SCC File No.: 40868/40873

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

B E T W E E N:

I.M.

Appellant

- AND –

HIS MAJESTY THE KING

Respondent

AND B E T W E E N:

S.B.

Appellant

- AND -

HIS MAJESTY THE KING

Respondent

- AND -

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Interveners

FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. Principles of fundamental justice articulate the most essential elements of our justice system. They reflect society's expectations for how the state treats its people. They operate to protect the most vulnerable – including youth convicted of criminal offences.

2. In 2008, this Court struck down a sentencing regime for young offenders that presumptively imposed adult sentences for certain offences. The presumptive offences regime violated two principles of fundamental justice: the presumption of diminished moral blameworthiness for young offenders; and the requirement that the Crown prove aggravating sentencing factors beyond a reasonable doubt. These principles of fundamental justice must be the core of the analysis in every application for an adult sentence under the *Youth Criminal Justice Act.* The centrality of these principles protects young offenders' *Charter* rights and ensures the fairness and dignity of our justice system.

3. And yet, in the last 16 years since this Court's decision in *R v. D.B.*, the principles of fundamental justice central to adult sentencing applications for youth have been consistently relegated to the background of the analysis – if they are present at all. Lower courts routinely fail to identify that the presumption of diminished moral blameworthiness is not merely a statutory suggestion, but a principle of fundamental justice. Further, the case law has developed, in part in reliance on a pre-*DB* case, to require an exceptionally low bar for the Crown to overcome the presumption. The second principle of fundamental justice endorsed by this Court in *DB* – the requirement that the Crown prove any aggravating sentencing factors beyond a reasonable doubt – is often not mentioned at all. When it is mentioned, it is rarely recognized as a principle of fundamental justice. The principles of fundamental justice are simply not receiving the rigorous engagement and analysis that they require.

4. The appeals at issue are the first time this Court will weigh in on adult sentencing for young offenders since *DB.* These appeals present an opportunity to refocus the analysis around the applicable principles of fundamental justice. Judges must explicitly engage with both principles of fundamental justice, *as* principles of fundamental justice. Without this analysis, we lose the rigor and transparency necessary to give effect to the principles that sit at the foundation of our justice system. Young offenders' constitutional rights are at stake.

5. The CCLA takes no position on the facts.

PART II – CCLA'S POSITION ON THE ISSUES ON APPEAL

6. The CCLA argues that:

a. All adult sentencing applications engage two principles of fundamental justice: the presumption of diminished moral blameworthiness for young offenders and the Crown's onus to prove any aggravating sentencing factors beyond a reasonable doubt;

b. The post-*DB* jurisprudence routinely fails to apply these principles of fundamental justice or provide them with sufficient weight in the analysis; and, as a result,

c. Sentencing judges must explicitly identify and discuss these principles of fundamental justice as part of the applicable sentencing framework in every adult sentencing application for young offenders.

PART III – STATEMENT OF ARGUMENT

1. All adult sentencing applications engage two principles of fundamental justice

a) The significance of principles of fundamental justice

7. Principles of fundamental justice are not merely codified common law or statutory rules, but reflections of "the basic values underpinning our constitutional order"[1] and "the basic norms for how the state deals with its citizens."[2] They are "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice".[3] This Court has the responsibility to promote and enforce our principles of fundamental justice as the guardians of the justice system.[4]

b) The presumptive offences regime violated two principles of fundamental justice

8. In *DB*, this Court held that the presumptive offences sentencing regime in s. 72 of the *Youth Criminal Justice Act* ("***YCJA***") was unconstitutional because it imposed a "reverse onus" on young offenders to prove their entitlement to a youth sentence. In doing so, the presumptive offences regime deprived young offenders of their s.7 right to liberty in violation of two principles of fundamental justice: (1) the presumption of youths' diminished moral blameworthiness; and (2) the Crown's onus to prove aggravating sentencing factors beyond a reasonable doubt.

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[1] *Bedford v. Canada (Attorney General)*, 2013 SCC 72 at para. 96 [***Bedford***].
[2] *Canadian Foundation for Children, Youth & the Law v. Canada*, 2004 SCC 4 at para. 8.
[3] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, p. 590.
[4] *Re BC Motor Vehicle* Act, [1985] 2 SCR 486 at para. 31.

(i) The presumption of diminished moral blameworthiness

9. It is a principle of fundamental justice that young people are entitled to a presumption of diminished moral blameworthiness.[5] The presumption reflects our broad societal consensus that young offenders should not be treated as if they have the same maturity, cognitive skills, insight, and experience as adults.[6] Indeed, the *YCJA* as a distinct legal and sentencing regime for young offenders is predicated upon the principle that young people are *presumed* to have – by virtue of their youth – heightened vulnerability, less maturity, and a reduced capacity for moral judgment. This presumption is fundamental to the fair operation of our legal system.[7]

10. In *DB*, this Court found the presumptive offences regime unconstitutional because it deprived young offenders of the benefit of the presumption based on the crime they committed, despite their age. By "putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice."[8] That is, it is a violation of young offenders' constitutional rights for judges to require something *more than* youth to give the young offender the benefit of the presumption they are constitutionally entitled to *because of* their youth. To rebut the presumption, Crown must prove that *despite* an offender's youth, the presumption does not apply, and an adult sentence would be in accordance with the principles of fundamental justice.

11. In addition to the constitutional imperative, any sentence that fails to give significant weight to the presumption will also necessarily contravene the fundamental sentencing principle of proportionality by failing to account for the young offender's diminished moral blameworthiness.[9]

(ii) The Crown's onus to prove aggravating sentencing factors beyond a reasonable doubt

12. In *DB*, this Court also found that the presumptive offences regime violated the principle of fundamental justice that the Crown is obliged to prove any factors leading to a more severe sentence beyond a reasonable doubt.[10] The "beyond a reasonable doubt" standard is a "vitally important"

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[5] *R. v. D.B.*, 2008 SCC 25 at para. 69 [***DB***].
[6] *DB* at para. 41; see also: *R. v. R.C.*, 2005 SCC 61 at para. 41.
[7] *DB* at paras. 63, 68.
[8] *DB* at para. 76.
[9] *YCJA*, s. 3(1)(b)(i) and (ii).
[10] *DB* at paras. 78, 82.

protection of an individual's right to be presumed innocent.[11] All offenders continue to have the right to this intentionally high standard in sentencing because the determination of their sentence continues to engage their liberty interest in the face of the government's power to take away liberty.[12]

13. As discussed below, the post-*DB* jurisprudence has lost sight of this Court's explicit direction that a maximum adult sentence "is, *by definition*, more severe than the maximum permitted youth sentence."[13] Where the Crown seeks to impose an adult sentence on a young offender then, they are necessarily seeking a more severe sentence – and a greater deprivation of liberty – than the young offender is presumptively entitled to. Accordingly, the factors the Crown relies on in support of an adult sentence are aggravating factors; and the Crown is required to prove those factors justifying the lengthier sentence beyond a reasonable doubt.[14] Requiring the young offender to justify their entitlement to a less severe (youth) sentence reverses the onus and is a breach of s. 7.

14. The rule set out by this Court in *DB* can be stated as follows: in an adult sentencing application, it is a principle of fundamental justice that the Crown has the burden to prove all underlying factors used to get an adult sentence – including, but not limited to a youth's lack of entitlement to the presumption – beyond a reasonable doubt. This is an intentionally onerous standard designed to protect young offenders' constitutional rights. Without the protection of the criminal standard, the onus is effectively reversed and placed on the young offender to prove the *absence* of aggravating factors, in violation of their *Charter* rights.

2. The post-*DB* jurisprudence does not apply the two principles of fundamental justice

15. Following this Court's decision in *DB*, Parliament amended s. 72 of the *YCJA* to replace the presumptive offences regime with a two-step inquiry for determining whether an adult sentence could be imposed on a young offender in accordance with the principles of fundamental justice. First, the Crown must rebut the presumption of diminished moral blameworthiness. Second, the Crown must prove that a youth sentence would not hold the offender accountable for their actions.

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[11] *R. v. Lifchus*, [1997] 3 SCR 320 at para. 27.
[12] *R. v. Gardiner*, [1982] 2 SCR 368, pp. 414-415; affirmed in *R. v. Pearson*, [1992] 3 SCR 665, p. 686. See also: *DB* at paras. 79-80.
[13] *DB* at para. 81 (emphasis added).
[14] *DB* at para. 78.

16. However, the post-*DB* jurisprudence has continually undermined, sidelined, and in some instances, ignored the two principles of fundamental justice that were central to this Court's decision. Lower courts have routinely failed to acknowledge and properly apply the principles this Court articulated in *DB* for adult sentencing applications. The two principles of fundamental justice are intertwined, such that failure to give proper weight and attention to one has the effect of diminishing the role of the other, as demonstrated below. The result is that courts are not giving effect to youths' *Charter* rights, at the cost of the most serious consequences available in our justice system.

a) Failure to apply the Crown's onus to prove aggravating factors beyond a reasonable doubt

17. The post-*DB* jurisprudence widely ignores this Court's endorsement that Crown's onus to prove factors leading to a more severe sentence beyond a reasonable doubt.[15] Where this principle is referred to, very few cases identify it as a principle of fundamental justice.[16] The failure to recognize the standard as a principle of fundamental justice obscures the Crown's burden at all stages of the analysis, including its burden for rebutting the presumption.

18. Rather than requiring the Crown to rebut the presumption beyond a reasonable doubt, many sentencing judges have applied a standard even lower than the civil standard. In *R. v. Okemow*, the Manitoba Court of Appeal stated that "the standard [to rebut the presumption] is one of satisfaction after careful consideration by the court of all relevant factors", relying on the pre-*DB* case of *R. v. A.O.*[17] Sentencing judges routinely adopt this "satisfaction of the court" standard, describing the Crown's burden as "not a heavy onus".[18] As discussed further below, because the Crown is often

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[15] See, for example: *R. v. R.D.*, 2019 ONSC 4468 [***RD***]; *R. v. Bouctsis*, 2023 ONSC 2405 [***Bouctsis***]; *R. v. S.W.P.*, 2018 BCPC 71 [***SWP***]; *R. v. T.B.K.*, 2019 BCSC 1037 [***TBK***]; *R. v. F. (J.M.)*, 2020 MBQB 161 [***JMF***], remanded to trial court on the merits, 2022 MBCA 52; *R v. M. (J.)*, 2020 MBPC 13 [***JM***], aff'd 2021 MBCA 26; *R. v. B. (H.E.J.E.)*, 2021 MBQB 223 [***HEJEB***].

[16] See, for example: *R. v. Hornick*, 2019 ONCJ 817. One notable exception is the Saskatchewan Provincial Court decision in *R v. Henderson*, 2018 SKPC 27, which identified this principle of fundamental justice. After rigorous analysis, the judge concluded that the standard for the s. 72 test must be "beyond a reasonable doubt": para. 34.

[17] *R. v. Okemow* (or *R. v. J.M.O.*), 2017 MBCA 59 at para 61, citing *R. v. A.O.*, 2007 ONCA 144 (a pre-*DB* decision). The MBCA also cited the Alberta Court of Appeal decision in *R. v. D.D.T.*, 2010 ABCA 365, a post-*DB* decision that cited *R. v. A.O.* The MBCA did not cite *DB*.

[18] *R. v. L.M.*, 2017 SKQB 336 at para. 111, citing *R. v. Turcotte*, 2008 SKQB 478 at para. 9. See also: *Bouctsis* at para. 65; *R. v. R.D.F.*, 2018 SKPC 28 at para. 219; *R. v. B.L.*, 2013 MBQB 89 at para. 36;

able to easily clear this low standard, the burden in adult sentencing applications has implicitly shifted back to the young offender to prove their entitlement to the presumption.

19. In addition to the Crown's burden on the s. 72 test generally, at the second step of the analysis, courts have tended to rely upon a confluence of potentially aggravating factors that have not, individually, been proven beyond a reasonable doubt. Examples include: relying on the existence or quantity of post-offence custodial staff incident reports;[19] relying on unproven or unarticulated facts or inferences;[20] and relying on a judge's own opinions about a young offender's mental health or rehabilitative prospects despite expert reports containing different expert opinions.[21] In doing so, courts fail to afford young offenders with the benefit of the procedural protections that adults receive as a matter of fundamental justice, despite the fact that young offenders are entitled to a higher degree of procedural protection.[22] It is a breach of young offenders' s. 7 rights.

20. The failure to demand an explicit analysis of whether each factor was individually proven beyond a reasonable doubt also has the pernicious effect of insulating the decision from proper appellate review. Appeal courts may assume that even if reliance on one factor was improper, the decision as a whole was sufficient and judges are presumed to know the law.[23] This cannot be the standard we hold sentencing judges to in determining if a young offender's sentence accords with principles of fundamental justice.

b) Failure to give effect to the presumption of diminished moral blameworthiness

21. Sentencing courts frequently fail to recognize that rebutting the presumption at the first step of the s. 72 analysis involves rebutting a principle of fundamental justice, and not merely a statutory or common law presumption. The presumption did not lose its status as a principle of fundamental justice or become relegated to an ordinary statutory presumption because of its inclusion into s. 72.

R. v. J.D., 2020 PESC 33 at paras. 21-28; *R. v. H.A.Q.*, 2023 ONCJ 377 at para. 20; *TBK* at para. 21, citing *R. v. Chol*, 2018 BCCA 179 at para. 12.

[19] See, for example: *R. v. I.M.*, 2023 ONCA 378 at para. 64 [***IM***].

[20] See, for example: *IM* at para. 56; *R. v. B.J.M.*, 2022 SKPC 38 at para. 43 [***BJM***]. To be clear, judges are allowed to rely on fair and reasonable inferences. But inferences used to support aggravating factors leading to an adult sentence must be proven beyond a reasonable doubt.

[21] See, for example: *R. v. A.S.D.*, 2019 BCSC 147 at paras. 566-573.

[22] *YCJA*, s. 3(1)(b)(iii).

[23] See, for example: *R. v. S.B.*, 2023 ONCA 369 at paras. 29-31, *IM* at paras. 57, 60, 64, 68.

22. The decisions on appeal reflect a broader trend of courts inconsistently applying, and failing to give meaning to, the presumption of diminished moral blameworthiness set out in *DB*. In an alarming number of cases, sentencing judges have ordered an adult sentence for a young offender without acknowledging that the presumption is a principle of fundamental justice or engaging with the corresponding constitutional importance of the presumption.[24] In some of these cases, the sentencing judges do not even cite this Court's decision in *DB* (and often continue to apply pre-*DB* authorities).[25] In *R. v. S.B.* the sentencing judge did not refer to the presumption at all.[26]

23. As a result, despite this Court's clear statement that the presumptive offences regime was unconstitutional, and despite Parliament's amendments to s. 72, many young offenders are still effectively facing a reverse onus and being deprived of their s. 7 rights. Indeed, some sentencing judges believe that "in considering the impact of the amendment to s. 72… the principles and factors to be considered by the court remain unchanged."[27]

24. Sentencing judges are still applying the pre-*DB* unconstitutional reverse onus, albeit disguised by lightly revised language. The following cases are examples of the implicit shift of the onus back onto the young person:

a. In *R. v. W.M.*, a case involving a 17-year-old Indigenous youth, the sentencing judge described the Crown's burden as a requirement to prove "that the accused was not so mentally or emotionally underdeveloped or so un-adult like in his ability to make decisions… that the presumption of diminished moral blameworthiness or culpability is rebutted."[28] The double negative obscures the import of this sentence, which effectively states that the Crown can rebut the presumption by showing only that the youth is age-appropriately developed. Yet the rationale for the presumption is that individuals under 18 are *presumed*, due to their youth, to be less developed than adults. Youth need not be *so* "underdeveloped" to benefit from the constitutional imperative.

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[24] See, for example: *R. v. T.G.*, 2019 ONSC 3057; *SWP*; *JM*; *R. v. R.J.H. and A.D.W.C.*, 2023 MBKB 5; *R. v. W.M.*, 2019 SKPC 50 [***WM***], rev'd in part on sentence length only, 2021 SKCA 103.
[25] See, for example: *RD*; *Bouctsis*; *JMF*; *HEJEB*; *BJM*.
[26] *R. v. S.B.*, 2014 ONSC 3436, aff'd 2023 ONCA 369 (with *de novo* sentencing).
[27] *SWP* at para. 22.
[28] *WM* at para. 31 (emphasis added).

b. In *R. v. F. (J.M.)*, the judge focused on the insufficiency of *the young offender's submissions* that the Crown *had not rebutted* the presumption. The factors the judge considered to determine that JMF "had the moral capacity of an adult and exercised adult-like judgement" included that: (a) JMF "was not a victim of abuse nor was his behaviour impaired or driven by addiction"; (b) did not "present as a young man with significant cognitive or learning disabilities"; and (c) that his "level of maturity [was] commensurate with his age."[29] These factors amount to requiring the young offender to prove something *more* than the fact of their youth to qualify for the presumption – that is, a reverse onus. The decision does not refer to *DB*.

c. In *R. v. R.D.*, in assessing a young offender's level of maturity, the judge considered that RD: (a) was 16; (b) had a mild learning disability but was of at least average intelligence; (c) did not suffer from mental illness; (d) was not under the influence of any substances; (e) did not blame his accomplices for his actions; and (f) the offences were planned, not "impulsive" or "spontaneous". Despite being "mindful" of RD's "tremendous progress" in custody, the judge found that RD's increased maturity was to be expected and was therefore not relevant to moral blameworthiness.[30] Again, the sentencing judge required something *in addition to* youth to apply the presumption.

25. This loose analysis is particularly dangerous in "serious offences" cases, where judges can conflate the moral blameworthiness of the *offence* with the moral blameworthiness of the *offender*, erroneously using seriousness of the offence as a proxy for moral blameworthiness of the offender. For example, in *R. v. S.W.P.*, a 16-year-old Indigenous male was convicted of sexual assault for breaking into a home and masturbating to a sleeping woman. In the sentencing decision, the s. 72 analysis began with a section on the seriousness of the offence that focused on the effects of the offence *on the victim*. The judge identified the vulnerability of the sleeping complainant as "a particularly aggravating circumstance", conflating the analysis of aggravating sentencing factors with analysis of whether the Crown has rebutted the young offender's entitlement to the presumption.[31]

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[29] *JMF* at paras. 29-33.
[30] *RD* at paras. 40-41.
[31] *SWP* at paras. 78-79. See also *JM* at paras. 184-236, where the judge was skeptical of the relevance of JM's provisional diagnosis of developmental delay and his "significant" *Gladue* factors, but

26. It is an error of law and a violation of young offenders' constitutional rights for judges to require something *more than* youth to find that the young offender deserves the benefit of the presumption they are constitutionally entitled to *because of* their youth. Rather, it is the Crown that must prove that *despite* a young offender's youth, an adult sentence would be in accordance with the principles of fundamental justice. This must, necessarily, be a high burden for the Crown to meet if we take seriously that the presumption of diminished moral blameworthiness is one of "the basic values underpinning our constitutional order."[32]

3. Explicit reference to and application of the two principles of fundamental justice is necessary to protect youths' constitutional rights in the sentencing process

27. This is not the first time the Court has encountered the systemic misapplication of protective frameworks. Where this happens, the Court has required sentencing judges to take explicit notice in their decisions of the relevant frameworks and principles. For example, in *R. v. Gladue*, this Court recognized that Indigenous offenders differ from the majority of offenders due, among other things, to systemic and direct discrimination and legacies of dislocation.[33] This Court required sentencing judges to take judicial notice of the systemic factors relevant to all Indigenous offenders when sentencing any Indigenous offender.[34] *Gladue*, however, was consistently misapplied for years.

28. As in *Gladue*, in *DB,* this Court identified the principles of fundamental justice relevant to all adult sentencing applications. Yet, as with *Gladue*, lower courts have gone on to apply those relevant principles in an "irregular and uncertain" way.[35] To remedy the systemic misapplication of *Gladue* (particularly in "serious offences" cases), this Court clarified in *R. v. Ipeelee* that sentencing judges have a duty to apply the *Gladue* principles in every case involving an Indigenous offender, and that failure to do so justified appellate intervention.[36]

29. Young offenders are not in the same position as Indigenous offenders. However, Parliament has also acknowledged that youth are differently situated than the majority of offenders through the

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considered "other factors" – such as the length of the attack and the "unprovoked and random nature of this assault" – to be relevant to determining whether the Crown had rebutted the presumption.

[32] *Bedford* at para. 96.
[33] *R. v. Gladue*, [1999] 1 SCR 688 at paras. 66-68 [***Gladue***].
[34] *Gladue* at paras. 82-83.
[35] *R. v. Ipeelee*, 2012 SCC 13 at para. 84 [***Ipeelee***].
[36] *Ipeelee*, at paras. 84-87.

YCJA. This Court has identified two principles of fundamental justice that protect youths' constitutional rights in the criminal sentencing process. Yet, in parallel to lower courts' failure to properly apply *Gladue*, lower courts are failing to give effect to these principles and to this Court's decision in *DB.* The strategy the Court developed in *Ipeelee* offers one solution: the mandatory, explicit articulation and application of the protective sentencing principles.

30. In light of the broad failure to properly acknowledge or apply the principles of fundamental justice that protect youths' constitutional rights in the sentencing process, sentencing judges should be required to identify and discuss the two principles of fundamental justice as part of the application of the s. 72(1) sentencing framework. While not a perfect solution, this approach would provide a crucial safeguard of young offenders' rights and allow for proper appellate review of adult sentencing applications. Specifically:

a. Sentencing judges must identify and discuss the presumption of youths' diminished moral blameworthiness as a principle of fundamental justice, and the onus on the Crown to rebut that presumption beyond a reasonable doubt; and

b. Sentencing judges must identify and apply the requirement for the Crown to prove any aggravating facts beyond a reasonable doubt throughout the entirety of the s. 72 analysis. In particular, each fact relied upon by the Crown in the 72(2)(b) accountability analysis requires a *Gardiner* analysis. It is an error of law and a breach of young offenders' *Charter* rights for the court to rely on the existence of multiple factors weighing in favour of an adult sentence unless each of those factors has been individually proven beyond a reasonable doubt.

31. Explicit articulation and consideration of the applicable principles of fundamental justice in every adult sentencing application is necessary for the rigorous and transparent protection of youths' constitutional rights and the promotion of the essential principles of our justice system.

PARTS IV & V – ORDERS AND COSTS

32. The CCLA seeks no costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF JUNE, 2024.

C Goldberger

Samara Secter & Cori Goldberger
Counsel for the Intervener, Canadian Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

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