COURT OF APPEAL OF YUKON

Citation: *R. v. Sheepway*,
2025 YKCA 1

Date: 20250211
Docket: 18-YU824

Between:

Rex

Respondent

And

Darryl Steven Sheepway

Appellant

Corrected Judgment: The text of the judgment was corrected on the cover page in the publication notice on February 24, 2025.

Restriction on publication: A publication ban has been imposed under s. 486.5 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a witness referred to by the initials C.B. (The witness C.B. is not the victim, Christopher Brisson). This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Justice Griffin
The Honourable Justice Charlesworth
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of Yukon, dated May 8, 2018 (sentence) (*R. v. Sheepway*, 2018 YKSC 26, Whitehorse Docket 16-01511).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	K. Laurie
Place and Date of Hearing:	Whitehorse, Yukon September 11, 2024
Place and Date of Judgment:	Whitehorse, Yukon February 11, 2025

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Mr. Justice Butler

Dissenting Reasons by: (Page 24, para. 90)
The Honourable Justice Charlesworth

Summary:

The issue on appeal is whether the sentencing judge erred in concluding that harsh conditions of custody negatively impacting an offender prior to trial and sentencing, are not a relevant factor when determining whether the period of parole ineligibility for a person convicted of second degree murder should be greater than 10 years. Held: The majority would allow the appeal. Harsh pre-sentencing conditions of custody which have an adverse impact on an offender may be taken into account in sentencing generally, and therefore may be taken into account when determining the appropriate period of parole ineligibility above 10 years pursuant to s. 745.4 of the Criminal Code. The judge erred in concluding that appellate authority precluded taking this factor into account. Based on the judge's findings regarding the pre-sentencing custodial conditions, and the mitigating and aggravating circumstances of the offender and offence, the judge's term of 13 years is set aside and a term of 12 years of parole ineligibility is substituted. The dissenting judge would dismiss the appeal on the basis that principles of statutory interpretation preclude this factor being taken into account under s. 745.4.

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Reasons for Judgment of the Honourable Justice Griffin:

Introduction

[1] After arranging to meet Christopher Brisson at a remote location to purchase crack cocaine from him, Mr. Sheepway killed him. He first sought to rob Mr. Brisson by loaded shotgun, which he had sitting in his lap in his truck. When Mr. Brisson resisted, a struggle ensued and an accidental shot discharged through Mr. Bisson's passenger window. As Mr. Brisson attempted to drive away, Mr. Sheepway shot at Mr. Brisson twice more through the rear of Mr. Brisson's truck and a bullet entered Mr. Brisson's back. Mr. Brisson crashed the truck. He died from loss of blood caused by the shotgun wound.

[2] Mr. Sheepway took the drugs and cash at the scene, left for home, and then returned to move Mr. Brisson's body and retrieve the shotgun shells. He disposed of Mr. Brisson's body down a steep embankment above Miles Canyon, near Whitehorse. He then cleaned his truck and disposed of the shotgun shells in a garbage bin in a public parking lot. The body was later found by a mushroom picker.

[3] Mr. Brisson was convicted by judge alone of second degree murder, with the conviction reasons indexed at 2018 YKSC 4, aff'd 2022 YKCA 3. The trial judge acquitted him of first degree murder, finding that the Crown had failed to prove beyond a reasonable doubt that the murder was planned and deliberate. This finding was in part due to Mr. Sheepway's entrenched cocaine addiction at the time of the murder. He was also found guilty of robbery and attempted robbery.

[4] There is a mandatory sentence of life imprisonment that must be imposed for second degree murder. As well, the *Criminal Code*, R.S.C. 1985, c. C-46 provides that a person convicted of this charge must remain in prison for a minimum of 10 years before the person is eligible for parole. This minimum period of eligibility for parole can, however, be increased by the sentencing judge up to a maximum of 25 years: s. 745.4.

[5] The narrow issue before us is whether the sentencing judge erred in determining that Mr. Sheepway should be ineligible for parole for a period of 13 years, as explained in reasons for sentencing indexed at 2018 YKSC 26 (“RFS”).

[6] I have had the privilege of reading a draft of my colleague’s reasons.

[7] Where we differ is in our view of whether, as a matter of principle, a judge determining the appropriate period of parole ineligibility for an offender convicted of second degree murder, above the mandatory minimum of 10 years’ parole ineligibility, may take into account particularly harsh conditions of pre-sentencing custody experienced by the offender.

[8] Whereas my colleague has concluded that the sentencing judge was correct in concluding that the harshness of pre-sentencing conditions of custody is not a relevant factor, I agree with the appellant that this is a factor that may be properly taken into account when determining the period of parole ineligibility, and therefore the judge erred. I note that the judge’s sentencing decision in 2018 occurred prior to significant recent developments in the case law.

[9] In this regard, I am in agreement with the approach of the Ontario Court of Appeal in *R. v. Lamba*, 2024 ONCA 778, which held that all relevant sentencing principles may be considered when determining whether the period of parole ineligibility should be increased from the 10-year mandatory minimum, including the impact of particularly harsh conditions of pre-sentencing custody.

[10] For the reasons that follow, I would set aside the judge’s sentence, and impose a 12-year term of parole ineligibility.

Sentencing Reasons

[11] At sentencing, the Crown sought a period of parole ineligibility of 15 years. The defence position was that the proper range was 10 to 15 years, but that it should be limited to 10 years because the mitigating factors substantially outweighed the aggravating factors.

[12] The judge carefully reviewed Mr. Sheepway's background, including his family life, employment and criminal history. Mr. Sheepway was 40 years old at the time of sentencing. His employment history included working at the Whitehorse Correctional Centre ("WCC") from 2007 to 2012. The judge considered Mr. Sheepway's descent into crack cocaine addiction at the time of the offence.

[13] The judge reviewed the legal principles appropriate to determining parole ineligibility, noting that it was well accepted that he must have regard to general sentencing principles set out in ss. 718–718.2 of the *Criminal Code*, citing the leading case of *R. v. Shropshire*, [1995] 4 S.C.R. 227, among others: paras. 42–43.

[14] The judge also considered cases submitted to him by counsel for use as comparisons, while noting that sentencing is a highly individualized process. In several cases that had factual similarities or parallels, the period of parole ineligibility imposed ranged from 12 years to 16 years (*R. v. M.D.H.*, 2005 YKSC 59; *R. v. Bell*, 2013 BCCA 463; *R. v. Overall*, 2009 BCSC 1864; *R. v. Paterson*, 2001 BCCA 11; *R. v. Benham*, 2009 BCSC 1863; and *R. v. Chretien*, [2009] O.J. No. 2578). The judge also considered a few cases where the offender was in a somewhat similar situation of killing someone when in the throes of addiction, and where the mandatory minimum 10 year period of ineligibility was imposed (*R. v. Bhandher*, 2010 BCSC 1812; *R. v. Reierson*, 2007 BCSC 541; *R. v. Yliruusi*, 2011 BCSC 268).

[15] The judge heard and considered evidence from Mr. Sheepway about the difficult conditions of his pre-sentencing custody, which he summarized as follows:

> [67] Mr. Sheepway testified at the sentencing hearing about the difficult conditions of his pre-sentence custody. His evidence was that he was originally housed in a segregated unit for about two weeks after his transfer to WCC on August 20, 2016. He did not recall whether he was allowed any time out of his cell, but he had no contact with any other inmates for that time. He said he was then transferred to the secure living unit ("SLU"), but was not informed of the reason for the transfer to that unit. Mr. Sheepway testified that he was in his cell for about 22 hours each day for the first eight months in the SLU. He said that he was never offered any programming and that he had nothing to do each day except watch TV. For the following period of about 10 months, Mr. Sheepway said that he was allowed to be out of his cell for 3 to 6 hours per day. While in both the segregated unit and the SLU, Mr. Sheepway had limited opportunity for contact with other inmates. He said

> that he filed numerous complaints requesting reasons for the manner of his incarceration, which largely went unanswered, until his counsel filed a petition in this court. After that, he testified that his custodial conditions changed almost immediately and he has more recently been allowed unlocked contact with other inmates previously deemed [incompatible].
>
> [68] Mr. Sheepway also filed a report from Dr. Lohrasbe dated March 15, 2018, which discusses how these difficult pre-sentence custody conditions have had an impact upon Mr. Sheepway's mental health. In his interview with Dr. Lohrasbe, Mr. Sheepway noted in particular the disturbing behaviour of a fellow inmate who apparently had mental health issues and was frequently yelling and banging on his cell. Mr. Sheepway said that this caused him to experience panic attacks and feelings of intolerable agitation. During the interview with Dr. Lohrasbe, he presented as anxious, morose and distressed. While Dr. Lohrasbe noted that Mr. Sheepway currently suffers from anxiety, depression, despair and suicidal thoughts, he acknowledged that those symptoms predated his incarceration. However, what Dr. Lohrasbe discovered as new and specific to his current placement were the particular manifestations of reactive anxiety, with features of panic attacks and PTSD, which he endured during the screaming and banging of his agitated fellow inmate.

[16] The judge noted there were some Ontario decisions which treated harsh conditions of pre-trial custody as a mitigating factor in determining sentencing, citing *R. v. D.W.*, 2017 ONSC 255; *R. v. Fournel*, 2014 ONCA 305; and *R. v. Downes* (2006), 79 O.R. (3d) 321. He also noted that general principles of sentencing likely included principles of equity, rationality, fairness, justice and common sense; and that s. 718.2(a) of the *Criminal Code* gives a judge authority to take into account any mitigating circumstances.

[17] The judge concluded that, outside the mandatory life sentence context of a murder conviction, harsh conditions of pre-trial custody could be accepted as a mitigating factor in sentencing generally:

> [74] Thus, it seems at least arguable that mitigating circumstances relating to the offender are to be generally construed and must be taken into account by the sentencing judge: see also *R. v. Doyle*, 2015 ONCJ 492, at para. 41. It also seems arguable that these could include harsh conditions of pre-sentence custody.

[18] Despite this, the judge considered himself constrained by appellate decisions in taking these custodial conditions into account. The judge interpreted appellate decisions as holding that this factor was not relevant in the context of determining

the period of parole ineligibility, relying on *R. v. Tsyganov*, 1998 NSCA 227; *R. v. Stephen*, 1999 ABCA 190; *R. v. Kitaitchik* (2002), 161 O.A.C. 169; *R. v. Toews*, 2015 ABCA 167; *R. v. Ryan*, 2015 ABCA 286; and *R. v. Johnston*, 2016 BCCA 413.

[19] Thus, the judge concluded he should give no consideration to the conditions of pre-sentence custody endured by Mr. Sheepway.

[20] As mitigating circumstances, the judge considered Mr. Sheepway's lack of criminal record before the murder, letters of reference, cooperation with the RCMP, admissions of certain facts at trial, and statement of remorse (although qualified).

[21] As aggravating circumstances, the judge considered the degree of premeditation of the crime and use of a loaded firearm, the shots fired at Mr. Brisson when he was attempting to leave, the theft from Mr. Brisson while he lay dead, and his attempt to cover up the shooting and the disposal of the body.

[22] The judge considered Mr. Sheepway's addiction as a neutral factor.

[23] The judge held that the combination of the robbery, use of the shotgun, thefts from the victim, and disposal of the body, were particularly aggravating and justified a sentence of more than 10 years of parole ineligibility. He concluded that the appropriate sentence was a period of 13 years of parole ineligibility.

Issue on Appeal

[24] The issue on appeal is whether the sentencing judge erred in concluding that harsh conditions of custody endured by an offender prior to sentencing are not a relevant factor when determining whether the period of parole ineligibility for a person convicted of second degree murder should exceed 10 years.

[25] This is the first time this issue has been considered in this Court.

[26] In my view, the sentencing judge did so err. Since it was an error in principle that had an impact on sentence, this Court is entitled to intervene: *R. v. Friesen,* 2020 SCC 9 at para. 26.

[27] We may therefore consider afresh what would be an appropriate period of parole ineligibility in all the circumstances.

Analysis

[28] In analyzing the issue, I will:

a) review the general principles that apply to the process of determining the period of parole ineligibility of an offender convicted of second degree murder;

b) review the application of ss. 719(3) and (3.1) of the *Criminal Code,* which permit a sentencing judge to give credit for time spent in custody to reduce a sentence imposed but which do not apply to a mandatory life sentence;

c) consider whether harsh conditions of pre-sentence custody impact other sentencing decisions, outside the context of ss. 719(3) and (3.1);

d) consider the appellate decisions cited by the judge on the question of whether pre-sentence custodial conditions can be considered when determining parole ineligibility;

e) explain why I agree with the Ontario Court of Appeal in *Lamba;* and

f) provide my views on what is an appropriate period of parole ineligibility.

Relevant Principles for Determining Parole Ineligibility for a Life Sentence

[29] A person convicted of first degree murder is subject to a mandatory sentence of life imprisonment without eligibility for parole for 25 years: *Criminal Code*, s. 745(a).

[30] A person convicted of second degree murder also is subject to life imprisonment, but there is discretion on the sentencing judge to impose a lesser degree of parole ineligibility, from a minimum of 10 years to the maximum of 25 years.

[31] In this regard, ss. 745(c) and 745.4 of the *Criminal Code* provide:

> 745. Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be…
>
> > (c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4…
>
> …
>
> 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.
>
> [Emphasis added.]

[32] Since this case did not involve a jury, there was no jury recommendation. However, if there were a jury, the judge would be required to instruct it pursuant to s. 745.2 to consider whether it wishes to make a recommendation of any period of parole eligibility greater than 10 years.

[33] It is clear from the express language of s. 745.4 that certain factors are relevant to determining the period of parole ineligibility, namely: the character of the offender, the nature of the offence, and the circumstances surrounding its commission.

[34] In addition, the judge has discretion to impose a period of parole ineligibility “as the judge deems fit in the circumstances”.

[35] In *Shropshire*, the Supreme Court of Canada held that the determination of the duration of parole ineligibility is a sentencing process. Therefore, the Court held at para. 24:

> The exercise of a judge's discretion under s. 744 should not be more strictly circumscribed than the sentencing itself.

[36] Since *Shropshire*, it has become well-established that sentencing judges determining the duration of parole ineligibility may take into account all relevant sentencing principles including those found in ss. 718–718.2 of the *Criminal Code*: see for example *R. v. Pelletier*, 2004 BCCA 264; and *R. v. McKnight* (1999), 135 C.C.C. (3D) 41 (ONCA).

[37] These general principles are governed by the overarching purposes of sentencing, which includes contributing to "respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions…": s. 718.

Credit for Time Served Pursuant to s. 719(3) and s. 719(3.1)

[38] Sections 719(3) and (3.1) of the *Criminal Code* allow a judge who is imposing a sentence to reduce the sentence by the amount of time the offender has already spent in custody, while that offender was awaiting trial and sentencing. This is known as a credit for time served.

[39] These provisions state:

> Determination of sentence
>
> 719(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> Exception
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

[40] Section 719(3) caps the credit to the sentence at one day for one day already served awaiting trial and/or sentencing. Section 719(3.1) allows for an enhancement

in that credit, to a maximum of one and one-half days for each day spent in custody awaiting trial and sentencing.

[41] As explained in *R. v. Summers*, 2014 SCC 26, the enhanced credit provided by s. 719(3.1) recognizes that in two respects, pre-sentencing custody is more onerous than post-sentencing custody. First, other than for life sentences, the legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before sentencing. Second, time spent in custody awaiting trial is usually in local remand centres that do not provide the educational or rehabilitative programming that can be made available in a correctional centre after conviction.

[42] A judge must determine an appropriate sentence before considering the s. 719(3) or (3.1) credit for time served. The credit is a subtraction from what is otherwise determined to be a fit sentence, reducing the duration of the sentence.

[43] The s. 719(3) and (3.1) credit for time served does not apply to murder and second degree murder offences.

[44] In these cases, s. 746 of the *Criminal Code* provides that pre-sentence custody will be recognized in calculating the period of imprisonment served for the purpose of determining parole eligibility. That calculation comes into play when determining when the period of parole ineligibility ends, and is not an issue for the sentencing judge: *Tsyganov* at para. 18.

[45] Section 746 is simply a calculation of the duration of actual custody; it is not concerned with the quality of pre-sentencing custody.

Do Harsh Conditions of Pre-Sentencing Custody Impact Other Sentencing Decisions?

[46] The limits on the amount of credit that can be given for pre-sentencing custody imposed by ss. 719(3) and (3.1) do not preclude sentencing judges from taking into account particularly harsh conditions of that custody more generally, as a factor in determining a fit sentence for crimes other than murder.

[47] The issue of accounting for particularly harsh pre-trial conditions in sentencing has received considerable judicial attention in Ontario, where it was at one time termed a "*Duncan* credit" based on the Ontario Court of Appeal's decision in *R. v. Duncan*, 2016 ONCA 754. In *Duncan*, the Court held that particularly harsh treatment in pre-sentence custody and its adverse impact on the offender can warrant "additional mitigation" apart from and beyond the 1.5 credit provided for in s. 719(3.1) of the *Criminal Code*: at paras. 6–7. The onus is on the offender to establish this.

[48] During the COVID-19 pandemic, the incidence of exceptionally harsh conditions of pre-sentence custody increased and this issue became more frequently addressed in sentencing.

[49] The Ontario Court of Appeal has reaffirmed *Duncan* on multiple occasions, although it has clarified that the correct approach in accounting for the impact of particularly harsh pre-sentence conditions is to treat it as a mitigating factor at sentencing, and not as the calculation of a "credit" that is deducted from the appropriate sentence, over and above the clear statutory limit set in s. 719(3.1): *R. v. Marshall*, 2021 ONCA 344 at para. 52; *R. v. Smith*, 2023 ONCA 500 at para. 37.

[50] Other appellate courts have accepted that sentencing judges have discretion to reduce an offender's sentence because of particularly harsh pre-sentence custody conditions that caused the offender hardship, quite apart from the credit provided for in s. 719(3.1): *R. v. Biever,* 2023 ABCA 138 at paras. 24–29; *R. v. Chaisson*, 2024 NSCA 11 at paras. 71–75; *Waite v. R.,* 2023 PECA 5 at para. 31; *R. v. Mosquito*, 2023 SKCA 29 at paras. 90–93; *R. v. Demeter*, 2022 BCCA 115 at paras. 54–58; *R. v. Morrison*, 2023 BCCA 242 at para. 41; *R. v. Joseph*, 2024 BCCA 392 at paras. 30–31.

[51] In *Joseph*, the Court of Appeal for British Columbia noted that there must be an evidentiary foundation for concluding that pre-sentencing custodial conditions due

to the COVID-19 pandemic had such an impact on the offender that it should be treated as a mitigating factor on the sentence: at para. 30.

[52] Recognizing that harsh custodial conditions causing hardship to an offender may be a mitigating factor at sentencing is analogous to the well-established approach of taking state misconduct into account as a factor in sentencing. In *R. v. Nasogaluak*, 2010 SCC 6, which dealt with police brutality, the Court noted that state misconduct can be a relevant factor that weighs on the side of reducing the appropriate sentence, even where the misconduct does not rise to the level of a *Charter* breach: para. 53. The Court noted that there is a long history in the law of recognizing that harm or prejudice caused to an offender by the state can be treated as a mitigating circumstance at sentencing: para. 54. It can be taken into account when crafting a fit and proportionate sentence: para. 55.

[53] However, in *R. v. Suter,* 2018 SCC 34, the Court identified that this logic is not limited to instances of state misconduct. In that case, vigilante violence against the offender was treated as a relevant factor in sentencing.

[54] The Court in *Suter* explained that consequences flowing from the commission of the offence, the offender's conviction, or the imposition of a particular sentence (together, "collateral consequences") are relevant to sentencing. This follows from the principles of individualization, parity, and proportionality: *Suter* at paras. 46–56. These consequences can have the effect of rendering a sentence more punitive for a particular offender: *Suter* at paras. 48–49. For that reason, these circumstances can, in appropriate circumstances, warrant a lower sentence being imposed: *Suter* at para. 47.

[55] Trial courts in BC have applied *Marshall* and recognized that harsh conditions of pre-sentencing custody affecting the offender could be taken into account at sentencing as a mitigating factor, for example, *R. v. Fulton*, 2021 BCSC 2721 at paras. 73–74; *R. v. Hughes*, 2023 BCSC 688 at paras. 83–84, 112; *R. v. Handule*, 2023 BCSC 1031 at paras. 102, 124–126, 194–195; *R. v. Khudhair*, 2023 BCSC 1175 at para. 124; *R. v. Clark*, 2023 BCSC 853 at para. 11.

[56] In *Fulton* at paras. 73–74, Skolrood J. (as he then was) treated the fact that the offender had spent a lengthy period of his pre-sentence custody in segregation, adversely impacting his ability to eat properly, sleep, exercise, and socialize, as a mitigating factor relevant to determining a fit sentence: at paras. 73–74. In that case, the periods of segregation that the offender experienced were mostly a result of protocols in response to the COVID-19 pandemic.

[57] In *Hughes*, the harsh custodial conditions considered by Winteringham J. (as she then was) were an unprovoked assault by another inmate and a resulting recovery in a medical unit, and then a period of 40 days in segregation, which the offender was placed in for his own protection: at paras. 83–83, 112. The sentencing judge adopted the approach in *Marshall* and considered these custodial conditions to be a mitigating factor in sentencing the offender for manslaughter using a firearm.

[58] In *R. v. Sorenson*, 2023 BCSC 787 and *R. v. Nour-Eldin*, 2023 BCSC 2310, Fitzpatrick J. as sentencing judge preferred to treat the factor of harsh pre-sentencing custodial conditions as a collateral consequence that may be taken into account at sentencing rather than a mitigating circumstance. This was also the approach in *Demeter*, although that may well be the way that counsel argued it.

[59] I do not see it as necessary to decide on this appeal which is the better description. It is clear from *Suter* that a collateral consequence that impacts an offender may be considered by a sentencing judge in mitigation of a sentence.

[60] I also do not consider it to be a new issue on appeal to alternatively describe this factor as a collateral consequence instead of a mitigating circumstance. The factual issues are the same: was there unusual hardship caused to the offender due to custodial conditions pending trial and sentence? The legal result is also the same: the discretion of the sentencing judge to take this into account when determining a fit sentence. This is not a new issue because it is not legally and factually distinct: see analogous discussion in *Suter* at para. 30.

[61] In conclusion, a sentencing judge has discretion to take into account the quality of pre-sentencing custody in determining what is a fit sentence, where for example, there is evidence that particularly harsh conditions had an adverse impact on an offender.

[62] The quantity of pre-sentencing custody remains a factor to base a credit against the sentence in sentencing for certain crimes, pursuant to s. 719(3) and (3.1). This credit is taken into account after determining a fit sentence, and does not apply to an offender such as Mr. Sheepway, convicted of second degree murder.

Appellate Decisions on Parole Ineligibility and Pre-Sentencing Custodial Conditions Cited by the Sentencing Judge

[63] The sentencing judge in this case referred to a number of appellate decisions dealing with the determination of parole ineligibility on a second degree murder conviction, and the relevance of pre-sentencing custody. He found himself bound by them and concluded they did not permit conditions of pre-sentence custody to be taken into account.

[64] Unfortunately, the judge did not fully appreciate that the appellate authorities he cited primarily turned on an analysis of the limitations of ss. 719(3) and (3.1), which do not apply to second degree murder convictions. The authorities were therefore making it clear that one cannot apply ss. 719(3) and (3.1) and reduce the period of parole ineligibility based on the quantity of pre-sentence custody, as a credit. Instead, the quantity of pre-sentence custody will be noted by custodial authorities when determining parole eligibility pursuant to s. 746.

[65] More specifically, a quick review of the authorities cited by the sentencing judge dealing with the determination of parole ineligibility in second degree murder cases, reveals:

a) In *R. v. Tsyganov*, 1998 NSCA 227, the Court was dealing expressly with the question of whether the credit pursuant to s. 719(3) for the time spent

in custody, pre-sentencing, applied to the determination of parole ineligibility. The Court held that s. 719(3) did not apply.

b) In *R. v. Stephen*, 1999 ABCA 190, the appellant argued that the judge who set a term of parole ineligibility after a conviction of second degree murder, erred in failing to give effect to s. 719(3). The Court rejected this argument.

c) In *R. v. Kitaitchik* (2002), 161 O.A.C. 169, the sentencing judge accepted the recommendation of the jury to impose a 12-year term of parole ineligibility. The trial was a second trial, after a successful appeal. It was argued on the sentence appeal from the second conviction, that the sentencing judge erred by not adopting the term imposed at the first trial, which was 10 years. The Court said that the sentence imposed at the first trial was in error because the judge took into account "the length of pre-trial custody" (emphasis added).

d) In *R. v. Toor*, 2005 BCCA 333, the Court was not dealing with pre-sentencing custody. The Court said that determining the length of parole ineligibility cannot "be read to give credit for serving strict conditions of bail" (para. 13, emphasis added).

e) In *R. v. Toews*, 2015 ABCA 167, the trial court erroneously reduced the period of parole ineligibility below the mandatory minimum 10 years, based on giving the offender "an enhanced credit" for pre-trial custody. The Court noted that it was an error to reduce the period below the statutory minimum, and that "[s]. 719(3.1) applies to sentences, not to parole eligibility" (para. 2, emphasis added);

f) Likewise, in *R. v. Ryan*, 2015 ABCA 286, the Court held that the trial judge erred in giving a credit for the quantity of time spent by the offender in pre-trial custody pursuant to s. 719(3.1), when determining parole ineligibility. In a lengthy concurring judgment, Wakeling J.A. promoted a

> methodology for determining parole ineligibility and an approach to statutory interpretation which was not adopted by his colleagues. While he stated generally at para. 206 that the time and conditions spent in pre-trial custody are not "related to the purposes, objectives, and principles of sentencing", in my respectful opinion this was *obiter*. Insofar as this statement relates to the quality of custody, it is against the weight of authority. It is clear that conditions of pre-sentencing custody may be related to the general principles of sentencing, as has been found in several authorities cited above.

[66] The last appellate authority cited by the judge on this point was *R. v. Johnston*, 2016 BCCA 413. In that case, an offender convicted of second degree murder appealed the sentencing judge's imposition of a 17-year term of parole ineligibility. The argument on appeal was that he should have been given a credit for his time in custody pending sentencing, because he was on remand and the time spent in custody on remand is recognized as more onerous than the time spent in a corrections facility after sentencing, as less programs are available for example. However, this is the same reason for the enhanced credit pursuant to s. 713(3.1).

[67] In rejecting the appeal, the Court in *Johnston* held that:

> [14] The respondent argues that to import s. 719(3) considerations into parole ineligibility would be contrary to *Shropshire*, and I agree. Conditions of pre-sentence custody do not fit within the criteria set out in s. 745.4.

[68] In *Johnston,* the Court went on to note there was no evidence of the actual conditions of the offender's custody while awaiting trial: para. 15.

[69] If the statement that pre-sentence custody conditions do not fit within the s. 745.4 criteria is read in isolation, it appears to support the Crown position on this appeal. However, read in context, *Johnston* was not referring to particularly harsh conditions of pretrial custody, but simply the factors that go to the credit in ss. 719(3) and 719(3.1).

[70] In my view, the appellate cases cited by the judge are authority for the proposition that the credit available for pre-sentence custody, pursuant to s. 719(3) and (3.1) of the *Code*, does not apply to the determination of parole ineligibility for second degree murder offenders.

[71] These authorities do not support a wider proposition, namely, that particularly harsh conditions of pre-sentencing custody cannot be considered as a mitigating factor or collateral consequence relevant to fixing the period of parole eligibility to a term between 10 years and 25 years. The sentencing judge erred in principle by considering himself constrained by these authorities and unable to take into account Mr. Sheepway's pre-sentence custodial conditions.

The Approach in *R. v. Lamba*, 2024 ONCA 778

[72] Subsequent to the sentencing in the present case and the hearing of the within appeal, the Ontario Court of Appeal in *Lamba* overturned a sentencing judge's determination of parole ineligibility on a second degree murder conviction. The Court held that the judge erred in concluding that he could not consider pre-sentence conditions of custody.

[73] In *Lamba*, the Court noted conflicting trial court decisions on the issue. The Court preferred the approach of Woollcombe J. in *R. v. Morales*, 2023 ONSC 1607. In that case, the sentencing judge gave reasons why harsh pre-sentencing custodial conditions could be considered when determining the appropriate term of parole ineligibility, namely:

a) the factors in s. 745.4 and all general sentencing principles apply to the determination of whether the appropriate term of parole ineligibility should be greater than 10 years; and

b) it is now well accepted that onerous pretrial conditions of custody may be a mitigating factor in sentencing.

[74] The Ontario Court of Appeal in *Lamba* endorsed the reasoning in *Morales* and held:

> [24] I agree with the reasoning in *Morales*, especially to the effect that all sentencing principles are relevant in determining the appropriate period of parole ineligibility. The fact that s. 745.4 of the *Criminal Code* lists specific factors that must be considered when deciding whether to increase the period of parole ineligibility for second degree murder beyond the 10-year mandatory minimum does not mean that other factors normally relevant to sentencing, including mitigating factors, become irrelevant. Taking this approach would not accord with basic principles of statutory interpretation: see *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 37. Accordingly, there is no principled reason for sentencing judges not to consider pre-sentence conditions of incarceration when deciding on an appropriate period of parole ineligibility.
>
> [25] As pointed out by Woollcombe J. in *Morales*, at para. 53, this does not mean that trial judges have the discretion to reduce the mandatory period of parole ineligibility due to the length of pre-sentence custody; this is clearly impermissible: *R. v. McKenna*, 2020 NBCA 71, 394 C.C.C. (3d) 494, at para. 18. However, as this court directed in *Marshall*, pre-sentence conditions are one of many mitigating factors that may affect a fit sentence. There are no principled reasons why this mitigating factor should not also apply to determining the appropriate period of parole ineligibility, as long as the statutory mandatory minimum sentence is maintained and the sentencing court also considers the factors in s. 745.4 of the *Criminal Code* when determining an appropriate period of parole ineligibility.

[75] In the result, the Court in *Lamba* set aside the sentencing judge's determination of a period of parole ineligibility of 12 years, and re-sentenced the offender to a period of parole ineligibility of 10 years.

[76] In my view, this approach also accords with the statutory language of s. 745.4 which provides that a judge may substitute a greater period of parole ineligibility as the judge deems fit "in the circumstances". While the period of ineligibility can be lengthened by reason of the three factors noted in that section, it must be determined having regard to all of the circumstances and in accordance with the principles of sentencing. As should be clear from my analysis above, I agree with the reasoning and approach in *Lamba*, which is consistent with the position taken by counsel for Mr. Sheepway on this appeal.

[77] In particular, it is my view that:

a) the guidance in s. 745.4 as well as general sentencing principles apply to the determination of whether the period of parole ineligibility for an offender convicted of second degree murder should be greater than 10 years (but not greater than the maximum 25 years);

b) as a general principle of sentencing, harsh conditions of pre-sentencing custody that have an impact on an accused may be taken into account in determining a fit sentence;

c) therefore, these harsh conditions of pre-sentencing custody may be taken into account in determining an appropriate term of parole ineligibility between 10 years and 25 years.

[78] The question might arise: what is the threshold of harsh conditions of pre-trial custody that warrant consideration at the time of sentencing? In my view it must be something beyond the mere distinction between custody on remand, and custody post-sentence. That is because that distinction is already provided for by the enhanced credit in ss. 719(3.1) of the *Code*, which does not apply to offenders convicted of second degree murder.

[79] Beyond that observation, I do not see it as necessary to describe the parameters of what types of adverse pre-sentencing custodial conditions might be treated as a mitigating factor at the time of sentencing. Many of the cases where this factor is taken into account involved custodial conditions of lengthy segregation or isolation, or situations where violence was inflicted against the offender while in custody. The relevance of custodial conditions to sentencing will be determined by a sentencing judge based on the evidence on a case-by-case basis.

Determining the Period of Parole Ineligibility

[80] Mr. Sheepway argued at the sentencing hearing that the determination of his period of parole ineligibility should take into account, as a mitigating circumstance, the harsh conditions of his pre-sentence custody which had caused him undue hardship.

[81] Whether the factor of exceptionally harsh pre-sentencing custodial conditions is described as a mitigating factor or collateral consequence, as I have reviewed above, the weight of authority holds that it is a factor that may be taken into account by the sentencing judge in determining a fit sentence generally, and this approach is in accordance with general sentencing principles.

[82] The judge heard evidence that Mr. Sheepway was held for approximately 18 months of time in conditions that were equivalent to segregated custody or in isolation from other inmates, when he was allowed very little time out of his cell. This was not due to any custodial misconduct by Mr. Sheepway, and after legal action was launched by his counsel, he testified that he was allowed unlocked contact with other inmates. As noted by the judge, the medical evidence supported the conclusion that these harsh conditions had a significant negative impact on his mental health.

[83] I am of the view that the sentencing judge accepted Mr. Sheepway's evidence in this regard. Otherwise, there would be no need for the judge's lengthy analysis as to whether he could take these conditions into account.

[84] The judge's error in concluding that he could not take this factor into account must therefore have materially contributed to the term he imposed for parole ineligibility.

[85] It is therefore appropriate for this Court to determine afresh the appropriate term of ineligibility for parole.

[86] I would agree that Mr. Sheepway's conditions of pre-sentencing custody were exceptionally harsh and affected his circumstances at the time of sentencing. They should be taken into account in mitigating the term of parole ineligibility to the extent it is otherwise greater than the mandatory 10 years.

[87] I agree with the sentencing judge's thorough analysis of other mitigating and aggravating factors, and his review of cases involving somewhat similar circumstances.

[88] Considering the factors taken into account by the sentencing judge, and the additional factors of Mr. Sheepway's harsh pre-sentencing custody, I would set aside the judge's sentence and impose a 12-year term of parole ineligibility.

Disposition

[89] I would allow the sentence appeal. I would set aside the trial judge's imposition of a 13-year term of parole ineligibility and substitute a sentence of a 12-year term of parole ineligibility.

"The Honourable Justice Griffin"

I agree:

"The Honourable Mr. Justice Butler"

Reasons for Judgment of the Honourable Justice Charlesworth:

Introduction

[90] I have had the benefit of reviewing my colleagues' judgment in draft form. With respect, I do not agree with their conclusion. I would find that the sentencing judge did not err in concluding that he was precluded from taking into consideration the quality of Mr. Sheepway's presentence custody when determining parole eligibility under s. 745.4. I would dismiss the sentence appeal.

Background

[91] The appellant, Darryl Sheepway, was found guilty of the second degree murder of Christopher Brisson. Mr. Sheepway admitted that on August 28, 2015, he shot and killed Mr. Brisson with a 12-gauge pump-action shotgun. The shooting took place during a pre-arranged meetup for Mr. Sheepway to purchase $250 worth of crack-cocaine from Mr. Brisson. Unbeknownst to Mr. Brisson, Mr. Sheepway had arranged the meeting with the intention to rob him of the drugs, which he did after Mr. Brisson was shot dead.

[92] The appellant was charged with first degree murder. With the consent of the Crown, he was tried by a judge alone in the Supreme Court of Yukon.

[93] The appellant argued at trial that he did not have the specific intent necessary to be convicted of Mr. Brisson's murder. The trial judge acquitted Mr. Sheepway of first degree murder, finding the Crown had failed to prove beyond a reasonable doubt that the murder was planned and deliberate. The trial judge did find, beyond a reasonable doubt, that Mr. Sheepway shot Mr. Brisson with the intent to cause bodily harm that he knew was likely to cause death and was reckless as to whether death ensued. As a result, Mr. Sheepway was found guilty of second degree murder contrary to s. 229(a) of the *Criminal Code*.

[94] Following the second degree murder conviction, Mr. Sheepway was sentenced to a mandatory term of life imprisonment pursuant to s. 235(1) of the *Criminal Code*. The trial judge then found that a combination of "the robbery, the use

of the shotgun, the thefts from Mr. Brisson's person and the disposal of Mr. Brisson's body", were "particularly aggravating and justify a sentence of more than 10 years of parole ineligibility." The trial judge set parole ineligibility at 13 years in accordance with s. 745.4 of the *Criminal Code*.

[95] Mr. Sheepway appealed his sentence. The appellant argued that "the sentencing judge erred in principle by concluding that the conditions of pre-sentence incarceration of the appellant were not relevant to the determination of ineligibility for parole under s. 745.4 of the *Criminal Code*."

[96] Owing to this alleged error, the appellant argued that his parole ineligibility period should be reduced to 10 years.

Procedural History and Evidential Background of Pretrial Detention

[97] This matter is the subject of several reported decisions. These decisions include the Reasons for Conviction (*R. v. Sheepway*, 2018 YKSC 4) the Reasons for Sentencing (*R. v. Sheepway*, 2018 YKSC 26), the Judgment dismissing the conviction appeal (*R. v. Sheepway*, 2022 YKCA 3), and now the majority reasons on this appeal. As the evidentiary background has been detailed extensively, only that evidence which is necessary to provide context to this dissent will be included below.

[98] Mr. Sheepway's pre-trial confinement commenced on August 20, 2016, in the Whitehorse Correctional Centre's ("WCC") Segregation Unit. The Segregation Unit at WCC has seven cells and is ordinarily reserved for prisoners who have committed disciplinary offences while in custody.[1] There is no television in a Segregation Unit cell and time spent out of the cell is limited to two hours per day for "ablutions, fresh air, and telephone calls."[2] Mr. Sheepway was not housed in segregated confinement due to any disciplinary issue, but rather due to his history working as a corrections officer at WCC.

[1] *Sheepway v. Hendriks*, 2019 YKSC 50 [*Sheepway*], para. 12.
[2] *Sheepway*, para. 13.

[99] Ten days after initially being incarcerated, Mr. Sheepway was moved to the Secure Living Unit of the WCC, where he was confined from August 31, 2016, to May 8, 2018, while he awaited his trial and sentence. Justice Veale, in *Sheepway v. Hendriks*, 2019 YKSC 50, an administrative law decision wherein Mr. Sheepway challenged the constitutionality of his pre-trial detention conditions, described the Secure Living Unit as follows at para. 15:

> [15] There is one Secure Living Unit for men which consists of seven cells. Each cell in the Secure Living Unit has a small television and the seven cells have access to a common area. The common area has a telephone, treadmill, shower and "fresh air room" which has a large barred window with no glass. There is no specific minimum time the inmate is allowed to be out of his cell and into the common area as it is dependent upon the number of inmates in the Secure Living Unit and a determination of inmate status and compatibility. It is possible that the inmate may be alone in the Secure Living Unit, which would result in no contact with fellow inmates or he could be compatible with other inmates with potential contact with one to six other inmates. An inmate in the Secure Living Unit does not have contact with the inmates in the general population.

[100] The explanation for why Mr. Sheepway's detention at WCC was in the Secure Living Unit for over 20 months was, from time to time, articulated to him through the provision of Secure Living Unit Placement Forms. A typical form would read:

> You have been in custody since August 20th, 2016 and have serious charges and are awaiting trial in November of 2017. There are significant safety and security concerns to the facility that are unique to your circumstances as you were employed at this facility as a corrections officer and have intimate knowledge of the facility. In addition to this, there are safety and security concerns to your person given your previous employment and the nature of the charges which you are facing.[3]

[101] At the second degree murder sentencing hearing, Mr. Sheepway, over the objection of the Crown, was permitted to give *viva voce* evidence relating to the time he spent in pre-trial custody at the WCC. The trial judge summarized Mr. Sheepway's testimony as follows at para. 67 of the Reasons for Sentencing:

> [67] Mr. Sheepway testified at the sentencing hearing about the difficult conditions of his pre-sentence custody. His evidence was that he was originally housed in a segregated unit for about two weeks after his transfer to WCC on August 20, 2016. He did not recall whether he was allowed any time

[3] *Sheepway*, para. 28.

> out of his cell, but he had no contact with any other inmates for that time. He said he was then transferred to the secure living unit ("SLU") but was not informed of the reason for the transfer to that unit. Mr. Sheepway testified that he was in his cell for about 22 hours each day for the first eight months in the SLU. He said that he was never offered any programming and that he had nothing to do each day except watch TV. For the following period of about 10 months, Mr. Sheepway said that he was allowed to be out of his cell for 3 to 6 hours per day. While in both the segregated unit and the SLU, Mr. Sheepway had limited opportunity for contact with other inmates. He said that he filed numerous complaints requesting reasons for the manner of his incarceration, which largely went unanswered, until his counsel filed a petition in this court. After that, he testified that his custodial conditions changed almost immediately and he has more recently been allowed unlocked contact with other inmates previously deemed compatible.

Issues

[102] I agree that the issue on this appeal is whether the sentencing judge erred in concluding that he could not consider Mr. Sheepway's pre-sentence conditions of custody when determining the period of parole ineligibility for a second degree murder conviction.[4]

[103] In my view, the trial judge did not so err. I would dismiss the sentence appeal.

Law

[104] Pursuant to s. 235(1) of the *Criminal Code*, "every one who commits first degree or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life".[5]

[105] Section 745(c) prescribes a 15-year range in which a person who has been convicted of second degree murder may wait prior to being able to apply for parole:

> …the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be
>
> (c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such

[4] This issue mimics that raised in *R. v. Lamba*, 2024 ONCA 778, para. 13, released after the hearing of this appeal.

[5] *Criminal Code of Canada*, R.S., C-34, s. 1, s. 235(1). Per s. 235(2) — the sentence of imprisonment for life prescribed by this section is a minimum punishment.

> greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to 745.4.
>
> [Emphasis added.]

[106] Section 745.4 gives the trial judge a specific, discretionary toolkit to use when determining whether a convicted murderer's parole ineligibility period should be longer than 10 years. The trial judge may increase the parole ineligibility period beyond 10 years only if, having regard to the character of the offender, the nature of the offence, and the circumstances surrounding its commission, she deems it fit in the circumstances to do so:

> 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.

[107] In *R. v. Shropshire*, 1995 4 S.C.R. 227 [*Shropshire*], the seminal case on the setting of parole ineligibility for second degree murder, Iacobucci J., writing for the Court, articulated the standard a trial judge must follow when setting parole ineligibility higher than 10 years:

> [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 s. 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.
>
> [Emphasis added.]

[108] While *Shropshire* was decided before the *Criminal Code* was amended to replace Part XXIII Punishment with Part XXIII Sentencing (in force September 3, 1996), the case remains authoritative. There has been almost unanimous acceptance by courts throughout Canada that all relevant sections in Part XXIII

should be considered in the analysis under s. 745.4 to find the appropriate parole ineligibility period. Justice Wakeling touched upon the implications of the timing of *Shropshire's* release and the coming into force of the *Criminal Code*'s provisions on Sentencing, in his concurring reasons in *R. v. Ryan*, 2015 ABCA 286, beginning at para. 102:

> [102] The Supreme Court of Canada released its *Shropshire* judgment on November 16, 1995. As of this date, Part XXIII of the *Criminal Code* entitled "Sentencing", as we know it today, was not in force. The old Part XXIII in force on November 16, 1995 had no provisions recording the purpose, objectives and principles of sentencing, the role ss. 718, 718.1 and 718.2 of the current Part XXIII play. The common law was the depository of these values. The new Part XXIII, introduced by *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, did not come into force until September 3, 1996, more than nine months after the release of *Shropshire*.
>
> [103] The force of the Shropshire direction to exercise any jurisdiction under s. 745.4 within the framework of sentencing principles is not diminished just because the sentencing principles were codified by the new Part XXIII in the 1996 statute.
>
> [104] It follows that a sentencing court determining the appropriate period of parole ineligibility for a second degree murderer must understand that this decision is the product of the application of the three criteria stipulated in s. 745.4 within the overall framework the purpose, objective and principles of sentencing set out in ss. 718 to 718.2 create.
>
> [Emphasis added.]

[109] The trial judge said as much in his decision at para. 43:

> [43] *Shropshire* was decided before the amendments to the *Code* to incorporate ss. 718 to 718.2. However, it is now generally accepted that all of those sections provide context to an analysis under s. 745.4, where applicable: *R. v. M.D.H.*, 2005 YKSC 59, at para. 85.
>
> [Emphasis added.]

[110] That the three criteria stipulated in s. 745.4 must be applied within the overall principles of the sentencing framework is unremarkable and uncontentious. Understanding the mitigating implications of an individual offender's character, the nature of the offence, and the circumstances surrounding its commission, is necessary for a trial judge to arrive at a fit and proper sentence. To find otherwise

would be an affront to leading sentencing jurisprudence such as *R. v. Gladue,* 1999 CanLII 679 (S.C.C.) and *R. v. Lacasse,* 2015 SCC 64.

[111] What is at issue on this appeal is something different than the simple application of the sentencing principles in ss. 718–718.2 to s. 745.4. The trial judge applied these principles quite ably as demonstrated in his reasons wherein he explains that “the robbery, the use of the shotgun, the thefts from Mr. Brisson’s person and the disposal of Mr. Brisson’s body”, were “particularly aggravating and justify a sentence of more than 10 years of parole ineligibility”.

[112] Because harsh pre-trial conditions do not relate to any of the three factors, the appellant argues that the sentencing judge should have read into s. 745.4 a fourth requirement, that “harsh pre-trial conditions” be an additional factor considered by a trial judge when determining parole ineligibility under s. 745.4.

[113] The recently released decision of the Ontario Court of Appeal in *R. v. Lamba*, accords with the appellant’s argument. At para. 24, Favreau J.A. for the Court writes:

> The fact that s. 745.4 of the *Criminal Code* lists specific factors that must be considered when deciding whether to increase the period of parole ineligibility for second degree murder beyond the 10-year mandatory minimum does not mean that other factors normally relevant to sentencing, including mitigating factors, become irrelevant. Taking this approach would not accord with basic principles of statutory interpretation: see *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 37. Accordingly, there is no principled reason for sentencing judges not to consider pre-sentence conditions of incarceration when deciding on an appropriate period of parole ineligibility.

[114] Paragraph 37 of *Green v. Law Society of Manitoba*, 2017 SCC 20 [*Green*], referenced by Favreau J.A., reads in relation to statutory interpretation:

> Second, Mr. Green’s argument is inconsistent with this Court’s purposive approach to statutory interpretation. An argument based on implied exclusion is purely textual in nature and cannot be the sole basis for interpreting a statute: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 256-57. The words of the statute must be considered in conjunction with its purpose and its scheme. In my view, the purpose of the Act supplements the open-ended wording of the relevant provisions to indicate that the implied exclusion rule should not be applied in this case.

[115] Counsel were without the benefit of *Lamba* at the time of submissions as it was released shortly after this appeal was argued.

Analysis

[116] The SCC's purposive approach to statutory interpretation means the words of a statute must be considered in conjunction with its purpose and its scheme as noted in *Green* above.

[117] The purpose of s. 745.4 is to impart a modicum of discretion on trial judges when handing down a mandatory life sentence for second degree murder. This enables an individualized sentence to be imposed, through the mechanism of setting parole ineligibility, in the face of a mandatory life sentence.

[118] The Saskatchewan Court of Appeal in *R. v. Wenarchuk*, 1982 CanLII 2600 (Sask C.A.) explained the intention of s. 745.4 (at that time, s. 671) as follows:

> The object, rather, is to give back to the judge some of the discretion he normally has in the matter of sentencing - discretion that the statute took away from him when it provided for a life sentence - so that the judge may do justice, not retributive or punitive justice, but justice to reflect the accused's culpability and to better express society's repudiation for the particular crime committed by the particular accused (with that repudiation's attendant beneficial consequences for society, including its protection through individual and general deterrence and, where necessary, segregation from society), and further, that the judge exercise that retrieved discretion by an order directing the postponement for a period of up to 15 additional years of the Parole Board's exercise of its function. The emphasis clearly is not the protection of society through an assessment of the accused's future rehabilitative needs, or the likely progress of his rehabilitation - a field better left to the Parole Board who will be in a much superior position to assess the rehabilitative needs and progress of the accused 10 or more years in the future than the court on the date of sentencing - but on the protection of society through its expression of repudiation for the particular crime by the particular accused, along with that repudiation's concomitants of individual and general deterrence.
>
> [Emphasis added.]

[119] Not every person convicted of murder carries the same moral blameworthiness. Sentences must be individualized to be fit. Offenders convicted of

second degree murder, while all burdened with a life sentence, are owed an individualized sentencing process where parole ineligibility is appropriately set.

[120] In *Lamba*, a taxi driver's unexplainable and apparently impulsive, criminal act, caused the death of a passenger. This situation is far removed from the premeditated drug theft with a firearm that led to the death of Mr. Sheepway's victim. To morally conflate the two criminal acts, while both tragic and both second degree murders, would be incorrect. To impose the same penalty would be unfair.

[121] However, while I agree with the Ontario Court of Appeal's decision in *Lamba* to decrease Mr. Lamba's parole ineligibility to 10 years, primarily on the three criteria test, I respectfully disagree with the Ontario Court of Appeal in its analysis of statutory interpretation and its determination of the scope of s. 745.4.

[122] I find that s. 745.4 limits the application of the sentencing principles to the character of the offender, the nature of the offence, and the circumstances surrounding its commission. To read s. 745.4 otherwise would render the inclusion of the three specific criteria superfluous. If s. 745.4 was meant to allow the sentencing judge to increase parole ineligibility simply as the trial judge "deems fit in the circumstances", there would have been no need for Parliament to direct the trial judge to have regard to the three specific factors (and of course the s. 745.2 jury recommendations when in play).

[123] Not only does my approach to statutory interpretation frustrate the ability to read into s. 745.4 a new criterion, but there is also a principled reason why harsh conditions should not be considered in establishing parole ineligibility.

[124] The 10-year minimum under s. 745(c) for parole ineligibility cannot be subverted, and the harsh pretrial conditions do nothing to the life sentence the offender must face. The s. 745.4 ability to increase the floor from 10 years for a further 15 years is merely to enable the trial judge to "reflect the accused's culpability and to better express society's repudiation for the particular crime committed by the particular accused": *Wenarchuk* at para. 7.

[125] While *Shropshire* tells us that "the power to extend the period of parole ineligibility need not be used sparingly", there has been a steering away from *Shropshire's* "general rule" that 10 years will be the period of parole ineligibility set for second degree murder. Perhaps this is owing to society's belief that 10 years is too short an amount of time for any offender found guilty of murder to spend prior to seeking parole. Or perhaps, it is due to courts erroneously prioritizing the sentencing principles in ss. 718–718.2 over the three defined criteria in s. 745.4 in the sentencing analysis.

[126] I find the trial judge made no error in principle or law in failing to look to harsh pre-sentence conditions when establishing the period of parole ineligibility.

A Note on Collateral Consequences

[127] Mr. Sheepway, in his sentencing testimony, detailed the differential and separate treatment he perceived he was subjected to during his pre-trial detention on account of his previous employment as a correctional worker at WCC.

[128] The Supreme Court of Canada released *R. v. Suter*, 2018 SCC 34 a month-and-a-half after Justice Gower decided the sentence in this case. In *Suter*, Justice Moldaver discussed the law regarding collateral consequences of sentences, starting at para. 46:

> [46] As I have observed, sentencing is a highly individualized process: see *Lacasse*, at para. 54; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 82; *Nasogaluak*, at para. 43. In *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, this Court stated that a sentencing judge must have "sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender" (para. 38). Tailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to look at collateral consequences. Examining collateral consequences enables a sentencing judge to craft a proportionate sentence in a given case by taking into account *all* the relevant circumstances related to the offence and the offender.
>
> [47] There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself: see *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at para. 11; *R. v. Bunn* (1997), 1997 CanLII 22728 (MB CA), 118 Man. R. (2d) 300 (C.A.), at para. 23; *R. v. Bunn*, 2000 SCC 9, [2000] 1 S.C.R. 183 ("*Bunn* (SCC)"), at para. 23; *Tran v. Canada (Public Safety and Emergency Preparedness)*,

> 2017 SCC 50, [2017] 2 S.C.R. 289. In his text *The Law of Sentencing* (2001), Professor Allan Manson notes that they may also flow from the very act of committing the offence:
>
> > *As a result of the commission of an offence*, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation.
> >
> > [Emphasis added; p. 136.]
>
> I agree with Professor Manson's observation, much as it constitutes an incremental extension of this Court's characterization of collateral consequences in [*R. v. Pham*, 2013 SCC 15]. In my view, a collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender.
>
> [48] Though collateral consequences are not necessarily "aggravating" or "mitigating" factors under s. 718.2(a) of the *Criminal Code* — as they do not relate to the gravity of the offence or the level of responsibility of the offender — they nevertheless speak to the "personal circumstances of the offender" (*Pham*, at para. 11). The relevance of collateral consequences stems, in part, from the application of the sentencing principles of individualization and parity: *ibid.*; s. 718.2(b) of the *Criminal Code*. The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but <u>whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances</u>. Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit.
>
> [Italicized emphasis in original; underline emphasis added.]

[129] The separate confinement of Mr. Sheepway's incarceration fit the definition of a collateral consequence. I see no obstacle to incorporating collateral consequences into two of the three criteria set out in s. 745.4: character of the offender and circumstances surrounding its commission.

[130] The murder, carried out by a former correctional employee within the jurisdiction of his former employer, led to a differential pre-trial experience for Mr. Sheepway.

[131] However, I also recognize Moldaver J.'s caution, in para. 56 of *Suter*, that "…collateral consequences cannot be used to reduce a sentence to a point where

the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender."

[132] Having not heard argument on this issue, I am not satisfied that a reduction of the sentence, on account of the collateral consequence, would necessarily be appropriate.

Conclusion

[133] Justice Gower, correctly in my view, found that he could not consider the quality of Mr. Sheepway's pre-trial detention under the s. 745.4 rubric when setting the parole ineligibility period for second degree murder. I would dismiss this appeal.

"The Honourable Justice Charlesworth"