SUPREME COURT OF CANADA

CITATION: R. *v.* I.M., 2025 SCC 23

APPEAL HEARD: October 15, 2024
JUDGMENT RENDERED: July 18, 2025
DOCKET: 40868

BETWEEN:

I.M.
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Canada,
Director of Criminal and Penal Prosecutions,
Attorney General of Alberta,
Justice for Children and Youth,
Queen's Prison Law Clinic,
Criminal Lawyers' Association (Ontario),
Peacebuilders Canada,
British Columbia Civil Liberties Association and
Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 224)	Kasirer J. (Wagner C.J. and Karakatsanis, Martin, Jamal, O'Bonsawin and Moreau JJ. concurring)
JOINT DISSENTING REASONS: (paras. 225 to 320)	Côté and Rowe JJ.

I.M. *Appellant*

v.

His Majesty The King *Respondent*

and

Attorney General of Canada,
Director of Criminal and Penal Prosecutions,
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Justice for Children and Youth,
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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Young persons — Sentencing — Adult sentence — Presumption of diminished moral blameworthiness or culpability — Accountability — Relevant factors — Young person found guilty of first degree murder in stabbing death of teenager — Youth justice court ordering that adult sentence be imposed on basis of applicable statutory two-part test requiring sentencing judge to be satisfied that presumption of diminished moral blameworthiness or culpability of young person was rebutted and that youth sentence would not be of sufficient length to hold young person accountable — Whether sentencing judge applied proper standard for rebuttal of presumption of moral blameworthiness or culpability — Whether sentencing judge erred in factors considered to impose adult sentence — Whether adult sentence should be imposed — Youth Criminal Justice Act, S.C. 2002, c. 1, s. 72(1).

When M was 17 years and 5 months old, he and several others confronted the victim, another 17-year-old, in an alley outside his home, seeking to rob him of firearms. The victim sustained multiple knife wounds in the altercation and died. Although M was the youngest in the group, he played an active role in planning and executing the robbery. A message he sent to one adult co-conspirator on the day of the murder indicated that he viewed the crime as a stepping stone to greater criminal activity. M also told a schoolmate days after the offence that he had stabbed the victim several times and showed him a bag containing bloodied clothing. After the events, M continued his efforts to procure a gun and, a week after the attack, left the country. He was eventually arrested and tried in youth court. The jury found M guilty of constructive first degree murder.

The Crown applied under s. 64 of the *Youth Criminal Justice Act* ("*YCJA*") to have M sentenced as an adult. The sentencing judge applied the two-step test under s. 72(1) of the *YCJA* to determine whether M should receive an adult sentence which required the court to be "satisfied" that the presumption of diminished moral blameworthiness had been rebutted and a youth sentence would be insufficient to hold M accountable for his actions. He determined that the applicable standard of proof was neither proof beyond a reasonable doubt nor proof on a balance of probabilities. Applying a standard of "satisfaction", the judge first concluded that, at the time of the offence, M exhibited the level of maturity, moral sophistication and capacity for independent judgment of an adult, based on the seriousness of the offence, M's role in the murder, the circumstances of the offence, M's age, youth record and post-offence conduct. He therefore concluded that the presumption of diminished moral blameworthiness was rebutted. Under the second step, the judge considered additional factors, including M's personal attributes and circumstances as well as his life in an impoverished neighbourhood. He then concluded that a youth sentence would be insufficient to ensure public safety and hold M accountable for his offending behaviour. The judge imposed an adult sentence of life imprisonment with a ten-year period of parole ineligibility. The Court of Appeal dismissed M's appeal.

Held (Côté and Rowe JJ. dissenting): The appeal should be allowed, the adult sentence imposed by the sentencing judge set aside and a youth sentence imposed.

Per Wagner C.J. and Karakatsanis, Martin, **Kasirer**, Jamal, O'Bonsawin and Moreau JJ.: On a proper interpretation of s. 72(1)(a) of the *YCJA*, the Crown must rebut the statutory presumption of diminished moral blameworthiness beyond a reasonable doubt. Furthermore, in determining whether the Crown has successfully rebutted this presumption, a court should not consider the seriousness or objective gravity of the offence; rather, it should consider factors that properly fix on the young offender's developmental age and capacity for moral judgment. In the instant case, at the first threshold step in s. 72(1)(a), the sentencing judge applied the wrong standard and erred in considering the seriousness of the offence and in failing to properly consider other factors. Accordingly, the sentence imposed by the sentencing judge is not deserving of deference on appeal. On re-sentencing, it is concluded that the Crown has failed to show, beyond a reasonable doubt, that the statutory presumption of diminished moral blameworthiness applicable to M has been rebutted. M must therefore be properly sentenced as a young person pursuant to the youth sentencing regime in the *YCJA*.

The regime for sentencing under the *YCJA* endeavours to hold young persons accountable for offending conduct through the imposition of sanctions with "meaningful consequences". It does so within a separate system for criminal justice based on "the principle of diminished moral blameworthiness or culpability" in s. 3(1)(b) of the *YCJA*. The onus of convincing the youth justice court that an adult sentence should be ordered is on the Crown and s. 72(1) of the *YCJA* sets out what the

Crown must prove. Section 72(1) creates a two-pronged onus under ss. 72(1)(a) and (b) and sentencing judges should engage separately with each of these two inquiries.

A blended approach would be contrary to the text of the provision, which sets the two prongs out in separate and independent paragraphs suggesting two inquiries, and the ordinary meaning of the words in each paragraph indicates that the inquiries are different in nature. Further, the legislative history of s. 72(1) includes amendments in 2012 which created two separate prongs and added the first prong requiring the Crown to rebut the presumption of diminished moral blameworthiness. This interpretation also takes into account the context and purpose of the general principle of diminished moral culpability of young persons that is enshrined in s. 3(1)(b) of the *YCJA*. Collapsing the two prongs into a blended analysis risks allowing accountability considerations to improperly influence the factually driven assessment of diminished moral blameworthiness.

Under the first prong of the test, set out in s. 72(1)(a), the Crown must satisfy a sentencing judge that the presumption of diminished moral blameworthiness has been rebutted. The law has long treated children and youth differently on the basis that they have reduced maturity and moral capacity and the unique developmental circumstances of young people justify a different societal response and approach to their culpability and sanction. An individual under 18 years of age is entitled to the presumption of diminished moral blameworthiness by virtue of their chronological age. When a young person is shown by the Crown to have the developmental maturity of an

adult, they lose the benefit of the presumption. Adult-like maturity and capacity for moral judgment develops over time. However, while age plays a role in the development of judgment and moral sophistication, chronological age and developmental age may not be one and the same and do not necessarily coincide. Developmental age refers to the actual stage of psychological, social, and moral maturity that an individual has attained. It is accorded significant weight in the recognition that young people often lack the judgment and autonomy that are generally attributed to adults. Rebuttal of the presumption therefore rests on proof of a fact — that the young person's developmental age, contrary to their chronological age, indicates they have the capacity for moral judgment of an adult. Proving that a young person has the developmental age of an adult is a factual inquiry that lends itself to proof beyond a reasonable doubt.

Section 72(1)(a) engages a young person's constitutionally protected liberty interest in that it risks raising the severity of their sentence to that of an adult, which can include life imprisonment. In the law of sentencing, facts that tend to aggravate a sentence must be proved beyond a reasonable doubt as a matter of fundamental justice under the *Charter*. Rebutting the presumption amounts to proving an aggravating factor because rebuttal exposes the young person to the risk of a significantly more severe sentence. Therefore, the Crown must rebut the statutory presumption of diminished moral blameworthiness beyond a reasonable doubt so that the *YCJA* conforms to the imperatives of the *Charter*. Approaching the presumption as a separate, threshold inquiry that must be assessed before consideration is given to

whether a youth sentence would hold the young person accountable ensures that the presumption is given constitutional force and that its purpose is achieved.

Although the fact of chronological age establishes who is entitled to the protection of the presumption, the unique developmental circumstances of young people is the rationale for the presumption. Since developmental age underlies a young person's presumed diminished blameworthiness, it must be the focus of the inquiry under s. 72(1)(a). The Crown must satisfy the court that the young offender's developmental profile is inconsistent with that presumed of a typical youth in that they possess adult-like maturity, capacity for moral judgment, and independence. Section 3(1)(b) of the *YCJA* codifies the principle of diminished moral blameworthiness, reflecting Parliament's intent to tether criminal responsibility to the developmental realities of young people.

Accordingly, to determine whether the presumption has been rebutted, the court must undertake a factual inquiry into the young offender's developmental age to determine if it is akin to an adult. This is undertaken by considering factors that provide insight into the young offender's personal developmental attributes at the time of the offence. This assessment is inherently fact-specific, nuanced, and contextual. The circumstances of the offender or evidence that speaks to the developmental age of the young person at the time of offence will be most relevant.

Factors that speak to the offence, rather than the young offender, are beyond the scope of this inquiry unless they show something about the offender's

personal attributes reflecting their developmental age. Courts should not weigh the objective seriousness of the offence in determining whether the Crown has rebutted the presumption, as it does not shed light on the offender's developmental attributes. Accordingly, consideration and weighing of the objective seriousness of an offence under s. 72(1)(a) is an error in principle. The circumstances of the offence may be relevant under s. 72(1)(a), but only insofar as they offer insights into the young person's developmental age.

Relevant considerations under s. 72(1)(a) may include conduct consistent with the presumed lesser maturity of the young offender such as impulsiveness or bravado that indicates immaturity, and whether planning reveals a level of sophistication and foresight that aligns with adult-level reasoning. A young offender's post-offence conduct temporally linked and related to the offence may be informative, but it can also reflect impulsive reactions driven by juvenile fear and panic.

The particular personal circumstances of the young person will be a central consideration to determining their developmental age. This may include the young person's actual age, background, sophistication in thinking, capacity for independent judgment, behaviour after the offence, whether the person was living like an adult, cognitive, emotional and mental health, and susceptibility to external influences among others. Chronological age is an important personal attribute but it cannot eclipse other indicators of developmental age as a matter of course. A sentencing judge who infers from a young offender's proximity to adulthood, without more, that their development

is akin to that of an adult effectively reverses the presumption of diminished moral blameworthiness. Courts may also examine the degree of independence the young person had at the time of the offence. Evidence of cognitive and emotional limitations, including behavioural disorders or mental health issues may assist sentencing judges when determining the young offender's developmental age. A young offender's history and background are also relevant, as they can significantly shape a young person's behaviour and judgment, and by extension, their development.

The probative value of evidence relating to the offender's behaviour and conduct while awaiting trial or sentencing in assessing developmental age will depend on the case. Courts must take care not to improperly infer greater maturity at the time of the offence based on such conduct as an adult but in some cases, such evidence may offer insight into developmental age at the time of the offence.

Expert evidence is not required to rebut the presumption, though it may provide valuable assistance in certain cases. A disadvantaged background and the connection between that background and systemic discrimination in the community can play a role in development. Social context evidence can provide helpful guidance to understand the particular experience of an offender and their moral culpability, especially with respect to offenders who belong to racialized groups that face overt and systemic discrimination. The social context in which a young offender grows up can often affect the trajectory of their life. Understanding that trajectory helps place the young offender's decisions in context, potentially demonstrating increased

vulnerability, diminished judgment, and a reduced capacity for moral decision making. The value of social context lies in what it can tell a sentencing judge about the offender, not the demographic groups to which that offender belongs.

If the presumption is rebutted under s. 72(1)(a), the Crown must also establish a second and distinct requirement before an adult sentence can be ordered. Under s. 72(1)(b), the sentencing judge must be satisfied that a youth sentence would be insufficient to hold the young person accountable for the offence. The Crown again bears the onus to show that the youth sentence would be unfit but the standard of satisfaction is not beyond a reasonable doubt. This inquiry resembles the determination of a fit sentence, an evaluative inquiry involving a discretionary weighing of aggravating and mitigating circumstances relating to the offence and the offender and the balance of competing sentencing principles.

The assessment under s. 72(1)(b) engages fundamental principles of youth sentencing and requires attention to the interplay between proportionality, accountability, and rehabilitation. It asks whether the constraints of youth sentencing must give way to achieve the accountability objectives established by the *YCJA*. Accountability as a cornerstone of youth sentencing encompasses sanctions that are not only proportionate but also promote meaningful consequences and aim to transform the young offender through measures tailored to their development and their capacity for societal reintegration. Since the inquiry under s. 72(1)(b) operates much like the determination of a fit sentence, it follows that assessing the appropriateness of a youth

sentence gives rise to similar considerations. This supports the view that the normative assessment called for by s. 72(1)(b) does not require proof beyond a reasonable doubt; it is evaluative in nature and requires a weighing and balancing of relevant factors.

The accountability inquiry permits the consideration of a broad array of factors, including the normative consequences of the offence, the impact on victims and the community, as well as the availability or lack of rehabilitative and reintegrative supports within the youth system. Sentencing judges must weigh the offender's culpability, the harm caused by their actions, and the normative character of their conduct. The seriousness of the offence is relevant to accountability. This encompasses both an objective examination of the offence including the harm inflicted, the nature of the violence, and the societal condemnation, as well as an assessment of its implications on the offender's culpability.

The breadth of the discretionary inquiry under the second prong necessarily includes relevant aspects of the offender's background to better understand their choices leading to, and their individual responsibility for, the crime. Sentencing judges must balance the aggravating and mitigating circumstances of the offence and the offender, including post-offence conduct and pre-sentence behaviour. Social context evidence can also shed light on the vulnerabilities arising from the offender's background and may assist in establishing a nuanced understanding of the offender's conduct and culpability. Other relevant factors are the harm caused to victims, fostering reparative measures and time spent in pre-sentence custody.

In the instant case, as the sentencing judge applied the wrong standard to testing the Crown's onus to rebut the presumption of diminished moral blameworthiness and erred in considering the seriousness of the offence as a factor, a fresh determination is required to decide whether the Crown has met its burden to have M sentenced as an adult. The Crown has not shown beyond a reasonable doubt that the presumption of diminished responsibility has been rebutted. There was evidence before the youth court of M's difficult upbringing and mental health problems affecting his developmental age and showing that his level of maturity was not that of an adult at the time of the offence. At the time of the offence, M saw his own conduct in the robbery as an occasion to prove his worth to adult peers as a criminal, and four days after the event, M imprudently recounted his wrongful conduct to a schoolmate. These facts reflected signs of incautious bravado, lack of adult-like reasoning and immature susceptibility to untoward adult influence at the time of the offence. On re-sentencing, these considerations are relevant to the proof of M's developmental age, and constitute evidence that indicates he did not have the maturity or capacity for moral judgment of an adult at the time of the offence. In light of the dire circumstances of the offence and considering all the relevant principles for youth sentencing, M should receive the maximum youth sentence for first degree murder expressly contemplated by Parliament in the *YCJA*: six years' custody and four years' conditional supervision.

Per **Côté** and **Rowe** JJ. (dissenting): The appeal should be dismissed. To rebut the presumption of diminished moral blameworthiness, a court must be *satisfied* by the Crown that the young offender has maturity, moral sophistication and capacity

for independent judgment of an adult. Parliament has imposed a standard of *satisfaction* for this evaluative question that a youth court sentencing judge must consider in reference to the totality of evidence. The majority conflates the application of a legal standard with a factual determination. The majority seeks to avoid this distinction by implicitly seeking to transform the legal standard established by Parliament into a factual finding. In the instant case, the sentencing judge committed no error having concluded that he was satisfied that, on all the evidence, the presumption of diminished moral blameworthiness was rebutted. Furthermore, the sentencing judge did not err in concluding that a youth sentence would not hold M sufficiently accountable for his crime and that, accordingly, an adult sentence should be imposed.

Parliament has set a standard of satisfaction in s. 72(1) of the *YCJA* to guide a determination of whether the *Criminal Code* or the *YCJA* ought to be used to craft a fit sentence. Both prongs of s. 72(1) require a youth court judge to be "satisfied". The word "satisfied" in s. 72(1)(b) gives rise to an evaluative inquiry involving a discretionary weighing of factors. The same should hold true for s. 72(1)(a), and the inquiry under s. 72(1)(a) does not require proof beyond a reasonable doubt. The presumption of diminished moral blameworthiness is not a fact to prove; it is a legal standard. The standard here is one of persuasion, is applicable under both prongs of s. 72(1), and is not equipped to be laid neatly on a scale of probabilities as it does not lend itself to classic burdens of proof. The evaluative calculus of the inquiry necessarily requires weighing and considering the totality of evidence. In other words, determining

whether the presumption has been rebutted is an evaluative exercise, not a finding of fact.

The legislative history supports this view. A first attempt in 2010 to amend s. 72(1), Bill C-4, proposed the standard of proof of "satisfied beyond a reasonable doubt" for both prongs of s. 72(1). Bill C-4 was met by opposition before it died on the Order Paper in 2011. In 2012, the federal government brought forward a new iteration of the Bill, which led to the 2012 amendments to s. 72(1). Notably, the proposed amendments in 2012 removed the standard of satisfaction beyond a reasonable doubt. At committee, an amendment proposing to reintroduce the standard of satisfaction beyond a reasonable doubt was defeated. This was a deliberate policy and legislative choice. This omission came in the wake of three provincial appellate decisions rejecting proof beyond a reasonable doubt as the applicable standard. This clarifies that Parliament expressly considered the beyond a reasonable doubt standard but ultimately opted against it. The majority fails to pay sufficient deference to what is clear legislative intent. Parliament adverted its mind to setting out a standard beyond a reasonable doubt but ultimately declined to do so. This legislative choice should not be casually dismissed. Statutory context also supports this conclusion. Part 4 of the *YCJA* sets out the rules for adult sentence applications, and sections in Part 4 related to s. 72(1) use language that acknowledges that the determination under s. 72(1) and the determination of a fit sentence are distinct inquiries. Section 72's express references to the *YCJA*'s Declaration of Principle further supports this conclusion. Similarly, the legislative text supports the conclusion that the standard set by Parliament does not require proof

beyond a reasonable doubt because s. 72(1) states that the youth justice court must be "satisfied" of both paras. (a) and (b).

Relevant factors to consider under s. 72(1)(a) relate to the circumstances of the offender, the circumstances and complexity of the offence, and conduct after the offence. There is agreement with M, as well as the majority, that the seriousness of the offence does not bear on the offender's maturity and risks overwhelming the analysis due to the serious nature of the crimes typically at stake when the rebuttal is at issue. The seriousness of the offence is a relevant question at the accountability stage under s. 72(1)(b), but is not relevant as to the offender's level of moral blameworthiness under s. 72(1)(a).

Circumstances of the young person include their age, background and antecedents, including location of upbringing, racial identity, and adverse childhood experiences; whether at the time of the offence they were living like an adult and, if so, was that by choice; previous offences; dependence on or vulnerability to the influence of others; *Gladue* factors if any or the contents of any Impact of Race and Culture Assessment, pre-sentence report, or *Gladue* report; and any cognitive limitations or emotional or mental health issues. Circumstances of the offence include indications of impulsiveness, bravado or a sense of invincibility; planning or premeditation; motive indicative of mature or immature reasoning; the young person's role; whether the young person chose to engage in the impugned activity; actions that demonstrate critical thinking and adult-like judgment; steps to follow through with the offence or to

cover it up; and whether the young person understood the consequences in terms of criminal sanctions and impact on others. Complexity of the offence can be an indication of maturity and assist in rebutting an assertion of youthful impulsiveness. Relevant post-offence conduct includes whether the young person took responsibility or demonstrated remorse; personal growth or lack thereof; attempts to evade detection or destroy evidence; steps at rehabilitation and restitution; and disciplinary records or behaviour in custody. Post-offence conduct is only relevant to the extent that it provides insight into the offender's maturity, level of sophistication, and capacity for adult-like judgment at the time of the offence.

The sentencing judge in the instant case did not err in deciding that he was satisfied that the Crown met its persuasive burden under s. 72(1)(a). He erred in considering the seriousness of the offence under this prong but this error did not have a material impact on the sentence. At the time of the offence, M was on the cusp of adulthood and was residing in his family home. He had a criminal record which included breaking and entering, theft, and possession for the purpose of trafficking. He had been sentenced to two probation orders and was banned from having any firearm or weapon. M's circumstances show a young man raised in an immigrant community in a low-income neighbourhood, influenced by negative neighbourhood dynamics. There is no indication of mental health issues but M reported being bullied as a child and may suffer from a learning disability. The circumstances and complexity of the offence include planning, premeditation, and participation as a principal. This indicates mature reasoning. Following the offence, M attempted to discard his bloody clothing,

left the country, and continued efforts to obtain a gun. This conduct is emblematic of a person who understands the gravity of their actions and points toward adult judgment and maturity at the time of the offence. There is no error in the sentencing judge having concluded as he did that he was satisfied that, on all the evidence, the presumption of diminished moral blameworthiness was rebutted.

A youth sentence would not be of sufficient length to hold M accountable. There is evidence of premeditation, organization to overcome the victim's resistance, and that the victim may have been stabbed from behind and may have been restrained. M and his co-accused terrorized the victim's mother inside the family home. The seriousness of the offence leads to a high degree of moral blameworthiness. The sentencing judge found M to be a stabber and a principal. Blameworthiness is not attenuated by M's age given his proximity to 18 and a lack of indicia pointing to immaturity. M demonstrated adult-like judgment before, during and after the crime. Serious concerns were expressed about treatment prospects and the adequacy of a youth sentence to ensure public safety. These findings should be shown deference.

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By Côté and Rowe JJ. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Tulloch and Huscroft JJ.A.), 2023 ONCA 378, 426 C.C.C. (3d) 468, [2023] O.J. No. 2312 (Lexis), 2023 CarswellOnt 7836 (WL), affirming the sentence of the accused for first degree murder. Appeal allowed, Côté and Rowe JJ. dissenting.

Nader R. Hasan, *Stephen Aylward* and *Alexandra Heine*, for the appellant.

Alexander Alvaro and *Justin Reid*, for the respondent.

Roy Lee and *Ginette Gobeil*, for the intervener Attorney General of Canada.

Julie Nadeau and *Philippe Desjardins*, for the intervener Director of Criminal and Penal Prosecutions.

Sarah Clive, for the intervener Attorney General of Alberta.

Mary Birdsell, *Jin Chien* and *Katherine Long*, for the intervener Justice for Children and Youth.

Annamaria Enenajor and *Heather Gunter*, for the intervener Queen's Prison Law Clinic.

Maija Martin and *Jolene Hansell*, for the intervener Criminal Lawyers' Association (Ontario).

Stephanie Di Giuseppe and *Maya Borooah*, for the intervener Peacebuilders Canada.

Vincent Larochelle and *Safiyya Ahmad*, for the intervener British Columbia Civil Liberties Association.

Cori Singer and *Samara Secter*, for the intervener Canadian Civil Liberties Association.

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

KASIRER J. —

I. Overview

[1] When I.M. was 17 years and 5 months old, he and several others confronted S.T., another 17-year-old, in an alley. The group sought to rob S.T. who they believed

was in possession of firearms. S.T. died as a result of knife wounds sustained in the fray. I.M. was convicted of first degree murder by a youth justice court. The Crown sought an order that he receive an adult sentence. The sentencing judge was satisfied that the requirements for an adult sentence order were met, and he sentenced I.M. to life in prison without eligibility for parole before 10 years. The Court of Appeal dismissed I.M.'s appeal. Before this Court, I.M. says the courts below erred in their interpretation of s. 72(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"), and those errors in law had a material effect on his sentence. I.M. asks that a youth sentence be imposed in place of the adult sentence of life imprisonment.

[2] To resolve I.M.'s sentence appeal, the Court must interpret s. 72(1) to decide when a young person may be sentenced as an adult rather than under the sentencing regime set forth in the *YCJA*. The companion case of *R. v. S.B.*, 2025 SCC 24, heard together with this appeal, raises the same issue.

[3] The regime for sentencing under the *YCJA*, like that under the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), applicable to adults, endeavours to hold young persons accountable for their offending conduct through the imposition of sanctions with "meaningful consequences". But the *YCJA* does so in a separate system for criminal justice based on "the principle of diminished moral blameworthiness or culpability" (s. 3(1)(b) *YCJA*). Thus, a youth sentence for first degree murder cannot exceed a period of 10 years, comprised of a committal to custody of no more than 6 years and a placement under conditional supervision in the community (s. 42(2)(q)(i)

YCJA). By contrast, the applicable adult sentence for the same offence is life imprisonment, without possibility of parole for 10 years (ss. 235(1) and 745.1(b) *Cr. C.*).

[4] There is no doubt that the onus of convincing the youth justice court that an adult sentence should be ordered is on the Crown (s. 72(2) *YCJA*). Section 72(1) *YCJA* sets out what the Crown must prove. An adult sentence shall be ordered when the youth justice court is satisfied that the "presumption of diminished moral blameworthiness or culpability" of the young person is rebutted and when a youth sentence would not be of sufficient length to "hold the young person accountable" for their offending conduct. In these companion appeals, the Court must interpret s. 72(1) to determine what these requirements mean and whether, in the result, the Crown has met its burden in the different circumstances of I.M. and S.B., both of whom were young persons when they committed their offences.

[5] Courts across Canada have divided on whether or not the Crown must satisfy a sentencing judge that the presumption of diminished moral blameworthiness in s. 72(1)(a) has been rebutted beyond a reasonable doubt. In this case, the courts below found, instead, that rebutting the presumption calls for a weighing of considerations by a sentencing judge that does not lend itself to the imposition of the standard of proof of beyond a reasonable doubt on the Crown. On this view, a youth justice court must make an evaluative decision, or an informed judgment, to determine whether the young person has the maturity, moral sophistication and capacity for

independent judgment of an adult. If the judge is satisfied of this after weighing the relevant considerations, the Crown has met its burden.

[6] I respectfully disagree with this reading of s. 72(1)(a). The statutory rule rests on a fact — the young person's age — that justifies the presumption of their diminished moral blameworthiness unless the presumption is rebutted. When an individual is under 18 — when they are a "young person" according to the definition in s. 2(1) *YCJA* — they are entitled to the presumption of diminished moral blameworthiness in s. 72(1)(a) by virtue of their chronological age. However, when a young person is shown by the Crown to have the maturity of an adult, they lose the benefit of the presumption that would otherwise mean, because of their age, that they receive a youth sentence under the *YCJA*. Like the presumption itself, rebuttal of the presumption by the Crown therefore rests on proof of a fact: when the young person's *developmental age*, contrary to their *chronological age*, indicates they have the capacity for moral judgment of an adult, the young person is no longer deserving of the presumption's benefit. Proving that a young person has the developmental age of an adult may of course be more complicated than proving chronological age, but it is no less a factual inquiry that lends itself just as well to proof beyond a reasonable doubt.

[7] Importantly, the rule on rebutting the presumption of diminished moral blameworthiness in s. 72(1) *YCJA* must be read, if its meaning is uncertain, in a manner that conforms to the *Canadian Charter of Rights and Freedoms*. The Court has decided that there is a principle of fundamental justice under s. 7 of the *Charter* that young

persons are entitled to a presumption of diminished culpability in sentencing (*R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at paras. 69-70). Moreover, the rebuttal of the presumption in s. 72(1)(a) engages a young person's constitutionally protected liberty interest in that it risks raising the severity of their sentence to that of an adult, in this case to life imprisonment. In the law of sentencing, this Court's jurisprudence makes plain that facts that tend to aggravate a sentence must be proved beyond a reasonable doubt as a matter of fundamental justice under the *Charter* (paras. 78-80, citing *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 686, and *R. v. Gardiner*, [1982] 2 S.C.R. 368, at pp. 414-15).

[8] If the presumption is rebutted, I.M.'s jeopardy is substantially increased in that he faces the adult sentence of life imprisonment for murder as against a youth sentence that cannot exceed 10 years. The Crown must show that, notwithstanding the fact that I.M. was a young person at the time of the offence, his developmental age at that time was that of an adult. This must be done on a standard of beyond a reasonable doubt given that rebutting the presumption amounts to proving an aggravating factor. This is because rebuttal exposes I.M. to the risk of a sentence that is significantly more severe than the youth sentence applicable to first degree murder.

[9] On a proper interpretation of s. 72(1)(a) *YCJA*, the Crown thus bears this persuasive burden if the youth justice court is to be "satisfied" that the presumption is rebutted. The constitutional principles recognized in *D.B.*, *Pearson* and *Gardiner*, considered together, require this interpretation of s. 72(1)(a). The Crown must rebut the

statutory presumption of diminished moral blameworthiness beyond a reasonable doubt so that the statute conforms to the imperatives of the *Charter* (*R. v. B.J.M.*, 2024 SKCA 79, 441 C.C.C. (3d) 316, at paras. 63-70 and 117, and *R. v. Henderson*, 2018 SKPC 27, at para. 34; see also D. Parkes, "'17 Going on 23': Sentencing Young People to Life in Canada" (2025), 48:1 *Dal. L.J.* 1, fn. 50, at pp. 11-13).

[10] Courts have also disagreed on what factors a sentencing judge should consider in determining whether the Crown has successfully rebutted the presumption of diminished moral blameworthiness. The seriousness or objective gravity of the offence, for example, while relevant at the second stage of the analysis under s. 72(1)(b) *YCJA*, has no logical bearing on the determination of whether a young person displays the capacity for moral judgment of an adult at the time of the offence. As such, it is irrelevant to rebutting the presumption in s. 72(1)(a). At the same time, factors that properly fix on the young offender's developmental age and capacity for moral judgment, such as their mental health and background, need to be considered where they are part of the record.

[11] If the presumption is rebutted by the Crown under s. 72(1)(a), a second and distinct requirement must be met before an adult sentence can be ordered. Under s. 72(1)(b), the sentencing judge must be satisfied that a youth sentence would be insufficient to hold the young person accountable for the offence.

[12] The Crown again bears the onus to show that the youth sentence — in this case the one that is set out in s. 42(2)(q)(i) *YCJA* — would be unfit, but the standard of

satisfaction is not beyond a reasonable doubt. Here the nature of the inquiry resembles the determination of a fit sentence, an evaluative inquiry involving a discretionary weighing of aggravating and mitigating circumstances relating to the offence and the offender and the balance of competing sentencing principles (see *B.J.M.*, at para. 95).

[13] At this stage, the seriousness of the offence is most germane, in that the exercise includes a consideration of whether a youth sentence is proportionate to the gravity of the offence and the degree of responsibility of the offender. The profile and background of the offender may again be relevant, but to a different end. At this stage, these matters are not considered in respect of the rationale engaged by the presumption in s. 72(1)(a) relating to the capacity for moral judgment but, instead, to the rationale of accountability to which Parliament speaks in s. 72(1)(b).

[14] In the case of I.M., and with respect for other views, I conclude that the Crown has not shown beyond a reasonable doubt that the presumption of diminished moral blameworthiness has been rebutted at the first threshold step in s. 72(1)(a). The sentencing judge applied the wrong standard to testing the Crown's onus. The court then considered, as a factor in the calculus, the seriousness of the offence which was a further error of law in that it is not relevant to the inquiry under s. 72(1)(a).

[15] In addition, the sentencing judge did not properly consider aspects of I.M.'s medical history, as revealed by expert medical evidence, and his personal background. Moreover, implications of some of the facts found by the sentencing judge showed I.M.'s immaturity and lack of adult-like capacity for moral judgment at the time of the

offence. These matters presented a further obstacle to rebutting the presumption. These errors had the cumulative effect of undermining the sentence which, following the standard of review explained in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 44 et seq., is not deserving of deference on appeal.

[16] In the circumstances, this Court must intervene and conduct its own sentencing analysis (*Lacasse*, at para. 43; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 27). This includes a fresh determination by this Court under s. 72(1) *YCJA* to decide whether the Crown has met its burden to have I.M. sentenced as an adult. Accepting the sentencing judge's findings of fact, including those arrived at in respect of the circumstances of the offence, there was evidence before the youth court of I.M.'s difficult upbringing and mental health problems affecting his developmental age relevant to s. 72(1)(a), and demonstrating that his level of maturity was not that of an adult at the time of the offence. Furthermore, the evidence accepted by the sentencing judge also showed that, at the time of the offence, I.M. saw his own conduct in the robbery as an occasion to prove his worth to adult peers as a criminal. Four days after the event, I.M. also imprudently recounted his wrongful conduct to a schoolmate. These facts were not just proof of I.M.'s involvement in the crime, as the sentencing judge rightly noted, but also reflected signs of incautious bravado, lack of adult-like reasoning and I.M.'s immature susceptibility to untoward adult influence at the time of the offence.

[17] On re-sentencing, these further considerations are relevant to the proof of I.M.'s developmental age, and constitute evidence that indicates he did not have the maturity or capacity for moral judgment of an adult at the time of the offence. I conclude that the Crown has failed to show, beyond a reasonable doubt, that the statutory presumption of diminished moral blameworthiness applicable to I.M. has been rebutted. He must therefore be properly sentenced as a young person pursuant to the youth sentencing regime in the *YCJA*.

[18] For the reasons that follow, I would allow the appeal, set aside the judgment of the Court of Appeal, quash the youth justice court's decision, and sentence I.M. afresh as a young person under s. 42(2) *YCJA*. I hasten to say that, I.M. remains no less accountable at sentencing for the offence he committed in 2011 as a young person. In light of the dire circumstances of the offence described by the sentencing judge, and considering all the relevant principles for youth sentencing, I propose that this Court impose upon I.M. the maximum youth sentence for first degree murder expressly contemplated by Parliament in s. 42(2)(q)(i) *YCJA*.

[19] In the result, for the six-year custodial portion of his youth sentence, I would credit I.M. for all the time he spent in custody post-committal under the wrongly imposed adult life sentence, a period approximating five years. As for additional credit for the period he was detained in custody prior to sentence, I would not accede to I.M.'s request to sentence him to "time served". Because the record before us is incomplete, I propose to remand the matter of pre-sentence credit to a youth justice court judge to

decide this discretionary question under s. 38(3) *YCJA*, with proper submissions and with full regard, in particular, to the significant time I.M. spent in pre-sentence custody and his conduct during that period of which we do not have a full account in the appellate record. Thereafter, as required by s. 105 *YCJA*, a youth justice court judge will determine the appropriate modalities to govern his four-year conditional supervision portion of his youth sentence, taking into account all relevant circumstances at that time.

II. Background

A. *The Offence and I.M.'s Conviction for First Degree Murder*

[20] On a January evening in 2011 in suburban Toronto, I.M. went in a group to the home of S.T., a 17-year-old youth. I.M. himself was 17 years and 5 months old at the time. He was in the company of at least four others, including several adult men. The group planned to rob S.T. of firearms they believed were in his possession.

[21] S.T. was shovelling snow outside his home when the group confronted him in the driveway. An altercation ensued. One of their number struck S.T. on the head with a handgun. When S.T. resisted, the group forced him into a narrow alleyway adjacent to his house. S.T. was stabbed 11 or more times, including a deep stab wound to the side of his nose, another to his back that punctured his right lung, and another still to the middle of his lower back that penetrated his right kidney. A forensic pathologist would later find that there were no defensive wounds on S.T.'s forearms or

hands, indicating that he may have been restrained, or unconscious from blood loss, or stabbed from behind during the attack. The absence of such injuries suggested that S.T. had been unable to meaningfully defend himself against his attackers.

[22] The group left S.T. bleeding in the alleyway with what would prove to be fatal wounds. I.M., who had received a cut to his hand during the attack, proceeded with the others into the house, where they encountered S.T.'s mother. She was struck twice in the head with a handgun and forced to sit in a chair with her head between her knees while I.M. and the others searched the house for firearms. The group found none. About this time, S.T.'s father and brother arrived home. The father found S.T. in the alleyway, covered in blood and unresponsive. The brother called emergency services for help. S.T. was transported to the hospital, where he was later pronounced dead.

[23] A week after the attack, I.M. left the country. Three of the adults involved were arrested several months later. In 2015, one of the adults was convicted of first degree murder and the two others were convicted of second degree murder. On appeal, the first degree murder conviction was substituted for second degree murder.

[24] I.M. was eventually arrested in 2013. A youth at the time of the offence, he was tried alone under the *YCJA* and convicted of first degree murder in 2019.

[25] Although he was the youngest in the group, I.M. played an active role in both planning and executing the robbery that led to the fatal assault. Text messages between I.M. and one adult co-conspirator showed that in the days leading up to the

robbery, I.M. actively sought to acquire a firearm, expressing his desire to purchase a .38 calibre handgun. On the day of the murder, I.M. sent a message to the same adult, referring to the planned robbery as his "cum.up" (A.R., vol. II, at p. 167), indicating that he viewed the crime as a stepping stone to greater criminal activity.

[26] In his jury instructions, the trial judge described I.M.'s involvement as significant. This conclusion rested on the forensic findings, corroborating testimony, and communications with co-conspirators. G.D., a schoolmate of I.M., testified that I.M. had acknowledged stabbing S.T. many times and that I.M. had shown him a bag of bloody clothing which he intended to throw out. This testimony reinforced the Crown's theory that I.M. was a principal actor in the events leading to S.T.'s death.

[27] I.M. did not testify at his trial. The defence's position was that he did not participate in the stabbing. His counsel advanced the theory that after being injured during the initial confrontation with S.T., I.M. entered the house to complete the robbery and was not in the alleyway when the fatal stabbing occurred. I.M. argued that the trail of his blood inside the house corroborated his version of events, as there was no evidence of his blood in the alleyway. In the end, the jury found I.M. guilty of first degree constructive murder under s. 231(5)(e) *Cr. C.*, an offence which directs that murder is in the first degree when it occurs in the course of an unlawful confinement.

[28] I.M. was a young person at the time of the offence. The Crown applied under s. 64 *YCJA* to have I.M. sentenced as an adult.

B. *Further Background Relevant to Sentencing*

[29] The effect of these events on S.T.'s family cannot be overstated. His mother continues to suffer from both the emotional and physical toll that her son's death and the violent nature of the robbery have had on her life. S.T.'s father's life has been consumed by grief; his son's death has left him without a sense of safety, and an inability to rest or connect with others. S.T.'s brother remains haunted by the tragedy.

[30] I.M. was born in Bangladesh on October 9, 1993. He immigrated to Toronto with his family in 1994. His family environment was a stable one. His parents described their relationship as close and respectful. I.M.'s mother emphasized his attentiveness and willingness to listen, while his father noted I.M.'s engagement in religious activities and his positive interactions with his siblings and cousins. The family visited I.M. regularly during his detention, expressing their continued support.

[31] I.M.'s education was disrupted by frequent changes in schools due to bullying and other difficulties he experienced. In 2010, he survived a school shooting, prompting a transfer to yet another school, but leaving him fearful long thereafter. He was diagnosed with a learning disability, requiring additional time to process and retain information. Despite I.M.'s struggles, school records noted his potential as a student.

[32] I.M.'s criminal involvement began in his early teens, influenced by older peers. He was involved in the selling of drugs and in burglaries by the age of 12 or 13. His first conviction was when he was 16, for break and enter, and theft. This was

followed by a conviction for drug trafficking. These offences resulted in probationary sentences and firearm prohibitions.

[33] While in custody on the murder charge, after his coming of age, I.M. accumulated 15 misconduct reports, including assaults, possession of contraband, and property damage. In February 2019, while awaiting trial in respect of the charge arising from S.T.'s death, I.M. was charged with trafficking a controlled substance.

[34] Dr. Mark Pearce, a forensic psychiatrist, conducted a psychiatric evaluation of I.M. prior to sentencing. His report provides significant information concerning I.M.'s psychological profile and potential for rehabilitation. Dr. Pearce diagnosed I.M. with adolescent-onset conduct disorder, characterized by persistent conduct violating societal norms. He noted I.M.'s lack of remorse and empathy, traits associated with a high risk of developing "antisocial personality disorder" in adulthood. I.M.'s early exposure to criminal behaviour, compounded by instability and poor role models, contributed to his antisocial conduct.

[35] The assessment included a "Structured Assessment of Violence Risk in Youth", highlighting several risk-enhancing factors: peer delinquency, supervision failures, and low school achievement. Positive protective factors, such as family support and the absence of a major mental illness, were also noted.

[36] Dr. Pearce expressed concern over I.M.'s misconduct while in custody, including assault and trafficking. I.M.'s behaviour reflected significant resistance to

authority and adherence to rules. Dr. Pearce recommended targeted interventions, including violence prevention programs and pro-social mentorship. He was unsure about I.M.'s prognosis due to the severity of his conduct disorder, entrenched antisocial values and his potential offending while in custody in early 2019.

[37] Dr. Pearce also addressed I.M.'s psychological vulnerabilities, including his reported feelings of sadness and stress in custody. While I.M. did not exhibit signs of major mental illness, these emotional challenges underscored the complexity of his case and the need for tailored rehabilitative efforts.

III. Judicial History

A. *Ontario Superior Court of Justice, 2020 ONSC 4660 (André J.)*

[38] In his reasons for sentence, the youth court judge turned first to the Crown's application for an order of an adult sentence for I.M.'s first degree murder conviction. I.M. had been in custody for more than six years and seven months since his arrest in 2013. His counsel argued that the Crown's application should be dismissed and that a fit sentence pursuant to the *YCJA* would be one additional year in custody followed by three and one-half years of mandatory community supervision. He also sought an Intensive Rehabilitative Custody and Supervision ("IRCS") order.

[39] The sentencing judge explained the two-step test under s. 72(1) *YCJA* to determine whether a young person should receive an adult sentence. The onus of proof,

he wrote, rests with the Crown. The court must be "satisfied" that the presumption of diminished moral blameworthiness had been rebutted and a youth sentence would be insufficient to hold I.M. accountable for his actions.

[40] At the outset, the sentencing judge identified the applicable standard of proof under s. 72(1), citing *R. v. O. (A.)*, 2007 ONCA 144, 218 C.C.C. (3d) 409, and *R. v. B.L.*, 2013 MBQB 89, 292 Man. R. (2d) 51. He held that the standard under s. 72(1) is neither proof beyond a reasonable doubt nor proof on a balance of probabilities. Instead, the court must determine whether it is satisfied, upon careful consideration of all relevant factors, that the statutory conditions are met. He then identified the key factors applicable to both ss. 72(1)(a) and 72(1)(b), including the seriousness and circumstances of the offence; the age, maturity, and character of the young person as well as the young person's background and prior record.

[41] Each of ss. 72(1)(a) and 72(1)(b) *YCJA* was analyzed separately. In respect of s. 72(1)(a) — whether the Crown had succeeded in rebutting the presumption of diminished moral blameworthiness — the judge began by recalling the seriousness of the offence. I.M. was convicted of first degree murder, "the most serious offence under the *Criminal Code*" (para. 28, reproduced in A.R., vol. I, at p. 12). The seriousness of the murder conviction did not, however, justify the imposition of an adult sentence "in and of itself" (para. 29).

[42] The judge characterized I.M.'s involvement as a principal in the commission of the crime, not a passive participant. In one text exchange, I.M. referred

to the robbery to one of the adult participants in the incident as his "cum.up", indicating that he viewed the crime as a stepping stone to other offences and that "this mission was his graduation to serious criminal activities" (para. 9). The sentencing judge also noted that this was not a spur of the moment incident; the planning of the robbery extended over several days. After the stabbing, I.M. continued on to search the house for firearms, demonstrating his unwavering commitment to the plan. The judge noted that G.D., a schoolmate, testified that I.M. told him several days after the event that he had stabbed the victim several times. He showed G.D. a bag containing bloodied clothing and told him that he was "trying to get rid of the clothing" (para. 11). I.M. later maintained efforts to procure a gun and eventually fled to Bangladesh, actions which, in the sentencing judge's view, constituted post-offence conduct that "exacerbate[d] the seriousness of the murder" (para. 33).

[43] The judge considered I.M.'s age and maturity. Although I.M. was 17 years and 5 months old at the time of the offence, his actions reflected the capacity for planning and independent judgment characteristic of an adult. I.M.'s ability to coordinate the robbery, act decisively during the crime, and methodically distance himself from the offence further demonstrated adult-level maturity. I.M.'s criminal record — convictions for break and enter, theft, and drug trafficking — revealed a pattern of escalating criminal behaviour. At the time of the murder, I.M. was subject to two probation orders and a weapons prohibition, none of which deterred him.

[44] Based on this evaluation, applying a standard of "satisfaction", the judge concluded that the presumption of diminished moral blameworthiness was rebutted. He found that, at the time of the offence, I.M. exhibited "the level of maturity, moral sophistication and capacity for independent judgment of an adult" (para. 38).

[45] Under the second prong of the test for an adult sentence in s. 72(1)(b) *YCJA*, the judge examined whether a youth sentence would be of sufficient length to hold I.M. accountable. Beyond the considerations common to both prongs already identified, the judge reviewed additional factors, including victim impact statements, I.M.'s pre-sentence report, his conduct while incarcerated, and expert assessments of his rehabilitative prospects that are relevant under the second prong. The victim impact statements provided accounts of the profound emotional and financial toll of the crime on S.T.'s family. The misconduct reports in his record raised concerns about I.M.'s willingness to reform. He also expressed concern over I.M.'s minimization of his role in the offence and his failure to disclose a recent drug-related incident while in custody. These findings, along with I.M.'s inconsistent statements about his motivations, led the judge to question I.M.'s resolve to rehabilitate.

[46] The "many sympathetic aspects" relating to I.M.'s life growing up in an impoverished neighbourhood were recorded. The judge noted the bullying, the peer group influences, and frequent change of schools, all of which "negatively impacted his youthful life" (para. 51). Despite evidence of family and community support, the judge nevertheless found that I.M.'s persistent misconduct, lack of remorse, and

continued involvement in criminal activity showed failure to take responsibility for his actions.

[47] The judge "reluctantly" concluded that a youth sentence would be insufficient to ensure public safety and hold I.M. accountable for his offending behaviour (para. 69). He imposed an adult sentence of life imprisonment with a 10-year period of parole ineligibility.

B. *Court of Appeal for Ontario, 2023 ONCA 378, 426 C.C.C. (3d) 468 (Simmons, Tulloch and Huscroft JJ.A.)*

[48] I.M. appealed both his conviction and sentence. The conviction appeal was dismissed and has not been appealed to this Court. On sentence, I.M. challenged in particular the decision to impose an adult sentence pursuant to s. 72(1) *YCJA*.

[49] The Court of Appeal agreed with the judge that the Crown had succeeded in rebutting the presumption of diminished moral blameworthiness. Just seven months shy of adulthood, I.M. demonstrated the maturity, moral sophistication, and independent judgment of an adult. The court underscored that I.M. had been convicted of first degree murder, "one of the most serious offences known to our criminal law" and it was "a brutal murder of a seventeen-year-old youth outside of his own home that had a devastating impact on the victim's family" (para. 75). There were additional factors that justified the judge's conclusion that the presumption was rebutted.

[50] I.M.'s active and willing participation in the robbery, his extensive criminal record, and his misconduct in custody distinguished his case from others where youth sentences had been deemed sufficient. I.M. was on the cusp of adulthood at the time of the offence, which can tip the balance towards an adult sentence over a youth sentence. Taken together, wrote the Court of Appeal, the seriousness and circumstances of the offence, along with I.M.'s age, character, background, previous record, and post-offence conduct showed a level of maturity, moral sophistication and capacity for independent judgment of an adult so that an adult sentence should apply.

[51] The court also agreed with the sentencing judge's conclusion that a youth sentence, even when coupled with an IRCS order, would be insufficient to hold I.M. accountable. Dr. Pearce's psychiatric assessment, evidence that not many programs would be responsive to adolescent-onset conduct disorder, and the proposed treatment plan under the IRCS framework raised concerns about I.M.'s suitability for rehabilitation. I.M.'s antisocial personality traits, compounded by his post-offence behaviour, rendered him a poor candidate for the specialized programs offered under the IRCS framework.

[52] In dismissing the appeal, the court emphasized that the sentencing judge's balancing of aggravating and mitigating factors, combined with his consideration of the *YCJA*'s principles, warranted deference on appeal. A life sentence with a 10-year period of parole ineligibility for I.M. was found to be fit in the circumstances.

IV. Issues on Appeal

[53] The principal issue in this appeal is whether the sentencing judge erred when he imposed an adult sentence on I.M. pursuant to s. 72(1) *YCJA*. If indeed the sentencing judge erred, the question arises whether that error had a material impact on the sentence imposed on I.M., thereby requiring appellate intervention, including re-sentencing by this Court.

[54] Answering these questions calls upon the Court to interpret s. 72(1), including the relevant standard of proof and factors relevant to deciding whether to order an adult sentence by a youth justice court. In the absence of a constitutional challenge to the law, I.M. argues that both the sentencing judge and the Court of Appeal misinterpreted the provision. The appellant says that these were errors in law that, in the result, had a material effect on the decision to sentence him to an adult sentence of life imprisonment, with no possibility of parole for 10 years under s. 745.1(b) *Cr. C.* Instead, I.M. says he should be sentenced to the term for a youth found guilty of first degree murder, following the modalities set forth in s. 42(2)(q) *YCJA*.

[55] An error in discerning the meaning of s. 72(1) *YCJA*, as alleged by the appellant, would be an error of law in the determination of the sentence. While the appellate standard of review of sentencing decisions is a deferential one, this Court explained in *Lacasse* that an appellate court may intervene to vary a sentence if the sentencing judge made an error in principle, but only if that error had an impact on the sentence (paras. 41 and 44). This same deferential approach applies to appellate review of youth sentencing decisions (see, e.g., *LSJPA — 1915*, 2019 QCCA 786, at para. 44;

R. v. W. (M.), 2017 ONCA 22, 134 O.R. (3d) 1, at para. 49; *R. v. A.W.B.*, 2018 ABCA 159, 71 Alta. L.R. (6th) 90, at para. 12; *R. v. Okemow*, 2017 MBCA 59, 353 C.C.C. (3d) 141, at para. 41).

V. Statutory Context for the Appeal

[56] A review of the statutory context for applications by the Attorney General to have a young person sentenced as an adult is essential to discerning the proper interpretation of s. 72(1) *YCJA*, a matter at the core of this appeal. The parties have rightly argued the case on the basis that the amended s. 72 applies to I.M.[1]

[57] Under the *YCJA*, a "young person" is someone between the ages of 12 and under 18 years old (s. 2(1)); the Act applies to persons 18 and over, like I.M., who committed an offence while a young person (s. 14(5)). In Canadian law, a person cannot be convicted of an offence in respect of conduct on their part while less than 12 years old (s. 13 *Cr. C.*). While a child of that age is, under statute, *doli incapax* (i.e. deemed to be incapable of committing a crime), a young person 12 and over and under 18 can be convicted of a criminal offence, including a "serious offence", as defined in s. 2(1), for which the maximum punishment is imprisonment for 5 years or more.

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[1] Section 72 was amended by the *Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 183. I.M. committed the offence in 2011 — prior to the coming into force of the amendments on October 23, 2012 — when he was a "young person" under s. 2(1) *YCJA*. Proceedings were commenced against him in 2013. The transitional provisions of the amending statute direct that where an offence is committed by a young person prior to October 23, 2012, the amended s. 72 nevertheless applies when the proceedings against the young person were commenced after that date (ss. 195 and 204 of the *Safe Streets and Communities Act*).

[58] This is a sentence appeal. The order made by the youth justice court to sentence I.M. as an adult is, on appeal, considered to be "part of the sentence" (ss. 37 and 72(5) *YCJA*). In addition to setting out the basis for the imposition of an adult sentence to a young offender, s. 72 also includes a direction that the onus under s. 72(1) falls to the Attorney General. As amended in 2012, s. 72(1) sets out the requirements for imposing an adult sentence, providing that the Crown must satisfy the youth justice court that the presumption of diminished moral blameworthiness is rebutted and that an adult sentence is necessary to ensure accountability. This test is central to the outcome of the present appeal. The Crown has the burden to demonstrate why a sentence imposed in accordance with the specific sentencing principles of the *YCJA* is inadequate in the particular circumstances of the case (*D.B.*, at paras. 82 and 93; *W. (M.)*, at para. 154). Section 72(2) places the burden of proof entirely on the Crown.

[59] Section 72 provides:

> **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.
>
> **(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.

> **(2)** The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is on the Attorney General.
>
> **(3)** In making an order under subsection (1) or (1.1), the youth justice court shall consider the pre-sentence report.
>
> **(4)** When the youth justice court makes an order under this section, it shall state the reasons for its decision.
>
> **(5)** For the purposes of an appeal in accordance with section 37, an order under subsection (1) or (1.1) is part of the sentence.

[60] The judgment of this Court in *D.B.* had significant implications for the *YCJA*, prompting Parliament to revisit the framework for imposing adult sentences on young offenders to align with the Court's guidance (N. Bala and S. Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at pp. 663 and 673-77). The amendments removed the presumptive offences regime and introduced a revised s. 72(1), which places the burden on the Crown — not the young person — to prove that an adult sentence is necessary.

[61] Section 72 appears in Part 4 of the *YCJA*, entitled "Sentencing". After conviction but prior to I.M.'s sentencing under the *YCJA*, the Crown brought an application before the youth justice court for an order that an adult sentence be imposed on I.M. for first degree murder. Under s. 64 *YCJA*, the Attorney General can bring an application in respect of a young person over 14 years old who has been found guilty of an offence for which an adult is liable for imprisonment for more than 2 years. Both those conditions are met here.

[62] The *YCJA* applies to "serious violent offence[s]" defined in s. 2(1) *YCJA* to include murder, attempted murder, manslaughter and aggravated sexual assault. A young person may thus be properly sentenced for murder under the *YCJA*. The Crown can, as it did here, bring an application for an offender to be sentenced as an adult, although the effect of s. 64 is to preclude an application for offenders who are 12 or 13, even those who have been convicted of murder. In the eyes of Parliament, 12- and 13-year-olds are too young to be properly sentenced as adults, even for a violent crime such as murder. Moreover, unless the Crown brings a successful application under ss. 64 and 72, young persons aged 14 to 17 are sentenced for their crimes under Part 4.

[63] The *YCJA* includes a Declaration of Principle in s. 3 that outlines a series of principles that apply to the whole of the Act, including the rules on sentencing in Part 4, and a direction at s. 3(2) that the *YCJA* be interpreted liberally. Section 3(1) makes plain that Parliament seeks to protect the public through a balance of different policy objectives. The youth criminal justice system is intended to hold young persons accountable for their conduct but also to promote rehabilitation and reintegration of young persons (s. 3(1)(a)). Importantly, the Declaration was amended in 2012 to recognize — echoing language, as we shall see, in the judgment of this Court in *D.B.* — that the youth criminal justice system must be separate from that of adults and based on the "principle of diminished moral blameworthiness" (s. 3(1)(b); s. 168(2) of the *Safe Streets and Communities Act*). Indeed, Parliament has directed that, in deciding an application by the Crown under ss. 64 and 72, including what sentence is necessary to hold them accountable pursuant to s. 72(1)(b), the youth justice court must take into

account, in particular, the "greater dependency of young persons" and their "reduced level of maturity" in s. 3(1)(b)(ii):

> **3 (1)** The following principles apply in this Act:
>
> . . .
>
> **(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:
>
> . . .
>
> **(ii)** fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity, ...

[64] Section 3(1)(c) also provides that within the limits of fair accountability, measures taken against young persons who commit offences should "reinforce respect for societal values", encourage the repair of harm to victims and the community and be meaningful for the young person given their needs and level of development. These measures should "respect gender, ethnic, cultural and linguistic differences" and respond to, in particular, the needs of Aboriginal youth. The *YCJA* thus provides a distinct sentencing framework for young persons, acknowledging that their cognitive development, decision-making capacity, and potential for rehabilitation are different from adults. Yet Parliament also recognizes, in ss. 3(1)(a)(i) and 38(1), the importance of imposing meaningful consequences on them for offending behaviour, and fixes its lengthiest custodial and supervisory sentences for what the *YCJA* defines as "serious violent offence[s]" in s. 2(1), which includes murder.

[65] The preamble to the *YCJA* further reinforces these considerations. It affirms that Canadian society has a responsibility to address the developmental challenges of young persons and that Canada is a party to the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which says that the detention of young persons must be a measure of last resort. The preamble also states that the youth justice system must command public respect, foster responsibility, ensure meaningful accountability, and reserve its most serious interventions for the most serious crimes.

[66] This case concerns sentencing, not criminal liability. The statutory framework governing youth sentencing is set out in Part 4 of the *YCJA*. Section 38(1) provides that the purpose of youth sentencing is to hold a young person accountable through just sanctions that promote rehabilitation and reintegration while contributing to the long-term protection of the public. This provision reflects Parliament's view that public safety is best achieved through rehabilitation:

> **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.

[67] Section 38(2)(c) further explains that "the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence". This reinforces the idea that sentencing must be both individualized to the young person and proportionate, recognizing that youths, even when convicted

of serious crimes, presumptively do not bear the same level of responsibility as adults. "This does not mean that young people are not accountable", wrote the majority of this Court in *D.B.*: "They are decidedly but differently accountable" (para. 1).

[68] These principles frame the assessment that a youth court must make in deciding whether it is satisfied that an adult sentence, rather than a sentence fixed by Parliament in Part 4 of the *YCJA*, should be imposed pursuant to s. 72(1). Before an adult sentence can be imposed, a court must determine whether the presumption of diminished moral blameworthiness has been rebutted. This presumption exists precisely because young persons, by virtue of age, cannot be presumed to have the same capacity for moral culpability as adults (*W. (M.)*, at para. 97).

[69] The *YCJA* is animated by the objective of minimizing custodial sentences (see *R. v. C.D.*, 2005 SCC 78, [2005] 3 S.C.R. 668, at paras. 48-50). Yet it does provide for what Parliament calls "meaningful consequences" to ensure that young persons are held accountable for criminal offences (preamble and s. 38(1) *YCJA*). A conviction for first or second degree murder, for example, attracts a custodial sentence that seeks to hold a young person accountable and to promote their rehabilitation into society, both of which are understood as "contributing to the long-term protection of the public", according to the purpose of youth sentencing recorded in s. 38(1). Parliament also directs that a youth sentence, subject to the principle of proportionality as applicable to young persons at s. 38(2)(c), may aim to denounce unlawful conduct and deter the young person from committing offences (s. 38(2)(f)).

[70] The *YCJA* has a number of special sentencing rules that recognize the character of murder as a serious violent offence. But it bears noting that, unlike an adult sentence for the same offence, a sentence for murder under the *YCJA* has a maximum but no mandatory minimum custodial sentence (Bala and Anand, at pp. 121 and 554). Section 42(2)(q)(i) provides for a maximum 10-year sentence for first degree murder, consisting of up to 6 years in custody, followed by a period of conditional supervision. To that, the sentencing judge may impose other enumerated sanctions "that the court considers appropriate" (s. 42(2)). This sentence underscores the fact that young persons convicted of the most serious offences remain subject to meaningful accountability, but within a framework that accounts for their presumed diminished culpability and rehabilitative potential. The relevant parts of s. 42(2) provides:

> **(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:
>
> . . .
>
> **(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, ...

[71] The sentencing regime for first degree murder in s. 42(2)(q)(i) expressly contemplates, in Part 5 of the *YCJA*, the intervention of a youth justice court judge to oversee how the custodial and supervision portions of the sentence are implemented as part of Parliament's purpose to "contribute to the protection of society" (s. 83(1)). In the case of youth sentences for certain serious violent crimes, including murder, and before the custodial portion of a sentence expires, s. 104(1) permits the Attorney General to apply for a continuation of custody if there are "reasonable grounds to believe that the young person is likely to commit an offence causing the death of or serious harm to another person". A decision made on a s. 104 application for continuation of custody is based on the evaluation by a youth court of possible persistent violent behaviour and the risk to reoffend (see s. 104(3); L. Tustin, *A Guide to the Youth Criminal Justice Act* (2024/2025 ed.), at pp. 226-27). Further, in the case of a youth sentence for first degree murder, s. 105(1) requires that, "at least one month before the expiry of the custodial portion of the youth sentence", the youth justice court determine the conditions that will apply during the period of community supervision. This allows for a contemporaneous and fact-sensitive measure of the young person's needs and of the community safety interest in the conditions of supervision. Together, ss. 104 and 105 are part of the youth sentencing regime that help ensure that youth sentences for serious violent offences proceed with timely oversight and evaluation of the young person's rehabilitation and risk of reoffending, in keeping with the purpose of the *YCJA*, by a youth court judge apprised of all of the relevant facts at the end of the custodial period of the sentence.

[72] As an alternative to the custodial sanction for first degree murder in s. 42(2)(q)(i), the youth justice court can make an IRCS order for a period not exceeding 10 years (s. 42(2)(r)(ii)). The order is aimed at first degree murder committed by a young person with mental illness, where the offender will be subject to a treatment and supervision plan (see S. Davis-Barron, *Youth and the Criminal Law in Canada* (2nd ed. 2015), at pp. 432-33). This ensures that young persons who suffer from a mental illness or disorder receive adapted rehabilitation, consistent with the overarching purpose of the *YCJA*.

[73] Youth court judges are thus tasked with determining whether the principles and objectives of fair, proportionate and meaningful accountability, as set out in ss. 3(1)(b)(ii) and 38(1), can be fully achieved within the *YCJA* regime. In this case, this applies in respect of the sentence Parliament has set for first degree murder in s. 42(2)(q)(i). The inquiry under s. 72(1) is not whether the young person should be held accountable — accountability is already a central consideration in Part 4 — but rather which sentencing regime ensures meaningful accountability in the circumstances of a case, considering the young offender's age.

[74] Even where an adult sentence is imposed, the distinction between youth and adult offenders remains critical. Section 76 *YCJA* provides that a young person sentenced as an adult may still serve their sentence in a youth facility, reinforcing Parliament's recognition that even those who receive adult sentences remain developmentally distinct from fully matured offenders.

[75] Finally, the adult sentence for first degree murder is imprisonment for life (s. 235(1) *Cr. C.*). Section 745.1 *Cr. C.* establishes reduced parole ineligibility periods for young persons sentenced as adults, recognizing their greater rehabilitative potential. Similarly, s. 743.5 *Cr. C.* governs the transition between youth and adult correctional facilities, ensuring that the legal system remains responsive to the unique circumstances of young offenders.

[76] In sum, I.M. was 17 years old at the time of the offence, and he was thus subject to be sentenced under Part 4 of the *YCJA*, pursuant to the prescriptions in s. 42(2)(q)(i) based on his conviction for first degree murder. Because he was sentenced as an adult by the youth justice court, as confirmed on appeal, he was sentenced to life imprisonment, with a 10-year parole eligibility.

VI. Grounds of Appeal

[77] The parties disagree on the proper interpretation of s. 72(1) *YCJA* and whether the courts below misapplied it by ordering an adult sentence for I.M.

[78] For I.M., s. 72(1) has two separate "prongs" reflecting distinct requirements that both must be proven by the Crown before an adult sentence can be ordered for a young person instead of a sentence under the *YCJA*. The Crown argues instead that s. 72(1) requires courts to engage in a "holistic" analysis for that determination. The two paragraphs of s. 72(1) should be considered together, says the Crown, as they both relate to the moral blameworthiness of the young person's

offending conduct. Their disagreement extends to the standard of proof that must be made before the Crown has met its onus and what factors are relevant to satisfying the youth justice court that an adult sentence is warranted in the circumstances of this case.

[79] Applying the law to the facts here, I.M. says that the sentencing judge and the Court of Appeal erred on the standard of proof relevant to rebutting the presumption and on factors that are irrelevant to the presumption. Those errors mean the decision to order an adult sentence for I.M. should be set aside and a youth sentence should be ordered for I.M. He asks that his youth sentence should be fixed at time served.

[80] While applying a holistic analysis of s. 72(1) would have been preferable, the Crown says the sentencing judge made no errors that affected his decision to sentence I.M. to life imprisonment. The Court of Appeal was right to dismiss his appeal. If, however, the Court allows the appeal and quashes the order under s. 72(1) *YCJA*, the Crown asks that the case be remitted to the youth justice court to impose a youth sentence or, in the further alternative, that this Court itself impose the maximum youth sentence for first degree murder of 10 years (R.F., at para. 116, referencing R.F., *S.B.*, at para. 120).

VII. Analysis

[81] The parties' disagreement on the proper interpretation of s. 72(1) is stark. Beyond the question of whether Parliament requires the Crown to satisfy the youth justice court of one or two requirements before an order for an adult sentence is made,

the parties part ways on the standard to which the Crown should be held to meet its onus and what factors a sentencing judge should consider under s. 72(1) in deciding the matter. The exercise of interpretation is made complicated by the fact that Parliament did not explicitly say in s. 72(1) whether or not a sentencing judge needed to be satisfied that the presumption has been rebutted beyond a reasonable doubt or on another basis. In addition, unlike its predecessor, s. 72(1) does not contain an enumerated list of factors relevant to the decision to sentence a young person as an adult.

[82] The modern approach for the construction of statutes embraced by this Court directs that s. 72(1) be interpreted by considering its text, context, and purpose (*La Presse inc. v. Quebec*, 2023 SCC 22, at para. 22; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at paras. 165-70). While the constitutionality of s. 72(1) is not directly challenged here, it must be read, as a matter of statutory interpretation, in a manner that conforms to the *Charter* where its meaning is uncertain (*Bell ExpressVu*, at para. 62).

[83] I turn to that meaning and how a youth justice court should decide an application for an adult sentence order by the Crown pursuant to s. 72(1). I will consider, first, whether Parliament has established separate requirements in ss. 72(1)(a) and 72(1)(b) before examining the standard of proof and the factors relevant to deciding whether I.M. should be sentenced to life imprisonment for the murder of S.T.

A. *The Two Prongs of Section 72(1) Should Be Considered Separately*

[84] In support of his interpretations of s. 72(1), I.M. argues that rebutting the presumption of diminished moral blameworthiness is a threshold requirement, distinct from showing the insufficiency of a youth sentence to hold the young person accountable, noting that the two paragraphs of s. 72(1) are separated by the word "and" in the statute. The Crown advances a blended interpretation, arguing that the sentencing judge's determination relates to the young person's moral blameworthiness and accountability which are inherently intertwined. Accordingly, says the Crown, the factors relevant to the judge's discretionary determination often overlap. The seriousness of the offence, for example, is relevant to all facets of the holistic exercise put in place by Parliament. I.M. objects to this blended approach, arguing that the presumption rests on a distinct rationale justifying a different standard of proof. He says some factors, such as the seriousness of the offence, are irrelevant to the young offender's capacity for moral judgment which justifies the presumption. I.M. accepts that factors such as the "seriousness of the offence" are relevant to the accountability prong of s. 72(1)(b) but argues that they should be confined to that question.

[85] I agree with I.M. that s. 72(1) creates a two-pronged onus for the Crown and that sentencing judges should engage separately with the inquiries under s. 72(1). This is the most natural reading of the text of the provision. Considering the grammatical and ordinary meaning of s. 72(1), the words and structure of the provision suggest that Parliament intended these inquiries to be treated separately. In the English

version, the two prongs are set out in independent paragraphs and are separated by the conjunction “and”, suggesting that there are two inquiries. It is also implicit in the phrasing and structure of the French version that both prongs must be independently satisfied. Furthermore, the ordinary meaning of the words in each paragraph indicates that the inquiries are different in nature. While the first paragraph requires the court to be satisfied the Crown has rebutted the “presumption of diminished moral blameworthiness” — a concept that is not defined in the statute — and sets out no other criteria, the second directs the court to consider specific provisions of the *YCJA* setting out the purpose and principles of sentencing in assessing the issue of accountability. The presumption is also listed as the first requirement, suggesting it is indeed a threshold consideration.

[86] This reading is reinforced by the legislative history of s. 72(1) *YCJA*. The 2012 amendments to s. 72(1) were enacted partly in response to *D.B.* in order to reflect this Court’s holding that young persons are constitutionally entitled to a presumption of diminished moral blameworthiness (*House of Commons Debates*, vol. 146, No. 21, 1st Sess., 41st Parl., September 27, 2011, at p. 1524 (B. Rathgeber)).

[87] The previous version of s. 72 placed the onus on the young offender to disprove only the accountability requirement of the current version of the provision. Specifically, the pre-amendment s. 72(1) enumerated a number of factors the youth justice court was required to consider — “the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young

person", as well as any other factor it considered relevant — in determining whether a youth sentence would be of sufficient length. Rather than simply amend the provision to add the presumption, Parliament created two separate prongs, and removed the enumerated factors. Under the current s. 72(1), the Crown now has the burden to prove that a youth sentence is insufficient to hold the offender accountable. In addition, Parliament added the first prong, requiring the Crown to rebut the presumption of diminished moral blameworthiness. This interpretation is consistent with the broader context of the provision.

[88] In *D.B.*, Abella J. wrote that "before a court can" impose an adult sentence, the Crown must show that the presumption "has been rebutted and that the young person is no longer entitled to its protection" (para. 93). This formulation does appear to be codified in the revised s. 72(1) where rebutting the presumption appears as a threshold requirement. Approaching the presumption as a separate, threshold inquiry thus preserves the constitutional protection afforded to young offenders by ensuring that the presumption based solely on age is not undermined by considerations that are irrelevant to the young person's maturity and capacity for moral judgment. Since the presumption must be rebutted for an adult sentence to be compliant with the *Charter* (paras. 70 and 76-78), a test with two separate prongs ensures that the presumption is given constitutional force by being assessed independently, before further consideration is given to whether a youth sentence would be of sufficient length to hold the young person accountable. I agree with the view that the blended approach to ss. 72(1)(a) and 72(1)(b) called for by the Crown flies in the face of the text of the

provision which separates the two prongs; it fails to take account of the context and purpose of the *YCJA* that enshrines, distinct from accountability, the general principle of diminished moral culpability of young persons enshrined in s. 3(1)(b). And practically speaking, it is unworkable in that it would bring irrelevant factors such as seriousness of the offence into the evaluation of the applicability of the presumption, thereby distorting the analysis required of sentencing judges under s. 72(1)(a) (see *Henderson*, at para. 38).

[89] Treating the presumption as a threshold inquiry also ensures that its purpose is achieved and that the distinct inquiries under each prong are given due consideration. In *D.B.*, the Court clarified that it is the unique developmental circumstances of young persons that justifies the presumption. As Epstein J.A. observed in *W. (M.)*, the *YCJA* recognizes young people as "constitutionally different" from adults for sentencing purposes (para. 163; see also *R. v. Chol*, 2018 BCCA 179, at para. 38; *Okemow*, at para. 52). As I will explain below, rebutting the presumption of diminished moral blameworthiness must therefore depend on the personal attributes of the offender that speak to their developmental age, rather than any objective assessments of fault that may flow from the offence at issue. To rebut the presumption, then, the sentencing judge must determine whether the young person's presumed diminished moral blameworthiness is contradicted by their actual personal attributes. As I seek to explain further below, this is a factual question that ultimately asks whether, at the time of the offence, the developmental age of the young offender was akin to that of an adult.

[90] By contrast, the inquiry mandated by s. 72(1)(b) is normative in nature. It involves assessing what sanction would be appropriate in light of the culpability reflected in the fault and gravity of the offence (see *B.J.M.*, at paras. 91-99). While the term "satisfied" appears in both prongs of s. 72(1), they serve two different purposes involving distinct inquiries (see para. 82). Collapsing the two prongs risks allowing accountability considerations to improperly influence the assessment of diminished moral blameworthiness (*W. (M.)*, at para. 94; Parkes, at pp. 12-13).

[91] In short, recognizing that ss. 72(1)(a) and 72(1)(b) are distinct inquiries ensures that the constitutionally protected, factually driven considerations of the first prong are not confused or affected by the statutorily mandated, normatively based assessments of the second prong. The constitutional status of the presumption codified in s. 72(1)(a) demands a clear and distinct inquiry; once the Crown has rebutted the presumption, it faces the distinct onus of showing that a youth sentence is insufficient to hold the young person accountable for their offending behaviour.

[92] I turn next to the first prong — rebutting the presumption recognized in s. 72(1)(a) — shaped as it is by Parliament's choice to codify this Court's decision in *D.B.*

B. *Rebutting the Presumption of Diminished Moral Blameworthiness (Section 72(1)(a))*

[93] The parties agree that the interpretative challenge in understanding what the Crown must prove in the first prong of s. 72(1) to rebut the presumption comes from what Parliament has not said in the provision. First, beyond the direction that the youth justice court must be "satisfied" that the presumption is rebutted — a term that applies to both paragraphs of s. 72(1) — there is no further explicit sign of what standard that proof must be made upon. Second, while the former version of s. 72(1) did not mention the presumption, it provided an enumerated list of factors relevant to whether a young person should be sentenced as an adult. The revised text of s. 72(1) applicable to this appeal is silent on factors relevant to the presumption or otherwise.

[94] Courts across the country have applied s. 72(1)(a) and *D.B.* inconsistently in respect of the standard of proof that the Crown must meet and in identifying the factors that a sentencing judge must consider in deciding whether an adult sentence should be ordered for a given young person convicted of a crime.

[95] The interpretation of the statutory presumption — informed by constitutional principles recognized in *D.B.* — is at the heart of this appeal. I begin by considering the presumption's rationale and constitutional status as they are relevant to the context and purpose of the provision, before examining the standard and factors for the Crown's rebuttal of the presumption in s. 72(1).

(1) <u>The Presumption as a Principle of Fundamental Justice</u>

[96] When a young person is sentenced, the separate regime of the *YCJA* applies because the offender is presumed to have diminished moral blameworthiness based on their chronological age. In *D.B.*, this Court recognized the presumption as a principle of fundamental justice protected by s. 7 of the *Charter* (para. 76). Section 72(1) *YCJA* was subsequently amended to codify this principle, which was also enacted as a guiding principle for the whole of the *YCJA* in s. 3(1). In interpreting s. 72, this Court must determine how the Crown goes about meeting its onus to rebut the presumption of diminished moral blameworthiness that would otherwise justify a youth sentence.

[97] Central to s. 72 is the concept of moral blameworthiness and its application to young persons. The law has long treated children and youth differently on the basis that they have reduced maturity and moral capacity, justifying a regime of diminished moral blameworthiness for criminal conduct (*D.B.*, at paras. 47-59). Through diminished moral responsibility, the law recognizes that the unique developmental circumstances of young people justify a different societal response and approach to their culpability and sanction.

[98] Grounded in the reduced maturity and capacity for moral judgment understood as common to young persons, s. 72(1)(a) *YCJA* operates to give presumptive weight to the heightened vulnerability in determining how they will be held accountable (*D.B.*, at para. 41). A gradation in the law's treatment of young people based on their particular age continues to exist under the *YCJA* and *Cr. C.*

[99] Children under 12 are, by statute, not criminally liable for their conduct as they are deemed incapable of wrong by the *Cr. C.*, whatever their level of maturity. For young people at least 12 but under the age of 14, their presumed diminished moral responsibility exposes them to liability, but entitles them to be held accountable for their offending conduct exclusively through youth sentences imposed under the *YCJA* (ss. 38 and 42). For those 14 and older, the sentencing judge may impose an adult sentence upon application by the Crown for offences that attract a sentence of more than 2 years' imprisonment for adults (s. 64). But they are still presumed to have diminished moral blameworthiness, until the Crown shows that, despite their chronological age, they have the maturity of an adult pursuant to s. 72.

[100] In these cases, for an adult sentence to be constitutionally compliant with the young person's s. 7 *Charter* rights, the presumption to which they are entitled must be rebutted by the Crown (*D.B.*, at paras. 70, 78 and 82). These principles were established by the Court in *D.B.*, faced with a statutory "presumptive offences regime" that required courts to impose an adult sentence on youth convicted of serious offences such as murder unless they successfully demonstrated that a youth sentence would be sufficient to ensure accountability. Drawing on s. 7's residual protection for the presumption of innocence, Abella J. recognized the presumption of diminished moral blameworthiness as a principle of fundamental justice under s. 7 of the *Charter* (paras. 45-69 and 80), and held that the onus provisions in the presumptive offences regime unjustifiably violated s. 7 of the *Charter*. The Court found that imposing the burden on young offenders to rebut the presumption of an adult sentence undermined

the central premise of the youth justice system: that young people are less morally culpable than adults due to their developmental immaturity (*D.B.*, at paras. 66 and 68).

[101] The decision in *D.B.* had significant implications for the *YCJA*, as it confirmed that before a young person can be deprived of the benefits of the youth sentencing scheme, the Crown is constitutionally required to rebut the presumption of diminished moral blameworthiness. Parliament amended the framework for imposing adult sentences on young offenders to align with the Court's guidance in *D.B.* (J. Campbell, "In Search of the Mature Sixteen Year Old in Youth Justice Court" (2015), 19 *Can. Crim. L. Rev.* 47, at p. 50). Parliament repealed the presumptive offences regime and introduced the amended s. 72(1), which codifies the burden on the Crown — not the youth — to demonstrate why a more severe adult sentence is necessary and appropriate (see *D.B.*, at para. 82).

[102] While the presumption is rebuttable, s. 72(1)(a) imposes on the Crown a heavy onus to justify the imposition of an adult sentence given its status as a principle of fundamental justice as recognized by the Court in *D.B.* (paras. 45 and 68). Section 72(1) mandates the youth justice court to impose an adult sentence if it is satisfied, first, that the presumption of diminished moral blameworthiness — a principle of fundamental justice — has been rebutted; and second, that a youth sentence imposed in accordance with the purpose and principles of sentencing under the *YCJA* would be of insufficient length to hold the young person accountable for their "offending behaviour".

(2) The Crown Must Prove That the Developmental Age of the Young Person Is That of an Adult

[103] A clear understanding of the focus of the inquiry under s. 72(1)(a) is required to further consider the applicable standard of proof and factors relevant to rebutting the presumption.

[104] As we shall see, the jurisprudence and scholarly commentary in youth matters have recognized that adult-like maturity and the capacity for moral judgment *develop* over time, echoing an idea Parliament gave voice to in the opening paragraph of the preamble to the *YCJA*: that "members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood". This Court's judgment in *D.B.* recognized, at para. 62, that while age plays a role in the development of judgment and moral sophistication, chronological age and maturity may not be one and the same. In connection with the rebuttal of the presumption, it is important to note that a young person's developmental maturity does not necessarily coincide with their chronological age.

[105] Justice Jamie Campbell, writing extrajudicially, speaks usefully to the same idea, observing that a young person may be "morally sophisticated beyond their years" (p. 56). Other young persons are less mature than their years would show, and have a lesser capacity for moral judgment than their actual age would suggest. This points to the idea — also evoked in the *YCJA*'s preamble — that maturity is linked not just to age but to development. In these reasons, I will use the term "developmental

age" to refer to the stage of developmental maturity that, for the purpose of s. 72(1), reflects the notion that a young person's developmental maturity is not necessarily the same as their "chronological age". Although developmental age, as distinct from chronological age, has informed and shaped youth criminal justice, it has thus far escaped clear definition.

[106] I.M. argues that the presumption is grounded in the "developmental maturity" of young people, and its rebuttal requires a factual inquiry into their psychological development (A.F., at paras. 5-6 and 60-62). The Crown accepts that the unique "developmental" circumstances of young people underlie the determination under s. 72, but says the presumption is a legal principle, not a factual inquiry, and courts must also consider factors such as seriousness of the offence to determine if it is rebutted (see R.F., at paras. 41, 44, 80 and 96).

[107] *D.B.* made plain that the law presumes diminished moral blameworthiness for young people based on their developmental differences from adults. The fact of chronological age establishes in statute who is entitled to the protection of the presumption, since "[i]t is widely acknowledged that age plays a role in the development of judgment and moral sophistication" (para. 62). However, it is the unique developmental circumstances of young people that is its rationale (para. 41). In my view, it naturally follows that, to rebut the presumption in a given case, the Crown must show that the *basis* of the rationale for the protection is not justified.

[108] In other words, since developmental age underlies a young person's presumed diminished blameworthiness, it must be the focus of the inquiry on an application to impose an adult sentence to remove the protection afforded by the presumption. Just as the presumption rests on a clear factual basis of chronological age, developmental age is similarly a factual inquiry, even if it is perhaps less straightforward. The Crown's onus is not merely a procedural protection, as the Crown emphasizes (R.F., at para. 97), but a substantive protection. As I will explain, it requires the Crown to satisfy the court that the young offender's developmental profile is inconsistent with that presumed of a typical youth — that they possess adult-like maturity, capacity for moral judgment, and independence (*D.B.*, at paras. 41-47; see also Parkes, at pp. 12-14).

[109] Developmental age has long animated the law governing the criminal liability and sanctioning of children and youth. Abella J. canvassed that history in *D.B.*, noting the law's longstanding recognition of the reduced capacity of children and youth to understand right from wrong and exercise moral judgment, attuned to their particular developmental stage (paras. 47-59). Historically, children under the age of 7 were deemed wholly immune from criminal liability, while children aged 7 to 14 less a day benefited from the common law defence of *doli incapax*, requiring the Crown to demonstrate that the accused child had the capacity to appreciate right from wrong and to understand the nature and consequences of their actions (H. Parent, *Traité de droit criminel*, t. I, *L'imputabilité et les moyens de défense* (6th ed. 2022), at para. 83; see

also Bala and Anand, at p. 214). Similar distinctions continue in the present-day *Cr. C.* and *YCJA*, as noted above.

[110] The recognition at common law that the reduced maturity and judgment of children and youth require different treatment, depending on their stage of development, found expression in Canada's various legislative regimes relating to young offenders (see L. Nasr, "Sentencing Kids to Life: New approaches for challenging youth life sentences under Section 12 of the *Charter*" (2023), 48:2 *Queen's L.J.* 1, at p. 6). With the enactment of the *YCJA*, young persons are tried exclusively in youth courts and the focus has shifted to whether a particular youth should be sentenced as an adult. Section 3(1)(b) *YCJA* also codifies the principle of diminished moral blameworthiness, reflecting Parliament's intent to tether criminal responsibility to the developmental realities of young people (see also Bala and Anand, at p. 682). This is true too at the time of sentencing, where the *YCJA* provides a distinct regime of sanctions, setting aside, in the main, the sentencing rules in the *Cr. C.* (s. 50(1)). Some sentencing principles, such as general deterrence or the separation of the offender from society, are not considered; as one author wrote recently, [TRANSLATION] "[t]he concept of accountability for young persons must be distinguished from the accountability of adults and must be assessed notably on the basis of the presumption of diminished moral blameworthiness that applies to young persons" (G. Destrempe Rochette, "Surveiller et… réadapter? — La notion de responsabilité chez les adolescents à l'aune de la jurisprudence récente concernant la détermination de la peine", in Service de la

formation continue du Barreau du Québec, vol. 573, *Développements récents en droit criminel* (2025), 37, at p. 37).

[111] The unique developmental stage of youth was central to this Court's recognition in *D.B.* that the presumption was fundamental to the operation of a fair legal system (paras. 61-67). Courts continue to focus on factors related to development of young offenders in considering whether the presumption is rebutted. In *W. (M.)*, Epstein J.A. clarified that the evidence must show "the level of maturity, moral sophistication and capacity for independent judgment of an adult" (para. 98). Expanding on *W. (M.)*, in *Chol*, Stromberg-Stein J.A. articulated a non-exhaustive list of factors that could be relevant to the inquiry, including the young person's independence or dependence on others, cognitive limitations, emotional or mental health issues, the maturity or immaturity of the reasoning behind the motive of the offence, and whether the actions demonstrated critical and adult-like judgment (para. 61).

[112] As these sources indicate, developmental age refers to the actual stage of psychological, social, and moral maturity that an individual has attained. In youth criminal justice it is accorded significant weight in the recognition that young people often lack the judgment and autonomy that are generally attributed to adults (see Parent, at paras. 72-89). Developmental age is thus central to understanding how moral blameworthiness and accountability are assessed in the case of a particular young

offender. As a concept, developmental age assists the fact-driven inquiry of discerning the vulnerability, maturity, and capacity for moral judgment of a particular offender.

[113] Chronological age continues to define the statutory thresholds for criminal liability under the *Cr. C.* and the *YCJA*, creating a framework that both protects young offenders and holds them appropriately accountable (see s. 13 *Cr. C.*; definition of "child" and "young person", s. 2(1) *YCJA*; B. Jones, "Accepting That Children Are Not Miniature Adults: A Comparative Analysis of Recent Youth Criminal Justice Developments in Canada and the United States" (2015), 19 *Can. Crim. L. Rev.* 95, at pp. 97-98). However, for youth aged 14 to 17, the presumption of diminished blameworthiness becomes rebuttable. As Abella J. acknowledged in *D.B.*, "there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences" (para. 76). For this category of youth, developmental age takes on great significance as the Crown may seek to impose an adult penalty on the basis that it is justified due to the young person's developmental age (see B. Kobayashi and J. H. Michalski, "The Meaning of Accountability under Section 72(1)(b) of the Youth Criminal Justice Act" (2024), 72 *Crim. L.Q.* 373, at p. 373). If it is the reduced maturity and judgment of youth that justifies the protection of the presumption, it must be the maturity and judgment of an adult that removes its protection. Indeed, even where the young person is made subject to an adult sentence, they are not punished as an adult in all respects: [TRANSLATION] ". . . the objective of rehabilitation remains important, having regard to the fact that the young person's level of accountability must be consistent with their greater dependency and reduced

maturity" (M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2024* (31st ed. 2024), at para. 5.139).

[114] In sum, in the context of youth sentencing, developmental age speaks to the stage of psychological, social, and moral maturity that an individual has attained. To determine whether the presumption has been rebutted in any particular case, the court must therefore undertake a factual inquiry into the young offender's developmental age to determine if it is akin to an adult. I turn now to the applicable standard of proof.

(3) The Standard of Proof To Meet the Crown's Onus To Rebut the Presumption Is Beyond a Reasonable Doubt

[115] Courts across Canada have differed on the appropriate standard of proof to be imposed on the Crown in rebutting the presumption of diminished moral blameworthiness. Some have relied on the "satisfaction" standard adopted in *O. (A.)*, at para. 38 (see, e.g., *R. v. T. (D.D.)*, 2010 ABCA 365, 36 Alta. L.R. (5th) 153, at para. 7; *Okemow*, at para. 61; *Chol*, at para. 12). Others have proceeded on the basis that first prong-related factors must be proven beyond a reasonable doubt (*B.J.M.*, at paras. 61-80; *Henderson*, at para. 35).

[116] The parties disagree about the nature of the onus on the Crown to rebut the presumption. The *YCJA* does not specify a standard of proof and the parties propose different approaches. I.M. argues that, because an adult sentence exposes a young

person to significantly greater penal consequences, the presumption under s. 72(1) must be rebutted beyond a reasonable doubt consistent with this Court's decision in *Gardiner*. Relying on *O. (A.)*, as the sentencing judge did in this case, the Crown contends that the nature of the assessment in s. 72(1) is evaluative, requiring the weighing of different considerations, and therefore does not lend itself to proof beyond a reasonable doubt.

[117] As I will explain, I agree with the appellant. In my view, the Crown must rebut the presumption beyond a reasonable doubt as the inquiry under s. 72(1)(a) is factual in nature and can expose the young person to a more severe sentence.

[118] Section 72(1) requires the court to be "satisfied" ("*convaincu*") that the presumption is rebutted and that a youth sentence is not of sufficient length to ensure accountability. Section 72(2) similarly provides that the onus of "satisfying" ("*convaincre*") the court of these matters is on the Crown. I agree with the Crown that the use of these words does not, on its own, mandate a particular standard of proof. Many provisions of the *Cr. C.* use the word "satisfied" and courts have interpreted them differently depending on the context (see, e.g., ss. 734(2), 742.1(a), 753(1) and 753.1). In each case, the requisite standard of proof is informed by the nature of each provision's inquiry (see *R. v. Currie*, [1997] 2 S.C.R. 260, at para. 25; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 40; *R. v. Topp*, 2011 SCC 43, [2011] 3 S.C.R. 119, at para. 24; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 120-22).

[119] For instance, the dangerous offender regime in the *Cr. C.* requires courts to be satisfied beyond a reasonable doubt that the offender constitutes a future threat to safety (s. 753(1)). However, once the offender has been designated as dangerous, no such standard attaches to the court's determination of whether to impose an indeterminate sentence (s. 753(4.1)). That determination incorporates the usual exercise of discretion by sentencing judges to determine the "fit" sentence, based on the evidence (see *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, at paras. 36, 41 and 64-69; *Currie*, at para. 25).

[120] Under s. 72(1)(a), the nature of the court's inquiry as to whether the presumption of diminished moral blameworthiness has been rebutted is factual. As I have explained, the presumption is based on the unique developmental circumstances presumed of young persons, and it can be rebutted by the Crown with evidence that the young offender's developmental age is in fact akin to that of an adult.

[121] In service of its argument that rebutting the presumption is not on the standard of beyond a reasonable doubt, the Crown observes that Parliament has only said that the youth justice court must be "satisfied" the requirement has been met in s. 72(1). The Crown points to *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, in which this Court was called upon to interpret similar language as it appeared in a predecessor statute dealing with transfer of a young offender to an adult court. In that case, the Court declined to apply a criminal or civil standard of proof to the decision made by the youth court judge, noting that those standards are "typically concerned with establishing

whether something took place" (p. 464). Instead, wrote the Court, the question under the applicable statute was "whether one [was] satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court" (*ibid.*). The Court rejected both "balance of probabilities" and "beyond a reasonable doubt" as the appropriate standard for what it saw as the balancing or weighing task set in the former *Young Offenders Act*, S.C. 1980-81-82-83, c. 110 (*ibid.*).

[122] *M. (S.H.)* is not transposable to the rebuttal of the presumption under s. 72(1)(a) *YCJA*. In our case, a youth justice court must be satisfied of proof of a fact — that the developmental age of the young person is that of an adult, such that their chronological age can no longer justify the presumption of diminished moral blameworthiness. The decision to rebut is not an evaluative or normative one of weighing, but the result of a factual inquiry. In these circumstances connected to the presumption, "satisfied" is a direction to the sentencing judge to make a finding of fact of the young person's developmental age. That fact is susceptible of proof on a criminal standard.

[123] I would reject the Crown's reliance on cases decided on the issue of transfer of young offenders to adult facilities in other statutory settings, as opposed to sentencing matters under the *YCJA*. Decided in 1989, *M. (S.H.)* did not engage the constitutional presumption of diminished moral culpability recognized by the Court in *D.B.* in 2008 and now consecrated in ss. 3 and 72(1)(a) *YCJA*. It is not controlling authority for the different matter of the interpretation of the presumption.

[124] Developmental age operates as the critical factual determination that may lead to a much higher sentence when the presumption is rebutted. Proof by the Crown of the young offender's advanced developmental age justifies a more severe sanction, as it permits the court to proceed to consider whether a more punitive adult sentence is necessary to hold them accountable (Parkes, at pp. 12-13). A factual finding that the young offender has the developmental maturity of an adult is aggravating, as it exposes the young person to the risk of an adult sentence and a significantly more severe penal consequence (see *Gardiner*, at pp. 414-15, cited in *D.B.*, at para. 79). Significantly, this Court has recognized that the requirement of the criminal standard of proof beyond a reasonable doubt for the potentially serious consequences of contested aggravating facts is protected by the *Charter* (see *Pearson*, at p. 686, cited in *D.B.*, at para. 80). For this reason, I would not follow authorities decided under the pre-2012 version of the *YCJA*, that relied on language in the former s. 72(2) to import a standard of balance of probabilities, and expressly rejected the argument — mistakenly in my humble view — that the effect of setting aside the presumption was akin to proving an aggravating factor in sentencing (see, e.g., *LSJPA — 088*, 2008 QCCA 401, [2008] R.J.Q. 670, at paras. 13-16). In fairness, this analysis predated this Court's judgment in *D.B.*

[125] Very respectfully, I am of the view the Court of Appeal for Ontario's conclusion in *O. (A.)* is distinguishable and cannot be relied upon for interpreting s. 72(1)(a) on this point. In that decision, the court found that the former version of s. 72(1) required the youth justice court to weigh and balance enumerated factors in deciding whether a youth sentence would be sufficiently long to hold the young person

accountable. The court concluded that "[t]hat type of evaluative decision — making an informed judgment — does not lend itself to proof beyond a reasonable doubt" (para. 34). This matter was decided prior to this Court's decision in *D.B.* and based on the previous, unamended version of s. 72(1), the substance of which was limited to the question of accountability (*B.J.M.*, at para. 39). The provision made no reference to the presumption of diminished moral blameworthiness. The court in *O. (A.)* was therefore attempting to determine whether proof beyond a reasonable doubt was applicable to a different question, namely that of accountability which is, of course, an evaluative matter like the fitness of a sentence.

[126] That same evaluative, discretionary determination, involving the weighing and balancing of principles is now in substance found under s. 72(1)(b). This may be properly contrasted with the factual inquiry of whether the young person's developmental age is akin to that of an adult. Any discrete, disputed facts in support of that determination must also be established beyond a reasonable doubt, including those relied upon in the accountability analysis. This protection safeguards against the use of unestablished facts to aggravate the sentence from youth to adult.

[127] The legislative history of the amendment to s. 72(1) is also of limited assistance with respect to the standard of proof. It is true that a previous iteration of Bill C-4, *Sébastien's Law (Protecting the Public from Violent Young Offenders)*, 3rd Sess., 40th Parl., 2010, which died on the Order Paper, had a reference to this standard that was subsequently not carried forward into law. But I would decline to

attribute definitive importance to this fact here in light of the Court's repeated injunction that extrinsic evidence of parliamentary debates, including those relating to iterations of draft legislation, should be treated with caution as they can amount to an imperfect indicator of the legislative intent (see, generally, R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 656-57 and 669-70).

[128] In this case, the parliamentary record is unclear and cannot reliably assist in determining the standard. The decision to remove references to proof beyond a reasonable doubt under the first prong followed concerns expressed by some speakers in the parliamentary record, intervening in different capacities, that the criminal standard may be higher than what the law required (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 25, 3rd Sess., 40th Parl., June 17, 2010, at pp. 6-7 and 15-16; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 52, 3rd Sess., 40th Parl., March 7, 2011, at pp. 12-14). But the Minister responsible said the matter should be left to the courts (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 4, 1st Sess., 41st Parl., October 6, 2011, at p. 2 (Hon. R. Nicholson)). The determination of what is constitutionally required by the *Charter* for s. 72(1) as recast by Parliament is indeed a task for the courts, as *D.B.* made very plain in 2008. By leaving an express reference to a reasonable doubt standard out, Parliament may well have sought to insulate the provision from direct constitutional challenge. Whatever the explanation, this evidence does not weigh definitively in favour of any particular standard.

[129] Because the burden on the Crown is to rebut the presumption beyond a reasonable doubt, it cannot be said that the onus is not a heavy one. The fact that the Crown, facing this burden, must displace a constitutionally mandated principle to rebut the presumption, has led some commentators to say that adult sentences will be "exceptional" (Bala and Anand, at p. 652; Parkes, at pp. 13-15). Be that as it may, it is undoubtedly true, as the Court recognized in *D.B.*, that the presumption can be rebutted but that the Crown's task of doing so beyond a reasonable doubt is not to be underestimated. Indeed, the *YCJA* reflects a broader principle of restraint in punishment (see *R. v. D. (R.)*, 2010 ONCA 899, 106 O.R. (3d) 755, at paras. 40-41; *R. v. Anderson*, 2018 MBCA 42, 361 C.C.C. (3d) 313 ("*Anderson MBCA*"), at paras. 61-62; B. Jones et al., *Prosecuting and Defending Youth Criminal Justice Cases* (3rd ed. 2024), at pp. 247-79). It is mandatory that the court not commit a young person to custody except in particular circumstances, but a violent offence may justify a custodial sentence (s. 39). In addition, the *YCJA* provides for custodial youth sentences for a conviction for first or second degree murder (s. 42(2)(q)), indicating that Parliament contemplated that youth sentences could hold young persons sufficiently accountable for these more serious offences. The *YCJA* also recognizes the shared responsibility of members of society to address young persons' developmental challenges, reinforcing the law's focus on rehabilitation and age-appropriate responses to young offenders (preamble; see also Bala and Anand, at pp. 138-42).

[130] For the reasons noted above, the proper standard of proof for rebutting the presumption under s. 72(1)(a) must be beyond a reasonable doubt. The source of the

presumption of diminished moral blameworthiness, and the ultimate justification for satisfying the court to the standard of beyond a reasonable doubt, lies not only in the statutory language, but in the constitutional protections that s. 7 of the *Charter* affords young persons. This high threshold is essential to preserve the integrity of the youth sentencing regime and to ensure that any imposition of an adult sentence is both factually justified and constitutionally sound. I agree with the intervener, the British Columbia Civil Liberties Association, that a lesser standard of proof would dilute the substantive protections afforded by the presumption, transforming it into a discretionary judicial assessment rather than a legal safeguard. In this case the sentencing judge erred in law by relying on the pre-*D.B.* standard set forth by the Court of Appeal for Ontario in 2007 in *O. (A.)* and therefore failing to apply the standard of beyond a reasonable doubt.

(4) The Factors Relevant to the Crown's Onus When Rebutting the Presumption

[131] Ascertaining whether the presumption of diminished moral blameworthiness is rebutted requires the sentencing judge to determine if the young offender's developmental age was, unlike their chronological age, that of an adult at the time of the offence. This exercise is undertaken by considering factors that provide insight into the young offender's personal developmental attributes at the time of the offence. This assessment is inherently fact-specific, nuanced, and contextual (see *Chol*, at para. 60). While it cannot be reduced to a rigid formula or checklist, the circumstances of the offender or evidence that speaks to the developmental age of the

young person at the time of the offence will be most relevant (see *D.B.*, at para. 41; *W. (M.)*, at para. 98; *Okemow*, at para. 62; *Chol*, at paras. 43 and 61).

[132] Factors that speak to the offence, rather than the young offender, are beyond the scope of this inquiry unless they show something about the offender's personal attributes reflecting their developmental age.

(a) *Seriousness of the Offence Is Not Relevant to the Presumption*

[133] Although it has been plain since *D.B.* that the presumption rests on developmental characteristics normally associated with youth (para. 41; see also *W. (M.)*, at para. 98; *Okemow*, at para. 62; *Chol*, at para. 43), at the time *D.B.* was rendered, s. 72(1) focused on the question of whether a youth sentence was sufficiently long to hold the young person accountable. To that end, the provision enumerated several factors the court was required to consider, including the seriousness of the offence.

[134] A central issue in this appeal is whether the sentencing judge improperly relied on the seriousness of the offence at the first prong of s. 72(1). The appellant, and S.B. in the companion appeal, assert that courts have improperly relied on this factor (*W. (M.)*, at para. 112; *R. v. Ellacott*, 2017 ONCA 681, at para. 18), when they should instead focus on factors relevant to maturity (A.F., at paras. 82 and 88; A.F., *S.B.*, at paras. 76-81).

[135] I agree that courts should not weigh the objective seriousness of the offence in determining whether the Crown has rebutted the presumption, although not every abstract reference to seriousness will necessarily be an error. Moreover, the circumstances of the offence may be relevant if they clarify the youth's developmental age at the time of the offence. I first address this issue before turning to other factors.

[136] I.M. submits that seriousness is a distinct consideration that belongs only to the second prong of the test, where the sufficiency of a youth sentence is assessed. He argues that relying on the objective gravity of the offence to rebut the presumption under s. 72(1)(a) impermissibly shifts the focus from an individualized assessment of the youth's developmental circumstances to an offence-driven analysis (A.F., at paras. 81-82, 102 and 105-13). In the companion appeal, S.B. submits that the seriousness of the offence provides no insight into the issues relevant to the presumption, the young person's maturity and ability to appreciate the consequences of their actions (A.F., *S.B.*, at para. 71). The Canadian Civil Liberties Association, intervening, also argues that it risks conflating the moral blameworthiness of the offence with that of the offender (I.F., at para. 25).

[137] The Crown, in turn, relies on *O. (A.)* to support the proposition that seriousness may provide insight into the young offender's moral reasoning, ability to plan, and moral blameworthiness (R.F., at paras. 100 and 103). The seriousness of the offence, the Crown explains, is relevant at the first prong because moral blameworthiness is "inextricably linked" to the offence at issue (para. 51). In its

intervening submissions, the Attorney General of Canada explains that seriousness of the offence continues to be relevant to both prongs of the s. 72(1) analysis (I.F., at paras. 36 and 41).

[138] It is true, as I.M. and S.B. point out, that appellate courts have concluded that both the seriousness and circumstances of the offence are relevant to determining whether the Crown has rebutted the presumption (see, e.g., *W. (M.)*, at para. 112). I also note that courts have attempted to attenuate the effect of seriousness in several cases and suggest that it is not determinative or should not overwhelm the analysis (*ibid.*; *R. v. R. (J.F.)*, 2016 ABCA 340, 46 Alta. L.R. (6th) 341, at paras. 25-26; *R. v. R.D.F.*, 2019 SKCA 112, 382 C.C.C. (3d) 1, at paras. 59-60).

[139] I also recognize that in *D.B.*, Abella J. observed that the "seriousness of the offence and the circumstances of the offender justify [an adult sentence] notwithstanding his or her age" (para. 77), however, it is helpful to recall that the Court was considering the previous version of s. 72(1) which listed these factors and did not advert to the presumption now codified in s. 72(1)(a). As she noted, it also listed circumstances of the offence, age, maturity, and character (see para. 73). I do not see Abella J.'s reasons as endorsing the view that the previously enumerated factor of seriousness of the offence was directly relevant to rebutting the presumption, only that it may be part of the court's analysis in determining whether an adult sentence is justified. Her focus in that passage was on who bore the burden of justifying an adult sentence, not what was required to rebut the presumption.

[140] As I have explained, s. 72(1) requires the youth justice court to engage in two distinct inquiries, reinforced by the adoption of a two-pronged provision in 2012. Resting on the rationale articulated in *D.B.* for the presumption, which is the unique developmental circumstances of young people, the focus of the presumption must be on the young person's developmental age. In my view, factors that speak to the objective gravity of the offence, rather than the young offender, are irrelevant to this inquiry as they would not shed light on the offender's developmental attributes.

[141] It is not enough to say, as some courts have observed, that seriousness of the offence is not determinative under s. 72(1)(a), or to say that the seriousness of the offence does not, "in and of itself, justify the imposition of an adult sentence" as the sentencing judge wrote in this case (para. 29). While relevant to accountability under s. 72(1)(b), seriousness of the offence as an abstract matter has no place in the analysis relating to the rebuttal of the presumption because it has no bearing on whether an individual young person has the developmental age of an adult. As one scholar noted, a young person either has or does not have, diminished capacity, "whatever their crimes" (M. E. Vandergoot, *Justice for Young Offenders: Their Needs, Our Responses* (2006), at p. 119; see also Parkes, at pp. 13-15). Moreover, it is important to recall that while "[t]he presumption is not displaced by virtue of the seriousness of the crime", youth sentencing is itself predicated on the idea that seriousness is relevant to "accountability and retribution" such that very serious offences, such as murder or aggravated sexual assault, attract longer sentences under Parliament's *YCJA* sentencing rules (see Campbell, at p. 53).

[142] Consideration and weighing of the objective seriousness of an offence as a factor under the presumption is therefore an error in principle. However, I note that not every reference to objective gravity or seriousness will result in a reviewable error if it is plain that it did not impact the sentencing judge's conclusion on the presumption and that the judge was focused on developmental age.

[143] In my view, the Crown incorrectly conflates the "seriousness" of an offence with its underlying factual circumstances. While the latter may be relevant, the former is not. As the Court of Appeal for Ontario describes in *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at para. 13, the "seriousness" or "gravity" of an offence is "determined by its normative wrongfulness and the harm posed or caused by that conduct in the circumstances in which the conduct occurred". This inquiry must be kept distinct from a determination of a particular offender's moral blameworthiness (para. 77). While the factual circumstances of an offence may provide insight into an offender's developmental age relevant to the first prong, they do not alter the offence's inherent gravity (see para. 76; *R. v. Hills*, 2023 SCC 2, at para. 58). Maintaining this distinction ensures that s. 72(1)(a) remains focused on the young person's developmental maturity rather than the objective gravity of the offence. A violent crime, however serious in character, tragic in consequence or troubling in execution, is not inherently indicative of a young person with the developmental age of an adult.

[144] In particular, requiring the seriousness of the offence to be considered in both prongs blurs that line and may, with respect to some offences like first degree

murder, distort or replace the analysis under the first prong by obscuring the focus of the offender-centric rationale of the presumption (see *R.D.F.*, at para. 60; see also Parkes, at p. 25). Its consideration under the first prong risks displacing the young offender and their personal circumstances as the focal point of s. 72(1)(a), undermining the constitutional significance of the presumption of diminished moral blameworthiness as a threshold requirement. Seriousness of the offence may properly be considered at the second stage of the analysis in s. 72(1) relating to accountability and fitness of the youth sentence, where it may be a significant factor, depending on the case.

[145] In contrast with the objective seriousness of the offence, the circumstances of the offence may be a relevant consideration under the first prong of s. 72(1)(a), but only insofar as they offer insights into the young person's developmental age. The parties agree on the relevance of the circumstances of the offence. However, there are some important considerations for sentencing judges to keep in mind as they engage in this analysis.

[146] As with any factor under the presumption, the circumstances of the offence must be examined through the lens of the young person's developmental age. Courts must resist the temptation to use the circumstances of the offence as a substitute for normative assessments of the offence committed. Those considerations are reserved for the second prong of s. 72(1). Courts must therefore exercise caution: the violent character of the commission of a crime, while relevant — like the seriousness of the

offence — to the young person's accountability under s. 72(1)(b), may not always carry relevant information to rebutting the presumption of diminished moral blameworthiness. Young persons may commit violent crimes in grim circumstances impulsively or to impress others, in ways that reflect a diminished capacity for adult-like judgment. Where either seriousness or circumstances, abstracted from the young person's developmental age, are invoked as proxies for proving developmental age to rebut the presumption, an error has been made.

[147] Relevant considerations under s. 72(1)(a) may include whether the conduct is consistent with the presumed lesser maturity of the young offender, such as impulsiveness or bravado (*R. v. A.M.*, 2024 ONSC 5323, at paras. 62-64). A young person's impulsive reaction in the course of committing an offence can reflect a sense of invincibility that indicates immaturity, while deliberate planning may suggest more advanced moral and cognitive development as it may demonstrate that they engaged in critical thinking, considered planning, adult-like judgment, or demonstrated an understanding of the consequences of their actions (*Chol*, at para. 61). Yet, as noted by the intervener Justice for Children and Youth, even young offenders are capable of some degree of planning and deliberation. The focus must remain on whether the offender's planning, combined with other considerations, reveals a level of sophistication and foresight that aligns with adult-level reasoning, rather than merely identifying the presence of planning.

[148] Similarly, a young offender's post-offence conduct — that is, after-the-fact conduct temporally linked and related to the offence at issue — may be potentially informative, but warrants some caution in its consideration. I agree with the Court of Appeal that post-offence conduct may demonstrate a "level of maturity, moral sophistication, and capacity for independent judgement" (para. 81, citing *W. (M.)*, at para. 98). Certain types of post-offence conduct — such as attempts to evade detection, destroy evidence, or mitigate the harm — may, depending on the case, suggest sophistication and capacity to form moral judgment.

[149] However, such conduct can also reflect impulsive reactions driven by juvenile fear and panic, rather than adult-like calculation (*Chol*, at para. 61). Post-offence conduct must be examined in context to avoid misinterpretation or overemphasis. The overarching question is whether the circumstances of the offence shed light on the offender's developmental age in light of their broader personal attributes.

(b) *Factors Related to Personal Circumstances of the Offender*

[150] Consistent with the rationale of the presumption, which rests on the presumed personal attributes of young people, the particular circumstances of the young person before the court will be a central consideration to determining their developmental age (see *R.D.F.*, at para. 37).

[151] Personal circumstances of the offender relevant to rebutting the presumption will be individualized, offender-centric evidence that the young person's developmental age is akin to that of an adult. This may include the young person's actual age, background, sophistication in thinking, capacity for independent judgment, behaviour after the offence, whether the person was living like an adult, cognitive, emotional and mental health, and susceptibility to external influences among others (*Chol*, at para. 61; *W. (M.)*, at para. 98; *R.D.F.*, at para. 37; C. C. Ruby, *Sentencing* (10th ed. 2020), at §22.48).

[152] An offender's chronological age is an important personal attribute, as it helps anchor further developmental considerations. However, age is only one factor, and it cannot eclipse other indicators of the young offender's developmental age as a matter of course (see *A.M.*, at paras. 65-66). An offender on the cusp of adulthood may still be developmentally young. Indeed, as a question of law and constitutional principle, they are entitled to that presumption. I note Parliament has directed in s. 16(a) *YCJA*, that even when an offence has been committed by a young person on the very eve of their 18th birthday, the youth justice court shall nevertheless impose a sentence under the regime of the *YCJA*. A sentencing judge who infers from a young offender's proximity to adulthood, without more, that their development is akin to that of an adult effectively reverses the presumption of diminished moral blameworthiness. Such an error would be contrary to the young offender's rights under s. 7 of the *Charter*.

[153] It may well be true, as a common-sense generalization, that a young person very near to their 18th birthday will likely be more mature than, say, a 14- or 15-year-old in respect of whom s. 64 *YCJA* adult sentencing applications may also be brought. By the same token, common-sense generalizations about the maturity of 14-year-old offenders compared to those who are on the cusp of 18 may fairly suggest that the 14-year-old is less likely to have the developmental age of an adult. In all cases, however, fixing developmental age remains an individualized factual determination that cannot be cut short by a common-sense generalization based on chronological age that is insufficiently sensitive to the offender's particular circumstances.

[154] Courts may also examine the degree of independence the young person had at the time of the offence. As the British Columbia Court of Appeal noted in *Chol*, an offender's living situation — whether they were functioning as an adult or were dependent and susceptible to the influence of others, including peers — can provide meaningful insight into maturity and capacity for independent judgment.

[155] Evidence of cognitive and emotional limitations, including behavioural disorders or mental health issues may also assist sentencing judges when determining the young offender's developmental age. These factors do not excuse criminal conduct but may demonstrate the young person's presumed vulnerability, reduced maturity and reduced ability to exercise independent judgment and capacity to make rational, informed decisions at the time of the offence (see *R.D.F.*, at para. 37; *Chol*, at para. 61; *R. v. Z.A.*, [2023] EWCA Crim 596, [2023] 2 Cr. App. R. (S.) 45 (p. 404), at para. 52;

on cognitive trauma in young persons more generally, see also *R. v. Brown*, [2013] NICA 5, at para. 7; *Bugmy v. The Queen*, [2013] HCA 37, 302 A.L.R. 192, at para. 43; *R. v. Amos*, [2012] NSWSC 1021, at paras. 43 and 82). A young person with cognitive impairments may struggle to foresee the consequences of their actions or fully appreciate the harm caused to others, underscoring their diminished capacity for moral judgment.

[156] A young offender's history and background are also relevant, as they can significantly shape a young person's behaviour and judgment, and by extension, their development (s. 72(1)(a); *Chol*, at para. 61; *B.J.M.*, at para. 110). That said, a young offender's background encapsulates many aspects. Social context evidence, which I will consider below, may be relevant. Moreover, certain experiences, such as exposure to traumatic events, may fundamentally change their worldview and therefore their vulnerability, maturity, and capacity for moral judgment.

[157] Two points warrant further comment.

[158] I.M. objects to the Court of Appeal's consideration of his behaviour in pre-trial custody as an indication of rehabilitative potential under the presumption and argues that this is irrelevant to a young person's maturity at the time of the offence (A.F., at para. 107). In my view, the probative value of evidence relating to the offender's behaviour and conduct while awaiting trial or sentencing in assessing developmental age will depend on the case. Courts must take care not to improperly infer greater maturity at the time of the offence based on conduct as an adult. However,

in some cases, such evidence may offer insight into developmental age at the time of the offence. For example, such behaviour may be relevant to maturity if it shows a real change over time, such as progress and growth consonant with a coming of age. This was the case in *W. (M.)*, where the court found a youth's "evolving maturity" while in custody suggested a "lesser degree of [his] maturity" at the time of the offence (para. 130). Conversely, consistently immature behaviour and inability to exercise judgment may well suggest stalled development, confirming ongoing immaturity. That said, I agree with the appellant that to the extent such conduct shows reduced rehabilitative potential, it is not relevant to s. 72(1)(a), but is relevant to s. 72(1)(b) (*Chol*, at para. 54). If assessed under s. 72(1)(a), the analysis must be anchored in the developmental age of the young person in question in order to be properly connected to the rationale of the presumption.

[159] Finally, although I.M. initially argued that expert evidence would always be necessary to assist in a youth justice court's determination of whether the presumption is rebutted, at the hearing, this point was properly conceded. In my view, expert evidence is not required to rebut the presumption, though it may provide valuable assistance in certain cases (see, e.g., *R. v. B.J.M.*, 2022 SKPC 38 ("*B.J.M. Prov. Ct.*"), at para. 47). This reflects the balance struck by Parliament in s. 72(1) to grant flexibility to sentencing judges to determine the most appropriate tools for assessing a youth offender's moral blameworthiness when considering the practical realities of sentencing.

[160] Section 34(2) *YCJA* authorizes youth justice courts to order an assessment by a qualified expert on an application for an adult sentence. Section 34(1) permits youth justice courts, in their discretion, to determine whether to order a youth offender to be assessed by a qualified person, provided that the court believes a psychological report is necessary for an enumerated purpose and the young person is alleged to have committed a "serious violent offence". Section 34(3) provides courts with the authority to remand a youth offender into custody to facilitate the preparation of such an assessment. While these assessments are distinct from expert evidence that may be tendered by the Crown or defence, they serve as a useful resource for courts in evaluating a youth's developmental maturity.

[161] Nor am I persuaded that an obligation to lead expert evidence is necessary to avert flawed "common sense" reasoning by some sentencing judges, as I.M. argues. Such arguments overlook the judiciary's experience and that sentencing judges routinely undertake complex and contextual analyses of the factual question of developmental age relevant to rebutting the presumption without expert input (see, generally, *Proulx*, at para. 116). Moreover, practical considerations also weigh against requiring expert evidence in all cases. A young offender may refuse for valid reasons to participate in assessments, as in *S.B.*, the companion case to this appeal. And the *YCJA*'s emphasis on timely intervention in the youth sentencing context points away from imposing rigid evidentiary requirements in all cases which may prolong proceedings (s. 3(1)(b)(iv) and (v)).

(c) *Social Context Evidence Relevant to Rebutting the Presumption*

[162] Other aspects of a young offender's background can play a role in their development, such as a young offender's disadvantaged background, and the connection between that background and systemic discrimination in their community. Evidence of such social context is normally provided to courts within reports prepared by individuals with relevant professional expertise (*Morris*, at paras. 137-47), such as an enhanced pre-sentence report or an Impact of Race and Culture Assessment as they are known in some provinces (A. S. Anderson, "Analysis: Considering Social Context Evidence in the Sentencing of Black Canadian Offenders" (2022), 45:6 *Man. L.J.* 152, at p. 164). However, courts may look to testimony or take judicial notice of social context in certain cases (*Morris*, at para. 13). The role that such evidence of social context plays in assessing young offenders' development and their moral blameworthiness merits commentary from this Court. For this, it helps to begin by examining the role of social context in sentencing generally.

[163] S.B. argues in the companion appeal that this evidence provides context for the young offender's criminal conduct and insight into his diminished moral blameworthiness (A.F., *S.B.*, at paras. 112-13). I.M. adopts S.B.'s submissions on this point (A.F., at para. 80). No party disputes the relevance of this evidence at both prongs of the inquiry, and several interveners attested to its importance to the issues on an adult sentence application.

[164] This Court has addressed in a number of cases the mandatory direction in s. 718.2(e) *Cr. C.* that sentencing judges consider the unique situation of Indigenous offenders (*R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 84-85). However, it has also generally recognized that an offender's background and personal circumstances are relevant to their individual moral responsibility (*Hills*, at para. 58), and that systemic factors will be important in sentencing non-Aboriginal offenders as well (*Gladue*, at para. 69; *Ipeelee*, at para. 77). While this Court has not yet specifically considered the role of social context evidence in the sentencing of non-Indigenous offenders, jurisprudence from provincial appellate courts indicates that it can provide helpful guidance to understand the particular experience of an offender and their moral culpability. This is especially true with respect to offenders who belong to racialized groups who face overt and systemic discrimination (see *Morris*; *R. v. Anderson*, 2021 NSCA 62, 405 C.C.C. (3d) 1; *R. v. Ellis*, 2022 BCCA 278, 417 C.C.C. (3d) 102, at para. 78; *R. v. C.K.*, 2022 QCCA 539, at para. 22; *R. v. Pierre*, 2023 ABCA 300, at para. 6; see also *Hills*, at para. 55).

[165] Given its role in understanding moral culpability, evidence of a young offender's social context can provide important information to sentencing judges under the first prong of s. 72(1) in explaining the criminal conduct at issue as it relates to the developmental age determination. It is the developmental age of the young person, and not the specific demographic group to which they belong, that remains the focus of the analysis relating to the presumption. As part of this individualized evaluation of the young person's maturity, I recall that the *YCJA* expressly directs that measures taken

against young persons should respect "ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons" (s. 3(1)(c)(iv)). This evidence may be equally valuable for the purposes of the distinct inquiry, focussed on accountability, under the second prong. If the Crown is successful in rebutting the presumption of diminished moral blameworthiness, social context evidence may still be relevant to determine whether a youth sentence will be of sufficient length to hold the young person accountable. My commentary here focuses on the additional role social context evidence plays under the first prong.

[166] The social context in which a young offender grows up can often affect the trajectory of their life. Understanding that trajectory helps place the young offender's decisions in context, potentially demonstrating increased vulnerability, diminished judgment, and a reduced capacity for moral decision making. As the court explained in *Morris*, "an offender's life experiences can . . . influence the choices made by the offender, and can explain, to some degree at least, why an offender made a choice to commit a particular crime in the specified circumstances" (para. 75). For example, as the intervener Justice for Children and Youth submits, gang affiliation can for some young persons act as a "refuge-seeking response to social dislocation or a lack of family stability, physical protection, or emotional or financial support" (I.F., at para. 33). A young offender's social context therefore provides "a more textured, multi-dimensional framework" for understanding their background and behaviour, including their stage of developmental maturity (see *R. v. X.*, 2014 NSPC 95, 353 N.S.R. (2d) 130, at para. 198). Ultimately, the effect of such evidence in understanding whether the

presumption of diminished blameworthiness has been rebutted will necessarily vary according to the facts of each case.

[167] Despite its role in assessing development and moral culpability, the value of social context lies in what it can tell a sentencing judge about the offender, not the demographic groups to which that offender belongs. It would be an error to assume that a young offender is developmentally younger or older than their chronological age based merely on their racial, ethnic, or gender identity, to name a few. I agree with the intervener Justice for Children and Youth that such an approach to social context risks inferences of adult-like behaviour based on myths or stereotypes (I.F., at para. 28). It could also give way to improper automatic "discount[s]" based on one's background (*Morris*, at para. 97). Again, the first prong demands a fact-specific, nuanced, and contextual inquiry. Evidence of social context must therefore be linked to the vulnerability, judgment, and capacity as reflected in the developmental age of the particular young offender before the court.

C. *Assessing Whether a Youth Sentence Would Not Be of Sufficient Length To Hold the Young Person Accountable (Section 72(1)(b))*

[168] Unlike s. 72(1)(a), which focuses on rebutting the presumption of diminished blameworthiness, s. 72(1)(b) asks whether a youth sentence is sufficient to hold a young offender accountable. The assessment s. 72(1)(b) calls for is not perfunctory. Rather, it engages with fundamental principles of youth sentencing, particularly those outlined in ss. 3(1)(b)(ii) and 38, to which it explicitly refers.

Understanding its nuances requires attention to the interplay between proportionality, accountability, and rehabilitation.

(1) The Onus on the Crown To Satisfy the Sentencing Judge That an Adult Sentence Is Required for Accountability Under Section 72(1)(b)

[169] It is important at this stage not to lose sight of what is meant by accountability under s. 72(1)(b). Although the effect of meeting the requirements of the second prong is to impose an *adult sentence* on the young offender, this does not mean that the desired accountability under the second prong is that of the adult sentencing regime. Instead, the second prong asks whether the constraints of youth sentencing must give way to achieve the accountability objectives established by the *YCJA*. Once the Crown meets its burden of rebutting the presumption in s. 72(1)(a), it must still demonstrate that a youth sentence would be insufficient in length to hold the young person accountable for their wrongful conduct under s. 72(1)(b) to obtain an order for an adult sentence. The exercise under s. 72(1)(b) relates to assessing the fitness of a youth sentence in the circumstances. As such, the burden on the Crown is to satisfy the sentencing judge in the exercise of their discretion that the youth sentence is not of sufficient length to hold the young person accountable. Unlike s. 72(1)(a), the burden on this prong is not beyond a reasonable doubt but one of satisfaction, suited to the kind of discretionary exercise sentencing judges typically undertake when weighing competing factors to determine a fit sentence.

[170] Parliament has enacted the *YCJA* with sufficient breadth as to hold young persons accountable through "just sanctions that have meaningful consequences", including for what s. 2(1) *YCJA* designates as "serious violent offence[s]", committed in dire circumstances, unless the Crown has rebutted the presumption (s. 38(1)). Accountability, as defined in s. 38(1), is a cornerstone of youth sentencing. It encompasses sanctions that are not only proportionate but also promote meaningful consequences and societal reintegration. Accountability, therefore, cannot be equated solely with retribution. While some appellate courts have linked accountability to retributivist principles (see *O. (A.)*, at paras. 47 and 50), others have recognized a hybrid model incorporating utilitarian aims, such as crime prevention through rehabilitation (*Anderson MBCA*, at paras. 80 and 82). This dual perspective underscores the importance of crafting sentences that reflect young offenders' circumstances while addressing the gravity of their actions.

[171] Accountability under the *YCJA* reflects an equilibrium between different purposes: [TRANSLATION] "Rather than adopting a strictly punitive approach, the YCJA favours accountability aimed at transforming the young offender through measures tailored to their development and their capacity for reintegration" (Destrempe Rochette, at p. 72). For example, the *YCJA* requires sentencing judges to consider, in measuring the proper sanction to be imposed, the harm caused to victims (ss. 3(1)(c)(ii) and 38(3)(b)), alongside rehabilitation and reintegration into society, which are all understood to "contribut[e] to the long-term protection of the public" (s. 38(1)). The rules in the *YCJA* are different from those that apply to adult offenders, recognizing, as

one scholar noted, an understanding that "children cannot be viewed merely as chronologically younger than adults, but rather as inherently vulnerable and immature human beings whose behavioural development and character formation remains ongoing" (Jones, at p. 97).

[172] Since the inquiry under s. 72(1)(b) "operates much like the determination of a fit sentence" (*B.J.M.*, at para. 95), it follows that assessing the appropriateness of a youth sentence gives rise to similar considerations. This supports the view that the normative assessment called for by s. 72(1)(b) does not require proof beyond a reasonable doubt. While the Court of Appeal's conclusion in *O. (A.)* and the case law that followed it have no relevance in relation to the first prong of s. 72(1), they continue to be relevant to the second prong. In that respect, I agree with the court in *O. (A.)* that the inquiry called for by s. 72(1)(b) is evaluative in nature and requires the youth justice court to "weigh and balance" the relevant factors (para. 34). This is an inherently contextual task rooted in judicial discretion (paras. 46-50). Accordingly, an assessment of the appropriateness of a youth sentence does not lend itself to proof beyond a reasonable doubt (see *B.J.M.*, at paras. 91-99).

(2) Factors Relevant to Accountability Under Section 72(1)(b)

[173] In contrast to the first prong, where the analysis is offender-centric, the accountability inquiry permits the integration of a broader array of factors, including the normative consequences of the offence, the impact on victims and the community, as well as the availability (or lack thereof) of rehabilitative and reintegrative supports

within the youth system. Again, this is inherently evaluative and discretionary. Sentencing judges must weigh the offender's culpability, the harm caused by their actions, and the normative character of their conduct (*O. (A.)*, at paras. 46-47).

[174] The assessment under s. 72(1)(b) is not merely procedural or perfunctory. It engages with fundamental principles of youth sentencing, particularly those outlined in ss. 3(1)(b)(ii) and 38. A young offender does not lose the statutory guardrail of s. 72(1)(b) simply because they are developmentally mature. The statutory context makes clear that the accountability inquiry is not a foregone conclusion once the presumption inscribed in s. 72(1)(a) is rebutted; it remains a distinct and essential assessment.

[175] Section 3(1)(b)(ii) *YCJA* underscores that young persons are characterized by a "reduced level of maturity" and "greater dependency", and that their accountability must be fair and proportionate to their circumstances. These principles reinforce that accountability under the second prong is a distinct inquiry that cannot be collapsed into the first prong simply because the young person's developmental age has been found to be akin to an adult. The fact that a youth's developmental age may be comparable to an adult does not, in itself, justify the imposition of an adult sentence.

[176] Similarly, s. 38(2)(c) links proportionality to the seriousness of the offence and the offender's degree of responsibility, while also prioritizing rehabilitation and restraint over denunciation and deterrence. Notably, general deterrence is excluded as a sentencing objective for young persons (*R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R.

941, at para. 4). This is further reinforced by the *YCJA*'s provisions on custodial sentences. For example, s. 39(1) restricts such sentences to exceptional cases (*C.D.*, at para. 39). Even for first degree murder, the maximum custodial sentence under the *YCJA* is six years (s. 42(2)(q)(i)). These principles inform the meaning of accountability under s. 72(1)(b).

[177] Under s. 72(1)(b), the seriousness of the offence is relevant to accountability. This encompasses both an objective examination of the offence — the harm inflicted, the nature of the violence, and the societal condemnation — as well as an assessment of its implications on the offender's culpability. But the second prong's broader focus on moral blameworthiness must not be confused with the inquiry required under s. 72(1)(a), which remains focused only on the young offender's developmental age, as indicative of capacity for moral judgment, maturity and heightened vulnerability. By contrast, under s. 72(1)(b), the assessment is properly informed by the seriousness of the offence, the offender's conduct in the commission of that offence, and, as the reference to s. 3(1)(b)(ii) in the second prong suggests, to their reduced maturity and greater dependency.

[178] The breadth of the discretionary inquiry under the second prong necessarily includes examining relevant aspects of the offender's background to better understand their choices leading to, and their individual responsibility for, the crime (*Hills*, at para. 58). Accordingly, sentencing judges must balance the aggravating and mitigating circumstances of the offence and the offender, including their post-offence conduct and

pre-sentence behaviour, to determine if a youth sentence falls short of delivering meaningful accountability. The assessment thus parallels the determination of a fit sentence, which must balance the offence's gravity with the offender's culpability (*L.M.*, at para. 17; Ruby, at §23.6; Vauclair, Desjardins and Lachance, at para. 47.2).

[179] As the Court of Appeal decided in the companion case of *S.B.*, social context evidence is often indispensable in assessing a young person's accountability (*R. v. S.B.*, 2023 ONCA 369, 426 C.C.C. (3d) 367, at para. 71). I agree. Such information can shed light on the vulnerabilities arising from the offender's background and therefore may assist in establishing a nuanced understanding of the offender's conduct and culpability (see *Morris*, at paras. 13 and 97; see also *Hills*, at paras. 55 and 58). For example, evidence of socioeconomic disadvantage and exposure to violence may indicate that a harsher, adult-style sentence is not appropriate, as it could exacerbate the young person's vulnerabilities. Thus, social context evidence plays a dual role under s. 72(1). While it may be critical in the factual inquiry under the first prong, it is equally vital to understanding whether the available youth sentence would sufficiently hold the young offender accountable.

[180] Other factors are also relevant in assessing accountability. Section 3(1)(c) requires sentencing judges to consider the harm caused to victims and mandates fostering reparative measures. Victims play an important role under the second prong, and their impact statements provide valuable insights into the consequences of the offender's actions and the gravity of the offence. Pre-sentence custody also affects the

accountability assessment. Time spent in custody can disrupt education and social stability, often compounding the challenges faced by young offenders. Courts must ensure that sentences remain proportionate and rehabilitative by taking these considerations into account (Bala and Anand, at pp. 523-24 and 536-37; see also Kobayashi and Michalski, at p. 373, p. 379, fn. 28, and p. 381, fn. 35).

[181] In sum, the accountability inquiry under s. 72(1)(b) must be understood as a distinct, normative decision that is predicated on — and only follows after — a rigorous factual inquiry into developmental age. It requires courts to balance the principles of proportionality, accountability, and rehabilitation in determining whether a youth sentence is adequate. This analysis reflects the *YCJA*'s overarching goals of promoting meaningful consequences, fostering reintegration, and addressing the harm caused by youth offences. By grounding the inquiry in these principles, judges can ensure that decisions are fair, individualized, and consistent with the needs of young offenders.

VIII. Application

[182] The central issue in this appeal is whether the Court of Appeal erred in upholding the sentencing judge's decision to impose an adult sentence on I.M. To resolve this question, I first set out the standard of appellate review that applies in this case. Second, I explain that the sentencing judge committed errors in principle that materially impacted I.M.'s sentence. Finally, I sentence I.M. afresh to determine whether the presumption was rebutted and to ascertain the appropriate sentence.

A. *The Standard for Appellate Intervention*

[183] It is of course settled law that the standard of appellate review for sentencing matters is one of deference (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paras. 89-94; *Lacasse*, at para. 41). However, as this Court explained in *Lacasse*, an appellate court may intervene where a sentencing judge has erred in principle, including by erroneously considering aggravating factors or omitting relevant factors, and where the error had a material impact on the sentence (paras. 41-44). This principle applies equally in the context of youth sentencing appeals, where the same deferential approach governs appellate review (see, e.g., *LSJPA — 1915*, at para. 44; *W. (M.)*, at para. 49; *A.W.B.*, at para. 12; *Okemow*, at para. 41). Under ss. 37 and 72(5) *YCJA*, an appeal from an order imposing an adult sentence is an appeal from that sentence. Therefore, where an appellant alleges an error in the interpretation of s. 72(1), as I.M. does in this case, that error — if established — constitutes an error in the determination of the sentence that will be reviewable if it had an impact on the sentence.

[184] I recall that, even when sentencing afresh, this Court owes deference to the sentencing judge's findings of fact "to the extent that they are not affected by an error in principle" (*Friesen*, at para. 28). Upon resentencing, an appellate court may nevertheless arrive at the same sentence, despite the error (paras. 27 and 29). That is not the case here.

B. *Errors in Principle Justify Intervention by This Court*

[185] I.M. alleges a number of errors in the reasoning of both the sentencing judge and the Court of Appeal under the first prong. He argues that the sentencing judge and the Court of Appeal applied the wrong standard of proof, improperly considered the seriousness of the offence at the first prong, and failed to consider key factors relevant to developmental maturity. The Crown, on the other hand, argues that the sentencing judge applied the correct evaluative standard that he be "satisfied" that the presumption is rebutted and properly considered Dr. Pearce's evidence on I.M.'s prognosis. The errors I.M. alleges, the Crown says, are largely challenges to the judge's factual findings, and I.M. has not demonstrated them to be palpable and overriding. The Crown submits that the sentencing judge and the Court of Appeal properly assessed that I.M. should be sentenced as an adult, as his actions show a high degree of moral blameworthiness.

[186] In light of the legal principles explained here, I agree with the appellant that the sentencing judge's reasons reflect errors in principle in the interpretation of s. 72(1) *YCJA* that materially affected I.M.'s sentence. While he correctly recognized that the rebuttal of the presumption requires a two-pronged analysis, I am of the respectful view that his misapplication of the standard of proof, reliance on improper factors, and failure to meaningfully engage with the rationale underlying the presumption of diminished moral blameworthiness necessitate appellate intervention. The effect of these errors was not merely technical but substantive, distorting the proper application of s. 72(1) and leading to a legally unsound conclusion.

[187] First, the sentencing judge erred in law by applying the wrong standard of proof to the Crown's burden under s. 72(1)(a). The presumption of diminished moral blameworthiness requires the Crown to establish, beyond a reasonable doubt, that the young person's developmental age, at the time of the offence, was akin to that of an adult. Instead, the sentencing judge applied a lower threshold, requiring only "satisfaction after careful consideration by the court of all the relevant factors" (para. 25, quoting *B.L.*, at para. 36). This failure to apply the correct standard constitutes an error in principle. By lowering the burden on the Crown, the sentencing judge distorted the required analysis, making it significantly easier to rebut the presumption than constitutionally required.

[188] This error reflected the sentencing judge's reliance upon outdated legal authorities (paras. 24-25). Rather than applying *D.B.*, he followed *O. (A.)* and *B.L.*, at para. 36, which also relied on *O. (A.)*. Neither case reflects the legal framework established in *D.B.* and the 2012 legislative amendments. As I have explained, *O. (A.)* predates both and incorrectly suggests that the Crown's burden in justifying an adult sentence is not a heavy one (at para. 38), while *B.L.* relied on *O. (A.)*. Most respectfully, the Court of Appeal, by remaining silent on this error, carried the mistake on the standard of proof forward, making it easier to rebut the presumption on appeal.

[189] I pause here to observe that a misapprehension of the requisite standard of proof under the first prong, while an error in principle, may not have a material effect on the outcome of an application for an adult sentence. An appellate court may be

satisfied that when the sentencing judge's reasons and record support a conclusion that the presumption was rebutted beyond a reasonable doubt the error had no impact on the sentence. In such a case, intervention is not necessary if there is no impact on the sentence (see *B.J.M.*, at para. 109). In the present case, however, the error in respect of the standard was compounded by other errors relating to the factors relevant to the rebuttal of the presumption, which, taken together, preclude that conclusion here.

[190] Secondly, the sentencing judge in the present case erred by improperly considering the seriousness of the offence at the first prong. He considered this factor at the outset of his reasons. Although the sentencing judge recognized that this factor did not alone justify an adult sentence (at para. 29), it was in point of fact irrelevant to rebutting the presumption altogether. He then noted it again as a key factor in his ultimate conclusion that I.M. demonstrated the maturity, moral sophistication, and capacity for independent judgment of an adult (para. 38). Respectfully stated, this reasoning reflects a legal error. The objective seriousness of the offence does not speak to, and has no bearing upon, a young person's developmental age.

[191] Respectfully said, the Court of Appeal fell into similar errors by considering this factor in its engagement with the first prong (see paras. 75 and 81). It was not enough for the court to say that seriousness is not "determinative" in respect of rebutting the presumption (para. 76). It should have set it aside as irrelevant under the first prong, and focused on I.M.'s personal attributes, as it did in the companion *S.B.* appeal (paras. 62-68).

[192] Moreover, apart from I.M.'s age, the sentencing judge's reasons did not consider other aspects of I.M.'s personal attributes and circumstances under the first prong. That evidence, although relevant to I.M.'s capacity for moral judgment, was given sparse treatment under s. 72(1)(a), yet played a role in later portions of the sentencing judge's reasons under the second prong. I.M.'s exposure to poverty, violence, and negative peers could have impacted his developmental maturity, yet the judge gave them no consideration in his analysis of the presumption. He also overlooked findings of fact that pointed to immaturity, including I.M.'s interactions with the adult co-conspirator when discussing the robbery and his boasting to G.D., a classmate. Of course, such factors do not necessarily preclude an adult sentence under s. 72(1). To be clear, not all young persons who face social and cognitive challenges are precluded from receiving an adult sentence under the *YCJA*. However, by emphasizing the seriousness of the offence at the first prong to the exclusion of I.M.'s personal attributes and circumstances, and by focusing on the circumstances of the offence without due regard of how some of those circumstances pointed to I.M.'s immaturity, I am of the respectful view that the sentencing judge erred in principle.

[193] Thirdly, I am respectfully of the view that the sentencing judge failed to consider key factors relevant to developmental maturity, in particular I.M.'s mental health history as it was relevant to I.M.'s capacity for moral judgment for the purposes of the presumption. A number of reports in the record, including Dr. Pearce's psychological assessment and pre-sentence reports, indicate that I.M. suffered from specific mental health issues and delayed cognitive development. This evidence

directly affects the assessment of his developmental age under s. 72(1)(a). The sentencing judge did not consider these factors under the first prong, and by omitting to do so, he failed to engage with the very rationale that underlies the presumption. I.M.'s developmental trajectory was treated as secondary to the seriousness and circumstances of the offence.

[194] The cumulative effect of these errors in the sentencing judge's approach contrast with *B.J.M.*, in which the Court of Appeal for Saskatchewan upheld the sentencing judge's decision that the presumption had been rebutted despite the judge's failure to apply the right standard. In that case, the sentencing judge carefully considered the offender's background, mental health history, and social context, specifically his Indigenous background and related systemic factors that impacted his life trajectory (*B.J.M. Prov. Ct.*, at paras. 21-39). He also properly considered the circumstances of the offence to understand B.J.M.'s maturity at the time of the offence (paras. 40-45). I.M.'s sentencing, by contrast, is a misapplication of the law, and should have been identified as an error on appeal.

[195] Finally, while it is not always an error, the sentencing judge in this case erred in his reliance on I.M.'s pre-sentence behaviour. Pre-sentence behaviour can, in some cases, indicate developmental progression and therefore shed light on the young offender's maturity at the time of the offence (*Chol*, at para. 54). However, the Crown led no direct evidence about pre-sentencing conduct beyond tendering correctional

records. Here, the sentencing judge assumed a linear trajectory from immaturity to maturity without sufficient evidentiary support.

[196] I.M. was convicted of constructive first degree murder under s. 231(5)(e) *Cr. C.*, an offence that, even under the *YCJA*, carries a significant sentence in respect of which the custodial portion must not exceed six years from the date of committal. The rebuttal of the presumption exposed I.M. to the risk of life imprisonment with a 10-year period of parole ineligibility, rather than a youth sentence that could include IRCS programming, for which he was found eligible. The sentencing judge's failure to apply the correct standard of proof, coupled with his failure to meaningfully consider the relevant factors, materially affected his decision to rebut the presumption and, in the result, impose an adult life sentence on I.M.

C. *Resentencing I.M. on Appeal*

[197] Now that I have determined that the sentencing judge's errors in principle have had a material impact on I.M.'s sentencing determination, I must decide afresh whether the presumption of diminished blameworthiness was rebutted, and if not, determine the appropriate youth sentence.

(1) <u>The Crown Did Not Discharge its Burden To Rebut the Presumption Under Section 72(1)(a)</u>

[198] When considering whether the presumption of diminished moral blameworthiness has been rebutted, sentencing judges must adhere to the constitutional and statutory rule that the burden lies with the Crown to prove that the young person's developmental age was akin to that of an adult.

[199] At the time of the offence, I.M. was 17 years and 5 months old. It was not a mistake for the sentencing judge, or for the Court of Appeal, to observe that I.M. was on the "cusp" of his 18th birthday when he committed the offence (he was in fact about 7 months away from that date). But, at best, it was one contextual factor among others relevant to developmental age. I.M. was no less entitled, by statute and as a matter of constitutional law, to the benefit of the presumption of diminished moral culpability simply because he was close to coming of age. While proximity to adulthood may lean in favour of rebutting the presumption, it is not sufficient. Even those on the cusp of adulthood are presumed to have diminished moral blameworthiness in the absence of contrary evidence. On re-sentencing, the Court must begin from the premise that I.M.'s developmental age is coincident with his chronological age at the time of the offence. If the Crown is unable to prove otherwise beyond a reasonable doubt, then I.M. remains entitled to the benefit of the presumption and must be sentenced as a young person and held to account for the murder for which he was convicted under s. 42(2) *YCJA*.

[200] I turn first to the sentencing judge's findings of fact in respect of the violent circumstances of the murder of S.T. and I.M.'s role in the death. The sentencing judge fairly relied on such facts to assess the extent of I.M.'s involvement in the offence, as

signs that I.M. planned the robbery in an adult-like manner. However, on closer inspection, some of these facts also raise questions about I.M.'s impulsiveness, susceptibility to peer influence, and propensity for risk-taking.

[201] First are the facts surrounding I.M.'s motivations for getting involved in the robbery that led to S.T.'s murder. The Crown points to evidence showing that I.M. wanted a firearm in the period leading up to and following the offence (R.F., at para. 8 and *passim*). It alludes to the text message I.M. sent to one of the adult co-conspirators that he — I.M. — saw the robbery as his "cum.up" to a more serious career in crime (para. 9). I accept, as the sentencing judge did, that these facts speak to I.M.'s involvement. At the same time, the "cum.up" framing is also consistent with adolescent risk-taking, susceptibility to influence of older criminal actors, and a young person's failure to measure consequences as carefully as someone with the developmental age of an adult. These facts raise at least some reasonable doubt as to I.M.'s alleged developmental maturity. The Crown, in my view, gave no consideration to this matter and did not dispel the negative inferences it raises in rebutting the presumption.

[202] Second are the facts surrounding I.M.'s interactions with his schoolmate G.D. soon after the offence. The sentencing judge relied on G.D.'s testimony that I.M. described his involvement in S.T.'s death and showed him a bloodied shirt. The judge cited this as evidence "[i]mplicating I.M." and as post-offence conduct that exacerbated the seriousness of the murder (heading of para. 11; see also para. 33). For I.M. to declare to a young peer four days after the event that he stabbed another youth, and to

then display the victim's bloodied clothes, was ill-considered and imprudent in the extreme. It showed bravado consonant with the impulsivity of an adolescent and stood in contrast to the capacity for moral judgment that one would expect from an adult. While these findings may establish I.M.'s role, they also stand as an obstacle that the Crown must overcome to rebut the presumption.

[203] To the extent that the Crown relied on this conduct, it did so to establish the extent of I.M.'s implication in the wrongful act. It failed to contend with the valuable insights these facts provided regarding developmental age — namely, that I.M.'s incautious sharing of information is also a sign of youthful boastfulness and a lack of adult-like reasoning. These facts raise reasonable doubt regarding whether I.M. had the developmental age of an adult at the time of the offence.

[204] I turn next to the sentencing judge's findings of fact in respect of I.M.'s social context, made in connection with s. 72(1)(b) but ignored for the purposes of the presumption. I.M. became involved in crime at the ages of 12 or 13 under the influence of older peers. His schooling was disrupted by frequent transfers due to bullying and social difficulties. In 2010, he survived a school shooting that left him paranoid and hypersensitive for years (A.R., vol. I, at pp. 110-11).

[205] On its face, I.M.'s difficult life circumstances are suggestive of a heightened vulnerability that reinforces, rather than overcomes, the presumption of diminished moral blameworthiness (*D.B.*, at para. 41). Situating I.M.'s early criminal involvement in this context supports the view that his behaviour is consistent with

adolescents' susceptibility to peer pressure, proneness to risk-taking, and tendency to not appreciate long term consequences. The Crown's onus required it to explain how, notwithstanding these difficulties, I.M. had the moral sophistication and capacity for judgment beyond his years at the time of the offence.

[206] The record before this Court does not support this conclusion. The Crown's mistaken insistence on a holistic approach to ss. 72(1)(a) and 72(1)(b) based on moral blameworthiness meant that it neglected to address how I.M.'s background affected his developmental age. The Crown did not address how evidence concerning I.M.'s background was relevant to his vulnerability or to his capacity for moral judgment. The Crown failed to discharge its burden on this point as well.

[207] I.M.'s mental health at the time of the offence presents yet another obstacle in the face of the Crown's position. The most direct evidence in this regard comes from Dr. Pearce's forensic psychiatric report. The sentencing judge relied on Dr. Pearce's evidence to conclude that I.M.'s "adolescent-onset conduct disorder" and other mental health problems meant that his rehabilitative prognosis at that time was negative (para. 59). However, Dr. Pearce's report also sheds light on I.M.'s developmental maturity. He observed that I.M. exhibited impulsivity and poor emotional regulation, both of which are characteristic of youth who have not yet developed full adult moral judgment. He found that I.M.'s peer delinquency, supervision failures, and low school achievement reflected social susceptibility, external instability, and limited cognitive development (A.R., vol. I, at pp. 120-22).

[208] In all, these findings undermine the Crown's proposition that I.M. exhibited adult-level reasoning and judgment at the time of the offence, roughly eight years prior to Dr. Pearce's examination. The Crown's submissions with respect to Dr. Pearce's assessment do not overcome the doubt that his report raises: in this Court, the Crown noted simply Dr. Pearce's conclusion that it was unclear to him that I.M.'s ingrained maladaptive personality traits and adolescent-onset disorder affected his rehabilitative prognosis in 2019. Nothing is said by the Crown about the impact of I.M.'s mental health problems on his capacity for moral judgment at the time of the offence (R.F., at para. 110).

[209] It is true that there were a number of factors that were relevant to the argument that I.M. had the developmental age of an adult and which may be helpful to the Crown's position. There is evidence on the record of I.M.'s role in planning the robbery that led to S.T.'s death. As the sentencing judge said, the offence was not a "spur of the moment incident" (para. 31). However, the record indicates he was not the sole person devising the plan and, as the judge observed, I.M. was motivated by adult peer influence given his desire to prove to others he was ready to progress into more serious criminal activity (paras. 8-9 and 30).

[210] Whatever one may say about I.M.'s role in planning the robbery, one must also note that the murder itself was not planned. The most consequential aspect of I.M.'s conduct — S.T.'s death — was in fact unplanned. This tempers the strength of the evidence that I.M.'s purported capacity for planning indicates that he had the

developmental age of an adult at the time of the offence. This is not to suggest that I.M. was unaware of the consequences of his actions. He was, of course, convicted of first degree murder and his state of mind met the *mens rea* requirement for the offence. Rather, the evidence supports that he lacked the maturity and capacity for moral judgment to be sentenced for the crime as would be an adult.

[211] In sum, there is some evidence on the record that supports the Crown's argument that the presumption of diminished moral blameworthiness has been rebutted. There remains, however, important unanswered evidence of impulsivity and conduct shaped by adult peer influence: I.M.'s "cum.up" comment, his boastful description to G.D., his decision to show the bloodied clothing, and Dr. Pearce's report. These facts leave one with the impression that I.M. showed signs of youthful bravado, impulsivity and propensity to risk-taking. They also suggest that he was susceptible to peer influence and adult pressure. The reasonable doubt that arises with these facts presents an obstacle to the Crown's argument that the presumption has been rebutted.

[212] Viewing the evidence in its totality on re-sentencing, I conclude the Crown has failed to discharge its onus to rebut the presumption of diminished moral blameworthiness. It was incumbent on the Crown to demonstrate, beyond a reasonable doubt, that I.M.'s developmental age was that of an adult, and dispel the evidence suggesting that I.M.'s developmental age — psychologically, socially, and morally — was in fact consonant with his chronological age. There is no question that sentenced as a young person I.M. will be held to account for his criminal conduct, but that is not

the inquiry under s. 72(1)(a). In the absence of a demonstration by the Crown that displaces the presumption to the standard of beyond a reasonable doubt, I.M. remains entitled to be sentenced as young person.

(2) Sentencing I.M. Under the *YCJA*

(a) *The Appropriate Sentence*

[213] The appellant simply requests that a youth sentence be set at "time served", while the Crown submits that, should the appeal be allowed, the matter should be remitted to a youth court for a determination of the appropriate sentence (A.F., at para. 113; R.F., at para. 116). "Time served" is not a recognized sentence as a judge cannot impose a sentence of "time served" in the sense that it reflects the fact that the offender has already served a given period in custody (see Ruby, at §3.94).

[214] In determining an appropriate sentence, I am guided by s. 38(1) *YCJA*, which emphasizes meaningful consequences, rehabilitation, and reintegration together promote the long-term protection of the public. The sentence must be proportionate to the seriousness of the offence and I.M.'s degree of responsibility (s. 38(2)(c)), while remaining the least restrictive option that still promotes a sense of responsibility and deters future offending by I.M. (s. 38(2)(e) and (f)).

[215] In light of the record before me, I would sentence I.M. to six years of custody from the date of his committal (July 31, 2020) followed by four years of

conditional supervision to be served in the community, the maximum youth sentence permitted under s. 42(2)(q)(i) *YCJA*. Imposing the maximum allowable sentence is justified by the gravity of S.T.'s murder, the effect it has had on his family, and the principal role that I.M. played in the events that led to that murder, all of which were canvassed by the sentencing judge. These are all considerations that the *YCJA* sentencing regime requires youth justice court judges to take into account. The modalities of the four-year period of supervision in the community must be determined by the youth justice court in accordance with s. 105 *YCJA*.

[216] A wrongly imposed adult sentence should not have the effect of circumventing the statutory limits set by Parliament under the *YCJA*. It is evident from the plain wording of s. 42(2)(q)(i)(A) that the custodial period of a youth sentence for first degree murder "must not . . . exceed six years from the date of committal". In the circumstances of this case, the custodial period must account for the nearly five years that I.M. has already served under an erroneous adult sentence. Accordingly, I would grant one-to-one credit for the time served under his adult sentence, from July 31, 2020, to the date of this judgment (see *R. (J.F.)*, at para. 34). Doing so ensures the custodial portion of his sentence does not exceed the six-year maximum specified by the *YCJA*. The remainder of I.M.'s six-year custodial portion of his youth sentence would therefore conclude on July 31, 2026, absent any application of credit for pre-sentence custody, which I discuss below. Prior to his release date, as required by s. 105 *YCJA*, and subject to an application by the Attorney General under s. 104, I.M. must appear

before a sentencing judge forthwith to determine whether any further credit should be granted for pre-sentence custody and the conditions governing the supervision period.

(b) *Pre-Sentence Custody Credit*

[217] A question arises at this stage as to how this Court should account for the period that I.M. spent in pre-sentence custody between November 23, 2013, and July 31, 2020. Section 38(3)(d) *YCJA* requires that courts "take into account . . . the time spent in detention by the young person as a result of the offence".

[218] The jurisprudence in respect of s. 38(3) has emphasized the importance of the discretion of the judge to grant or deny credit in order to fashion an appropriate youth sentence that is responsive to the needs of the young person. Some courts have applied credit for pre-sentence custody on a one-to-one or partial basis, depending on the specific context faced by the young offender and the rehabilitative goals of the sentence (*R. v. B.L.P.*, 2011 ABCA 384, 519 A.R. 200, at para. 35). Other courts have declined to recognize any credits for pre-sentence custody (*LSJPA — 1915*, at paras. 45-51; *T. (D.D.)*, at paras. 56-57; *W. (M.)*, at para. 78; *R. v. C.H.C.*, 2009 ABQB 125, 465 A.R. 240, at paras. 91-92).

[219] In this case, aside from I.M.'s bare request for credit for "time served", the parties made no submissions on the issue — either in relation to young persons generally or I.M. specifically — and the matter was not addressed by the court below. In the absence of submissions, I would not address this important question of law.

[220] The record indicates that I.M. spent a significant period in pre-sentence custody. It also refers to multiple incidents of misconduct during that time (sentencing reasons, at paras. 48 and 52), and suggests that I.M. fled the jurisdiction soon after the crime. However, there is no information before this Court regarding whether he continues to pose a risk to himself or others. I note as well that under s. 104 *YCJA*, where a young person is convicted of first degree murder, the Attorney General may apply for continued custody at the end of the custodial portion of the sentence if there are reasonable grounds to believe the young person is likely to commit an offence causing death or serious harm. By remanding the matter to a youth justice court, submissions can be made on the applicable law, and evidence can be submitted regarding I.M.'s current circumstances and time spent in custody, allowing the discretion conferred by s. 38(3) to be exercised in an informed and individualized manner. I further note that a youth court can credit time not only to the remaining custodial portion of the sentence, but also potentially to the supervisory portion of the sentence.

[221] I make one final comment. It falls to counsel — particularly on sentence appeals where, as in this instance, the appellate court may be called upon to re-sentence the young person — to provide the court with comprehensive and well-supported submissions to assist in the proper determination of sentence. Sentencing is a delicate process, and appellate courts cannot construct a proportionate and individualized sentence in the absence of essential information. Where an appellate court is asked to

sentence an offender afresh, that submission must be furnished with the foundation necessary to support such a determination.

[222] In light of this, I would not make any determination of whether to award I.M. with pre-sentence custody credits. I.M. was convicted of a very serious and violent offence. The record before the Court contains little information regarding I.M.'s present circumstances.

IX. Disposition

[223] I would allow the appeal, set aside the adult sentence imposed by the sentencing judge, and sentence I.M. afresh by imposing on him a youth sentence of six years of committal to custody and four years of placement under conditional supervision pursuant to s. 42(2)(q)(i) *YCJA*, calculated from July 31, 2020, the date of the sentencing judge's reasons. In respect of the custodial portion of the sentence, I would grant I.M. credit for time spent in custody from July 31, 2020 to the date of this judgment at a rate of one day for each day spent in custody. I would remand the matter forthwith to the youth justice court to determine any applicable credit for pre-sentence custody pursuant to s. 38(3) *YCJA*, and to set the conditions of I.M.'s conditional supervision in accordance with s. 105 *YCJA* at the applicable time.[2]

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[2] Section 46.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, provides this Court with the discretionary authority to "remand any appeal or any part of an appeal" and order "any further proceedings that would be just in the circumstances". This discretion must be exercised in the interests of justice (*R. v. Esseghaier*, 2021 SCC 9, [2021] 1 S.C.R. 101, at paras. 62-63; *C.D.*, at paras. 91 and 94).

[224] In light of Parliament's direction that persons responsible for enforcing the *YCJA* must act with promptness and speed (s. 3(1)(b)(v)), remanding to the youth justice court for pre-sentence custody credit and relevant evaluations under Part 5 of the *YCJA* should be scheduled before a youth court judge by priority. The enhanced need for timeliness in youth proceedings is not only codified in the *YCJA*, but firmly rooted in the case law and longstanding principles of youth justice (see, e.g., *R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39, at para. 4).

The following are the reasons delivered by

CÔTÉ AND ROWE JJ. —

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I. Overview

[225] Following a finding of guilt, a conviction is entered. Next, a fit sentence is imposed. These are two distinct determinations. In youth criminal justice matters, there is sometimes a third, intervening step: the Crown may bring an application to sentence a youth offender as an adult, which requires a youth court to make a determination as to which legislative scheme — the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), or the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*") — ought to be used to craft a fit sentence.

[226] Parliament has set a standard of *satisfaction* in s. 72(1) of the *YCJA* to guide a youth court's determination of which legislative regime should apply to develop a fit 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.

[227] At the heart of this appeal lies the proper interpretation of the word "satisfied" in s. 72(1) of the *YCJA*.

[228] The majority finds the word "satisfied" creates a factual inquiry — whether the young person's *developmental age* is contrary to that of their *chronological age* — which must be resolved on a proof beyond a reasonable doubt standard. This conclusion is in contrast to a string of appellate courts across Canada successively interpreting s. 72(1) since the 2012 legislative amendments of the *YCJA* as imposing a standard of *satisfaction*, giving way to an evaluative question for courts to consider by weighing the totality of the evidence (*R. v. T. (D.D.)*, 2010 ABCA 365, 36 Alta. L.R. (5th) 153, at paras. 6-7; *R. v. Okemow*, 2017 MBCA 59, 353 C.C.C. (3d) 141, at para. 61; *R. v. McClements*, 2017 MBCA 104, 356 C.C.C. (3d) 79, at para. 39; *R. v. Chol*, 2018 BCCA 179, at para. 12). Only one appellate decision has, very recently, interpreted this provision as requiring proof beyond a reasonable doubt (*R. v. B.J.M.*, 2024 SKCA 79, 441 C.C.C. (3d) 316, at paras. 63-70 and 117).

[229] We reject that jurisprudential outlier and the majority's adoption of it. In our view, the word "satisfied" imposes a standard of *satisfaction* which requires a youth court sentencing judge to be *satisfied* that the Crown has demonstrated the youth offender has displayed the level of "maturity, moral sophistication and capacity for independent judgment of an adult" (*R. v. W. (M.)*, 2017 ONCA 22, 134 O.R. (3d) 1, at paras. 97-98). This is an evaluative question that a youth court sentencing judge must consider in reference to the totality of evidence.

[230] The majority conflates the application of a legal standard with a factual determination. The majority seeks to avoid this distinction by implicitly seeking to transform the legal standard established by Parliament into a factual finding, by its statement that the standard is, in fact, proving an aggravating factor.

[231] Clearly, Parliament — and our Court — have recognized that young persons are entitled to a presumption of diminished moral blameworthiness (*R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3). This is not at issue in this appeal. Likewise, both institutions have recognized that presumption can be rebutted (paras. 93 and 105). To rebut it, a court must be *satisfied* by the Crown that the young offender has maturity, moral sophistication and capacity for independent judgment of an adult. It is not an inquiry which requires proof beyond a reasonable doubt, as we will demonstrate in reference to the legislative history, statutory context and text, and the practicalities at play.

[232] Having found that rebutting the presumption of diminished moral blameworthiness must be on a standard of satisfaction, we would reach a different result in application. We would dismiss the appeal.

II. Analysis

A. *Rebutting the Presumption Requires the Crown to Satisfy a Legal Standard*

(1) Legal Standard, Not a Factual Inquiry

[233] The presumption of diminished moral blameworthiness is not a fact to prove; it is a legal standard. To rebut that presumption, the Crown must *satisfy* the court that the youth offender has the level of "maturity, moral sophistication and capacity for independent judgment of an adult" (*W. (M.),* at paras. 97-98). This does not create a factual inquiry, as the majority finds, because, in our view, determining whether the presumption of diminished moral blameworthiness has been rebutted is an evaluative question that a youth court sentencing judge must consider in reference to the totality of evidence. The final conclusion a court must draw as to whether it is satisfied that the presumption has been rebutted is not a "fact". Rather, it is a standard of persuasion, and one that is not equipped to be laid on a scale of probabilities. As noted in the following text:

> . . . the prosecutor does not need to prove these matters on the criminal standard of proof beyond a reasonable doubt or even on the civil standard

> of a balance of probabilities. The test does not lend itself to such classic burdens of proof. [Emphasis added; footnote omitted.]
>
> (E. Winocur, D. Robitaille and M. Borooah, *Sentencing: Principles and Practice* (2nd ed. 2024), at p. 446)

[234] The instant case is not the first where our Court has pronounced on how a standard of satisfaction does not neatly fall onto a scale of probabilities. In *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, McLachlin J. (as she then was) assessed the nature of an onus on a party seeking a transfer to adult court under the pre-1995 provisions of the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110. She distinguished an onus "to satisfy" from the criminal law onus of proof beyond a reasonable doubt, writing as follows for the majority:

> Parliament set out in detail the factors which must be weighed and balanced, and stipulated that if after considering them the court was satisfied that it was in the interests of society and the needs of the young person that he or she should be transferred, the order should be made. . . .
>
> Nor do I find it helpful to cast the issue in terms of a civil or criminal standard of proof. Those concepts are typically concerned with establishing whether something took place. It makes sense to speak of negligence being established "on a balance of probabilities", or to talk of the commission of a crime being proved "beyond a reasonable doubt". But it is less helpful to ask oneself whether a young person should be tried in ordinary court "on a balance of probabilities". One is not talking about something which is probable or improbable when one enters into the exercise of balancing the factors and considerations set out in s. 16(1) and (2) of the *Young Offenders Act*. The question rather is whether one is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court. [Emphasis added; pp. 463-64.]

[235] McLachlin J.'s comments holding that a question of *satisfaction* is one of weighing and balancing all the relevant considerations remain salient today, especially so in the instant case. This is because a youth sentencing judge facing an application to impose an adult sentence on a youth offender is being asked to weigh whether a youth offender — by virtue of the circumstances of the offence, their background, and the nature of their post-offence conduct — displays sufficient "maturity, moral sophistication and capacity for independent judgment of an adult" (*W. (M.)*, at paras. 97-98). To arrive at that determination — to, in essence, ask and answer whether the youth offender should be subject to adult-like moral culpability — is not a question capable of being proven as if it were a factual question as to whether something did or did not occur. By its very nature, it is an evaluative question.

[236] In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, our Court considered the "evolving maturity" of children and teenagers in the context of judicial authorization of medical treatments for minors, when interpreting a legislative provision which permitted a court to order medical treatment for a minor over 16 only if it was "satisfied" that the child was unable to understand the information relevant to making a decision to consent or not consent to a medical examination or treatment, or to appreciate the reasonably foreseeable consequences of consenting or not (paras. 9 and 23). Writing for the majority, Abella J. wrote that childhood and teenage development gives rise to "inherent imprecision", making an assessment of maturity difficult to discern and reliance on a "complicated constellation of considerations" required (paras. 1 and 4):

> I acknowledge that because we are dealing with the inherent imprecision of childhood and adolescent development, maturity is necessarily an imprecise standard. There is no judicial divining rod that leads to a "eureka" moment for its discovery; it depends on the court's assessment of the adolescent, his or her circumstances and ability to exercise independent judgment, and the nature and consequences of the decision at issue. [Emphasis added; para. 4.]

[237] While the issues addressed in *A.C.* are different, assessing maturity is similar to the instant case. This is a question to be resolved by weighing and balancing the evidence before a sentencing judge.

[238] By contrast, the majority rejects the interpretation that s. 72(1)(a) imposes an evaluative question for a youth sentencing judge to weigh. Instead, its view is that the statutory rule rests on a fact — the young person's chronological age — that can only be rebutted if that young person is shown by the Crown to have the maturity of an adult by virtue of the young person's "developmental age". Proving that a young person has the developmental age of an adult, to the majority, is a factual inquiry (para. 6). By this means, the majority misstates an evaluative process leading to the application of a legal standard and mis-characterizes it as a fact-finding exercise.

[239] On the one hand, the majority states that determining "developmental age" amounts to a factual inquiry, as opposed to an evaluative or normative question to weigh (para. 122). On the other hand, the majority acknowledges that "developmental age" is a "concept" that "assists the fact-driven inquiry of discerning the vulnerability, maturity, and capacity for moral judgment of a particular offender" (para. 112). The majority goes on to state, at para. 126, that any "discrete, disputed facts in support of

that determination must also be established beyond a reasonable doubt . . . . This protection safeguards against the use of unestablished facts to aggravate the sentence from youth to adult."

[240] At the root of the flawed approach taken by the majority is a failure to distinguish between the onus to prove disputed aggravating facts at the sentencing stage and the onus of satisfaction imposed by s. 72(1) of the *YCJA* to determine the regime under which a young offender should be sentenced.

[241] It is uncontroversial that whenever the Crown seeks to rely on a contested aggravating factor at sentencing, that factor must be proven beyond a reasonable doubt (*R. v. Gardiner*, [1982] 2 S.C.R. 368, at pp. 414-15; *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 686; s. 724(3)(e) *Cr. C.*). We do not seek to displace this longstanding principle. However, the majority draws a false equivalence between the presumption of diminished moral blameworthiness, which is a principle of fundamental justice, and what they characterize as the "fact" of "developmental age". Respectfully, the majority's reasons have two fundamental flaws: first, the majority mis-characterizes as a fact the presumption of diminished moral blameworthiness described by Abella J. in *D.B.*, which is a legal principle. Second, the majority, relying on this mis-characterization, extends the proposition in *Gardiner* and *Pearson* beyond its proper purpose.

[242] Recall that in *Gardiner*, the accused entered a guilty plea. Dickson J. (as he then was), writing for the majority, was concerned about cases where a guilty plea

is entered without a trial. In such cases, the sentencing judge must make findings of fact that would otherwise be determined at trial. Dickson J. was concerned about the liberty interest of offenders in these cases. He was preoccupied with ensuring the "information obtained" during sentencing be "accurate and reliable" (p. 414). He stated the following:

> To my mind, **the facts which justify the sanction** are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. . . .
>
> . . .
>
> In my view, both the informality of the sentencing procedure as to the admissibility of evidence and the wide discretion given to the trial judge in imposing sentence are factors militating in favour of the retention of the criminal standard of proof beyond a reasonable doubt at sentencing.
>
> > [B]ecause **the sentencing process poses the ultimate jeopardy** to an individual enmeshed in the criminal process, **it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process** [J. A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97, at p. 121].
>
> [Underlining in original; emphasis added; p. 415.]

[243] Similarly, in *Pearson*, Lamer C.J. was concerned with the impact of contested aggravating facts on sentencing:

> The interaction of s. 7 and s. 11(*d*) is also nicely illustrated at the sentencing stage of the criminal process. The presumption of innocence as set out in s. 11(*d*) arguably has no application at the sentencing stage of the trial. However, **it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt: *R. v. Gardiner*, [1982] 2 S.C.R. 368**. The Court in *Gardiner* cited with approval at p. 415 the

following passage from J. A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97, at p. 121:

> . . . because the sentencing process poses the ultimate jeopardy to an individual . . . in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.

Although, of course, *Gardiner* was not a *Charter* case, the problem it confronted can readily be restated in terms of ss. 7 and 11(*d*) of the *Charter*. While the presumption of innocence as specifically articulated in s. 11(*d*) may not cover the question of the standard of proof of contested aggravating facts **at sentencing**, the broader substantive principle in s. 7 almost certainly would. The specific application of the right would take account of the serious consequences adverted to in the passage from Olah, cited by the Court in *Gardiner*. [Emphasis added; p. 686.]

[244] *Gardiner* pre-dates the *Canadian Charter of Rights and Freedoms*. *Pearson* is a relatively early post-*Charter* case. In that era, the law surrounding the protections available to an accused person during a criminal trial as opposed to a sentencing hearing was unclear. In both cases, our Court sought to extend the procedural protections afforded to an accused person during the criminal trial to the sentencing process as well. This is especially so in *Gardiner*, in which the Court addressed the standard for making findings of fact at sentencing in the absence of findings of fact at trial.

[245] In the instant case, reliance on the rule from *Gardiner* and *Pearson* — that contested aggravating factors at sentencing by the Crown must be proven beyond a reasonable doubt — is misplaced. The case does not concern the standard for making findings of fact during a trial or in determining a fit sentence once the applicable sentencing scheme, youth or adult, is decided. Indeed, in this case, an intervening step

is at issue: the Crown's application to sentence a young offender under the adult sentencing regime rather than the youth regime of the *YCJA*. This step takes place *between* a conviction being entered and the determination of a fit sentence. As such, the inquiry under s. 72(1) demands that a youth court judge consider all the evidence — including that which is proven beyond a reasonable doubt as required by the usual rules of evidence — to determine if the presumption has been rebutted.

[246] The "evaluative calculus" necessarily requires the youth court judge to weigh and consider the totality of evidence. However, the presumption of diminished moral blameworthiness is a legal standard, not a fact. Therefore, determining whether the presumption has been rebutted is an evaluative exercise, not a finding of fact. The legislative history, context, and text of the statute support this view.

(2) Legislative History

[247] Section 72(1) of the *YCJA* was enacted in 2012, following two legislative iterations and debate in the wake of our Court's decision in *D.B.*

[248] The previous legislative version of that section included a presumptive offences regime which explicitly set out that 16- or 17-year-old young persons charged with murder, attempted murder, manslaughter or aggravated sexual assault be tried as adults in ordinary court, unless the young offender or the Crown applied to have the matter proceed in youth court (*D.B.*, at para. 56). This effectively created a reverse-onus on young offenders to demonstrate to a court why a youth sentence should be

made available to them if they were convicted of one of the presumptive offences. It seemingly disregarded, and sat in tension with, the well-established principle that young people had diminished moral blameworthiness.

[249] This presumptive regime was constitutionally challenged in three provinces — Quebec, Ontario and Alberta — on the basis that the reverse onus violated s. 7 of the *Charter*. Appellate courts in those provinces declared the reverse onus unconstitutional (*Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 228 D.L.R. (4th) 63 (Que. C.A.); *R. v. B. (D.)* (2004), 72 O.R. (3d) 605 (S.C.J.), aff'd (2006), 79 O.R. (3d) 698 (C.A.); *R. v. M.B.W.*, 2007 ABPC 214, 424 A.R. 18, aff'd 2008 ABCA 317, 437 A.R. 325). Eventually, the Court of Appeal for Ontario's holding in *B. (D.)* was adopted when Abella J., writing for a majority of our Court, held that the presumptive offences regime deprived young persons of the benefit of the presumption of diminished moral blameworthiness, as the presumption itself attracted constitutional status as a principle of fundamental of justice (*D.B.*, at paras. 41 and 76). She also held that the presumptive offences regime contravened another principle of fundamental justice, which is that the Crown is obliged to prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies (para. 78). She did not find that those breaches of s. 7 were saved by s. 1 of the *Charter* (para. 95).

[250] *D.B.* was decided in 2008. The federal government first tried to address the holding in *D.B.* through Bill C-4, a 2010 bill: *Sébastien's Law (Protecting the Public from Violent Young Offenders)*, 3rd Sess., 40th Parl., 2010, s. 18 (short title of the *Act*

to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts). It was tabled in the House of Commons by the Minister of Justice and Attorney General of Canada, the Hon. Rob Nicholson, and passed on first reading on March 16, 2010. Second reading was completed on May 3, 2010. Bill C-4 proposed the following amendment to the *YCJA*:

> **18. (1) Subsections 72(1) to (3) of the Act are replaced by the following:**
>
> **72.** (1) The youth justice court shall order that an adult sentence be imposed if it is satisfied beyond a reasonable doubt 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.

[251] The standard of satisfaction beyond a reasonable doubt was met by opposition from witnesses when Bill C-4 was studied at committee. Mr. Joshua Hawkes from the Alberta Department of Justice and Attorney General stated:

> Cases subsequent to D.B. from the Alberta Court of Appeal, the Ontario Court of Appeal, and the Quebec Court of Appeal all held that the decision of the Supreme Court of Canada does not mean that the standard of proof is beyond a reasonable doubt. So by entrenching that in the legislation, this section goes much further than what is required by the Supreme Court of Canada, and in fact imposes an almost intractable proof problem on the crown. Because we're not talking about proving particular factors about an offence that has particular facts. Was it premeditated? Did you have a weapon? The code and the charter already recognize that if I as a

> prosecutor want to rely on aggravating facts, facts about the offence or the offender, I have to prove those beyond a reasonable doubt. That's well established and well understood. The difference is we are now talking about having to establish that principles have been satisfied beyond a reasonable doubt, not facts, and that will cause a very great difficulty. [Emphasis added.]
>
> (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 25, 3rd Sess., 40th Parl., June 17, 2010, at p. 6)

[252] David Greening, testifying on behalf of Manitoba's Department of Justice, echoed similar concerns:

> In terms of the adult sentencing provisions, Manitoba shares the view expressed today that Bill C-4 goes beyond what is necessary to address the Supreme Court of Canada's concerns in the R. v. D.B. case and that the proposed new proof beyond a reasonable doubt standard for determining when an adult sentence should be imposed will make obtaining an adult sentence virtually impossible except in the rarest of cases. The adult sentence provision of Bill C-4 should be amended to remove the reasonable doubt standard of proof requirement . . . . [Emphasis added.]
>
> (Standing Committee on Justice and Human Rights, No. 25, at p. 7)

[253] Bill C-4 died on the Order Paper when Parliament was dissolved on March 26, 2011.

[254] In 2012, the federal government brought forward a new iteration of a bill to respond to the jurisprudential developments relating to *D.B.*, as part of the *Safe Streets and Communities Act*, S.C. 2012, c. 1. Notably, the proposed amendments removed the specified standard of satisfaction beyond a reasonable doubt:

> **183. (1) Subsections 72(1) to (3) of the Act are replaced by the following:**
>
> **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.

[255] The amendments have since been described as representing a "philosophical shift in the *YCJA*, but . . . not a tectonic one for sentencing non-violent and non-repeat offenders" (*Okemow*, at para. 47). In fact, during parliamentary debate on the proposed changes to the *YCJA*, Minister Nicholson told the House of Commons that the amendments were "to strengthen its handling of violent and repeat young offenders" (*House of Commons Debates*, vol. 146, No. 17, 1st Sess., 41st Parl., September 21, 2011, at p. 1299).

[256] The respondent argues the removal of the beyond a reasonable doubt standard from the 2010 version, as compared to the 2012 version, demonstrates an intent by Parliament to comply with *D.B.* while rejecting the "proof beyond a reasonable doubt" standard (R.F., at para. 66). We agree.

[257] This conclusion is supported by the fact that, at committee, an amendment proposed by a member of the opposition to reintroduce the standard of satisfaction beyond a reasonable doubt was defeated (House of Commons, Standing Committee on

Justice and Human Rights, *Evidence*, No. 14, 1st Sess., 41st Parl., November 22, 2011, at pp. 19-20). This was a deliberate policy and legislative choice. This omission came in the wake of three provincial appellate decisions rejecting proof beyond a reasonable doubt (*R. v. Estacio*, 2010 ABCA 69, 252 C.C.C. (3d) 469; *R. v. O. (A.)*, 2007 ONCA 144, 218 C.C.C. (3d) 409; *LSJPA — 088*, 2008 QCCA 401, [2008] R.J.Q. 670) and in the face of objections from the provinces.

[258] The majority states "the parliamentary record is unclear and cannot reliably assist in determining the standard" (para. 128). It further offers a vague reference to this legislative history, stating it "is true that a previous iteration of [the Bill] . . . had a reference to this standard that was subsequently not carried forward into law. . . . But the Minister responsible said the matter should be left to the courts" (paras. 127-128). In our view, the majority's statements in this regard are incomplete and fail to pay sufficient deference to what is clear legislative intent. Parliament adverted its mind to setting out a standard beyond a reasonable doubt but ultimately declined to do so. This legislative choice should not be casually dismissed.

[259] The Justice and Human Rights Committee of the House of Commons met on 16 occasions between May 11, 2010 and March 23, 2011 to study Bill C-4, the 2010 iteration. This demonstrates careful, and some may even say meticulous, consideration of the legislative provisions. Appellate authority and the position of provincial attorneys general were carefully considered. The committee was in active consideration of the bill when Parliament was dissolved. In the next Parliament, when similar

amendments were proposed the explicit standard of proof was omitted. This legislative context is both relevant and important to considering the actual Parliamentary intent, so as not to minimize or cast away the importance of the deliberate choice Parliament undertook.

[260] The majority, as noted, states that the Hon. Nicholson said "the matter should be left to the courts". While that is true, it is a quote in isolation and does not, respectfully, capture the entire spirit and context of the Minister's words:

> Finally, part IV of the bill proposes to amend the Youth Criminal Justice Act to strengthen the way the system deals with violent and repeat young offenders.
>
> These measures include highlighting protection of the public as a principle, making it easier to detain youth charged with serious offences pending trial, ensuring that prosecutors consider seeking adult sentences for the most serious offences, requiring police to keep records of extra judicial measures, and requiring courts to lift the publication ban on the names of young offenders convicted of violent offences when a youth sentence is given. These reforms were previously proposed in Bill C-4, Sebastien's Law.
>
> The former Bill C-4 was extensively studied by the House of Commons standing committee through 16 meetings at the dissolution of the previous Parliament. The bill includes changes to address concerns that have been highlighted by the provinces regarding pretrial adult sentencing and deferred custody provisions in the bill. For example, changes to the pretrial detention provisions respond to the provinces' request for more flexibility to detain youth who are spiralling out of control and pose a risk to the public — by committing a serious offence if released — even if they have not been charged initially with a serious offence. The test for pretrial detention would now be self-contained in the act, without requiring reference to the Criminal Code, which is currently the case.
>
> Other technical changes include removing the proposed test for adult sentences and deferred custody and supervision orders and returning to the current law's approach. For example, the former bill referred to the

> standard of "beyond a reasonable doubt", which some provinces found more difficult to meet. That has been removed. The bill continues the current approach of leaving it up to the courts to determine the appropriate standard of proof.
>
> . . .
>
> We are taking action to protect families, stand up for victims, and hold individuals accountable. Canadians can count on our government's commitment to fulfill its promise to pass this comprehensive bill within the first 100 sitting days of this Parliament. [Emphasis added.]
>
> (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 4, 1st Sess., 41st Parl., October 6, 2011, at p. 2)

[261] It would be improper to draw from the Minister's comments that Parliament simply opted to leave the matter to the courts as if Parliament had not considered it. To rely on the Minister's comments in isolation from the legislative history surrounding this issue would be to leave the mistaken impression that Parliament had not weighed in the issue at all.

[262] The majority also quotes a government member, Mr. Brent Rathgeber, from Hansard, to support the proposition that the legislative amendments were partly in response to *D.B.* (para. 86). This is true, but again, a more fulsome review of Mr. Rathgeber's comments provide a more full and clearer picture as to the deliberate nature of Parliament's choice to omit the beyond a reasonable doubt standard:

> In the former Bill C-4 the proposed test for an adult sentence would have required that a judge be satisfied beyond a reasonable doubt that an adult sentence was necessary. When we were consulting, a number of the provinces expressed the view that "beyond a reasonable doubt" was too high a standard to meet, was not required by the current case law and would

> make it significantly more difficult to obtain adult sentences in appropriate circumstances.
>
> The current proposals remove reference to the "beyond a reasonable doubt" standard that had been in the former Bill C-4, thus leaving it up to the courts to determine the appropriate standard of proof, as is the case under the current law. [Emphasis added.]
>
> (*House of Commons Debates*, vol. 146, No. 21, 1st Sess., 41st Parl., September 27, 2011, at p. 1524)

[263] In sum, the majority is not wrong to point out that Parliament left elucidating the standard to rebut the presumption to the courts. But we respectfully suggest the analysis is incomplete, if left there. The legislative history is not "unclear". Rather, the record makes plain that Parliament expressly considered — and even studied — the possibility of imposing proof beyond a reasonable doubt but ultimately opted against it. It was not a mere omission. It was a legislative choice that should be considered and respected, not dismissed nor discounted.

(3) Statutory Context

[264] As we have outlined, the legislative history does not lend itself to the obvious conclusion that the standard of satisfaction imposed by Parliament requires beyond a reasonable doubt. We suggest the statutory context also supports this conclusion.

[265] Section 72(1), found within Part 4 of the *YCJA*, determines under which scheme (youth or adult) the young offender will be sentenced. More specifically, the

provision is housed within the "Adult Sentence and Election" subsection of Part 4, which outlines the rules applicable to requests by the Attorney General to seek that an adult sentence is imposed on a young offender.

[266] The *YCJA* limits the category of cases in which the Attorney General can seek an adult sentence. Under s. 64(1), the Attorney General can seek an adult sentence only in relation to offences for which an adult is liable to imprisonment for a term of more than 2 years and only if the young person has attained 14 years of age.

[267] Once a decision is made under s. 72(1), the fit sentence is determined under the appropriate regime. A fit youth sentence is determined in accordance with the principles on youth sentencing in s. 38. A fit adult sentence is determined under the relevant *Criminal Code* provisions.

[268] As a matter of procedure and ease, the determination of the appropriate sentencing regime and the appropriate sentence within the respective regime are addressed at the same time. However, they remain conceptually distinct determinations. A hearing in respect of an application to impose an adult sentence on a young offender is held at the commencement of the sentencing hearing (s. 71). When the young offender appeals their sentence, an order to impose a youth or adult sentence (s. 72(1) and (1.1)) is "part of the sentence" for the purposes of the appeal. This language acknowledges that the determination under s. 72(1) and the determination of a fit sentence are distinct inquiries.

[269] Section 72 refers to the *YCJA*'s Declaration of Principle, and in particular to s. 3(1)(b)(ii). The latter states that 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 . . . fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity". Section 3(1)(a)(i) also recognizes that the youth criminal justice system is intended to protect the public by holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person. Section 3(1)(c) goes on to state that, "within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should (i) reinforce respect for societal values, [and] (ii) encourage the repair of harm done to victims and the community".

[270] Section 72 also makes specific reference to s. 38, which incorporates all of s. 3 and includes as a principle of youth sentencing that "the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence" (s. 38(2)(c)).

(4) Text

[271] Similarly, the legislative text supports the conclusion that the standard of satisfaction as set by Parliament does not require proof beyond a reasonable doubt.

[272] Section 72(1) states that the youth justice court must be "satisfied" (in French, "*convaincu*") of both paras. (a) and (b):

> **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.

[273] As the conjunctive "and" connects paras. (a) and (b), we are in agreement with the appellant and the majority that the structure of the provision requires two distinct inquiries for paras. (a) and (b).

[274] The question of the applicable standard rests on the interpretation of the term "satisfied". Both prongs of s. 72(1) — rebutting the presumption and the accountability analysis — require a youth court judge to be *satisfied*. With respect to s. 72(1)(b), the majority is of the view that the word "satisfied" gives rise to an "evaluative inquiry involving a discretionary weighing" of factors (para. 12). On this we agree.

[275] Using the same text, the majority reaches a different conclusion for s. 72(1)(a). In our view, the same text that underpins the interpretation that s. 72(1)(b) is an evaluative inquiry holds true for s. 72(1)(a) as well. This supports our conclusion

that rebutting the presumption of diminished moral blameworthiness does not require proof beyond a reasonable doubt.

B. *Principles to Guide the Analysis Under Section 72(1)(a)*

[276] Rebutting the presumption under s. 72(1)(a) requires that the Crown satisfy a youth court that the offender has displayed the level of "maturity, moral sophistication and capacity for independent judgment of an adult" (*W. (M.)*, at paras. 97-98).

[277] To arrive at this determination, the court must be guided by certain principles and factors relevant to this.

(1) Presumption of Diminished Moral Blameworthiness Serves as Overarching Principle in the Analysis

[278] We are in agreement with the majority (para. 109) that the presumption of diminished moral blameworthiness is a legal principle that should animate the analysis because of the longstanding recognition that youth have a diminished moral blameworthiness compared to adults. Abella J., in *D.B.*, pointed to society's express choice to hold young persons to account for criminality in a system distinct from that of adults because of youth development and maturity, or lack thereof (paras. 47-59). This served as the basis for our Court to recognize the presumption of diminished moral blameworthiness as a principle of fundamental justice protected by s. 7 of the *Charter* (para. 76).

[279] In the *YCJA*, diminished moral blameworthiness is recognized as a broad principle in light of the heightened vulnerability, less maturity and reduced capacity for moral judgment stemming from youth (*D.B.*, at para. 41). Section 3(1)(b) of the *YCJA*, the Act's "Declaration of Principle", sets this out in stating that "the criminal justice system for young persons must be separate from that of adults, [it] must be based on the principle of diminished moral blameworthiness or culpability".

[280] Sentencing is a process of reasoned evaluation. As stated by the Court of Appeal for Manitoba in *Okemow*: "The art of sentencing is all about the careful weighing of relevant factors" (para. 88). In deciding whether they are "satisfied" under s. 72(1)(a), those factors relate to an assessment of maturity, moral sophistication and capacity for independent judgment of the young offender.

(2) Points of Agreement With the Majority

[281] We take no issue with the way the majority sets out the purpose and context of s. 72(1) of the *YCJA* (paras. 60-73). We also agree that the test under s. 72(1) of the *YCJA* is two-pronged and separate (para. 85). Section 72(1)(a) addresses rebutting the presumption while s. 72(1)(b) engages whether a youth sentence would be sufficient to hold the youth offender accountable. We agree that the seriousness of the offence is relevant to the second inquiry under s. 72(1)(b) but not relevant when considering whether the presumption has been rebutted under s. 72(1)(a) (paras. 10 and 141-42).

[282] We also agree that expert evidence is not needed as a general rule (majority reasons, at paras. 159-61). It may very well be the case that expert evidence should be called in a given case, but this is a question for the Crown, as the party bringing the application to impose an adult sentence, to weigh. It is also a question a youth court can consider, as contemplated under s. 34 of the *YCJA*.

[283] Finally, we take no issue with the majority's approach to s. 72(1)(b).

C. *Factors Relevant to the Rebuttal of the Presumption of Diminished Moral Blameworthiness*

[284] In seeking to rebut the presumption, the Crown must lead evidence relevant to maturity, moral sophistication and capacity for independent judgment of the young person at the time of the offence (*W. (M.)*, at paras. 97-98). Abella J.'s description in *A.C.* is salient to this determination: ". . . because we are dealing with the inherent imprecision of childhood and adolescent development, maturity is necessarily an imprecise standard. . . . [I]t depends on the court's assessment of the adolescent, his or her circumstances and ability to exercise independent judgment, and the nature and consequences of the decision at issue" (para. 4).

[285] We are in agreement with the appellant, as well as the majority, that the seriousness of the offence does not bear on the offender's maturity and risks overwhelming the analysis due to the serious nature of the crimes typically at stake when the rebuttal is at issue. The seriousness of the offence is a relevant question at the

accountability stage under s. 72(1)(b), but is not relevant as to the offender's level of moral blameworthiness under s. 72(1)(a). Therefore, the seriousness of the offence is relevant to the second prong to evaluate accountability, not the first.

[286] How, then, should courts assess maturity? We agree with the approach of Stromberg-Stein J.A. of the Court of Appeal for British Columbia; she set out relevant factors to consider under the s. 72(1)(a) analysis in *Chol*. Those factors relate to the circumstances of the offender, the circumstances of the offence, and conduct after the offence. Having regard to *D.B.* and other appellate decisions, Stromberg-Stein J.A. set out a non-exhaustive list of factors, with none of them determinative, as "assessment of the presumption prong is a case-dependent, fact-dependent determination and not all of the same factors will be present" (paras. 59-63). We agree with this approach.

(1) Circumstances of the Offender

[287] Stromberg-Stein J.A. set out the following factors:

> Circumstances of the young person
> - The young person's age.
> - The young person's background and antecedents.
> - At the time of the offence was the young person living like an adult and, if so, was that by choice?
> - Has the young person committed previous offences?
> - At the time of the offence was the young person dependent on others and/or vulnerable to the influence of others?
> - Are there any *Gladue* factors?
> - At the time of the offence were there any cognitive limitations or emotional or mental health issues? [para. 61]

[288] Some or all of these factors may be relevant in the analysis under s. 72(1)(b), or in determining a fit sentence. Stromberg-Stein J.A. noted that the young person's cognitive limitations and emotional and mental health, while relevant to this prong, should not overwhelm the analysis.

[289] As to age, we agree that it is a relevant factor to consider but also agree with the intervening Peacebuilders Canada that proximity to 18 should not overwhelm the analysis given neurodevelopment of young people takes different paces.

[290] As to the offender's "background", we agree with the appellant in the companion appeal, *R. v. S.B.*, 2025 SCC 24, that location of upbringing, racial identity, and adverse childhood experience are relevant. If an "Impact of Race and Culture Assessment", pre-sentence report, or *Gladue* report has been conducted, the content of that report can inform the question of background.

[291] An assessment of the offender's background should include, *inter alia*, any impact of trauma, lived experiences, behavioural or mental health disorders, race, family dynamics, and level of independence.

(2) Circumstances and Complexity of the Offence

[292] Stromberg-Stein J.A. set out the following factors as relevant to the circumstances of the offence:

Circumstances of the offence

- Is the offence indicative of impulsiveness, bravado or a sense of invincibility?
- Was the offence planned or premeditated?
- Is the motive for the offence indicative of mature or immature reasoning?
- What was the young person's role in the offence?
- Did the young person choose to engage in the impugned activity?
- Do the young person's actions demonstrate critical thinking and adult-like judgment?
- Once the offence was initiated, did the young person take steps to follow through or to cover it up afterwards?
- Did the young person understand the consequences of his or her actions, in terms of criminal sanctions and impact on others? [para. 61]

[293] Complexity of the offence is of importance to the circumstance of the offence. This is because complexity can be an indication of maturity, which can assist in rebutting an assertion that the offence was one of youthful impulsiveness. Whether it was committed as an act of bravado can shed light on the maturity of the youth offender. Whether the youth offender played a leading or supporting role, and the extent to which they carried through with the offence once initiated can also be important.

[294] The mechanics of planning and the involvement in execution of the offence serve as indicators of maturity and adult-like judgment. That said, these considerations should not become a means to import seriousness of the offence into the analysis under s. 72(1)(a) (see also majority reasons, at para. 147).

(3) Post-Offence Conduct

[295] Stromberg-Stein J.A. set out the following factors as relevant to conduct after the offence:

> Conduct after the offence
> - Did the young person take responsibility after the offence and/or demonstrate remorse?
> - Does the young person's personal growth since the offence (or lack thereof) indicate anything about the young person at the time of the offence? [para. 61]

[296] The first two categories of factors to consider — circumstances of the offender and circumstances and complexity of the offence — are key. As the analysis under s. 72(1)(a) is focused on assessing the maturity of the offender at the time of the offence, the circumstances of the offender and of the offence, naturally, shed light on that inquiry most directly.

[297] Post-offence conduct can do so only indirectly; it can to the extent that it provides insight as of the time of the offence into the offender's maturity, level of sophistication, and capacity for adult-like judgment. In addition to the two factors laid out by Stromberg-Stein J.A., we would agree with the majority that other types of post-offence conduct such as attempts to evade detection or destroy evidence may be relevant in assessing sophistication and capacity of adult-like judgment. As well, we share the concerns expressed by the majority that some post-offence conduct can be driven by immaturity, or youthful fear and panic (paras. 148-49). That said, post-offence conduct temporally and substantively connected to the offence which shows the offender's maturity or moral judgment at the time of the offence will be relevant.

As the Attorney General of Alberta submits, such was the case in *R. v. Anderson*, 2018 MBCA 42, 361 C.C.C. (3d) 313, where the Court of Appeal for Manitoba interpreted the youth offender's lack of panic and display of self-assuredness during the murder and successful efforts to cover up the murder in a small community as evidence of heightened moral blameworthiness.

[298] As in the instant case, the Crown or defence may seek to rely on post-offence conduct that is not temporally linked to the underlying offence. This could include an offender's steps at rehabilitation, restitution, or their expressions of remorse. It could also include correctional disciplinary records, including behaviour in pre-trial custody (as is the case for I.M.) or post-sentence conduct (as is the case in the companion appeal for S.B.).

D. *Application to I.M.*

(a) *Prong One: Rebutting the Presumption*

[299] We would uphold the Court of Appeal for Ontario in concluding that the sentencing judge did not err in deciding that he was "satisfied" that the Crown met its persuasive burden under s. 72(1)(a) to impose an adult sentence. While the sentencing judge and the Court of Appeal erred in considering seriousness of the offence at the first prong of s. 72(1), this error did not have a material impact on the sentence.

(i) <u>Circumstances of the Offender</u>

[300] In reviewing the circumstances of the offender, the Court of Appeal properly had regard to I.M.'s age, character, background, and previous record as factors relevant to showing the appellant's level of maturity, moral sophistication, and capacity for independent judgment of an adult (2023 ONCA 378, 426 C.C.C. (3d) 468, at para. 81). The Court of Appeal pointed out that as 17 years and 5 months old at the time of the offence, I.M. was "on the cusp of adulthood", but also recognized that this factor alone is not determinative but could "tip the balance" towards an adult sentence (para. 79).

[301] With respect to criminal antecedents and previous offences, I.M. had a criminal record which included crimes of breaking and entering, theft, and possession of a scheduled substance for the purpose of trafficking. He had been sentenced to two probation orders and was banned from having any firearm or weapon for one year. These orders were active at the time of the offence.

[302] Criminal antecedents can form part of the social context evidence. Living arrangements and personal background also form part of social context evidence. At the time of the offence, I.M. was residing in his family home. He is of Bangladeshi origin and comes from a poor family. The pre-sentence report reveals that while he had a supportive family, his immigrant parents did not work and could not speak English, making it difficult for them to understand or give advice on how to navigate the neighbourhood of community housing in which they lived. I.M. reported being recruited to sell drugs, which he did for two years to make money. At least one member

of his family grew concerned he was selling drugs and socializing with gang members. Given his family's financial position, it is fair to say he had some level of dependency and therefore could be vulnerable to the neighbourhood group with whom he was involved to sell drugs.

[303] In looking to possible cognitive limitations or other emotional or mental health related issues, there is no indication that I.M. suffered from mental health issues. That said, he reported being bullied as a child and the psychiatric report stated he "may suffer" from a learning disability that could be considered a mental illness.

(ii) Circumstances and Complexity of the Offence

[304] Turning to the offence itself, there was planning and premeditation. The offence was not "spur of the moment", as text messages in the run-up to the attack demonstrated. As stated by the Court of Appeal, I.M. was found to be a "willing and active participant in the plan to rob the victim and his intention to do so never wavered" (para. 78). This indicates mature reasoning.

[305] When considering I.M.'s role in the offence, the sentencing judge found I.M. to be "the stabber or one of the stabbers", "not merely a party to the offence" but "at the very minimum, a principal" (2020 ONSC 4660, at paras. 30 and 53, reproduced in A.R., vol. I, at pp. 13 and 20). This was proven beyond a reasonable doubt and upheld by the Court of Appeal. This finding is owed deference.

(iii) Conduct After the Offence

[306] Following the offence, I.M. attempted to discard his bloody clothing, and ultimately left the country in short order. He also continued efforts to obtain a gun. This conduct is emblematic of a person who understands the gravity of their actions and understands the serious consequences that would arise should they be detected. This is a sign of mature, adult-like judgment.

[307] While post-offence conduct does not offer much insight into maturity as compared to the circumstances of the offender and the offence, I.M.'s post-offence conduct demonstrates thought and continued planning on how to evade detection. This points toward adult judgment and maturity at the time of the offence.

(iv) Discussion

[308] I.M.'s circumstances show a young man raised in an immigrant community in a low-income neighbourhood, influenced by negative neighbourhood dynamics. This social context evidence is important. However, in our respectful view, the majority fails to properly use it to evaluate the maturity, moral sophistication and capacity of for independent judgment of I.M. at the time of the offence.

[309] Notably, the majority's conclusion discards the trial judge's finding that I.M. was a principal stabber in a planned and coordinated attack. The sentencing judge described I.M. as "at the very minimum, a principal" (para. 30). The sentencing judge

observed that the stabbing "was not a spur of the moment incident" and he had "a number of accomplices" (para. 31). After the victim was stabbed and his mother was struck on the top of her head with the gun, I.M. continued to look for guns in the residence (para. 32). At the time of the offence, I.M. executed the planned stabbing and search of his victim's residence with the goal of finding a gun. Searching the victim's house after the stabbing for drugs and guns showed that I.M. continued to execute his plan even after stabbing the victim and terrorizing his family. The sentencing judge did not err in deciding that I.M. showed a capacity for planning and judgment befitting of an adult. This has to be viewed in light of the fact at the time of the offence I.M. was subject to two previous criminal charges and was on probation and ordered not to be in possession of firearms. This did not deter him from committing the serious criminal acts that he did in pursuit of obtaining firearms.

[310] We note I.M.'s submission that his planning and participation in the offence was a result of peer pressure. I.M. suggests that the involvement of adults in the commission of the offence means that I.M., a youth at the time, was peer pressured by them (A.F., at para. 99). The record, including I.M.'s text messages, does not support this claim. I.M.'s text messages show he was involved in planning the robbery. I.M. referred to the robbery as his "cum.up" (A.F., at para. 109), meaning that he saw it as a step in his criminal career. The majority views this text message as raising a reasonable doubt as to I.M.'s alleged developmental maturity, because it demonstrates that he was susceptible to social pressure from adults in the group and that he failed to measure consequences as someone with adult maturity. While I.M. may well have been

subjected to peer pressure by adults, the evidence indicates that he was internally motivated. As the sentencing judge observed, "[I.M.] needed no encouragement to be part of the robbery because he wanted a handgun, likely as a result of his involvement in selling drugs" (para. 30). Nor does the record support the majority's view that I.M. did not understand the consequences of his actions.

[311] We agree with the Court of Appeal that I.M. demonstrates maturity and adult-like deliberation after the commission of the offence (paras. 77-78). I.M. understood the consequences of the crime he committed and took steps to escape them: he discarded his bloodied clothing and fled the country (sentencing reasons, at para. 33). This post-offence conduct further demonstrated capacity for independent judgment.

[312] We acknowledge that both showing his classmate G.D. his bloodied shirt and fleeing the country could also be interpreted as showcasing impulsivity or panic after the offence was committed. But viewed in context, alongside I.M.'s conduct before and during the offence, we are satisfied that I.M. acted with adult-like judgment and maturity.

[313] More to the point, we see no error in the sentencing judge having concluded as he did that he was satisfied that, on all the evidence, the presumption of diminished moral blameworthiness was rebutted. The Crown has met its persuasive burden and rebutted the presumption of diminished moral blameworthiness.

(b) *Prong Two: Accountability Analysis*

[314] Having found that the Crown rebutted the presumption, the analysis then shifts to the second prong: Would a youth sentence not be of sufficient length to hold the young person accountable for his offending behaviour?

[315] I.M. was sentenced as an adult to life imprisonment with a 10-year period of parole ineligibility. A youth sentence would be 10 years at maximum, with only 6 years in closed custody.

[316] It is appropriate to consider the seriousness of the offence at this stage. Not only was there evidence of premedication, which included the organization of a large group to overcome any resistance during an evening robbery, the evidence suggests the victim may have been stabbed from behind and may have been restrained when he was stabbed. The stabbing did not stop the appellant and his co-accused from terrorizing the victim's mother by confining her and pursuing the robbery inside the family home. As such, the seriousness of the offence in this instance leads to a high degree of moral blameworthiness.

[317] To achieve accountability, the sentence "must be long enough to reflect the seriousness of the offence . . . and the accused's role in it" (*O. (A.)*, at para. 50). The trial judge found I.M. to be a stabber and a principal. The heinous nature of the crime warrants a long sentence given the high moral blameworthiness attached. This blameworthiness is not attenuated by his age given his proximity to 18 and lack of

indicia pointing to immaturity. He demonstrated adult-like judgment both before, during, and after the commission of this crime, which calls for a longer sentence.

[318] With respect to the rehabilitation, there were serious concerns expressed about the appellant's possible treatment prospects, or lack thereof, expressed by the psychiatrist, the sentencing judge, and the Court of Appeal. Despite the statement of remorse, community support, and courses taken within custody, the sentencing judge expressed serious concerns about the sentence proposed by the defence as he felt it would be inadequate to ensure public safety and hold the appellant accountable for the murder. He arrived at this conclusion based on the appellant's minimization of his role in the murder to his probation officer, and expressed concern the appellant may not be amenable to treatment. These findings were shown deference by the Court of Appeal (at para. 85), as they should be by our Court.

[319] Therefore, we agree with the Court of Appeal that the sentencing judge did not err in concluding that a youth sentence would not hold I.M. sufficiently accountable for his crime and that, accordingly, an adult sentence should be imposed.

III. Conclusion

[320] We would dismiss the appeal and affirm the sentence imposed.

Appeal allowed, CÔTÉ *and* ROWE JJ. *dissenting.*

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