

Fourteen to Life:
Giving Constitutional Effect to the Age-Based Presumption of Diminished Moral
Blameworthiness by Respecting Parliament's Two-Pronged Test for Adult Sentence Applications
Pursuant to Section 72 of the Youth Criminal Justice Act.

by

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Abstract

Since the inception of the Youth Criminal Justice Act (*YCJA*) 20 years ago, the Supreme Court of Canada (SCC) has considered the adult sentence applications framework on only one occasion in *R v DB*, 2008 SCC 25. Additionally, Parliament enacted a major legislative overhaul of the provisions related to adult sentence applications in 2012. Without further input from the SCC, trial and appellate courts across Canada have filled the gaps in interpreting section 72 of the *YCJA*. On November 23, 2023, the SCC has announced they will hear the appeals of *R v IM*, 2023 ONCA 378 and *R v SB*, 2023 ONCA 369 and revisit the issue the presumption of diminished moral blameworthiness. The adult sentence application provisions are arguably the most important provision within the Act, given the serious jeopardy that goes along with an adult sentence.

Courts across Canada have struggled to give constitutional effect to the age-based presumption of diminished moral blameworthiness. In this thesis, I present a critical examination of the current approaches to adult sentence applications and outline the best practices for youth court judges, Crown attorneys and defence lawyers. In support of this end, I have conducted a survey of 20 years of trial level adult sentence decisions from across Canada tracking the age, race, gender, support structures, and cognitive and mental health challenges, among other factors. I have framed this inquiry with the Critical Legal Studies tradition. However, given that adult sentence applications touch on a broad range of complex issues, portions of this thesis engage other legal and interdisciplinary theories including Critical Discourse Analysis, Law and Emotion Theory, Critical Race Theory and Disability Legal Theory.

Ultimately, this thesis highlights the importance of respecting the letter and spirit of the law set forth by Parliament and by the Supreme Court of Canada in *DB*, in anticipation of the SCC's upcoming consideration of these very important principles.

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Dedication

Representing young people is incredibly rewarding. Representing young people is also incredibly heartbreaking. As youth criminal defence lawyers, we are more to these young people than court appointed counsel—we are part of their support teams. For some youth, we are the most consistent adult in their lives from age 12 to 18. We not only defend our ‘kids’ in the courtroom, but we also see them grow through major life events and we stand by them through their harder days. We have attended their graduations and we have attended their funerals.

This thesis is for the kids and those who love and support them, as we do.

CHAPTER ONE: INTRODUCTION

1.1 Introduction

In Canada, youths as young as fourteen years old may, in exceptional circumstances, be sentenced as adults. In this thesis I argued that, as a youth criminal justice system and as a society, we must limit the use of this extraordinary state power and ask ourselves these critical questions: In what circumstances, if ever, is it appropriate to sentence a young person to criminal sanctions generally reserved for an adult? What criteria must we consider to determine if it is appropriate to impose an adult sentence on a young person? What evidence should be advanced by counsel to best position a youth court judge to properly adjudicate such applications? And how do we limit the use of this extraordinary sentencing option in order to conform with the *Canadian Charter of Rights and Freedoms (Charter)*,¹ the tenets of the *Youth Criminal Justice Act (YCJA)*,² and our international obligations to uphold the human rights of young people?³

Across the country, youth court judges preside over Crown applications for adult sentences for young people in wide ranging circumstances, including cases where there has been no loss of life. The adult sanctions that flow from a successful Crown application are substantial and long-lasting. In cases of first and second-degree murder, the jeopardy for these young teens is a life sentence.

This thesis will examine the current legislative structure of the adult sentence application process in conjunction with the body of case law that has developed from trial and appellate courts since the inception of the *YCJA* in 2003. In the 20 years since the *YCJA* came into force, the

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (UK)*, 1982, c 11. [*Charter*]

² *Youth Criminal Justice Act*, SC 2002, c 1, s 72 [*YCJA*].

³ See eg. United Nations, *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 40(1) [*UNCRC*].

Supreme Court of Canada (SCC) considered this very important area of criminal law only once in *R v DB*, 2008 SCC 25⁴—a decision which is, for reasons which will be discussed below, almost entirely outdated and of very little practical assistance beyond its affirmation that the presumption of diminished moral blameworthiness of young people is a principle of fundamental justice.⁵ This is a result of the significant amendments made to the provisions within the *YCJA* governing adult sentence applications in 2012,⁶ making the SCC’s decision in *DB* less influential in today’s adult sentence hearings. In the absence of further guidance from the SCC, lower courts across Canada have been left to fill the interpretive gaps left by the SCC’s silence on this issue.

In its current iteration, sections 72(1)(a) and (b) of the *YCJA* govern the mechanism by which a youth court judge may, in exceptional cases, order that a young person be sentenced as an adult.⁷ Section 72 is broken into two distinct legal questions and is considered a two-pronged test. The first prong states that “the youth justice court shall order that an adult sentence be imposed if it is satisfied that the presumption of diminished moral blameworthiness or culpability of the young person is rebutted.”⁸ If the Crown rebuts the presumption, the Court must consider the second prong, which requires the imposition of an adult sentence only where “a youth sentence imposed in accordance with the purposes and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.”⁹ Both prongs must be satisfied independently. The two prongs may not be blended or

⁴ *R v DB*, 2008 SCC 25 [*DB*].

⁵ *Ibid*.

⁶ C-10, *Safer Streets and Communities Act*, 1st Sess, 41st Parliament, 2012, c1 (assented to on March 13, 2012) [*2012 Amendments*]; *YCJA*, *supra* note 2 s 72.

⁷ *YCJA*, *supra* note 2 s 72, s 64(1). Note: Section 64(1) of the *YCJA* limits the Crown’s ability to pursue adult sentence applications to circumstances where an adult could receive two or more years in custody.

⁸ *Ibid* at s 72(1)(a).

⁹ *Ibid* at s 72(1)(b).

weighed one against the other. The onus on the Crown is neither a balance of probabilities nor beyond a reasonable doubt, but instead one of “satisfaction”, which will be discussed below.

I am of the view that the *YCJA*’s articulation of the test in its current form is drafted in such a way that protects and respects the unique position of young people in Canadian society as well as their lesser capacity for critical thinking and good judgement as a result of their young age. However, I would contend that the application of these provisions in trial and appellate level decisions has been inconsistent, with courts applying the adult sentence test with divergent methods and results. While some decisions give thoughtful consideration to this difficult issue—decisions which I argue embody a best practice standard in this area of law, which will be revisited in Chapters Three and Five of this thesis—others have struggled to uphold the spirit of the SCC’s decision in *DB*, Parliament’s intention regarding the enhanced protections for young people in the *YCJA*, as well as the 2012 reformulation of the adult sentence test. Without further guidance from the SCC, these struggles will continue. Fortunately, on November 23, 2023, the SCC granted leave to appeal in two cases: *R v IM*, 2023 ONCA 378¹⁰ and *R v SB*, 2023 ONCA 369.¹¹ The SCC will hear these appeals together in the near future. From SCC case summaries, the issues the SCC will consider are precisely the issues raised in this thesis.¹²

¹⁰ *R v IM*, 2023 ONCA 378, leave to appeal to SCC granted November 23, 2023, [2023] 1 SCR 40868 [*IM ONCA*]; Supreme Court of Canada, “Summary: 40868 IM v His Majesty the King” (23 November 2023), online: *Supreme Court of Canada* <<https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=40868>>.

¹¹ *R v SB*, 2023 ONCA 369, leave to appeal to SCC granted November 23, 2023, [2023] 1 SCR 40873 [*SB*]; Supreme Court of Canada, “Summary: 40868 IM v His Majesty the King” (23 November 2023), online: *Supreme Court of Canada* <<https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=40873>>.

¹² Note: The SCC decision on leave to appeal was announced just days before the completion of this thesis, as such, few materials on these appeals are publicly available at this time. The online SCC case summaries are the only publicly available materials as of November 27th, 2023.

Given the significant time that has elapsed since the SCC last addressed adult sentence applications, I have identified and compiled all regional trial and appellate level decisions to illustrate how courts have filled the many gaps left unaddressed by *DB*. In anticipation of the SCC revisiting these very important issues in *IM* and *SB*, I will draw on the body of case law post-*DB* and the legislative amendments made to section 72 in 2012,¹³ in conjunction with relevant academic literature to opine on how the SCC will address the long-standing issues with the application of the presumption of diminished moral blameworthiness in their upcoming hearings. *IM* and *SB* will be revisited in Chapters Two and Five of this thesis.

1.2 Giving Constitutional Effect to the Presumption of Diminished Moral Blameworthiness

Courts across Canada have long-struggled to give constitutional effect to the age-based presumption of diminished moral blameworthiness which is the first of the two lynch-pin considerations of the adult sentence application test. In this thesis, I examine the current approaches to adult sentence applications with a focus on the constitutionally protected presumption of diminished moral blameworthiness of young people found in the first prong of the two-pronged test. Additionally, I will outline the best practices (topic by topic in Chapter 3 and as a whole in Chapter 5) in adult sentence applications for youth court judges, Crown attorneys, and defence counsel. Throughout this thesis I will highlight the importance of respecting the letter and spirit of Parliament's two-pronged adult sentence test, as well as the SCC's decision in *DB*, where the SCC held that the presumption of diminished moral blameworthiness of young people is a principle of fundamental justice.

In order to uphold the section 7 rights of young people, I argue that courts and court participants must all strive to give full constitutional effect to the presumption of diminished moral

¹³ 2012 Amendments, *supra* note 6.

blameworthiness. In this thesis, it is my intention to examine when and why courts and court participants are missing the mark on the conceptualization of the presumption of diminished moral blameworthiness of young people; to identify best practices for all court participants as they participate in adult sentence hearings, as counsel or as youth court judges; and to encourage approaching adult sentence applications in a way that respects the intention of Parliament, as well as the fundamental tenet that youths are protected by the presumption of diminished moral blameworthiness which may only be rebutted through the legal avenue provided in section 72(1)(a) of the *YCJA*. My aim is to present these examinations through a review and analysis of the relevant case law and academic literature pertaining to sentencing young people as adults in Canada and to provide an overview of what factors courts have considered on each prong of the adult sentence test.

The analysis of this issue is of utmost importance in youth criminal law as the adult sentence provisions operate to deprive young people of their liberty in an extreme and life-altering fashion. These decisions—and the legislated criteria we engage to make such decisions—must not be treated lightly. At its core, giving full constitutional effect to the presumption of diminished moral blameworthiness is vital to the proper functioning of the entirety of the youth criminal justice system as it was envisioned with the implementation of the *YCJA*, the SCC’s ruling in *DB*, and the subsequent amendments to the *YCJA* that made fundamental changes to the adult sentence application process in 2012.¹⁴ If the protective provisions related to adult sentence hearings are eroded, so too may there be an erosion of any or all of the *YCJA*’s measures to keep our youth justice system separate and apart from adult criminal courts.

¹⁴ *Ibid.*

1.3 Theoretical Framework

As stated above, the presumption of diminished moral blameworthiness of young persons is a principle of fundamental justice and is protected under section 7 of the *Charter*.¹⁵ As such, upholding the presumption of diminished moral blameworthiness of young people *by virtue of their age*, is both a constitutional and human rights issue and is deserving of thorough and thoughtful consideration by courts and all court participants, as will be discussed in Chapter Three.¹⁶

This thesis presents a doctrinal analysis of the presumption of diminished moral blameworthiness of young people in the context of adult sentence applications, in which the overarching theoretical framework engaged aligns predominantly with the Critical Legal Studies tradition. Youth as a group have very little power and agency in society. Within that wider group of young people, marginalized youth—including, but not limited to, racialized youth, youth experiencing poverty, youth in care of the state, youth with disabilities, and youth who come from dysfunctional origins—wield the least power of all.

Critical Legal Studies laid the foundation for the critique of legal issues by examining the relationship between law and power.¹⁷ In the Canadian youth criminal law context, for more than a century youth criminal legislation has developed in a way that has provided increased procedural protections for youth, who are particularly vulnerable to the state's power in criminal proceedings by virtue of their age, their increased reliance on adults, and their limited agency in the everyday

¹⁵ *Charter*, *supra* note 1; Nader R Hasan, “Three Theories of Principles of Fundamental Justice.” (2013) 63 the Supreme Court Law Review: Osgoode’s Annual Constitutional Case Conference 340 at 340 [*Hasan*].

¹⁶ Mark Carter, “Fundamental Justice in Section 7 of the *Charter*: A Human Rights Interpretation” (2003) 52 UNBLJ 243 at 243 [*Carter*].

¹⁷ Gerald L Thompson, *The Canadian Legal System*, 5th ed. (Toronto: Thompson Canada Ltd., 2004) at 16.

workings of the world. Any erosion of the rights and protections provided for in the *YCJA* should raise concerns and invite critical examination. While Chapter Two of this thesis will discuss the evolution of youth law and the adult sentence application process, Chapter Three will outline the ways in which all court participants can best protect young people, particularly marginalized young people, from the power of the state—a power that, in the context of adult sentence applications, can lead to life in prison.

Given that adult sentence applications touch on a broad range of complex issues, portions of this thesis will also engage various other legal and interdisciplinary theories including Critical Discourse Analysis, Law and Emotion Theory, Critical Race Theory and Disability Legal Theory.

Critical Discourse Analysis in the legal context is a qualitative method of analysis that examines the structure of language and explores the social, cultural and political context within which legislation is written and/or policies are implemented. Critical Discourse Analysis is an interdisciplinary method of analysis that is “interpretive and explanatory” but “does not have a unitary theoretical framework.”¹⁸ This theoretical framework engages applied linguistics to trace the evolution of law and legislation over time and identifies the ways in which linguistic tactics may be employed to frame, reframe or subvert legal principles. Ultimately, Critical Discourse Analysis “focuses on the ways discourse structures enact, confirm, legitimate, reproduce, or challenge relations of *power abuse (dominance)* in society.”¹⁹

In the context of the application of the *YCJA*’s adult sentence provisions, a Discourse Analysis approach to the linguistic adherence to, or conversely, the manipulation of Parliament’s phrasing of the adult sentence test is critical to understanding why courts and court participants

¹⁸ Deborah Tannen, Heidi E Hamilton, & Deborah Schriffin, ed, *The Handbook of Discourse Analysis*, 2nd ed (Chichester, UK: Wiley Blackwell, 2015) at 467-468.

¹⁹ *Ibid* at 467.

struggle to interpret and apply the presumption of diminished moral blameworthiness of young people, as will be seen throughout the first three chapters of this thesis.

Generally, Emotion Theory is an interdisciplinary framework that draws on a “range of fields, including philosophy, psychology, sociology, political science, anthropology and cognitive neuroscience.”²⁰ More specifically, Law and Emotion Theory looks at the intersection of the role of emotion and legal processes.²¹ Law and Emotion Theory advocates call for the recognition of the “pervasive and invisible influence of emotion on every aspect of the decision-making process.”²²

As I will discuss in the later part of Chapter One, an open and honest consideration of the role that emotions play in the youth criminal justice system is particularly important when dealing with young people who kill, or commit heinous and harmful offences towards, members of the community. When viewed from the theoretical lens of Law and Emotion, it is easier to understand how courts and court participants at times stray from the two-pronged test for adult sentence applications—after all, when young people commit extreme violence, emotions like anger, fear and outrage are natural, but ultimately unhelpful to courts and court participants, if those emotions are permitted to undermine the appropriate legal test to be employed.

Traditionally, legal systems have all but ignored the role of emotions. As stated by Terry A Maroney in their article “Emotional Regulation and Judicial Behavior”, judges are “human and experience emotion when hearing cases, though the standard account of judging has long denied

²⁰ Susan A Bandes, “Repellant and Rational Deliberation: Emotion and the Death Penalty”, (2009) 33 Vermont L Rev 489 at 490 [*Bandes*].

²¹ *Ibid* at 491.

²² Richard L Wiener, Brian H Barnstein & Amy Voss, “Emotion and the Law: A Framework for Inquiry” (2006) 30 Law and Human Behaviour 231 at 236 [*Wiener*]; Terry A Maroney, “Emotional Regulation and Judicial Behavior” (2011) 99:6 Calif L Rev 1485 at 1485 and 1488 [*Maroney*]; *Bandes*, *supra* note 20 at 491;

this fact.”²³ However, framed differently, the Law and Emotion Theory becomes more palatable. For instance, practitioners and scholars have long welcomed discussions around morality’s role in law and human behaviour, legal realism, and issues related to cognitive bias. By couching this discourse of law and emotion in such traditional terms, we can see that the discussion of the intersections of law and emotion have always had a place. After all, judges, jurors, lawyers, police officers, social workers, and probation officers all have one thing in common: they are human. I am of the view that it is crucial that we acknowledge the role emotion may play in adult sentence applications to ensure courts and court participants appropriately channel those emotions in such a way that does not undermine the legal test in adult sentence applications, as will be discussed later in this chapter.

When discussing the disproportionately negative impact of youth criminal proceedings on Indigenous, Black and visible minority youth in general and the adult sentence application process specifically, this thesis engages the Critical Race Theory. Critical Race Theory has been defined as a “[r]adical movement that seeks to transform the relationship among race, racism and power.”²⁴ Given the alarming rates of the over-representation of Indigenous, Black, and visible minority youth—which will be discussed in Chapters Two, Three and Four—it is abundantly clear that the youth criminal justice system is in the midst of a national crisis that is deserving of immediate attention from the courts and policy-makers alike.

²³ *Maroney, ibid* at 1485. Note: Maroney proposes a Judicial Engagement Model to address the intersection of law and emotion wherein judges take a cognitive appraisal of the emotions engaged, they acknowledge and disclose the presence of those emotions, and engage mindfully with those emotions in a way that ultimately assists in decision-making, instead of hindering the adjudication process. Maroney argues that emotional suppression is harmful and unrealistic. In the context of youth court, where emotions are often engaged and managed for all court actors, this approach has high practical value.

²⁴ Richard Delgado, Jean Stefancic, *Critical Race Theory: An Introduction*. 2ed. (New York: New York University Press, 2012) at 159 [*Delgado & Stefancic*].

In Chapters Three and Four this thesis will address how young people with disabilities who are subject to adult sentence applications may find themselves bearing a *de facto* burden to the satisfy the court that, as a result of cognitive disability, they should be afforded by the very statutory protections they are entitled to in light of their biological age alone. The critical analysis of how courts have treated evidence of young people's disabilities within the adult sentence application process is undertaken within the Disability Legal Theory framework. Disability Legal Theory and Disability Studies "applies social, cultural, historical, legal, philosophical, and humanities perspectives to understanding the place of disability in society. It explores disability as a social and cultural construct and as a phenomenon reflecting and constituting identity formation by incorporating the "real-lived" experiences of people with disabilities."²⁵

This thesis also engages (in an over-arching manner) principles of statutory interpretation including the plain meaning rule and fidelity to parliamentary intent.

1.4 Defining Moral Blameworthiness in the Context of Adult Sentence Applications

As stated above, the presumption of diminished moral blameworthiness of young people is at the core of the adult sentence application test and must be satisfactorily rebutted by the Crown in order to lawfully sentence a young person as an adult. However, significant confusion remains about the definition and operation of this fundamental tenet of youth criminal justice in Canada.²⁶

When looking at the term "moral blameworthiness" generally, it is most frequently engaged in determining the proportionality of a sentence where courts must weigh the gravity of the offence and the moral blameworthiness or culpability of the offender by balancing the

²⁵ Arlene S Kanter, "The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies" 42 Columbia Human Rights L Rev 403 at 404 [Kanter].

²⁶ Cheryl L Milne, "The Differential Treatment of Adolescents as a Principle of Fundamental Justice: An Analysis of R. v. B. (D.) and C. (A.) v. Manitoba." (2009) 47 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 235 at 241 [Milne].

aggravating and mitigating features of the offence and of the circumstances of the offender.²⁷ However, unlike the proportionality test, the adult sentence application test explicitly bars the blending and weighing of the gravity of the offence against the moral blameworthiness of the offender—for good reasons that shall be discussed below. As a result, the framework within section 72 of the *YCJA* is counter-intuitive to much of what we know about sentencing. This is because the adult sentence application process is not the sentencing hearing proper, but instead is a crucial and high-stakes step on the way to that final determination, with its own governing provisions and legal considerations.

Returning to the use of the term “moral blameworthiness” within the proportionality test, it is important to note that as courts consider the proportionality of a given sentence, separate inquiries are made into the gravity of the offence and the offender’s moral blameworthiness.²⁸ As such, the isolation of moral blameworthiness from the seriousness of the offence is not entirely novel. Even in sentencing, moral blameworthiness is conceptually disconnected from the gravity of the offence and the harm an offender has caused. The ultimate determination of a proportionate

²⁷ Danielle Robitaille & Erin Wincour, *Sentencing: Principles and Practice*, by Brian H Greenspan & Justice Vincenzo Rindinelli (Toronto: Emond Montgomery Publications Limited, 2020) at 3 [*Robitaille*]. Note: Moral blameworthiness appears twice within the adult sentence test. In the first prong that considers the presumption of diminished moral blameworthiness, as well as a proportionality-like assessment is conducted on prong two. See: *R v Chol*, 2018 BCCA 179 at para 43 [*Chol*] that states that “moral blameworthiness is relevant to both questions, but the questions themselves are of a different character. One considers whether the offender’s moral blameworthiness is that of a youth or an adult, whereas the other considers whether a youth sentence would be proportionate to the level of moral blameworthiness to hold the young person accountable, among other factors”.

²⁸ Note: The SCC has long accepted that “background and systemic factors” are consideration for all offenders, but that particular attention must be paid to the unique circumstances faced by Indigenous people in Canada. See: *R v Gladue*, [1999] 1 SCR 688 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

sentence, however, is reached by balancing these distinct considerations. This is not the case with the adult sentence test that states that the two concepts must not be weighed one against the other.

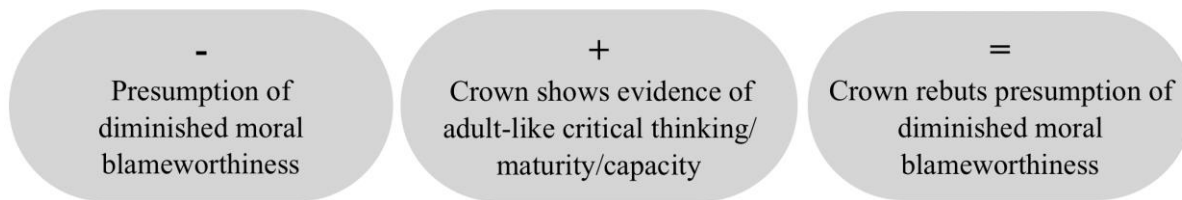
How, therefore, must we conceptualize moral blameworthiness within the context of the adult sentence application? Unlike the proportionality analysis in the final determination of a sentence, the moral blameworthiness of the young person is *not* weighed against the gravity of the offence in the first prong of the adult sentence test. This is because section 72(1)(a) creates an independent assessment of whether the Crown has rebutted the presumption of diminished moral blameworthiness that is generally inherent in young persons by virtue of their age, and nothing more.

From the judgements reviewed for this thesis, it appears as though moral blameworthiness itself is difficult to conceptualize in the context of serious violent offences, as will be discussed below.²⁹ However, the general tenet that young people, by virtue of the fact that their brains are not fully developed, are less worthy of blame and culpability than their adult counterparts is undisputed.

Young people, as a result of their age alone, may act impulsively and with limited capacity to foresee and appreciate the consequences of their actions. This is the very basis of the presumption, which applies to all offences, even the most serious. The starting point of the equation is not neutral, as the very nature of the presumption of diminished moral blameworthiness has the

²⁹ Marie Manikis, "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions." *Osgoode Hall Law Journal* 59.3 (2022) at page 7-8. [Manikis] See also: David M Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences" (1995) 59:2 *Sask L Rev* 271 [*Paciocco D*] The fault requirement as an element of an offence "is that moral fault or blameworthiness comes from the state of mind of the actor, and not simply from the commission of an injurious act" at 274.

young person at a deficit by virtue of their age alone. The proper visualization of the first prong of the adult sentence application test is an accounting of sorts:

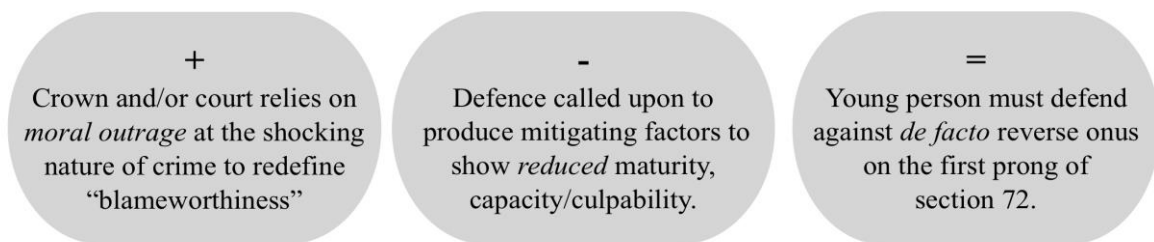


Moral blameworthiness is easily misinterpreted and even deliberately distorted to suit purposes that run counter to the two-pronged test. For death-related offences in particular, arguments around moral blameworthiness can easily devolve into statements about the general immorality of committing murder. Through extensive research, I have noted what can best be described as an underlying linguistic false equivalence between *moral blameworthiness* and *moral outrage*.

In her article “Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty”, Law and Emotion theorist, Susan A Bandes, notes that extreme crimes “provoke the highest emotions—anger, especially even outrage— that in turn makes rational deliberation problematic for investigators, prosecutors, judges and juries.”³⁰ I argue that we must acknowledge the role emotion may play in adult sentence applications.

³⁰ *Bandes, supra* note 19 at 489 [Bandes]. Note: Despite the fact that this article is addressing capital punishment cases, it is relevant as the seriousness of the crimes themselves are parallel despite the more extreme sentencing option available in the United States. It is the crime that provokes the outrage in this context, not the sentence.

While the term ‘moral outrage’ does not appear in any reported decisions, the sentiments it evokes are regularly advanced by Crown counsel as they argue the first prong of the adult sentence test. In this context, I would define moral outrage as an engagement in reasoning that sees the analysis of moral blameworthiness infiltrated by a morality based judgement of the heinous or shocking nature of the crime itself or the harm the crime has caused, together with a strong desire to denounce the crime and/or a call for retribution, which are considerations that are *not* to be blended into the first prong of the adult sentence test. In such circumstances, the accounting presented above, looks more like this:



In such circumstances the Crown is asking the court to distort the adult sentence test into a blended analysis that pits the seriousness of the offence against the mitigating factors presented by the defence, which creates a *de facto* reversal of the onus, which is unconstitutional in light of *DB*.³¹ Such an approach creates what I refer to as the ‘*de facto* presumptive offence regime’.

Ultimately, the presumption cannot be “trumped by a combination of other factors that do not relate to the psychological and scientific evidence that underlies the presumption.”³² In *R v DRA*, 2014 MBQB 199, Justice Menzies characterized the danger of disregarding the two-pronged

³¹ *DB*, *supra* note 4.

³² Jamie Campbell, “In Search of the Mature Sixteen Year Old in Youth Justice Court” (2015) 19 Can Crim L Rev 47 at page 6 [*Campbell*]; See e.g.: *R v DVJS*, 2013 MBPC 34 [*DVJS*]; *R v TJT*, 2018 ONSC 5280 at para 75 [*TJT*].

test, stating “the fact that the accused is charged with second degree murder cannot be the justification for imposing an adult sentence. If that were the case, the *YCJA* would not provide for a youth sentence for the charge of murder.”³³

In her text, *Justice for Young Offenders: Their Needs, Our Responses*, clinical psychologist Mary Vandergoot commented:

“The seriousness of the crime should never be the test of a young person’s maturity of judgement or capacity. How does a youth become less a youth and more an adult by committing a serious crime? Youth have diminished culpability as a result of their immaturity, particularly their diminished capacity for judgement, whatever their crimes.”³⁴

Similarly, in *R v MW*, 2017 ONCA 22, the Ontario Court of Appeal stated, “the presumption assumes that all young people start from a position of lesser maturity, moral sophistication and capacity for independent judgement than adults.”³⁵ The Crown must show more than neutrality to rebut the presumption of diminished moral-blameworthiness. They *must* satisfy the court of an advanced moral blameworthiness—one that is commensurate with an adult-like capacity.

Directly related, the court must never shift the onus on to the defence—consciously or unconsciously—by requiring the defence to produce evidence of developmental incapacitation to maintain the presumption of diminished moral blameworthiness. While the defence is always free to bring evidence that shows a *further* reduction beyond the age-based reduction of diminished moral blameworthiness, and while such evidence assists the court, it is not required in law.

1.5 Deciding the Most Difficult Cases

Within the body of reported adult sentence application decisions, and for each prong of the test, there are numerous examples of “extremes”. There are instances of extreme, destructive, and

³³ *R v DRA*, 2014 MBQB 199 at para 17. [*DRA*]

³⁴ Mary E Vandergoot, *Justice for Young Offenders: Their Needs, Our Responses* (Saskatoon: Purich Publishing Limited, 2006) at page 119 [*Vandergoot*].

³⁵ *R v MW*, 2017 ONCA 22 at para 97. [*MW ONCA*]

life-altering violence. There are, likewise, stories of young people challenged with extreme deficits, hardships and traumas that diminish their moral blameworthiness.

However, given the nature of the adult sentence test, it is not the instances of *extreme* diminishment of moral blameworthiness that are the most difficult for courts to decide. The most difficult cases involve young people whose moral blameworthiness is *closest* to their chronological age. These are the circumstances that most acutely challenge courts and court participants to respect the presumption of diminished moral blameworthiness. These are the cases that truly test the best practice standards for courts and court participants. Best practices will be highlighted factor by factor throughout Chapter Three and as a whole in Chapter Five.

1.6 Research Questions

In preparation for this thesis, my primary curiosity has been to understand how counsel—both Crown and defence—should approach the adult sentence application process to best serve the youth court judges making these very difficult decisions in a way that shows respect to the section 7 rights of young people, namely the presumption of diminished moral blameworthiness. In service of this primary curiosity, I have been guided by the following research questions:

- What approaches to adult sentence applications best respect the SCC’s ruling in *DB*?
- Without recent guidance from the SCC, what can be gleaned from appellate and trial level decisions to aid in the application of section 72 of the *YCJA*?
- What role do judges, Crown attorneys and defence attorneys play in ensuring the section 7 rights of young people are respected, particularly the presumption of diminished moral blameworthiness?

I have also considered the following procedural questions that speak to best practices for adult sentence applications:

- What sources of evidence are courts considering in their analysis of section 72?
- What factors have courts considered on each prong of the adult sentence application test?
- When are Crown's exercising their discretion to pursue adult sentence applications?

Furthermore, I wanted to examine the demographics and individual circumstances of the young people who face adult sentence applications by conducting a survey of trial level decisions:

- Are there certain identifiable groups of youth more frequently facing adult sentence applications by age, by race, by gender, or by status as a youth in state care?
- How are these demographics being considered by the courts?
- What cognitive and mental health challenges do these young people face, and how have such cognitive and mental health challenges been considered by the courts?
- Are Intensive Rehabilitative Custody and Supervision (IRCS) orders being explored and granted in appropriate cases?
- Are there regional differences in the frequency of adult sentence applications per capita?
- Are there regional differences in the exercise in Crown discretion to pursue adult sentence applications?

In light of the announcement from the SCC on November 23, 2023, a final question has arisen at the 11th hour of this thesis' exploration of the presumption of diminished moral blameworthiness:

- In anticipation of *IM* and *SB*, how will the SCC address the long-standing problems with the application of the adult sentence test as they re-visit the age-based presumption of diminished moral blameworthiness of young people?

1.7 Methodology

This thesis is based on a compilation of relevant academic literature as well as a survey of all reported adult sentence application decisions, from all provinces and territories and from all levels of court, spanning the 20 years since the inception of the *YCJA*. In my survey of the case law, I have identified, catalogued and reviewed every reported decision in the 20 year period using a trial level evaluation form I created to capture data from each case.³⁶

To give context to the survey of the case law, I have gathered academic literature including journal articles, monographs, governmental reports and statistics, and other secondary source materials related to adult sentence applications or related issues.

To document my findings, I have prepared two tables of trial level reported decisions. The first table tracks, region by region, the reported adult sentence applications from 2003 to 2023.³⁷ The second table takes a more in-depth view of the factors considered in each reported decision from 2018 to 2023.³⁸ These tables will be discussed at greater length at the conclusion of this chapter and in Chapter 4.

1.8 In the Interests of Full Disclosure

As a practicing youth criminal defence attorney for the past 15 years, I have had the benefit of participating in adult sentence applications on numerous occasions. The knowledge and experience I have gained by defending youth against these life-changing applications has been

³⁶ Note: The Trial Level Case Evaluation Form can be found at appendix page 14. Note: However, as I surveyed the earlier case law, it became clear that cases from 2003-2008 (prior to the decision in *DB*) and from 2008-2012 (between *DB* and the 2012 amendments) were of little assistance in the examination of the research questions above. Given the significant change to section 72 after the 2012 amendments, the trial level evaluation form was not overly conducive to analyzing cases before that time.

³⁷ Note: Table One can be found at page 132 in the Appendix of this thesis [*Table One*].

³⁸ Note: Tale Two can be found at page 136 in the Appendix of this Thesis [*Table Two*].

profoundly important to my growth as a lawyer. However, while my experience in Manitoba's youth courts has been invaluable, I am aware of the potential bias I bring to scholarly work.

In the interests of full disclosure, I have defended young people in reported and unreported adult sentence application hearings in the Manitoba Provincial Court, the Manitoba Court of King's Bench and in the Manitoba Court of Appeal. For reported decisions, I was counsel for the young person in *R v RM*, 2014 MBPC 18, as well as appellant counsel in *R v Meeches*, 2021 MBCA 26 and *R v McKenzie*, 2021 MBCA 8.³⁹ Following the hearing in the Manitoba Court of Appeal in *McKenzie*, I assisted with McKenzie's leave to appeal to the SCC, which was denied. Furthermore, I have consulted defence counsel on the majority of adult sentence applications in Manitoba since 2014. I have met nearly all of the youth involved in the Manitoba cases since 2010, either through my role at Legal Aid Manitoba or by meeting the young people in passing at the Manitoba Youth Centre where I attend on a nearly daily basis. Furthermore, I have known and/or previously represented several of the teenaged victims involved in reported and unreported Manitoba decisions. In my research and writing, I have maintained my duty of solicitor-client privilege and I have been careful to only include case details that are publicly accessible in reported decisions. Furthermore, while I am a 15 year employee of Legal Aid Manitoba, the views expressed in this thesis are entirely my own.

³⁹ *R v RM*, 2014 MBPC 18 [RM]; *R v Meeches*, 2021 MBCA 26 [Meeches]; *R v McKenzie*, 2021 MBCA 8 [McKenzie] Note: I was not counsel for the initial provincial court adult sentence applications for *Meeches* or *McKenzie*, which were both unreported. Our application for leave to the SCC was denied in *McKenzie*. The preparation of the application for leave to appeal to the SCC was the major impetus for my application to the Faculty of Graduate Studies to further study adult sentence applications and the presumption of diminished moral blameworthiness.

1.9 Limitations

It is difficult to conduct fulsome research on youth related matters as it is essentially impossible to access unreported or oral decisions as a result of policies relating to the *YCJA*'s privacy provisions contained in section 110 of the *YCJA*.⁴⁰ In Manitoba, for example, unless a lawyer or legal researcher is defence counsel of record (or from the same law firm as the counsel of record) on the particular case they wish to access, there is a complicated court process to access transcripts of or listen to sentencing decisions. While it is technically possible, a lawyer or a researcher must first know the name of the case and when it was heard to make the appropriate application to request transcripts for unreported decisions. The natural outcome of this policy is that unless the individual conducting legal research already knows that a particular case is relevant, there is no way to identify relevant cases, other than by word of mouth. A further criticism of this system is that, given that Manitoba Prosecutions operates as one "law firm", Crown attorneys are able to order favourable transcripts and amass this research in a central location accessible to all Crowns in the province, which creates a systemic imbalance in favour of the prosecution in the relative ability to conduct and access legal research for academic or court purposes. This imbalance raises concerns regarding a young person's right to make full answer and defence, which are concerns that are beyond the scope of this thesis. Ultimately, as a result of these *YCJA*-specific barriers to legal research, I have limited the case law considered to reported decisions only.

Given that the findings in this thesis are based only on reported cases, it is possible that the frequency with which the Crown pursues adult sentences may be significantly underestimated in my findings, as this research is limited to cases that have both a contested adult sentence application hearing *and* that hearing results in a reported decision. There may be numerous cases

⁴⁰ *YCJA*, *supra* note 2 at s 110.

where the court does not release a decision *or* there may be cases where the Crown gives notice that they will seek an adult sentence and negotiate an outcome with counsel without contested litigation.

There may also be instances where the threat of an adult sentence is made by the Crown as a blunt negotiating tool used to secure joint recommendations or plea bargains such as foregoing triable issues, or agreeing to youth maximum sentences when a young person is not willing to risk the potential of an adult sentence.⁴¹ At this juncture, such scenarios are impossible to track, but warrant further investigation beyond the scope of this thesis.

1.10 Thesis Outline

Chapter One of this thesis has outlined its purpose and the research questions this thesis intends to explore, the theoretical framework(s) within which I have considered adult sentence applications, as well as the methods by which that exploration has been conducted and the limitations encountered.

Chapter Two will outline the legislative history of youth criminal law and its legislation in Canada from the early 20th century to today, with a special focus on the evolution of Canada's approach to the rare times when courts have been called upon to determine if a young person ought to be sentenced as an adult. This historical overview is important as it highlights how previous iterations of the adult sentence test operated in a way that allowed the seriousness of the offence

⁴¹ Note: While plea bargaining has many salutary uses, the integrity of the plea bargaining process relies on the Crown ethically assessing the strengths and weaknesses of their case and making offers that align with their ethical obligations, namely a realistic assessment of their likelihood of securing a conviction or, in the context of adult sentence applications, their likelihood of success on the adult sentence and/or the existence of *prima facie* evidence to support their application. See generally: Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining." (2018) 63:1 McGill Law Journal 45 [*Paciocco P*].

to overshadow all other factors and did not respect or acknowledge the presumption of diminished moral blameworthiness of young people by virtue of their age. In Chapter Two, I have situated the SCC's decision in *DB* within the legislative history. Chapter Two also provides an introduction to the SCC's upcoming consideration of *IM* and *SB*.

Chapter Three considers and catalogues the trial and appellate level case law relating to adult sentence applications to address the research questions from Chapter One. Chapter Three offers an extensive, but non-exhaustive, compilation of factors that have been considered by courts on the first and second prong of the adult sentence test. The factors outlined are compiled from a review of 20 years of trial level decisions under the *YCJA*, with preference given to cases decided after the 2012 amendments. The focus of this thesis is primarily, but not exclusively, on the first prong of the two-pronged test found in section 72. However, despite my focus on the presumption of diminished moral blameworthiness, I felt it was important to include commentary and research on the second prong of the adult sentence application test to provide insight into the application process as a whole, which is included in the latter half of Chapter Three. Ultimately, my aim in providing this information is to identify the ways in which counsel, both Crown and defence, can advance evidence and arguments that best assist the sentencing judge in giving full constitutional effect to the presumption of diminished moral blameworthiness. By addressing each distinct factor individually within Chapter Three, my aim is to show how courts may properly consider the constituent sources of evidence that make up the adult sentence inquiry as a whole. Given the breadth of the factors considered on each prong and given the limits on the length of this thesis, some factors are dealt with very briefly. It is important to note that each factor set forth in Chapter Three is deserving of further consideration and research, far beyond the scope of this thesis.

Chapter Four is a survey of trial level case law, which provides two tables derived from my analysis of the reported adult sentence application decisions from trial level courts across Canada. I have created two tables to convey this information: the first table provides a regional breakdown of all reported adult sentence application decisions from 2003 to 2023; the second table focuses on reported adult sentence application decisions from 2018 to 2023, tracking the age, race, gender, cognitive and mental health challenges of each young person, whether or not a young person is in the care of social services, whether the courts considered an IRCS order, and whether an adult sentence was ultimately granted. The analysis of each table gives insight into the per capita frequency with which these applications are sought by region. The analysis of table two will also include measurements against the total number of death-related convictions of youth by province or territory, to better contextualize the per capita data for the frequency of adult sentence applications. The information contained within these tables illuminates trends in adult sentence applications as well as areas of concerns of disproportionate negative implications for youth with disabilities, mental health issues, youth in care, and racialized youth. By conducting an empirical legal analysis of this data, my aim is to identify and examine trends in adult sentencing that may assist adjudicators, counsel, and policy makers to make more informed decisions relating to individual adult sentence applications and to the adult sentence regime/provisions in general.

Chapter Five, this thesis's concluding chapter, will revisit the research questions posed in Chapter one and draw conclusions where possible. While chapters three and four highlight the ways in which courts have evaluated the distinct factors that have been considered on the first and second prong of the adult sentence test, Chapter Five closes this thesis by reflecting on 4 judgments as a whole that embody the best practice standards for giving constitutional effect to the presumption of diminished moral blameworthiness. Chapter five concludes with a summary of

outstanding issues that would benefit from further comment and clarification from the SCC in their upcoming hearing of *IM and SB*.

CHAPTER TWO: A BRIEF HISTORY OF YOUTH CRIMINAL JUSTICE LEGISLATION AND ADULT SENTENCE APPLICATIONS IN CANADA.

2.1 Introduction

Canada has long recognized that children and youth occupy a unique station in society, and should they become involved in criminal behaviour an approach that acknowledges their lesser maturity is warranted. However, since the inception of Canada's first youth criminal justice legislation, the *Juvenile Delinquents Act (JDA)*⁴² in 1908, Canada has maintained a mechanism by which certain young persons may be sentenced as adults.⁴³

This chapter will focus on both the evolution of youth criminal legislation in Canada from its highly discretionary origins to its current due process model, as well as the mechanisms with which each iteration has exercised its jurisdiction to sentence young people as adults. This historical overview shows that prior iterations of the adult sentence test failed to fully acknowledge the principle of diminished moral blameworthiness of young people, particularly for young people charged with serious violent offences—a development that took 100 years to become law when the SCC solidly endorsed this principle in *DB* and was later codified in the 2012 amendments. This Chapter's discussion of parliament's intentions in enacting the YCJA as well as the 2012 amendments sheds light on how the adult sentence provisions should be interpreted and applied.

⁴² Russell C Smandych & Raymond R Corrado, "Too Bad, So Sad': Observations on Key Outstanding Policy Challenges of Twenty Years of Youth Justice Reform in Canada, 1995-2015" (2018) 41:3 Man LJ 191 at page 195. [Smandych & Corrado] See also: Nicholas Bala, "Changing Professional Culture and Reducing Use of Courts and Custody for Youth: The Youth Criminal Justice Act and Bill C-10" (2015) 78:1 Sask L Rev 127 at pages 129-130. [Bala 2015]

⁴³ Lee Tustin & Robert E Lutes, *A Guide to the Youth Criminal Justice Act*, 2020-2021 ed (Toronto: LexisNexis Canada Inc, 2020) at 1. [Tustin & Lutes]

2.2 A Brief History of Youth Criminal Justice and Adult Sentence Applications in Canada

The *JDA* operated through ‘delinquency proceedings’ which were notably informal and highly discretionary.⁴⁴ While many cases before the juvenile court were addressed through community-based interventions, such outcomes were entirely at the discretion of the juvenile court judge. Nearly any matter before the court could lead to, what was referred to then as, an ‘indeterminate sentence’ where a young person could be held for an indeterminate amount of time, up to the age of 21.⁴⁵ This gave juvenile court judges the ability to sentence children as young as 7 years old to indeterminate imprisonment until the age of 21 years.⁴⁶ Furthermore, under the *JDA* a young person over the age of 14 who was charged with an indictable offence could be transferred to face trial and/or sentencing in adult court. This occurred if the juvenile court judge was of the opinion that “the good of the child” and the “interests of the community” demanded it.⁴⁷ If convicted, the young person faced severe sanctions, potentially including capital punishment.⁴⁸

History has shown that under the *JDA* sentences were often both arbitrary and discriminatory, with courts delivering disproportionately punitive sentences to Indigenous,

⁴⁴ *Bala 2015, supra* note 42 at 129-130.

⁴⁵ *Smandych & Corrado, supra* note 42 at 195-196; *Ibid* at 129.

⁴⁶ *Bala 2015, ibid* at 129-130.

⁴⁷ *Juvenile Delinquents Act*, SC 1908, c40 s 31 at s 91 [*JDA*]; Rick Ruddell & Justin Gileno, “Lifers Admitted as Juveniles in the Canadian Prison Population”(2013) 13:3 *Youth Justice* 234 at page 236-237 [*Ruddell & Gileno*]; Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin Law Inc., 2012) at page 619. [*Bala & Anand*]

⁴⁸ *R v Truscott*, [1960] OJ No 402 (QL). Note: Steven Truscott was convicted of killing of a 12 year old child. Truscott himself was only 14 years old at the time of the offence. Truscott was transferred to adult court, convicted and sentenced to death. Truscott’s death sentence was ultimately commuted, and in 2008 the Ontario Court of Appeal ruled that his conviction was a miscarriage of justice; See: *Ruddell & Gileno, ibid* at 246.

immigrant and indigent youth. Like today, marginalized youth were over-represented in the juvenile courts and juvenile custody facilities under the *JDA*.⁴⁹

The *Young Offenders Act* (YOA)⁵⁰ came into effect in 1984, just two years after the *Charter*.⁵¹ The YOA brought the informal and discretionary nature of youth criminal law under the *JDA* into line with *Charter* values. When the YOA was enacted it was supported by all federal parties and championed as a bi-partisan piece of legislation that would usher in a “new era for juvenile justice in Canada.”⁵²

However, the YOA created new problems. For instance, while being touted as a system that would hold youth more accountable for serious crimes, the initial iteration of the YOA allowed for only three year maximum sentences.⁵³ This low maximum available sentence led to an increase in the number of transfers to adult court in light of what some considered inadequate consequences available under the YOA. Later amendments to the YOA raised the maximum sentences available for the most serious offences, but also introduced “presumptive offences” in 1995 which would consume arguments by courts and legal scholars until the regime was ultimately declared unconstitutional by the SCC in 2008.⁵⁴

Under the YOA’s presumptive offence regime a young person over the age of 16 who was charged with murder, attempted murder, manslaughter, or aggravated sexual assault was

⁴⁹ *Bala 2015*, supra note 42 at 130; *Ruddell and Gileno*, *ibid* at 237; *Smandych & Corrado*, supra note 42 at 195-96.

⁵⁰ *Young Offenders Act*, RSC 1985, c Y-1 [YOA].

⁵¹ *Charter*, supra note 1.

⁵² *Bala 2015*, supra note 42 at 132. Note: The *JDA* was criticized for its informality, lack of legal rights for young people, its arbitrary and discriminatory application of the law that varied from region to region. Many of the controversial aspects of the *JDA* were either abolished or brought into line with contemporary criminal procedure.

⁵³ *Ruddell & Gileno*, supra note 47 at 237.

⁵⁴ *DB*, supra note 8.

presumptively transferred to stand trial and/or be sentenced in adult court, *unless* that young person could satisfy that court that an adult sentence was not appropriate in their case.⁵⁵ Youths aged 14 and 15 could still be transferred to adult court under the YOA, however, the Crown bore the onus on such hearings.⁵⁶ Eight years after the 1995 amendments to the YOA, the presumptive offence regime would be expanded upon with the passing of the YCJA.

While the YOA was meant to usher in a new era of youth criminal law with added procedural protections for young people and an increased role for defence counsel, it ultimately led to a ballooning of the use of custody for both violent and non-violent offences.⁵⁷ Critics, professionals and academics raised concerns that the youth criminal system under the YOA was costly and ineffective.

Prior to the passing of the YCJA, Canada had one of the highest rates of the use of court-based sanctions and incarceration of young people in the world.⁵⁸ Through the YCJA, Parliament took aim at the frequent use of incarceration of young people, particularly for non-violent crimes. The YCJA created strict rules for the use of custody.⁵⁹

The YCJA's governing principles sought to encourage restraint and the imposition of the least restrictive measures possible to still achieve a meaningful consequence for a young person,

⁵⁵ YOA, *supra* note 50 at s 16; Nicholas Bala, "Responding to Young Offenders: Diversion, Detention & Sentencing Under Canada's YCJA" (October 10, 2007) Queen's Univ. Legal Studies Research Paper No. 07-10, Queen's University Legal Research Paper No. 2015-027 at 71 [Bala 2007].

⁵⁶ YOA, *ibid* at s 16; Bala and Anand, *ibid* at 626.

⁵⁷ Smadych & Corrado, *supra* note 42 at 199-200. Note: While youth crime rates did not substantially increase after the passing of the YOA (and had in fact been gradually decreasing since around 1992) the youth court system's response under the YOA was to impose more punitive and intrusive measures and to incarcerate young people at alarmingly high rates—including the use of the new and controversial presumptive offence regime that came into effect in 1995.

⁵⁸ Bala 2015, *supra* note 42 at 127.

⁵⁹ YCJA, *supra* note 2 at s 38.

while optimizing their prospects of rehabilitation and reintegration into society.⁶⁰ For professionals working within the youth criminal court system, including police, probation officers, Crown attorneys, defence counsel, and youth court judges, the *YCJA* spurred changes in policies, approaches and attitudes in youth criminal law.⁶¹

Scholars at the time were optimistic about the new *YCJA*. In their 2003 publication, “Tough on Crime: Rethinking Approaches to Youth Justice”, Ross Green and Kierney Healey, youth lawyers from Legal Aid Saskatchewan, discussed with hopeful enthusiasm the various changes expected with the implementation of the *YCJA*.⁶²

In his 2007 article, “Responding to Young Offenders: Diversion, Detention & Sentencing under Canada’s *YCJA*”, Nicholas Bala commented that the new *Act* reflected Parliament’s recognition that, under the previous legislation, youth courts were too quickly resorting to punitive, expensive, and often ineffective sanctions against young people.⁶³ The *YCJA*’s clearly articulated preamble, principles, and provisions made it clear that the major purpose for enacting the *YCJA* was to “reduce Canada’s historic overreliance on the use of custody and courts for dealing with young offenders, especially those committing nonviolent offences.”⁶⁴

However, concerns remained regarding the continued over-representation of Indigenous youth in custody and many hoped that the new *YCJA* might make strides in that area. Green and Healey argued that the youth criminal system had become society’s “default system” for youths

⁶⁰ *Ibid* at preamble, s 3 and s 38.

⁶¹ *Bala 2015, supra* note 42; See also: Rebecca Jaremko Bromwich “Compassion, Human Rights and Adult Sentencing under the *YCJA*: Guidance for the Adult Sentencing Provisions of Canada’s New Youth Justice Law,” (2002) 14 Windsor Rev Legal & Soc Issues 71 [Bromwich 2002].

⁶² Ross Gordon Green & Kearney F Healey, *Tough on Kids: Rethinking Approaches to Youth Justice* (Saskatoon: Purich Publishing Limited, 2003) [*Green & Healey*].

⁶³ *Bala 2007, supra* note 55 at 5.

⁶⁴ *Ibid*.

who had been let down by other social systems through seriously inadequate responses to mental health, housing, education and child poverty.⁶⁵ In 2000, Indigenous youth made up 5% of the total Canadian population, but represented 26% of young people in pre-trial custody and 24% of young people serving custodial sentences.⁶⁶ The crisis of over-representation of Indigenous youth was most concerning in Manitoba, where Indigenous youth made up 16% of the province's population, but represented 70% of youth in pre-trial custody, and 82% of youths serving custodial sentences.⁶⁷ Despite thoughtful input from lawmakers, scholars and professionals as the *YCJA* was coming into force, media and public opinion were deeply divided on the issue of youth criminal law and Parliament's response was quickly politicized.⁶⁸ The drafting and legislative process leading up to the passing of the *YCJA* was politically divisive and partisan. What resulted was a piece of legislation containing internal inconsistencies, competing objectives, and political compromise.⁶⁹

Arguably, the most controversial aspect of the new *YCJA* was the expansion of the presumptive offence regime. Section 72 of the *YCJA* maintained the reverse onus provisions and expanded the presumptive offence regime to apply to youths 14 years and older.⁷⁰ It also introduced what is essentially a third strike rule wherein if a youth is convicted of a third "serious violent offence" the presumptive offence regime would apply, and the onus would fall on the youth to satisfy the court why they ought not be sentenced in adult court.⁷¹

⁶⁵ *Green & Healey, supra* note 62 at 99.

⁶⁶ *Smandych & Corrado, supra* note 42 at 206.

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at 207.

⁶⁹ *Ibid* at 207; *Bala 2007, supra* note 55 at 87.

⁷⁰ *YCJA, supra* note 2 at s 72; *Bala & Anand, supra* note 32 at 627. Note: Although the initial iteration of the *YCJA* allowed provinces to set the minimum age at 16, all provinces except Quebec and Newfoundland set the minimum age for adult sentence applications at 14.

⁷¹ *Bala & Anand, supra* note 47 at 624. Note: Procedurally, the *YCJA* moved the timing of the transfer hearing from pre-trial to post-plea/post-conviction, which allowed the presiding judge to know the facts of the case by either having presided over the trial or by agreed facts on plea.

From the outset, critics of the presumptive offence regime, scholars and defence counsel alike, argued that the reverse onus provisions were unconstitutional.⁷² The presumptive offence provisions of the *YCJA* were immediately challenged in *Quebec (Ministre de la justice) c Canada (Ministre de la justice)*, (2003) 10 CR (6th) 281 (Que CA).⁷³

Ultimately, the presumptive offence regime provisions—the very provisions that “tough-on-crime” proponents touted in the early days of the *YCJA*—were declared unconstitutional by the SCC.⁷⁴

In the lower court decision in *DB*, the sentencing judge accepted *DB*’s guilty plea to manslaughter and found that *DB* should be sentenced as a youth. The Ontario Court of Appeal agreed with the lower court’s ruling and the prosecution was granted leave to appeal the decision to the SCC. The SCC held that the presumptive offence provisions infringed upon *DB*’s rights under section 7 of the *Charter*. The SCC proclaimed that young people are entitled to the presumption of diminished moral blameworthiness as a principle of fundamental justice due to their age, heightened vulnerability, reduced maturity, and reduced capacity for moral judgement, striking down the presumptive offence provisions and the reverse onus that regime created.⁷⁵

Bill C-10 and the 2012 amendments codified the presumption of diminished moral blameworthiness.⁷⁶ The 2012 amendments also separated the once blended analysis for adult

⁷² *Bromwich 2002*, *supra* note 61 at 73 and 82.

⁷³ *Quebec (Ministre de la justice) c Canada (Ministre de la justice)*, (2003) 10 CR (6th) 281 (Que CA) Note: While the Quebec Courts found the presumptive offence provisions to be unconstitutional, courts in British Colombia and Nova Scotia came to a different conclusion when they considered challenges to the constitutionality of the presumptive offence regime. *Contra: R v KDT*, 2006 BCCA ; *R v GDS*, [2007] NSJ No 232 (Youth Court).

⁷⁴ *DB*, *supra* note 4.

⁷⁵ *Ibid.*

⁷⁶ *2012 Amendments*, *supra* note 6.

sentence applications into two distinct steps that the Crown must overcome before an adult sentence can be ordered. This articulation of section 72 remains in place today.

2.3 The YCJA's Legislative Framework

While the provisions for adult sentence applications are found in section 72 of the *YCJA*, they are meant to operate in conjunction with the entire *Act*, with a particular connection to section 3, section 38 and the preamble of the *YCJA*.

The preamble of the *YCJA* is critical to the spirit of the *Act* and recognizes that youths have rights protected by the *Canadian Charter of Rights and Freedoms*,⁷⁷ and *The United Nation's Convention on the Rights of the Child*.⁷⁸ While the preamble is not part of the body of the *YCJA*, and is therefore not binding, it is frequently referenced in youth court proceedings and is an important tool which courts have used to interpret provisions within the body of the *YCJA*.⁷⁹

The *YCJA*'s declaration of principles is found in section 3, which addresses the basic principles and intentions of the *Act*, the principles of accountability, rehabilitation and reintegration, and the special rights and considerations that are to be taken into account within criminal proceedings against young persons.⁸⁰

Section 38 of the *YCJA* addresses the purposes and principle of sentencing under the *Act*. Section 38(2) refers to the principles of the *Act* outlined in section 3, signaling that they are meant to be read and applied together. Section 38(2) outlines numerous, and at times competing, sentencing principles. Section 38(2)(d) of the *YCJA* mandates courts to pay particular attention to the circumstances of Indigenous youth when engaging the sentencing principles of the *Act*.⁸¹

⁷⁷ *Charter*, *supra* note 1.

⁷⁸ *UNCRC*, *supra* note 3.

⁷⁹ *YCJA*, *supra* note 2 at preamble.

⁸⁰ *Ibid* at s 3.

⁸¹ *Ibid* at s 38(2)(d).

Section 38(3) addresses factors that a youth court judge shall take into consideration in the sentencing of young persons.⁸²

For ease of reference, the entirety of the *YCJA*'s preamble, section 3, section 38, section 72 and other relevant sections that appear throughout this thesis can be found in full in the Appendix to this thesis.

2.4 The SCC's Upcoming Consideration of *R v IM*, 2023 ONCA 378 and *R v SB*, 2023 ONCA 369.

On November 23, 2023 the SCC granted leave to appeal for two Ontario youth, IM and SB. In *IM*, the young person was convicted of first degree murder by a jury. The deceased was 17 years old and died as a result of 12 stab wounds and 10 blunt force injuries. IM was part of a group of four assailants. The group approached the deceased with the intention of robbing him, a fact which IM admitted, however, IM maintained that he was not party to the manslaughter. IM was 17 at the time of the offence but was not arrested until several years after the killing.⁸³

The sentencing judge in *IM* purported to use the two-pronged test, despite the offence taking place before the 2012 amendments. However, despite stating that the two-pronged test was the test the court would engage, the sentencing judge then directly referenced the factors enumerated in the pre-amendment iteration of section 72 and seemingly used the blended analysis as the operational framework in reaching their ultimate decision to sentence IM as an adult.⁸⁴ IM was sentenced to life in prison with no eligibility for parole for 10 years.⁸⁵

⁸² *Ibid* at s 38(3).

⁸³ *IM ONCA*, *supra* note 10 at paras 3-7.

⁸⁴ *R v IM*, 2020 ONSC 4660 at para 27 [*IM ONSC*].

⁸⁵ *Ibid* at para 70.

The Ontario Court of Appeal upheld the adult sentence concluding that the sentencing judge's decision did not disregard the presumption of diminished moral blameworthiness,⁸⁶ a decision that will now be considered by the SCC.

In *SB*, the Ontario Court of Appeal considered the appeal of SB who was convicted of the shooting death of a 16 year old male, who was shot in the head twice at close range. SB was 16 years old at the time of the offence.⁸⁷ SB was convicted alongside two youth co-accused, MW and TF. All three youth were sentenced as adults, however, MW and TF were successful in overturning their adult sentences on appeal.⁸⁸

In *SB*, the Ontario Court of Appeal agreed that the sentencing judge failed to consider and apply the presumption of diminished moral blameworthiness.⁸⁹ However, upon conducting their own analysis using the pre-amendment section 72 blended analysis, the Ontario Court of Appeal found that the presumption had been rebutted and did not overturn SB's adult sentence.⁹⁰ This decision will be reviewed by the SCC in the near future, alongside the *IM* appeal.

⁸⁶ *IM ONCA*, *supra* note 10 at paras 74-75.

⁸⁷ *SB*, *supra* note 11 at para 1.

⁸⁸ *MW ONCA*, *supra* note 22.

⁸⁹ *SB*, *supra* note 35 at para 38.

⁹⁰ *Ibid* at para 60.

CHAPTER THREE: LITERATURE AND CASE REVIEW

3.1 Introduction

This chapter begins with a review of the limited academic commentary on adult sentence applications in Canada, as well as a review of the relevant legal principles articulated by trial and appellate courts. From these sources, this chapter delivers a comprehensive list of factors that have been considered on both the first and second prong of the adult sentence test.

3.2 Literature Review

In conducting a review of articles specifically related to adult sentence applications under the *YCJA*, only four published articles were directly on point.⁹¹ As a result, academic literature that addresses adjacent topics is cited throughout this chapter to contextualize and conceptualize the elements and philosophies of the adult sentence application process in Canada—a process which has received very little scholarly attention in the last 20 years.

The adult sentence application process was the sole focus in Nicholas Bala's 2009 article, "*R. v. B.(D.): The Constitutionalization of Adolescence*".⁹² In that article, Bala provides commentary on *DB*, the landmark decision wherein the SCC recognized the principle of diminished moral blameworthiness of young people as a constitutionally protected principle of fundamental justice. Bala discussed the historical context of the SCC's decision and the significant

⁹¹Note: While there has been limited academic discussion directly addressing the issue of adult sentence applications, there are numerous instances where commentary on adult sentence application was made within other works related to youth criminal law. However, these comments are of a general nature and do not go far beyond a summary of the SCC decision in *DB*, and/or the basic legislative framework of section 72 of the *YCJA*.

⁹² Nicholas Bala, "*R. v. B. (D.): The Constitutionalization of Adolescence*" (2009) 47 SCLR 211 [*Bala 2009*].

implications it might have on youth justice in Canada. Bala foresaw that *DB* would be the most important and influential decision in the area of youth criminal law in Canadian history.⁹³

Cheryl Milne's 2009 article "The Differential Treatment of Adolescents as a Principle of Fundamental Justice: An Analysis of *R. v. B. (D.)* and *C. (A.) v. Manitoba*"⁹⁴ considered the SCC's ruling in *DB* to examine the meaning of diminished moral blameworthiness in relation to adult sentence applications. Milne's article analyzed how the SCC's decision in *DB* established a view of adolescence "as a trajectory toward adulthood, but not quite there yet, and limits autonomous rights and adult responsibility accordingly."⁹⁵

Several years after the release of *DB* and after the 2012 amendments, Justice Jamie Campbell of the Nova Scotia Supreme Court penned his 2015 article, "In Search of the Mature Sixteen Year Old in Youth Justice Court".⁹⁶ In this work, Justice Campbell discussed the 2012 amendments to the *YCJA* pertaining to adult sentence applications, focusing on the first prong of the new adult sentence application test. Justice Campbell stated that the question of moral blameworthiness is not informed by the facts of a particular crime, but through evidence relating to a young person's maturity, limitations, background and moral sophistication.⁹⁷ Justice Campbell highlighted that under the *YCJA*, young people are presumed to have diminished capacity for *every crime*, even the most serious. The severity or heinousness of a crime does not provide insight into the ultimate legal question posed in the first prong of the adult sentence test.⁹⁸ Justice Campbell

⁹³ *Ibid* at 213.

⁹⁴ *Milne, supra* note 26.

⁹⁵ *Ibid* at 236.

⁹⁶ *Campbell, supra* note 32. Note: Justice Campbell, prior to his appointment to the Nova Scotia Supreme Court in 2014, regularly presided over youth matters as a judge of the Nova Scotia Provincial Court.

⁹⁷ *Ibid* at 4.

⁹⁸ *Ibid* at 5.

warned of the ways in which considerations of the facts of the offence can taint and overshadow the true purpose of the first prong.⁹⁹

In her 2023 article, “Sentencing Kids to Life: New approaches for challenging youth life sentences under Section 12 of the Charter”,¹⁰⁰ author Leila Nasr questions the constitutionality of the adult sentence application provision that require courts to adhere to mandatory minimum life sentences. Nasr provides a framework to challenge such sentences using section 12 of the *Charter*.¹⁰¹ Nasr argues that sentencing a young person to life will always amount to cruel and unusual punishment, given what we know about adolescent neurological development.¹⁰² While I tend to share Nasr’s dim view of the use of adult sentences as criminal sanctions for young people, this thesis does not delve into the overall abolishment of adult sentences, although this author is of the opinion that such arguments carry significant persuasive weight. However, an analysis of the merits of the outright abolishment of adult sentence provisions is beyond the scope of this thesis.

3.3 Case Law Review: Principles and Procedure for Adult Sentence Applications

As a result of the existence of so few scholarly works directly on point, the bulk of the evaluation of the research questions posed in Chapter One must necessarily shift to what can be gleaned from case law across Canada, supplemented by literature that discusses adjacent topics where available.

In the years between *DB* and the 2012 amendments, section 72 of the *YCJA* contained what has been referred to in the case law as the ‘blended’ analysis wherein the presumption of diminished moral blameworthiness was weighed against the accountability analysis which

⁹⁹ *Ibid* at 6.

¹⁰⁰ Leila Nasr, “Sentencing Kids to Life: New approaches for challenging youth life sentences under Section 12 of the Charter” (2023) 48:2 Queen’s LJ 1 [*Nasr*].

¹⁰¹ *Ibid* at 10.

¹⁰² *Ibid* at 14-16.

included, among other factors, the seriousness of the offence, the young person's prospects of rehabilitation and whether or not the sentence available under the *YCJA* would be of sufficient length. Under the blended approach, the seriousness of an offence would often trump all considerations of a young person's capacity, background, personal circumstances or even disability.¹⁰³ The blended approach was in reality, what I refer to as, a '*de facto* presumptive offence regime' as it essentially allowed the Crown to discharge their singular onus by doubling down on the seriousness of the offence with little regard for the presumption of diminished moral blameworthiness. This approach all but reversed the onus on to the defence to justify a youth sentence. Even today under the two-pronged test there is a risk of an unconscious or unspoken reversal of onus that can occur when the two-pronged approach is folded into one single analysis by weighing the two prongs one against the other to reach a final, blended, conclusion. Courts must be mindful of the dangers associated with collapsing the two-prongs. Parliament, scholars and the courts have made it abundantly clear that the heinous or destructive nature of an offence alone is not enough to warrant an adult sentence under the two-pronged test.¹⁰⁴ Despite this, many decisions show that courts are still using the blended approach, even when they insist they are not.

Giving full effect to the two-pronged approach is crucial to upholding the constitutional protection set forth in *DB*. Ultimately, the change from the blended analysis to the two-pronged

¹⁰³ Note: The original iteration of section 72 did not have two prongs and instead allowed for a blended analysis that gave courts license to balance all factors, including the gravity of the offence.

¹⁰⁴ Note: While the bulk of the discussion in this thesis will focus on how the first prong may be improperly negated by blending its proper factors against the gravity of the offence, the two-pronged test also protects against first prong considerations overpowering the second prong. For example, a young person may be considered to have adult-like moral blameworthiness, but the inquiry must not stop there. The adult-like moral blameworthiness must not outweigh a determination on whether or not the sentence available under the *YCJA* is sufficient to hold the young person accountable. See: *R v Okemow*, 2017 MBCA 59 at 53 [*Okemow*].

test reflects the presumption of diminished moral blameworthiness and is more in line with the values expressed by Parliament within the *YCJA*'s preamble, section 3 and section 38.

Section 72 requires the court to independently consider its two distinct legal questions.¹⁰⁵ While certain factors related to the circumstance of the offender *and* the circumstances of the offence may inform the distinct questions raised by each prong, the underlying purpose of each prong must not be conflated or pitted one against the other.¹⁰⁶ The danger posed by the use of a blended analysis was best articulated in the Ontario Court of Appeal decision *R v MW*, 2017 ONCA at paragraphs 95 and 106:

[95] The two prongs address related but distinct questions and, although similar factors are applicable to both, there is not a complete overlap. It is not necessarily the case that every factor relevant to an assessment of whether a youth sentence would hold a young person accountable is relevant to the question of whether the Crown has rebutted the presumption. [...]

[106] However, as closely connected as the two prongs -- the presumption and the issue of accountability -- are, there is a risk associated with considering the Crown's application to have the young person sentenced as an adult in a blended analysis in which the presumption and accountability are dealt with together. The risk is that a factor relevant only to one of the two prongs may be relied upon to support a finding in relation to the other.¹⁰⁷

3.3.1 Crown Onus

In their pursuit of an adult sentence, the Crown's onus is neither a balance of probabilities nor beyond a reasonable doubt. Instead, to be successful in their application the Crown must "satisfy the court that, at the time of the offence, the evidence supports a finding that the young person demonstrated the level of maturity, moral sophistication and capacity for independent judgment of an adult such that an adult sentence and adult principles of sentencing should apply

¹⁰⁵ Note: Courts should not only *consider* the two prongs and their distinct questions but should fully engage with their concepts in their reasons. See: *R v McClements*, 2017 MBCA 104 at para 58 [*McClements*].

¹⁰⁶ *Ibid* at para 39; *MW ONCA*, *supra* note 35 at para 94; *Okemow*, *supra* note 104 at para 53.

¹⁰⁷ *MW ONCA*, *ibid* at paras 95 and 106.

to him or her.”¹⁰⁸ The Crown must also satisfy the Court that “a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.”¹⁰⁹

The term “satisfy” was considered in *R v AO*, 2007 ONCA 144, wherein the Ontario Court of Appeal ruled that the provisions imposed “an onus of satisfying the court, nothing more.”¹¹⁰ However, in applying that onus the Ontario Court of Appeal also stressed that youth courts must “bear in mind the very serious consequences of an adult sentence for the young person, so as to only order an adult sentence when necessary to fulfill the objectives of the *YCJA*.”¹¹¹

3.3.2 Adult Sentence Applications Require an Evidence-Based Analysis

Adult sentence applications are fact-driven and evidence-based hearings. Therefore, to give respect to the presumption of diminished moral blameworthiness as a principle of fundamental justice—a principle that is first and foremost a statutory protection of chronological age—the Crown must present evidence to support their position beyond the elements of the offence itself, no matter how serious the offence may be, as justification for imposing an adult sentence.

¹⁰⁸ *Ibid* at para 98; *R v AO*, 2007 ONCA 144 at para 38 [AO].

¹⁰⁹ *YCJA*, *supra* note 2 at s 72(1)(b).

¹¹⁰ *AO*, *supra* note 108 at para 38.

¹¹¹ *Ibid*. Note: While the burden of proof within the adult sentence test is one of “satisfaction, the Crown must prove any disputed or aggravating facts beyond a reasonable doubt. See e.g.: *R v ZC*, 2020 ONSC 5999, the court was careful not to admit hearsay evidence from institutional records that had not been proven beyond a reasonable doubt [ZC]; See also: *McClements*, *supra* note 105 at para 39; *Bala & Anand*, *supra* note 47 at 640.

The *YCJA* has several provisions that facilitate the gathering of evidence and expert opinion including ordering sentencing conferences, pre-sentence reports and section 34 psychological assessments, all of which may assist the court in an adult sentence application hearing.¹¹²

Section 34 of the *YCJA* allows the Court to obtain a psychological assessment that is prepared by a psychologist or psychiatrist.¹¹³ Section 34 reports generally include a risk-assessment, but also cover a young person's background, mental health, and assessment of any cognitive or learning challenges.¹¹⁴ Section 34 reports are very valuable to youth court judges in their decision-making, are heavily relied upon in sentencing, and are nearly universally ordered for adult sentence application hearings.¹¹⁵

While the onus is *not* on the defence, and there may even be circumstances where defence calls no evidence, it is often prudent for defence counsel to obtain assessments prepared by expert witnesses that focus on the nuanced factors related to the circumstances of the offence and the offender and how they relate to both first and second prong of the adult sentence application test.¹¹⁶ Courts have benefitted from the more in-depth and tailored psychological, social, or medical

¹¹² Note: Reports for bail may also be admissible in adult sentence applications if they contain relevant information about the circumstances of the young person. See: *R v HJR*, 2019 MBPC 12 [HJR].

¹¹³ *YCJA*, *supra* note 2 at s 34. Note: the terminology used for section 34 reports varies from region to region, and are referred to as forensic reports (Manitoba), psychological assessments and section 34 reports. For the purpose of this thesis, I will use the term 'section 34 report' when referring to reports ordered under section 34 of *YCJA*.

¹¹⁴ Michele Peterson-Badali, Sarah McCormick, Nina Vitopoulos, Krista Davis, Zohrah Haqanee & Tracey A Skilling, "Mental Health in the Context of Canada's Youth Justice System" (2015) 19:1 Canadian Criminal Law Review 5 at page 9 [Peterson-Badali].

¹¹⁵ Hygiea Casiano & Sabrina Demetriooff, "Forensic Mental Health Assessments: Optimizing Input to the Courts" (2020) 43:3 Man LJ 249 at page 268 [Casiano & Demetriooff].

¹¹⁶ *R v HM*, 2022 MBPC 42 [HM]. Note: *HM* An excellent example of defence preparedness where, as a result of the defence team's diligence in advancing expert evidence and reports, the sentencing judge was able to make a deeply informed decision on the first prong of the adult sentence application test predominantly through defence-led evidence.

reports beyond the scope of section 34 assessments including expert evidence from mental health specialists, social workers, occupational therapists, addictions specialists, Fetal Alcohol Spectrum Disorder (FASD) specialists, and experts on the impact of race and culture. These potential sources of evidence will be discussed in more detail later in this chapter.

3.3.3 The Value of Scientific Evidence Related to Adolescent Brain Development

Scientific evidence related to adolescent brain development can be of tremendous assistance. Incorporating such evidence into the adult sentence application process is crucial for the proper consideration of the presumption of moral blameworthiness. In her 2018 article, “Potential Impact of Research on Adolescent Development on Juvenile Judge Decision-making”, Dr. Colleen Berryessa notes that there is consensus in the neuroscience literature that the differences between the adult and youth brain development occurs in three key areas. First, the youth brain is marked by an underdeveloped prefrontal cortex which plays an important role in cognitive control and emotional regulation. Second, the amygdala of the youth brain is in a state of over-reactivity, which effects emotional processing and reaction to threats. Third, there are differences in the development of the ventral striatum which plays a role in the brain’s anticipation and attainment of rewards. Ultimately, and as a result of these differences, youth “inherently view and perceive risk differently from adults, specifically viewing risk as more rewarding if it results in excitement or peer acceptance.”¹¹⁷ As a result of these developmental differences, youth are “known to have problems calculating risk, perceiving the gravity of potential bad consequences, and delaying gratification if the action is thought to incur a reward.”¹¹⁸

¹¹⁷ Colleen M Berryessa, “Potential Impact of Research on Adolescent Development on Juvenile Judge Decision-making” (2018) 69:3 Juvenile & Family Court J 19 at page 23 [Berryessa].

¹¹⁸ *Ibid.*

Furthermore, when a young person—whose capacities are already impacted as a result of their age alone—presents with a history of trauma, the neuroscience literature suggests that such trauma *further affects and slows* the development of the adolescent brain and can effect decision-making, judgement, and impulsivity.¹¹⁹

“There is well-known evidence,” according to Dr. Berryessa “that early childhood abuse, exposure to violence, neglect, and other trauma have significant and lasting effects on adolescents’ executive functioning by damaging the developing prefrontal cortex.”¹²⁰ Executive functioning is comprised of three elements: working memory, inhibition and behavioural control, and cognitive flexibility (ie critical judgement and perspective taking). Executive functioning is relevant to assessing a young person’s moral blameworthiness, as weaknesses in that area of development can contribute to offending behaviour.¹²¹

Ultimately, when courts are presented with expert evidence that touches on the scientific knowledge that Dr. Berryessa describes in her article—evidence that can speak directly to the neuroscience of adolescent brain development of the young person in question—courts are in a better position to make informed decisions on the first prong of the adult sentence test.

3.3.4 Crown Discretion to Pursue Adult Sentences

As has been established, the Crown must rebut the presumption of diminished moral blameworthiness by satisfying the court that, at the time of the offence, “the evidence supports a finding that the young person demonstrated the level of maturity, moral sophistication and capacity for independent judgement of an adult.”¹²²

¹¹⁹ *Ibid* at 23-24; See also: Beatriz Luna et al, “Maturation of Cognitive Processes From Late Childhood to Adulthood” (2004) 75:5 Child Development 1357 at 1358 [*Luna*].

¹²⁰ *Berryessa, ibid* at 23-24.

¹²¹ *Ibid* at 24.

¹²² *YJCA, supra* note 2 at s 72(1)(a); *MW ONCA, supra* note 35 at para 98.

Given this evidentiary obligation, how does the Crown determine when they will seek an adult sentence application? Furthermore, how can they be said to be justly exercising that discretion in cases where they lack the proper evidentiary foundation for one or both prongs of the adult sentence application test? When cases are brought with insufficient evidence, is it due to a fundamental misapprehension of the law or is it related to the prevalence of out-dated views on the adult sentence application process? And how can Crown policies be drafted in a way that shows respect for the section 7 rights of young people and parliament's intentions with the two-pronged test? These are important questions.¹²³

Generally, when exercising their discretion to pursue a matter through to trial, the Crown must assess their evidence to determine if they have a reasonable likelihood of conviction. This analysis is crucial to the proper functioning of the criminal justice system. Similarly, logic (and ethics) would dictate that when exercising their discretion to pursue an adult sentence, it is equally crucial for the Crown to take an honest and candid view of their reasonable likelihood of success in attaining an adult sentence, based on a current and informed understanding of the law governing adult sentence applications.

In relation to the first prong, when the Crown presents an adult sentence application without a *prima facie* evidentiary foundation, they are asking the court to endorse a fiction of adulthood for a youth, simply and singly because of the nature of the offence.¹²⁴ The decision to pursue an adult sentence in such circumstances reflects a deeply flawed understanding of the state of the law

¹²³ Note: It may be that a Crown assigned to a serious matter may be bound by policy to pursue an adult sentence that may not fully take into account the two-pronged test, or the ultimate decision to pursue the adult sentence may be made by individuals in a supervisory role. However, without access to Crown manuals or policies on how this discretion is exercised, or even who is making the decision, it is impossible to reach firm conclusions on this issue.

¹²⁴ *ZC*, *supra* note 111 at para 158 Note: The Court found that the Crown made a strategic error by arguing that the offences essentially “ [spoke] for themselves” on the first prong analysis.

or an attempt to return to bygone approaches where the Crown could present the facts of the case alone and shift the onus on to the accused. It must be emphasized again, such a *de facto* presumptive regime approach is not permissible in law and runs afoul of the principle of fundamental justice that youths by the very virtue of their age, are to be presumed to have diminished moral blameworthiness.¹²⁵

Similarly, Crown attorneys might show flawed reasoning in the exercise of their discretion to pursue adult sentences in circumstances where they lack evidentiary foundation to overcome the accountability prong of the adult sentence test. For example, when the Crown presents an adult sentence recommendation that is equal to or shorter than the sentence length that is otherwise available under the *YCJA*, the Crown cannot be said to be arguing the second prong in good faith.¹²⁶

3.3.5 Roles of Court Participants in Respecting Charter Rights of Young People

The preamble of the *YCJA* addresses the fact that Canada is party to the *United Nations Convention on the Rights of the Child*, and “recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms.”¹²⁷ The presumption of diminished moral blameworthiness is a principle of fundamental justice, a *Charter* protected presumption, and is deserving of respect from all court participants.

¹²⁵ *HM*, *supra* note 116 at para 71. Note: The Crown seemingly presented little to no evidence to the court (beyond relying on the seriousness of the offence) that HM was operating with adult-like capacity. Judge Devine noted “every psychiatric, medical, psychological and multi-disciplinary report came to the same conclusion” regarding HM’s capacity.

¹²⁶ *R v AG*, 2019 ONCJ 211 at paras 86-87 [AG]. Note: In *AG*, the Crown sought a sentence that was achievable through the *YCJA* youth maximum sentence available. The sentencing judge admonished this approach calling it out of line with the purpose of the second prong.

¹²⁷ *YCJA*, *supra* note 2 at preamble.

In my 2023 article, “Zora, the Charter, and the Youth Criminal Justice Act: Defending the Rights of Youths is the Responsibility of all Court Participants”, I argued that, just as we have been directed by *Zora* in the bail context,¹²⁸ all court participants have a positive obligation to uphold all charter protected rights of young people facing criminal prosecution.¹²⁹ The notion that all court participants play a role in upholding the *Charter* rights of young people is directly tied to the ways in which the Crown exercises its discretion to pursue an adult sentence. Just as the Crown plays an important role in upholding the systemic right of accused people to reasonable bail by carefully considering the *Charter* compliance of the position they take in bail proceedings, so too must the Crown measure the exercise of their discretion to pursue an adult sentence against the *Charter*-protected presumption of diminished moral blameworthiness.

3.3.6 Adult Sentence Applications Ought to be Rare

The SCC significantly narrowed the overall likelihood of the imposition of adult sentences by striking down the presumptive offence regime.¹³⁰ The more restrictive approach to adult sentence applications that followed *DB* better aligns with the purposes and principles of the *YCJA*, the *Charter*, and is more consistent with Canada’s commitments under international law.¹³¹

Adult sentences should be rare and reserved for a “very narrow set of offences and offenders”¹³² and such orders should be limited to youth who were “criminally exceptional.”¹³³

¹²⁸ *R v Zora*, 2020 SCC 14 at paras 101-103 [*Zora*].

¹²⁹ Hillarie Tasche, “Zora, the *Charter*, and the *Youth Criminal Justice Act*: Defending the Rights of Youths is the Responsibility of all Court Participants.” (2023) 46:4 Man LJ [*Tasche*].

¹³⁰ *DB*, *supra* note 4 at para 77 and 93; *Nasr*, *supra* note 100 at 10. Note: While the SCC made it clear that there were still some circumstances where an adult sentence would be appropriate, they unfortunately did not elaborate as to when or how. With the upcoming appeals in *IM*, *supra* note 10 and *SB*, *supra* note 11, hopefully the SCC will clarify the operational aspects of the presumption of diminished moral blameworthiness.

¹³¹ *Bala & Anand*, *supra* note 47 at 631.

¹³² *R v Anderson*, 2018 MBCA 42 at para 61 [*Anderson*].

¹³³ *Campbell*, *supra* note 32 at 8.

Legal scholars have largely echoed this sentiment and have commented on the serious consequences for young people sentenced as adults, including the the increased risk of harm and further entrenchment into criminal lifestyle while in custody, the stigma associated with having an adult criminal record, the limitations on movement across borders for travel or emigration, employment barriers, and collateral immigration concerns.¹³⁴

Given the rarity of adult sentence applications, defence lawyers, Crown attorneys and youth court judges may go their entire careers without participating in an adult sentence application hearing. As a result, when these hearings arise, all participants must re-orient their way of thinking about moral blameworthiness and must operate solely within the provisions of section 72 of the *YCJA*.

3.3.7 Regional Disparity in the use of Courts, Custody and Adult Sentences

Whether during the *JDA*, the *YOA* or the *YCJA*, regional differences and variations in the way in which youth justice legislation has been implemented has resulted in the inconsistent and at times inequitable treatment of young people.¹³⁵ This has been particularly true with the frequency of adult sentence applications (historically called transfer hearings). Under the *YOA*, Manitoba had particularly high rates of regional transfers to adult court,¹³⁶ and as this thesis will endeavour to show in Chapter Four, this trend has continued under the *YCJA*.¹³⁷

¹³⁴ *Ruddell & Gileno, supra* note 47 at 244.

¹³⁵ *Smadych & Corrado, supra* note 42 at 194.

¹³⁶ *Bromwich 2002, supra* note 61 at 96 and 97.

¹³⁷ Note: As will be shown through data presented in Chapter Four, Manitoba has the highest rate of adult sentence applications both per capita and when measured against total death-related convictions by province/territory. Some years Manitoba has even had the highest total number of adult sentence applications without accounting for population.

3.3.8 Over-Representation of Indigenous, Black and Visible Minority Youth

The declaration of principles found in section 3 of the *YCJA* states that “within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.”¹³⁸ However, 20 years after the inception of the *YCJA*, Indigenous, Black and visible minority youth continue to be over-represented in courts and in custody. Indigenous, Black and visible minority youth also disproportionately face applications for adult sentences, an issue that will be explored later in this chapter, as well as in chapter four.

For Indigenous youth in Canada, the alarming reality of their over-representation in the justice system has been caused by a myriad of factors, many of which are tied to the effects of colonialism and systemic racism that have left Indigenous communities facing alarming rates of poverty, fewer opportunities for education, greater exposure to violence in homes and neighbourhoods, substance misuse and mental and emotional struggles.¹³⁹ The over-representation of Indigenous youth in criminal courts and in custody results from barriers that have existed for many generations.

In his article, “Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influences,” Nate Jackson discusses the connection between intergenerational trauma and increased rates of incarceration, aptly stating “the physical and

¹³⁸ *YCJA*, *supra* note 2 at s 3.

¹³⁹ Raymond Corrado, Sarah Kuehn & Irina Margaritescu, “Policy Issues Regarding the Over-representation of Incarcerated Aboriginal Young Offenders in a Canadian Context” (2014) 14:1 *Youth Justice* 40 at page 41 [*Corrado, Kuehn & Margaritescu*].

mental anguish stemming from colonialism does not dissipate over time.”¹⁴⁰ Jackson highlights the effects of the intergenerational trauma of colonialism on Indigenous people, stating “compounded by contemporary racism and an overarching loss of identity, the effect on aboriginal youth is all the more toxic and has lead to, in combination with other factors, the increased interaction with the criminal justice system.”¹⁴¹

The over-representation of Black and visible minority youth is similarly concerning and stems from a myriad of factors including systemic barriers and discrimination. For Black youth, despite representing only 3.5% of the population in Canada, they represent approximately 8% of youths in custody.¹⁴² This over-representation is a direct result of the historic and ongoing barriers and discrimination that have limited the opportunities available for Black youth in Canadian society. Furthermore, studies have shown there is over-policing of Black communities in Canada, a disproportionate systemic response by the child welfare system when dealing with Black families, and a disproportionate use of police to respond to mental health issues of Black youth, all of which lead to Black youth coming disproportionately into contact with the criminal justice system.¹⁴³

To be abundantly clear, the reasons for the over-representation of Indigenous, Black or visible minority youth in court and custody is *not* the result of an inherent proclivity towards crime

¹⁴⁰ Nate Jackson, “Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influences” (2015) 52:4 Alta L Rev 927 at 931 [*Jackson*].

¹⁴¹ *Ibid* at page 931.

¹⁴² Marie C Dugas, “Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders” (2020) 43:1 Dal L J 103 at 135 [*Dugas*]. Note: The alarming rate of over-incarceration of Black people in Canada has been recognized by the United Nations following a visit to Canada in 2016 from an envoy working group of experts on people of African descent. *Ibid* at 107.

¹⁴³ Canada, Department of Justice, *Black youth and the criminal justice system: summary report of an engagement process in Canada*, Akwasi Owusu-Bempah (Ottawa: Department of Justice, 2021) at 13, 15, 19 [*Owusu-Bempah*].

among youths of these backgrounds. In his 2015 article, “Changing Professional Culture by Reducing Use of Courts and Custody for Youth: The Youth Criminal Justice Act and Bill C-10”,¹⁴⁴ Nicholas Bala notes that “the rates of offending behaviours are similar for aboriginal and non-aboriginal populations, provided the factors such as relative rates of unemployment, family background, academic difficulties, and alcohol or drug abuse are taken into account.”¹⁴⁵ While the over-representation of Indigenous, Black and visible minority youth in court and in custody is effected by the systemic and personal barriers as outlined above, there is also evidence that this over-representation may, in some instances, be a result of discriminatory treatment and practices in the youth justice system.¹⁴⁶ The source of discrimination may be from police, from Crown and defence lawyers, from probation officers, from corrections officers and even from the courts themselves.¹⁴⁷

As youth courts consider and apply the principles from *Gladue* and *Ipeelee*, as well as section 3 of the *YCJA*, there must be a recognition of the unique ways that centuries of colonial policies have affected this current generation of young people. Courts and court participants cannot ignore the broader world in which today’s Indigenous and Black youth live and the impacts of colonialism and racial discrimination in Canada.¹⁴⁸ In the context of Indigenous youth, as Raymond Corrado, Sarah Kuehn and Irina Margaritescu highlight in their article “Policy Issues Regarding the Over-representation of Incarcerated Aboriginal Young Offenders in a Canadian Context”¹⁴⁹ the “destructive, intergenerational impact on Aboriginal people and their families

¹⁴⁴ *Bala 2015, supra* note 42.

¹⁴⁵ *Ibid* at 170.

¹⁴⁶ *Ibid* at 167.

¹⁴⁷ *Ibid* at 168-169.

¹⁴⁸ *Corrado, Kuehn & Margaritescu, supra* note 139 at 53.

¹⁴⁹ *Ibid.*

included unresolved grief and trauma and a greater risk of mental illness, family conflict, child morality, suicide and self-harm, lack of educational achievement, poverty, unemployment and substance abuse.”¹⁵⁰

For the young generation of Indigenous people in Canada today, the problem of over-incarceration is a crisis. Furthermore, evidence suggests that when compared to their white contemporaries, Indigenous youth are more likely to receive longer sentences when sentenced for crimes of similar severity and with similar criminal history.¹⁵¹ The over-representation of indigenous youth in the youth justice system is most acute in Manitoba.¹⁵²

3.3.9 Human Rights and International Standards

The preamble of the *YCJA* references Canada’s obligations under the *United Nations Convention on the Rights of the Child*, which recognizes the right of “every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age”¹⁵³

While the preamble of the *YCJA* is not binding, as it does not form part of the body of the legislation, arguments rooted in international human rights standards “are increasingly influential

¹⁵⁰ *Ibid* at 53.

¹⁵¹ *Ibid*.

¹⁵² *Smandych & Corrado, supra* note 42 at 97. Note: The ratio of aboriginal to non-aboriginal youth in courts and in custody has increased since the inception of the *YCJA*. Also, Indigenous youth are over-represented among children in state care. These issues are both most acute in Manitoba.

¹⁵³ *DB, supra* note 4 at para 60.

on domestic and youth justice practice.”¹⁵⁴ The SCC has also recognized the international consensus that youthfulness is a mitigating factor to be considered in the imposition of any criminal sanction on young people.¹⁵⁵ Legal scholars have endorsed this principle, and some have called for even greater protections, particularly through section 12 of the *Charter*, than those afforded by parliament in the *YCJA*, arguing that the potential imposition of life sentences for children is not consistent with human rights.¹⁵⁶ These authors cite the *United Nations Convention on the Rights of the Child* General Comment 10, which forbids cruel and unusual punishment for youth, noting that the definition of this concept includes the imposition of life imprisonment without possibility of release.¹⁵⁷ While the *YCJA* has special provisions for the opportunity of earlier parole for youth sentenced to life sentences, there still remains the possibility that a young person may either not be granted parole or, once sentenced as an adult, could also be subjected to further sanctions by way of dangerous offender applications.¹⁵⁸

¹⁵⁴ Nessa Lynch, “Human Rights for ‘Hard Cases’: Alternatives to Imprisonment for Serious Offending by Children and Youth” in Elizabeth Stanley, ed, *Human Rights and Incarceration: Critical Explorations*, 1st ed (Cham: Palgrave MacMillan 2018) 153 at 161 [Lynch 2018]; See also: *Bromwich 2002*, *supra* note 61 at 108.

¹⁵⁵ *DB*, *supra* note 4 at para 67.

¹⁵⁶ *Ruddell & Gileno*, *supra* note 47; *Nasr*, *supra* note 100.

¹⁵⁷ Committee on the Rights of the Child, *General Comment No 10, Children’s rights in juvenile justice*, UNOHCHR, 44th Sess, CRC/C//GC/10 (2007) [*General Comment 10*]; *Nasr*, *ibid* at 2.

¹⁵⁸ Note: Very few psychiatrists take the position that it is ethical to make a diagnosis of psychopathy on a young person, as they recognize this diagnosis is incompatible with a brain that is still developing. See: *Bala & Anand*, *supra* note 47 at page 669; However, dangerous offenders for youths have been granted. See: *R v Laboucan*, 2002 BCCA 376 where Laboucan was sentenced as an adult as received a dangerous offender designation for the sexual assault of a three-month old baby. Laboucan was 15. As of November 2020, Laboucan remained in prison and had served 24 without parole. See: Ashley Wadhwani “Canada’s youngest dangerous offender from B.C. denied parole; to be reviewed in 2021”, *Vancouver Island Daily* (November 9, 2020), online: < News Article www.vancouverislandfreedail.com/news/canadas-youngest-dangerous-offender-from-b-c-denied-parole-to-be-reviewed-in-2021> ; See also: *R v PH*, [2005] OJ No 5698 where a dangerous offender application was pursued after an adult sentence was granted in but not granted.

3.3.10 Concluding Remarks on the General Principles of Adult Sentence Applications

While *DB* was groundbreaking from a rights perspective in its abolishment of the presumptive offence regime, it gave little insight into the procedural aspects of adult sentence applications. From the preceding sections of this chapter, it is clear that in the 15 years since *DB*, Parliament and appellate courts have filled in many of the procedural and legal gaps left in this area of the law. With this more fulsome understanding of the general principles of adult sentence applications, the remainder of this chapter will delve into the common and novel factors that have been considered by trial level courts in their assessment of both the first and second prong of the adult sentence test. The factors considered will be evaluated in conjunction with interdisciplinary academic literature that touches on the topics covered.

3.4 The Presumption of Diminished Moral Blameworthiness

3.4.1 Introduction

Throughout my practice and research, I have routinely revisited the Alberta Queen's Bench decision *R v DDT*, 2009 ABQB 362,¹⁵⁹ wherein Justice Germaine conducted a cross-Canada evaluation of the multitude of factors that courts have considered in assessing adult sentence applications.¹⁶⁰ Justice Germaine's thoughtful and thorough decision was praised by the Alberta Court of Appeal and the Crown's leave to appeal to the SCC was denied.¹⁶¹

DDT has been frequently cited in the 14 years since it was decided. Even if not referred to directly in more recent decisions, *DDT* has continued to be a valuable roadmap for lawyers as they prepare their evidence and arguments for adult sentence applications. While *DDT* was decided under the pre-amendment section 72, its overall lessons are easily adapted to the new two-pronged

¹⁵⁹ *R v DDT*, 2009 ABQB 362 [*DDT ABQB*], aff'd 2010 ABCA 365.

¹⁶⁰ *Ibid.*

¹⁶¹ *R v DDT*, 2010 ABCA 365 [*DDT ABCA*], leave to appeal to SCC denied.

test. Through the remainder of this Chapter, I have endeavoured to update and build upon Justice Germaine’s remarkable work.¹⁶²

3.4.2 Factors Considered by Trial Level Courts in Assessing the First Prong

3.4.2.1 Age

As chronological age advances through adolescence, so does the development of the brain. While some teens take on the physical appearance of an adult at a very young age, internally, their brain development is set to a different clock. Research into the development of the teen brain shows that the cerebral cortex develops slowest and later than other areas of the brain.¹⁶³ This is important to understanding teen behaviour as the cerebral cortex is responsible for many of the functions relevant to assessing moral blameworthiness and culpability.

The cerebral cortex controls key functions such as decision making, response inhibition, holding attention, perspective taking and social skills. The underdevelopment of these functions *as a result of chronological age alone* means that teenagers may not reach the capacity for high executive functioning—skills needed to make good decisions, appreciate consequences, regulate their emotions—until the maturation of the cerebral cortex is more complete.¹⁶⁴

When other factors, such as trauma are present in the life of a young person, cerebral development may fall even further behind. As a result, it is important for courts to have access to reports, expert evidence, and specialized knowledge relating to brain development in conjunction

¹⁶² *Chol*, *supra* note 27 at para 61. Note: A similar but less expansive approach was taken by the BCCA in *Chol*.

¹⁶³ Ashley Williams, “Early Childhood Trauma Impact on Adolescent Brain Development, Decision Making Abilities, and Delinquent Behaviors: Policy Implications for Juveniles Tried in Adult Court Systems” (2020) 71:1 *Juvenile & Family Court J* 5 at 7 [*Williams*]. Note: Age at the time of sentencing is not a factor on the first prong, only the age at the time of the offence.

¹⁶⁴ *Ibid.*

with a full social and medical history of a young person to assess a young person's functional age in addition to their chronological age.

3.4.2.1.1 Who is the 'adult' contemplated in 'adult-like'?

As noted in Chapter One, all youths start from a presumed deficit of maturity and capacity, unless the Crown can satisfy the court of a more advanced, adult-like degree of moral blameworthiness. But who is the 'adult' contemplated in 'adult-like'?

In *R v ASD*, 2019 BCSC 147, the Honourable Justice Schultes considered the characteristics of the 'adult' contemplated in the term 'adult-like' used in section 72(1).¹⁶⁵ Justice Schultes described this adult not as a person of "especially advanced maturity, judgement or sophistication," but of an adult that has matured to a "point that the deficits in those qualities that the YCJA presumes all young persons have are no longer present."¹⁶⁶ Ultimately, the Justice Schultes describes the comparator as "the average 18-year-old offender, who receives no benefit from the presumption."¹⁶⁷ The Court also found that holding the Crown to a higher standard by envisioning an adult at a more ideal level of maturity would require the Crown to prove that a youth facing a section 72 application would be even more mature than many of their adult counterparts.¹⁶⁸

3.4.2.1.2 Proximity to Eighteenth Birthday

Even when a young person is on the eve of their 18th birthday, courts have been clear that proximity to one's 18th birthday is not sufficient to negate or dilute the presumption of diminished

¹⁶⁵ *R v ASD, GCAR & LZ*, 2019 BCSC 147 [*ASD, GCAR & LZ*], *ASD* aff'd 2020 BCCA 208 [*ASD BCCA*].

¹⁶⁶ *Ibid* at para 513.

¹⁶⁷ *Ibid* at para 345.

¹⁶⁸ *Ibid* at para 513.

moral blameworthiness statutorily afforded to youth.¹⁶⁹ The following cases involve young people who have committed their offence on the proverbial or actual eve of their 18th birthday.¹⁷⁰

In a rather novel case, the adult sentence applications of two twin brothers were heard in *R v CM*, 2014 ABQB 701, and *R v TM*, 2015 ABQB 134.¹⁷¹ CM was found guilty of murder, and TM was found guilty of manslaughter for a killing that took place just 12 days before their 18th birthday. In discussing the biological age of the accused as a factor in the first prong analysis in the hearing for CM, the court considered the Alberta Court of Appeal's statement in *R v NLH*, 2009 ABCA 168, that maturity should be considered from two perspectives, behaviourally as exhibited by "words, thoughts and actions" and chronologically by looking at an accused's "actual state of development".¹⁷²

In *R v Wong*, 2016 BCCA 305, the British Columbia Court of Appeal was of the opinion that the moderating effect on sentencing under the *YCJA* may, in some circumstances, lessen the closer a young person is to their 18th birthday. However, while it *may* lessen the moderating effect of the *YCJA*, proximity to 18 alone is not determinative.¹⁷³

In *R v JD*, 2020 PESC 33, the young person JD committed his offence 1 day, possibly within hours of his 18th birthday. This case highlights the statutory nature of a young person's right to be sentenced pursuant to the *YCJA*, unless the Crown rebuts the presumption of diminished

¹⁶⁹ *HM*, *supra* note 116 at para 46; *R v JD*, 2020 PESC 33 at para 129 [*JD*]; *R v MG*, 2017 ONCJ 565 [*MG*].

¹⁷⁰ Note: Recent cases where the young person was just days or weeks away from 18: *R v MB*, 2021 ONCJ 355 [*MB*]: 18 - 2 months; *R v TG*, 2019 ONSC 3057 [*TG*]: 18 - 3 weeks; *R v RDF*, 2018 SKPC 28 [*RDF SKPC*]: 18 - 15 days; *ASD GCAR & LZ*, *supra* note 165: LZ was 18 - 14 days; *R v AM*, 2023 ABKB 312 [*AM*]: 18 - 11 days.

¹⁷¹ *R v CM*, 2014 ABQB 701 [*CM*]; *R v TM*, 2015 ABQB 134 [*TM ABQB*]. Note: CM was given an adult sentence and TM was not.

¹⁷² *R v NLH*, 2009 ABCA 168 para 86 [*NLH*].

¹⁷³ *R v Wong*, 2016 BCCA 305 at para 46 [*Wong*].

moral blameworthiness.¹⁷⁴ While 18 is an arbitrary line, it is a hard and fast age-based threshold for presumed statutory protections.¹⁷⁵ Despite a young person’s proximity to 18, the court must still respect the statutory line drawn by Parliament.

As articulated by Justice Loparco of the Alberta Court of Kings’ Bench in *R v AM*, 2023 ABKB 312, while age does play a role in the analysis of moral blameworthiness, age alone is not a determinative factor and that those who are very close to their 18th birthday are not necessarily to be treated differently or “somehow afforded less protection” under the *YCJA* as the “presumption afforded to young persons under the *YCJA* does not become increasingly diluted the closer one gets to the age of majority.”¹⁷⁶

3.4.2.1.3 Adult-like Lifestyle

Evidence related to the young person living an adult-like lifestyle has shown to be the strongest source of evidence for the Crown to satisfy the court that the presumption of diminished moral blameworthiness has been rebutted. However, the Crown must base their arguments in actual evidence and not on speculative inferences drawn from the seriousness of the offence (eg. arguments such as “only someone with an adult-like lifestyle will carry a gun” or “only someone with an adult-like lifestyle is capable of such violence”). Proper evidence of an adult-like lifestyle might include evidence of complex financial decisions, such as independently leasing apartments, or buying and insuring vehicles. The cases below outline instances where the court has considered evidence of a young person living an adult-like lifestyle.

In *R v TG*, 2019 ONSC 3057, the court found that the 17 year old accused showed maturity, capacity and adult-like culpability within the execution of his offence as he conducted ransom

¹⁷⁴ *JD*, *supra* note 169.

¹⁷⁵ *Ibid* at para 129.

¹⁷⁶ *AM*, *supra* note 170 at para 90.

negotiations, handled firearms, procured false IDs, rented and drove rental cars with those false IDs, leased luxury apartments, drank champagne and cognac and spent thousands of dollars every month, profits which came from selling drugs and spent to live a lavish lifestyle.¹⁷⁷

In *R v AM*, 2023 ABKB 312, AM was found to be living an adult-like lifestyle. He had moved out of his mother's home, rented an apartment of his own, was employed, and had bought and insured the vehicle involved in the manslaughter. Furthermore, he had no notable cognitive deficits or mental health issues and attained his grade 12 in custody while awaiting trial.¹⁷⁸

3.4.2.1.4 Adultification Bias

Courts must be cautious not to attribute adult-like capacity to youths who have been forced to take on adult roles due to a lack of parental guidance or presence, or even by virtue of their adult-like physical appearance. This phenomenon has been referred to as “adultification bias”.¹⁷⁹

For example, before being over-turned on appeal and sent back for a new trial, the Alberta Provincial Court commented on the ‘adultification’ of the young person in *R v MM*, 2012 ABPC 153. The court found that MM had a lack of parental guidance due to family instability, maternal depression and polysubstance abuse “which quickly forced [MM] into an adult-like existence at a very young age without the appropriate tools/skills and/or role model.” The court went on to include that “his early adultification/parentification coupled with a complete lack of structure/accountability ultimately led to his criminal lifestyle.”¹⁸⁰

Furthermore, courts must be cautious not to attribute a greater maturity based on stereotypes and misperceptions of racialized youth. For example, studies have shown that:

¹⁷⁷ *TG*, *supra* note 170 at paras 72-74.

¹⁷⁸ *AM*, *supra* note 170.

¹⁷⁹ *Owusu-Bempah*, *supra* note 143 at 39.

¹⁸⁰ *R v MM*, 2012 ABPC 180 at para 51 [*MM*].

Black youth are more likely to have their age over-estimated, be perceived as adults, deemed less innocent, treated more severely than White and Hispanic counterparts perceived as less emotionally expressive and misperceived as being angry a phenomenon known as “adultification bias” that negatively impacts Black youth. These misperceptions occur across the education and justice fields, necessitating particular attention being paid to the age of Black young people in court.¹⁸¹

3.4.2.2 Adverse Childhood Experiences

Adverse childhood experiences (commonly referred to with the acronym ACE) are identified instances in a young person’s life that have been traumatic in nature. Adverse childhood experience may include, but are not limited to, instances of child maltreatment, neglect, physical abuse, sexual abuse, emotional abuse, general violence, family violence, parental incarceration, incarceration of other family members under the age of 18, household substance abuse, living in poverty, parental separation or divorce, death of a care-giver or loved-one, household mental illness, and experiencing violence in one’s community.¹⁸²

Adverse childhood experiences are tied to an increased likelihood of juvenile delinquency.¹⁸³ In an American study conducted in 2004, it was found that 93% of individuals entering the youth justice system had at least one adverse childhood experience and over 50% of young people entering the youth justice system had 6 or more adverse childhood experiences.¹⁸⁴

Not only is there a nexus between adverse childhood experiences and criminal offending, adverse childhood experiences are also linked to increased mental health challenges.¹⁸⁵

The tally of adverse childhood experiences that a young person has faced in their life is often referred to as an ACE score. It is crucial for courts and court participants to understand the

¹⁸¹ *Owusu-Bempah, supra* note 143 at 39.

¹⁸² *Williams, supra* note 163 at 6.

¹⁸³ *Ibid.* Note: Williams notes in her article that the United States Centre for Disease Control has identified and recognized a link between early childhood trauma with juvenile delinquency.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

full and cumulative effect of a young person's experiences. This can be done through measurement tools, such as an ACE score, and can be presented to the court through reports, testimony, and expert witnesses.

3.4.2.2.1 Trauma and Complex Trauma

Beyond the proven differences in brain development between youths and adults, there is agreement among the scientific community that trauma in childhood may further impair a young person's ability to make sound decisions, as well as their ability to self-regulate.¹⁸⁶

The impact of adverse childhood experiences on young people is cumulative,¹⁸⁷ and so for youths with various sources of trauma, the full effect of their lived experiences can be complex and multi-faceted. In some cases, these traumas are too much to imagine let alone bear for a young person.¹⁸⁸

R v LTN, 2019 SKQB 337 is illustrative of how the accumulation of trauma in childhood plays a role in their development and growth through adolescence. LTN acquired a brain injury *in utero* as his mother drank alcohol to excess during her pregnancy. After his birth LTN, came into state care at 12 months old after being beaten by his step-father with a metal rod which broke his leg and perforated his bowel. LTN lived in 25 different foster homes in 16 years, where, in some homes, he suffered physical and sexual abuse and neglect. LTN's girlfriend died two weeks before he came into custody, and his mother died while he was in custody and he was not informed of her death until after the funeral. LTN was the victim of violence having been stabbed on two separate occasions as a teen. LTN suffered from extreme longstanding depression and, while in custody,

¹⁸⁶ *Ibid.*; *Nasr*, *supra* note 100 at 16.

¹⁸⁷ *Williams*, *supra* note 163 at 9-10.

¹⁸⁸ See e.g.: *R v LTN*, 2019 SKQB 337 [*LTN*]; *HM*, *supra* note 116 at 61.

had multiple suicide attempts and hospitalizations after swallowing objects and lodging objects in his eyes. LTN's cumulative experiences are truly devastating.¹⁸⁹

Interestingly, LTN instructed counsel not to fight the Crown's adult sentence application.¹⁹⁰ LTN had an FASD diagnosis, numerous and tragic adverse childhood experiences and significant *Gladue* factors. Furthermore, LTN had already spent the equivalent of 1,199 days in custody, with a three year youth sentence available going forward for a global sentence of nearly 6 years. These factors could have presented a significant challenge to the success of the Crown's application. It is clear that LTN suffered tremendously in his young life and one might speculate that LTN's instructions to agree to the order may have, in part, reflected the very depression and hopelessness caused by his many adverse childhood experiences.

3.4.2.2.2 Witnessing Horrors of War

In assessing the presumption of diminished moral blameworthiness, courts have considered evidence of the adversities faced by children who have witnessed the horrors of war. Canada is home to many young newcomer refugees whose development has been negatively affected by their experiences surviving war. Sadly, these youth are at high risk of becoming involved in the criminal justice system, and should they face an adult sentence application, courts must be prepared to hear evidence regarding the ways in which their lived experiences as refugees have affected their moral capacity.

R v MS, 2022 ONCJ 56, involved a teenaged Syrian refugee charged with terrorism related offences. In the analysis of the first prong, MS's offending behaviour was tied directly to trauma of living through war and was a relevant factor pointing to a further diminishment of his moral

¹⁸⁹ *LTN*, *ibid* at paras 7-34.

¹⁹⁰ *Ibid* at para 47.

blameworthiness.¹⁹¹ Similarly, in *R v HAQ*, 2023 ONCJ 377, HAQ’s family came from Libya where the accused had witnessed and experienced horrific violence during that country’s armed conflict.¹⁹²

3.4.2.2.3 Being a Victim of or Witness to Violence and Tragedy in the Community

Being a victim of or witness to violence can also impact a young person’s moral blameworthiness. In *R v TJH and ADWC*, 2023 MBKB 5, the young person TJH, who ultimately was sentenced as a youth, had been directly present during an officer involved shooting of an Indigenous teen girl in Winnipeg in April, 2020. The court took this into consideration, with numerous other factors and circumstances, as it assessed TJH’s moral blameworthiness. The Court summarized the events and the effect they had on TJH:

A few months before these crimes, [TJH] was running amok with other kids robbing liquor stores. During one robbery, he was a passenger in a car that was pursued by police. After crashing, the young female driver of the car, [TJH]’s friend, was shot by police. She died as [TJH] watched. Months later, another friend, also a passenger in the car chase, was killed by a sibling. All this haunts [TJH]. His existence was unstructured and chaotic. Leading up to the Canada Day shootings, this contributed to his spiraling down in a haze of depression, substance abuse and indifference to life. He was victimized, and in turn, he victimized.¹⁹³

3.4.2.2.4 Victim of Physical Abuse, Sexual Abuse, or Sexual Exploitation

The tragic case of *R v SRM*, 2018 MBQB 86 is illustrative of how the court may take into account an accused’s history as a survivor of sexual abuse and/or sexual exploitation within the first prong of the adult sentence test.¹⁹⁴ SRM was 17 years old when she committed the two offences that brought her before the court to face an adult sentence application. In the first offence, SRM assisted the adult co-accused in luring the complainant through an online dating website. The

¹⁹¹ *R v MS*, 2022 ONCJ 56 [MS].

¹⁹² *R v HAQ*, 2023 ONCJ 377 [HAQ].

¹⁹³ *R v TJH and ADWC*, 2023 MBKB 5 at para 34 [TJH and ADWC].

¹⁹⁴ *R v SRM*, 2018 MBQB 86 [SRM].

complainant knew that SRM was underage and had made arrangements to pay SRM for sex, a fact that the group of accused ensured was documented in advance of the meeting, likely to diminish the chances of the complainant bringing the matter to police attention. The group lured the complainant to a residence where he was forcibly confined, assaulted and stabbed. The complainant was struck with a golf club, bound, injected with drugs, placed in the closet, while a co-accused left to take money from his bank account. Finally, the group took the complainant's vehicle (with the complainant inside) to the outskirts of Winnipeg and left it there, with the complainant still drugged and unconscious in the car.¹⁹⁵

SRM's second offence also involved a complainant that had paid SRM for sex knowing she was underage. According to SRM's evidence, the complainant had also sexually assaulted her in the past. In that case two co-accused and SRM went to the complainant's home, SRM was armed with a bat, and the group assaulted and stole items from the complainant.¹⁹⁶

Beyond the facts of the case, the sentencing judge also heard that SRM had a diagnosis of FASD, had an IQ below 70, and had led a life of trauma and neglect that left her vulnerable to exploitation. Justice McKelvey of the Manitoba Court of Queen's Bench ultimately concluded that what the Crown had argued to be adult-like behaviours may "cut both ways" in a case such as *SRM*.¹⁹⁷ The Crown was not successful in rebutting the presumption of diminished moral blameworthiness.

¹⁹⁵ *Ibid*. Note: Being the victim of sexual assault is an all too common yet under-reported experience for many youths who become involved in the criminal justice system. See e.g.: *R v HEJEB*, 2021 MBQB 223 at para 16 [*HEJEB*].

¹⁹⁶ *SRM*, *supra* note 194.

¹⁹⁷ *Ibid* at para 66.

On the other end of the spectrum, in *R v KOM*, 2017 ONCA 106¹⁹⁸ the Ontario Court of Appeal considered the appeal of an adult sentence application of a young female youth who was found to be sexually exploiting five teen girls. The lower court referred to her crimes as an “organized and vicious human trafficking enterprise”.¹⁹⁹ KOM’s offences took place before the 2012 amendments, but the nature of her offending demonstrated calculated critical-thinking that was profit-motivated, factors which were to be considered on the first prong of the adult sentence test. KOM’s adult sentence was upheld by the Ontario Court of Appeal.

3.4.2.2.5 Neglect

Many young people involved in the youth criminal justice system have experienced neglect by caregivers. This neglect may take many forms including physical, medical, psychological, or educational, and is entirely relevant to the moral blameworthiness assessment as neglect significantly impacts a young person’s growth and development.

One extreme example of educational neglect was in *R v HM*, 2022 MBPC 42, wherein the Honourable Judge Devine included a verbatim portion of the testimony of a speech-language pathologist who was working with HM while he was awaiting sentencing. Just as Judge Devine let the testimony speak for itself by reproducing it in full in her judgement, I provide the full quote here:

When asked if he had liked drawing, he said he didn’t know what drawing was until a few months ago. The concept of drawing an object on a piece of paper appeared to be very foreign to [H.M.] and he was excited to explain this process to this examiner.²⁰⁰

¹⁹⁸ *R v KOM*, 2017 ONCA 106 [KOM].

¹⁹⁹ *Ibid* at para 1.

²⁰⁰ *HM*, *supra* note 116 at para 72.

This testimony speaks directly to one of many ways HM's needs were not met. To be 17 years old and to have never experienced the basic joy of drawing shows just how far HM had fallen between the cracks.

3.4.2.3 Gender

While gender is frequently considered in statistical research in general offending by young people, a young person's gender does not necessarily speak to a diminishment of moral blameworthiness.²⁰¹ However, there may be instances where a young person's gender may play a greater role in assessing moral blameworthiness. For instance, this may arise if a young person has experienced trauma, discrimination or limited opportunities related to their gender. Another possible example of the relevance of the young person's gender identity could be a scenario where a young person has experienced trauma and rejection in relation to external lack of acceptance of identifying as non-binary or transgender—such as being bullied or being abandoned by unsupportive caregivers. If and when such cases arise, it is imperative that courts and court participants seek out experts to address such factors. Furthermore, courts must assess such factors through a lens that respects the complex intersection between gender and the law.

3.4.2.4 Family of Origin

Understanding the environment in which a young person was raised is a key component of the first prong of the adult sentence application test. If a young person is in the care of biological family, courts should be given information outlining any difficulties a young person's family has

²⁰¹ Note: As will be discussed in Chapter 5, only two of the 36 of the adult sentence application decisions between 2018 and 2023 involved female accused: *SRM*, *supra* note 194 and *R v Henderson*, 2018 SKPC 27 [*Henderson*]. In *Henderson*, the young person was sentenced to life in prison following the murder of a 46-day-old infant. Henderson was 16 years old at the time of the offence, had a record for violence, and unbeknownst to the family of the baby who took her in the night before the murder, had escaped from an open custody facility in Saskatoon.

faced such as intergenerational trauma, a history of residential schools, absence of positive and consistent adult role models, exposure to domestic violence, a history of limited opportunities for advancement, and/or poverty or disadvantage.

Conversely, where a young person has been raised in a life of privilege and opportunity, only to choose to lead a duplicitous criminal lifestyle, courts have used such evidence as a factor suggesting a higher degree of moral blameworthiness.²⁰²

3.4.2.4.1 Being in the Care of the Child Welfare System

Youths who are both in the care of the child-welfare system and involved with the youth criminal justice system have been referred to as “crossover youth” by academics and within the legal and social work professions.²⁰³ Crossover youth face complex and inter-connected challenges including higher rates of incarceration, higher rates of maltreatment, trauma, marginalization and instability, and are at higher risk of experiencing mental health issues.²⁰⁴ Youth in care have a higher rate of substance dependence, are disproportionately in need of special education resources and have often come from households experiencing poverty and as a result have often had fewer developmental opportunities compared to youth who have come from more advantaged backgrounds.²⁰⁵ Children in care have also disproportionately experienced abuse and neglect.²⁰⁶

²⁰² *R v Bouctsis*, 2023 ONSC 2405 [*Bouctsis*].

²⁰³ Nicholas Bala et al, “Child Welfare Adolescents & the Youth Justice System: Failing to Respond Effectively to Crossover Youth” (2015) 19 Can Crim L Review 129 at 130 [*Bala 2015: Child Welfare*].

²⁰⁴ Jennifer Bergman, “Intersectionality: A Means of Addressing the Needs of Children with Mental Health Issues who are Engaged with Family Law and Criminal Justice Systems?” (2019) 36 Windsor YB Access Just 115 at 118-120 [*Bergman*].

²⁰⁵ Raymond Corrado, Lauren F Freedman, and Catherine Blatier, “The Over-Representation of Children in Care in the Youth Criminal Justice System in British Columbia: Theory and Policy Issues.” (2011) 1&2 International Journal of Child, Youth and Family Studies 99 at 104-106 [*Corrado, Freedman & Blatier*]. .

²⁰⁶ *Ibid* at 107.

Being a youth in care is associated with a disproportionate involvement in the youth criminal justice system and flaws within the child welfare system itself—including placement instability, anger and mistrust toward the child welfare system—further increase the risk of youths in care becoming criminally involved.²⁰⁷ Estimates show that between 40 to 50 per cent of youths incarcerated in Canada were in the child welfare system when they came into custody.²⁰⁸

If a young person has been taken from their biological family and placed in the child welfare system, courts must be provided with information about the young person’s experiences in state care as many young people face considerable hardships as they navigate being a ward of the state. For instance, children in care are more likely to be diagnosed with mental health concerns such as depression and youth in care have four times more suicide attempts than youth not in care.²⁰⁹

It is important for courts to acknowledge the pain of dislocation that many young people experience when they are not raised in their family and/or culture of origin. In *HM*, Judge Devine commented on HM’s loss of connection to his family and culture, how deeply that had impacted him, noting that he displayed a “hunger for connection with his culture and people.”²¹⁰

In *R v ZC*, 2020 ONSC 5999 the court commented on the connection between being in state care to criminal involvement.²¹¹ ZC came to Canada from Grenada at age 3, became a ward of the state at age 7, and witnessed his mother’s suicide attempt. Following this tragic experience, his brother completed suicide. ZC lived in 8 foster homes in 9 years and attended 18 different

²⁰⁷ *Ibid* at 99; Rebecca Jaremkow Bromwich, “Cross-Over Youth and Youth Criminal Justice Act Evidence Law: Discourse Analysis and Reasons for Law Reform.” (2019) 42:4 Man L J 265 at 273 [*Bromwich 2019*].

²⁰⁸ *Ibid* at 271.

²⁰⁹ *Ibid* at 102.

²¹⁰ *HM*, *supra* note 116 at paras 58-59.

²¹¹ *ZC*, *supra* note 111 at para 181.

schools before coming into custody. The judge in his case took a trauma-based understanding of his ability to self-regulate in light of all that he had experienced by age sixteen.²¹²

3.4.2.5 Racial Identity

The legislative foundation for the consideration of race and culture is codified in section 3(1)(c)(iv) of the *YCJA* which calls on courts to impose sanctions that respect the ethnic and cultural differences of young people.²¹³ While this concept has been predominantly operational in cases dealing with Indigenous accused, this provision applies to the unique cultural backgrounds of Black and visible minority youth that become involved in the criminal justice system.²¹⁴

Young people who belong to groups that have been historically disadvantaged in Canadian society are more likely to have had harsher upbringings than their white contemporaries. In one American study, researchers found that scores related to adverse childhood experiences (ACE scores) varied across racial groups. This study found that 61% of Black children and 51% of Hispanic children have at least one instance of an adverse childhood experience, in comparison with 41% of white children.²¹⁵ This study did not poll the experiences of Indigenous children. The differences in the ACE scores reflect the unequal opportunities and resources for these youths in their homes or neighbourhoods.²¹⁶

It is important to acknowledge that the predominant narratives throughout Canadian history have centered the experience of white people. This default perspective, centered around the white experience, exists in the court system. While section 3(1)(c)(iv) is meant to address this issue, courts and court participants have struggled to account for the racial identities of the individuals

²¹² *Ibid*, at paras 154 and 161.

²¹³ *YCJA*, *supra* note 2 at s (3)(1)(c)(iv).

²¹⁴ See e.g.: *Anderson*, *supra* note 132; *R v X*, 2014 NSPC 95 [X]; *R v NW*, 2018 NSPC 14 [NW].

²¹⁵ *Williams*, *supra* note 163 at 9-10.

²¹⁶ *Ibid*.

who come before them.²¹⁷ The failure of courts to fully appreciate the impact of an individual's race and culture is a long-standing issue. In *R v Parks* (1993), 84 CCC (3d) 353 (Ont CA), a case involving the potential bias of jury members, the Ontario Court of Appeal held that anti-black racism was a very real consideration for the fairness of the proceedings. The ONCA commented:

Racism, and in particular anti-Black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.²¹⁸

While *Parks* was decided 30 years ago, the bias shown towards people of colour persists in our criminal justice system. This is precisely why the inclusion of alternative narratives from Black, Indigenous and visible minority voices are crucial in the courtroom.²¹⁹ Since *Parks*, the development and inclusion of *Gladue* and IRCA reports, at least at the sentencing phase of criminal proceedings, has created avenues for such voices to be heard to better contextualize the experiences of racialized individuals, but more must be done at all stages of criminal proceedings and in the wider community.

In the youth context, evidence of the impact of race and culture is vital to the adult sentence application process, particularly in the consideration of the presumption of diminished moral blameworthiness. Beyond simply giving passing mention to the racial identity of the young person, however, the best practice is to obtain expert evidence and give that evidence more than lip service. In his article, "Black Voices Matter Too: Counter-narrating *Smithers v The Queen*", Professor Amar Khoday of the University of Manitoba states that "[t]elling counter-stories is important for

²¹⁷ Amar Khoday, "Black Voices Matter Too: Counter-Narrating *Smithers v The Queen*" (2021) 58:3 Osgoode Hall Law Journal 567 at page 582 [*Khoday*].

²¹⁸ *R v Parks*, [1993] 84 CCC (3d) 353 at para 369 [*Parks*].

²¹⁹ *Khoday*, *supra* note 217 at 579.

challenging the myths and preconceptions in legal discourse.”²²⁰ In the context of adult sentence applications, such evidence is best presented by experts trained in the impact of race and culture which will be discussed at greater length later in this Chapter.

3.4.2.5.1 *Gladue* and *Ipeelee* for Young People

When applying *Gladue* and *Ipeelee* in youth court matters, courts and court participants must recognize that the relevant *Gladue* factors necessarily vary from generation to generation and will be unique for Indigenous youth. Such considerations are vital within youth courts given the reality that Indigenous youth are over-represented in custody to an even greater degree than Indigenous adults.²²¹ Furthermore, according to Jonathan Rudin and Liora Zimmerman, in their article “The Over-representation of Aboriginal Youth in Custody in Ontario from 2004-2010”, although “absolute numbers of youth receiving custodial sentence have decreased, the over-representation of Aboriginal youth has continued and indeed worsened.”²²²

In *Anderson*, the Manitoba Court of Appeal stated that *Gladue* factors must be considered on both the first and second prong of the adult sentence application test. Justice Mainella found that the sentencing judge erred by not properly considering *Gladue* on both the first and second prong of the test under section 72(1)(a) and (b) of the *Youth Criminal Justice Act*.²²³ The Manitoba Court of Appeal conducted a fresh analysis of the Crown’s application and, despite the sentencing judge’s errors, reached the same conclusion and upheld the adult sentence. While the result

²²⁰ *Ibid.*

²²¹ Jonathan Rudin & Liora Zimmerman, “The End is Not in Sight—The Over-Representation of Aboriginal Youth in Custody in Ontario 2004-2010” (2014) 60:3 Crim LQ 433 at 435 [*Rudin & Zimmerman*].

²²² *Ibid* at 444.

²²³ *Anderson*, *supra* note 132 at para 57.

remained the same for the Appellant, this case is an important reminder that to disregard *Gladue* factors on the first or second prong is a reversible error.²²⁴

3.4.2.5.2 Impact of Race and Culture Reports for Black Youth

In the context of adult sentence applications, several cases from Nova Scotia and Ontario highlight the importance of considering the unique circumstances and experiences of Black youth on both the first and second prong of the adult sentence application test. Given that many members of Canadian society, including members of the criminal justice system cannot and do not fully appreciate the lived experience of Black youth, “examining and advancing alternative narratives to mainstream accounts of the lives and experiences of racialized persons and communities is important.”²²⁵ Examples of the inclusion of such expert voices are explored below.

In *X*, Judge Derrick (now appointed to the Nova Scotia Court of Appeal) found that evidence of race and culture, particularly, the unique experience of Black Nova Scotians was relevant to the determination on the first prong of the adult sentence test of whether the Crown had rebutted the presumption of diminished moral blameworthiness.²²⁶ Judge Derrick heard expert evidence on the social factors relating to where *X* lived and the effect those social factors had on *X* in relation to the adult sentence application *X* was facing. This expert evidence was contrary to evidence that was presented in the traditional section 34 report. Ultimately, Judge Derrick favoured the expert opinion that gave better context and analysis of the role that *X*’s race and cultural

²²⁴ *Ibid* at para 55.

²²⁵ *Khoday, supra* note 217 at 579.

²²⁶ *X, supra* note 214 at para 198. Note: Although the expert evidence relied upon in *X* was not a formal IRCA report, this case was one that helped lay the foundation for formal IRCA reports that we have today.

identity played in his offending behaviour over the section 34 report's findings. As a result, the court did not impose an adult sentence on X.²²⁷

In *NW*, a 17 year old Black Nova Scotian youth shot the teenaged victim twice at close range in a pre-meditated killing. *NW* was found guilty of first degree murder after trial and the Crown sought to have him sentenced as an adult. Judge Buckle of the Nova Scotia Provincial Court heard expert evidence that shed light on the cultural context, background and systemic factors that impacted *NW*'s life and might have played a role in the offence.²²⁸ This evidence was pivotal to the court ultimately sentencing *NW* as a youth.

Following the decisions in *X* and *NW*, the burgeoning framework for presenting and considering evidence related to anti-Black racism and the evidence related to the lived experience for Black Canadians was solidified in two Ontario Superior Court decisions, *R v Jackson*, 2018 ONSC 2527²²⁹ and *R v Morris*, 2018 ONSC 51867.²³⁰ Justice Nakatsura of the Ontario Superior Court presided over each case and outlined a framework that has three parts: first, the court may take judicial notice of systemic racism; second, the court must acquire information and connect the historical and contextual elements of anti-Black racism to the circumstances of the offender; and third, treat all of the information, taken together, as a mitigating factor in the sentencing.²³¹

Evidence of the lived experiences of Black youth is vital to a fair and fulsome adult sentence hearing. In *R v MB*, 2021 ONCJ 355,²³² the court heard evidence that *MB* had come to Canada at age 13, fleeing war in his home country of Somalia. The court took into account systemic

²²⁷ *Ibid* at paras 163, 198, 248, 250.

²²⁸ *R v NW*, 2018 NSPC 14 [*NW*]. Note: Judicial authority to consider IRCA reports in the youth context flows from *YCJA* section 3(1)(c)(iv).

²²⁹

²³⁰ *R v Jackson*, 2018 ONSC 2527 [*Jackson*]; *R v Morris*, 2018 ONSC 51867 [*Morris*].

²³¹ *Jackson*, *ibid*; *Morris*, *ibid*.

²³²

racism towards Black Canadians and was given considerable information within the pre-sentence report. *MB* moved to a new country at 13 with a new culture and a new language. *MB* lived below the poverty line. The Court found that *MB* was vulnerable and ripe for recruitment into gangs by older, negative peers, a factor that ultimately weighed against the imposition of an adult sentence.²³³

In *R v TJT*, 2018 ONSC 5280,²³⁴ *TJT* faced an adult sentence application for a conviction of second degree murder. *TJT* was 15 years old at the time of the offence, his family background included intergenerational criminal involvement, he had lost 2 childhood friends who were murdered, and both of his brothers had been victims of shootings. *TJT* was not gang affiliated but was promised a gun, ammunition, cash and a car in exchange for shooting the victim in the leg. When *TJT* did so, he not only shot the victim in the leg, but also in the chest, resulting in death. A formal IRCA report was provided by defence who argued that, for the first prong of the test, the court must look beyond the facts of the offence and look at the maturity of the accused at the time of the offence and how his age, race, including his community and family background, all affect his moral blameworthiness.²³⁵ Ultimately, the court found that the Crown had not rebutted the presumption of diminished moral blameworthiness.²³⁶

In these cases, IRCA reports assisted the sentencing judges to better understand the lives of Black youth in Canada and how their lived experiences shape their moral blameworthiness—directly informing the questions raised in the first prong of the adult sentence application test. IRCA reports “operate from the presumption that a person’s race and culture are important factors

²³³ *MB*, *supra* note 170 para 27.

²³⁴ *TJT*, *supra* note 32 at para 59.

²³⁵ *Ibid.*

²³⁶ *Ibid* at para 87.

in crafting a fit sentence” and “they provide the court with necessary information about the effect of anti-Black racism on people of African descent,” explains Maria C Dugas in her article “Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders.”²³⁷

Similar to the intergenerational effects of colonization on Indigenous peoples, Dugas connects the prevalence of anti-Black racism to the enslavement and subjugation of Black people in Canada.²³⁸ It is important to highlight the reality that anti-Black racism, along with many other social factors that flow from systemic discrimination throughout Canadian history, has resulted in the over-representation of Black people in courts and in custody.²³⁹

While IRCA reports are considered in this section for their value to the first prong analysis, like *Gladue* reports, they are also relevant to the accountability and rehabilitation analysis in the second prong of the adult sentence application test.²⁴⁰

3.4.2.6 Being Raised in a Micro-Culture of Normalized Violence or Criminal Lifestyle

While the above terminology was used in *X*, the general consideration of what essentially can be described as a micro-culture of normalized violence or criminal lifestyle was a factor considered on the first prong in *X*, *NW*, and *HM*, and is relevant to the first prong of the adult sentence test.²⁴¹ While this factor was first raised in *X*, it is not unique to Black youth. For example, in *HM*, the young person spent his early years in a home where his mother was operating a brothel

²³⁷ *Dugas, supra* note 142 at 106.

²³⁸ *Ibid.*

²³⁹ *Ibid* at 107. Note: In her article, Dugas comments that the problem of the over-incarceration of Black people in Canada has been recognized by the United Nations following a visit from a working group of experts on people of African descent to Canada in 2016.

²⁴⁰ *Ibid* at 115; See e.g.: *Anderson, supra* note 132; *Ibid* at 115; *ZC, supra* note 111.

²⁴¹ *X, supra* note 214; *NW, supra* note 214; *HM, supra* note 116.

with her children living in the home. When HM was apprehended by child and family services, he was found dirty and neglected in a home with used condoms on the floor.²⁴²

3.4.2.7 Cognitive Skills and Deficits and Mental Health Considerations

While cognitive disabilities and mental health diagnosis are always relevant to the first prong of the adult sentence test, some courts have found that they are not always determinative in assessing moral blameworthiness—a finding that I would argue allows for the erasure of the presumption of diminished moral blameworthiness of young people, particularly disabled young people.

In *R v Okemow*, 2017 MBCA 59 the Manitoba Court of Appeal upheld the sentencing judge’s imposition of an adult sentence on a 14 year old boy with cognitive disabilities including FASD, ADHD and was assessed to have an IQ of below 75. The Manitoba Court of Appeal articulated 3 questions that a sentencing judge should ask themselves when assessing whether or not there is a causal link between a person’s cognitive disability or mental health and their moral blameworthiness in the commission of an offence. First, is there “cogent evidence that the offender suffers from a recognized illness or some other cognitive limitation?”; second, is there “evidence as to the nature and severity of the offender’s mental circumstances such that an informed decision can be made as to the relationship, if any, between those circumstances and the criminal conduct?”; and third, “assuming the record is adequate, the sentencing judge must decide the offender’s degree of responsibility for the offence taking into account whether, and if so, to what degree his or her mental illness or cognitive limitation played a role in the criminal conduct.”²⁴³ Ultimately, the Court of Appeal in *Okemow* states:

²⁴² *HM*, *ibid* at para 56.

²⁴³ *Okemow*, *supra* note 104 at para 73.

A reduction of moral blameworthiness for the purpose of sentencing, either for an adult or a young person, due to a recognized and properly diagnosed mental illness or other condition where the functioning of the human mind is impaired is a “fact-specific” case-by case determination as opposed to an automatic rule that the mental illness or cognitive limitation necessarily impacted the commission of the offence in question.²⁴⁴

As discussed in Chapter One, the difficulty with the approach in *Okemow* is the undue focus on evidence that *reduces* moral blameworthiness. In the context of assessing the presumption of diminished moral blameworthiness, if the offence was committed before the age of 18, the focus ought to be on what evidence exists that *increases* moral blameworthiness, as the starting point is an inherent diminished moral blameworthiness based on the age of the accused alone. That starting point of diminished moral blameworthiness by virtue of age alone is the core protection of the *YCJA* and must be respected unless the Crown can satisfy the court of a greater degree of maturity than the young person’s biological age.

3.4.2.7.1 Mental Health

The intersection between youth criminal law and mental health is complex. As discussed in their article “Mental Health in the Context of Canada’s Youth Justice System” Michele Peterson-Badali et al. identified three pertinent questions about the interplay between mental health and youth offending.²⁴⁵ First, does having difficulties with mental health increase the likelihood of justice system involvement, and if yes, is it because the system criminalizes behaviour associated with mental illness? Second, is the likelihood of developing mental health issues in adolescence the same as the risk factors that might bring a young person into trouble with the law, such as poverty, school problems and discrimination? Third, could involvement in the justice system itself worsen existing mental health conditions, or even *cause* mental health issues that

²⁴⁴ *Ibid* at para 72.

²⁴⁵ *Peterson-Badali, supra* note 114.

were not present before involvement in the justice system?²⁴⁶ Unfortunately, there is no Canadian data on these points, but American researchers have found that 90% of youths involved in the youth criminal justice system meet “minimal diagnostic criteria for at least one mental health disorder.”²⁴⁷ The same study found that rates of serious mental disorder (severe disorders that require immediate interventions) are found in 25% of the youth in the criminal justice system.²⁴⁸

The presence or absence of a psychiatric condition will be relevant for a sentencing judge presiding over an adult sentence application. Such evidence will be highly contextual and considered on a case-by-case basis but will always be relevant on the first prong of the adult sentence test.

3.4.2.7.2 Depression and Suicide Attempts

A young person’s depression and intention to commit suicide was considered in AG after he drove 160km/hr going the wrong direction and caused a head on collision. AG’s intention was to commit suicide. AG survived the collision while one of the passengers from the oncoming vehicle was killed and the other seriously injured. AG had attempted suicide 12 days before. AG’s various mental health struggles including self-harm, suicide attempts, anger and aggression were all considered in evaluating his moral blameworthiness (and also on the second prong in planning for rehabilitation and reintegration). In AG, the court concluded that the IRCS plan proposed was best suited to address the antecedents to the crime.²⁴⁹

²⁴⁶ *Ibid* at 7.

²⁴⁷ *Ibid* at 6.

²⁴⁸ *Ibid*.

²⁴⁹ AG, *supra* note 126 at paras 52-56, 74.

3.4.2.7.3 Behavioural Disorders

Behavioural disorders such as Attention Deficit and Hyperactivity Disorder (ADHD),²⁵⁰ Oppositional Defiance Disorder (ODD),²⁵¹ Conduct Disorder (CD),²⁵² have all been considered by the courts on the first prong of the adult sentence test.²⁵³ The difficulties associated with behavioural disorders will vary from youth to youth and the court must determine how each individual's diagnosis might have played a role in their offending behaviour and moral blameworthiness.

In *Justice for Young Offenders: Their Needs, Our Responses*, Clinical Psychologist Mary Vandergoot writes that, generally, young people with a diagnosis of ADHD will have difficulty sustaining attention, they may interrupt others, they may talk excessively, and act impulsively. Young people with ADHD may have impaired memory, impaired self-management, and an inability to work towards future goals. A person "suffering ADHD will have great difficulty with self-regulation and will likely need external guidance and support to function effectively."²⁵⁴

For a young person diagnosed with ODD, their behaviour will include a pattern of negative and hostile behaviour, such as angry outbursts, arguing with others, defying rules, and casting blame on others.²⁵⁵

²⁵⁰ See e.g.: *Ibid*; *TG*, *supra* note 170; *R v TFD*, 2019 ONSC 3389 [*TFD*]; *R v Hornick*, 2019 ONCJ 817 [*Hornick*]; *ZC*, *supra* note 111; *R v SWP*, 2018 BCPC 71 [*SWP*]; *SRM*, *supra* note 194; *HM*, *supra* note 116; *TJH and ADWC*, *supra* note 193 (both young people had ADHD); *Henderson*, *supra* note 184; *R v IK*, 2023 SKKB 56 [*IK*].

²⁵¹ See e.g.: *TG*, *ibid.*; *Hornick*, *ibid.*; *HM*, *ibid.*

²⁵² See e.g.: *TFD*, *supra* note 250; *Hornick*, *ibid.*; *R v WM*, 2019 SKPC 50 [*WM*]; *NW*, *supra* note 214.

²⁵³ See e.g.: *Hornick*, *ibid.* Note: Hornick had all three: ADHD, ODD and CD.

²⁵⁴ Vandergoot, *supra* note 34 at 70.

²⁵⁵ *Ibid.*

For a young person a diagnosis of CD, they may present with anti-social behaviour including “aggression towards animals or people, destruction of property, and serious violations of rules.”²⁵⁶

Less common disorders recognized within the body of case law for adult sentence applications includes narcissistic traits,²⁵⁷ anti-social traits and manipulative tendencies.²⁵⁸

While evidence of the presence of a behavioural disorder will likely have a major impact on the first prong of the adult sentence test, such diagnoses are also relevant on the second prong as behavioural disorders, unless properly treated and/or managed, *may* present a barrier to a young person’s rehabilitation. However, such barriers must be addressed with caution so as not to unjustly penalize a young person for the presence of a medical disorder.

3.4.2.7.4 Fetal Alcohol Spectrum Disorder

The Canadian FASD Research Network encourages the use of the following paragraph as a standard definition to be used consistently by professionals when discussing FASD, and so will be reproduced here in full:

Fetal Alcohol Spectrum Disorder (FASD) is a diagnostic term used to describe impacts on the brain and body of individuals prenatally exposed to alcohol. FASD is a lifelong disability. Individuals with FASD will experience some degree of challenges in their daily living, and need support with motor skills, physical health, learning, memory, attention, communication, emotional regulation, and social skills to reach their full potential. Each individual with FASD is unique and has areas of both strengths and challenges.²⁵⁹

²⁵⁶ *Ibid*, at 70-71.

²⁵⁷ *AM*, *supra* note 170.

²⁵⁸ *Boucstis*, *supra* note 202.

²⁵⁹ Kelly Harding, Katherine Flanigan & Audrey McFarlane, “Policy Action Paper: Toward a Standard Definition of Fetal Alcohol Spectrum Disorder in Canada” (July 2019) online: <canfasd.ca/wp-content/uploads/2019/08/Toward-a-Standard-Definition-of-FASD-Final.pdf> at page 3 [*Harding*].

FASD is a significant public health issue in Canada and can lead to permanent learning disabilities, emotional and sensory regulation challenges, and other health concerns. FASD is the most common known cause of developmental disability in Canada.²⁶⁰ Studies estimate that 4% of individuals in Canada have FASD, which amounts to over 1.4 million people.²⁶¹

The diagnostic process for FASD is complex and expensive.²⁶² There are significant barriers to receiving a diagnosis of FASD, which then affects an accused person's ability to raise FASD as a mitigating factor on sentencing as courts have required a concrete diagnosis before the deficits that may be associated with FASD may be considered in sentencing.²⁶³

According to the Canada FASD Research Network, "A diagnosis of FASD is made only when there is evidence of pervasive brain dysfunction, which is defined by severe impairment in three or more of the following neurodevelopmental domains: motor skills; neuroanatomy/neurophysiology; cognition; language; academic achievement; memory; attention; executive

²⁶⁰ *Ibid.*

²⁶¹ Canada FASD Research Network, "Basic Information", online: *Canada FASD Research Network* <canfasd.ca/topics/basic-information/#:~:text=Current%20studies%20suggest%20that%20closer,represent%20the%20true%20prevalence%20rates>.

²⁶² Jocelynn L Cook et al. "Fetal alcohol spectrum disorder: a guideline for diagnosis across the lifespan" (2015) 188:3 Canadian Medical Association Journal 191 at page 196 [Cook]. Note: The 2015 Guidelines updated the use of term "FASD" as a diagnosis in and of itself, with a statement about whether the person has or does not have the "sentinel facial features" of FASD. FASD was originally a broad term that covered more specific diagnoses: Fetal Alcohol Syndrome (FAS), partial Fetal Alcohol Syndrome (pFAS), and Alcohol-Related Neurodevelopmental Disorder (ARND). In Canada we now use "FASD" as the general term to cover anyone who meets criteria for diagnosis.

²⁶³ *R v Harris*, 2002 BCCA 152 at para 18. See Also: Simon N Verdun Jones & Amanda Butler, "Sentencing Neurocognitively Impaired Offenders in Canada" (2013) 55:4 Can J Corr 495; Kent Roach & Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 42 UBC L Rev 1.

function, including impulse control and hyperactivity; affect regulation; and adaptive behaviour, social skills or social communication.”²⁶⁴

Individuals with FASD may experience difficulties with learning and remembering information, following or participating in conversation, reading and writing, understanding abstract concepts, inability to see another person’s perspective, inability to read social cues, sensitivity to stimuli, difficulties with impulsivity and distractibility, poor judgement, being easily overwhelmed, difficulty shifting from one thing to another, resistant to change, slow and inconsistent cognitive and auditory processing, decreased mental stamina, and an inability to predict outcomes of their own actions or the actions of others.²⁶⁵

Individuals with FASD may be in a state of “dysmaturity” as a result of problems with expressive language and language comprehension, social and self-care skills, and awareness and regulation of emotions.”²⁶⁶

Furthermore, individuals with FASD are more likely to be negatively impacted by imprisonment as they may struggle to fully understand the rules of the institution which may lead to discipline and solitary confinement. They are also at greater risk of experiencing physical, emotional and sexual abuse in custody.²⁶⁷

²⁶⁴ Cook, *supra* note 262 at 196. Note: As part of the new 2015 guidelines, language related to the effect domains was also refined: “Hard and soft neurological signs including sensory motor” was renamed “motor skills” and redefined, “Brain structure” was renamed “neuroanatomy/neurophysiology” and redefined, “Communication” was renamed “language”, “Attention deficit/hyperactivity” was renamed “Attention” and redefined, “Affect regulation” was added, “Executive function” was expanded and clarified.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Diane K Fast & Julianne Paley Blair, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System” (2009) 15:3 Developmental Disabilities Research Rev 250 at 256.

The individual difficulties stemming from FASD may inform the courts on the question of moral blameworthiness.²⁶⁸ In *HM*, the court found that HM's ability to perceive and understand threats against him was impaired as a result of his challenges related to FASD. Ultimately, the combination of his personal circumstances, including impairments to executive functioning and his limited communication skills (that may have otherwise allowed him to verbally mediate through the encounter) as a result of FASD did "much to explain his impulsive decision to pull a knife and stab someone who might have been perceived as a threat or insulting".²⁶⁹

While the sentencing of young people with FASD has presented a challenge for the courts as to how to best achieve the purposes of the *YCJA* and protect the public,²⁷⁰ courts must not use a diagnosis of FASD as a reason to blend the analysis within the adult sentence application test. In particular, Courts must not use evidence of the potentially more difficult path towards rehabilitation for a young person with FASD to infiltrate the presumption of diminished moral blameworthiness analysis.

3.4.2.8 Substance Use

Many youths come before the court with active addictions or a history of drug and alcohol abuse. These substances do damage to the young person's social and physiological development. As well as having a profound negative impact on their own lives, the use of substance is often an insidious feature in the lives of their extended families and friends. How issues related to substance use are treated by the courts will vary, but may, in certain circumstances, be relevant on both the first and second prong.

²⁶⁸ See e.g.: *HM*, *supra* note 116; *Henderson*, *supra* note 201; *TJH and ADWC*, *supra* note 193. Note: ADWC had an FASD diagnosis.

²⁶⁹ *HM*, *ibid* at para 106.

²⁷⁰ See also: David Milward, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47:3 UBC L Rev 1025, Article 6.

For example, in *R v TFD*, 2019 ONSC 3389, the young person pleaded guilty to second degree murder following a shooting that took place when TFD was heavily intoxicated and high on cocaine. TFD started using drugs in grade 6 and had been drinking and doing drugs on a daily basis prior to the offence. He was diagnosed with substance use disorder which was considered on the first prong of the adult sentence application test, as well as on the second prong as one of the main areas of concern to be addressed in his IRCS treatment plan.²⁷¹

3.4.2.8.1 Intergenerational Substance Use

Intergenerational substance use has a profound and negative impact on young people. Exposure to and normalization of substance use at a young age is a factor on the first prong of the adult sentence test as it gives insight into the stability of the environment in which the young person was raised.

In *R v JM*, 2020 MBPC 13, Judge Pullan considered the case of 15 year old JM who pleaded guilty to second degree murder following the prolonged and vicious stomping death of the 73 year old member of the Winnipeg community. Intergenerational substance use was highlighted in the decision as part of JM's background. JM was addicted to alcohol and prescription drugs and the consumption of these drugs was normalized in JM's world. JM's father abused alcohol. JM's step-father was addicted to methamphetamine, alcohol and Xanax bars—even overdosing on Xanax and ending up in a four day coma when JM was 11 years old. JM's mother was addicted to opiate pain medications following an injury she sustained in an accident when JM was 7 years old. The use of substances was entirely normalized among JM's kin and he too developed addictions issues, overdosing on Xanax and spending three days in a coma at the age of 14.²⁷² While JM was

²⁷¹ *TFD*, *supra* note 250 at para 43.

²⁷² *R v JM*, 2020 MBPC 13 at paras 73-74 [*JM*].

ultimately sentenced as an adult, the evidence related to intergenerational substance use was met with compassion, and given significant and appropriate consideration.

Similarly, in *HM*, it was noted that HM's substance use issues were directly tied to the influence of his biological family. His brother was the first to give him alcohol and he would share methamphetamine with his mother in an attempt to form a bond between them.²⁷³

In certain circumstances, substance use at the time of the offence has been considered by the court but should be considered on the first prong only in so far as it gives insight into a young person's moral blameworthiness.²⁷⁴

3.4.2.9 Criminal Record and History of Violence

A prior criminal record or history of violence must be carefully considered on the first prong as it is relevant only in so far as it assists the court in assessing moral blameworthiness and maturity. Furthermore, a criminal record must be considered contextually, as it is a factor that may 'cut both ways' in certain circumstances. A prior criminal record should be considered with caution as young people may not always be in a position to profit from their past behaviour, which is commensurate with the lesser maturity of adolescence. For example, in *HM*, Judge Devine commented on HM's inability to profit from lessons and consequences stating, "If anything, [HM's criminal record] may point to his limited ability up to this point, of learning from his past mistakes, which is a significant characteristic of impaired intellectual functioning."²⁷⁵

3.4.2.10 Gang Involvement

Courts have, on numerous occasions, considered gang membership as a factor on the first and second prong of the adult sentence application test. On the first prong, this factor holds

²⁷³ *HM*, *supra* note 116, at para 62.

²⁷⁴ *Ibid* at para 106.

²⁷⁵ *Ibid* at para 77.

particular weight when the offence was motivated by or conducted for the benefit of a criminal organization and shows critical thinking to achieve that end.

However, the presence of gang membership or gang affiliation may also lead to the conclusion that the accused is not operating with an adult-like mindset. This is seen in cases where the accused has been exposed to gang culture at a young age, has been socialized in such a way that normalizes gang activity, and where the young person's membership in a gang is marked less by maturity and more by limited opportunities, being vulnerable to gang recruitment, living in poverty and being a product of their surrounding circumstances. This is particularly true in cases where the accused is vulnerable as a result of disability, where they are disconnected from their family of origin, have limited educational opportunities or positive ways to spend their time, are experiencing poverty and hunger, or if they are easily led astray by criminally minded peers. This issue was directly considered in *R v BR*, 2016 MBPC 74, where Judge Corrin commented:

Some social science researchers have concluded that street gangs are a kind of family, that they often perform a family-like role for members, in particular when the youths are vulnerably in need of emotional refuge, material support, physical protection and social belonging.²⁷⁶

Similarly, in *R v HJM*, 2019 MBPC 12, the sentencing judge commented that it was not acceptable, but not surprising that the 15 year old accused was gang involved. The judge found that HJM's gravitation towards gangs was the result of dysfunction in his own family.²⁷⁷

Other factors in determining if a young person's gang involvement is a marker of advanced maturity is whether they are recruiting others into criminal activities or into criminal organizations,

²⁷⁶ *R v BR*, 2016 MBPC 74 at para 23 [*BR*].

²⁷⁷ *HJR*, *supra* note 112 at para 20. Note: HJR was the youngest in the group of co-accused and was charged as a party to an aggravated assault in a break and enter that ended in a shooting. It was unclear if HJR went inside or remained outside as lookout.

engaging in criminal behaviour to benefit a gang, or if they are exercising control over others as a “ringleader.”²⁷⁸

3.4.2.11 Being a Follower or Easily Manipulated

Being a follower or easily manipulated is a factor courts have considered on the first prong of the adult sentence test. In *R v TJT*, 2018 ONSC 5280, 15 year old TJT carried out a shooting after being promised cash, a gun and a car. The plan was found to be unsophisticated, that TJT was not the mastermind behind the murder and that he was manipulated by others to carry out the shooting. The court considered this to be a display of “immaturity, vulnerability, short-sightedness and a lack of sophistication or appreciation for the consequences of his actions.”²⁷⁹

3.4.2.12 Street Smarts

Courts should be cautious not to equate maturity with what may colloquially be referred to as “street smarts” as such so-called intelligence may not reflect true maturity and may speak only to base survival instincts of youth who have slipped between the cracks.²⁸⁰ As Jamie Campbell noted, “street smarts and maturity are not the same thing.”²⁸¹

However in *Okemow*, the Manitoba Court of Appeal relied on a probation officers description of Okemow as a “very street-wise young man”. Such pithy labels like “street smart” should be closely scrutinized, especially when the young person has formally diagnosed markers of intellectual disability.²⁸²

²⁷⁸ See e.g.: *Boucstis*, *supra* note 202. Note: courts have also considered criminal activity within the context of a negative peer group that falls short of being considered a criminal organization.

²⁷⁹ *TJT*, *supra* note 32 at para 87.

²⁸⁰ *Campbell*, *supra* note 32.

²⁸¹ *Ibid* at page 6. See e.g.: *R v Skeete*, 2013 NSPC 3 at para 119 [*Skeete*]; *HM*, *supra* note 116 at paras 74 and 76, where judge rejected argument that HM was “street smart”.

²⁸² *Okemow*, *supra* note 104 at para 20.

3.4.2.13 Evidence Related to the Commission of the Offence

Consideration of the facts of the offence on the first prong is the most controversial aspect of the two-pronged analysis and the point at which courts run the most risk of blending the moral blameworthiness and accountability prongs of the adult sentence test. Evidence related to the commission of the offence should be considered on the first prong with extreme caution and only in so far as it informs the analysis of the young person's moral blameworthiness. What courts have focused on when looking to the facts of the offence when assessing the first prong has been indications that the young person's actions show critical thinking, sophisticated planning and/or execution of the crime, measured attempts to cover their tracks, but only to the extent that they show the presence or absence of critical, adult-like, thinking and judgement.²⁸³

Furthermore, the execution of an otherwise grave and serious offence may show markers of juvenile thinking processes, such as impulsivity, invincibility, and poor judgement. In *R v JFR*, 2016 ABCA 340 the Alberta Court of Appeal commented that “invincibility, bravado and poor judgement are hallmarks of immaturity.”²⁸⁴

The court may also consider efforts to divert suspicion on to another person, particularly when those efforts show critical thinking. In *R v AKB*, 2023 MBKB 1,²⁸⁵ following the beating death of his mother as she slept in their home, AKB tried to divert suspicion on to an individual with whom his mother worked when he was interviewed by police.²⁸⁶

It is important to note that the average youth is able to plan, execute, and conceal criminal activity, but will often do so in a way that does not show adult sophistication. Evidence to support

²⁸³ *Anderson*, *supra* note 132 at para 51; *AKB*, *supra* note 285 at para 13.

²⁸⁴ *R v JFR*, 2016 ABCA 340 at para 27 [*JFR*].

²⁸⁵ *AKB*, *supra* note 285.

²⁸⁶ *Ibid* at para 17.

the imposition of an adult sentence must show a degree of adult-like critical thinking beyond the capacities of an adolescent.

3.4.3 Conclusion on the First Prong of the Adult Sentence Application Test

Courts and court participants must identify all possible facets of a young person's life to fully gauge their moral blameworthiness at the time of the offence. Evaluating a young person's circumstances and the circumstances of the offence must be done in a way that is directed towards the distinct underlying question of the first prong: in what way does the evidence presented to the court speak to the young person's maturity and moral blameworthiness?

While it is well-advised for defence counsel to present evidence of a young person's intellectual functioning, mental health diagnoses, and instances of adverse childhood experiences that affect and lessen their brain development, it is not proper in law to require the defence to satisfy the court of a diminished capacity *below* their client's actual age, as their *age alone* is the basis for the presumption. Requiring defence to prove a *further* reduced moral blameworthiness is a *de facto* shift of the onus and a return to the impugned presumptive offence regime of the past. All youths, even those who have committed serious offences, are to be sentenced under the YCJA's sentencing provisions, unless the Crown can satisfy the court of a maturity *beyond their chronological age*, by producing evidence sufficient to rebut the presumption of diminished moral blameworthiness.

3.4.3 Considerations on the Second Prong: Accountability, Rehabilitation and Reintegration

3.5.1 Introduction

Given the focus of this thesis is primarily on the operational elements of the first prong of the adult sentence application test and the underlying philosophy of diminished moral

blameworthiness of young people, the discussion of the second prong of the test will be relatively brief.

If the Crown successfully rebuts the presumption of diminished moral blameworthiness, the Crown must then satisfy the court that “a youth sentence imposed in accordance with the purposes and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.”²⁸⁷

If the Crown cannot satisfy the court on the first prong, the application fails without consideration of the second part of the test. As was made clear by the Manitoba Court of Appeal in *Okemow*, “the Crown’s application cannot be ‘saved’ by the fact that a youth sentence may not seemingly hold a young person accountable for a very serious offence.”²⁸⁸

Before addressing the common factors considered on the second prong, it is important to note that there is an unresolved debate between two linguistic approaches to addressing a young person’s potential for rehabilitation. In one approach, a sentence must be of sufficient length to ‘promote’ rehabilitation.²⁸⁹ The second approach, a sentence must be of a sufficient length to give ‘reasonable assurance’ of rehabilitation.²⁹⁰ While resolving this debate is beyond the scope of this thesis, what both approaches agree upon is that there need not be a ‘guarantee’ of rehabilitation nor that the sentence must eliminate future risk entirely.²⁹¹ Ultimately, without further guidance from the SCC, the concepts ought to be interpreted in a way where they can be used

²⁸⁷ *YCJA*, *supra* note 2 s 72(1)(b).

²⁸⁸ *Okemow*, *supra* note 104 at para 54.

²⁸⁹ *AO*, *supra* note 108; *R v MG*, 2017 ONCJ 565 at para 24 [*MG*].

²⁹⁰ *R v Ferriman*, 2007 ONCA 710 [*Ferriman*]; *R v ZTS*, 2012 MBCA 90 [*ZTS*].

²⁹¹ *MG*, *supra* note 169 at para 24.

interchangeably—one approach must not lead to a harsher standard than the other, which appears to be at the heart of the “reassure” versus “promote” rehabilitation debate.²⁹²

3.5.2 Factors Considered by Trial Level Courts in Assessing the Second Prong

The remainder of this Chapter will briefly address factors considered by the courts as they assess the second prong of the adult sentence test.

3.5.3.1 Sentences Available Under Youth and Adult Systems

The ultimate decision a youth court judge must make on the second prong is entirely informed by the length and nature of sentencing options under the *YCJA*, including the availability of IRCS, which will be discussed later in this chapter. Courts and court participants must accurately assess the youth maximum sentence available under the *YCJA*, as well as identify any minimum sentences that would bind the court should the youth be sentenced as an adult. If an adult would generally receive less time than what is available through a youth maximum sentence, prong two will almost certainly be unsuccessful.²⁹³

3.5.2.2 Time Spent in Custody Before Sentencing

Section 38(3)(d) of the *YCJA* directs the court to “take into account the time spent in detention by the young person as a result of the offence.”²⁹⁴ The *YCJA* permits the court to both

²⁹² Note: This debate was acknowledged in obiter in *RM*, *supra* note 39 at para 72.

²⁹³ Note: There have been instances where the Crown has pursued an adult sentence where the ultimate differences between the available youth and the adult sentence they seek is negligible. There are even instances where the Crown has suggested sentences that are of shorter length than the maximum allowable youth sentence, even though the test requires the Crown to satisfy the court that the length of sentence available under the *YCJA* would be insufficient to hold the young person accountable. See e.g.: *R v NA aka NTS*, 2018 MBQB 93 [*NA aka NTS*].

²⁹⁴ *YCJA*, *supra* note 2 s 38(3)(d) Note: Unlike the *Criminal Code* provisions for calculating and attributing time in custody, the *YCJA* does not involve a rigid or mechanical calculation. The *YCJA*’s flexible approach to time in custody often becomes a major factor in the second prong test of an adult sentence application as it allows that judge to consider sentences that are effectively longer than the available youth maximum sentence, once time in custody is considered. *Criminal Code*, RSC 1985, c C-46.

“consider” notionally—to effectively give the young person credit for time spent in detention—while also giving that time in custody a zero count on paper. The court may choose to not deduct any time in custody from the youth maximum sentence, which generally works to a young person’s advantage in the assessment of the second prong of the adult sentence application test.²⁹⁵

For example, in *HAQ*, the Crown sought a 6 to 7 year adult sentence. HAQ had spent twenty months in custody awaiting disposition and given his very good behaviour while awaiting sentencing was eligible to have that time credited at 2.5 years. The youth maximum for his offences were 3 years and so cumulatively the court had 5.5 years available to it under the *YCJA*. While the Judge agreed that the 6 to 7 year assessment was within a reasonable range for the offences, he also cited case law that suggested that a 5 to 6 year range would also suffice. While the court held that the presumption of diminished moral blameworthiness had been rebutted, it ultimately found that the Crown failed to satisfy the court that the sentence available pursuant to the *YCJA* was of insufficient length to hold HAQ accountable.²⁹⁶

Similarly, in *R v NA aka NTS*, 2018 MBQB 93, the Crown sought 5 years custody or, in the alternative, 2 years custody less a day followed by probation.²⁹⁷ The maximum available under the *YCJA* was three years going forward.²⁹⁸ The three year maximum available above and beyond the time NA had already spent in custody awaiting sentencing brought the available sentence very close to the sentencing range the Crown had proposed if NA was to be sentenced as an adult. Interestingly, the Crown’s alternative position would have seen the accused in custody for *less* time than was available for a youth sentence. Both the primary and alternative position advanced

²⁹⁵ *MB*, *supra* note 170 at para 10.

²⁹⁶ *HAQ*, *supra* note 192 at paras 2, 49, 51, 62-68 and 70.

²⁹⁷ *NA aka NTS*, *supra* note 293.

²⁹⁸ Note: The *YCJA* sentence for manslaughter does not have an automatic early release and all three available years can be served in custody.

by the Crown undermined their assertion that they had satisfied prong two of the adult sentence test.²⁹⁹

Even more concerning, in *AG*, the Crown sought an adult sentence “in name only” as their sentencing recommendation was shorter than what was available under the *YCJA*. The youth court judge admonished the Crown for requesting an adult sentence in such circumstances, calling it out of line with the purpose of the second prong of the adult sentence test.³⁰⁰

3.5.2.3 Availability and Operation of IRCS sentence

IRCS is a therapeutic sentencing option available to young persons who are suffering from “mental illness or disorder, psychological disorder, or an emotional disturbance, who have been convicted of a serious violent offence, and for whom a plan of treatment is likely to reduce the risk of committing a serious violent offence.”³⁰¹ Courts have consistently taken a broad view of what disorders or disturbances are eligible for IRCS funding.³⁰² IRCS sentences are funded through both the federal and provincial government with the goal of preventing future criminal offending through intensive and targeted interventions.³⁰³

IRCS treatment planning is individually tailored and involves the recruitment of professionals from across disciplines including, but not limited to, social workers, occupational therapists, action therapists, art or music therapists, tutors, and educational assistants. IRCS also may provide funding for pro-social recreational activities specifically intended to engage the youth with positive community connections. To qualify for an IRCS order, the young person must state their willingness to fully engage in IRCS programming in advance of the provincial director

²⁹⁹ *Ibid* at para 33.

³⁰⁰ See e.g.: *AG*, *supra* note 126 at paras 86-87. Note: *AG* was given an IRCS order.

³⁰¹ *YCJA*, *supra* note 2 s 42(7)(l); *Peterson-Badali*, *supra* note 114 at 9.

³⁰² *Bala & Anand*, *supra* note 47 at 654.

³⁰³ *JM*, *supra* note 272 at para 116.

approving the availability of the order for the judge's consideration.³⁰⁴ Once an IRCS sentence is ordered and the duration of the sentence is determined by the Court, the IRCS coordination team adjusts the plan to take into account the length of the youths time with the program.³⁰⁵

IRCS is a voluntary program. Should a youth, after sentencing, decide that they no longer wish to participate in the IRCS programming, they are brought back before the court to have their sentence converted to the standard youth custody and community supervision order.³⁰⁶ Even if the IRCS sentence was a mitigating factor during an adult sentence application, if a youth subsequently abandons the IRCS programming, it is not open to the Crown to have the adult sentence application revisited.

As will be shown in Chapter Four of this thesis, IRCS orders have been considered in numerous cases across Canada as an alternative to an adult sentence. In such circumstances, IRCS is advanced by the young person through counsel, to counter a Crown application for adult sentence on the second prong.³⁰⁷

Defence counsel must know and explore the potential of IRCS sentences *long before* the adult sentence hearing. For example, in *AM*, defence counsel suggested an IRCS sentence without

³⁰⁴ *NW*, *supra* note 214 at para 165; See also: *R v TPD*, 2009 NSSC 332 [*TPD*] IRCS sentences are only available with the prior approval of the attorney general—although, this provision was not strictly followed in *TPD*. In *TPD* the youth court judge found that the director's decision to deny the preparation of an IRCS plan was based on cynical and uninformed assumptions about the accused, and that the decision was arbitrary and unreasonable. The court considered IRCS as an available sentence, despite the director's initial decision.

³⁰⁵ *NW*, *ibid* at para 165.

³⁰⁶ *Ibid*.

³⁰⁷ See e.g.: *Ibid*; *HM*, *supra* note 116; *TFD*, *supra* note 250. Note: The judge in *TFD* gave significant weight to the value of the IRCS program under second prong, outlining the specialized treatment plan available at paras 36, 43, 71-71.

laying the requisite foundation for the judge to consider such an order.³⁰⁸ As such, the court ruled that it was unable to consider IRCS as a viable sentencing option.

It is also important for counsel to be aware of the timing of the application in relation to the young person's age at sentencing, as this may effect the long-term viability of IRCS. If the sentencing hearing is happening after the young person turns 18, in certain circumstances there *may* not be IRCS programming available if and when a young person is moved to an adult institution.³⁰⁹ Questions around the long-term viability of IRCS programming, should a young person move to an adult facility, should be answered prior to the hearing or within the adult sentence application hearing itself through testimony from local IRCS coordinators.

3.5.2.4 The Gravity and Nature of the Violence Used in the Commission of the Offence

Given that all adult sentence applications likely involve violence or a threat of violence, courts must consider the gravity and nature of the violence used in the commission of the offence when assessing the second prong.

For instance, courts have considered evidence of the use of violence for violence's sake. In *NW*, and in *TJH and ADWC*, the young people each stated that their motivation was to “catch a body”—a slang term for committing murder for the sheer experience or for clout among peers, often through a random or unprovoked attack.³¹⁰ In *TJH and ADWC*, the two young people went

³⁰⁸ *AM*, *supra* note 170 at paras 193-196. Note: *YCJA* section 42(7) requires that a young person be assessed by the provincial director in order to determine eligibility for IRCS and develop a treatment plan to present at sentencing. See Also: *R v MJM*, 2016 MBQB 36 at para 32 and 49 [*MJM*], wherein defence counsel arrived on the day of the adult sentence application seeking an adjournment for a IRCS report to be prepared. Given late request, the adjournment was denied and the hearing proceeded without consideration of IRCS.

³⁰⁹ See e.g.: *R v Owusu*, 2021 ONCA 417 at paras 17 to 24 [*Owusu*].

³¹⁰ *NW*, *supra* note 214 at para 44.

on a late-night shooting spree on Canada Day in and around Winnipeg’s city centre, with no apparent motivation other than to commit violence, scare people, and to “catch some bodies”.³¹¹

Courts have also considered instances where the offence involved gratuitous or unnecessary violence. In *WM*, the young person pleaded guilty to manslaughter in the death of a man who had went to great lengths to assist MW through his adolescent years. The killing was profit motivated as MW intended to carry out a sophisticated plan to rob the deceased of a \$60,000 watch. The degree of violence used in the course of the beating death was significant, referred to by the sentencing judge as “an orgy of violence and blood”.³¹² This was a significant aggravating factor on the second prong.

Furthermore, courts have also considered whether the offences were part of a spree of other violent offences when considering the accountability aspect of the second prong of the adult sentence test.³¹³

Courts have also considered the use of violence for the benefit of criminal organization or for monetary gain. In *R v Bouctsis*, the young person engaged in a sophisticated plan to lure the deceased to a convenience store for the purposes of a drug transaction, with the plan of robbing the individual instead of carrying out the exchange. As part of the plan, Bouctsis recruited others to assist in the robbery, and during the course of the interaction, Bouctsis shot the deceased point blank with a 9mm handgun. The court heard evidence of Bouctsis’s dealings with buying and selling weapons and drugs in the years leading up to the murder.³¹⁴ While the court did not go so

³¹¹ *TJH and ADWC*, *supra* note 193 at para 5.

³¹² *R v MW*, 2019 SKPC 50 at paras 49 and 54 [*MW SKPC*].

³¹³ See e.g.: *TJH and ADWC*, *supra* note 193. Note: Involved a shooting spree over 24 hour period; See e.g.: *RDF SKPC*, *supra* note 170, which involved a school shooting in Northern Saskatchewan. See e.g.: *R v RD*, 2019 ONSC 4468 [*RD*]. RD pleaded guilty to multiple sophisticated gunpoint jewelry store robberies with significant injuries.

³¹⁴ *Bouctsis*, *supra* note 202 at paras 46-55.

far as to conclude Bouctsis was a gang member, they noted his close connections to a criminal sub-culture.³¹⁵ Bouctsis was ultimately sentenced as an adult.

Other factors considered relating to the way in which the offence was carried out have included whether the offence involved unnecessary humiliation or degradation of the victim,³¹⁶ whether there was a series of offences where violence was used to finance substance abuse or obtain substances,³¹⁷ whether the offending behaviour repeatedly targeted the same victim,³¹⁸ whether weapons were used in the commission of the offence,³¹⁹ and whether there was an escalation in violence over the course of the offending behaviour.³²⁰

3.5.2.5 Deliberate Risk-Taking

Deliberate risk-taking is a factor in the accountability analysis. The young person's intellectual sophistication factors into the degree to which the risk a young person has taken in the course of their offending behaviour can be said to be deliberate or intentional. However, in *HM*, Judge Devine made an astute comment on the degree to which courts can truly consider risk-taking as a deliberate act when a young person's cognitive deficits and diagnosis may prevent them from being capable of properly appreciating the risks associated with their actions.³²¹

3.5.2.6 Remorse

Courts have considered expressions of remorse on the second prong of the adult sentence test to assess prospects for rehabilitation. In *HM*, despite extreme cognitive impairments (*HM*'s

³¹⁵ *Ibid* at para 112.

³¹⁶ See e.g.: *SRM*, *supra* note 194.

³¹⁷ See e.g.: *JM*, *supra* note 272.

³¹⁸ See e.g.: *WM*, *supra* note 252. Note: Threats of violence had been made to the same victim before the murder.

³¹⁹ See e.g.: *McClements*, *supra* note 105; *Bouctsis*, *supra* note 202.

³²⁰ See e.g.: *RD*, *supra* note 313.

³²¹ *HM*, *supra* note 116 at para 97.

IQ may have been as low as 40) HM used a feelings chart to work through and identify how his actions would have made the family of the deceased feel fear, anger, sadness, concern, confusion, disappointment, discouragement, hurt, loneliness, alarm, shock and stress.³²²

Unlike HM's ability to express remorse to the best of his abilities, in HAQ, the Court found it more difficult to truly assess HAQ's remorse. HAQ had a significant criminal record and had been sentenced by Justice Ghosh on two previous occasions. On the third occasion—the adult sentence application—Justice Ghosh noted that HAQ had previously expressed remorse and stated a desire to change with no results. Justice Ghosh noted that HAQ's current expressions of remorse and insight rang “somewhat hollow” at that late stage in his criminal career.³²³

Expressions of remorse, or lack of remorse, are highly contextual. In certain circumstances it may be unrealistic to expect expressions of remorse. For example, in the case of SRM, where one of her offences was carried out against an individual who is said to have sexually assaulted her, it would be unrealistic to expect an expression of remorse from a teen girl in those circumstances, particularly one with deficits resulting from FASD.³²⁴

3.5.2.7 Guilty Plea

A guilty plea is a mitigating factor that speaks to both accountability and rehabilitation. The guilty plea offered by TJH in *TJH and ADWC*, was a factor that set him apart from his co-

³²² *HM*, *supra* note 116 at para 11 and 127. Note: While he was awaiting sentencing, HM also stated “I’m glad I killed the guy, I can go to adult.” The defence advised that this statement was made out of frustration and was an example of HM's difficulties as a result of his cognitive and communicative impairments. Ultimately, the court found that this statement was not consistent with his ongoing expressions of remorse. HM's remorse was considered to be consistent and genuine and was a factor weighed on the second prong of the adult sentence test.

³²³ *HAQ*, *supra* note 192 at para 44. Note: The absence of remorse cannot be considered an aggravating factor, but instead only as an absence of mitigation that would be present with an expression of remorse. See e.g.: *R v CM*, 2018 ABCA 214 [CA ABCA].

³²⁴ *SRM*, *supra* note 194.

accused. While the guilty plea was not the sole determinative factor for TJH's ultimate youth sentence it was a mitigating factor considered by the court.³²⁵ Ultimately, TJH was sentenced as a youth, and ADWC (who did not plead guilty) was sentenced as an adult.

3.5.2.8 Institutional Behaviour and the Use of Institutional Records

A young person's behaviour in pre-sentence custody, both positive and negative, are relevant to the second prong of the adult sentence test as it may speak to the young person's prospects for rehabilitation and reintegration. However, courts have been properly cautious with the admission of untested institutional records wholesale, as the Crown has the onus to prove aggravating factors in support of their adult sentence application.³²⁶

Whether or not the sentencing judge was entitled to rely on an young person's jail misconduct records was one of the grounds for appeal in *R v IM*, 2023 ONCA 378.³²⁷ While not overturning the adult sentence, the ONCA agreed with the appellant's submission that on their own, the misconduct reports "did not prove the occurrence of the underlying conduct beyond a reasonable doubt" and could not be relied upon as an aggravating factor. However, the Court of Appeal also held that the judge was entitled to use the records to find that the young person had "repeatedly contravened the rules and regulations of the institution" which properly raised concerns about the question of rehabilitation.³²⁸ The admission of IM's misconduct reports will be

³²⁵ *TJH and ADWC*, *supra* note 193.

³²⁶ *R v Gardiner*, [1982] 2 SCR 368.

³²⁷ *IM*, *supra* note 10.

³²⁸ *Ibid* at para 61-63. Note: Similarly, in *ZC*, *supra* note 111 at para 103, the institutional running records were introduced by consent, despite the fact that some of the impugned behaviour within was set for trial. The sentencing judge concluded that while those records were admitted into evidence by consent, there was "no concession to their accuracy upon their admission" and that "no further evidence was offered as to the accuracy of those record" and that "no actual evidence of the alleged facts was offered at the sentencing hearing."

considered by the SCC in the near future, as the Crown's burden of proof for aggravating factors appears to be an issue on appeal for both *IM* and *SB*.

3.5.2.9 Accumulating New Charges While Awaiting Sentencing

Courts have considered new allegations of criminal wrong-doing that have arisen while a young person is awaiting sentencing on the second prong of the adult sentence application test, both in an out of custody.

In one extreme case, *Boucstis*, the young person accumulated a number of very serious allegations while in pre-sentence custody, including threatening witnesses to the offence, attempting to bribe institution staff to gather information about his case, and attempting to bring drugs into the institution where he was being held among other misdeeds.³²⁹

Behaviour in the community after an offence is also relevant when looking at the second prong of the adult sentence test. In *RDM*, the accused was 46 years old when he was convicted of an historical sexual assault. RDM had since amassed an extensive adult criminal record. The court put considerable weight on the subsequent record on the second prong of the section 72 test.³³⁰

3.5.2.10 Evidence of Rehabilitation While Awaiting Sentencing

Just as negative behaviour is a factor on the second prong, so is positive progress. Following through with schooling, medical treatment, and counselling while awaiting sentencing has been considered on numerous occasions when weighing a young person's potential for rehabilitation.³³¹

³²⁹ *Boucstis*, *supra* note 202 at para 107-108 and 110. See also: *HEJEB*, *supra* note 195 where the young person attempted to escape custody in a violent group attack on a guard while awaiting trial, a factor which was considered for his prospects of rehabilitation.

³³⁰ *R v RDM*, 2019 ONSC 3007, at para 15 and 24 [*RDM*].

³³¹ *AG*, *supra* note 126; See also: *HAQ*, *supra* note 192 at para 28 Justice Ghosh credited the progress the HAQ made in custody, noting that the young person took advantage of all available programming and completed his grade 12 while awaiting sentencing.

Conversely, a young person's glorification of a gang lifestyle or their continued intentions to remain in their gang may also be relevant. In *R v JM*, 2020 MBPC 13, it was revealed through the IRCS planning process that JM was unwilling to leave his gang, even getting a fresh gang tattoo while awaiting sentencing. This factor weighed heavily in favour of an adult sentence on the second prong.³³²

3.5.2.10.1 Targeted Counselling to Reduce Risk and Promote Rehabilitation

To be in the best position to assess the second prong, courts should be provided with any available evidence of targeted counselling aimed at reducing risk and promoting rehabilitation.

In *MS*, the young person had created a powerpoint presentation detailing how to make a pressure cooker bomb and disseminated the instructions online. An undercover FBI agent from the United States conversed with MS online, pretending to want to further the cause of the Islamic State and carry out a terrorist attack in America. MS had also manufactured explosive substances, which were found in his room when he was arrested along with various other incriminating pieces of evidence including notes about jihad and killing infidels.³³³

MS was born in Syria and had lived a stable life until his home city of Aleppo became a war zone. MS witnessed the horrors of war and lost friends and family members, including his grandmother. MS's family fled through Turkey where he had to work as a child labourer in a factory. MS's motivations for his criminal charges were directly related to the trauma he experienced. With targeted counselling, MS made tremendous strides in custody.³³⁴ Given new information presented during the adult sentence hearing related to MS's hard work towards rehabilitation while he awaited sentencing the Crown abandoned its application for adult sentence

³³² *JM*, *supra* note 272 at paras 87 and 122.

³³³ *MS*, *supra* note 191 at paras 5-6.

³³⁴ *Ibid* at paras 86 and 93.

mid-hearing. The court agreed with this approach finding that a youth sentence would be sufficient to hold MS accountable for his actions and would promote and/or give reasonable assurance of his rehabilitation and reintegration in to society.³³⁵

Similarly, in *MG*, targeted counselling to de-program a radicalized youth was a major factor on the second prong of the adult sentence test. MG had become increasingly fascinated by white-nationalist propaganda, identified as a skinhead and considered himself to be part of the white power movement. MG spray-painted a swastika on the private residence of a Rabbi, white power symbols on a United Church, which was home to a predominantly Black congregation, and also a spray-painted a Mosque. The court found that the Crown had successfully rebutted the first prong of the adult sentence application test, but the Court concluded that the Crown’s application failed on the second prong, in part due to MG’s progress with targeted counselling in custody.³³⁶

3.5.2.11 Concerns About Penitentiary Time on Rehabilitation

Courts have raised concern about the social impact of a penitentiary sentence on the rehabilitation of an accused. In *HM*, the court included the verbatim concerns of defence counsel regarding the penitentiary:

“It is a place that does exactly what the Crown is concerned about—entrenches people in a criminal lifestyle, promotes violence, allows for negative influences to overtake and for glorification of such things as gang membership, if only for protection in the institution.”³³⁷

3.5.2.12 Criminal Record and Breaches of Court Orders

Just as in any sentencing, a criminal record will be a factor when considering both accountability and prospects for rehabilitation and reintegration. Previous convictions of violence,

³³⁵ *Ibid* at paras 78 and 100.

³³⁶ *MG*, *supra* note 169 at paras 4-6, 17 and 31,

³³⁷ *HM*, *supra* note 116 at para 141.

breaching court orders, or for breaching weapons prohibitions have been particularly relevant on the second prong.³³⁸

However, a young person's record may not be relied on too heavily so as to re-punish the accused for past behaviour.³³⁹ Furthermore, the absence of a criminal record is not determinative for either prong of the adult sentence test, but is frequently considered as a factor in favour of the young person.³⁴⁰

3.5.2.13 Consequences of an Adult Sentence and Adult Record

Beyond the lengthier sentence that comes with an adult sentence, one of the consequences of a successful adult sentence application is the permanent adult record it creates. Courts routinely consider the serious consequences of an adult sentence and adult criminal record on the second prong of the adult sentence test.³⁴¹ In *HAQ*, the court acknowledged there to be a “legitimate” concern that an adult sentence could “unduly derail” HAQ, just as he was beginning to make positive prosocial changes in his life.³⁴²

3.5.2.14 Collateral Immigration Concerns

For young people without Canadian citizenship, the imposition of an adult sentence may trigger immigration proceedings. The court and court participants should be aware of and prepared to address potential collateral immigration issues that may arise if an adult sentence is imposed.

³³⁸ See: *HAQ*, *supra* note 192 at para 16. HAQ was being supervised by the Intensive Support and Supervision Program (ISSP) when he committed his offences, a factor which was relevant to the second prong of the adult sentence test. See also: *R v Green*, 2017 MBQB 181 [*Green*], the young person did not oppose the adult sentence application brought by the Crown as Green was already serving a youth sentence for 2nd degree murder that happened 40 hours prior the 2nd degree murder charge subject to the adult sentence application.

³³⁹ *ZC*, *supra* note 111 at para 179; See also: *R v Larche*, 2006 2 SCR 762 paras 28-30.

³⁴⁰ *AKB*, *supra* note 285 at para 4.

³⁴¹ *AO*, *supra* note 108 at para 37.

³⁴² *HAQ*, *supra* note 192 at para 68.

In *ZC*, the Crown conceded that collateral immigration concerns maybe considered by the court,³⁴³ and the judge commented extensively on the collateral immigration concerns *ZC* would face if sentenced as an adult.³⁴⁴ Also, given that these applications deal with youths as young as 14 years old, the collateral immigration consequences are all the more serious, as the young person may have a limited connection to their country of birth, having come to a new country some time in their childhood, which has an even greater negative impact on the young person.³⁴⁵

3.5.3 Conclusion on the Second Prong of the Adult Sentence Test

While the focus of this thesis is not primarily on the second prong, it is an important aspect of the adult sentence test and should be assessed with the same care and attention as the presumption of diminished moral blameworthiness to give full effect to Parliament's intentions in their drafting of the two-pronged test.

³⁴³ *ZC*, *supra* note 111 at para 184. See also: *R v Pham*, 2013 SCC 15 at para 11.

³⁴⁴ *ZC*, *ibid* at para 176. See also: *Owusu*, *supra* note 309 at para 29 which explains “[s]ection 718.1 of the Criminal Code codifies proportionality as the fundamental principle of sentencing in the adult context. Collateral consequences are not to be applied in a manner that undermines that principle. As the Supreme Court of Canada has emphasized, 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”: *R v Suter*, 2018 SCC 34 at para 56.

³⁴⁵ See e.g: *ZC*, *ibid*. Note: *ZC* came to Canada from Grenada at age 3. His mother, who struggled with her own mental health, did not take appropriate steps to get *ZC* Canadian citizenship. It appears as though *ZC* himself did not have a substantial connection to Grenada.

CHAPTER FOUR: SURVEY OF TRIAL LEVEL CASE LAW

4.1 Introduction

I have identified 161 reported decisions from courts of first instance across Canada since the inception of the *YCJA* in April 2003, 138 of which were decided after the SCC's decision in *DB*.³⁴⁶ This number is an under-representation of the true number of adult sentence applications heard, as I have been unable to access and include decisions that have been delivered orally. Furthermore, I have excluded Quebec from my analysis given my own language limitations. Despite this, it is important to note that Quebec, like Manitoba, appears to have a high youth crime rate which is deserving of study beyond the scope of this thesis and beyond my own abilities.

This chapter examines two tables I have compiled from reported trial level decisions between 2003 and 2023 (Table One)³⁴⁷ and 2018 and 2023 (Table Two).³⁴⁸ The first table tallies reported decisions from 2003 to 2023 by province/territory. The second table provides a more detailed analysis of reported decisions during a six year window from 2018 to 2023. This second table tracks, by province/territory, the number of applications, the nature of the charges subject to adult sentence applications, the age, gender, race of a young person, if they are in the care of the state, and if they face cognitive or mental health challenges. The second table also tracks when IRCS sentences have been considered and granted, as well as a tally of adult sentence applications outcomes in each region.

Given my history as a practicing youth lawyers, the empirical research included in this Chapter (alongside the qualitative research found in Chapters Two and Three) was undertaken to

³⁴⁶ *Table One*, *supra* note 37. Note: Table One can be found at page 132 in the Appendix on this thesis.

³⁴⁷ *Ibid.*

³⁴⁸ *Table Two*, *supra* note 38. Note: Table Two can be found at page 136 in the Appendix on this thesis.

help me address my own questions and worries on this profoundly important area of the law. I wanted to compile an inventory the entirety reported decisions for the ease of reference for my learned friends and respected adjudicators, so that they may gain insights into this very important area of youth criminal law in preparing for adult sentence hearings. However, more broadly, this research represents more than just a simple “practitioner’s guide”—it helps to identify trends and patterns in adult sentence hearings, to assess the impact of existing interventions (e.g. the 2012 amendments), identify regional differences and allow for cross-jurisdictional comparisons, to support and/or inspire future research in this very important area of youth criminal justice and to influence policy decisions related to the allocation of resources for youth in Canada and beyond.

4.2 Death-Related Convictions of Youth by Province/Territory

In the opening sections of this chapter, I will discuss regional disparities from region to region related to the frequency of sentences being sought and granted. While it is convenient to look at these regional disparities in the frequency of adult sentence applications from a per capita perspective, this approach ignores the very real differences in youth crime from region to region. According to Statistics Canada, from April 1, 2003, to April 1, 2022, there have been 595 convictions of young people for death-related offences (first and second degree murder, manslaughter and attempted murder) in Canada, including Quebec. Of those 595 death-related convictions, 145 were in Quebec, 111 were in Ontario, 76 in British Columbia, 69 in Alberta, 101 in Manitoba, 54 in Saskatchewan, 21 in Nova Scotia, 5 in New Brunswick, 2 in Newfoundland, zero in Prince Edward Island, 2 in the Yukon, 2 in the Northwest Territories, and 4 in Nunavut.³⁴⁹

³⁴⁹ Statistics Canada, “Youth courts, number of cases and charges by type of decision” (September 27, 2023), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003801> [StatCan Cases].

Percentage of Death-Related Youth Convictions to Percentage of Population

Province	% of Population of Canada	% of Youth Death-Related Convictions (DRC)	Differential between Population & DRC
Ontario	38%	19%	.5
Quebec	23%	26%	1.1
British Columbia	14%	13%	.9
Alberta	12%	12%	1
Manitoba	4%	17%	4.3
Saskatchewan	3%	9%	3
Nova Scotia	3%	4%	1.3
New Brunswick	2%	1%	.5
Newfoundland	1%	0.3%	.3
Prince Edward Island	0.4%	0%	0
Yukon	0.1%	0.3%	3
Northwest Territories	0.1%	0.3%	3
Nunavut	0.1%	0.6%	6

The table above was calculated using the 2021 census.³⁵⁰ The number of death-related youth convictions is particularly concerning in Manitoba and Nunavut. Manitoba makes up just over 4% of Canada’s total population but accounts for 17% of youth death-related convictions.³⁵¹ Therefore, Manitoba’s share of youth-death related convictions (representing 111 convictions between 2003 and 2021 and a provincial population of 1,342,153) is 4.3 times higher than that provinces share of the total population of Canada. Similarly concerning, Nunavut’s share of death-

³⁵⁰ Statistics Canada, “Census Profile, 2021 Census of Population” (November 15, 2023), online: <www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/index.cfm?Lang=E> [StatCan Population].

³⁵¹ Note: This crisis must be addressed by further research and governmental interventions, which is beyond the scope of this thesis.

related youth convictions (representing 4 convictions between 2003 and 2021 and a territorial population of 36,858) is 6 times higher than that territories share of the total population of Canada.

Ultimately, these figures show that measuring the frequency of adult sentence applications against death-related convictions is a more accurate metric than a per capita analysis to give insight into the frequency with which the Crown seeks adult sentences. While we know that adult sentence applications may be sought in cases that are not death-related, death-related convictions are the closest data point available from Statistics Canada that provides insight into the frequency of serious violent crimes in each region.

4.3 Analysis of Table One: Adult Sentence Applications—Reported Decisions: 2003 to 2023

Between 2003 and 2023 there have been a total of 161 reported adult sentence decisions, however 138 cases were decided after *DB* on May 16, 2008.³⁵² Table one (particularly for the time period after *DB* was decided on May 16, 2008) is valuable as it shows that numerous applications have been heard in certain provinces, while others have seen very few in the 15 years since *DB* (and 20 years since the *YCJA*). Notably, New Brunswick has had zero reported adult sentence decisions while Manitoba has had 42.

4.2.1 Regional Differences in Frequency of Reported Adult Sentence Decisions

Of the 138 reported decisions since *DB*, 35 reported decisions came from Ontario, 16 from British Columbia, 16 from Alberta, 42 from Manitoba, 16 from Saskatchewan, 9 from Nova Scotia, zero from New Brunswick, zero from Newfoundland, 1 from Prince Edward Island, 1 from the Northwest Territories, 1 from the Yukon, and 1 from Nunavut.

Interestingly, Manitoba surpasses Ontario in the frequency of its pursuit of adult sentences, despite having just under 10% less death-related convictions in a similar time frame. Similarly,

³⁵² *Table One, supra* note 37.

while Saskatchewan has fewer death-related convictions than British Columbia and Alberta, they have seen the same number of adult sentence applications since DB.

4.4 Analysis of Table Two: Adult Sentence Applications—Reported Decisions: 2018 to 2023

While the date range between 2018 to 2023 was a relatively arbitrary choice, 2018 marks a point at which courts across Canada had built a sufficient body of trial and appellate level decisions that a more consistent approach can be seen in the interpretation of section 72 of the *Act* itself.

While there were 39 individuals subjected to adult sentence applications between 2018 and 2023 (without reported decisions from Quebec due to language limitations), I have excluded three historical cases as they did not use the current iteration of the adult sentence application process.³⁵³ Therefore, for the purposes of analyzing table two, 36 individual youths who faced adult sentence applications have been considered.

Of the 36 total cases 18 received adult sentences. Of the 36 reported cases where young people faced an adult sentence application, 12 of those youths were from Ontario (4 received an adult sentence), 5 from British Columbia (3 received an adult sentence), 1 from Alberta (1 received an adult sentence), 10 from Manitoba (4 received an adult sentence), 6 from Saskatchewan (6 received an adult sentence), 1 from Nova Scotia (0 received an adult sentence), and 1 in Prince Edward Island (0 received an adult sentence). No reported decisions for adult sentence applications were heard in New Brunswick, the Northwest Territories, Yukon and Nunavut from 2018 to 2023.

³⁵³ Note: Two of the decisions had within them multiple accused, and so for the analysis of table two, I am using using individual youth.

4.4.1 Nature of Charge

Of the 36 cases represented in Table Two, 25 were death-related. Of the 25 cases with death-related convictions against a young person, 13 received adult sentences. Of the 11 cases that were not death-related, 3 received adult sentences. This data confirms that Crown attorneys do pursue adult sentence applications in non-death related cases but, naturally, at a lesser frequency than in death-related cases. Furthermore, their success rate is lower in non-death related cases.

4.4.2 Age

Of the 36 cases represented in Table Two, the average age of the accused was 16 and 10 months at the time of the offence. In Ontario, the average age was 17 years old at the time of the offence. In British Columbia, the average age was 17 and 2 months old. In Manitoba, the average age was 16 years and 4 months old. In Saskatchewan, the average age was 17 years old.

Of the 36 cases in Table two, 12 individuals were within six months of their 18th birthday at the time of their offence. One accused committed his offence just hours before his 18th birthday.³⁵⁴ Only one accused was 14 years old at the time of his offence, the lowest age a youth can be to face an adult sentence.³⁵⁵ The Crown was successful in their application and the 14 year old was sentenced to life in prison. This was in Manitoba.

4.4.4 Race

From Table Two, it appears as though Indigenous and Black, as well as visible minority youth disproportionately face adult sentence applications. However, what is unknown is the racial demographics of the youths who have been convicted of death-related offences in general, therefore the following analysis may only hint at the potential over-representation within the

³⁵⁴ *JD, supra* note 169.

³⁵⁵ *TJH and ADWC, supra* note 193.

pursuit of adult sentences themselves. This issue requires more study and better data tracking to facilitate such research.

From Table Two we can see that across Canada the breakdown by race of the 36 reported adult sentence decisions: 14 were Indigenous, 6 were Black, one mixed race Métis-Sudanese youth, one Syrian youth, one Saudi Arabian youth, one youth of unstated middle eastern descent, and 12 had no race stated in the body of the decision.

Three provinces stand out in regards to the over-representation of Indigenous, Black and visible minority youth facing adult sentence applications. In Saskatchewan, every youth who faced an adult sentence application where a reported decision was generated were Indigenous. In Manitoba, 7 out of 10 of the youth represented in the reported decisions were Indigenous, and one of the three remaining youths was of mixed Métis and Sudanese descent. In Ontario, 5 of the 12 youth represented in reported decision were Black, 2 were visible minorities, and 5 had no race stated in the body of the decision. These numbers are troubling; however, firm conclusions cannot be drawn as these numbers only represent reported decisions. For instance, it is possible that the in-depth analysis required for *Gladue* or IRCA factors alone may lead more judges to write decisions for Indigenous and Black youth. Without access to transcripts for all decisions across Canada, these findings can only point to the potential of over-representation rather than draw definitive conclusions. More study is certainly warranted.

4.4.5 Gender

Of the 36 cases outlined in Table Two, only two of the youths facing adults sentence applications were female. Statistics Canada research reports that of the 76 death-related convictions across Canada, excluding Quebec, between April 1, 2018, and April 1, 2022, 6 of the youths convicted were female.

As stated in Chapter Three, gender has not yet played a pivotal role in the assessment of the adult sentence regime. However, courts and court participants should be prepared to critically examine gender related factors if and when they arise in future cases.

4.4.6 In State Care or with Biological Family

Of the 36 cases outlined in Table Two, 12 youth were in care of the state. This information is important, however, further study is necessary to compare this Table's results to the broader picture of youth in care in Canada and the rate at which those youths become criminally involved to get the most benefit from the above data. However, I would argue that given my qualitative findings on this topic in Chapter Three, it is very likely that youths in state care are not only at a disadvantage in almost every area of their lives, but they are also at a disadvantage in adult sentence hearings given the myriad of traumas, barriers, and struggles they disproportionately face.

4.4.7 Cognitive Disability

Of the 36 cases recorded in Table Two approximately 14 of those youths had what could be considered a cognitive disability.³⁵⁶ Of the 14 youths who could be considered cognitively disabled, 8 received adult sentences.

This data, read in conjunction with the commentary on cognitive disabilities in Chapter Three, is concerning as it appears as though courts are sentencing cognitively impaired youth to adult sentences despite the protections in prong one of the adult sentence test. We must critically examine how courts can ever conclude that cognitively disabled youths are of an advanced maturity or capacity, so as to satisfy the first prong criteria. I would argue that this is the point at

³⁵⁶ Note: This number was difficult to ascertain and is an approximation at best, as within the decisions there was no uniform way of describing cognitive abilities. The 14 includes any youth that was described as low-average and below.

which courts are at most risk of endorsing a fiction of maturity that is in actuality inferred from the seriousness of the offence or other inappropriately blended factors.

4.4.8 Mental Health

Of the 36 cases recorded in Table Two, 21 of those youths were affected by mental health diagnoses. One youth was reported to have a physical disability, a rare form of Multiple Sclerosis, that would lead to physical and neurological degeneration.³⁵⁷ Of these 21 youth with mental health conditions, 10 received adult sentences.

Similar to the section above on cognitively disabled youth, we must critically examine when, if ever, youth with mental health concerns can be seen as operating with sophisticated adult-like capacity and judgement.

4.4.9 Availability and Consideration of IRCS Sentence

Of the 36 cases recorded in Table Two, IRCS was considered in 11 of those decisions, and in one additional case the court rejected IRCS outright, without consideration, as defence counsel had not sought the appropriate orders in advance of the hearing to screen for IRCS eligibility.³⁵⁸ Of the 11 instances where IRCS was considered by the court, it was ordered on 6 occasions. I would argue that it is heartening to see the intensive and supportive sentencing options under IRCS being engaged instead of adult sentences. It is imperative that courts and court participants avail themselves of such robust sentencing options whenever appropriate.

³⁵⁷ *MS, supra* note 191.

³⁵⁸ *AM, supra* note 170.

4.4.10 Cases where Parties Agreed on Adult Sentence Application Outcome

Within the pool of reported decisions, there was one instance where the accused agreed to and adult sentence,³⁵⁹ and one case where the Crown agreed to abandon the adult sentence application in the course of the proceedings.³⁶⁰

Unfortunately, analyzing a pool of reported decisions does not give a complete picture of the true frequency of instances where the Crown and defence have agreed to an adult sentence—where the Crown has abandoned the adult sentence after a closer review of the evidence required to succeed in the application or where the Crown agrees to forego an adult sentence. These are the cases that are nearly impossible to track and study, as they are both less likely to lead to written decisions and less likely to be reported.

It should be noted that it is also impossible to track instances where adult sentence applications are abandoned in exchange for a plea bargain for the youth maximum sentence in order for an accused to avoid the risk associated with an adult sentence application hearing. This strategic phenomenon is deserving of further research and investigation from both a practical and ethical perspective.

³⁵⁹ *LTN*, *supra* note 188.

³⁶⁰ *MS*, *supra* note 191.

CHAPTER FIVE: CONCLUSIONS

5.1. Introduction

This thesis has taken a broad look at the adult sentence application process from a practice-driven point of view by examining the best practice standard. However, in doing so, this thesis has also engaged—and contributed to—various legal theories including Critical Legal Theory, Discourse Analysis Theory, Law and Emotion Theory, Critical Race Theory, and Disability Legal Theory. Furthermore, these theories have been engaged (in the respective areas in which each of these schools of thought have been of assistance) to ground and inform the more practical aspects of this work.

5.2 Giving Effect to the the Presumption of Diminished Moral Blameworthiness.

In Canada, youths as young as fourteen years old may, in exceptional circumstances, be sentenced as adults. In cases of first and second-degree murder, the jeopardy for these young teens is a life sentence. Section 72 of the *YCJA* requires the courts to adhere to a two-pronged approach. The Crown bears the onus to satisfy the court on both prongs.

From a constitutional perspective, the presumption of diminished moral blameworthiness is at the core of the adult sentence application test and at the core of the *YCJA* itself. If the presumption is eroded, so is the rest of the *Act*. Unfortunately, significant confusion remains about the definition and operation of this fundamental tenet of youth criminal justice.

Through a survey of the trial and appellate level cases, I have encountered numerous instances where courts have struggled to give constitutional effect to the presumption of diminished moral blameworthiness by blending the two prongs of the adult sentence test; by reversing the onus on to the accused to prove reduced blameworthiness as opposed to requiring the Crown to satisfy the court of an advanced adult-like moral capacity; and/or by resorting to a

de facto presumptive offence for the most serious offence. While these decisions are problematic, through my research I have found numerous decisions that embody ‘best practices’ in their approach to adult sentence applications.

5.3 Cases that Represent the Best Practices in their Consideration of the Presumption of Diminished Moral Blameworthiness.

At the outset of my research in preparation for this thesis, I hoped to identify cases that best respected both the letter and spirit of the *YCJA* as well as the principle of fundamental justice as expressed in *DB*—that all youth are presumed to have a lesser degree of moral blameworthiness by virtue of their age. In my reading of 20 years of adult sentence decisions, four judgements stand out as clear representations of overall ‘best practices’ in their consideration of the first prong of the adult sentence test: *JFR*, *X*, *HM*, and the dissenting opinion penned by Justice Jackson of the Saskatchewan Court of Appeal in *RDF*.³⁶¹ These cases represent a clear roadmap for how the SCC should approach the upcoming appeals in *IM* and *SB*.

JFR was 17 years old when she attended a party to which she was not invited, with a group of other young people. *JFR* felt she had been insulted at the party, left and then returned with a kitchen knife. Upon her return, *JFR* came into contact with the deceased, who had already been stabbed 6 times by another assailant, and stabbed him once in the back. *JFR* was convicted of second degree murder.³⁶²

At sentencing, the youth court judge purported to use the two-pronged approach, however in their application of the first prong, the Alberta Court of Appeal found that the sentencing judge

³⁶¹ *HM*, *supra* note 116; *JFR*, *supra* note 284; *R v RDF*, 2019 SKCA 112 [*RDF SKCA*] at para 89.

³⁶² *JFR*, *ibid* at paras 1-2.

was not prepared to see JFR's actions through a "lens of immaturity."³⁶³ Instead, the sentencing judge discredited, disregarded and/or entirely rejected evidence that supported a finding of diminished moral blameworthiness.³⁶⁴

The sentencing judge properly identified three factors outlined in *DB* that speak to a young person's diminished moral blameworthiness: heightened vulnerability, reduced maturity, and reduced capacity for moral judgement. However, in applying those three factors, the sentencing judge erred in their evaluation of the evidence. The Court of Appeal noted that the sentencing judge rejected all evidence that spoke to JFR's heightened vulnerability;³⁶⁵ that the sentencing judge erroneously used the circumstances of the facts of the killing itself to conclude that JFR did not display "helplessness, powerlessness, dependency, or susceptibility to influence or intimidation;³⁶⁶ the sentencing judge erroneously disregarded the evidence that JFR's "level of functioning was below that of her expected age;³⁶⁷ and that the sentencing judge erred in concluding that, by committing the offence itself, JFR was making adult decisions.³⁶⁸ The Alberta Court of Appeal noted that the sentencing judge placed significant emphasis on JFR's conduct on the night of the offence in considering the first prong of the adult sentence test.³⁶⁹

Furthermore, the sentencing judge highlighted the immoral nature of JFR's decision to stab as the evidence that proved JFR did not have the reduced capacity for moral judgement of a young person.³⁷⁰ In reaching this conclusion, the sentencing judge fell in to the very linguistic trap that I

³⁶³ *Ibid* at para 28.

³⁶⁴ *Ibid* at para 20.

³⁶⁵ *Ibid*.

³⁶⁶ *Ibid* at para 21.

³⁶⁷ *Ibid* at para 22.

³⁶⁸ *Ibid*.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid* at para 23.

outlined in Chapter One of this thesis by conflating reduced moral judgement or reduced moral blameworthiness with an assessment of the general immorality of murder, an error which the Alberta Court of Appeal corrected by reversing the adult sentence decision. Ultimately, the Alberta Court of Appeal found that:

[F]or purposes of sentencing, Parliament has legislated a presumption of diminished moral responsibility for young persons. The events leading up to the offences can be explained by the appellant's immaturity, lack of judgment, and sense of invincibility, all of which are common characteristics of many young persons. The Crown's alternative explanation did not rebut the presumption and the sentencing judge erred in so finding.³⁷¹

The Nova Scotia Provincial Court decision in *X* stands out for its thoughtful consideration of the first prong of the adult sentence test, particularly in relation to the Court's analysis of the expert evidence related to the impact of race and culture on the young person. *X* was a 16 years and 4 months old when he shot and attempted to kill a 15 year old youth. Both young people were African Nova Scotian and grew up together in a close-knit community.³⁷² I have referenced *X* on numerous occasions in this thesis to highlight the value of Judge Derrick's approach to the very serious offence, as such I will not conduct a fresh case analysis here. However, when looking at the entirety of Judge Derrick's reasons, it is clear that considerable effort was made by the court to follow the letter and spirit of the law, despite the tragic circumstances of the case. As a result, this judgement stands out as a case that represents an example of reaching an overall 'best practice' standard in light of its thorough and thoughtful analysis of the first prong of the adult sentence test.

Similarly in *HM*, Judge Devine of the Manitoba Provincial Court delivered a thoughtful and well reasoned judgement that aligned with both the letter and spirit of the *YCJA*'s sections 3, 38, and 72, as well as the *Charter* protected presumption of diminished moral blameworthiness.

³⁷¹ *Ibid* at para 29.

³⁷² *X*, *supra* note 214 at para 11.

The *HM* decision as a whole embodies the best practices in its conclusion, but also in the example set by counsel in preparing an array of helpful evidence. No stone was left unturned by the defence team, which best positioned Judge Devine to give full constitutional effect to the presumption of diminished moral blameworthiness.

Finally, I look to the dissenting opinion of Justice Jackson of the Saskatchewan Court of Appeal in *RDF*, which I have not yet addressed in this thesis as the dissent only speaks to what might come in future discourse around adult sentence applications. While Justice Jackson's reasons did not carry the day, I nonetheless see her dissenting opinion as the roadmap the SCC must follow in their upcoming hearing of *IM* and *SB* if they are to give proper constitutional effect to the operational aspects of the presumption of diminished moral blameworthiness, particularly for cases that stem from extreme and violent circumstances.

In the lower court decision in *RDF*,³⁷³ Saskatchewan Provincial Court Judge McIvor imposed an adult sentence on a 17 year old Indigenous youth for two counts of first degree murder, two counts of second degree murder, and seven counts of attempted murder after carrying out a school shooting in La Loche, SK.³⁷⁴ Judge McIvor found that the Crown had rebutted the presumption of diminished moral blameworthiness and that a youth sentence would not be of sufficient length to hold the young person accountable given the seriousness of the offence and rehabilitative needs.³⁷⁵ *RDF* was 15 days away from his 18th birthday and had no criminal record.³⁷⁶ Judge McIvor based the first prong decision mainly on the sophistication of the accused's plan in carrying out the shooting.³⁷⁷

³⁷³ *RDF SKPC*, *supra* note 170.

³⁷⁴ *Ibid* at paras 306, 331-332.

³⁷⁵ *Ibid*.

³⁷⁶ *Ibid* at paras 313 and 315.

³⁷⁷ *Ibid* at para 293.

RDF appealed to the Saskatchewan Court of Appeal where two of the three presiding Justices upheld the sentencing judge's conclusion that the Crown had successfully rebutted the presumption of diminished moral blameworthiness and that the IRCS sentence proposed by defence would not be of sufficient length to hold the young person accountable.³⁷⁸ The majority decision concluded that the sentencing judge had not engaged in a blended analysis and that the factors relating to the seriousness of the offence had not overshadowed factors relating to RDF's maturity on the first prong of the adult sentence test.³⁷⁹

Justice Jackson of the Saskatchewan Court of Appeal wrote a lengthy and well-reasoned dissent in *RDF* that is quite enlightening in regard to the common pitfalls in assessing the moral blameworthiness of young people charged with particularly heinous crimes. Justice Jackson's dissent focused on the majority's treatment of the presumption of diminished moral blameworthiness and asked the very important question: in what circumstances will the Crown ever fail to overcome the presumption of diminished moral blameworthiness using the approach taken by the sentencing judge in this case?³⁸⁰ Furthermore, Justice Jackson disagreed with the Majority's conclusion that RDF did not suffer from cognitive impairments, noting that the only IQ testing showed:

[T]hat only 2% of the population would test lower than he does. With respect to decision-making, only a small percentage of the population would fare more poorly than he. The experts disagreed on how the data should be interpreted, but all of them agreed that the young person is intellectually challenged.³⁸¹

Justice Jackson emphasized the constitutional considerations of *DB* and concluded that by letting the seriousness of the offence govern the first prong of their analysis and disregarding RDF's

³⁷⁸ *Ibid* at para 87.

³⁷⁹ *Ibid*.

³⁸⁰ *Ibid* at para 89.

³⁸¹ *Ibid* at para 95.

cognitive impairments, neither the sentencing judge nor the majority gave proper effect to the constitutional presumption of diminished moral blameworthiness.³⁸²

While I am of the view that the dissenting opinion in *RDF* best captures all that I have advanced in this thesis, I am not entirely confident that the SCC will follow Justice Jackson's approach as leave to appeal to the SCC was not granted in *RDF*.³⁸³

5.4 The *De Facto* Presumptive Offence Approach is Harmful to Young People—Especially for Indigenous, Black and Visible Minority Youth and Young People with Disabilities.

Allowing the gravity of the offence to infiltrate the first prong of the adult sentence test, deliberately or not, is harmful to young people and violates their section 7 rights. From the critical inquiries made through a survey of 20 years of adult sentence applications, particularly those decided after *DB* and the 2012 amendments, I have reached the conclusion that the use of the blended analysis, in any form, violates the section 7 rights of young people. However, the dangers posed by the blended approach has a disproportionately negative effect on young people with cognitive disabilities as well as a disproportionately negative effect on Indigenous, Black, and visible minority youth. It is critical that courts and court participants approach adult sentence applications in a way that respects the intentions of Parliament and the SCC decision in *DB*, by following the two-pronged approach. This is the only way to give full effect to the constitutionally protected presumption of diminished moral blameworthiness.

³⁸² *Ibid* at para 92 and 95.

³⁸³ Note: Youths, unlike adults, do not have an automatic right of appeal to the SCC when there is a dissenting opinion at the lower appellate court. This is due to section s 37(1) of the *YCJA*, which was challenged and upheld in *R v CP*, 2021 SCC 19.

5.5 Looking Forward: Why the SCC Must Follow the Letter and Spirit of the YCJA and *DB* in Their Upcoming Hearing of *IM* and *SB*.

On November 23, 2023, the SCC announced that they will revisit the very issues that I have raised in this thesis. Given the disparate application of the two-pronged test in courts across Canada, the SCC's decision to revisit the presumption of diminished moral blameworthiness is welcome news for those who regularly work within the youth criminal justice system. It is imperative that the SCC give full constitutional effect to the presumption of diminished moral blameworthiness, as it is vital to the proper functioning of the youth criminal justice system as it was envisioned with the implementation of the *YCJA*, the SCC's ruling in *DB*, and the subsequent amendments to the *YCJA* in 2012.

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APPENDIX:

1. TABLE ONE

Adult Sentence Applications — Reported Decisions: 2003 to 2023

Province/ Territory*	2003 (Presumptive Offence Reverse Onus)	2004 (Presumptive Offence Reverse Onus)	2005 (Presumptive Offence Reverse Onus)	2006 (Presumptive Offence Reverse Onus)	2007 (Presumptive Offence Reverse Onus)
Ontario		<i>R v TW</i> , 2004 OCNJ 64	<i>R v DL(No 3)</i> , 2005 ONCJ 386 <i>R v Olusoga</i> , 2005 CanLII 51606 (ONSC) <i>R v SW</i> , 2005 CanLII 21109 (ONSC)	<i>R v Ferriman</i> , 2006 CanLII33472 (ONSC)	<i>R v Lights</i> , 2007 ONCJ 173 <i>R v LAB</i> , 2007 ONCJ 538
British Columbia			<i>R v KDT</i> , 2005 BCSC 1808 <i>R v JETR</i> , 2005 BCPC 26	<i>R v Ritchie</i> , 2006 BCSC 1579 <i>R v JKW</i> , 2006 BCPC 52 <i>R v Pratt</i> , 2006 BCSC 1198	<i>R v Green and Nguyen</i> , 2007 BCPC 386
Alberta				<i>R v CWW</i> , 2006 ABPC 191	<i>R v MBW</i> , 2007 ABPC 292
Manitoba	<i>R v BWP</i> , [2003] MJ No 331(QL)				<i>R v KEJL</i> , 2007 MBPC 11
Saskatchewan			<i>R v JTS</i> , 2005 SKQB 416		
Nova Scotia					<i>R v GDS</i> , 2007 NSSC 159
New Brunswick					
Newfoundland					
Prince Edward Island					
Northwest Territories					
Yukon					
Nunavut					

*Descending by population. Quebec excluded in case law sample.

Province/ Territory*	2008 (<i>R v DB</i> :Reverse Onus Unconstitutional)	2009 (Blended Test)	2010 (Blended Test)	2011 (Blended Test)	2012 (Blended or Two- Pronged Test—by offence date)
Ontario	<i>R v SEY</i> , 2008 ONCJ 285	<i>R v Simpson-Rowe</i> , 2009 CanLII 18884 (ONSC) <i>R v Bagshaw</i> , 2009 CanLII 55306 (ONSC) <i>R v Todorovic</i> , 2009 CanLII 40313 (ONSC) <i>R v MT</i> , 2009 CanLII 40314 (ONSC)	<i>R v IC</i> , 2010 ONSC 3359	<i>R v DE</i> , 2011 ONCJ 157	<i>R v Elie</i> , 2012 ONCJ 39
British Columbia	<i>R v Quintana</i> , 2008 BCPC 17 <i>R v JAP</i> , 2008 BCSC 1259 <i>R v Kenworthy</i> , 2008 BCPC 218 <i>R v PN and DC</i> , 2008 BCPC 32	<i>R v BJ</i> , 2009 ABPC 180	<i>R v AD</i> , 2010 BCPC 66 <i>R v Arrieta</i> , 2010 BCPC 87		<i>R v JF</i> , 2012 BCSC 780
Alberta	<i>R v SRB</i> , 2008 ABQB 48 <i>R v DE</i> , 2008 ABPC 231 <i>R v Bird</i> , 2008 ABQB 327	<i>R v DDT</i> , 2009 ABQB 362 <i>R v Casavant</i> , 2009 ABQB 672 <i>R v CHC</i> , 2009 ABQB 125		<i>R v AA</i> , 2011 ABQB 598	<i>R v MM</i> , 2012 ABPC 153 <i>R v KPB and RTT</i> , 2012 ABQB 135
Manitoba		<i>R v HVC and PW</i> , 2009 MBPC 58 <i>R v BKTS</i> , 2009 MBQB 56 <i>R v RL</i> , 2009 MBQB 137 <i>R v Smith</i> , 2009 MBQB 54	<i>R v JJT</i> , 2010 MBQB 216 <i>R v IRN</i> , 2010 MBQB 137 <i>R v JJH</i> , 2010 MBQB 177	<i>R v MO</i> , 2011 MBPC 5 <i>R v CJP</i> , 2011 MBPC 62 <i>R v CLS et al</i> , 2011 MBQB 28	<i>R v MNP</i> , 2012 MBQB 263 <i>R v DLS and JB</i> , 2012 MBQB 177 <i>R v RLT</i> , 2012 MBQB 223 <i>R v SL</i> , 2012 MBPC 22
Saskatchewan	<i>R v BCF</i> , 2008 SKPC 98 <i>R v Turcotte</i> , 2008 SKQB 478	<i>R v CRB</i> , 2009 SKQB 176	<i>R v SJA</i> , 2010 SKPC 112 <i>R v CM(No 2)</i> , 2010 SKPC 139		<i>R v RL</i> , 2012 SKPC 22 <i>R v DS</i> , 2012 SKPC 34
Nova Scotia	<i>R v CS</i> , 2008 NSPC 22	<i>R v AJD</i> , 2009 NSSC 56 <i>R v NH</i> , 2009 NSPC 36 <i>R v TPD</i> , 2009 NSSC 332	<i>R v Smith</i> , 2010 NSPC 53		
New Brunswick					
Newfoundland					
Prince Edward Island					
Northwest Territories					
Yukon					
Nunavut					

Province/ Territory*	2013 (Blended or Two-Pronged Test—dependant on offence date)	2014 (Blended or Two-Pronged Test—dependant on offence date)	2015 (Two-Pronged Test)	2016 (Two-Pronged Test)	2017 (Two-Pronged Test)
Ontario	<i>R v JK</i> , 2013 ONCJ 67 <i>R v PM</i> , 2013 ONCJ 190 <i>R v CE</i> , 2013 ONSC 798 <i>R v Knelson</i> , 2013 ONCJ 157 <i>R v MP</i> , 2013 ONCJ 36	<i>R v SB</i> , 2014 ONSC 3436 <i>R v IR</i> , 2014 ONSC 4086 <i>R v CS</i> , 2014 ONSC 4362		<i>R v PJ</i> , 2016 ONSC 3061 <i>R v FO</i> , 2016 ONSC 7654 <i>R v ASM</i> , 2016 ONSC 3940	<i>R v MG</i> , 2017 ONCJ 565
British Columbia	<i>R v Wong</i> , 2013 BCSC 1254 <i>R v BSA</i> , 2013 BCSC 75 <i>R v WDD</i> , 2013 BCPC 440				<i>R v TM</i> , 2017 BCSC 862 <i>R v RK</i> , 2017 BCSC 1510 <i>R v PH</i> , 2017 BCSC 1105 <i>R v Chol</i> , 2017 BCSC 1709 <i>R v LMS</i> , 2017 BCPC 250
Alberta	<i>R v CM</i> , 2013 ABPC 30 <i>R v Tilley</i> , 2013 ABQB 734	<i>R v LL</i> , 2014 ABQB 497 <i>R v JW</i> , 2014 ABPC 234	<i>R v FRG</i> , 2015 ABPC 248 <i>R v CM and TM</i> , 2015 ABQB 134	<i>R v Scheerschmidt</i> , 2016 ABQB 35	
Manitoba	<i>R v BL</i> , 2013 MBQB 89 <i>R v DVJS</i> , 2013 MBPC 24 <i>R v RRI</i> , 2013 MBQB 22 <i>R v KH</i> , 2013 MBPC 31 <i>R v JM</i> , 2013 MBPC 38	<i>R v SA</i> , 2014 MBPC 17 <i>R v CGD</i> , 2014 MBQB 142 <i>R v JC</i> , 2014 MBPC 40 <i>R v RM</i> , 2014 MBPC 18 <i>R v DRA</i> , 2014 MBQB 199	<i>R v JAMC</i> , 2015 MBQB 115 <i>R v TDK</i> , 2015 MBQB 119 <i>R v GCP</i> , 2015 MBQB 160	<i>R v MJM</i> , 2016 MBQB 36 <i>R v DD</i> , 2016 MBPC 14 <i>R v BJA</i> , 2016 MBQB 207 <i>R v AM</i> , 2016 MBQB 161 <i>R v BR</i> , 2016 MBPC 74	<i>R v Green</i> , 2017 MBQB 181
Saskatchewan		<i>R v JMK</i> , 2014 SKPC 186	<i>R v DR</i> , 2015 SKQB 157		<i>R v LM</i> , 2017 SKQB 336 <i>R v Prockner</i> , 2017 SKQB 202
Nova Scotia	<i>R v Skeete</i> , 2013 NSPC 3 <i>R v Munroe</i> , 2013 NSPC 45	<i>R v "X"</i> , 2014 NSPC 95			
New Brunswick					
Newfoundland					
Prince Edward Island					
Northwest Territories					<i>R v KM</i> , 2017 NWTSC 26
Yukon				<i>R v JVP</i> , 2016 YKTC 34	
Nunavut	<i>R v Lucassie</i> , 2013 YJCN 01				

Province/ Territory*	2018 (Two-Pronged Test)	2019 (Two-Pronged Test)	2020 (Two-Pronged Test)	2021 (Two-Pronged Test)	2022 (Two-Pronged Test)	2023 (Two-Pronged Test)
Ontario	<i>R v TJT</i> , 2018 ONSC 5280	<i>R v TFD</i> , 2019 ONSC 3389 <i>R v AG</i> , 2019 ONCJ 211 <i>R v RDM</i> , 2019 ONSC 3007 <i>R v Hornick</i> , 2019 ONCJ 817 <i>R v AR</i> , 2019 ONCJ 505 <i>R v TG</i> , 2019 ONSC 3057 <i>R v RD</i> , 2019 ONSC 4468	<i>R v ZC</i> , 2020 ONSC 5999 <i>R v AM</i> , 2020 ONCJ 477	<i>R v MB</i> , 2021 ONCJ 355 <i>R v NM</i> , 2021 ONCJ 617	<i>R v MS</i> , 2022 ONCJ 56	<i>R v Bouctsis</i> , 2023 ONSC 2405 <i>R v HAQ</i> , 2023 ONCJ 377
British Columbia	<i>R v LAR</i> , 2018 BCPC 71	<i>R v ASD</i> , 2019 BCSC 147 <i>R v TBK</i> , 2019 BCSC 1037				
Alberta						<i>R v AM</i> , 2023 ABKB 312
Manitoba	<i>R v NA</i> , 2018 MBQB 93 <i>R v SRM</i> , 2018 MBQB 86	<i>R v HJR</i> , 2019 MBPC 12	<i>R v JMF</i> , 2020 MBQB 161 <i>R v JM</i> , 2020 MBPC 13	<i>R v HEJEB</i> , 2021 MBQB 223	<i>R v HM</i> , 2022 MBPC 42	<i>R v TJH and ADWC</i> , 2023 MBKB 5 <i>R v AKB</i> , 2023 MBKB 1
Saskatchewan	<i>R v Henderson</i> , 2018 SKPC 27 <i>R v RDF</i> , 2018 SKPC 28	<i>R v WM</i> , 2019 SKPC 50 <i>R v LTN</i> , 2019 SKQB 337			<i>R v BJM</i> , 2022 SKPC 38	<i>R v IK</i> , 2023 SKKB 56
Nova Scotia	<i>R v NW</i> , 2018 NSPC 14					
New Brunswick						
Newfoundland						
Prince Edward Island			<i>R v JD</i> , 2020 PESC 33			
Northwest Territories						
Yukon						
Nunavut						

Adult Sentence Applications — Reported Decisions: 2003 to 2023

A deeper analysis into nature of charges, demographics of accused, and per capita applications by province.

Reported Cases: 2018 to 2023*	Charges subject to application	Death-related offence	Age	Gender	Race	In state care	Cognitive Impairments	Mental Health diagnosis	IRCS considered	S.72 app granted
Ontario	Population**: 14,223,942 Total number of youth in reported adult sentence applications from 2018 to 2023: 13 Total death-related convictions from 2018 to 2023: 22									
<i>R v TJT</i> , 2018 ONSC 5280	2nd Degree Murder	Yes	15	Male	Black	No	30th percentile (Average range)	None	Not eligible	No
<i>R v AG</i> , 2019 ONCJ 211	Man-slaughter, crim neg cause death, TAWOC	Yes	16 + 4 months	Male	Not stated	No - w/ grand-parents	None noted	Offence itself was suicide attempt, ADHD, self-harm, anger, aggression, history of being bullied.	Yes. IRCS ordered.	No
<i>R v TG</i> , 2019 ONSC 3057	Kidnapping w/firearm, Pos firearm, PPT Heroin +Cocaine, PPOBC	No	18 - 3 weeks	Male	Not stated	No - w/ mother	Described as "learning disability"	Oppositional defiance disorder (ODD), ADHD - difficult to diagnose as mother uncooperative	No	Yes
<i>R v TFD</i> , 2019 ONSC 3389	2nd degree murder	Yes	15 + 9 months	Male	Not stated	No - w/ parents	Described as "Average"	ADHD, conduct disorder, severe substance abuse disorder	Yes. IRCS ordered.	No
<i>R v RDM</i> , 2019 ONSC 3007	Excluded from this table as historic offence took place in 1990.									
<i>R v AR</i> , 2019 ONCJ 505	Excluded from this table's analysis as historic offence took place under YCJA but before DB.									
<i>R v Hornick</i> , 2019 ONCJ 817	2nd Degree Murder	Yes	17	Male	Black	No - w/ parents (two homes)	None stated	ADHD, Substance use disorder, Conduct disorder, ODD	No	Yes - by consent of accused.
<i>R v RD</i> , 2019 ONSC 4468	Robberyx3, Attempt Robbery	No	16 + 3 months	Male	Not stated	No - w/ mother	Described as "Average"	Conduct Disorder	No	Yes

Reported Cases: 2018 to 2023*	Charges subject to application	Death-related offence	Age	Gender	Race	In state care	Cognitive Impairments	Mental Health diagnosis	IRCS considered	S.72 app granted
<i>R v ZC</i> , 2020 ONSC 5999	Robbery w/ firearmx5, Unlawful confinem't, PPOBC+, Possess firearm while prohib.	No	16 + 6 months	Male	Black	Yes	None stated	ADHD, PTSD, Complex Grief Reaction.	No	No
<i>R v AM</i> , 2020 ONCJ 477	Excluded from this table's analysis as historic offence took place under YOA.									
<i>R v MB</i> , 2021 ONCJ 355	Discharge firearm with intent, aggravated assault, possess firearm contrary to s 51, discharge firearm into place, Occupy MV with Firearm, poss loaded firearm, poss firearm w/ serial removed etc.	No	17 + 10 months	Male	Black	No	Described as "below 3rd percentile"	None stated	No	No
<i>R v NM</i> , 2021 ONCJ 617	2nd degree murder	Yes	17 + 7 months	Male	Black	Yes	Described as "average"	Anxiety, Depression Panic attacks	No	No
<i>R v MS</i> , 2022 ONCJ 56	Knowingly facilitating terrorist activity, Counselling person to deliver, discharge or detonate explosive device, Making explosive substance, Doing anything with intent to cause explosion etc	No	15	Male	Syrian refugee	No w/ family	None	None stated. *Rare form of aggressive multiple sclerosis which will effect MS physically, and cognitively considered on second prong.	No	No - Crown abandoned application after further reports provided following an adjournment of sentencing hearing to get progress report.

Reported Cases: 2018 to 2023*	Charges subject to application	Death-related offence	Age	Gender	Race	In state care	Cognitive Impairments	Mental Health diagnosis	IRCS considered	S.72 app granted
<i>R v Bouctsis</i> , 2023 ONSC 2405	2nd degree murder	Yes	17 + 5 months	Male	Not stated	No - w/ family but had run away and was living independently for 4 months before offence	None	None	No	Yes
<i>R v HAQ</i> , 2023 ONCJ 377	Discharge firearm reckless, weapons offences and breaches, possess cocaine for purpose of trafficking	No	17 + 11 months	Male	Libyan	No w/ family	None	Described as having experienced abuse and violence. Came to Canada from civil war in Libya.	No	No (app failed on prong two as Crown position only 6 months longer than youth max)
British Columbia	Population: 5,000,879 Total number of youth in reported adult sentence applications from 2018 to 2023: 5 Total death-related convictions from 2018 to 2023: 10									
<i>R v SWP</i> , 2018 BCPC 71	Sexual Assault	No	16 + 10 months	Male	Indigenous	Yes	Described as below average with a mild intellectual disability	Paraphilia sexual disorder, ADHD, schizophrenia, OCD.	No	Yes
<i>R v ASD, GCAR, LZ</i> , 2019 BCSC 147	Separate analysis for each co-accused below:									
Accused: ASD	Man-slaughter	Yes	17 + 9 months	Male	Not Stated	No - w/ family	Grade 12 acheived	None stated	No	No
Accused: GCAR	Man-slaughter	Yes	17 + 1 month	Male	Not Stated	No - w/ family	One credit short of grade 12	None stated	No	No
Accused: LZ	2nd degree murder	Yes	18 - 2 weeks	Male	Saudi Arabian	No - w/ family	Grade 12 achieved	ADHD	Yes	Yes
<i>R v TBK</i> , 2019 BCSC 1037	Attempt murder x 2, Poss loaded firearm	Yes	16 + 1 month	Male	Not Stated	No - w/ parents	Described as “low average” and “on par with peers”	None	No	Yes

Reported Cases: 2018 to 2023*	Charges subject to application	Death-related offence	Age	Gender	Race	In state care	Cognitive Impairments	Mental Health diagnosis	IRCS considered	S.72 app granted
Alberta	Population: 4,262,625 Total number of youth reported adult sentence applications from 2018 to 2023: 1 Total death-related convictions from 2018 to 2023: 5									
<i>R v. AM</i> , 2023 ABKB 312	Man-slaughter	Yes	18 - 11 days	Male	Middle Eastern descent	No - rented apartment solo at age 17.	None	No traditional diagnosis but describe as narcissistic and anti-social traits	Yes - rejected because defence had not followed steps required to advance IRCS.	Yes
Manitoba	Population: 1,342,153 Total number of youth in reported adult sentence applications from 2018 to 2023: 10 Total death-related convictions from 2018 to 2023: 20									
<i>R v SRM</i> , 2018 MBQB 86	Robbery, Forcible confinement	No	17	Female	Indigenous	Yes	FASD IQ below 70	Trauma ADHD	No	No
<i>R v NA</i> , 2018 MBQB 93	Man-slaughter	Yes	17 + 10 months	Male	Not stated	No - w/ parents	Described as highly intelligent	None	No	No
<i>R v HJR</i> , 2019 MBPC 12	B&E, Aggravated Assault	No	15	Male	Indigenous	Yes	IQ 70-79	Significant impairment in attention regulation, adaptive function and executive function.	No	No
<i>R v JMF</i> , 2020 MBQB 161	1st degree murder (Note: conviction overturned on appeal)	Yes	16 + 9 months	Male	Metis	No - w/ Mother	Described as having no significant cognitive impairments	None	No	Yes
<i>R v JM</i> , 2020 MBPC 13	2nd degree murder	Yes	15	Male	Indigenous	No - w/ Mother. Some CFS involvement in the past	Testing placed him in Extremely low category	Un-specified emotional disturbance and learning disability	Yes - although questions raised as to JM's willingness to participate	Yes
<i>R v HEJEB</i> , 2021 MBQB 223	2nd degree murder x2	Yes	16	Male	Indigenous	No - w/ parents	Described as IQ "low end"	None	No	Yes
<i>R v HM</i> , 2022 MBPC 42	Man-slaughter	Yes	17 + 7 months	Male	Indigenous	Yes	FASD. IQ between 40 and 65. Designated vulnerable person due to cognitive deficits	FASD ADHD Depression ODD.	Yes	No

Reported Cases: 2018 to 2023*	Charges subject to application	Death-related offence	Age	Gender	Race	In state care	Cognitive Impairments	Mental Health diagnosis	IRCS considered	S.72 app granted
<i>R v TJH and ADWC, 2023 MBKB 5</i>	Separate analysis for each co-accused below:									
Accused: <i>TJH</i>	Robbery w/ firearm, Discharge firearm with intent, second degree murder, discharge firearm with intent to endanger life,	Yes	15 + 9 months	Male	Indigenous	No - with family	Described as low-average intellectual abilities.	Conduct disorder, substance use disorder, Major depressive disorder, ADHD, PTSD.	Yes	No
Accused: <i>ADWC</i>	Discharge firearm with intent to endanger life, attempt murder, first degree murder, attempt murder	Yes	14 + 6 months	Male	Metis and Sudanese	Yes	Described as borderline intellectual functioning and cognitive limitations.	FASD, and exposure to cocaine in utero, ADHD, mixed-use substance disorder, anxiety, major depressive disorder	Yes	Yes
<i>R v AKB, 2023 MBKB 1</i>	2nd degree murder	Yes	16 + 10 months	Male	Not Stated	No w/ parents in two households	None	None	No	No
Saskatchewan	Population: 1,132,505 Total number of reported adult sentence applications from 2018 to 2023: 6 Total death-related convictions from 2018 to 2023: 16									
<i>R v Henderson, 2018 SKPC 27</i>	2nd degree murder	Yes	16	Female	Indigenous	Yes	Described as elementary school aged level.	FASD ADHD	No	Yes
<i>R v RDF, 2018 SKPC 28</i>	1st degree murder x 2, 2nd degree murder x 2, attempt murder x 7.	Yes	18 - 15 days	Male	Indigenous	No - w/ Aunt	Disagreement between experts - generally agreed that RF had cognitive challenges	Disagreement between experts.	Yes	Yes
<i>R v WM, 2019 SKPC 50</i>	Man-slaughter, Robbery	Yes	17 + 4 months	Male	Indigenous	Yes	Described as intelligent, average or above average.	Conduct disorder, substance abuse disorder, reactive attachment disorder	Yes	Yes

Reported Cases: 2018 to 2023*	Charges subject to application	Death-related offence	Age	Gender	Race	In state care	Cognitive Impairments	Mental Health diagnosis	IRCS considered	S.72 app granted
<i>R v LTN</i> , 2019 SKQB 337	Discharge firearm intent x2, Discharge firearm reckless into place x2	No	16	Male	Indigenous	Yes	Auditory processing disorder, FASD	Depression anxiety, suicidal ideation, self-harm, multiple suicide attempts	No	Yes *Accused did not oppose order (para 47)
<i>R v B/JM</i> , 2022 SKPC 38	2nd degree murder	Yes	17 + 5 months	Male	Indigenous	Yes	Some difficulties with verbal processing	None	No	Yes
<i>R v IK</i> , 2023 SKKB 56	Man-slaughter, Aggravated assault	Yes	17	Male	Indigenous	No - w/ parents	Grade 7 - highest grade. cognitive abilities "average range"	ADHD	Yes	No
Nova Scotia	Population: 969,383 Total number of reported adult sentence applications from 2018 to 2023: 1 Total death-related convictions from 2018 to 2023: 3									
<i>R v NW</i> , 2018 NSPC 14	1st Degree Murder	Yes	17 +3 months	Male	Black	No - w/ mother	Learning disorders in math and reading. Low on cognitive testing.	Conduct Disorder	Yes	No
New Brunswick	Population: 775,610 Total number of reported adult sentence applications from 2018 to 2023: 0 Total death-related convictions from 2018 to 2023: 0									
Newfoundland	Population: 510,550 Total number of reported adult sentence applications from 2018 to 2023: 0 Total death-related convictions from 2018 to 2023: 0									
Prince Edward Island	Population: 154,331 Total number of reported adult sentence applications from 2018 to 2023: 1 Total death-related convictions from 2018 to 2023: 0									
<i>R v JD</i> , 2020 PESC 33	Sexual Assault	No	18 - 1 day	Male	Not Stated	No - w/ family	None	None	No	No
Northwest Territories	Population: 41,070 Total number of reported adult sentence applications from 2018 to 2023: 0 Total death-related convictions from 2018 to 2023: 1									
Yukon	Population: 40,232 Total number of reported adult sentence applications from 2018 to 2023: 0 Total death-related convictions from 2018 to 2023: 0									
Nunavut	Population: 36,858 Total number of reported adult sentence applications from 2018 to 2023: 0 Total death-related convictions from 2018 to 2023: 1									

*by Province/Territory (descending population, excluding Quebec). Chronologically ordered by date of judgement within each provincial/territorial heading.

**Provincial and Territorial populations from Statistics Canada 2021 Census.

Trial Level Case Evaluation Form

Trial Level Case Evaluation Form
(Neutral Citation)
· Adult Sentence granted
1. CASE INFORMATION:
Date of Judgement:
Charges subject to adult sentence application:
Guilty plea or Trial (Judge or Jury):
2. DEMOGRAPHIC OF ACCUSED:
Gender:
Age at the time of the offence:
Age at the time of hearing:
Race:
Newcomer to Canada:
Immigration status:
Guardian:

In care of child welfare agency:
Criminal Record:
· Family history of residential schools:
· Substance use:
· Gang involvement:
· History of sexual or physical victimization:
· Highest grade level achieved:
3. DETAILS OF OFFENCE:
Summary of facts:
Formerly presumptive offence: Y/N

Mandatory Minimum if adult:
4. EVIDENCE CONSIDERED:
· Pre-sentence Report
· Gladue Report
· IRCS Report
· FASD Report
· Medical Reports
· IQ:
· Diagnosis:
· Institutional Reports
· Other Reports:
· Testimony at s 72 hearing:
· Victim Impact statement
5. CASES CITED
Cases Judge considers within body of judgement:

6. ANALYSIS	
·	Section 72 Review:
·	Section 3, 38 Review:
·	Onus Review:
·	Diminished Moral Blameworthiness Review:
Prong one analysis :	

Prong two analysis:

Any concerning paragraphs re: blending the two prongs?

Was Gladue Considered on both prongs?
7. OUTCOME
Did Crown satisfy court on first prong? Y/N
Did Crown satisfy court on second prong? Y/N
Adult Sentence granted: Y/N
Ultimate Disposition:

RELEVANT STATUTORY PROVISIONS

YOUTH CRIMINAL JUSTICE ACT

PREAMBLE

WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;

WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;

WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;

AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

[...]

SECTION 3: Declaration of Principle

Policy for Canada with respect to young persons

3 (1) The following principles apply in this Act:

- (a)** the youth criminal justice system is intended to protect the public by
 - (i)** holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
 - (ii)** promoting the rehabilitation and reintegration of young persons who have committed offences, and
 - (iii)** supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

- (i)** rehabilitation and reintegration,
- (ii)** fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
- (iii)** enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
- (iv)** timely intervention that reinforces the link between the offending behaviour and its consequences, and
- (v)** the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

- (i)** reinforce respect for societal values,
- (ii)** encourage the repair of harm done to victims and the community,
- (iii)** be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
- (iv)** respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(d) special considerations apply in respect of proceedings against young persons and, in particular,

- (i)** young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
- (ii)** victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
- (iii)** victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
- (iv)** parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

Act to be liberally construed

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

[...]

SECTION 34: Medical or psychological assessment

34 (1) A youth justice court may, at any stage of proceedings against a young person, by order require that the young person be assessed by a qualified person who is required to report the results in writing to the court,

- (a) with the consent of the young person and the prosecutor; or
- (b) on its own motion or on application of the young person or the prosecutor, if the court believes a medical, psychological or psychiatric report in respect of the young person is necessary for a purpose mentioned in paragraphs (2)(a) to (g) and
 - (i) the court has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability,
 - (ii) the young person's history indicates a pattern of repeated findings of guilt under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or
 - (iii) the young person is alleged to have committed a serious violent offence.

Purpose of assessment

(2) A youth justice court may make an order under subsection (1) in respect of a young person for the purpose of

- (a) considering an application under section 33 (release from or detention in custody);
- (b) making its decision on an application heard under section 71 (hearing — adult sentences);
- (c) making or reviewing a youth sentence;
- (d) considering an application under subsection 104(1) (continuation of custody);
- (e) setting conditions under subsection 105(1) (conditional supervision);
- (f) making an order under subsection 109(2) (conditional supervision); or
- (g) authorizing disclosure under subsection 127(1) (information about a young person).

Custody for assessment

(3) Subject to subsections (4) and (6), for the purpose of an assessment under this section, a youth justice court may remand a young person to any custody that it directs for a period not exceeding thirty days.

Presumption against custodial remand

(4) A young person shall not be remanded in custody in accordance with an order made under subsection (1) unless

- (a) the youth justice court is satisfied that
 - (i) on the evidence custody is necessary to conduct an assessment of the young person, or
 - (ii) on the evidence of a qualified person detention of the young person in custody is desirable to conduct the assessment of the young person, and the young person consents to custody; or
- (b) the young person is required to be detained in custody in respect of any other matter or by virtue of any provision of the Criminal Code.

[...]

Report to be part of record

(12) A report made under subsection (1) forms part of the record of the case in respect of which it was requested.

[...]

Section 37(10): Appeal to the Supreme Court of Canada

(10) No appeal lies under subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information or indictment to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada.

[...]

SECTION 38: Sentencing - Purpose and Principles**Purpose**

38 (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

Sentencing principles

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

- (a)** the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
- (b)** the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- (c)** the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- (d)** all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
- (e)** subject to paragraph (c), the sentence must
 - (i)** be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
 - (ii)** be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
 - (iii)** promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community;
- (e.1)** if this Act provides that a youth justice court may impose conditions as part of the sentence, a condition may be imposed only if
 - (i)** the imposition of the condition is necessary to achieve the purpose set out in subsection 38(1),
 - (ii)** the young person will reasonably be able to comply with the condition, and

- (iii) the condition is not used as a substitute for appropriate child protection, mental health or other social measures; and
- (f) subject to paragraph (c), the sentence may have the following objectives:
 - (i) to denounce unlawful conduct, and
 - (ii) to deter the young person from committing offences.

Factors to be considered

- (3) In determining a youth sentence, the youth justice court shall take into account
- (a) the degree of participation by the young person in the commission of the offence;
 - (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
 - (c) any reparation made by the young person to the victim or the community;
 - (d) the time spent in detention by the young person as a result of the offence;
 - (e) the previous findings of guilt of the young person; and
 - (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

[...]

SECTION 39: Sentencing - Committal to custody

39 (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

- (a) the young person has committed a violent offence;
- (b) the young person has previously been found guilty of an offence under section 137 in relation to more than one sentence and, if the court is imposing a sentence for an offence under subsections 145(2) to (5) of the *Criminal Code* or section 137, the young person caused harm, or a risk of harm, to the safety of the public in committing that offence;
- (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or
- (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

Alternatives to custody

(2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

Factors to be considered

- (3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to
- (a) the alternatives to custody that are available;

- (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
- (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

[...]

SECTION 42: Considerations as to youth sentence

42 (1) A youth justice court shall, before imposing a youth sentence, consider any recommendations submitted under section 41, any pre-sentence report, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person, and any other relevant information before the court.

Youth sentence

(2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the [Criminal Code](#), the court shall impose a sanction set out in paragraph (q) or subparagraph (r)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:

[...]

(l) subject to subsection (3) (agreement of provincial director), order the young person into an intensive support and supervision program approved by the provincial director;

[...]

(n) make a custody and supervision order with respect to the young person, ordering that a period be served in custody and that a second period — which is one half as long as the first — be served, subject to sections 97 (conditions to be included) and 98 (continuation of custody), under supervision in the community subject to conditions, the total of the periods not to exceed two years from the date of the coming into force of the order or, if the young person is found guilty of an offence for which the punishment provided by the [Criminal Code](#) or any other Act of Parliament is imprisonment for life, three years from the date of coming into force of the order;

(o) in the case of an offence set out in section 239 (attempt to commit murder), 232, 234 or 236 (manslaughter) or 273 (aggravated sexual assault) of the [Criminal Code](#), make a custody and supervision order in respect of the young person for a specified period not exceeding three years from the date of committal that orders the young person to be committed into a continuous period of custody for the first portion of the sentence and, subject to subsection 104(1) (continuation of custody), to serve the remainder of the sentence under conditional supervision in the community in accordance with section 105;

[...]

(q) order the young person to serve a sentence not to exceed

(i) in the case of first degree murder, ten years comprised of

(A) a committal to custody, to be served continuously, for a period that must not, subject to subsection 104(1) (continuation of custody), exceed six years from the date of committal, and

- (B) a placement under conditional supervision to be served in the community in accordance with section 105, and
- (ii) in the case of second degree murder, seven years comprised of
 - (A) a committal to custody, to be served continuously, for a period that must not, subject to subsection 104(1) (continuation of custody), exceed four years from the date of committal, and
 - (B) a placement under conditional supervision to be served in the community in accordance with section 105;
- (r) subject to subsection (7), make an intensive rehabilitative custody and supervision order in respect of the young person
 - (i) that is for a specified period that must not exceed
 - (A) two years from the date of committal, or
 - (B) if the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of committal, and that orders the young person to be committed into a continuous period of intensive rehabilitative custody for the first portion of the sentence and, subject to subsection 104(1) (continuation of custody), to serve the remainder under conditional supervision in the community in accordance with section 105,
 - (ii) that is for a specified period that must not exceed, in the case of first degree murder, ten years from the date of committal, comprising
 - (A) a committal to intensive rehabilitative custody, to be served continuously, for a period that must not exceed six years from the date of committal, and
 - (B) subject to subsection 104(1) (continuation of custody), a placement under conditional supervision to be served in the community in accordance with section 105, and
 - (iii) that is for a specified period that must not exceed, in the case of second degree murder, seven years from the date of committal, comprising
 - (A) a committal to intensive rehabilitative custody, to be served continuously, for a period that must not exceed four years from the date of committal, and
 - (B) subject to subsection 104(1) (continuation of custody), a placement under conditional supervision to be served in the community in accordance with section 105; and
- (s) impose on the young person, in accordance with paragraph 38(2)(e.1), any other conditions that the court considers appropriate.

Agreement of provincial director

(3) A youth justice court may make an order under paragraph (2)(l) or (m) only if the provincial director has determined that a program to enforce the order is available.

[...]

Intensive rehabilitative custody and supervision order

(7) A youth justice court may make an intensive rehabilitative custody and supervision order under paragraph (2)(r) in respect of a young person only if

(a) either

- (i) the young person has been found guilty of a serious violent offence, or
- (ii) the young person has been found guilty of an offence, in the commission of which the young person caused or attempted to cause serious bodily harm and for which an adult is liable to imprisonment for a term of more than two years, and the young person had previously been found guilty at least twice of such an offence;

(b) the young person is suffering from a mental illness or disorder, a psychological disorder or an emotional disturbance;

(c) a plan of treatment and intensive supervision has been developed for the young person, and there are reasonable grounds to believe that the plan might reduce the risk of the young person repeating the offence or committing a serious violent offence; and

(d) the provincial director has determined that an intensive rehabilitative custody and supervision program is available and that the young person's participation in the program is appropriate.

Consecutive youth sentences

(13) Subject to subsections (15) and (16), a youth justice court that sentences a young person may direct that a sentence imposed on the young person under paragraph (2)(n), (o), (q) or (r) be served consecutively if the young person

- (a) is sentenced while under sentence for an offence under any of those paragraphs; or
- (b) is found guilty of more than one offence under any of those paragraphs.

Duration of youth sentence for a single offence

(14) No youth sentence, other than an order made under paragraph (2)(j), (n), (o), (q) or (r), shall continue in force for more than two years. If the youth sentence comprises more than one sanction imposed at the same time in respect of the same offence, the combined duration of the sanctions shall not exceed two years, unless the sentence includes a sanction under paragraph (2)(j), (n), (o), (q) or (r) that exceeds two years.

Duration of youth sentence for different offences

(15) Subject to subsection (16), if more than one youth sentence is imposed under this section in respect of a young person with respect to different offences, the continuous combined duration of those youth sentences shall not exceed three years, except if one of the offences is first degree murder or second degree murder within the meaning of section 231 of the [Criminal Code](#), in which case the continuous combined duration of those youth sentences shall not exceed ten years in the case of first degree murder, or seven years in the case of second degree murder.

Duration of youth sentences made at different times

(16) If a youth sentence is imposed in respect of an offence committed by a young person after the commencement of, but before the completion of, any youth sentences imposed on the young person,

- (a) the duration of the sentence imposed in respect of the subsequent offence shall be determined in accordance with subsections (14) and (15);

- (b) the sentence may be served consecutively to the sentences imposed in respect of the previous offences; and
- (c) the combined duration of all the sentences may exceed three years and, if the offence is, or one of the previous offences was,
 - (i) first degree murder within the meaning of section 231 of the Criminal Code, the continuous combined duration of the youth sentences may exceed ten years, or
 - (ii) second degree murder within the meaning of section 231 of the Criminal Code, the continuous combined duration of the youth sentences may exceed seven years.

[...]

Adult Sentence and Election

SECTION 64: Application by Attorney General

64 (1) The Attorney General may, before evidence is called as to sentence or, if no evidence is called, before submissions are made as to sentence, make an application to the youth justice court for an order that a young person is liable to an adult sentence if the young person is or has been found guilty of an offence for which an adult is liable to imprisonment for a term of more than two years and that was committed after the young person attained the age of 14 years.

Notice of intention to seek adult sentence

(2) If the Attorney General intends to seek an adult sentence for an offence by making an application under subsection (1), the Attorney General shall, before the young person enters a plea or with leave of the youth justice court before the commencement of the trial, give notice to the young person and the youth justice court of the intention to seek an adult sentence.

Included offences

(3) A notice of intention to seek an adult sentence given in respect of an offence is notice in respect of any included offence of which the young person is found guilty for which an adult is liable to imprisonment for a term of more than two years.

[...]

SECTION 71: Hearing — adult sentences

71 The youth justice court shall, at the commencement of the sentencing hearing, hold a hearing in respect of an application under subsection 64(1) (application for adult sentence), unless the court has received notice that the application is not opposed. Both parties and the parents of the young person shall be given an opportunity to be heard at the hearing.

SECTION 72: Order of adult sentence

72 (1) The youth justice court shall order that an adult sentence be imposed if it is satisfied that

- (a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
- (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.

Order of youth sentence

(1.1) If the youth justice court is not satisfied that an order should be made under subsection (1), it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed.

Onus

(2) The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is on the Attorney General.

Pre-sentence report

(3) In making an order under subsection (1) or (1.1), the youth justice court shall consider the pre-sentence report.

Court to state reasons

(4) When the youth justice court makes an order under this section, it shall state the reasons for its decision.

[...]

SECTION 110: Identity of offender not to be published

110 (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Limitation

(2) Subsection (1) does not apply

(a) in a case where the information relates to a young person who has received an adult sentence; or

(b) [Repealed, 2019, c. 25, s. 379]

(c) in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

Exception

(3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.

Ex parte application for leave to publish

(4) A youth justice court judge shall, on the *ex parte* application of a peace officer, make an order permitting any person to publish information that identifies a young person as having committed or allegedly committed an indictable offence, if the judge is satisfied that

(a) there is reason to believe that the young person is a danger to others; and

(b) publication of the information is necessary to assist in apprehending the young person.

Order ceases to have effect

(5) An order made under subsection (4) ceases to have effect five days after it is made.

Application for leave to publish

(6) The youth justice court may, on the application of a young person referred to in subsection (1), make an order permitting the young person to publish information that would identify him or her as having been dealt with under this Act or the [Young Offenders Act](#), chapter Y-1 of the Revised Statutes of Canada, 1985, if the court is satisfied that the publication would not be contrary to the young person's best interests or the public interest.