Separable from Its Verdict”, Note, (1945) 9:1 *J Crim L* 61 at 61.

11. The role of mercy in the criminal law context is a subject beyond the scope of this short article. However, there is no question that “mercy” has long played a role in the criminal justice system. Although most discussions of mercy have stressed its beneficent quality, some scholars have argued that the discretionary exercise of mercy was a means of projecting the majesty of the law and thereby of exerting social control over the citizenry. See e.g. Douglas Hay, “Property, Authority and the Criminal Law” in Douglas Hay et al, eds, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975) 17 at 40-49.

it”.¹² In cases where the trial judge had no discretion, the recommendation was considered to be mere “surplusage”,¹³ since it was the judge who had the legal responsibility over punishment.¹⁴

The receipt of mercy recommendations at common law appears to have been a mostly unstructured process.¹⁵ Judges were not allowed to remind jurors about their privilege to recommend mercy.¹⁶ In fact, the spontaneity of the jury recommendation was viewed as a mark of its value.¹⁷ However, defence counsel (in Canada at least) were allowed to plead for the jury to add a recommendation to their verdict.¹⁸ While mercy recommendations were not uncommon (approximately one out of every five in capital cases),¹⁹ there was little guiding the jury’s decision to

12. See *R v Trebilcock* (1858), 169 ER 1079 at 1081, Martin B (where the jury found the accused guilty of larceny but recommended mercy because they believed he intended to return the plate that he had stolen). However, it was common for jurors to “editorialize” on the reasons for their verdict when attaching a recommendation for mercy. See e.g. *R v Puddick* (1865), 176 ER 662 at 662 (a case of rape in which the jury made a recommendation to mercy, adding that they did not think the woman had resisted as she ought to have done). There is at least one instance of jurors being asked to divulge reasons for their recommendation. See *R v Hewes* (1835), 111 ER 589 at 590.

13. It has been described as “surplusage” by courts in the United States. See “Court’s Instructions in Answer to Jury’s Inquiry Concerning Recommendations of Mercy”, Note, (1939) 73:8 US L Rev 421 at 423.

14. See *Whittaker v The King* (1928), 41 CLR 230 at 240 (Austl HC).

15. In fact, it was so unstructured that it appears that the prosecutors themselves could join in a recommendation. See e.g. *R v Carlile* (1834), 172 ER 1393 at 1393.

16. See *R v Larkin* (1942), [1943] KB 174 (CA).

17. See LJ Blom-Cooper, “Pleading for Mercy” (1964) 27:2 Mod L Rev 233 at 233.

18. See e.g. *Re Nicol*, [1954] 3 DLR 690, 108 CCC 355 (BCSC) [cited to DLR] (“defence counsel in his address made no attempt to offer a defence in law but confined himself to a plea for compassion, mainly on account of the offender’s youth, to which the jury acceded by adding as a rider to its verdict a very strong recommendation for mercy” at 693). English courts were more ambivalent about counsel directly pleading for mercy and attempted to place a restraining hand on the practice. See *R v Black*, [1963] 3 All ER 682. See also Blom-Cooper, *supra* note 17 at 234–35.

19. In 1956, the Special Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries reported that recommendations to mercy were added in 135 out of 597 murder cases in the 30-year period between 1920 and 1949. Canada, Special Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries, *Final Report on Capital Punishment* (Ottawa: Queen’s Printer and Controller of Stationery, 1956) at 5 [*Report on Capital Punishment*].

make one, except perhaps their natural sympathies or prejudices toward an offender. The limited evidence available in the Canadian jurisprudence suggests mercy recommendations were often made in murder cases where there was an element of provocation;²⁰ the offender was a young person;²¹ the offender was of good character;²² or the offender was suffering from a mental disorder that fell short of bringing him within the insanity defence.²³

Prior to the 1960s, jury recommendations raised little legal controversy in Canada. Issues only arose in cases where judges had improperly or inadvertently commented on the availability of a jury recommendation.²⁴ Judges were, as a matter of law, prohibited from commenting on the jury's ability to recommend mercy because such a comment would "not assist the jury in performing their duty to decide the issue of fact before them" and because "a suggestion that the verdict is to be reviewed may result in some abatement of the deep sense of responsibility with which a jury ought to be brought to regard their duty in passing upon any criminal charge".²⁵ The concern seems to have been that jurors might come to a compromise verdict if they believed the accused's life might later be spared.

The question of whether the jury's role in sentencing should be formalized emerged with the development of a distinction between capital and non-capital murder. Before 1961, all forms of murder were treated as

20. See *R v Krawchuk* (1940), [1941] 2 DLR 353, 75 CCC 16 (BCCA); *R v Harrison* (No 2) (1945), [1946] 3 DLR 690, 86 CCC 166 (BCCA).

21. According to the 1956 *Report on Capital Punishment*, unlike the United Kingdom, Canada had no rule prohibiting the execution of a person who committed murder under the age of 18. *Report on Capital Punishment*, *supra* note 19. However, the *Report on Capital Punishment* said it appeared youth was taken into account in deciding whether to execute an individual. Only "three persons, under the age of 18 when the offence was committed, have been executed in Canada". *Ibid* at 5.

22. See *R v Voll* (1920), 48 OLR 437, 57 DLR 440 (SC (AD)).

23. See *R v Moke* (1917), 12 Alta LR 18, 38 DLR 441 (SC (AD)); *R v Logan*, [1944] 4 DLR 287, 82 CCC 234 (BCCA).

24. See *R v McLean*, [1933] SCR 688 at 693, [1934] 2 DLR 440; *R v Cathro* (1955), [1956] SCR 101 at 105, 2 DLR (2d) 270; *R v Cracknell*, [1931] OR 634 at 637, [1931] 4 DLR 657 (CA); *R v Stevenson* (1990), 41 OAC 1, 58 CCC (3d) 464 (CA). A similar issue arose more recently. See *R v Latimer*, 2001 SCC 1 at para 67, [2001] 1 SCR 3.

25. *R v McLean*, *supra* note 24 at 693. That being said, judges do not appear to have followed this rule punctiliously. See *R v Weber* (1921), 51 OLR 218, 61 DLR 601 (CA).

a capital offence and hence were subject to the death penalty unless the Governor General in Council commuted the sentence or pardoned the offender.²⁶ Although gradations in murder were already common in the United States, Canada continued to adhere to the “British common-law custom of applying only one definition of murder”.²⁷ In 1961, however, murder was divided into capital and non-capital murder.²⁸ Capital murder paralleled what we now call first-degree murder and was punishable by mandatory hanging unless the accused was under eighteen years of age. Non-capital murder, now called second-degree murder, was punished by life imprisonment.

The 1961 *Criminal Code* amendments were also significant because they introduced a new section pursuant to which a trial judge was required to solicit a jury recommendation for clemency upon conviction for capital (now first-degree) murder.²⁹ In view of the importance of the section, it is worthwhile setting it out as a whole:

642A. (1) Where a jury finds an accused guilty of an offence punishable by death, the judge who presides at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty and the law requires that I now pronounce sentence of death against him (or “the law provides that he may be sentenced to death”, as the case may be). Do you wish to make any recommendation as to whether or not he should be granted clemency? You are not required to make any recommendation but if you do make a recommendation either in favour of clemency or against it, your recommendation will be included in the report that I am required to make of this case to the Minister of Justice and will be given due consideration.³⁰

Section 642A is in many respects a remarkable provision. Not only does it codify the jury’s involvement in granting clemency, but it is also a unique example of a jury instruction being set out in the

26. *Criminal Code*, SC 1953–54, c 51, ss 201–02 [*Criminal Code* 1954].

27. Carolyn Strange, “Mercy for Murderers?: A Historical Perspective on the Royal Prerogative of Mercy” (2001) 64:2 Sask L Rev 559 at 568. The United Kingdom modified its homicide law in 1957 and reclassified murder as being capital and non-capital. See *The Homicide Act, 1957* (UK), 5 & 6 Eliz II, c 11, s 5.

28. *Capital Murder Amendment*, *supra* note 5.

29. *Ibid*, s 13, amending *Criminal Code* 1954, *supra* note 26, s 642A.

30. *Ibid*.

Criminal Code itself.³¹ As with the entire package of amendments, the government was inspired by the United Kingdom's Royal Commission on Capital Punishment (also known as the Gowers Commission).³² The Gowers Commission was appointed in 1949 to explore the practice of capital punishment. Although most of the Gowers Commission report focused on whether liability for capital punishment should be limited, modified or replaced by other forms of punishment, the report also made recommendations on procedural aspects of capital punishment.³³ Commissioners were concerned that the "rigidity" of the punishment for murder was only mitigated by the prerogative of mercy. They concluded that this could only be resolved by giving "either to the [j]udge or to the jury a discretion to decide in each particular case . . . whether the sentence of death is appropriate, and, if it appears to them that it is not, to impose or to recommend a lesser punishment".³⁴

It is evident from the 1961 debates in the Canadian Parliament that the Gowers Commission report strongly influenced the government of the day. When the 1961 amendments were introduced, the Minister of Justice referred opposition critics "to the findings of the Gowers

31. Model jury instructions are a relatively modern phenomenon. See e.g. Gerry A Ferguson, Michael R Dambrot & Elizabeth A Bennett, *CRIMJI: Canadian Criminal Jury Instructions*, 4th ed (Vancouver: Continuing Legal Education Society of British Columbia, 2005) [*Canadian Criminal Jury Instructions*]; David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Carswell, 2005) [*Watt's Manual*]. Traditionally, jury instructions developed incrementally through the common law. See e.g. *R v Vetrovec*, [1982] 1 SCR 811, 136 DLR (3d) 89 (the need for corroboration when relying upon unsavory witnesses); *R v Hibbert*, 2002 SCC 39, [2002] 2 SCR 445 (inferences to be drawn from a false alibi); *R v W(D)*, [1991] 1 SCR 742, 63 CCC (3d) 397 (assessing credibility of accused); *R v Lifchus*, [1997] 3 SCR 320, 150 DLR (4th) 733 (explaining the meaning of reasonable doubt).

32. UK, *Report of the Royal Commission on Capital Punishment, 1949-1953* (London, UK: Her Majesty's Stationery Office, 1953) [*Gowers Report*]. The Special Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries expressly rejected the Gowers Report recommendation, stating that it did not "favour the granting of discretion as to sentence to the jury because it does not conform to the traditional function of the jury which is to decide whether a person is guilty or innocent as charged". The Special Joint Committee added that "the exercise of a jury's discretion on the question of sentence would result in inconsistency and uncertainty in the administration of the law". *Report on Capital Punishment*, *supra* note 19 at 18.

33. For a helpful summary of the report, see George H Dession, "The Gowers Report and Capital Punishment" (1954) 29:5 NYUL Rev 1061.

34. *Gowers Report*, *supra*, note 32 at 190.

Royal Commission”.³⁵ Yet the government was not prepared to go so far as to place the death penalty entirely in the hands of jurors, as had been done in some US jurisdictions. Section 642A, therefore, represents a quintessentially Canadian compromise that envisioned the jury having some influence, but placed the ultimate decision in the hands of the executive.

Although the legislative record suggests that parliamentarians were mostly content to permit the jury to make a recommendation, the amendment was not without controversy. In particular, a number of opposition members questioned whether the jury would have to be unanimous in making a recommendation.³⁶ When the issue came before the House of Commons, the government held fast to its position that unanimity would be required. The Minister of Justice stated the “provision for unanimity is, generally speaking, one that works in favour of the accused” and it was therefore proper to carry the principle forward with respect to their recommendation.³⁷ The Bill containing section 642A was passed in the House, but when it reached Senate, the debate over unanimity continued. The question was finally resolved when the Senate added the following amendment, which permitted a judge to poll deadlocked jurors for their recommendation:

If the jury reports to the judge that it is unable to agree upon a recommendation, either in favour of clemency or against it, and the judge is satisfied that further retention of the jury would not lead to agreement, he shall ascertain the number of jurors who are in favour of making a recommendation for clemency and the number of jurors who are against making such a recommendation and shall include such information in the report required by subsection 1 of section 643.³⁸

35. *House of Commons Debates*, 24th Parl, 4th Sess, No 6 (5 June 1961) at 5894 (Mr Fulton).

36. *Ibid* at 5889, 5894–95.

37. *Ibid* at 5902. Whether this was the position at common law is unclear. The law reports do not contain any discussion of whether the jury had to be unanimous in making a recommendation to mercy. Nevertheless, there are many cases in which recommendations were made, and I have not encountered any that refer to the jury being divided on its recommendation. There is also no mention of the jury being divided in any of the leading commission reports on capital punishment, which suggests that unanimity was the operating assumption, if not actually a formal legal rule.

38. JH McC McNair, “Capital and Non-Capital Murder” (1962) 20 UT Fac L Rev 53 at 67, citing *Capital Murder Amendment*, *supra* note 5, s 13, amending *Criminal Code* 1954, *supra* note 26, s 642A(2).

Following its enactment in 1961, section 642A seems to have led a mostly inconspicuous existence, with only a few reported decisions on the section.³⁹ The only decision of real consequence is that of the Supreme Court of Canada in *R v Fulton*.⁴⁰ In that case, the offender appealed on the basis that the trial judge had failed to adequately explain the meaning of clemency and the extent of the jury's right to recommend it under section 642A of the *Criminal Code*. In a brief set of oral reasons, the Court dismissed the appeal, holding that "all that the judge is required to do, and all that he should do, is to put to the jury the question in the terms of [section 642A]".⁴¹

This brings us to the current provisions of the *Criminal Code*. In 1976, the distinction between capital and non-capital murder was abolished along with the death penalty.⁴² The amending legislation created the now familiar categories of first- and second-degree murder. Both forms of murder were subject to a mandatory minimum sentence of life imprisonment.⁴³ However, offenders convicted of first-degree murder would be subject to a twenty-five-year period of parole ineligibility.⁴⁴ On the other hand, offenders convicted of second-degree murder would be subject to a period of parole ineligibility of ten to twenty-five years.⁴⁵ The only exception to the parole ineligibility provisions in the *Criminal Code* was the so-called "faint hope" clause, which permitted a reduction in parole ineligibility after an offender had served a fifteen-year period of imprisonment.⁴⁶

Under the current provisions of the *Criminal Code*, the period of parole ineligibility for second-degree murder is ten years unless the

39. See *R v Kowalski* (1962), 37 WWR 529, 132 CCC 324 (Man CA); *R v Fulton*, [1966] SCR 402, 49 CR 93 [cited to SCR]; *R v More*, [1963] SCR 522, 41 DLR (2d) 380; *R v Booth*, [1966] OJ No 490 (QL) (SC (CA)).

40. *Supra* note 39.

41. *Ibid* at 402. This is a rather disappointing conclusion given that jurors might not have understood the meaning of the word "clemency" and in particular, that the word only referred to the commutation of the death sentence to be replaced by a sentence of life in imprisonment.

42. *Criminal Law Amendment (Capital Punishment) Act*, SC 1973-74, c 38, s 3.

43. *Criminal Code*, *supra* note 1, s 745.

44. *Ibid*, s 745(a).

45. *Ibid*, s 745.4.

46. The faint hope clause was substantially repealed in 2011. See *Criminal Code Amendment 2011*, *supra* note 2. I say "substantially" because it has not been eliminated for

sentencing judge substitutes a longer period under section 745.4, up to a maximum of twenty-five years. However, a judge's discretion is not unfettered. Section 745.5 of the *Criminal Code* stipulates that a sentencing judge must consider four factors in fixing a parole ineligibility period, namely: (1) the character of the offender; (2) the nature of the offence; (3) the circumstances surrounding its commission; and (4) the jury recommendation (if any).⁴⁷ As this suggests, the main remnant from section 642A (set out above) is the jury recommendation. The question that judges must now ask jurors is as follows:

You have found the accused guilty of [second-degree] murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.⁴⁸

Similar prescribed questions are also in place for an accused who commits either first- or second-degree murders while under the age of sixteen. Most recently, Parliament has added a new provision for offenders who have been convicted of multiple murders, according to which the jury is asked if the parole ineligibility period should be imposed concurrently or consecutively.⁴⁹

The existing provisions for jury recommendations were seemingly inspired by the former section 642A of the *Criminal Code*. However, there is no record of debate in the 1976 legislative record about retaining jury recommendations after the abolition of capital punishment. Perhaps understandably, parliamentarians were preoccupied with the question

persons tried and convicted of murder prior to the coming into force of the amendments. That being said, the amendments impose more stringent conditions on applicants. For example, an offender must apply for early release within ninety days of the end of the first fifteen-year period. If this is not successful, the offender must wait another five years before making a fresh application.

47. *Supra* note 1, s 745.5.

48. *Ibid*, s 745.2, as amended by *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22, ss 6, 22.

49. *Criminal Code*, *supra* note 1, s 745.21.

of whether capital punishment should be abolished. For that reason, however, there is almost no information on why Parliament decided to retain jury recommendations in murder sentencing.

While there are striking similarities between section 745.2 and the former section 642A of the *Criminal Code*, there are also important differences between the two sections. Most obviously, section 745.2 concerns parole ineligibility, not the imposition of the death penalty. Another important difference is that the existing jury recommendation procedure does not expressly permit judges to poll jurors when they do not reach a unanimous recommendation. As discussed below, this has not stopped the majority of Canadian appellate courts from holding that a jury recommendation under section 745.2 need not be unanimous.

II. The Judicial Treatment of Jury Recommendations

The operation of the current parole ineligibility regime can only be properly understood by examining the jurisprudential treatment of jury recommendations under section 745.2 of the *Criminal Code*. Unlike the former section 642A of the *Criminal Code*, section 745.2 has been the subject of considerable judicial comment.⁵⁰ In part, this may be explained by the fact that the non-binary nature of parole ineligibility recommendations provides a comparatively broader range of options than those that existed under the capital/non-capital murder regime. As a result, there is inevitably more balancing involved in weighing the four factors set out in section 745.5 of the *Criminal Code*.⁵¹ Yet another reason for the larger volume of parole ineligibility jurisprudence is that the decision is a high stakes one for the offender. Each additional day, week or year of parole ineligibility is time spent in prison.⁵² It is also worth noting

50. As a part of an ongoing study of national parole ineligibility trends, I have located 477 reported parole ineligibility decisions between 1990 and 2012. In order to avoid double counting, this figure excludes trial level decisions that were subject to an appeal. On average there are approximately twenty-five reported parole ineligibility decisions per year. By contrast, I located only four decisions in total under the former section 642A.

51. *Supra* note 1, s 745.5.

52. *Ibid.*, s 746.1. See also *Corrections and Conditional Release Act*, SC 1992, c 2, s 119 [CCRA].

that an offender has a right to appeal parole ineligibility decisions, unlike most other sentences that require leave to appeal.⁵³ Whatever the precise reason for the volume of reported decisions, there is now a significant body of jurisprudence to draw upon.

Although this article focuses on jury recommendations, it is nevertheless appropriate to comment briefly on parole ineligibility decisions more generally. Apart from the jury recommendation, section 745.5 of the *Criminal Code* states that courts must consider the character of the offender, the nature of the offence and the circumstances surrounding its commission.⁵⁴ While it is difficult to pinpoint the exact reasons courts depart from the ten-year minimum, factors that courts frequently invoke include: multiple murder victims;⁵⁵ exploitation of vulnerability;⁵⁶ circumstances indicative of premeditation or planning;⁵⁷ evidence of an unsavoury motive;⁵⁸ brutality of killing;⁵⁹ or an accused's history of dangerousness.⁶⁰ There are relatively few reported cases where courts have imposed parole ineligibility sentences in excess of twenty years.⁶¹

Like all sentencing, imposing a period of parole ineligibility is a matter of discretion.⁶² Unfortunately, appellate courts have given little

53. *Criminal Code*, *supra* note 1, s 675(2).

54. *Ibid*, s 745.5.

55. See *R v JJA* (1994), 52 BCAC 291, 25 WCB (2d) 460 (CA); *R v JMC*, 2011 BCSC 1177, 88 CR (6th) 175; *R v Turcotte*, 2006 BCSC 2087, 79 WCB (2d) 305.

56. See e.g. *R v Cruz* (1998), 52 BCLR (3d) 370, [1999] 1 WWR 322 (CA) [cited to BCLR]; *R v Van Osselaer*, 2004 BCCA 3, 181 CCC (3d) 322; *R v Guignard*, 2008 ABQB 283, 447 AR 376.

57. See *R v Nash*, 2009 NBCA 7, 340 NBR (2d) 320; *R v Atwal*, 2006 BCCA 493, 232 BCAC 64.

58. See *R v Faulds* (1994), 20 OR (3d) 13 at 15, 79 OAC 313 (CA).

59. See *R v Tsyganov* (1998), 172 NSR (2d) 43, 524 APR 43 (CA); *R v Yaeck* (1991), 6 OR (3d) 293, 68 CCC (3d) 545 (CA); *R v Muise* (1994), 135 NSR (2d) 81, 94 CCC (3d) 119 (CA); *R v Warren*, [1995] 3 WWR 371, 35 CR (4th) 347 (NWTSC).

60. See *R v Bennight*, 2012 BCCA 461, 329 BCAC 250.

61. I have found 66 out of 477 reported decisions since 1990 in which a parole ineligibility period of twenty years or more has been imposed.

62. See *R v Shropshire*, [1995] 4 SCR 227, 128 DLR (4th) 657 [cited to SCR]; *R v M(CA)*, [1996] 1 SCR 500 at 565, 46 CR (4th) 269; *R v Nasogaluak*, 2010 SCC 6 at para 46, [2010] 1 SCR 206.

guidance with respect to appropriate ranges for parole ineligibility.⁶³ Certain provincial courts once held that the *Criminal Code* established a rebuttable legal presumption of ten years parole ineligibility;⁶⁴ however, the Supreme Court of Canada rejected this interpretation as an unnecessary restriction on judicial discretion.⁶⁵ One appellate court has vaguely suggested that there are two main groups of cases (cases in the twelve- to fifteen-year range, and cases in the fifteen- to twenty-year range), which supposedly reflect orders of magnitude in terms of moral blameworthiness or dangerousness.⁶⁶ It is far from clear that this holding is empirically accurate. Furthermore, because it is stated at such a high level of generality, it does little to provide guidance for lower courts.

Returning to the relevance of the jury recommendation itself, it is difficult to identify a fixed pattern in the case law that would allow one to draw a firm, empirical conclusion about when jury recommendations are influential.⁶⁷ While there is sometimes a correlation between a jury's

63. Many Supreme Court of Canada decisions acknowledge the importance of setting a "range" of sentences "customarily" imposed on an offender for an offence. See e.g. *R v Shropshire*, *supra* note 62.

64. See *R v Brown* (1993), 83 CCC (3d) 394, 31 BCAC 59 (CA) (considers the accused's background/bad childhood to determine parole ineligibility); *R v Gourgon* (1981), 58 CCC (2d) 193 at 201, 21 CR (3d) 384 (BCCA) (considers "society's condemnation of a crime of the nature committed by the accused" and public protection to determine parole ineligibility). But see *R v Doyle*, 108 NSR (2d) 1 at para 14, 14 WCB (2d) 387 (CA) (determined that the trial judge erred in exercising discretion and misinterpreted parole eligibility requirements setting out guidelines for when the character of the accused should be considered under section 744 of the *Criminal Code*); *R v Wenarchuk*, [1982] 3 WWR 643, 67 CCC (2d) 169 (Sask CA).

65. *R v Shropshire*, *supra* note 62 at para 34. At the same time, the Supreme Court maintained that "it may well be that, in the median number of cases, a period of 10 years might still be awarded". *Ibid* at para 27.

66. See *R v Cerra*, 2004 BCCA 594 at para 26, 206 BCAC 168.

67. There was some empirical evidence suggesting a correlation between recommendations for mercy and the eventual granting of clemency when capital punishment was available. The *Report on Capital Punishment* noted that between 1920 and 1949, recommendations were added to 135 out of 597 sentences. *Report on Capital Punishment*, *supra* note 19. Appellate courts disposed of 42 of those cases and 69 of them were commuted. The *Report on Capital Punishment* further stated that 25% of the commuted cases contained a recommendation to mercy. This is some evidence of a positive correlation between the exercise of the prerogative of mercy and the recommendation of jurors. *Ibid* at 5-6.

recommendation and a lengthy parole ineligibility period,⁶⁸ it is difficult to say how much influence a jury recommendation actually had on a decision. One thing that can be said is that courts frequently comment on the limited role that jury recommendations should play in murder sentencing. In *R v McKnight*, for instance, the Ontario Court of Appeal held that trial judges need not “slavishly” follow a jury recommendation.⁶⁹ The notion that a jury recommendation need not be “slavishly” followed has become a familiar trope in the Ontario jurisprudence.⁷⁰ In many other cases, courts have held that a jury’s recommendation was “not binding”,⁷¹ was merely a “factor” that should be considered,⁷² and that it would be inappropriate to place “too much weight on the jury’s recommendation”.⁷³

Appellate courts have been quite clear that sentencing judges are free to depart from a jury’s recommendation. For example, in *R v Nash*, the New Brunswick Court of Appeal stated that a sentencing judge “is not bound to accept the jury’s recommendation. The trial judge has the authority to increase the period of parole ineligibility even if the jury declines to make a recommendation or makes a recommendation to fix

68. See e.g. *R v Guignard*, *supra* note 56; *R v McInnis* (1999), 44 OR (3d) 772, 134 CCC (3d) 515 (CA); *R v Cousins* (2000), 196 Nfld & PEIR 169, 586 APR 169 (Nfld SC); *R v Price*, 42 WCB (2d) 106, 1999 CanLII 2465 (BCSC) [cited to CanLII].

69. (1999), 44 OR (3d) 263 at 278, 135 CCC (3d) 41 (CA). The Court of Appeal adopted Watt J’s conclusion in *R v Barry* with approval. 19 WCB (2d) 60, 1991 CarswellOnt 3274 (WL Can) (Ct J (Gen Div)), Watt J [cited to WL Can] (it is “difficult to gauge with any accuracy the weight which should be attributed to a jury recommendation” at para 16).

70. *R v RRR*, [2003] OJ No 1465 (QL) at para 13 (Sup Ct J); *R v Hindessa*, [2009] OJ No 6412 (QL) at para 33, 2009 CarswellOnt 9747 (WL Can) (Sup Ct J); *R v Angelis*, 2011 ONSC 462 at para 11, [2011] OJ No 608 (QL); *R v Oigg*, 2006 MBQB 68 at para 12, [2006] MJ No 166 (QL); *R v Arashvand*, 2012 ONSC 5852 at para 42, [2012] OJ No 5255 (QL); *R v Fairclough*, [2003] OJ No 6314 (QL) at para 54 (Sup Ct J); *R v Willis*, [2005] OJ No 503 (QL) at para 5 (Sup Ct J).

71. See *R v Jimenez-Acosta*, 2013 ONSC 5524 at para 43, [2013] OJ No 4015 (QL); *R v Ly* (1992), 78 Man R (2d) 209 at para 22, 72 CCC (3d) 57 (CA). See also *R v Angelis*, *supra* note 70.

72. See *R v Jimenez-Acosta*, *supra* note 71 at para 43; *R v Plaha*, [1999] OJ No 5577 (QL) at para 36 (Sup Ct J); *R v Folker*, 2013 NLTD(G) 176 at para 34, 344 Nfld & PEIR 247; *R v Gale*, 2013 ONSC 6308 at para 58, [2013] OJ No 4597 (QL); *R v Modin*, 66 Alta LR (2d) 1 at para 14, [1989] AJ No 123 (QL) (CA); *R v White*, 2006 ABQB 909 at para 16, 408 AR 64; *R v Tokarchuk*, 2006 MBCA 46 at para 14, 205 Man R (2d) 64.

73. *R v Van Osselaer*, *supra* note 56 at para 16.

eligibility at the minimum.”⁷⁴ The Ontario Court of Appeal was similarly dismissive of a jury recommendation in *R v Chalmers*, where it said that jury recommendations “are not particularly well-informed, are generally made without any appreciation of the wider sentencing context, and need not be slavishly followed”.⁷⁵

Courts have also been remarkably candid in explaining why limited weight should be placed on jury recommendations. They cite the fact that jurors are given no guidance as to appropriate ranges or the principles of sentencing, and that they receive no further evidence about recidivism or likelihood of future danger.⁷⁶ Some judges have observed that jurors are only asked a “very brief question”, noting that “counsel make no submissions”.⁷⁷ Other judges have explained that in “most cases, the jury is not in possession of all of the facts”,⁷⁸ that they are “never instructed in the jurisprudence which surrounds the sentencing function of a judge”,⁷⁹ and that jurors are “not instructed on the principles of proportionality and similarity”.⁸⁰ Courts have also noted that jury recommendations are not unanimous, are “based upon impressions gained during the course of the trial”,⁸¹ and that “juries do not deliver reasons for judgment”.⁸² As explained below, many of these perceived deficiencies stem from courts declining to give juries instructions, refusing to permit counsel to make submissions and holding that juries need not be unanimous. In effect, the courts have condemned the jury to ignorance and used this ignorance as justification for marginalizing their recommendations.

As for the relevance of jury recommendations, the case law reveals a remarkable inconsistency between jury recommendations and the parole ineligibility period ultimately imposed on an offender. On occasion, the jury recommendation corresponds to the sentence

74. *R v Nash*, *supra* note 57 at para 51.

75. 2009 ONCA 268 at para 115, 247 OAC 250.

76. See *R v Barry*, *supra* note 69 at para 16.

77. *R v Plaba*, *supra* note 72 at para 37.

78. *R v Ly*, *supra* note 71 at para 50.

79. *Ibid.*

80. *R v Mafi*, 2000 BCCA 135 at para 70, 133 BCAC 221.

81. *R v Osei-Agyemang*, 2011 ABCA 2 at para 12, 267 CCC (3d) 298.

82. *R v Cruz*, *supra* note 56 at para 44.

imposed by the judge,⁸³ and sentencing judges note their reliance on the recommendation.⁸⁴ But in many instances, sentencing judges have freely departed from a jury's recommendation, and not always in favour of the accused. While courts often impose lower parole ineligibility periods than the ones recommended,⁸⁵ there are a number of instances where the opposite is true.⁸⁶ In cases where the jury is deeply divided, it is virtually impossible to know what a sentencing judge has taken from the jury's recommendation.⁸⁷ For example, in one recent Ontario case, two jurors made no recommendation, four jurors recommended fifteen

83. See *R v Parmar*, [1997] OJ No 3302 (QL), 1997 CarswellOnt 3646 (WL Can) (Ct J) (the trial judge imposed a fifteen-year period of parole ineligibility, the period recommended by the jury).

84. See *R v Lincoln*, 2009 BCSC 1181 at para 90, [2009] BCJ No 2338 (QL).

85. See *R v McKnight*, *supra* note 69 at 278 (the Court imposed a fourteen-year parole ineligibility period despite a jury recommendation of twenty years); *R v Morrow*, [1995] OJ No 4052 (QL) at paras 10, 24, 1995 CarswellOnt 3153 (WL Can) (Ct J (Gen Div)) (the jury recommended a twenty-year period of parole ineligibility and the trial judge imposed a fifteen-year period); *R v Price*, *supra* note 68 at paras 3, 53 (the jury recommended a twenty-five-year period of parole ineligibility and the trial judge imposed a twenty-one-year period); *R v Beamish* (1996), 144 Nfld & PEIR 357 at paras 7, 35, 451 APR 357 (PEISC (TD)) (the jury recommended a twenty-five-year period of parole ineligibility and the sentencing judge imposed an eighteen-year period); *R v Nepoose* (1988), 93 AR 32 at paras 5–6, 64 Alta LR (2d) 41 (CA) (the jury recommended a twenty-year period of parole ineligibility and the trial judge imposed a fifteen-year period, which was affirmed on appeal); *R v Redavid*, [1980] BCJ No 1881 at paras 5, 14 (QL), 1980 CarswellBC 744 (WL Can) (SC) (the jury recommended a fifteen-year period of parole ineligibility and the trial judge imposed a twelve-year period); *R v Helpin*, 2009 QCCS 676 at paras 23, 30, [2009] QJ No 1365 (QL) (the jury recommended a fourteen-year period of parole ineligibility and the trial judge imposed a twelve-year period).

86. See *R v Gale*, *supra* note 72 at paras 5, 88 (the Court imposed a fifteen-year parole ineligibility period despite the jury recommending ten years); *R v Oigg*, *supra* note 70 at paras 6, 36 (the Court imposed a fourteen-year parole ineligibility period despite the jury unanimously recommending ten years); *R v Chalmers*, *supra* note 75 at para 115 (upholding a period of fourteen years where two jurors made no recommendation and ten recommended the minimum ten years); *R v Angelis*, *supra* note 70 at paras 11, 33 (the Court imposed a period of twelve years despite the jury unanimously recommending ten years).

87. See *R v RRR*, *supra* note 70 (half of the jurors made no recommendation and half suggested parole ineligibility in the range of fifteen to twenty years); *R v Yaeck*, *supra* note 59 (ten jurors made no recommendation; one juror recommended ten years; one juror recommended fifteen years); *R v Plaha*, *supra* note 72 (six jurors recommended fifteen years and six made no recommendation).

years, another four recommended twenty years and two jurors proposed twenty-five years.⁸⁸

The courts' justifications for departing from jury recommendations also vary considerably. In *R v Olsen*, for example, eight jurors recommended that the ten-year minimum parole ineligibility period be imposed on two co-accused who killed a six-month-old child.⁸⁹ The sentencing judge rejected the recommendation and imposed periods of twenty-five and fifteen years parole ineligibility, respectively. The Court of Appeal described the jury recommendation "as unrealistic" and said that "no juror acting rationally could possibly have recommended the minimum period" for two co-accused who murdered their "six-month-old daughter".⁹⁰ The Court added: "[W]hen a jury's recommendation is unreasonable or irrational, a trial judge is entitled to give it little or no weight".⁹¹

At the same time, courts have occasionally described the jury recommendation as "an important and influential part of the sentencing judge's decision".⁹² In *R v Hoang*, for instance, a trial judge sentenced the accused to a parole ineligibility period of twenty years, which was double the ten-year period unanimously recommended by the jury.⁹³ The British Columbia Court of Appeal set aside the twenty-year period in favour of a fifteen-year period. In doing so, it held that "[a]bsent any explanation, the doubling of the recommendation for parole ineligibility from 10 years to 20 years suggests that the sentencing judge may not have given adequate consideration to the jury recommendation."⁹⁴

Another topic that has occasionally come up in the case law is the relevance of a jury's failure to make any recommendation at all. In *R v Cerra*, the British Columbia Court of Appeal rejected the argument that where a jury declines to make a recommendation, it should be presumed to have recommended the ten-year minimum.⁹⁵ The majority of the Court

88. *R v Fatima*, [2004] OJ No 6278 (QL) at para 2, 2004 CarswellOnt 10077 (WL Can) (Sup Ct J).

89. (1999), 131 CCC (3d) 355 at para 47, 116 OAC 357.

90. *Ibid* at para 56.

91. *Ibid* at para 57.

92. *R v Cruz*, *supra* note 56 at para 23. See also *R v Cousins*, *supra* note 68 at para 28.

93. 2002 BCCA 430 at paras 2, 19, 167 CCC (3d) 218.

94. *Ibid* at para 13.

95. *Supra* note 66 at para 13.

held that “[w]hile not an entirely neutral factor, the jury response could not have added much weight to the defence position on penalty.”⁹⁶ In concurring reasons, Ryan JA held that a non-recommendation was indeed an entirely neutral factor and observed that while a jury recommendation was a relevant factor, the *Criminal Code* did “not give life to the lack of one”.⁹⁷ One recent Ontario Court of Appeal decision seems to entertain the notion that there is a “deemed recommendation” of ten years where the jury declines to make a parole ineligibility recommendation.⁹⁸ Overall, however, the idea that a non-recommendation is anything but a neutral signal does not appear to have made headway in the case law.⁹⁹ Courts usually treat non-recommendations as an indication that the jury has preferred to leave the matter with the trial judge¹⁰⁰ and have often imposed periods in excess of the ten-year minimum where a jury makes no recommendation.¹⁰¹ This makes sense given that the question in section 745.2 states that the jury is “not required to make any recommendation”.¹⁰²

The court’s reluctance to give effect to jury recommendations is also reflected in the procedures used to solicit recommendations from the jury. As noted above, the *Criminal Code* stipulates that the jury must be asked a question, but it is otherwise silent on process. For a period of time, there was some uncertainty as to whether counsel should be permitted to make submissions to the jury on parole ineligibility. Certain lower courts decided that section 745.2 violated section 7 of the *Canadian Charter of Rights and Freedoms*¹⁰³ because it did not permit counsel to make

96. *Ibid* at para 14.

97. *Ibid* at para 35.

98. *R v Pasqualino*, 2008 ONCA 554 at para 77, 233 CCC (3d) 319.

99. See *R v Atwal*, *supra* note 57 at para 22. See also *R v Osei-Agyemang*, *supra* note 81 at para 14, commenting on *R v Pasqualino*, *supra* note 98.

100. See *R v Gray*, [2000] OJ No 5317 (QL) (Sup Ct J).

101. See *R v Roberts*, 2006 ABCA 113, 208 CCC (3d) 454; *R v Bishop* (1994), 162 AR 190, 94 CCC (3d) 97 (CA).

102. *Criminal Code*, *supra* note 1, s 745.5.

103. S 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

submissions to the jury.¹⁰⁴ However, this direction in the law was quickly reversed by appellate courts. In *R v Nepoose*, the Alberta Court of Appeal held that it was improper for the Crown to lead an offender's criminal record when making submissions on parole ineligibility.¹⁰⁵ The Court held that the "jury should respond to the question put to it on the basis of only the evidence and arguments of counsel presented prior to and resulting in the conviction and the trial judge's instructions".¹⁰⁶ In *R v Okkuatsiak*, the Newfoundland Court of Appeal adopted *Nepoose*, holding that, given "the Jury's sole function at this stage is to make a recommendation to the sentencing judge", there would be no consequence in not allowing counsel to address the jury.¹⁰⁷ A majority of the British Columbia Court of Appeal reached a similar conclusion in *R v Cruz*, where that Court concluded that section 754.2 "permits the jury to communicate to the trial judge their view of the seriousness of the murder"¹⁰⁸ but that the section was "not . . . designed to bring the jury any further into the process".¹⁰⁹

The final procedural point that this article will touch on concerns the question of whether jury unanimity is required in parole ineligibility recommendations. As mentioned earlier, this was a matter of debate when the jury recommendation provisions were first added to the *Criminal Code* in 1961, leading to an amendment in the Senate that permitted judges to poll jurors when they were not unanimous. However, no such polling provision was included when the *Criminal Code* was amended in 1976. In spite of this, Courts of Appeal in Alberta, Ontario, New Brunswick and Newfoundland have concluded that a jury recommendation as to parole ineligibility need not be unanimous.¹¹⁰ Recently, the British Columbia

104. *R v Atsiqtaq* ((1998), [1998] NWTR 315, 47 CRR 365 (SC). See also *R v Okkuatsiak* (1992), 99 Nfld & PEIR 181, 11 CRR (2d) 152 (Nfld SC (TD)); *R v Chalice* (1994), 22 WCB (2d) 241, 20 CRR (2d) 319 (Ont Ct J (Gen Div)) (holding that judges had a discretion to permit counsel to address the jury). It appears that counsel were given the opportunity to make submissions on occasion. See *R v Chase* (1990), 56 CCC (3d) 521, 38 OAC 172 (CA).

105. *Supra* note 85 at para 19.

106. *Ibid.*

107. *R v Okkuatsiak* (1993), 105 Nfld & PEIR 85 at para 14, 80 CCC (3d) 251 (Nfld CA) [*Okkuatsiak CA*].

108. *R v Cruz*, *supra* note 56 at para 44.

109. *Ibid* at paras 44–45.

110. See *R v Brenn*, [1989] OJ No 2172 (QL), 1989 CarswellOnt 2095 (WL Can) (CA); *R v Hanscom*, 172 NBR (2d) 29, [1996] NBJ No 37 (QL) (CA); *Okkuatsiak CA*, *supra* note 107; *R v Osei-Agyemang*, *supra* note 81.

Court of Appeal also found that unanimity is not required¹¹¹ and trial decisions in Manitoba and Saskatchewan also suggest that unanimity is not required.¹¹² On the other hand, the Quebec Court of Appeal has held that unanimity is required.¹¹³ While the view that unanimity is not required is reflected in model jury instructions,¹¹⁴ it is difficult to see what value, if any, can be taken from a recommendation made by a sharply divided jury. However, given that judges put almost no stock in a jury's recommendation, they may consider it pointless to force jurors into a second deliberative exercise after having condemned a person to life imprisonment.

Overall, the jurisprudence on parole ineligibility reveals that courts are profoundly skeptical about the jury's involvement in the process. There appears to be no consistent pattern in terms of the weight given to jury recommendations. Perhaps more importantly, the courts have been all too willing to signal their near disdain for the jury recommendation process and its relevance for sentencing. This, in turn, is reflected in the procedures that are used to solicit a recommendation; if judges believed that any weight should be attached to the jury recommendation, then presumably the procedures would reflect this belief.

III. The Abolition of Jury Recommendations

It is appropriate to now return to the claim that the jury recommendation provision in the *Criminal Code* should be repealed. One immediate objection to this proposal might be that it is a solution in search of a problem; after all, for all intents and purposes, jury recommendations have been repealed through judicial interpretation. Although there is some merit to this objection, it is a response that lacks principle. Whether one agrees with removing the jury from sentencing or not, it does not

111. See *R v Sunshine*, 2014 BCCA 318 at paras 40–46, [2014] BCJ No 2045 (QL). For previous ambiguity, see *R v Cruz*, *supra* note 56 at para 48; *R v Hoang*, *supra* note 93 at para 11. But see *R v Bell*, 2013 BCCA 463 at para 1, 344 BCAC 237; *R v Walker*, [1999] BCJ No 3203 (QL) at para 2, 1999 CarswellBC 3125 (SC); *R v Sipes*, 2012 BCSC 2019 at para 32, [2012] BCJ No 2888 (QL); *R v Reeves*, 2011 BCSC 821 at para 4, [2011] BCJ No 1170 (QL).

112. See *R v Oigg*, *supra* note 70; *R v Worm*, 2009 SKQB 122, 330 Sask R 298.

113. *R c Ameeriar*, 60 CCC (3d) 431 at 432, 10 WCB (2d) 640 (Que CA).

114. *Canadian Criminal Jury Instructions*, *supra* note 31, § 10.03.3, n 2; *Watt's Manual*, *supra* note 31, at Final 503-A.

mean that any legal method whatsoever can be used to achieve this end. Furthermore, the judicial repeal of jury recommendations raises questions of legitimacy, especially given that Parliament has taken the extraordinary step of codifying jury involvement. More importantly, a judicial repeal of jury recommendations does not squarely confront arguments advanced in support of maintaining a role for the jury in murder sentencing.

While the majority of scholars have expressed skepticism about the involvement of juries in sentencing, there are reasons that can be offered in support of jury sentencing. The more legalistic reason for giving greater weight to jury recommendations in Canada has already been alluded to; namely, that Parliament took the extraordinary step of institutionalizing the jury's role in murder sentencing. Parliament did this in 1961, 1976 and again in 2011.¹¹⁵ However, courts have largely ignored the extraordinary character of the jury recommendation provision.¹¹⁶ Given that Parliament has specified that there are four considerations relevant to parole ineligibility, it should follow, as a matter of statutory interpretation, that Parliament intended the jury recommendation to be taken seriously.¹¹⁷ But perhaps more importantly, a judicial repeal of jury recommendations does not squarely confront the arguments in support of maintaining a role for the jury in murder sentencing.

While scholars have expressed skepticism about jury involvement in sentencing,¹¹⁸ there are reasons that can be offered in its support. One argument that can be advanced in support of jury recommendations relates to the nature and importance of the decision itself. While it would be difficult to argue that setting parole ineligibility is as significant a

115. *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*, SC 2011, c 5.

116. One exception to this is *R v Cruz*, where the Court noted that “in cases of second degree murder (unlike all other offences) there is available a jury recommendation which will provide assistance to the trial judge in determining if the jury has a unanimous view with respect to the seriousness of the crime”. *Supra* note 56 at para 48.

117. The general rule is that a proper interpretation of a statute must avoid rendering words or clauses superfluous or meaningless. See *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at para 73, [2002] 3 SCR 269.

118. For a discussion of the American jurisprudence, see Adriaan Lanni, “Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?” (1999) 108:7 Yale LJ 1775 (noting that “academic criticism of jury sentencing generally focuses on the issues of disparity, inadequate sentencing information, compromise verdicts, [and] lack of expertise” at 1788).

decision as imposing the death penalty, setting a lengthy period of parole ineligibility is still a matter of great moral import. Many scholars have expressed doubt about the validity of lengthy periods of incarceration without review.¹¹⁹ This skepticism is also expressed internationally, where lengthy sentences and parole ineligibility are strictly limited in many jurisdictions. For example, Spain, Portugal, Norway, Croatia and Serbia do not impose life sentences¹²⁰ and parole ineligibility in Germany is limited to fifteen years.¹²¹ Indeed, the European Court of Human Rights recently ruled that “whole life orders” without the possibility of review violate Article 3 of the *European Convention on Human Rights*,¹²² which prohibits “inhuman or degrading treatment or punishment”.¹²³ The Supreme Court of Canada has alluded to the problems associated with indefinite detention as well.¹²⁴ Thus, the arguments advanced in favour of involving a jury in capital punishment have some currency when applied to lengthy periods of incarceration.

Perhaps the most compelling reason for retaining (and even expanding) the role of juries in murder sentencing is that judges are really in no better position to decide the issue than a jury. Traditionally, opposition to jury sentencing was based upon historical arguments concerning the

119. Dirk van Zyl Smit, “Abolishing Life Imprisonment?” (2001) 3:2 *Punishment & Society* 299. See also Catherine Appleton & Bent Grøver, “The Pros and Cons of Life Without Parole” (2007) 47:4 *Brit J Crim* 597.

120. See generally Dirk van Zyl Smit, “Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective” (1998) 9:1 *Crim LF* 5.

121. *Ibid* at 42.

122. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS at 221, art 3 (entered into force 3 September 1953).

123. *Vinter and Others v the United Kingdom*, No 66069/09, [2012] ECHR 61 at para 92.

124. The Supreme Court has held that extended periods of incarceration without parole may “constitute a deprivation of a cognizable liberty interest under s. 7 of the *Charter*”. See *R v M(CA)*, *supra* note 62 at 545, citing *R v Gamble*, [1988] 2 SCR 595 at 609, 646, 45 CCC (3d) 204. Moreover, in *R v Luxton*, the Supreme Court held that twenty-five years without eligibility for parole is not cruel and unusual punishment. [1990] 2 SCR 711, 58 CCC (3d) 449 [cited to SCR]. However, in reaching this conclusion the Court pointed to the fact that “after serving 15 years the offender can apply to the Chief Justice in the province for a reduction in the number of years of imprisonment without eligibility for parole”. *Ibid* at 720. Given that this is no longer the case, there may be some question as to whether twenty-five years or more without parole would constitute cruel and unusual punishment.

functional differences between the judge and jury.¹²⁵ Scholars have, for example, claimed that the “wisdom of centuries” has made sentencing a “uniquely judicial function”.¹²⁶ In truth, however, the history of the jury’s involvement in sentencing “is substantially more complicated”.¹²⁷ Because there was so little discretion in sentencing for much of English history,¹²⁸ jury verdicts were de facto decisions about sentencing. The historian John Langbein has persuasively argued that English criminal trials were, for all intents and purposes, sentencing proceedings which served the function of reducing “the sanction from death to transportation, or to lower the offense from grand to petty larceny, which ordinarily reduced the sanction from transportation to whipping”.¹²⁹ In reality, therefore, the strict delineation of the function of juries is a relatively modern phenomenon.

Some have argued that the jury’s involvement in sentencing is more democratic.¹³⁰ Others have observed that the contemporary rationale

125. Since Canada does not have a tradition of jury sentencing, the debate has mostly played out in the US case law. See HM LaFont, “Assessment of Punishment: A Judge or Jury Function?” (1960) 38:7 Tex L Rev 835 at 848 (arguing that judges do a better job of assessing punishment in non-capital cases than juries do); Webster, *supra* note 3 at 230 (advocating for the abolition of jury sentencing); “Statutory Structures for Sentencing Felons to Prison”, Note, (1960) 60:8 Colum L Rev 1134 (arguing for the abolition of jury sentencing). See also Erik Lillquist, “The Puzzling Return of Jury Sentencing: Misgivings About Apprendi” (2004) 82:2 NCL Rev 621; Robert A Weninger, “Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas” (1994) 45 Wash UJ Urb & Contemp L 3.

126. Blom-Cooper, *supra* note 17 at 233.

127. Morris B Hoffman, “The Case for Jury Sentencing” (2003) 52:5 Duke LJ 951 at 958 (arguing that the shift away from rehabilitationism to neo-retributivism supports rediscovering the role of jurors). See also Lanni, *supra* note 118 (arguing that sentencing has increasingly become the province of inexperienced legislators who respond to political pressure, and that jury sentencing may be the most direct and least distorting mechanism to conform criminal sanctions to community sentiment); Jenia Iontcheva, “Jury Sentencing as Democratic Practice” (2003) 89:3 Va L Rev 311 (arguing that the reintroduction of jury sentencing is the next logical step given the increasing imposition of mandatory minimum sentences and fixed sentencing guidelines); John H Langbein, “Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?” (1981) 6:1 Am B Found Res J 195 (comparing the German mixed court model with the American jury model).

128. See John H Langbein, “Shaping the Eighteenth-Century Jury: A View from the Ryder Sources” (1983) 50:1 U Chicago L Rev 1 at 36–37.

129. *Ibid* at 41.

130. See Iontcheva, *supra* note 127.

for excluding jurors from sentencing has been eroded through statutory reforms that deprive judges of discretion. For instance, a number of American scholars have argued that the increasing prevalence of mandatory minimum sentences and sentencing guidelines make the claims about judicial expertise in sentencing ring hollow.¹³¹ There has, moreover, been a more general shift from rehabilitationist to neo-retributivist approaches to punishment. Scholars have for some time challenged the empirical foundation for the claim that judges are less susceptible to prejudice or that their sentences are more uniform.¹³² The upshot is that if judges no longer have any discretion and they are really no better at sentencing, then why should we privilege them over the jury?

Another argument in favour of jury sentencing comes from the normative underpinnings of parole ineligibility itself. Like most mandatory minimum sentences, the setting of parole ineligibility is clearly informed by retributive considerations. It is primarily targeted at denouncing or deterring unlawful conduct and not at rehabilitating an offender.¹³³ Indeed, by definition, a period of parole ineligibility requires the continued imprisonment of an offender even if the National Parole Board would otherwise conclude that the offender does not “present an undue risk to society” and could be reintegrated “into society as a law-abiding citizen”.¹³⁴ If parole ineligibility is not about rehabilitation, then one is compelled to ask whether judges are really in a better position than jurors to denounce unlawful conduct. Put differently, why are juries less capable than judges to decide how long an otherwise rehabilitated offender should be incarcerated in order to denounce the offender’s criminal act? If the ostensible purpose of parole ineligibility is to express society’s collective disdain for murder, then surely the jury’s view is a reasonable proxy for public sentiment.

131. See Lanni, *supra* note 118; Hoffman, *supra* note 127.

132. Hoffman, *supra* note 127.

133. The Supreme Court of Canada has acknowledged that parole ineligibility is primarily motivated by the goals of deterrence and denunciation. See *R v M(CA)*, *supra* note 62 at 545. Yet the Court has also rejected the notion that parole ineligibility does not have some rehabilitative aims. See *R v Shropshire*, *supra* note 62.

134. See e.g. *CCRA*, *supra* note 52, s 102. A person serving a life sentence is not entitled to statutory release. Even if granted parole, they will remain subject to the conditions set by the Correctional Service of Canada and subject to supervision by a parole officer.

Although there are reasons for supporting the involvement of juries in sentencing, the balance still favours the removal of the jury from the sentencing equation. While it is true that lengthy periods of incarceration engage some of the same concerns as capital punishment, this argument presupposes that there was merit in involving the jury in capital punishment in the first place. As discussed above, the idea of institutionalizing jury recommendation in Canada can be traced to the Gowers Commission. The Gowers Commission felt it would be inappropriate to give the sentencing judge discretion since it was too onerous a responsibility, and because it might have led to the inconsistent imposition of capital punishment based on an individual judge's moral predilections or intuition.¹³⁵ The solution was to place the decision in the hands of the jury. In this way, the procedure was a sort of "moral comfort procedure" aimed at assuaging the "moral anxieties" associated with the act of judgment.¹³⁶ There is no reason, however, to conclude that the Gowers Commission was ever right to recommend that a jury be given scope to influence punishment. The Law Reform Commission of Canada, by contrast, later concluded that the jury recommendation process should be repealed entirely.¹³⁷

While the historical division between judge and jury sentencing may sometimes be exaggerated, it does not follow that the division is undesirable. There are many reasons why the jury should not be involved in making a parole ineligibility recommendation, some of which have been identified by the courts. These include: jurors have no understanding of the legal principles relevant to sentencing; they have no sense of whether a sentence fits within an appropriate range; and they have no information about an offender's potential for future dangerousness or rehabilitation.

135. *Gowers Report*, *supra* note 32 at 193–94.

136. James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008). Whitman convincingly argues that proof beyond a reasonable doubt was designed to assuage religiously motivated fears about convicting the innocent. The point I am making is that the introduction of the jury recommendation was intended to provide a mechanism for sharing moral responsibility when faced with the awesome task of sentencing a person to death.

137. The Law Reform Commission of Canada, *The Jury* (Ottawa: Minister of Supply and Services Canada, 1982) at 69. In fact, the Law Reform Commission of Canada proposed that jurors should be instructed that they have "no prerogative to make any recommendation either as to clemency or as to the severity of the sentence". *Ibid.*

Likewise, jurors are not apprised of an offender's background, and as a result their conclusions are likely to be impressionistic and based only upon the perceived severity of the offence, not on the moral culpability of the offender. In this regard, even if one gives primacy to the retributive aims of sentencing, it is still necessary to consider the relative "moral wickedness" of the offender and not merely the nature or quality of the offence.¹³⁸

A related reason for completely removing the jury from sentencing is that juries are simply unable to give effect to other important statutory principles of sentencing. While parole ineligibility places a decidedly heavy emphasis upon retribution, there are other principles that may (and must as a matter of law) have some impact on parole ineligibility. To give one important example, a sentencing judge in Canada must take into account the particular circumstances of an Aboriginal offender.¹³⁹ Sentencing judges are also bound by the principles of parity (similar offenders must be treated similarly) and proportionality.¹⁴⁰ The surrounding statutory scheme of the *Criminal Code* produces other discrepancies, including the fact that not all trials are by juries. Why, for example, should an accused who has elected a trial by jury be required to submit to a jury for sentencing when an accused who has opted for trial by judge alone does not? Although these discrepancies could be addressed by amending the *Criminal Code*, the point is that Parliament has established a framework of interlocking sentencing principles that are ill-suited to the occasional involvement of a jury.

138. See HLA Hart, "Postscript: Responsibility and Retribution" in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) 210 at 234–35.

139. See *R v Gladue*, [1999] 1 SCR 688 at 728–29, 171 DLR (4th) 385; *R v Ipeelee*, 2012 SCC 13 at para 129, [2012] 1 SCR 433. There was some doubt about whether section 718.2(e) applied to parole ineligibility. See *R v Wilson*, 2007 BCSC 1382 at paras 14–15, [2007] BCJ No 2030 (QL); *R v Pelletier*, 2004 BCCA 264 at para 17, [2004] BCJ No 926 (QL); *R v Macki*, 2001 BCSC 427 at para 23, [2001] BCJ No 574 (QL). However, *R v Ipeelee* has made it clear that this applies to all violent offences. *Supra* note 139 at para 84. Trial courts have begun referring to section 718.2(e) when fixing parole ineligibility periods. See e.g. *R v Robinson*, 2013 BCSC 772 at para 60, [2013] BCJ No 1076 (QL); *R v Florence*, 2013 BCSC 194 at para 3, [2013] BCJ No 216 (QL); *R v Land*, 2013 ONSC 6526 at para 4, [2013] OJ No 4987 (QL); *R v Beardy*, 2013 MBQB 15 at para 21, 289 Man R (2d) 18; *R v Swite*, 2012 BCSC 1755 at para 19, [2012] BCJ No 2455 (QL).

140. *Criminal Code*, *supra* note 1, ss 718.1–718.2.

There are other reasons that can be cited in support of repealing the jury recommendation procedures in the *Criminal Code*, but the last one that will be touched on relates to the burden it imposes on the jury itself. Consider for a moment the way the jury recommendation process operates in practice. The evidentiary phase of a jury trial often lasts for weeks and sometimes for months. This is followed by an intense process of deliberation during which the jurors often spend days sequestered with one another. For many, if not most jurors, the decision to convict or acquit an offender must be an awesome responsibility. However, as soon as the verdict is delivered by this tired and bedraggled group of citizens, they are asked whether they have any recommendation in terms of parole ineligibility. The trial judge will read them the confusing and cumbersome question set out in section 745.2 of the *Criminal Code*, and once again, the jury will be ushered away to deliberate. In short, the jury will once again be burdened with another awesome responsibility, but one for which they are given almost no assistance. Surely little, if any, social good can come from this process.

Conclusion

The jury recommendation is a fascinating and yet largely unexplored facet of Canada's criminal sentencing regime. This article has argued that it is time to reconsider the utility of retaining the jury's involvement in second-degree murder sentencing. Although there is a long tradition permitting jurors to make mercy recommendations, the historical jury recommendation procedures in the *Criminal Code* were clearly intertwined with concerns about the imposition of capital punishment. The normative underpinnings of jury recommendation processes have disappeared with capital punishment, and so the time has come to reconsider whether jury recommendations serve any utility in the present day.

As this article has demonstrated, jury recommendations have never played a significant role in sentencing in Canada. Moreover, the relevance of jury recommendations has been winnowed down through judicial interpretation. Although it is possible to identify a few instances where judges have commented on the importance of the jury recommendation, they have mostly ignored it. This is demonstrated by

the inconsistency between jury recommendations and sentences imposed on offenders. It is also evidenced by courts' willingness to depart from jury recommendations, even when this means imposing a sentence that is more punitive than the one recommended by the jury. At the same time, courts have sealed the fate of the jury recommendation by refraining from imposing a unanimity requirement on jurors and by refusing to permit counsel to make submissions to the jury. In short, the courts have eviscerated the jury recommendation process, making it impossible to give any significant weight to jury recommendations.

The remaining question discussed in this article was whether the history and judicial treatment of jury recommendations justifies its role in sentencing. Most important is the fact that parole ineligibility rests upon a retributive logic, making it difficult to argue that judges are better able to decide a fit sentence. While it may be candidly acknowledged that there is some merit in this argument, it ultimately does not provide an adequate basis for retaining jury recommendations. If anything, the retributive character of parole ineligibility is itself a matter of concern. Above all else, it has been argued that there is little social utility in requiring juries to engage in a second deliberating process after convicting an accused of murder. For these reasons and more, the time has come to recognize jury recommendation for what it is: an interesting legal curio, born of a half-baked idea, whose time has come and gone.