SUPREME COURT OF CANADA

CITATION: R. *v.* D.B., 2008 SCC 25

DATE: 20080516
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BETWEEN:

Her Majesty The Queen
Appellant
v.
D.B.
Respondent
- and -
Attorney General of Canada, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of Manitoba,
Attorney General of British Columbia and
Justice for Children and Youth
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 102)	Abella J. (McLachlin C.J. and Binnie, LeBel and Fish JJ. concurring)
REASONS DISSENTING IN PART: (paras. 103 to 192)	Rothstein J. (Bastarache, Deschamps and Charron JJ. concurring)

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r. *v.* d.b.

Her Majesty The Queen *Appellant*

v.

D.B. (a young person within the meaning of the *Youth Criminal Justice Act*) *Respondent*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of British Columbia and Justice for Children and Youth *Interveners*

Indexed as: R. *v.* D.B.

Neutral citation: 2008 SCC 25.

File No.: 31460.

2007: October 10; 2008: May 16.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Reverse onus provisions — Sentencing — Young persons — Presumptive offences — Adult sentences — Loss of privacy protection of publication ban — Youth criminal justice legislation requiring young person convicted of presumptive offence to justify why adult sentence, rather than youth sentence, should not be imposed and why publication ban should apply — Whether burden on young person infringes right not to be deprived of liberty except in accordance with principles of fundamental justice — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 7 — Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 62, 63, 64(1), 64(5), 70, 72(1), 72(2), 73(1), 75, 110(2)(b).

Criminal law — Sentencing — Young persons — Reverse onus provisions — Imposition of adult sentence for presumptive offences — Loss of privacy protection of publication ban — Youth criminal justice legislation requiring young person convicted of presumptive offence to justify why adult sentence, rather than youth sentence, should not be imposed and why publication ban should apply — Whether reverse onus provisions constitutional — Canadian Charter of Rights and Freedoms, ss. 1, 7 — Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 62, 63, 64(1), 64(5), 70, 72(1), 72(2), 73(1), 75, 110(2)(b).

B went to the local mall with friends. A fight ensued with R, in the course of which B knocked R to the ground and punched him. B fled. By the time the paramedics saw him, R had no vital signs and was immediately taken to the hospital. Later that night, B received a call informing him that R had died from his injuries. He was arrested the following morning at a friend's house. B pleaded guilty to manslaughter. As a 17-year-old, his sentencing took place under the *Youth Criminal*

Justice Act ("*YCJA*"). Under the *YCJA*, manslaughter is a "presumptive offence". In the case of presumptive offences, an adult sentence is presumed to apply. B sought a youth sentence, but the Crown opposed his application. B then challenged, under s. 7 of the *Canadian Charter of Rights and Freedoms*, the constitutionality of the "onus provisions" in the presumptive offences regime. The basis of the challenge was that the provisions impose a "reverse onus", since the burden is on the young person to persuade the court that he or she should not lose the benefit of the youth sentencing provisions, rather than on the Crown to attempt to prove that an adult sentence is justified. The trial judge allowed the *Charter* challenge and sentenced B to the maximum youth sentence that included an intensive rehabilitative custody and supervision order for a period of three years. The Court of Appeal upheld the decision.

Held (Bastarache, Deschamps, Charron and Rothstein JJ. dissenting in part): The appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, **Abella** and Fish JJ.: The onus provisions in the presumptive offences regime are conceded to engage the liberty interest of the young person under s. 7 of the *Charter*. The inquiry in this case is into whether the deprivation of liberty is in accordance with the principles of fundamental justice. The principle of fundamental justice at issue here is that young people are entitled to a *presumption* of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment. That is why there is a separate legal and sentencing regime for them. This presumption must meet the three-part threshold for defining a principle of fundamental justice within the meaning of s. 7 of the *Charter*: (1) it must be a legal principle; (2) there must be a consensus that the rule

or principle is fundamental to the way in which the legal system ought fairly to operate; and (3) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The presumption in question is, firstly, a legal principle. The legislative history of the youth criminal justice system in Canada confirms that the presumption of diminished moral culpability for young persons is a long-standing legal principle that has consistently been acknowledged in all of the *YCJA*'s statutory predecessors. This principle also finds expression in Canada's international commitments, in particular the UN *Convention on the Rights of the Child*. Secondly, there is consensus that the principle is fundamental to the operation of a fair legal system. It is widely acknowledged that age plays a role in the development of judgment and moral sophistication. Courts too have acknowledged the reality of reduced moral culpability on the part of young people. The consensus also exists internationally. Thirdly, the principle can be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. It has been administered and applied to proceedings against young people for decades in this country. [38-39] [41] [45-48] [50] [59-62] [66-67] [69]

The presumption of an adult sentence in the onus provisions is inconsistent with the principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability. This does not mean that an adult sentence cannot be imposed on a young person. It may well be that the seriousness of the offence and the circumstances of the offender justify it notwithstanding his or her age. The issue in this case, however, is who has the burden of proving that an adult sentence is justified. A young person who commits a presumptive offence should not *automatically* be presumed to attract an adult sentence. Because the presumptive

sentence is an adult one, the young person must provide the court with the information and counter-arguments to justify a youth sentence. If the young person fails to persuade the court that a youth sentence is sufficiently lengthy based on the factors set out in s. 72(1) of the *YCJA*, an adult sentence must be imposed. This forces the young person to rebut the presumption of an adult sentence, rather than requiring the Crown to *justify* an adult sentence. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption because of the crime and *despite* their age, and 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. [5] [70] [75-77]

The onus on the young person of satisfying the court of the sufficiency of the factors in s. 72(1) also contravenes another principle of fundamental justice, namely, that the Crown is obliged to prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies. Putting the onus on the young person to prove the *absence* of aggravating factors in order to justify a youth sentence, rather than on the Crown to prove the aggravating factors that justify a lengthier adult sentence, reverses the onus. [78]

The onus on young persons to demonstrate why they remain entitled to the ongoing protection of a publication ban is also a violation of s. 7 of the *Charter*. Lifting a ban on publication makes the young person vulnerable to greater psychological and social stress. Since a publication ban is part of a young person's sentence (s. 75(4) of the *YCJA*), lifting a ban renders the sentence more severe. The onus should therefore be, as with the imposition of an adult sentence, on the Crown

to justify the enhanced severity, rather than on the youth to justify retaining the protection to which he or she is otherwise presumed to be entitled. [83] [87]

The onus requirements do not survive either the rational connection or minimal impairment branches of the s. 1 analysis. Parliament's objectives of accountability, protection of the public and public confidence in the administration of justice can as easily be met by placing the onus on the Crown, where it belongs. Placing the onus on young persons is inconsistent with the presumption of diminished moral culpability, a principle of fundamental justice which requires the Crown to justify the loss both of a youth sentence and of a publication ban. The impugned provisions are therefore inconsistent with s. 7 of the *Charter* and are not saved by s. 1. To the extent that they impose this reverse onus, they are unconstitutional. [91-92] [94-95]

The youth sentence imposed by the trial judge should not be set aside. [96]

Per Bastarache, Deschamps, Charron and **Rothstein** JJ. (dissenting in part): The presumptive offence sentencing provisions in the *YCJA* do not violate s. 7 of the *Charter*. While the possibility of an adult sentence engages a young person's s. 7 right to liberty, the liberty deprivation is in accordance with the two principles of fundamental justice applicable in this case: (1) the reduced moral blameworthiness of young persons and (2) the Crown's burden of proving aggravating sentencing factors beyond a reasonable doubt. Fundamental justice, however, does not require that there always be a presumption of youth sentences for young persons. There is no societal consensus that such a presumption is a vital component of our notion of justice. [103] [122] [129-131] [141]

With respect to the provisions relating to the presumption of publication, they do not engage a young person's s. 7 right to liberty because a publication ban is not part of the sentence. The *YCJA* deems the order for a publication ban to be part of the sentence for appeal purposes only. The deeming provisions simply create an express right of appeal of publication ban orders, which would otherwise not exist. Furthermore, the interests sought to be protected in this case do not fall within the liberty interest protected by s. 7 because the presumption of publication does not cause physical restraint on young persons or prevent them from making fundamental personal choices. Moreover, the publication provisions do not engage the young person's s. 7 right to security of the person. Here, there is no state action: the stigma and labelling that may result from release of the young offender's identity are a product of media coverage and society's reaction to young offenders and to the crimes they commit. In any event, the publication provisions of the *YCJA* are consistent with the principles of fundamental justice applicable in this case. [171-173] [178] [190]

When examining the contours of a principle of fundamental justice, individual and societal interests within s. 7 must be taken into account. In enacting the presumptive offence scheme, it was entirely appropriate for Parliament to consider the competing interests, on the one hand, of young persons to have their reduced moral blameworthiness taken into account and, on the other, of society to be protected from violent young offenders and to have confidence that the youth justice system ensures the accountability of violent young offenders. This balancing was a legitimate exercise of Parliament's authority to determine how best to penalize particular criminal activity, a power this Court has recognized as broad and discretionary. The *YCJA* presumption of adult sentences and publication for serious violent offences is in accordance with principles of fundamental justice because it in no way precludes a

youth sentence or a publication ban where considered appropriate by the youth criminal justice court. Further, to focus solely on the presumption of adult sentences and publication ignores the entire presumptive sentencing and publication scheme which provides extensive protections for young persons who have committed serious violent offences and recognizes the presumption of reduced moral blameworthiness, properly defined. The presumptive offence scheme significantly recognizes the age, reduced maturity and increased vulnerability of young persons. [107-108] [143] [146] [148]

The publication and sentencing provisions do not create a reverse onus which contravenes the principle of fundamental justice that the Crown bears the burden of proving aggravating sentencing circumstances. First, the potential publication is neither state-imposed nor part of the young person's sentence. Second, the impugned provisions in no way relieve the Crown of its burden of proving all aggravating facts on sentencing. In effect, the presumptive sentencing regime simply provides for a higher range of sentences for young persons convicted of the most serious violent offences. Even so, Parliament has provided young persons with the opportunity to satisfy the youth justice court that the presumptive higher range of sentence or the presumptive publication should not apply. Providing this opportunity to young persons, especially when the sentencing judge is required to prompt the young persons to take advantage of the opportunity, represents Parliament's approach to balance the status of young persons with the need to protect society from the perpetrators of the most serious violent crimes. It does not place a "persuasive burden" on young persons that eliminates the Crown's burden of establishing aggravating sentencing factors. [109]

The youth sentence imposed on B was reasonable and does not warrant interference. [192]

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By Abella J.

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By Rothstein J. (dissenting in part)

Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9; *R. v. S.R.B.*, [2008] A.J. No. 56 (QL), 2008 ABQB 48; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74; *R. v. Pearson*, [1992] 3 S.C.R. 665; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Smith*, [1987]

1 S.C.R. 1045; *R. v. K.D.T.* (2006), 222 B.C.A.C. 160, 2006 BCCA 60; *Blencoe v. British Columia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 C.C.C. (3d) 321; *Mills v. The Queen*, [1986] 1 S.C.R. 863.

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Canadian Charter of Rights and Freedoms, ss. 1, 7, 12.

Criminal Code, R.S.C. 1985, c. C-46, ss. 718.1. 718.2(*a*), 724, 745, 745.1, 745.3, 745.5.

Juvenile Delinquents Act, 1908, S.C. 1908, c. 40, ss. 7, 31.

Juvenile Delinquents Act, 1929, S.C. 1929, c. 46, s. 3(2).

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Youth Criminal Justice Act, S.C. 2002, c. 1, preamble, ss. 2(1) "adult sentence", "presumptive offence", "young person", 3, 4, 10, 14(1), 26, 32(1)(*d*), 34(1), (2)(*b*), 37(4), 38, 39, 40(2), 42(7), 62, 63, 64(1), (5), 65, 70 to 73, 75, 76(2), (9), 110(1), (2), 113(2), 146(2), (4).

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Sprott, Jane B. "Understanding public views of youth crime and the youth justice system" (1996), 38 *Can. J. Crim.* 271.

APPEAL from a judgment of the Ontario Court of Appeal (Goudge, Armstrong and Blair JJ.A.) (2006), 79 O.R. (3d) 698, 208 O.A.C. 225, 206 C.C.C. (3d) 289, 37 C.R. (6th) 265, 140 C.R.R. (2d) 168, [2006] O.J. No. 1112 (QL), 2006 CarswellOnt 1719, upholding a decision of Lofchik J. (2004), 72 O.R. (3d) 605, 190 C.C.C. (3d) 383, 123 C.R.R. (2d) 182, [2004] O.J. No. 3823 (QL), 2004 CarswellOnt 3747. Appeal dismissed, Bastarache, Deschamps, Charron and Rothstein JJ. dissenting in part.

Alexander Alvaro and *Deborah Krick,* for the appellant.

Dean D. Paquette and *Paola Konge*, for the respondent.

Janet Henchey, for the intervener the Attorney General of Canada.

Jean-Yves Bernard and *Isabelle Fortin*, for the intervener the Attorney General of Quebec.

Peter P. Rosinski, for the intervener the Attorney General of Nova Scotia.

Diana M. Cameron, for the intervener the Attorney General of Manitoba.

Joyce DeWitt-Van Oosten, for the intervener the Attorney General of British Columbia.

Cheryl Milne and *Lee Ann Chapman*, for the intervener the Justice for Children and Youth.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish and Abella JJ. was delivered by

[1] ABELLA J. — Young people who commit crimes have historically been treated separately and distinctly from adults. This does not mean that young people are not accountable for the offences they commit. They are decidedly but differently accountable.

[2] The *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"), creates a category of serious offences known as "presumptive offences". Presumptive offences are murder, attempted murder, manslaughter, aggravated sexual assault. A third serious violent offence, defined as "an offence in the commission of which a young person causes or attempts to cause serious bodily harm", is also designated as a presumptive offence.

[3] A youth court judge must impose an adult sentence in the case of these presumptive offences unless the young person can demonstrate that a youth sentence has "sufficient length" to hold him or her accountable. The legislation thus puts the onus on the young person to justify why an adult sentence should *not* be imposed, rather than on the Crown to show why the youth has lost his or her entitlement to a youth sentence.

[4] The issue in this case, therefore, is whether this burden on the young person violates s. 7 of the *Canadian Charter of Rights and Freedoms*, and, in particular, the young person's right not to be deprived of liberty except in accordance with principles of fundamental justice.

[5] The question is not whether young people who commit more serious crimes can attract more serious penalties. They can. In some cases, it may even be that they should receive the same sentence as an adult. What is before us, however, is whether young people who commit presumptive offences should *automatically* be presumed to

attract an adult sentence, or whether, as previously, they continue to be subject to the youth justice sentencing provisions unless the Crown can demonstrate that the combination of the circumstances of the crime and of the offender warrant the imposition of an adult sentence.

[6] For the reasons that follow, I conclude that there is a breach of s. 7 and that the breach is not saved by s. 1 of the *Charter*.

BACKGROUND

[7] On December 13, 2003, D.B. went to the local mall with friends. A fight ensued with 18-year-old Jonathan Romero, in the course of which D.B. knocked Romero to the ground and punched him. Romero lost consciousness. D.B. fled.

[8] An ambulance was called. By the time the paramedics saw him, Romero had no vital signs and was immediately taken to the hospital.

[9] Later that night, D.B. received a call informing him that Romero had died from his injuries. He was arrested the following morning at a friend's house.

[10] D.B. pleaded guilty to manslaughter in July 2004. As a 17-year-old, he was sentenced under the *YCJA*.

Prior Proceedings

[11] The offence to which D.B. pleaded guilty, manslaughter, is a presumptive offence. D.B. applied for a youth sentence rather than the adult sentence presumptively imposed by the Act. The Crown opposed his application, seeking to have him sentenced as an adult and recommending a sentence of five years' imprisonment. The maximum youth sentence allowable for this offence under the *YCJA* is three years.

[12] D.B. then challenged the constitutionality of the provisions of the *YCJA* which place the onus on a young person to prove that a youth sentence, not an adult one, should be imposed. He also challenged the constitutionality of the provision that requires the young person to justify the continuance of a ban protecting him from publicity.

[13] The trial judge, Lofchik J., allowed the *Charter* challenge ((2004), 72 O.R. (3d) 605 (S.C.J.)). In so doing, he relied primarily on the decision of a five-judge panel of the Quebec Court of Appeal in a reference brought by the Quebec government (*Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 C.C.C. (3d) 321 ("*Quebec Reference*")).

[14] In separate unreported reasons for sentence, the trial judge concluded that a youth sentence involving intensive rehabilitation custody would be appropriate for D.B., explaining to him:

> You are to be the subject of an intensive rehabilitative custody and supervision order for a period of three years, and committed into a continuous period of intensive rehabilitative custody for a period of thirty months and serve the remainder of the sentence under conditional supervision in the community in accordance with s. 105 of the *Youth Criminal Justice Act.*
>
> In my view the maximum period of a youth sentence is necessary to achieve the desired ends of the rehabilitation programme, and for that reason I have not given credit for the one year period of pre-trial custody.

The Crown appealed.

[15] The Ontario Court of Appeal dismissed the Crown's appeal ((2006), 79 O.R. (3d) 698). Goudge J.A., writing for a unanimous court (Armstrong and Blair JJ.A.), concluded that the onus provision in the *YCJA* placed a considerable burden on the young person. The burden was not only one of persuasion, but an evidentiary one to support the factors referred to in the Act, including maturity and other facts which may not otherwise be in the record.

[16] He identified two principles of fundamental justice that were breached by what he described as the reverse onus provisions: (1) that "young offenders should be dealt with separately and not as adults in recognition of their reduced maturity" (para. 55) and (2) that "in sentencing, the Crown must assume the burden of demonstrating beyond a reasonable doubt that there are aggravating circumstances in the commission of the offence that warrant a more severe penalty" (para. 63).

[17] Because the Act requires the young person to prove the factual matters in order to justify a *lesser* sentence, the principle that it is the Crown who must justify a harsher penalty was held by Goudge J.A. to be violated.

[18] Goudge J.A. also held that the publication ban provisions contravene s. 7 of the *Charter*. Since publishing a young person's identity adds to the harshness of his punishment, the Crown should similarly bear the burden of proving that it is appropriate for the young person to be deprived of the ban.

[19] The court did not accept the Crown's submission that these violations of s. 7 could be saved by s. 1 of the *Charter*, concluding that placing the onus on the Crown to demonstrate the need for an adult sentence and for the lifting of a publication ban, would serve the same objectives without impairing the young person's rights.

ANALYSIS

[20] The constitutionality of two sets of provisions of the *YCJA* are at issue, both of which D.B. asserts violate s. 7 of the *Charter*, which states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[21] Both sets of provisions affect a young person who has been found guilty of a presumptive offence. A presumptive offence is defined as follows in s. 2(1):

> (*a*) an offence committed, or alleged to have been committed, by a young person who has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, under one of the following provisions of the *Criminal Code*:

> (i) section 231 or 235 (first degree murder or second degree murder within the meaning of section 231),
>
> (ii) section 239 (attempt to commit murder),
>
> (iii) section 232, 234 or 236 (manslaughter), or
>
> (iv) section 273 (aggravated sexual assault) . . .
>
> (*b*) a serious violent offence for which an adult is liable to imprisonment for a term of more than two years committed, or alleged to have been committed, by a young person after the coming into force of section 62 (adult sentence) and after the young person has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, if at the time of the commission or alleged commission of the offence at least two judicial determinations have been made under subsection 42(9), at different proceedings, that the young person has committed a serious violent offence.

[22] The first group of impugned provisions requires a young person convicted of a presumptive offence to justify the imposition of a youth sentence rather than an adult one. They are ss. 62, 63, 64(1) and (5), 70, 72(1) and (2), and 73(1), and are appended to these reasons.

[23] The second set of provisions being challenged, the "privacy provisions", deals with the loss of the privacy protection of a publication ban when a young person is convicted of a presumptive offence. They are ss. 75 and 110(2), also appended to these reasons.

[24] The "onus provisions" affect the length and type of sentence that young persons receive. The "privacy provisions" determine whether or not their identity will be disclosed. The basis of the constitutional challenge before this Court is that both sets of provisions impose a "reverse onus" since the burden is on the young person to persuade the court that he or she should not lose the benefit of the youth sentencing

provisions, rather than on the Crown to attempt to prove that an adult sentence is justified.

[25] The onus provisions operate as follows. Section 62 of the *YCJA* provides that young persons, 14 or older, who are convicted of a presumptive offence — such as manslaughter in this case — "shall" be sentenced as adults. The language is mandatory.

[26] Section 2(1) provides that an "adult sentence" means "any sentence that could be imposed on an adult who has been convicted of the same offence".

[27] A young person may, however, under s. 63(1) of the Act, "make an application for an order that he or she is not liable to an adult sentence". The court is then required to consider the factors set out in s. 72(1), namely: "the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant". The onus of satisfying the court about these matters is on the young person (s. 72(2)). Consequently, if the young person is unable to persuade the court that a youth sentence "would have sufficient length to hold the young person accountable for his or her offending behaviour", an adult sentence "shall" be imposed (s. 72(1)(*b*)). The default position, in other words, is an adult sentence.

[28] The "privacy provisions" of the *YCJA*, ss. 110 and 75, deal with a "ban on publication", which restricts the information about a young person that can be made publicly available. A publication ban is considered to be part of the sentence (s. 75(4)).

[29] Section 110(1) provides that "no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act". Under s. 110(2), this protection does not apply if a young person has received an adult sentence. If an adult sentence has been imposed, the young person cannot apply for a publication ban.

[30] Under s. 75(1), if a young person has been convicted of a presumptive offence but has succeeded in persuading the court that a youth sentence is nonetheless appropriate, the sentence is not accompanied by the publication ban that normally attaches to a youth sentence. A further onus is on the young person to satisfy the court that, in addition to the youth sentence, a publication ban should also be imposed. Absent such an application by the young person, the default position is the loss of the ban.

[31] The constitutionality of these provisions has been examined by the British Columbia Court of Appeal and, as previously noted, the Quebec Court of Appeal.

[32] The Quebec Court of Appeal identified four fundamental principles of justice which it used to assess whether the onus provisions violate s. 7. These were:

> [TRANSLATION] Young offenders must be dealt with separately from adults;
>
> Rehabilitation, rather than suppression and dissuasion, must be at the heart of legislative and judicial intervention with young persons;
>
> The justice system for minors must limit the disclosure of the minor's identity so as to prevent stigmatization that can limit rehabilitation;
>
> It is imperative that the justice system for minors consider the best interests of the child.

(*Quebec Reference*, at para. 215)

[33] It concluded that the onus provisions represented [TRANSLATION] "an excessive burden, considering the vulnerability of the young persons on whom it rests and the purposes of the Act" (para. 249) and, accordingly, held that they violated s. 7 of the *Charter* and could not be saved under s. 1. The federal government did not appeal the judgment, indicating that it intended to amend the *YCJA* in a manner consistent with the court's conclusion (*House of Commons Debates*, vol. 25, 2nd Sess., 37th Parl., May 12, 2003, at pp. 6086-87).

[34] The *Quebec Reference*, it should be noted, preceded two relevant decisions from this Court: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, which established a template for determining a principle of fundamental justice, and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at paras. 10-11, stating that the "best interests of the child" is not such a principle.

[35] The British Columbia Court of Appeal in *R. v. K.D.T.* (2006), 222 B.C.A.C. 160, 2006 BCCA 60, reached a contrary result, concluding that the onus under s. 72(2) did not impose "an excessive burden of proof on an applicant" (para. 59). Relying on *R. v. Jones*, [1994] 2 S.C.R. 229, and *R. v. Shropshire*, [1995] 4 S.C.R. 227, the court unanimously concluded that s. 7 protection is less robust at the post-trial (sentencing) phase. Because it remained possible for the young person to prove that an adult sentence was inappropriate in his or her case, there was no violation of s. 7 because the vulnerability of young persons was thereby accommodated.

[36] In my view, the conclusion of the appeal courts of Ontario and Quebec is correct, namely, that the onus on young persons to displace the presumption of an adult sentence for presumptive offences is a violation of s. 7.

The Operative Principle of Fundamental Justice

[37] The analysis under s. 7 proceeds in two stages: Is there a deprivation of life, liberty and/or security of the person? If so, does the deprivation accord with principles of fundamental justice? If there has been a deprivation that does not accord with principles of fundamental justice, a violation of s. 7 has occurred.

[38] The Crown concedes that the onus provisions in the presumptive offences regime engage the liberty interest of the young person. Imprisonment and the threat of imprisonment constitute clear deprivations of liberty (*Reference re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 500-501).

[39] This concession means that the inquiry in this case is into whether that deprivation is in accordance with the principles of fundamental justice. And that in turn requires a determination first of what principle of fundamental justice is at issue here.

[40] The Quebec and Ontario Courts of Appeal set out different but conceptually related views of the governing principle, both of them emphasizing that young persons should be dealt with separately from adults based on their reduced maturity. I agree that this is important, but do not see this as engaged in this case. As

the Act confirms, there *is* in fact a separate legal system for young persons. Section 3(1)(*b*) of the *YCJA* confirms that "the criminal justice system for young persons must be separate from that of adults".

[41] What the onus provisions *do* engage, in my view, is what flows from *why* we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment.

[42] There are, for example, numerous sentencing provisions in the *YCJA* designed to protect, presumptively, young persons from custody. Confronted with a crime committed by a young person, police must consider whether alternatives, namely extra-judicial measures or extra-judicial sanctions, would be adequate before proceeding to court. Section 4 of the *YCJA* declares that extra-judicial measures are "presumed to be adequate to hold a young person accountable . . . if the young person has committed a non-violent offence and has not previously been found guilty of an offence". Section 10 of the *YCJA* declares that extra-judicial sanctions "may be used . . . only if the young person cannot be adequately dealt with by a warning, caution or referral [extra-judicial measures] . . . because of the seriousness of the offence, the nature and number of previous offences committed by the young person, or any other aggravating circumstances".

[43] Sections 38 and 39 of the *YCJA* also restrict when custody is available. Before sentencing a young person to custody, the court must:

- believe that no reasonable alternative or combination of alternatives exists (s. 39(2));

- know that the previous use of a non-custodial sentence does not preclude another non-custodial sentence (s. 39(4));

- recognize that custody must not be a substitute for appropriate child protection, mental health or other social measures (s. 39(5));

- consider a pre-sentence report and any sentencing proposal made by the young person or the counsel present (s. 39(6));

- state reasons why a non-custodial sentence is inadequate (s. 39(9));

- require that the principles set out in s. 3 of the *YCJA* govern sentencing (s. 38(2));

- ensure that the sentence is no greater than might be afforded an adult under the same circumstances (s. 38(2)(*a*));

- consider all available sanctions other than custody first (s. 38(2)(*d*)); and

- ensure that the sentence is the least restrictive one capable of holding the young person accountable, subject to proportionality concerns (s. 38(2)(*e*)).

[44] This statutory preoccupation with ensuring that sentencing reflects the reduced maturity and moral sophistication of young persons, guided this Court in *R. v. C.D.*, [2005] 3 S.C.R. 668, 2005 SCC 78, where Bastarache J. noted the *YCJA*'s goal to "send a clearer message to those involved in the youth criminal justice system about restricting the use of custody for young offenders" (para. 48). Bastarache J. concluded that "the object and scheme of the *YCJA*, as well as Parliament's intention in enacting it, all indicate that the *YCJA* was designed, in part, to reduce over-reliance on custodial sentences for young offenders" (para. 50).

[45] These considerations reveal that the approach to the sentencing of young persons is animated by the principle that there is a *presumption* of diminished moral culpability to which they are entitled. Like all presumptions, it is rebuttable. Under the presumptive offences sentencing scheme, it is the young person himself or herself who is required to prove that the presumption should *not* be rebutted, rather than the Crown who is required to show why it should be. The constitutional implications of this reversal of the onus create the legal knot we are asked to untie. To do so, we must first determine whether the principle of a presumption of diminished culpability is one of fundamental justice within the meaning of s. 7 of the *Charter*.

[46] In *Malmo-Levine* and *Foundation for Children*, this Court provided a framework for assessing whether a particular principle meets this threshold. Three criteria must be met:

(1) It must be a legal principle.

(2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.

(3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[47] The first question therefore is whether the presumption of diminished moral culpability is a legal principle. In my view it is. Special rules based on reduced maturity and moral capacity have governed young persons in conflict with the law from "the beginning of legal history" (Nicholas Bala and Mary-Anne Kirvan, "The Statute: Its Principles and Provisions and Their Interpretation by the Courts", in Ruth M. Mann, ed., *Juvenile Crime and Delinquency: A Turn of the Century Reader* (2000), at p. 45). English common law included the defence of *doli incapax*, or "incapacity to do wrong". Children under seven were considered incapable of committing a crime, and a presumption of incapacity applied to children between the ages of seven and thirteen, although the prosecution could rebut the presumption with evidence that the child had sufficient intelligence and experience to "know the nature and consequences of the conduct and to appreciate that it was wrong" (p. 45).

[48] Canada too has consistently acknowledged the diminished responsibility and distinctive vulnerability of young persons in all of the *YCJA*'s statutory predecessors.

[49] The first Canadian legislation separating adults from child and adolescent persons was introduced in 1857, placing young persons in training schools and reformatories rather than penitentiaries. Community-based alternatives to imprisonment

for young persons were initiated at that time. The first probation officers working specifically with and for juveniles were hired (Nicholas Bala, *Youth Criminal Justice Law* (2003), at pp. 6-7).

[50] A distinct youth criminal justice system was established in 1908 through the enactment of the *Juvenile Delinquents Act, 1908*, S.C. 1908, c. 40. Its purpose was described at s. 31 of the Act as follows:

> **31.** . . . That the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

[51] A young person over the age of 14 could, however, be transferred to adult court pursuant to s. 7 of the Act if he or she had been charged with an indictable offence:

> **7.** Where the act complained of is, under the provisions of The Criminal Code or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of The Criminal Code in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it. The court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made.

[52] Parliament reformed the youth criminal justice system in 1984 with the enactment of the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, later codified as the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (*YOA*). The purpose of this legislation was articulated in s. 3(1) in part as follows:

> **3.** (1) It is hereby recognized and declared that
>
> (*a*) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;
>
> . . .
>
> (*c*) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;
>
> . . .

[53] Initially, s. 16 of the *YOA* permitted the transfer to adult court of youths charged with the most serious offences. The Crown, in applying for such a transfer, bore the burden of demonstrating that it was appropriate. In *R. v. M.* (*S.H.*), [1989] 2 S.C.R. 446, this Court held that this was not a "heavy onus". Nor did the Crown have to demonstrate "exceptional" circumstances to make its case for transfer. Nonetheless, the Court noted "[t]hat is not to say that the transfer of a case from Youth Court to ordinary court is not a matter of the utmost seriousness" (p. 463).

[54] The test for transfer was whether the judge was "of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court" (p. 455). A number of factors were to be considered before transferring the young person, including the seriousness

and circumstances of the offence, the young person's situation, and whether he or she already had a record.

[55] In 1992, the federal government amended the *YOA* to lengthen the maximum sentence in youth court for murder from three years to five years less a day. It also amended the transfer provisions to stipulate that the "protection to the public" was the paramount consideration. The period of parole ineligibility was, however, reduced for young persons convicted of first and second degree murder in adult court so that once incarcerated in adult facilities, they could be released sooner than their adult counterparts.

[56] In 1995, the *YOA* was amended by the addition of s. 16(1.01) to require explicitly that 16- or 17-year-olds charged with murder, attempted murder, manslaughter or aggravated sexual assault be tried as adults in ordinary court, unless the young person or the Crown applied to have the matter proceed in youth court. The constitutionality of this provision was never tested in this Court.

[57] And finally, we come to the current legislation, the *YCJA*, which came into force on April 1, 2003. The fundamental underlying principles of this legislation are found in s. 3 of the Act:

> **3.** (1) The following principles apply in this Act:
>
> . . .
>
> (*b*) the criminal justice system for young persons must be separate from that of adults and <u>emphasize the following</u>:
>
> (i) <u>rehabilitation and reintegration</u>,

> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
>
> . . .

Section 3(2), moreover, stipulates that the Act "shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1)". Section 2(1) defines a young person as someone

> who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act.

[58] Moreover, the preamble recognizes society's "responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood"; encourages "guidance and support"; and seeks "effective rehabilitation and reintegration".

[59] This legislative history confirms that the recognition of a presumption of diminished moral culpability for young persons is a long-standing legal principle.

[60] It is also a legal principle that finds expression in Canada's international commitments. The United Nations *Convention on the Rights of the Child*, explicitly mentioned in the preamble to the *YCJA*, was ratified by Canada in 1992 (Can. T.S. 1992 No. 3). Paragraph 1 of art. 40 of the Convention states:

> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

[61] Having concluded that a presumption of diminished moral blameworthiness for young persons is a legal principle, the next question is whether there is a consensus that this principle is fundamental to the operation of a fair legal system. In my view there is little doubt that such general recognition exists. Fish J., for the majority, noted in *R. v. R.C.*, [2005] 3 S.C.R. 99, 2005 SCC 61, at para. 41, that "[i]n creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons".

[62] It is widely acknowledged that age plays a role in the development of judgment and moral sophistication. Professor Allan Manson notes that "[t]he general principle that applies to youthful offenders . . . [is] that a lack of experience with the world warrants leniency and optimism for the future" (*The Law of Sentencing* (2001), at pp. 103-4). And Professor Bala describes the *YCJA* as

> premised on a recognition that to be a youth is to be in a state of "diminished responsibility" in a moral and intellectual sense. Adolescents, and even more so children, lack a fully developed adult sense of moral judgment. Adolescents also lack the intellectual capacity to appreciate fully the consequences of their acts. In many contexts, youths will act without foresight or self-awareness, and they may lack empathy for those who may be the victims of their wrongful acts. Youths who are apprehended and asked why they committed a crime most frequently respond: "I don't know." Because of their lack of judgment and foresight, youths also tend to be poor criminals and, at least in comparison to adults, are relatively easy to apprehend. . . . This is not to argue that adolescent offenders should not be morally or legally accountable for their criminal acts, but only that their accountability should, in general, be more limited than is the case for adults.

(*Youth Criminal Justice Law*, at pp. 3-4 (footnotes omitted))

[63] The following observation by Justice Gilles Renaud in *Speaking to Sentence: A Practical Guide* (2004), at p. 10, is also apt:

> Stated simply, offenders who act out of immaturity, impulsiveness, or other ill-considered motivation are not to be dealt with as if they were proceeding with the same degree of insight into their wrongdoing as more mature, reflective, or considered individuals. The less elevated the degree of moral blameworthiness, the greater the reach of leniency. By way of limited example, the relative youth of an offender will be emphasized in those cases in which an individualized disposition is selected . . . .

[64] As Professor Bala explains, "adolescents generally lack the judgment and knowledge to participate effectively in the court process and may be more vulnerable than adults" (*Youth Criminal Justice Law*, at p. 5). There is, moreover, evidence suggesting that as a result of this reduced judgment and maturity, young persons respond differently to punishment than adults, and that harsher penalties do not, by themselves, reduce youth crime. See A. N. Doob, V. Marinos, and K. N. Varma, *Youth Crime and the Youth Justice System in Canada: A Research Perspective* (1995), at pp. 56-71.

[65] This helps explain why, in s. 3(1)(*b*)(i) of the *YCJA*, "rehabilitation and reintegration", not general deterrence, are emphasized and why, in s. 3(1)(*b*)(ii), accountability should be "fair and proportionate . . . consistent with the greater dependency of young persons and their reduced level of maturity".

[66] The courts, too, have acknowledged the reality of reduced moral culpability on the part of young people. In *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at p. 268, Lamer C.J. observed:

> [W]hat distinguishes this legislation from the *Criminal Code* is the fact that it creates a special regime for young persons. The essence of the young offenders legislation is a distinction based on age and on the diminished responsibility associated with this distinction. [Emphasis added.]

[67] This consensus also exists internationally. Professor Bala points out that "[e]very legal system recognizes that children and youths are different from adults and should not be held accountable for violations of the criminal law in the same fashion as adults" (*Youth Criminal Justice Law*, at p. 1). Anthony N. Doob and Michael Tonry, "Varieties of Youth Justice", in *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (2004), at p. 1, observe that "[t]he most notable aspect of the treatment of youths who offend in Western countries is that every country appears to have laws or policies reflecting the belief that youths should be treated differently from adult offenders" (p. 3). This is so because "generally speaking, the assumption is that the youthfulness of an offender mitigates the punishment that youths should receive and that youths should be kept separate from adult offenders" (p. 5).

[68] The preceding confirms, in my view, that a broad consensus reflecting society's values and interests exists, namely that the principle of a presumption of diminished moral culpability in young persons is fundamental to our notions of how a fair legal system ought to operate.

[69] The third criterion for recognition as a principle of fundamental justice is that the principle be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. This is not a difficult criterion to satisfy in this case. The principle that young people are entitled to a presumption of diminished moral culpability throughout any proceedings against them, including during sentencing, is readily administrable and sufficiently precise to yield a manageable standard. It is, in fact, a principle that has been administered and applied to proceedings against young people for decades in this country.

Application of the Principle

[70] The remaining issue, therefore, is whether the presumption of an adult sentence in the onus provisions is consistent with the principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability. In my view, they are not. They deprive D.B. of this presumption by putting the onus on him to justify his continued entitlement to the presumption, rather than on the Crown to demonstrate why it no longer applies to D.B., thereby allowing him to be sentenced as an adult.

[71] Presumptive offences are treated differently from other serious offences in the *YCJA*. Ordinarily, the Crown can seek an adult sentence for a young person over the age of 14 who has been found guilty of certain indictable offences. The young person must be notified of the Crown's intention and, once notified, can elect to be tried by a youth court judge or, in the Ontario Superior Court of Justice, by a

judge alone or with a jury following a preliminary inquiry. The onus is on the Crown. If the Crown does not persuade the court, a youth sentence will be imposed.

[72] The young person charged with or found guilty of a presumptive offence, however, must *apply* for an order that he or she is not liable to an adult sentence so that a youth sentence can be imposed (s. 63(1)). In making its decision, the court is directed to consider whether a youth sentence "would have sufficient length to hold the young person accountable for his or her offending behaviour" (s. 72(1)(*a*) and (1)(*b*)).

[73] In deciding whether it would be a sufficiently long sentence, the court is to consider

> the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant . . . . [s. 72(1)]

[74] Professor Bala has observed that such an onus implicates three elements — procedural, tactical and persuasive:

> Under the new *Act* [the *YCJA*], the onus on the young offender seeking a youth sentence under section 63 in a presumptive offence situation has procedural, tactical, and persuasive elements. The onus is procedural in the sense that the youth must make an application to prevent the imposition of an adult sentence. It is tactical in the sense that there is an onus on the youth to adduce some evidence about why a youth sentence is appropriate, though the youth is not obliged to testify, and as discussed above, the court may still require the Crown to lead its evidence first. Further, section 72(2) provides that "the onus of satisfying the youth justice court" as to the matters referred to in section 72(1) is on the applicant. This places a "persuasive" burden on
> the youth to satisfy the youth justice court that a youth sentence would be of "sufficient length to hold the young person accountable for his or her offending behaviour."
>
> (*Youth Criminal Justice Law*, at p. 521 (emphasis added))

[75] Because the presumptive sentence is an adult one, the young person must provide the court with the information and counter-arguments to justify a youth sentence. If the young person fails to persuade the court that a youth sentence is sufficiently lengthy based on the factors set out in s. 72(1), an adult sentence must be imposed. This forces the young person to rebut the presumption of an adult sentence, rather than requiring the Crown to *justify* an adult sentence. It is therefore a reverse onus.

[76] No one seriously disputes that there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences. But the onus provisions in the presumptive offences sentencing regime stipulate that it is the offence, rather than the age of the person, that determines how he or she should be sentenced. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption

because of the crime and *despite* their age, and 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.

[77] This does not mean that an adult sentence cannot be imposed on a young person. It may well be that the seriousness of the offence and the circumstances of the offender justify it notwithstanding his or her age. The issue in this case, however, is who has the burden of proving that an adult sentence is justified.

[78] The onus on the young person of satisfying the court of the sufficiency of the factors in s. 72(1) so that a youth sentence can be imposed also contravenes what the Crown concedes in its factum is another principle of fundamental justice, namely, that the Crown is obliged to prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies. Putting the onus on the young person to prove the *absence* of aggravating factors in order to justify a youth sentence, rather than on the Crown to prove the aggravating factors that justify a lengthier adult sentence, reverses the onus.

[79] In *R. v. Gardiner*, [1982] 2 S.C.R. 368, a pre-*Charter* case, Dickson J. cogently explained the significance of this burden on the Crown when he observed:

> It is well to recall in any discussion of sentencing procedures that the vast majority of offenders plead guilty. . . . The sentencing judge therefore must get his facts after plea. Sentencing is, in respect of most offenders, the only significant decision the criminal justice system is called upon to make.
>
> . . .
>
> 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).
>
> (Emphasis in original; pp. 414-15.)

[80] In *R. v. Pearson*, [1992] 3 S.C.R. 665, this Court, citing *Gardiner*, noted that

> 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 . . . .
>
> 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. [p. 686]

[81] In the case of presumptive offences, it is the young person who must satisfy the court of the factors justifying a youth sentence, whereas it is normally the Crown who is required to satisfy the court of any factors justifying a more severe sentence. A maximum adult sentence in the case of presumptive offences is, by definition, more severe than the maximum permitted for a youth sentence. A youth sentence for murder cannot exceed ten years; for second degree murder, seven; and for manslaughter, three. The maximum adult sentence for these offences is life in prison.

[82] A young person should receive, at the very least, the same procedural benefit afforded to a convicted adult on sentencing, namely, that the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case. The onus on the young person reverses this traditional onus on the Crown and is, consequently, a breach of s. 7.

[83] Similarly, I see the onus on young persons to demonstrate why they remain entitled to the ongoing protection of a publication ban to be a violation of s. 7. As discussed, the effect of the reverse onus provisions is that if a young person is unable to persuade the court that a youth sentence should be imposed, an adult sentence is imposed. When an adult sentence is imposed, the young person loses the protection of a publication ban. But even if the young person succeeds in discharging the reverse

onus and receives a youth sentence, the *YCJA* imposes an additional onus by requiring the young person to apply for the ban that normally accompanies a youth sentence.

[84] In s. 3(1)(*b*)(iii) of the *YCJA*, as previously noted, the young person's "enhanced procedural protection . . . including their right to privacy", is stipulated to be a principle to be emphasized in the application of the Act. Scholars agree that "[p]ublication increases a youth's self-perception as an offender, disrupts the family's abilities to provide support, and negatively affects interaction with peers, teachers, and the surrounding community" (Nicholas Bala, *Young Offenders Law* (1997), at p. 215). Professor Doob, cited by the court in the *Quebec Reference*, testified about this issue before the Standing Committee on Justice:

> [TRANSLATION] I think you'd be hard-pressed to find a single professional who has worked in this area who would be in favour of the publication of names. From the very beginning when this was proposed in May 1998, I'd never heard anybody give a single reasoned, principled argument for doing it.
>
> Now, there are some other arguments for doing it having to do essentially with vindictiveness, but in terms of actually trying to be constructive in any way, as I said, I would certainly find it very difficult to find anybody who has done any research on this kind of issue who would support it. It just seems to me to be a gratuitous meanness.
>
> (*Quebec Reference*, at para. 278)

[85] International instruments have also recognized the negative impact of such media attention on young people. The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("Beijing Rules") (adopted by General Assembly Resolution A/RES/40/33 on November 29, 1985) provide in rule 8 ("Protection of privacy") that "[t]he juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the

process of labelling" and declare that "[i]n principle, no information that may lead to the identification of a juvenile offender shall be published".

[86] The Ontario Court of Appeal, echoing the Quebec Court of Appeal, recognized the impact of "stigmatizing and labelling" the young person, which can "damage" the offender's "developing self-image and his sense of self-worth" (para. 76).

[87] The foregoing demonstrates that lifting a ban on publication makes the young person vulnerable to greater psychological and social stress. Accordingly, it renders the sentence significantly more severe. A publication ban is part of a young person's sentence (s. 75(4)). It is therefore subject to the same presumption as the rest of his or her sentence. Losing the protection of a publication ban renders the sentence more severe. The onus should therefore be, as with the imposition of an adult sentence, on the Crown to justify the enhanced severity, rather than on the youth to justify retaining the protection to which he or she is otherwise presumed to be entitled. The reversal of this onus too is a breach of s. 7.

[88] This brings us to the issue of whether the breaches are justifiable under s. 1 of the *Charter*.

[89] This Court has previously noted that violations of s. 7 are seldom salvageable by s. 1. In *Re B.C. Motor Vehicle Act*, at p. 518, Lamer J. observed that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like".

Wilson J., who concurred in the judgment, declared: "I cannot think that the guaranteed right in s. 7 which is to be subject *only* to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system" (p. 531 (emphasis in original)). In *R. v. Oakes*, [1986] 1 S.C.R. 103, this Court held a provision of the *Narcotic Control Act* to be unconstitutional because it required the defendant to prove that, having been found guilty of possession, he was not also guilty of possession for the purpose of trafficking.

[90] On the other hand, reverse onus provisions have not always failed the s. 1 analysis when they were impugned under s. 11(*d*) of the *Charter* guaranteeing the presumption of innocence. In *R. v. Chaulk*, [1990] 3 S.C.R. 1303, this Court upheld a statutory provision putting the onus on the accused to prove insanity in a criminal case. Section 16(4) of the *Criminal Code* provided at that time that "[e]very one shall, until the contrary is proved, be presumed to be and to have been sane" (p. 1314). While acknowledging that the provision violated s. 11(*d*), it was held by the Court to be saved by s. 1. The Court justified its conclusion because of what it found to be the "impossibly onerous burden of disproving insanity" in every case (p. 1337). In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, this Court upheld the constitutionality of a reverse onus provision in s. 36 of the *Competition Act*, R.S.C. 1970, c. C-23. It also upheld a reverse onus provision (by which the defendant could escape conviction by claiming he had made truthful statements) under hate crime legislation in *R. v. Keegstra*, [1990] 3 S.C.R. 697, concluding that the impugned provision, which violated s. 11(*d*) of the *Charter*, could be saved by s. 1.

[91] In this case, the Crown claimed that these sentencing provisions served the goals of accountability, protection of the public, and public confidence in the administration of justice. Even accepting the importance of these objectives, I agree with Goudge J.A. that the reverse onus requirements do not survive either the rational connection or minimal impairment branches of the s. 1 analysis:

> Taking as a given that in appropriate serious cases it serves accountability, public protection and public confidence to impose an adult sentence on the young offender and to lift the publication ban, putting the onus on the young person to demonstrate why neither should happen does little if anything to advance these objectives. Surely it is the availability of a more serious outcome (that is, the adult sentence and the lifted publication ban), rather than the placement of the onus on the young person to escape such an outcome, that serves these objectives. Thus, I think there is a want of rational connection between the objectives advanced and the impugned provisions.
>
> Moreover, so far as the more severe outcome does advance the objectives put forward by the Crown, the impugned provisions do not minimally impair the young offender's s. 7 rights. If the onus were on the Crown in each situation — to demonstrate why an adult sentence should be imposed and the publication ban lifted — the objectives would be achieved without infringing on the young offender's s. 7 rights at stake in this case. [paras. 86-87]

[92] I share these views, and am persuaded that Parliament's objectives can as easily be met by placing the onus on the Crown.

[93] This does not make young persons less accountable for serious offences; it makes them *differently* accountable. Nor does it mean that a court cannot impose an adult sentence on a young person. It means that before a court can do so, the Crown, not the young person, should have the burden of showing that the presumption of diminished moral culpability has been rebutted and that the young person is no longer entitled to its protection.

[94] Promoting the protection of the public is equally well served by putting this onus on the Crown, where it belongs. The Crown may still persuade a youth court judge that an adult sentence or the lifting of a publication ban is warranted where a serious crime has been committed. And young persons will continue to be accountable in accordance with their personal circumstances and the seriousness of the offence. But the burden of demonstrating that more serious consequences are warranted will be, as it properly is for adults, on the Crown.

[95] Under the presumptive offences regime, an adult sentence is presumed to apply and the protection of a publication ban is presumed to be lost. The impugned provisions place the onus on young persons to satisfy the court that they remain entitled to a youth sentence and to a publication ban. This onus on young persons is inconsistent with the presumption of diminished moral culpability, a principle of fundamental justice which requires the Crown to justify the loss both of a youth sentence and of a publication ban. The impugned provisions are therefore inconsistent with s. 7 of the *Charter* and are not saved by s. 1. To the extent that they impose this reverse onus, they are unconstitutional.

The Sentence

[96] There is no doubt that D.B. committed a serious offence with tragic consequences. It remains to determine whether the maximum allowable youth sentence he received from Lofchik J. should be set aside.

[97] The purpose of sentencing under the *YCJA* is expressed as follows in s. 38(1):

> **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.

[98] D.B. had been previously convicted for possession of stolen property and robbery, both involving threats and intimidation, and was bound by two separate probation orders at the time of the offence. He had a history of mental health issues and behavioural problems in school.

[99] He expressed remorse for his offence prior to sentencing and had made some positive steps while in pre-trial detention. The predisposition assessment recommended that he be treated in a therapeutic milieu, including a highly structured environment with integrated academic and social programming, and also concluded that societal as well as his personal needs could best be met by keeping D.B. in the juvenile justice correctional system rather than exposing him to more hardened criminals.

[100] Lofchik J. noted that the maximum allowable youth sentence for D.B.'s offence was three years. Acknowledging that the offence had to be considered "most serious", Lofchik J. described the act as "stupid, impulsive . . . borne of exuberance of youth and a misguided need for 'image' before the offender's peers" leading to a "tragic outcome". In response to the Crown's concerns about the maturity, character, background and previous record of the person, Lofchik J. felt that they could be addressed by the intensive rehabilitative custody and supervision order provisions of the *YCJA*. He concluded that "the need for rehabilitation of this offender and . . . the protection of society are better achieved through the intensive rehabilitation

programme available through a youth sentence than through a more protracted period of incarceration which may result from the imposition of an adult sentence". He sentenced D.B. to the maximum allowable sentence of intensive rehabilitative custody and supervision order for a period of three years — a continuous period of intensive rehabilitative custody for a period of 30 months, with the remainder of the sentence to be served under conditional supervision in the community.

[101] I agree with the rationale articulated by Goudge J.A. for upholding the sentence:

> Section 72(1) of the *YCJA* sets out a number of matters to be considered by the youth justice court in reaching its opinion about whether a youth sentence would be sufficient. The reasons for sentence of the trial judge reflect that he did so. His weighing of these matters to reach his opinion about sufficiency is a task that must attract deference in this court. The Crown does not suggest that he acted on an improper principle or considered extraneous matters. It essentially argues that he did the weighing wrongly. In my view, that is not enough to warrant the setting aside of his decision.
>
> With respect to the publication ban, the Crown did not make any submissions to support lifting it once the trial judge decided the onus question. Since the respondent clearly thought the ban should continue, I think the trial judge could properly proceed on the basis that no one challenged that it should be continued and that it was appropriate in the circumstances to leave the ban in place. I see no error in the trial judge's order to that effect.
>
> In summary, therefore, I see no reviewable error in the substantive dispositions made by the trial judge on the nature of the respondent's sentence and the continuation of the publication ban. [paras. 90-92]

[102] The appeal is therefore dismissed.

The reasons of Bastarache, Deschamps, Charron and Rothstein JJ. were delivered by

ROTHSTEIN J. —

I. Introduction

[103] I have read the reasons of my colleague Justice Abella. She is of the opinion that the provisions of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"), at issue in this appeal violate s. 7 of the *Canadian Charter of Rights and Freedoms*. In my respectful view, they do not.

[104] The *YCJA* creates a regime of presumptive offences committed by young persons aged 14 to 17 inclusive:

> (1) murder in the first and second degrees;
> (2) attempted murder;
> (3) manslaughter;
> (4) aggravated sexual assault; and
> (5) a third conviction for a serious violent offence (s. 2).

[105] If a young person is found guilty of one of these offences, two presumptions arise. The first is that the young person will be sentenced as an adult under the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), for those crimes. The second is that the publication ban that otherwise applies to young offenders will not be applicable. Both presumptions may be rebutted on application.

[106] I agree with Abella J. that young persons are entitled, based on their reduced maturity and judgement, to a presumption of diminished moral blameworthiness and that this presumption is a principle of fundamental justice. It is on the issue of whether this principle of fundamental justice creates further

presumptions of youth sentences lower than adult sentences and of a publication ban that we disagree.

[107] In my respectful view, the presumption of reduced moral blameworthiness of young persons as a principle of fundamental justice does not lead to the further presumption of a youth sentence or a publication ban, as held by Abella J. Parliament considered the competing interests, on the one hand, of young persons to have their reduced moral blameworthiness taken into account and, on the other, of society to be protected from violent young offenders and to have confidence that the youth justice system ensures the accountability of violent young offenders as it was entitled to do. That the *YCJA* presumes adult sentences and publication for serious violent offences is in accordance with principles of fundamental justice because it in no way precludes a youth sentence or a publication ban where considered appropriate by the youth criminal justice court. Further, to focus solely on the presumption of adult sentences and publication ignores the entire presumptive sentencing and publication scheme which provides extensive protections for young offenders who have committed serious violent offences and recognizes the presumption of reduced moral blameworthiness, properly defined.

[108] The presumptive offence scheme *significantly* recognizes the age, reduced maturity and increased vulnerability of young persons and, as a result, it complies with the principles of fundamental justice.

[109] I do not agree with Abella J. that the publication and sentencing provisions create a reverse onus which contravenes the principle of fundamental justice requiring that the Crown bear the burden of proving aggravating sentencing circumstances.

First, even though the legislative scheme treats a publication ban as part of the sentence for appeal purposes, the potential publication is neither state imposed nor part of the young person's sentence in fact. Second, the impugned provisions in no way relieve the Crown of its burden of proving all aggravating facts on sentencing. In effect, the presumptive sentencing regime simply provides for a higher range of sentences for young persons convicted of the most serious violent offences. Even so, Parliament has provided young offenders with the opportunity to satisfy the youth justice court that the presumptive higher range of sentence or the presumptive publication should not apply. Providing this opportunity to young offenders, especially when the sentencing judge is required to prompt young offenders to take advantage of the opportunity, represents Parliament's approach to balance the status of young offenders with the need to protect society from the perpetrators of the most serious violent crimes. It does not place a "persuasive burden" on young offenders that eliminates the Crown's burden of establishing aggravating sentencing factors.

[110] For these reasons, I am of the opinion that the Crown's appeal on the constitutional questions ought to be allowed.

II. Facts

[111] The following facts are found in the Statement of Facts for Guilty Plea (Appellant's Record, Exhibit 1, at pp. 164-66).

[112] On December 13, 2003, D.B., who was 17 at the time, went to a shopping mall in Hamilton with some friends. They began exchanging insults with another group of young men and two of them decided to fight. When the fight between those

two began outside the mall, D.B. turned to Jonathan Romero and said “me and you are going to fight right now”. Romero said “no”. Romero was watching the others fight with his arms down at his sides when D.B. punched him on the right side of his neck and face area. The punch was described as a “sucker punch” meaning that Romero was neither prepared nor ready for the punch. Romero fell to the ground from the force of D.B.’s punch. D.B. then continued the assault by jumping on top of Romero and punching him four more times on the face and neck. Romero was knocked unconscious and unable to defend himself.

[113] D.B. then fled back towards the shopping mall. The two other combatants stopped fighting and, along with three employees of a nearby store, came to the aid of the victim. An ambulance was called. When it arrived, Romero had no vital signs. Romero later died of his injuries.

[114] Inside the shopping mall, D.B. was heard to say “[y]ou missed it, it was one punch, the guy’s not even fuckin’ moving”. D.B. changed his clothes in a nearby restaurant, stowed the old clothes in a knapsack and gave the knapsack to another person. He then went to the home of one of his friends, talking about the fight on the way. Later that evening, D.B. went to a nightclub. He left with some friends in a taxi around closing time.

[115] In the taxi, D.B. learned via cellular telephone that Romero had died. He stayed the night at the home of one of his friends. When the police arrived at the friend’s home the following morning, D.B. attempted to flee out the back door, but was subsequently caught and arrested.

[116] D.B. pleaded guilty and was convicted of manslaughter. He made an application to receive a youth sentence, which was opposed by the Crown.

[117] D.B. had had frequent physical altercations with peers and had been suspended from high school numerous times, primarily for disruptive behaviour, verbal aggression, and disrespectful and intimidating conduct towards school staff. At the time of the offence, D.B. was bound by two separate probation orders, arising out of prior convictions for possession of stolen property and robbery. Both offences involved threats and intimidation. While he was in custody awaiting disposition and sentence for manslaughter, D.B. was involved in several assaultive incidents with other inmates and staff members (see Predisposition Assessment, Appellant's Record, at pp. 184-85).

[118] As a result of the Crown opposing his youth sentence application, D.B. challenged the constitutionality of the presumptive offence provisions of the *YCJA*. The sentencing judge allowed the *Charter* challenge ((2004), 72 O.R. (3d) 605 (S.C.J.)). He imposed a youth sentence of 30 months in a juvenile correctional facility. The Crown appealed to the Ontario Court of Appeal. The Court of Appeal dismissed the Crown's appeal, holding that the presumptive offence provisions violated s. 7 of the *Charter* and were not saved under s. 1 ((2006), 79 O.R. (3d) 698).

III. Analysis

[119] The constitutionality of the sentencing and publication ban provisions of the *YCJA* in the case of presumptive offences is at issue. The basis of the challenge is that these provisions presume the imposition of adult sentences and permit

publication of a young offender's identity. It is said that the onus is placed on the young person, rather than the Crown, since it is the young offender who must persuade the court that, contrary to the presumptions, a youth sentence and a publication ban are appropriate. It is argued that this constitutes a *reverse onus* and is a violation of s. 7 of the *Charter*.

[120] These reasons first address the constitutionality of the presumptive offence sentencing provisions by (1) determining whether there is a deprivation of s. 7 interests, (2) examining the applicable principles of fundamental justice and (3) determining whether the deprivation is in accordance with them. The reasons next address the constitutionality of the publication provisions by applying the same approach.

A. *Sentencing Provisions*

(1) Section 7 Interests

[121] Section 7 of the *Charter* guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". This requires proof first, of a deprivation of the right to life, liberty or security of the person, and second, that the deprivation is not in accordance with the principles of fundamental justice. If both are established, there will be a violation of s. 7. The Crown then bears the burden of justifying the deprivation of the s. 7 right under s. 1, which provides that the rights guaranteed by the *Charter* are "subject only to such reasonable limits prescribed by law as can be

demonstrably justified in a free and democratic society": *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, at para. 12.

[122] As conceded by the Crown, the possibility of an adult sentence engages a young offender's s. 7 right to liberty. The young offender is exposed to the adult sentencing regime rather than the youth sentencing scheme and, as a result, to longer sentences. As such, if a young offender is sentenced as an adult, there is a deprivation of liberty since the duration of the restriction of the young offender's liberty interest is affected (*R. v. S.R.B.*, [2008] A.J. No. 56 (QL), 2008 ABQB 48, at para. 30). This possibility of an adult sentence constitutes a deprivation of the s. 7 right to liberty: *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, at p. 464, *per* Lamer J. (as he then was).

[123] I next turn to the applicable principles of fundamental justice.

(2) Applicable Principles of Fundamental Justice

[124] In her reasons, Abella J. holds that the presumption of reduced moral blameworthiness of young persons is a principle of fundamental justice. She states that from this principle of fundamental justice follows the presumption of lower sentences for young offenders. Although the Ontario Court of Appeal formulated a different principle of fundamental justice, that of the separate treatment of young and adult offenders, it also held that this entitles young offenders to a presumption of lower sentences. I will examine both proposed principles of fundamental justice separately. Then, I will refer to the principle of fundamental justice that in sentencing, the Crown

bears the burden of establishing aggravating factors that would justify a more severe penalty.

(a) *Abella J.'s Formulation: Is the Presumption of Reduced Moral Blameworthiness of Young Persons a Principle of Fundamental Justice?*

[125] In her reasons, Abella J. holds that the presumption of reduced maturity and increased vulnerability of young persons must be taken into account by the justice system. I agree with her and with her analysis of how this principle meets all three of the requirements of a principle of fundamental justice, set out by this Court in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74. The presumption of reduced moral blameworthiness of young persons is (1) a legal principle (2) about which there is significant societal consensus that it is fundamental to the way the legal system ought to fairly operate and (3) it is sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty or security of the person: *Malmo-Levine*, at para. 113.

[126] The controversy is what follows from this presumption of reduced moral blameworthiness: is a presumption of lower sentences for young offenders a necessary attribute of this presumption of reduced moral blameworthiness?

(b) *Ontario Court of Appeal's Formulation: Is the Separate Treatment of Young and Adult Offenders a Principle of Fundamental Justice?*

[127] The Ontario Court of Appeal determined that the separate treatment of young and adult offenders is a principle of fundamental justice (*per* Goudge J.A., at para. 55). Although this formulation differs *in form* from the one advanced by Abella

J., *in substance*, it also requires that the presumption of reduced moral blameworthiness of young persons must be taken into account. As stated above, I agree that the presumption of reduced moral blameworthiness of young persons is a principle of fundamental justice.

(c) *Is the Presumption of Youth Sentences a Principle of Fundamental Justice?*

[128] Abella J. and Goudge J.A. both conclude that a further presumption of youth sentences for young offenders necessarily follows from the presumption of reduced moral blameworthiness of young persons.

[129] Abella J. and Goudge J.A. do not expressly state that the presumption of the imposition of youth sentences is a principle of fundamental justice. However, I think it must follow that if, as they hold, the principle of reduced moral blameworthiness leads inevitably to the presumption of youth sentences, the presumption of youth sentences must also be a principle of fundamental justice. In other words, fundamental justice requires that there always be a presumption of youth sentences.

[130] I do not agree that the presumption of youth sentences is a principle of fundamental justice. First, there is no such thing as a youth sentence in the abstract. What constitutes a *youth sentence* as opposed to an *adult sentence* depends on the particular legislative sanctions in force at the relevant time. Further, there may be much overlap between the range of sentences that can be imposed on a young person and that which can be imposed on an adult offender for any given offence. Therefore, the presumption of youth sentences cannot be "identified with sufficient precision to

yield a manageable standard against which to measure deprivations of . . . liberty" so as to establish a constitutional norm: *Malmo-Levine*, at para. 113.

[131] In addition, there is no societal consensus that such a presumption is a vital component of our notion of justice. Although there is societal consensus that young persons are more dependent and vulnerable and that the criminal justice system should take this into account, there is also societal consensus that young offenders must be held accountable for the acts that they commit and that the public must be protected from them. Studies on public perceptions of youth crime suggest that the prevailing views of the public are that youth crime is rising, particularly violent youth crime, and that young offenders are handled too leniently by youth justice courts: A. N. Doob and C. Cesaroni, *Responding to Youth Crime in Canada* (2004), at pp. 3-13. Studies also suggest that a strong majority of Canadians think that the sentences imposed by youth justice courts are either too lenient or much too lenient: J. B. Sprott, "Understanding Public Opposition to a Separate Youth Justice System" (1988), 44 *Crime & Delinquency* 3, at pp. 399-411, and J. B. Sprott, "Understanding public views of youth crime and the youth justice system" (1996), 38 *Can. J. Crim.* 271, at pp. 281-85. These findings are indicative that there is no societal consensus that youth sentences are a vital component of our notion of justice.

[132] Further, a historical analysis of young offender legislation shows that even though it has existed in Canada since 1908, its purpose and approach have varied significantly. This is indicative of a lack of societal agreement over time that the presumption of youth sentences should apply to young offenders for all offences as a vital component of our notion of justice: N. Bala, *Youth Criminal Justice Law* (2003),

at p. 501. Indeed, frequent legislative reform has resulted because of changes in societal perceptions of how young offenders should be treated.

[133] From 1908 to 1984, the law governing youth crime, the *Juvenile Delinquents Act, 1908*, S.C. 1908, c. 40, was "welfare oriented", focussing on the treatment needs of individual young persons (see Bala, *Youth Criminal Justice Law*, at p. 7).

[134] Once a young person was found delinquent, the *Juvenile Delinquents Act* provided that "he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision" (*Juvenile Delinquents Act, 1929*, S.C. 1929, c. 46, s. 3(2)). It is noteworthy that, for the first half of the twentieth century, there was relatively little public concern about the legal responses to youth crime: Bala, *Youth Criminal Justice Law*, at pp. 7-9.

[135] By the 1960s, questions were being raised about the welfare-oriented philosophy underlying the *Juvenile Delinquents Act*. There was a growing public controversy about whether promoting the welfare of young persons should be the only principle guiding the societal response to young offenders: Bala, *Youth Criminal Justice Law*, at p. 10. In 1984, the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110 (later codified as the *Young Offenders Act*, R.S.C. 1985, c. Y-1 ("*YOA*")), replaced the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. In keeping with societal pressure to get tough on youth criminality, the *YOA* was introduced and represented a change in Canada's response to youth offending, moving from a welfare-oriented regime to a regime that was criminal law: Bala, *Youth Criminal Justice Law*, at p. 12. The *YOA* provided that "while young persons should not in all instances be held accountable in

the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions" (s. 3(1)(*a*)).

[136] After its coming into force, the *YOA* underwent major amendments. Many of the changes brought about by the amendments were in response to the public's request for a more punitive approach to young offenders and tougher sentences: S. S. Anand, "Catalyst for Change: The History of Canadian Juvenile Justice Reform" (1999), 24 *Queen's L.J.* 515, at pp. 515-59, and Bala, *Youth Criminal Justice Law*, at pp. 12-18. For instance, in the 14 years following the proclamation of the *YOA*, the maximum sentence for murder in youth court increased twice and the transfer provisions were amended to stipulate that the "protection of the public" was to be the paramount consideration when deciding on the transfer of young persons into adult courts: Anand, at pp. 515-59, and see for example *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1992, c. 11. See also N. Bala, "Dealing with Violent Young Offenders: Transfer to Adult Court and Bill C-58" (1990), 9 *Can. J. Fam. L.* 11, and N. Bala, "The 1995 *Young Offenders Act* Amendments: Compromise or Confusion?" (1994), 26 *Ottawa L. Rev.* 643.

[137] In 2002, public concern regarding the level and seriousness of youth crime served, once again, as a catalyst for reform in Canadian youth justice when the *YCJA* was enacted. One of the reasons given by the federal Justice Minister for the new legislation was that "the public believes that the *Young Offenders Act* and youth court judges are too lenient, and questions the ability of the youth justice system to provide meaningful penalties proportionate to the seriousness of offences": Canada, Department of Justice, *A Strategy for the Renewal of Youth Justice* (1998), at p. 6.

[138] From the above historical review of young offender legislation in Canada, it is apparent that frequent legislative reform has occurred because of changes in societal views of how to treat young offenders and in response to the public's request for a more punitive approach to young offenders and tougher sentences. This is indicative of a lack of societal agreement that the presumption of youth sentences should apply to young offenders for all offences as a vital component of our notion of justice: Bala, *Youth Criminal Justice Law*, at p. 501. For all these reasons, I conclude that there is no societal consensus that the presumption of youth sentences is vital to our notion of justice. It is therefore not a principle of fundamental justice.

(d) *Is the Crown's Burden of Proving Aggravating Sentencing Circumstances a Principle of Fundamental Justice?*

[139] I agree with Abella J. and the Ontario Court of Appeal that it is a principle of fundamental justice that, in sentencing, the Crown bears the burden of establishing beyond a reasonable doubt any aggravating circumstances in the commission of an offence that would justify a more severe penalty: *R. v. Pearson*, [1992] 3 S.C.R. 665.

(e) *Summary*

[140] To summarize, at this point I have recognized two principles of fundamental justice: the reduced moral blameworthiness of young persons and the Crown's burden of proving aggravating sentencing factors beyond a reasonable doubt. I have also concluded that the presumption of youth sentences is not a principle of fundamental justice.

[141] I now turn to whether the presumptive offence sentencing provisions of the *YCJA* are in accordance with the two applicable principles of fundamental justice: (a) the reduced moral blameworthiness of young persons and (b) the Crown's burden of proving aggravating sentencing factors beyond a reasonable doubt.

(3) Sentencing Provisions: Is the Liberty Deprivation in Accordance with Principles of Fundamental Justice?

(a) *The Current Sentencing Provisions Recognize the Presumption of Reduced Moral Blameworthiness of Young Persons*

[142] Abella J. and I both agree that young offenders who have committed presumptive offences can be subject to adult sentences. Our disagreement lies in the question of whether a presumption of adult sentences may apply to serious and violent offences. This question cannot be answered properly without defining the boundaries of the presumption of reduced moral blameworthiness of young persons.

[143] When defining the boundaries of the presumption of reduced moral blameworthiness of young persons, consideration must be afforded to societal interests such as public safety and accountability of young offenders who commit the most serious violent offences. This Court has held that, when examining the contours of a principle of fundamental justice, individual and societal interests within s. 7 must be taken into account. As Gonthier and Binnie JJ. held in *Malmo-Levine*, at para. 99:

> Implicit in each of these principles [of fundamental justice] is, of course, the recognition that the appellants do not live in isolation but are part of a larger society. The delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question. [Emphasis added.]

[144] Consideration of both societal interests and individual rights within s. 7 is necessary because "[t]he principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally" (*per* McLachlin J. (as she then was) in *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-52).

[145] To delineate the boundaries of the presumption of reduced moral blameworthiness of young persons as a principle of fundamental justice in the context of the presumptive offence scheme, societal goals of sentencing and the circumstances of the offence must be considered. Such a contextual interpretation is required because s. 7 rights "often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances": *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 61. Only by affording consideration to important societal interests, such as public safety and accountability of young offenders, can the presumption of reduced moral blameworthiness of young persons be properly defined.

[146] In enacting the presumptive offence scheme, Parliament considered the interests of society in being protected against the violence that may be perpetrated as a consequence of the earlier release of young offenders who received lower youth sentences and in requiring the accountability of young offenders who commit serious violent offences. Parliament recognized that some young offenders have committed offences that are so serious and egregious in nature, and pose such a great risk to public safety that it would be inappropriate to presume a lesser youth sentence in such circumstances (Canada, Department of Justice, *A Strategy for the Renewal of Youth Justice*; Doob and Cesaroni, at pp. 22-23 and 189).

[147] Although the presumptive sentencing scheme recognizes the interests of society, it also recognizes the interests of young offenders since it provides for youth sentences in appropriate cases. Parliament appreciated these competing interests. La Forest J. stated for the majority in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 329:

> In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing. [Emphasis added.]

[148] Abella J. focusses solely on the age of the young offender to conclude that the presumption of reduced moral blameworthiness requires the further presumption of a lesser youth sentence for serious violent offences. However, it was entirely appropriate for Parliament to consider the competing interests, on the one hand, of young persons to have their reduced moral blameworthiness taken into account and, on the other, of society to be protected from violent young offenders and to have confidence that the youth justice system ensures the accountability of violent young offenders. This balancing was a legitimate exercise of Parliament's authority to determine how best to penalize particular criminal activity, a power this Court has recognized as broad and discretionary. In general, Parliament's authority in determining appropriate sentences is subject only to constitutional review under s. 12 of the *Charter* (*R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1069-70).

[149] That the *YCJA* presumes adult sentences for serious violent offences is in accordance with the presumption of reduced moral blameworthiness of young persons because it in no way precludes a youth sentence where considered appropriate by the youth criminal justice court. In effect, Parliament has merely legislated a

presumptively higher range of sentences in respect of young persons who are convicted of the most serious violent crimes. Further, to focus solely on the presumption of adult sentences ignores the entire presumptive sentencing scheme which provides extensive protections for young offenders who have committed serious violent offences. By looking at the sentencing provisions of the *YCJA*, it is evident that there is extensive legislative recognition of the interests of young persons in having their presumed reduced moral blameworthiness considered:

(1) Even before a finding of guilt, the youth justice court judge must inform the young person charged with a presumptive offence that he or she may face an adult sentence (s. 32(1)(*d*)).

(2) While these offences carry the presumption of an adult sentence, the young offender is entitled to make an application for an order to receive a youth sentence (s. 63(1)).

(3) If the Crown does not oppose the young person's application for a youth sentence, the court must, without a hearing, find that a youth sentence is warranted (s. 63(2)).

(4) If at any stage of the proceedings the Crown decides to not seek an adult sentence, the court shall order the imposition of a youth sentence and a publication ban (s. 65).

(5) Even when the young offender has not made an application for a youth sentence of his or her own volition, the sentencing judge *must* ask the young person whether he or she wishes to make such an application (s. 70(1)).

(6) During the hearing of the young offender's application for a youth sentence, the court *must* consider *the age and maturity* of the young

offender and whether a youth sentence is of sufficient length to hold the young offender accountable for the offending behaviour (s. 72(1)).

(7) In making its decision on the young person's youth sentence application, the court *must* also consider the pre-sentence report (s. 72(3)). This independent report includes information regarding (s. 40(2)):

a) the young offender's criminal history;

b) the availability and appropriateness of community services;

c) the school and employment history of the young offender;

d) the results of an interview with the young offender and members of his or her family;

e) information on the young offender's *age*, *maturity*, character, attitude, and willingness to make amends;

f) any other information that may assist the court in determining whether there is an alternative to custody.

(8) The youth justice court may, on its own motion or on application of the young offender or the Crown, require a medical, psychological or psychiatric report of the young offender when it is determining whether or not to impose an adult sentence (ss. 34(1) and 34(2)(*b*)).

(9) The youth justice court must give an opportunity to young offenders and their parents to be heard (s. 71).

[150] Because a youth sentence may be imposed notwithstanding that a young offender has been convicted of a serious violent offence, and because of all of the other procedural protections afforded to young offenders convicted of such offences, the legislative sentencing scheme recognizes the interests of young persons in having their presumed reduced moral responsibility taken into account.

[151] Further, the interests of the young offender continue to be recognized even when an adult sentence has been imposed. Section 76(2) *YCJA* specifies that if the offender is under 18 years of age at the time of sentencing, the adult sentence shall be carried out in youth custody unless it is not in the youth's best interest or it would be unsafe to do so. Young offenders serving adult sentences are allowed to stay in youth custody until they reach 20 years of age, and even then the court has the discretion to extend the stay in the youth facility (s. 76(9) *YCJA*).

[152] It is important to note that even when an adult sentence for manslaughter, aggravated sexual assault or a third conviction for a serious violent crime is imposed, the young person also benefits from unique treatment under the *Criminal Code.* The fundamental principle of sentencing, as set out in the *Criminal Code,* is that a sentence must be proportionate to the gravity of the offence and *the degree of responsibility of the offender* (s. 718.1 *Cr. C.*). The youth justice court must also consider all relevant circumstances relating to the offence and to *the offender* (s. 718.2(*a*) *Cr. C.*). These provisions ensure that when young offenders are sentenced as adults for these offences, their presumed reduced moral blameworthiness is considered before the imposition of a sanction.

[153] Even young offenders serving adult sentences for first or second degree murder are given special recognition under the *Criminal Code* and benefit from significantly reduced parole ineligibility periods (ss. 745.1, 745.3 and 745.5 *Cr. C.*). The young offender sentenced as an adult for first or second degree murder will be eligible for parole under s. 745.1 when he or she has served:

> (*a*) . . . between five and seven years of the sentence as is specified by the judge presiding at the trial, or if no period is specified by the judge

> presiding at the trial, five years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;
> (*b*) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and
> (*c*) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence.

[154] This affords the young offender significant reduced parole ineligibility given the fact that adult offenders are only eligible for parole after 25 years of imprisonment in the case of first degree murder and 10 years in the case of second degree murder (s. 745(*a*) and (*c*) *Cr. C.*).

[155] Hence, the current *YCJA* sentencing provisions recognize the presumption of reduced moral blameworthiness of young persons even when an adult sentence has been imposed on the young offender.

[156] I note that other provisions of the *YCJA* also recognize the presumption of reduced moral blameworthiness of young persons.

[157] Prior to a finding of guilt, all young persons accused of a crime — no matter how serious the allegations against them — benefit from a separate youth system which recognizes their reduced maturity and increased dependency (s. 3(1)(*b*)(ii) *YCJA*). This special system includes guaranteed access to a youth justice court during the entire process, including sentencing (s. 14(1) *YCJA*). Access to a youth justice court translates into a reduction of procedural delays that arose in the adult sentencing process under the *YOA* and ensures that the youth justice court has more information when making important sentencing decisions: Bala, *Youth Criminal Justice Law*, at p. 506.

[158] Throughout the *YCJA*, there are other examples of special protections afforded to young persons, which are not available to adults, during police questioning and their arrest and pre-trial detention:

(1) notification of the young person's parents if the young person is arrested by the police (s. 26);

(2) young persons cannot consent to a police request for fingerprints for investigative purposes (s. 113(2));

(3) a young person being questioned by police must be advised of the right to silence and warned of the potential use of any statement against him or her, as well as of the right to consult with a parent and to have that parent present while a statement is being made (s. 146(2)(*b*), (*c*) and (*d*));

(4) if the young person being questioned decides to waive his or her rights pursuant to s. 146, the waiver must be video- or audio-taped or must be in writing and signed by the young person (s. 146(4)).

[159] It is evident that throughout the *YCJA* there are numerous protections provided to young offenders. See: Bala, *Youth Criminal Justice Law*, at pp. 184-271. The number of different procedural protections and the fact that these protections are afforded *before*, *during* and *after* sentencing demonstrate that significant consideration is afforded to a young person's age, maturity and vulnerability throughout the *YCJA*. The nature, number and extent of the enhanced legislative protections afforded to young persons make it abundantly clear that the *YCJA* as a whole, and the presumptive offence sentencing scheme in particular, significantly recognize the presumption of the reduced moral blameworthiness of young persons.

[160] For all of these reasons, I am of the opinion that the presumptive sentencing provisions accord with the presumption of reduced moral blameworthiness of young persons. I next turn to whether they also comply with the other applicable principle of fundamental justice.

(b) *The Current Sentencing Provisions Comply with the Requirement that the Crown Bears the Burden of Proving Aggravating Factors in Sentencing*

[161] In para. 78 of her reasons, Abella J. states that the presumptive sentencing provisions are inconsistent with the principle of fundamental justice which requires that the Crown bear the burden of proving aggravating sentencing factors since the provisions place the onus on young offenders, rather than on the Crown, to demonstrate why a youth sentence should be imposed. She refers to Professor Bala's characterization of the burden placed on young offenders as "persuasive" (Abella J.'s reasons, at para. 74).

[162] The focus in this case is whether the presumptive sentencing provisions comply with the requirements of the *Charter*. In my view, pursuant to s. 63(1) *YCJA*, Parliament provided young offenders with a *right* to satisfy the youth justice court that the higher legislated range of sentences should not apply and that a youth sentence is warranted. Conferring this right on young offenders represents Parliament's approach to balance the status of young persons with the need to protect society from the perpetrators of the most serious violent crimes. Parliament did not simply provide for more severe sentences in all cases where a young person has been convicted of such a crime. Young offenders are given the opportunity to apply for youth sentences and thereby set in motion the determination by the youth justice court of the appropriate

sentence in the circumstances. Providing this opportunity to young offenders, especially when the sentencing judge is required to prompt the young offenders to take advantage of the opportunity (s. 70(1)), does not place a "persuasive burden" on young offenders that eliminates the Crown's burden of establishing aggravating sentencing factors.

[163] Section 72 does not mandate that the young person adduce evidence, such that failing to do so automatically leads to the imposition of an adult sentence. The youth justice court *must* have access to information in relation to the factual matters referred to in s. 72(1), i.e. all relevant considerations, *even if the young person declines to call any evidence on those matters.* In the present case, the sentencing judge considered, among other things, the agreed statement of facts, a pre-sentence report, a comprehensive predisposition assessment and a second predisposition assessment prepared in relation to another offence committed by D.B. (Appellant's Record, at pp. 20-21). It is important to note that the predisposition assessment, a 23-page document, contained information about D.B.'s background, family and individual history, history of mental health, school and vocational information, history of criminal and assaultive behaviour, reports of the custody facility where he spent time prior to his sentencing hearing, and individual, family, psychological and psychiatric assessments. Further, the sentencing judge also requested an expert report from the Provincial Director of the Intensive Rehabilitation Custody and Supervision (IRCS) Program in Ontario. In his report, he outlined D.B.'s suitability for the IRCS Program. This program is only available to young offenders who receive a youth sentence (s. 42(7) *YCJA*). As such, the sentencing judge had access to all of this information, regardless of whether D.B. sought to adduce evidence.

[164] Nonetheless, s. 72(2) entitles the young person to adduce additional evidence to show that a youth sentence is sufficient. This is analogous to a normal sentencing hearing in which the Crown puts forward evidence of any aggravating factors and the accused puts forward evidence of any mitigating factors. As held by the Court of Appeal for British Columbia in *R. v. K.D.T.* (2006), 222 B.C.A.C. 160, 2006 BCCA 60, at para. 62:

> As in any sentencing situation, if the Crown wishes to bring forward evidence of aggravating factors, the Crown bears the burden of proving any relevant facts that are contested. Likewise, contested facts in support of mitigating factors must be proved by the offender. As in all sentencing situations, the aim of the judge is to balance the considerations raised and arrive at an appropriate sentence. [Emphasis added.]

[165] In the present case, D.B. did bring forward evidence of mitigating factors. He adduced into evidence:

> (1) a handwritten letter, in which he expressed remorse for his actions, and
>
> (2) a letter from Tracy Kowalchuk, a teacher at the detention centre, attesting that D.B. was committed and behaved well in her class.

[166] Further, as held in *K.D.T.*, at para. 62, the onus found within s. 72(2) is "not one that contains a requirement of proof, nor does it remove the onus on the party bringing forward contested facts to prove those facts". That young offenders must apply for youth sentences does not obviate the Crown's burden regarding aggravating circumstances on sentencing. To the extent that the Crown wishes to rely on contested aggravating factors to persuade the court that an adult sentence is appropriate, it will still be required to prove those facts beyond a reasonable doubt: *Pearson*, at p. 683, and s. 724 *Cr. C.*

[167] In this case, the Crown did wish to rely on contested aggravating factors to persuade the sentencing judge that an adult sentence was appropriate. The Crown's submission was that D.B. bragged about the fight to his friends in the mall. Since the issue of the characterization of D.B.'s statement to his friends was contested, the Crown, to support its submission, adduced into evidence the testimony of a witness in the mall who overheard D.B.'s statement.

[168] For these reasons, the opportunity given to young offenders to apply for youth sentences cannot be characterized as a "persuasive burden" on young offenders.

[169] In the theoretical case where the young offender does not make an application for a youth sentence, one might argue that the presumptive offence sentencing provisions allow the Crown to achieve the "more severe" penalty of an adult sentence without discharging any burden of persuasion. However, it is important to remember that the sentencing judge has prompted the young offender to take advantage of this opportunity but the young offender has declined to do so. I cannot see how not taking advantage of an opportunity can be characterized as placing a burden of persuasion on the young offender. Answering "yes" cannot be cast as a burden of proof of any kind.

[170] For these reasons, the presumptive offence sentencing provisions do not contravene principles of fundamental justice which always require that the Crown bears the burden of proving aggravating sentencing factors beyond a reasonable doubt.

B. *Publication Provisions*

(1) Section 7 Interests

[171] I am unable to agree with Abella J. that the provisions relating to the presumption of publication engage the young offender's s. 7 right to liberty because a publication ban is part of the sentence (Abella J.'s reasons, at para. 87). In my view, even though the *YCJA* legislative scheme treats the order for a publication ban as part of the sentence for appeal purposes (ss. 37(4) and 75(4)), the publication ban forms no part of the young person's sentence in fact. It is *deemed* part of the sentence *for appeal purposes only*. The purpose of the deeming provisions is to create an express right of appeal of publication ban orders, which would otherwise not exist. They do not change the fact that a publication ban is not a sentence.

[172] Further, the liberty interest protected by s. 7 encompasses freedom from physical restraint and protection of an individual's personal autonomy: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 49. Since the presumption of publication does not cause physical restraint on young offenders nor does it prevent them from making fundamental personal choices, the interests sought to be protected in this case do not fall within the liberty interest protected by s. 7.

[173] Also, I cannot agree with the Ontario Court of Appeal, at para. 76, that the publication provisions engage the young offender's s. 7 right to security of the person.

[174] Where, as here, the security right in s. 7 is being invoked on the basis of an impact on the individual's psychological security, "serious state-imposed psychological stress" must be demonstrated: *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

In *Blencoe*, at p. 57, Bastarache J., for the majority of this Court, stated the two factors which must be evaluated: "the psychological harm must be state imposed, meaning that the harm must result from the actions of the state" and "the psychological prejudice must be serious" (emphasis deleted).

[175] I accept that publication of a young offender's identity may "increase a youth's self-perception as an offender, disrupt the ability of a youth's family to provide support, and negatively affect interaction with peers, teachers, and the surrounding community": Bala, *Youth Criminal Justice Law*, at p. 382. See also *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 15.

[176] However, the difficulty in this case is not the *existence of harm* but rather whether that harm is *state induced*. In my view, it is not.

[177] In *Blencoe*, the respondent Blencoe claimed that his s. 7 security rights were violated because of psychological harm that he suffered as a result of state-caused delays in his human rights proceedings. Bastarache J. emphasized that it is "inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state" (para. 59). He explicitly stated that psychological stress resulting from media coverage can only underlie a s. 7 claim *where it can be directly linked to state action* (paras. 67, 72 and 73).

[178] In the case at bar, there is *no* state action: the stigma and labelling that may arise from release of the young offender's identity result from the actions of the media

and broader society. The harm is a product of media coverage and society's reaction to young offenders and to the crimes they commit.

[179] Although Parliament has recognized that unwanted publicity and the public's negative reaction may harm young offenders convicted of crimes, and has afforded the vast majority of them a degree of protection by requiring a publication ban (s. 110(1) *YCJA*), this does not mean that the state is responsible for *imposing* the harm that may result without the publication ban.

[180] D.B. argued that in *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 C.C.C. (3d) 321 ("*Quebec Reference*"), at paras. 209-10, the Quebec Court of Appeal distinguished *Blencoe* on the basis that there are fundamental differences between criminal proceedings and human rights proceedings. In doing so, the Quebec Court of Appeal relied, at para. 207, on a passage from *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 919-20:

> In this context, the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (A. Amsterdam ["Speedy Criminal Trial: Rights and Remedies" (1975), 27 *Stan. L. Rev.* 525], at p. 533). These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

[181] While I agree with the proposition advanced in *Mills*, in my view, this passage is not relevant to the case at bar. Finding that, in criminal proceedings, the concept of security of the person includes protection against stigmatization does not resolve the problem of whether the harm is state induced. There is nothing in *Mills* that implies that the requirement of nexus between the harm and the state is not necessary in criminal proceedings.

[182] Furthermore, the comments in *Mills* relate specifically to the stigma which may attach to an accused person *awaiting trial* and who is still benefiting from the presumption of innocence. Indeed, in that case, Mr. Mills made a motion to stay the proceedings during his preliminary inquiry alleging, among other things, denial of his right to be tried within a reasonable time under s. 11(*b*) of the *Charter*. In the present appeal, we are considering the rights of an individual who has already pleaded guilty to a crime. Hence, *Mills* is not applicable to the present appeal. For all these reasons, I disagree with the view expressed by the Quebec Court of Appeal in *Quebec Reference*.

[183] In sum, the publication ban provisions of the *YCJA* do not engage the s. 7 right to security of the person. However, even though it is unnecessary to do so, I have also briefly considered whether they accord with the principles of fundamental justice.

(2) Publication Provisions: Is the Presumed Deprivation in Accordance with Principles of Fundamental Justice?

(a) *The Current Publication Provisions Recognize the Presumed Reduced Moral Blameworthiness of Young Persons*

[184] In a case where a young person has received an adult sentence, there will not be an automatic publication ban of his or her name (s. 110(2) *YCJA*). The young person is entitled to make an application to have the publication ban imposed (s. 75(1) *YCJA*). Even when the young person has not made an application, at the sentencing hearing the court *must* ask whether he or she now wishes to make such an application for a publication ban (s. 75(3) *YCJA*). This feature clearly demonstrates the importance the *YCJA* affords to the privacy interests of the young offender.

[185] When an application for a publication ban has been made by either the young offender or the Crown, the court will grant the order if it considers it appropriate *in the circumstances*, taking into account the importance of rehabilitating the young person and the public interest (s. 75(3) *YCJA*). This ensures that the presumption of reduced moral responsibility of young offenders is taken into consideration by the sentencing judge together with the protection and safety of the public.

[186] All of these features make it clear that the publication provisions take into account the reduced moral blameworthiness of youth.

(b) *The Current Publication Provisions Comply with the Requirement that the Crown Bears the Burden of Proving Aggravating Factors in Sentencing*

[187] Abella J. states that the publication provisions violate the principle of fundamental justice that the Crown must bear the burden of proving aggravating sentencing circumstances because (1) publication is part of a "more severe" sentence and (2) removing the publication ban stigmatizes the young offender and increases the severity of the sentence for the young person (Abella J.'s reasons, at paras. 86 and 87).

[188] Firstly, as I have already stated, even though the *YCJA* legislative scheme treats a publication ban as part of the sentence for appeal purposes (ss. 37(4) and 75(4)), the publication ban forms no part of the young person's sentence in fact.

[189] Secondly, even if I were to accept the proposition that a presumption of publication does increase the severity of the sentence of the young offender because

of its psychological impact, the opportunity given to a young person to make an application for the imposition of a publication ban does not eliminate the Crown's burden of establishing aggravating sentencing factors. Without requiring anything more from the young person, the youth justice court *must* take into account the importance of rehabilitating the young person and be satisfied that it would be appropriate to impose a publication ban (s. 75(3) *YCJA*). The opportunity to make an application does not rise to the level of a burden of proof of any kind, especially given the fact that the young person must be advised of the opportunity by the sentencing judge (s. 75(1) *YCJA*).

[190] As a result, it is my conclusion that the publication provisions do not breach the principle of fundamental justice that the Crown must bear the burden of proving aggravating sentencing factors.

IV. Conclusion

[191] For these reasons, the impugned provisions of the *YCJA* are not in contravention of principles of fundamental justice and, in my view, the appeal on the constitutional questions ought to be allowed. I would answer the constitutional questions as follows:

1. Do ss. 62, 63, 64(1), 64(5), 70, 72(1), 72(2), 73(1), 75 and 110(2)(*b*) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, in whole or in part or through their combined effect, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

[192] Finally, on the issue of whether D.B.'s youth sentence was reasonable, since the trial judge determined D.B.'s sentence before deciding on the constitutionality of the presumptive sentencing and publication provisions, it cannot be said that the trial judge's sentence was tainted by his determination of the unconstitutionality of the provisions. As a result, I do not believe that the sentence warrants interference by this Court.

APPENDIX

Youth Criminal Justice Act, S.C. 2002, c. 1

> **62.** An adult sentence shall be imposed on a young person who is found guilty of an indictable offence for which an adult is liable to imprisonment for a term of more than two years in the following cases:
>
> (*a*) in the case of a presumptive offence, if the youth justice court makes an order under subsection 70(2) or paragraph 72(1)(*b*); or
>
> (*b*) in any other case, if the youth justice court makes an order under subsection 64(5) or paragraph 72(1)(*b*) in relation to an offence committed after the young person attained the age of fourteen years.
>
> **63.** (1) A young person who is charged with, or found guilty of, a presumptive offence may, at any time before evidence is called as to sentence or, where no evidence is called, before submissions are made as

to sentence, make an application for an order that he or she is not liable to an adult sentence and that a youth sentence must be imposed.

(2) If the Attorney General gives notice to the youth justice court that the Attorney General does not oppose the application, the youth justice court shall, without a hearing, order that the young person, if found guilty, is not liable to an adult sentence and that a youth sentence must be imposed.

64. (1) The Attorney General may, following an application under subsection 42(9) (judicial determination of serious violent offence), if any is made, and before evidence is called as to sentence or, where no evidence is called, before submissions are made as to sentence, make an application for an order that a young person is liable to an adult sentence if the young person is or has been found guilty of an offence, other than a presumptive offence, for which an adult is liable to imprisonment for a term of more than two years, that was committed after the young person attained the age of fourteen years.

. . .

(5) If the young person gives notice to the youth justice court that the young person does not oppose the application for an adult sentence, the youth justice court shall, without a hearing, order that if the young person is found guilty of an offence for which an adult is liable to imprisonment for a term of more than two years, an adult sentence must be imposed.

70. (1) The youth justice court, after hearing an application under subsection 42(9) (judicial determination of serious violent offence), if any is made, and before evidence is called or, where no evidence is called, before submissions are made as to sentence, shall inquire whether a young person wishes to make an application under subsection 63(1) (application for youth sentence) and if so, whether the Attorney General would oppose it, if

(*a*) the young person has been found guilty of a presumptive offence;

(*b*) the young person has not already made an application under subsection 63(1); and

(*c*) no order has been made under section 65 (young person not liable to adult sentence).

(2) If the young person indicates that he or she does not wish to make an application under subsection 63(1) (application for youth sentence) or fails to give an indication, the court shall order that an adult sentence be imposed.

72. (1) In making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and

(*a*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and

(*b*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.

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

73. (1) When the youth justice court makes an order under subsection 64(5) or 70(2) or paragraph 72(1)(*b*) in respect of a young person, the court shall, on a finding of guilt, impose an adult sentence on the young person.

. . .

75. (1) If the youth justice court imposes a youth sentence in respect of a young person who has been found guilty of having committed a presumptive offence set out in paragraph (*a*) of the definition "presumptive offence" in subsection 2(1), or an offence under paragraph (*b*) of that definition for which the Attorney General has given notice under subsection 64(2) (intention to seek adult sentence), the court shall at the sentencing hearing inquire whether the young person or the Attorney General wishes to make an application under subsection (3) for a ban on publication.

(2) If the young person and the Attorney General both indicate that they do not wish to make an application under subsection (3), the court shall endorse the information or indictment accordingly.

(3) On application of the young person or the Attorney General, a youth justice court may order a ban on publication of information that would identify the young person as having been dealt with under this Act if the court considers it appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest.

(4) For the purposes of an appeal in accordance with section 37, an order under subsection (3) is part of the sentence.

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

(2) Subsection (1) does not apply

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

(*b*) subject to sections 65 (young person not liable to adult sentence) and 75 (youth sentence imposed despite presumptive offence), in a case where the information relates to a young person who has received a youth sentence for an offence set out in paragraph (*a*) of the definition "presumptive offence" in subsection 2(1), or an offence set out in paragraph (*b*) of that definition for which the Attorney General has given notice under subsection 64(2) (intention to seek adult sentence); and

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

Appeal dismissed, BASTARACHE, DESCHAMPS, CHARRON *and* ROTHSTEIN JJ. *dissenting in part.*

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