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# "17 going on 23": Sentencing Young People to Life in Canada

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**"17 going on 23"[1]: Sentencing Young People to Life in Canada**

International human rights bodies have recommended the abolition of life sentences for children[2] but these punishments remain legal in many countries, including Canada. In 2008, the Supreme Court of Canada recognized the presumption of diminished moral blameworthiness of young people[3] as a constitutional principle of fundamental justice and overturned a law that presumed young people (those under 18) should be sentenced as adults for some serious crimes, including murder.[4] The burden is now on the Crown to rebut the presumption and prove that a youth sentence would not be of sufficient length to hold the young person accountable for their behaviour. For murder, the only available adult sanction is the mandatory sentence of life with a prescribed period of parole ineligibility ranging from 5–10 years, depending on the age of the person being sentenced and the degree of murder.[5]

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[1] The young person in *R v DE,* 2008 ABPC 231 was described in these terms in one of the reports before the court sentencing him for second degree murder. ED was born in the Philippines and came to Canada with his family at the age of six. At paragraph 17 of the decision, the sentencing judge said, "The accused has been living on his own for approximately the last 3 years, having pushed his family and their values aside to live a gang member lifestyle. As one member of the IRCS [Intensive Rehabilitative Custody and Supervision] assessment team put it "he is 17 going on 23". In the result, there is nothing to suggest there is a lack of maturity or diminished maturity on the part of the accused. On the contrary, the evidence points to a maturity and sophistication beyond the accused's chronological age." DE was sentenced to life.

[2] In 2015, the United Nations Human Rights Council has urged states to prohibit all forms of life imprisonment for offences committed by young people under the age of 18: UNHRC, *Human rights in the administration of justice, including juvenile justice*, UNHRCOR, 30th Sess, UN Doc A/HRC/30/L.16 (29 September 2015) at para 24. See Yannick van den Brink & Nessa Lynch, "Beyond the Life Sentence: A Children's Rights Lens on Sentencing for Murder" (2021) 29 International Journal of Children's Rights 972.

[3] In this paper, the term "young person" is used in the sense defined in the *Youth Criminal Justice Act*, SC 2002, c1, s 2(1) [*YCJA*]: "young person means a person 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." The term "child" is similarly used to correspond to these same individuals, in accordance with its definition in Article 1 of the *United Nations Convention on the Rights of the Child* which states "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier": UNGA, *United Nations Convention on the Rights of the Child*, UNGAOR, GA Res 44/25, 44th Sess, UN Doc A/RES/44/25/ (2 September 1990) art 1.

[4] *R v DB,* 2008 SCC 25.

[5] *Criminal Code*, RSC 1985, c C-46, ss 235(1), 745.1, 745.3.

The difference between a youth and adult sentence for murder is stark. A young person sentenced as an adult for murder will be in adult prison for at least 5–10 years and crucially, will be in prison or on parole for the rest of their life. By comparison, a young person sentenced under the *Youth Criminal Justice Act* for even first-degree murder will serve a maximum of 10 years (only six of which can be ordered at the sentencing stage to be spent in custody)[6] and will have their records sealed at the end of the access period following completion of the youth sentence.[7] Importantly, they will not be on parole, nor subject to return to prison at the discretion of a parole officer, for the rest of their life.[8]

This paper analyzes reported Canadian cases from 2008 to 2022 in which young people were sentenced for murder. It shows that, at least in these reported decisions, sentencing young people as adults for murder is not rare. The Crown routinely seeks life sentences for young people and the court orders them in the vast majority of cases in which they are sought.[9] Life sentences for young people have become normalized and expected in murder cases, rather than exceptional. This paper delves into the case law to get a better picture of why and how this is happening.

The analysis begins in Part A with a brief look internationally to understand the prevalence of, and human rights concerns associated with, imposing life sentences on young people. In Part B, I provide an

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[6] Some young people may serve more than six years in custody under a youth sentence for murder through a return to custody following breach of conditions of community release pursuant to *YCJA*, section 102(1)(b) during the remainder of the 10 year sentence. I am grateful to youth defence lawyer Sandra Bracken for explaining the practical application of these provisions and the reality that many young people spend most of the 10 year period in custody under this provision.

[7] See *YCJA*, *supra* note 3, ss 114–124. The access period for an indictable offence is five years following completion of the youth sentence: *YCJA*, *supra* note 3, s 119(2)(j).

[8] For a powerful first-hand account of the impact of a life sentence imposed on a young person who was convicted as a party to murder at 17, the struggle to survive federal prison, and the lifelong challenge to remain out of prison, see James Ruston, "Evolution of a Life Sentence" (2022) 30 Journal of Prisoners on Prisons 64.

[9] As further discussed below, we found 102 reported decisions from 2008–2022 in which a court sentenced a young person for murder, whether first-degree or second-degree. See F. Appendix for the list of cases. The Crown sought an adult (life) sentence in 89 cases, and the court imposed a life sentence in 62 of them (87%).

overview of the historical and present-day laws that allow for the sentencing of young people as adults. Part C delves into the reported cases that are the focus of this paper. I discuss the prevalence of adult sentencing in youth murder cases and the demographics and identity markers – age, gender, and race/Indigeneity – of the young people being sentenced to life in Canada. In Part D, I interrogate the Crown arguments and judicial decisions that have produced this reality. To succeed in a petition for an adult sentence, the Crown must prove that a youth sentence would not be sufficient to hold a young person accountable *and* must rebut the constitutional presumption of diminished youth responsibility. While some lower courts have used a balance of probabilities standard for this analysis, and have suggested that the two rebuttable presumptions overlap, I argue that constitutional protections for yong people require the Crown to rebut each presumption separately and beyond a reaspoanble doubt. The cases I examine provide a window into how judges navigate a sentencing regime which mandates that teenagers convicted of murder either receive a maximum sentence of 7 or 10 years under the youth system or a minimum sentence of life as an adult, but nothing in between. The fact that sentencing judges have imposed adult sentences in a majority of cases over the last fifteen years reveals the extent to which the crime of murder, even when committed by a young person, attracts extraordinarily harsh and globally exceptional penal consequences in Canada. Reading these cases together, I argue in this Part that the findings of sentencing judges that the Crown has rebutted the presumption of reduced moral culpability and shown the insufficiency of a youth sentence appear driven by the gravity of murder, rather than a careful or principled analysis of the psychological, political, or social condition of young people. Drawing these threads together, I conclude in Part F by highlighting the troubling normalization of this extreme punishment for young people and urge a revisiting of its constitutionality.

### A. Sentencing Young People to Life: Harms and Human Rights

Sixty-seven countries permit the imposition of life sentences on young people under the age of 18[10] (down from 73 identified in 2015).[11] These severe sentences are a feature of common law legal systems such as Canada, the United States, the United Kingdom, and New Zealand, but they are much less common in other countries such as member states of the European Union.[12] Life sentences carry a number of harsh consequences for young people including an increased risk of victimization in adult prisons[13] and severe mental health issues.[14] This group may develop "prisonization"[15] as an adaptive strategy in ways that make community reintegration more difficult and that may contribute to long stays in prison well past parole eligibility.[16] The fact that young people may be eligible for parole earlier than their adult counterparts does

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[10] Children's Rights International Network, "Life Imprisonment", online: https://home.crin.org/issues/deprivation-of-liberty/life-imprisonment?rq=life%20imprisonment.

[11] Children's Rights International Network, "Inhuman Sentencing: Life Imprisonment of Children Around the World", online: (2015) https://archive.crin.org/en/library/publications/inhuman-sentencing-life-imprisonment-children-around-world.html.

[12] van den Brink & Lynch, *supra* note 2.

[13] Anthony N Doob & Carla Cesaroni, *Responding to Youth Crime in Canada* (Toronto: University of Toronto Press, 2004), ch 10; Margaret Leigey, Jessica Hodge & Christina Saum, "Kids in the Big House: Juveniles incarcerated in adult facilities" in Rick Ruddell & Matthew O Thomas, eds, *Juvenile Corrections* (Richmond: Newgate Press, 2009) 113.

[14] Jeffrey Fagan, "Juvenile Incarceration and the Pains of Imprisonment" (2011) 3 Duke FL & Soc Change 29.

[15] Craig Haney, "The psychological impact of incarceration: Implications for post-prison adjustment," online (January 2002) Urban Institute https://www.urban.org/research/publication/psychological-impact-incarceration at 80-84. Haney describes the process of adaptation to prison, or "prisonization", as including a number of psychological adaptations including dependence on institutional structure and contingencies; hypervigilance, interpersonal mistrust, and suspicion; emotional over-control, alienation, and psychological distancing; social withdrawal and isolation; incorporation of exploitative norms of prison culture; diminished sense of self-worth and personal value; and posttraumatic stress reactions to the pains of imprisonment. He notes that "younger inmates have little in the way of already developed independent judgment, so they have little if anything to revert to or rely upon if and when the institutional structure is removed" (at 80).

[16] See, for example, Ruston, *supra* note 8, a first person account of navigating a life sentence imposed on him as a youth. See also the experience of Nathaniel Williams, a Black man serving a life sentence in Ontario for a murder committed while he was 16 years old. A CBC News story reports that Williams

not mean that it will be granted.[17] Furthermore, these sentences are lifelong, subjecting a young person to a future of stigma, parole supervision, and the ever-present risk of a return to prison at the discretion of a parole officer if they are, in fact, ever parolled.[18]

By any measure, sentencing teenagers to life in prison is an extreme punishment with many documented harms.[19] For these reasons, the United Nations Special Rapporteur on Torture, Juan E. Méndez, concluded in 2015 that any kind of life sentence is incompatible with the human rights of a child, as it causes "physical and psychological harm that amounts to cruel, inhuman or degrading punishment."[20] The UN General Assembly subsequently urged states to prohibit all forms of life imprisonment for offences

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remains in prison in his 40s: Mary Wiens, "After more than 20 years in prison, Nathanael Williams is getting a parole hearing this week", online: (February 2023) CBC Metro Morning https://www.cbc.ca/player/play/2174459459899.

[17] See *infra*, text accompanying note 152, discussing our findings in Debra Parkes, Jane Sprott & Isabel Grant, "The Evolution of Life Sentences for Second Degree Murder: Parole Ineligibility and Time Spent in Prison Before Parole" (2022) 100(1) Canadian Bar Review 66.

[18] Parole officers have broad discretion to suspend or revoke parole for reasons such as communicating with the wrong person, being high, being homeless, or being depressed, anything that might be considered to "indicate a potential increase in risk": Correctional Service Canada, "Commissioner's Directive 715-2 Post-Release Decision Process", online: (April 2019) https://www.csc-scc.gc.ca/politiques-et-lois/715-2-cd-en.shtml#5.

[19] Kaylyn C Canlione & Laura S Abrams, "Surviving Life: How Youth Adapt to Life Sentences in Adult Prisons" in Alexandra Cox & Laura S Abrams, eds, *The Palgrave International Handbook of Youth Imprisonment* (New York: Springer International Publishing, 2021) 503; Ben Crewe, Susie Hulley & Serena Wright, *Life Imprisonment from Young Adulthood: Adaptation, Identity and Time* (London: Palgrave Macmillan UK, 2019); Haney, *supra* note 17; Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (Washington: Justice Policy Institute, 2006); Nessa Lynch, "Protective measures for children accused or convicted of serious crimes" in Wendy O'Brien & Cédric Foussard, eds, *Violence Against Children in the Criminal Justice System* (London: Routledge, 2019) 56; Serena Wright, Susie Hulley & Ben Crewe, "The Pains of Life Imprisonment During Late Adolescence and Emerging Adulthood" in Alexandra Cox & Laura S Abrams, eds, *The Palgrave International Handbook of Youth Imprisonment* (New York: Springer International Publishing, 2021) 479.

[20] UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, UNHRCOR, 28th Sess, UN Doc A/HRC/28/68 (5 March 2015) at para 74.

committed by young people under the age of 18.[21] Countries around the world are abolishing life sentences for young people: five have done so since 2008 and in others, fewer youth are serving these sentences.[22]

Meanwhile, setting aside the U.S., which is an extreme outlier in sentencing people to death and to life without parole,[23] Canada is a an ignominious leader worldwide in imposing life sentences.[24] The *Criminal Code*'s mandatory life sentence for murder[25] is the primary driver of the growing population of life-sentenced individuals in Canadian prisons; yet, there is little publicly available data or research on the nature and impact of these sentences, even for adults.[26] Canadian law has punished young people with adult (life) sentences for decades, with the current regime set out in the *Youth Criminal Justice Act* [*YCJA*][27] the "latest in a series of legislative steps to increase the likelihood that punitive sanctions are imposed on youthful offenders."[28] Rick Ruddell and Justin Gileno observe that "there has been very little [Canadian] research on what happens to these individuals once transferred to adult courts or placed in adult corrections."[29] This remains the case with respect to Canadian juvenile lifers. However, a recent study by

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[21] UNHRC, *supra* note 2. See van den Brink & Lynch, *supra* note 2.

[22] Leo Ratledge, "Abolishing life imprisonment for children: A battle that's not won yet", online: (8 November 2021) Penal Reform International.

[23] Ashley Nellis, "No End in Sight: American's Enduring Reliance on Life Imprisonment", online: (17 February 2021) The Sentencing Project https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf.

[24] More than 5,000 people or a quarter of all people under federal correctional supervision in Canada (*i.e.*, serving sentences of two years or more) are serving a life sentence. Public Safety Canada, "2020 Corrections and Conditional Release Statistical Overview" online: (2022) https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2020/index-en.aspx. See also Rick Ruddell & Justin Gileno, "Lifers Admitted as Juveniles in the Canadian Prison Population" (2013) 13:3 Youth Justice 234 at 234–235 ("Not only is Canada a leader in imprisoning Lifers but that population is projected to increase […] because once sentenced to this sanction the offender remains under correctional supervision, in custody or on parole, for the rest of his or her life").

[25] *Criminal Code*, *supra* note 5, s 235(1).

[26] Parkes, Sprott & Grant, *supra* note 17.

[27] *YCJA*, *supra* note 3, s 64.

[28] Ruddell & Gileno, *supra* note 24 at 238.

[29] *Ibid* at 236.

the Correctional Investigator, Canada's prison ombudsperson, found that young adults (aged 18–21) incarcerated in federal prison regularly experience bullying and intimidation, and are subject to higher rates of self-injury, uses of force, and placement in segregation than older people in prison.[30] The report also found a lack of programming tailored to young adults, very few positive relationships with staff, very little parole planning, and extremely limited educational opportunities.[31] Given the harms recognized internationally and domestically with life sentences for young people, it is important to examine the legal regime that authorizes them and the judicial decisions that mete them out.

## B. The Legal Regime

### 1. Before the *Youth Criminal Justice Act*

Canada's first youth criminal law, the *Juvenile Delinquents Act* [*JDA*],[32] was enacted in 1908 in response to a growing public sentiment that the state ought to respond to and intervene in the area of youth "delinquency". The *JDA* was driven by the notion that youth were misguided and needed state intervention to be "saved".[33] Rooted in a welfarist approach, the *JDA* tended to emphasize diagnosing problems (social, family, school, personal, physical, environmental) and favoured individualized treatment over punishment.[34] These processes were informal and juvenile court judges had a great deal of discretion to

[30] Office of the Correctional Investigator, "Missed Opportunities: The Experience of Young Adults Incarcerated in Federal Penitentiaries - Final Report", online: (13 August 2017) https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20170831-eng.aspx.

[31] *Ibid*.

[32] The *Act* underwent a series of minor amendments, culminating in *Juvenile Delinquents Act,* RSC1 970, c J-3.

[33] Lisa M Kelly, "Judging Youth Time" (2023) 108 Supreme Court Law Review 85 at 89–91.

[34] John A Winterdyk & Anne Miller, "Juvenile Justice and Young Offenders: A Canadian Overview" in *Juvenile Justice* (Oxfordshire: Routledge, 2014) at 110.

impose community measures or to sentence children as young as seven to indeterminate imprisonment until the age of 21.[35]

Despite the establishment of juvenile courts, young people could still be treated as adults and subjected to harsh sentences, including death.[36] Doing so involved the transfer of juveniles to adult court through a relatively informal process.[37] Under the *JDA*, if a juvenile was transferred into adult court for trial and was denied bail, they would be immediately detained in an adult prison pending adult trial and, if convicted of murder, faced the prospect of capital punishment until its abolition in 1976.[38]

By the mid twentieth century, the *JDA* faced criticism for permitting inconsistent and inequitable treatment of young people and for denying youth their rights. In 1966, the federal government struck a committee chaired by Allen J. MacLeod to study juvenile delinquency and recommend reforms. The MacLeod Report critiqued the paternalist, informal approaches of the *JD*A and "endorsed a theory of youth vulnerability grounded in developmental psychology and social and economic dependency, which, in its view, mandated more procedural rights for young people, not less."[39] Around the same time there were also mounting and competing calls for increased accountability for young people convicted of crime amid perceptions that community-based sanctions were ineffective.[40]

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[35] Nicholas Bala, "Changing Professional Culture and Reducing Use of Courts and Custody for Youth: The Youth Criminal Justice Act and Bill C-10" (2015) 78:1 Sask L Rev 127 at 129–130.

[36] See, for example, the capital sentence imposed on Stephen Truscott for a murder that occurred in 1959 when he was 14 years-old, and for which he was later exonerated: Sarah Harland-Logan, "Steven Truscott", online: Innocence Canada https://www.innocencecanada.com/exonerations/steven-truscott/.

[37] Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Emond, 2012) at 653. See also Kelly, *supra* note 33 at 91.

[38] Bala & Anand, *ibid*.

[39] Kelly, *supra* note 33 at 95.

[40] Winterdyk & Miller, *supra* note 34.

Twenty years of public pressure and reform culminated in the enactment of the *Young Offenders Act* [*YOA*] in 1984 to replace the *JDA*.[41] In comparison to the *JDA,* the adult transfer process under the *YOA* was complex.[42] The *YOA* allowed for the transfer of youth cases for trial in adult courts where the accused person was over the age of 14 and had been charged with a serious offence. In a transfer hearing, the court would consider a range of evidence to determine the appropriate legal regime, including evidence that would not be admissible in a criminal trial.[43] At the time of the *YOA*'s enactment, the onus was on the Crown to satisfy the court that a transfer was appropriate based on the seriousness and circumstance of the offence, as well as the young person's age, character, and prior offending record.[44] The determination required the youth court to balance protection of the public with rehabilitation of the youth. There was wide interprovincial variation in how these assessments were made.[45] If transferred and ultimately convicted in adult court, the young person was subject to an adult sentence under the *Criminal Code.*

Procedurally, the pre-trial transfer process under the *YOA* raised a number of concerns including the fact that judges were directed to consider the "seriousness and circumstances" of the charged offence before hearing trial evidence. This meant that a youth charged with first degree murder could be transferred based on the seriousness and circumstances of that charge but ultimately convicted of the lesser included charge of manslaughter. The young person would still be subject to an adult sentence given the intitial pre-trial transfer.[46] Transfers were often made on the basis of Crown allegations and hearsay evidence, compounding the unfairness.[47]

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[41] *Ibid* at 111–112.

[42] Bala & Anand, *supra* note 37 at 654.

[43] *Ibid.*

[44] *Young Offenders Act*, RSC 1985, c.Y-1, ss 3, 16.

[45] Bala & Anand, *supra* note 37 at 65–56.

[46] *Ibid* at 654.

[47] *Ibid* at 656.

At the same time, tough-on-crime critics insisted that the *YOA* sentencing provisions were inadequate for murder.[48] As the *YOA* was originally enacted, a judge faced with a transfer hearing involving a first degree murder charge had to make a "choice between what was seen as two extremes, a three-year maximum disposition under the *YOA* or the possibility of life imprisonment in the adult system with no opportunity for parole for at least twenty-five years".[49] Therefore, the *YOA* was amended, increasing the maximum available youth sentence for murder to ten years, thereby reducing the need for adult transfers. Other amendments to the *Criminal Code* reduced the parole eligibility period for youth convicted of murder to 5–10 years (instead of 10–25 years for adults).

In 1995, further amendments were made to the framework governing the transfer of young people to adult court. Under the amended *YOA*, 16- and 17-year-old youths were to be presumptively dealt with in adult court if they were charged with a "presumptive offence" such as murder, attempted murder, manslaughter, and aggravated sexual assault.[50] The burden was on the young person to rebut this presumption of transfer to adult court.

### 2. The *YCJA* Regime for Sentencing Young People as Adults

In 2003, Parliament replaced the *YOA* with the *Youth Criminal Justice Act* in an effort to stem the tide of mass youth incarceration in Canada. To a large extent, courts and commentators have celebrated the *YCJA* as a success in reducing the use of courts and custody for the majority of young people deemed potentially in conflict with the law.[51] This de-carceral turn was facilitated by a punitive compromise at the

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[48] *Ibid* at 690.

[49] *Ibid*.

[50] *Ibid* at 660.

[51] Rates of youth custody have fallen significantly since 2003, although Indigenous young people have not benefited from this decarceration trend. See Cheryl Webster, Jane Sprott & Anthony N Doob, "The Will to Change: Lessons from Canada's Successful Decarceration of Youth" (2019) 53:4 Law & Society Review 1092.

heart of the *YCJA*: while most youth charges are dealt with through diversion and non-custodial sanctions, harsh adult sentences of imprisonment remain available for certain violent offences. Prominent in the introduction of the *YCJA* and the debates surrounding its enactment was the Liberal government's intention "to respond more firmly and effectively to the small number of the most serious, violent young offenders."[52] Bryan Hoogeveen has argued that "while the discourse of intrusive punishment has not been the lone voice directing Canada's juvenile justice policy, it has certainly been the loudest."[53] Doob and Sprott describe the political decision to sell the *YCJA*, with its broad decarceration policy, to a skeptical electorate by including – and, indeed, highlighting – the availability of adult sentences for young people convicted of violent offences.[54]

Under the *YCJA*, the judicial decision to impose an adult or youth sentence is now made after conviction. Adult sentences are available for any "offence for which an adult is liable to imprisonment for a term of more than two years and that was committed after the young person attained the age of 14 years."[55] The focus of this study is the imposition of adult sentences for murder because of the mandatory life sentence.

As originally enacted, the *YCJA* carried over the concept of "presumptive offences" from the *YOA* and broadened their scope to include young people 14 and older, rather than 16 and older under the previous regime. Certain offences, including murder, carried the presumption that an adult sentence would be imposed.[56] This regime was challenged in *R v DB* where a majority of the Supreme Court of Canada held

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[52] Then Justice Minister Anne McLellan (Press Release, Canada, Department of Justice, May 12, 1999). See also Anne McLellan, *Hansard*, Senate Committee on Legal and Constitutional Affairs, Hearings on Bill C-7, September 27, 2001, cited in Nicholas Bala, "R. v. B.(D.): The Constitutionalization of Adolescence" (2009) 47 Supreme Court Law Review 211 at 217 [Bala, "Constitutionalization"].

[53] Bryan R Hogeveen, "'If we are tough on crime, if we punish the crime, then people get the message' Constructing and Governing the Punishable Young Offender in Canada During the Late 1990s" (2005) 7:1 Punishment and Society 73 at 74.

[54] Anthony N Doob and Jane B Sprott, "Youth Justice in Canada" (2004) 31 Crime and Justice 185 at 225.

[55] *YCJA*, *supra* note 3, s 64(1).

[56] Bala & Anand, *supra* note 37 at 660.

that imposing adult sentences for youth did not *per se* violate the *Charter*. However, "presumptive offences", with their reverse onus on the accused young person, were unconstitutional.[57] *DB* held that the presumption that young people have diminished moral culpability or blameworthiness is a principle of fundamental justice protected by s. 7 of the *Charter*. Nicholas Bala described this development at the time as the "constitutionalization of adolescence."[58]

In 2012, the *YCJA* was amended to reflect the ruling in *DB* and address some of the issues that had arisen in its wake. With the elimination of presumptive offences, the Crown bears the double burden of rebutting the presumption of diminished moral culpability and demonstrating that a youth sentence would not be long enough to hold a young person accountable for their offending behaviour.

### 3. The Test: Rebutting the Presumption & Holding a Young Person Accountable

Section 72(1) of the *YCJA* sets out the test for ordering an adult sentence. The 2012 amendments expressly include the presumption of diminished moral culpability and the section now reads:

> **72 (1)** The youth court shall order that an adult sentence be imposed if it is satisfied that
>
> > **(a)** the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
> >
> > **(b)** a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.

Both branches or prongs of the test – rebutting the presumption of diminished moral blameworthiness and determining that a youth sentence would not be sufficient to hold the young person accountable – must be satisfied for an adult sentence to be imposed. There is some disagreement in the caselaw about the standard of proof, with some judges adopting the standard of proof beyond a reasonable doubt,[59] although appellate

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[57] *R v DB*, 2008 SCC 25 at para 77.

[58] Bala, "Constitutionalization", *supra* note 52.

[59] *R v Henderson*, 2018 SKPC 27 at para 34. ("The court [in *DB*] found that the statutory onus placed on youths amounted to a Charter breach. The court acknowledged the Crown's concession that it is a principle

courts seem to have settled on a standard of "satisfaction after careful consideration by the court of all the relevant factors" which is neither proof beyond a reasonable doubt nor proof on a balance of probabilities.[60] The ease with which this standard is satisfied in the case law, as discussed below, suggests that the courts are not giving meaningful effect to the constitutional rights of young people articulated in *DB*.

In the 2017 decision in *R v W(M),*[61] the Ontario Court of Appeal outlined the dominant approach to the first prong, the presumption of diminished moral blameworthiness or culpability:

> In my view, the focus must necessarily be on the issue of maturity. The Presumption assumes that all young people start from a position of lesser maturity, moral sophistication and capacity for independent judgment than adults. Bala and Anand explain at p. 4:
>
> > 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." This seemingly impertinent answer may simply reflect a lack of forethought or self-awareness, or non-responsiveness due to embarrassment and the shame of hindsight, or it may signal a more significant cognitive issue. 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. [Footnotes omitted.]
>
> In order to rebut the Presumption, the Crown must satisfy the court that, at the time of the offence, the evidence supports a finding that the young person demonstrated the level of maturity, moral sophistication and capacity for independent judgment of an adult such that an adult sentence and adult principles of sentencing should apply to him or her.[62]

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of fundamental justice that the prosecution prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies (para 78 of D.B.). The court also concluded that any deviation from the traditional onus on the Crown, to demonstrate why a more severe sentence is necessary and appropriate in any given case, constitutes an infringement of section 7 of the *Charter* (para 82 of D.B.). Taken together, it seems clear that the onus of proof associated with the new section 72 must be the "beyond a reasonable doubt" standard.") The author of this decision is Judge Sanjeev Anand, a former law professor, expert in the law of youth criminal justice, and co-author of a leading text on the subject.

[60] *R v Okemow*, 2017 MBCA 59 at para 61; *R v RDF*, 2019 SKCA 112 at paras 14-16, 19; and *R v AO*, 2007 ONCA 144 at paras 28-38.

[61] *R v W(M),* 2017 ONCA 22.

[62] *Ibid* at paras 96–98.

As for the second branch of the test, accountability, the court in *W(M)* said that "consideration must be given to the sentence that has the greatest chance to rehabilitate the young person."[63] The court went on to say that similar factors are applied under the two inquiries, namely "(a) the seriousness and circumstances of the offence; (b) the age, maturity, character (including sophistication, intelligence and capacity for moral reasoning), background and previous record of the young person; and (c) any other factors the court considers relevant."[64] However, they also note that sentencing judges must guard against the risk that "a factor relevant only to one of the two prongs may be relied upon to support a finding in relation to the other."[65] As discussed further in section D.1. below, this warning has proven prescient as the nature of the offence of murder has often seemed to overwhelm the analysis on both prongs.

Early on, commentators had predicted that it would be rare for a sentencing judge to find that a young person possessed the moral capacity and mental judgment to be sentenced as an adult. Writing shortly after *D.B.*, Nicholas Bala took the view that the *YCJA* regime for sentencing youth as adults reserves those sentences for the "exceptional cases".[66] He wrote:

> The unfortunate reality is that those youths who commit the most serious and senseless crimes are precisely those who lack foresight and judgment, and who will not be deterred by adult sentences. Indeed, there is significant evidence that adolescents who are placed in adult prison are more likely to re-offend on release than adolescents who have committed the same offences and have the same prior records but are kept in youth custody facilities. This is not surprising when one considers the relative rehabilitative value and inmate subculture in the different types of custody facilities.[67] [citations omitted]

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[63] *Ibid* at para 101.

[64] *Ibid* at para 105.

[65] *Ibid* at para 106.

[66] Bala, "Constitutionalization", *supra* note 52 at 230–231. Views of this kind were shared by other scholars in the field of youth criminal justice. Writing in 2004, criminologists Tony Doob and Jane Sprott described the adult sentencing provisions as "symbolically tough" but unlikely to have an impact in practice: Doob & Sprott, *supra* note 54 at 186.

[67] *Ibid* at 231.

In Bala's view, rather than revealing the maturity of the young person, the gravity of serious offences often suggested the opposite. Writing extrajudicially several years later in 2015, two years before *W(M),* Justice Jamie Campbell similarly suggested that "[i]t would be a rare 16- or 17-year-old who is convicted of a serious violent crime who has the moral capacities of judgement, restraint, and independence beyond those of his adolescent age cohort so that adult sentences and adult principles of sentencing should be applied to him."[68]

In the following Parts, I show that these predictions that adult sentences would be reserved for exceptional or rare cases have not been borne out in practice, at least when it comes to youth convicted of murder.[69] The reported cases show that a majority of young people convicted of murder in Canada are sentenced to life as adults.

### C. The Numbers

There is no publicly available data on the use of these adult sentencing provisions – no statistics on how many young people have been sentenced to life (or to adult prison generally) nor any available data on the number of convictions for murder by young people.[70] To begin to fill some of these gaps, I examined all reported cases post-*DB* where judges decided whether to impose an adult (life) sentence for murder on

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[68] Jamie Campbell, "In Search of the Mature Sixteen-Year-Old in Youth Justice Court" (2015) 19 Can Crim L Rev 47.

[69] I acknowledge that murder is the most serious of the offences for which young people may be subject to an adult sentence and that these statements by Professor Bala and Justice Cameron were about the imposition of adult sentences more broadly and not specifically about murder.

[70] To the extent Statistics Canada reports on youth crime and sentencing, the numbers are for "homicide" (which includes manslaughter, infanticide and murder) generally. See Statistics Canada, "Youth Courts, Guilty Cases by Most Serious Sentence", online: (9 August 2023) Government of Canada https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510004201; Statistics Canada, "Youth Courts, Number of Cases and Charges by Type of Decision", online: (9 August 2023) Government of Canada https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003801.

a young person (2008–2022).[71] Included in the dataset are reasons for sentence, appeals from sentence, and appeals from conviction or other proceedings where the sentence imposed was mentioned.[72] Where a sentence was altered on appeal, it is that final sentence that is included as the sentence imposed. Where a single case involves the sentencing of more than one young person, each person sentenced is treated as a separate case.

### 1. Prevalence

This search found reported decisions involving 102 young people sentenced for murder between from 2008 to 2022.[73] Given the lack of publicly available data discussed above, it is difficult to know how many of the total sentencing decisions in question are represented in our study.[74] As such, studying reported judgments can never paint a complete picture of what is happening in the courts. However, I and other scholars have used this methodology in the past to provide some insight into the approach taken by courts to legislative interpretation and to lay the groundwork for further research and analysis.[75]

Of the 102 individuals in the reported cases, the Crown sought an adult (life) sentence for 89, and of those 62 were sentenced to life. In other words, the Crown sought life sentences for young people in 87% of reported decisions and judges sentenced young people to life in 70% of the cases in which the Crown

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[71] My research assistants searched the three Canadian case law databases: Westlaw, Quicklaw, and CanLII.

[72] For example, *R v A (KDG)*, 2014 SKQB 192 is a review of youth sentence pursuant to s. 94 of the *YCJA*, but the original sentencing decision is unreported.

[73] See F. Appendix: Reported Youth Murder Cases 2008-2022.

[74] Correspondence with Statistics Canada (Canadian Centre for Justice Statistics) about lack of relevant data, on file with author.

[75] See, for example, Parkes, Sprott & Grant, supra note 17; Isabel Grant & Janine Benedet, "The 'Statutory Rape' Myth: A Case Law Study of Sexual Assaults Against Adolescent Girls" (2019) 31:2 CJWL 266; Helene Love, Fiona Kelly & Israel Doron, "Age and Ageism in Sentencing Practices: Outcomes from a Case Law Review" (2013) 17:2 Can Crim L Rev 253; Richard Jochelson, Debao Huang & Melanie J Murchison, "Empiricizing Exclusionary Remedies — A Cross Canada Study of Exclusion of Evidence Under s. 24(2) of the Charter, Five Years After *Grant*" (2016) 63:1/2 Crim LQ 206.

sought such a sentence. Of the 62 young people who got life sentences, the vast majority (52 or 84%) were for single murders. Ten individuals were sentenced to life for multiple murders. These numbers show that adult sentences are not "exceptional" or "rare" for young people convicted of murder; they are the norm. Further evidence of the extent to which adult sentences, including the life sentence, are normalized for young people can be found in Crown policy manuals that *require* prosecutors to seek an adult sentence for certain violent offences.[76] Such an approach effectively turns the legislation (and the constitutional presumption in *DB*) on its head, creating a *de facto* presumptive offence regime and treating youth sentences as exceptional for young people convicted of murder and other serious offences.

It is not possible to draw reliable conclusions with respect to regional (provincial) differences in judicial approach, given the relatively small number of reported decisions and high rate of Crown seeking adult sentences overall. However, some findings are worthy of further investigation.[77] For example, Manitoba accounted for more than a quarter of the reported cases found, with 24 young people sentenced

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[76] See, *e.g.,* Ontario Prosecution Directive: Youth Criminal Justice: Resolution Discussions and Sentencing (14 November 2017), online: https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf. ("The Prosecutor must seek an adult sentence for those serious violent offences defined in the YCJA as murder, attempted murder, manslaughter and aggravated sexual assault. If, in the opinion of the Prosecutor, a youth sentence would be appropriate, the Prosecutor must obtain the approval of the Crown Attorney and Director prior to agreeing to the youth sentence.")

[77] In our case law study, the numbers break down as follows:

BC: 10 total, 9 Crown sought, 6 got life (67%)

AB: 15 total, 13 Crown sought, 9 got life (69%)

SK: 8 total, 7 Crown sought, 5 got life (71%)

MB: 24 total, 18 Crown sought, 15 got life (83%)

ON: 28 total, 26 Crown sought, 15 got life (58%)

QB: 11 total, 10 Crown sought, 8 got life (80%). This overall number seems low to us, given the population of Quebec and the numbers from other provinces. However, we were unable to find any more cases using bilingual searches on the various case law databases.

NS: 5 total, 5 Crown sought, 3 got life (60%)

NWT: 1 total, 1 Crown sought, 1 got life (100%)

We found no reported cases during our time period from the other provinces and territories (Yukon, Nunavut, New Brunswick, Prince Edward Island, and Newfoundland and Labrador).

for murder.[78] The Crown sought an adult sentence in 18 of these cases and a life sentence was ordered for 15 young people. Ontario, a province with more than ten times the population of Manitoba, had 28 youth sentenced for murder during this period, with the Crown seeking an adult sentence in 26 cases and the court ordering a life sentence for 15 young people. The high number of youth sentenced as adults in Manitoba is consistent with pre-*YCJA* trends. Manitoba had, by far, the highest rate of transferring young people to adult court under the *YOA*, with that province accounting for close to one-third of all transfers from youth to adult court annually from 1996–1999.[79]

### 2. Gender

Teenage girls account for approximately 25% of youth admitted to custody while the rate for adult women is approximately 14% for provincial/territorial custody and 8% for federal custody.[80] Research shows that female youth who are convicted of violent crimes such as murder may, in some cases, be treated particularly harshly in both courts and media for violating gendered expectations of femininity, even more so for Black and Indigenous girls.[81] My study found only seven murder sentencing cases involving female youth. The Crown sought an adult sentence for five of those young people and two of them were sentenced

[78] Manitoba accounts for just 3.6% of the population of Canada: Statistics Canada, "Population estimates, quarterly", online: (19 December 2023) Government of Canada https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901.

[79] Russell Smandych and Raymond Corrado, "'Too Bad, So Sad': Observations on Key Outstanding Policy Challenges of Twenty Years of Youth Justice Reform in Canada, 1995-2015" (2018) 41(3) Manitoba Law Journal 191 at 205, citing Canada, Department of Justice, "Background for YCJA", online: (2016) at tables C1 and C2, http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/back-hist/index.html.

[80] Jamil Malakieh, "Youth correctional statistics in Canada, 2015/2016" (2017) 37:1 Juristat.

[81] See, for example, Meda Chesney-Lind, *Beyond Bad Girls: Gender, Violence and Hype* (New York: Routledge, 2008); John M MacDonald & Meda Chesney-Lind, "Gender Bias and Juvenile Justice Revisisted: A Multiyear Analysis" in Merry Morash, ed, *Feminist Theories of Crime* (London: Routledge, 2011) 321; Jennifer Silcox, "Institutionalized 'bad girls': adolescent female folk devils in Canadian newspapers between 1991 and 2012" (2023) Feminist Media Studies 1.

to life as adults, one in Saskatchewan[82] and one in Ontario.[83] Both cases would be worthy of further study for the way that gendered and racialized assumptions figured in them. The 15 year-old in *R v Todorovic*,[84] discussed in section D.1. below, was convicted as an abettor or counsellor to a first degree murder committed by her then-boyfriend, where she was not present. The 16 year-old Indigenous young person in *R v Henderson*,[85] who had significant diagnosed cognitive disabilties, was sentenced to life for the second degree murder of a baby. The remaining three female teens were sentenced as young people: two in Alberta[86] and one in Ontario.[87]

### 3. Age

The vast majority of young people sentenced were 16- or 17 years-old (28 were 16 and 43 were 17). The Crown sought an adult sentence for all of the 16-year-olds and 37 (86%) of the 17-year-olds. In most of these cases, the judge made a point of indicating the young person's age in years and months (*e.g.*, "the then 17-year-old appellant, who would turn eighteen less than three months later"[88]).

While younger teenagers were a smaller cohort, they were not as rare as one might imagine. Eighteen decisions involved 14- or 15-year-olds, with the Crown seeking a life sentence for 13 of them.

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[82] *R v Henderson*, 2018 SKPC 27 (the victim was a baby).

[83] *R v Todorovic*, 2009 CarswellOnt 4353 (the young person was convicted as a party the first-degree murder of another teenage girl by T's boyfriend).

[84] *Ibid.*

[85] *R v Henderson*, *supra* note 82.

[86] *R v T(DD)* 2009 ABQB 362; *R v T(DD)*, 2009 ABQB 384 (16-year-old who was a party to the sexual assault and murder by her boyfriend of a 13-year-old girl; max youth sentence); *R v R(JF),* 2016 ABCA 340 (Court of Appeal overturned the sentencing judge's order of an adult sentence, holding that the sentencing judge erred in finding that the presumption of a youth sentence was rebutted).

[87] *R v S(A),* 2016 ONSC 3940 (17-year-old Indigenous young person killed her much older male intimate partner; guilty plea; no *Gladue* report; max youth sentence ordered; 4 years of pre-trial custody credited as 3. The effect was that AS would spend a further year in provincial custody and then be subject to a 3-year supervision order).

[88] *R v Joseph*, 2020 ONCA 73.

Over half (7) of the 14- and 15-year-olds were from Manitoba.[89] Five were from Ontario (although one of those was an historic case involving the sentencing of a middle-aged man who had been 15 at the time the offence was committed in 1983)[90] and one was from Saskatchewan.[91] Five of the seven young people from Manitoba were sentenced to life.

There were five cases where the Crown did not seek a life sentence for a young person aged 14 or 15 years. One was from Alberta,[92] one from in Saskatchewan,[93] and two from Manitoba.[94] In most of these cases, the Crown agreed not to seek an adult sentence in exchange for guilty pleas to murder.[95] It is likely that there are also unreported decisions in which the Crown has used the powerful bargaining chip of a life sentence to elicit guilty pleas from young people charged with murder, a practice that is concerning given the research demonstrating the vulnerabilities of young people – particularly Indigenous and other marginalized youth – to pleading guilty and confessing to crimes they did not commit.[96]

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[89] *R v H(JJ),* 2010 MBQB 177 (youth sentence); *R v T(JJ)*, 2010 MBQB 216 (life sentence); *R v S(DL)*, 2012 MBQB 177 (life sentence); *R v S(DVJ),* 2013 MBPC 34 (life sentence); *R v D(CG)*, 2014 MBQB 142 (life sentence); *R v A(DR)*, 2014 MBQB 199 (youth sentence); *R v M(J),* 2020 MBPC 13 (life sentence).

[90] *R v Ellacot*, 2017 ONCA 681.

[91] *R v A(KDG),* 2014 SKQB 192 (youth sentence).

[92] *R v T(TW),* 2007 ABPC 346 (15-year-old drove a car directly into the victim, killing him).

[93] *R v M(CJ),* 2010 SKQB 103 (15-year-old Indigenous young person was convicted as a party to the murders (2) and attempted murders (3) committed by his older co-accused and gang associate. IRCS max sentence).

[94] *R v S(CL),* 2011 MBQB 28 (a 14-year-old girl, CLS, received the max youth sentence of 7 years minus 3 years of credit for 42 months of pretrial custody and another 14-year-old girl, CACD, received the same sentence). There is no specific mention of the girls being Indigenous and no mention of *R v Gladue*. However, the judge discussed that CACD was from Nelson House, a Cree First Nations community in Northern Manitoba. See also *R v (RA),* 2011 MBPC 54 (14-year-old Indigenous boy was given the maximum youth sentence of 7 years with one year credit for over two years in pretrial custody. A *Gladue* report was before the court in this case).

[95] See, for example*, R v S(CL), ibid.*

[96] For a review of the literature showing the particular vulnerabilities of youth and their increased risk of false guilty pleas, see Alison D Redlich, Tina Zottoli & Tarika Daftary-Kapur, "Juvenile Justice and Plea Bargaining" in Vanessa A Adkins & Alison D Redlich, eds, *A System of Pleas: Social Sciences Contributions to the Real Legal System* (New York: Oxford Academic, 2019) 107. For discussion of the ways Indigenous youth are at greater risk of false confessions due to factors such as inadequate defence representation, mistrust of state systems, traumatic life experiences, and living in state care, see Amanda

### 4. Race and Indigeneity

In the United States, the racial impact of juvenile life without parole is well documented.[97] In Canada there is increasing awareness of the extent to which systemic racism pervades the criminal legal system.[98] The grossly disproportionate rate of incarceration of Indigenous people has reached alarming proportions, and continues to rise each year.[99] Black and other people of colour are also overrepresented in the prison population[100] and sentencing with attention to the impact of colonialism and systemic racism is

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Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3-4 Crim LQ 415 and Jeremy Greenberg, "When One Innocent Suffers: Phillip James Tallio and Wrongful Convictions of Indigenous Youth" (2020) 67 Crim LQ 477.

[97] See Laura Beckman & Nancy Rodriguez, "Race, Ethnicity, and Official Perceptions in the Juvenile Justice System: Extending the Role of Negative Attributional Stereotypes" (2021) 48:11 Criminal Justice and Behavior 1536; James Bell, "Racial and Ethnic Disparities of Children in the United States: Pursuing Equity and Engaging Structural Racism in Youth Serving Systems" in Gertrud Lenzer, ed, *Violence Against Children: Making Human Rights Real* (New York: Routledge, 2017) 348; Rod K Brunson & Kashea Pegram, "'Kids Do Not So Much Make Trouble, They Are Trouble': Police-Youth Relations" (2018) 28:1 The Future of Children 82.

[98] See Nancy Macdonald, "Canada's prisons are the 'new residential schools", online: (18 February 2016) Maclean's https://macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/; Ontario, *Stephen Lewis report on race relations in Ontario* (Toronto: Race Relations and Policing Task Force, 1992); Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba,* AC Hamilton, commissione & CM Sinclair, commissioner (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991); Canada, *The Report of the Royal Commission on Aboriginal Peoples*, Mary C Hurley & Jill Wherrett (Ottawa: Parliamentary Research Branch, 1999); Canada, *Creating Choices: The Report of the Task Force on Federally Sentenced Women*, Correctional Service of Canada & Canadian Association of Elizabeth Fry Societies (Ottawa: Correctional Service Canada, 1990); *R v Parks*, [1993] OJ No 2157 at para 369; *R v Williams*, [1998] 1 SCR 1128 (SCC).

[99] See Paul Robinson et al, "Over-representation of Indigenous persons in adult provincial custody, 2019/2020 and 2020/2021", online: (12 July 2023) Statistics Canada https://www150.statcan.gc.ca/n1/pub/85-002-x/2023001/article/00004-eng.htm. See also Efrat Arbel, "Rethinking the "Crisis" of Indigenous Mass Imprisonment" (2020) 34:3 CJLS 437 (arguing that, in the face of the relentless intensification of Indigenous mass imprisonment, the language of "crisis" has operated to subtly entrench the colonial structures it purports to disrupt).

[100] See Statistics Canada, "Admissions to adult corrections by visible minority group and sex", online: (23 February 2023) Government of Canada https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510020301; Ivan Zinger, "Office of the Correctional Investigator Annual Report 2021-2022", online: (20 June 2022) Office of the Correctional Investigator https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2021-2022;

mandated by the Supreme Court of Canada[101] and appellate courts.[102] Consequently, I searched the cases for mention of the race of individuals being sentenced. In many cases, there was no direct mention of race but I was able to identify that at least 29 of the young people being sentenced were Indigenous (28% of the 102 cases), the vast majority in Manitoba and Saskatchewan. Nineteen young people were identified as Black (19% of the 102 cases), most of them in Ontario. A total of 55 individuals were Black, Indigenous, or people of colour[103] (54% of cases), although this number is likely lower than the true count due to the failure to mention race in many of the decisions.[104]

Of the 29 Indigenous young people convicted and sentenced for murder, the Crown sought an adult sentence in 21 of the cases and, of these, 19 (90%) were sentenced as adults to life. The Crown sought an adult sentence for all 19 young people identified as Black, with the courts sentencing 13 of them (68%) to life. Finally, looking at Black, Indigenous, and people of colour as a combined cohort, the Crown sought an adult sentence in 44 cases, with the court ordering a life sentence in 36 (82%) of cases. In the 41 cases where race was not discussed or not otherwise evident, the Crown sought an adult sentence for 35 young people and the court ordered life for 19 (54%) of individuals.

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Office of the Correctional Investigator, "The Changing Face of Canada's Prisons: Correctional Investigator Reports on Ethno-Cultural Diversity in Corrections", online: (26 November 2013) https://oci-bec.gc.ca/en/content/changing-face-canada-s-prisons-correctional-investigator-reports-ethno-cultural-diversity; Howard Sapers, "Annual Report of the Office of the Correctional Investigator 2012-2013", online: (28 June 2013) Office of the Correctional Investigator https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2012-2013; Toni Williams, "Sentencing Black Offenders in the Ontario Criminal Justice System" in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 200.

[101] *R v Gladue*, [1999] 1 SCR 688; *R v Ipeelee*, 2012 SCC 13.

[102] *R v Morris*, 2021 ONCA 680; *R v Anderson*, 2021 NSCA 62.

[103] This cohort of cases includes individuals identified as Asian, Middle Eastern, Hispanic, Black, or Indigenous.

[104] For a discussion of the practice of "recognizing race" in American judicial opinions, including instances where judges recognize race where they should arguably avoid doing so and fail to do so in cases where they should, see Justin Driver, "Recognizing Race" (2012) 112 Columbia Law Review 404.

A considerable body of research identifies the ways that Black and Indigenous young people are more likely than white youth to be perceived as deviant or criminal in popular culture and in justice system decision-making.[105] As one American study concludes, "because of widespread dehumanization of [B]lack [people] as a racial group, the time-honoured benefits of childhood innocence aren't applied equally to black and white boys; rather they're reserved for whites."[106] In a recent report for the Department of Justice Canada, Akwasi Owusu-Bempah and Storm K. Jeffers noted that "Black children and youth are more likely to have their age overestimated, be perceived as adults, deemed less innocent, [and] treated more severely than White and Hispanic counterparts,"[107] a phenomenon described as "adultification bias."[108] Given the high number of decisions involving Black and Indigenous young people, further research could usefully interrogate the extent to which racialized assumptions about childhood, maturity, and "adultification" contribute to the punitive outcomes we see in these cases.

### D. Observations from the Case Law

#### 1. In Search of Maturity: Rebutting the Presumption of Diminished Moral Blameworthiness

[105] See Chris Cunneen, "Surveillance, stigma, removal; Indigenous child welfare and juvenile justice in the age of neoliberalism" (2015) 19:1 Australian Indigenous Law Review 32; Brunson & Pegram, *supra* note 97; Beckman & Rodriguez, *supra* note 97; Robyn Maynard, *Policing Black Lives in Canada* (Halifax/Winnipeg: Fernwood Publishing, 2017).

[106] Brunson & Pegram, *ibid* at 87.

[107] Akwasi Owusu-Bempah & Storm K Jeffers, "Black Youth and the Criminal Justice System: Summary Report of an Engagement Process in Canada", online: (2021) Department of Justice Canada https://www.justice.gc.ca/eng/rp-pr/jr/bycjs-yncjs/pdf/RSD2021-BlackYouth-CJS-Engagement-EN.pdf, at 39, citing Phillip Atiba Goff et al, "The Essence of Innocence: Consequences of Dehumanizing Black Children" (2014) 106(4) Journal of Personality and Social Psychology 526.

[108] Owusu-Bempah & Jeffers, *supra* note 107 at 39, citing Rebecca Epstein et al, "Girlhood Interrupted: the Erasure of Black Girls' Childhood", online: (2017) Georgetown Law Centre https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf.

Read together, the post-*DB* sentencing cases reveal that the presumption of diminished moral blameworthiness has proven relatively easy to rebut, at least with resepct to murder. It is instructive to look at cases where one might expect the presumption to operate at its strongest – those dealing with 14- and 15-year-olds – to see what analytical work conceptions of (im)maturity and the presumption of diminished responsibility might be doing. In noting the focus in this analysis on maturity, Justice Jamie Campbell, writing exra-judicially, has stressed the difference between "maturity" and "street smarts":

> Maturity has been a consideration that both makes intuitive sense on one level and creates a disconnect on another. If the issue is an adult or quasi-adult moral level of understanding and personal restraint, "maturity" would surely be a factor. At the same time, it appears there are different kinds of maturity. The ability to use cunning to survive on the street in a hostile environment without adult guidance, or a level of criminal sophistication, suggests a kind of maturity. It is far from clear that these kinds of maturity are relevant to the issue of whether the young person is functioning as an adult with regard to judgment and restraint. Street smarts and maturity are not the same thing.[109]

Equating survival skills – especially those developed in dangerous environments – with "maturity" risks over-punishing those young people who have been pushed to the margins early in life by social, economic, and familial forces beyond their control.

This "adultification" of marginalized young people is precisely what many Crown prosecutors and sentencing judges have done in the murder cases I reviewed. In a number of cases, sentencing judges have found the presumption of reduced culpability rebutted where the young person was involved in a gang or had a significant youth record. For example, in *R v D(CG)*,[110] a fifteen-year-old young person who pled guilty to second-degree murder was sentenced to life. He is described as a member of the Mad Cowz gang. His race is not mentioned but media reports show that this informal "gang" was formed in the early 2000s

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[109] Jamie Campbell at *supra* note 68, citing *R v Skeete*, 2002 CarswellOnt 6103 (Ont SCJ) at para 119. See also Hillary Tasche, "Fourteen to Life: Giving Constitutional Effect to the Age-Based Presumption of Diminished Moral Blameworthiness by Respecting Parliament's Two-Pronged Test for Adult Sentence Applications Pursuant to Section 72 of the *Youth Criminal Justice Act*" University of Manitoba LLM Thesis (2023), on file with author, at 86 for a discussion of the problematic reliance on "street smarts" in this context.

[110] *R v D(CG), supra* note 89.

by Black young people whose families had recently arrived in Winnipeg as refugees from Sudan and Somalia.[111] According to the decision, "[t]he murder was gang-related and retribution for a drive-by shooting done by a rival gang that had occurred three days prior. According to CGD, he was informed by older members of the Mad Cowz gang that he was the smallest, so he had to hold the gun and be the shooter. CGD said that he was pressured by older gang members to carry out the offence."[112] In finding that the presumption of diminished responsibility was rebutted, the court put significant emphasis on evidence that this young person had 15 disciplinary incidents in the youth system since his arrest, as well as on the "brazen" nature of the offence and impact on perceptions of public safety.

In *R v M(J)*,[113] a 15-year-old Indigenous young person was sentenced to life for the brutal killing of an elderly man who was unknown to him. There was no *Gladue* report but pre-sentence reports created for other offences were used as evidence. JM's parents had been in and out of jail and he was described as having joined a gang at the age of 13. On this point, the court said that "[h]is connection to the gang is grounded in an attempt to create a sense of family he is missing, yet this offence was committed alone, with no apparent connection to his gang affiliation."[114] She went on to cite this passage from the Manitoba Court of Appeal in *Anderson*[115]:

> While a direct causal link between the young person's unique and systemic background factors and the commission of the offence is not required, I am not satisfied that the *Gladue* factors here diminish the young person's moral blameworthiness or culpability in a meaningful way. The *Gladue* factors here do not "[tie] in some way" the young person to committing murder; they do not appear to have played a part in bringing him before the courts...[116]

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[111] Mike McIntyre, "Cowz and effect: Police, activists cautiously optimistic as jail sentences, deportations and defections weaken ultra-violent West End street gang" online: (10 June 2017) Winnipeg Free Press https://www.winnipegfreepress.com/breakingnews/2017/06/10/cowz-and-effect.

[112] *R v D(CG), supra* note 89 at para 18.

[113] *R v M(J), supra* note 89.

[114] *Ibid* at para 22.

[115] *R v Anderson*, 2018 MBCA 42.

[116] *R v M(J)*, *supra* note 89 at para 222, citing *R v Anderson*, *ibid* at para 74. This search for a causal link between the harmful impacts of colonialism and systemic racism and the commission of the offence for s. 718.2(e) to have an impact was rejected by the Supreme Court of Canada in *R v Ipeelee*, 2012 SCC 13, a

Because this young person acted alone (*i.e.,* not with a gang, although involved with one), he was seen as an adult and not subject to peer-pressure and immature decision-making.

For the fifteen-year-old Indigenous teen in *R v S(DVJ)*,[117] the fact that he took videos with his friends, "bragging" about the murder, was taken as evidence of adult moral blameworthiness that contributed to rebutting the youth presumption. Together with an 18-year-old co-accused, this young person used an axe to rob a Pizza Hotline store, killing a man. DVJS is Indigenous but there was no *Gladue* report.[118] Furthermore, the Crown argued that *Gladue* principles and analysis were not relevant in this case because it was only the preliminary stage of determining whether an adult sentence is required. The court rejected this argument, noting evidence of alcohol-related neurodevelopmental disorder, intergenerational trauma and harms of residential schools experienced by the young person and his family, and the evidence of some experts that he would respond to rehabilitation in the youth system. However, the court put a great deal of weight on DVJS's actions following the murder, stating that they showed "clear evidence of someone whose moral blameworthiness or culpability was unfettered and uninhibited by his youthful age. There is no other way to say it than his intent and his actions are those of an adult."[119] This decision shows the malleability of the analysis as it might just as easily be inferred that the actions of a young person bragging about a murder show *immaturity* rather than maturity.[120]

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decision rendered six years earlier: "[S]ome cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence" (at para 81).

[117] *R v S(DVJ), supra* note 89.

[118] In the cases that involved the sentencing of Indigenous young people, *Gladue* reports were rarely mentioned, although "*Gladue* principles" were sometimes discussed, often leading to a decision to impose an adult sentence. See, for example*, R v T(JJ), supra* note 89; *R v L(S),* 2012 MBPC 22; *R v AWB*, 2018 ABCA 159.

[119] *R v S(DVJ), supra* note 89 at para 47.

[120] See *R v TJT,* 2018 ONSC 5280 where a 15 year-old Black young person was handed a youth sentence for second-degree murder where his actions following the shooting of a stranger "reflected immature, impulsive and irresponsible youth who lacked adult understanding of true seriousness or consequences of

One of the few cases involving a female young person, *R v Todorovic*,[121] is an example of a teenager's perceived lack of empathy being taken as evidence of her adult moral responsibility, despite this being one of the hallmarks of youth and immaturity.[122] The 15-year-old (who the court described as "just six days shy of her 16th birthday")[123] was convicted by a jury of the first-degree murder of a 14-year-old girl by the young person's 17-year-old boyfriend. She was not present when the stabbing occurred but was found guilty as an abettor or counsellor. The court discounted the psychiatric evidence which said that this was an unusual case and that the young person did not likely pose a high risk to reoffend. The court said "[a]ccepting [the young person's] relatively young age, her pro-social background and her lack of any prior criminal record are all positives, they are outweighed in my view by these other facts that suggest a character flaw that is frightening in its prospects, especially if it is not properly diagnosed and treated."[124] He sentenced her to life.[125]

There is little agreement in the case law about what is required to rebut the presumption of diminished responsibility, leaving ample room for judge's own views about maturity and immaturity to shape the decision, often to the deteriment of the young person being sentenced. Even where there is evidence from psychiatrists or psychologists who have examined the young person, the search for youthful

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his behaviour." This young person was said to be gang-involved but his life experience was contextualized for court in an IRCA prepared by Akwasi Owusu-Bempah.

[121] *R v Todorovic*, *supra* note 83, affirmed on appeal: *R. v. Todorovic*, 2014 ONCA 153.

[122] See *R v TFD*, 2019 ONSC 3389 where, in sentencing a 15 year-old who shot and killed a stranger to the maximum youth sentence, Justice Ratushny cited Bala & Anand, *supra* note 37, on the way that a failure to display empathy is common among youth.

[123] It was very common for the court to describe a young person's age beyond the number, usually to locate them on the older side of a particular age (*e.g.,* "nearly 18": *R v W (D),* 2008 ONCA 268 and "16 and 8 months": *R v L(L),* 2014 ABQB 497).

[124] *R v Todorovic*, *supra* note 83 at para 68.

[125] This case was decided before the 2012 amendments which requires the Crown to prove both that the presumption of diminished moral responsibility is rebutted and that a youth sentence would be insufficient to hold the young person accountable. As in other cases in the post-*DB*/pre-2012 era, the analysis is a blended one.

immaturity can lead to troubling decisions. In *R v Henderson*[126] a 16-year-old Indigenous girl with significant cognitive disabilities[127] was sentenced to life for the murder of a baby. The sentencing judge noted that the young person was immature, saying the "consensus from those who have examined her is that [the young person] will require lifelong care because she will not outgrow the immaturity/impulsivity associated with her FASD diagnosis."[128] Perversely, this finding that the young person required *care* contributed to the judge's decision to impose a life sentence in adult prison. The court was satisfied "that [her] moral culpability in committing the murder was diminished, but that her age was not a significant contributing cause of her lower level of moral blameworthiness for the offence."[129] On this basis, and combined with a conclusion that a life sentence in prison was necessary to ensure accountability for the crime (a conclusion that is difficult to reconcile with the earlier statement about the need for care), she was sentenced as an adult.

The result in *Henderson* is arguably a feature of the primary focus on neuropsychological arguments for the diminished moral blameworthiness of young people, rather than a broader justification that considers the ways that young people are systematically disempowered.[130] Where a court finds, as Judge Anand did in *Henderson*, that the source of the young person's immaturity and impulsiveness is her disability and not her age, the justification for treating her differently from an adult (including an adult with

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[126] *R v Henderson*, *supra* note 82.

[127] She had been diagnosed with Fetal Alcohol Spectrum Disorder and had experienced substantial trauma and abuse in her childhood.

[128] *R v Henderson*, *supra* note 82 at para 63.

[129] *Ibid* at para 64.

[130] I am grateful to Lisa Kelly for sharing this insight. See Gideon Yaffe, *The Age of Culpability: Children and the Nature of Criminal Responsibility* (Oxford: Oxford University Press, 2018) for an argument that that young people should be punished less harshly than adults due to their political disenfranchisement, rather than due to their behavioural or neuropsychological immaturity. While Yaffe's thesis is rooted in a formalist, liberal understanding of criminal wrongdoing and moral culpability that I do not share, the central idea that the disempowerment of youth reduces the state's standing to punish them is compelling and arguably provides a stronger foundation for the presumption of diminished moral responsibility than a focus on brain science.

the same disability) seems to fall away. However, the influential MacLeod Report in 1966 framed the need for different treatment of youth on an understanding of their vulnerability grounded in social and economic dependency as well as developmental psychology.[131] In *DB* Justice Abella cited the "heightened vulnerability" of youth, along with "less maturity and reduced capacity for moral judgment,"[132] suggesting a broader justification and inquiry. More recently, in *R v CP*, Justice Abella (in dissent, but not on this point) expanded upon *DB* by acknowledging the "amplified" vulnerability faced by racialized and Indigenous young people. "These young people disproportionately interact with the criminal justice system for a complex variety of reasons," Justice Abella wrote, "which include both direct and systemic racial discrimination within the system."[133] Quite apart from aggravating neuropsychological vulnerabilities, the political and racial subordination of young people, including by state actors, militates against the state constitutionally punishing them as adults, especially for life.

Even within the neuropsychological paradigm, for many judges, the horrific nature of the crime appears to overshadow evidence that goes more directly go to the question of maturity, amounting to a *de facto* "presumptive offence" regime for homicide.[134] As noted by Campbell, "[s]ection 72 can be interpreted so that the fundamental principle of diminished responsibility can be rebutted by reference to circumstances such as the horrific nature of the crime, that are unrelated to the social scientific and scientific factors that have given rise to the presumption. Or, a finding can be made that the presumption is rebutted based on a very basic level of moral judgment, restraint, and independence on the part of the young person. Neither

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[131] Kelly, *supra* note 33 at 95.

[132] *R v DB, supra* note 4 at para 41.

[133] *R v CP* [2021] 1 SCR 679 at para 88 [internal citations omitted].

[134] Tasche, *supra* note 109, at 14. Susan Bandes has argued, in the context of US capital punishment cases, that extreme crimes such as murder "provoke the highest emotions—anger, especially even outrage— that in turn makes rational deliberation problematic for investigators, prosecutors, judges and juries": Susan Bandes, "Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty" (2009) 33 Vermont L Rev 489 at 489.

choice, it seems, respects the fundamental nature of the presumption."[135] Such decisions effectively blend the two inquiries – rebutting the presumption of diministhed moral blameworthiness and proving that a youth sentencing will not hold the young person accountable – contrary to the legislative direction in s. 72 of the *YCJA*. Furthermore, they undermine the constitutional presumption of diminished moral blameworthiness articulated in *DB*.[136]

### 2. In Search of Accountability: the Invisible Life Sentence

The second branch of the test provides that, for an adult sentence to be imposed, the Crown must prove that a youth sentence would not be sufficient to hold the young person accountable. Again, the Crown is regularly found to have met this burden in the reported cases. Sometimes judges are frank about their view that youth sentences should be rare for murder convictions,[137] seemingly ignoring the double burden on the Crown and the constitutional principles underlying the youth regime. The focus of the accountability inquiry is usually on what programs and interventions are available in the youth system. It is rare for the court to discuss what a federal sentence in adult prison would mean, in practical terms, for the young person before them.[138] When a judge makes this determination, it is often simply assumed that an adult sentence would provide the necessary supervision and support that the youth needs. In other cases, where there is evidence from corrections officials, it may lead judges to assume that the offerings in federal prisons are greater than they actually are.[139] Notwithstanding the lack of any evidence in some cases of what is available

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[135] Campbell, *supra* note 68.

[136] Tasche, *supra* note 109 at 14.

[137] See, for example, *R v SB, TF & MW,* 2014 ONSC 3436 at para 52 ("the situations where [youth sentences] will be properly viewed as having meaningful consequences are likely to be much fewer for the offence of murder than would be the case for all other offences").

[138] See, for example, *R v H*, 2019 ONCJ 817.

[139] See, for example, *R v L(L), supra* note 123 at para 58 ("Sarah McIsaac, the acting Edmonton area program manager with parole services […] said that schooling opportunities, even post-secondary opportunities, are available to inmates"). However, the lack of access to post-secondary education for people incarcerated in federal prisons is well documented. See, for example, John Howard Society of

(or not) for the young person in federal prison, these decisions regularly conclude that rehabilitation for the young person is more likely in adult prison and with supervision on release. It is rare for the court to even mention that the supervision will be lifelong.

Moreover, some courts have held that it is not the role of the sentencing judge to decide whether adult prison would meet the needs of the young person being sentenced. On this basis, the Quebec Court of Appeal in *Joseph c R* held that a sentencing judge did not err in refusing to hear evidence of the conditions, classification system, and the programs that would be available (or not) in the federal prison system for the young person being sentenced.[140]

A rare exception to this approach is the decision of Judge Anne Derrick (as she then was) in *R v Skeete.*[141] Judge Derrick spent considerable time addressing her concerns about the ill fit of a lifelong federal prison sentence for a young person. She cited *D (TP)*[142] for the proposition that "...[o]ne of the underlying premises of the *Youth Criminal Justice Act* is that, with some exceptions, young persons who commit crimes can be rehabilitated and successfully reintegrated into society so they commit no further crimes. They do not need to be on parole for a lifetime or return to prison for an offence because, if rehabilitated and reintegrated, they will not recidivate and commit another offence."[143] Judge Derrick also considered a 2009 decision, *R v Smith,*[144] in which the appellate court found no error where a sentencing judge failed to

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Canada, "Lack of education and training in Canadian prisons" online: (7 December 2020) https://johnhoward.ca/blog/lack-of-education-and-training-in-canadian-prisons/. Canadian prisoners have no access to the internet while virtually all distance education from Canadian post-secondary institutions is offered via the internet, leading to an effective ban on post-secondary education for federal prisoners. See Lisa Kerr & Samantha Bondoux, "BCCLA Position Paper: Prisoner Access to Education + Internet" online: https://bccla.org/wp-content/uploads/2020/08/2019-12-31-Position-Paper-re-Prisoner-Access-to-Education-Internet-final-for-approval.pdf.

[140] *Joseph c R*, 2018 QCCA 1449.

[141] *R v Skeete*, *supra* note 109.

[142] *R v D(TP),* 2009 NSSC 332.

[143] *Ibid* at para 128, cited in *R v Skeete*, *supra* note 109 at para 204.

[144] *R v Smith*, 2009 NSCA 8.

specifically address certain differences between youth and adult correctional settings. However, she went on to note that *Smith* required judges to "be alive to these issues."[145] Unlike many other judges in these cases, Judge Derrick discussed the evidence of what would be available (or not) for the young person if he were sentenced to adult prison. She also cited the Correctional Investigator's report criticizing the lack of programs for younger individuals in the federal prison system.[146] Judge Derrick expressed significant concern about imposing an adult life sentence[147] but ultimately felt compelled by the legislative regime and the evidence to do so.

Beyond paying little to no attention to the immediate nature of a life sentence in adult prison, many decisions leave the impression that a young person sentenced as an adult will actually get out of prison at or near their parole eligibility date. For example, in *R v TFD*,[148] the court says,

> [t]he two possible sentences in terms of their custodial portion in a facility, and leaving aside for the moment the discretionary crediting of pre-sentence custody, have the potential to be quite similar because of the statutory limits applying to young persons. For a young person convicted of second-degree murder committed when he was under the age of sixteen and who is sentenced as an adult, the period of parole ineligibility and, therefore, actual custody, is between 5 and 7 years pursuant to s. 745.1(a) of the *Criminal Code*. For that same young person who is given a youth sentence, the custodial portion of it must not exceed 4 years pursuant to either s. 42(2)(q)(ii)(A) or s. 42(2)(r)(iii)(A) of the *YCJA*.[149]

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[145] *R v Skeete*, *supra* note 109 at para 200, citing *R v Smith*, *ibid* at para 51.

[146] *R v Skeete*, *supra* note 109 at paras 244–246, citing Office of the Correctional Investigator, "Annual Report of the Office of the Correctional Investigator 2005–2006", online: (30 June 2006) at 13 https://publications.gc.ca/collections/collection_2013/bec-oci/PS100-2006-eng.pdf.

[147] *R v Skeete*, *supra* note 109 at para 245: "In sentencing Melvin to life, I harbour no naïve assumptions about the effectiveness of the programming available in a federal penitentiary. There is something amiss when mental health professionals identify what a young person needs to optimize their rehabilitation - in Melvin's case, individualized therapeutic interventions - and yet the only sentencing option I have available to me once I have determined a youth sentence to be unsuitable is an option that almost exclusively relies on a one-size-fits-all rehabilitation model."

[148] *R v TFD*, *supra* note 122.

[149] *Ibid* at paras 10–11 (emphasis added).

Similarly, the sentencing judge in *R v Todorovic*,[150] where the young person being sentenced was 15 years-old, says "there is some similarity in the end result between a youth and an adult sentence in terms of the ultimate period of incarceration"[151] while going on to say that the difference is that under a life sentence the individual will be under the supervision of the Parole Board of Canada. However, this conception of similarity between the youth and adult sentence for murder misses entirely the reality that many people serving life sentences will remain in prison well past their parole eligibility dates.[152] Moreover, even if parolled, they are subject to lifelong supervision and may be returned to prison upon the decision of a parole officer,[153] usually for breaches of conditions and not for new offences.[154] Even where judges considered whether to impose adult sentences on very young people (15 year-olds), they rarely discussed the nature or impact of adult sentences that would follow these young people for the rest of their natural lives.[155]

### 3. Mind the Gap: Credit (Or Not) for Time Spent in Pre-Trial Custody

Sentencing judges decide these youth cases in the shadow of the harsh mandatory minimum life sentence imposed on adults for murder in Canada.[156] One of the consequences of this extreme adult

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[150] *R v Todorovic*, *supra* note 83.

[151] *Ibid* at para 73.

[152] See Parkes, Sprott & Grant, *supra* note 17. This study shows that of adults sentenced to life for murder who were eligible for parole between 2009 to 2015, only 14.8% were released within one year of their parole eligibility date. This study did not include people serving life sentences who were youth at the time of the offence, due to the incompleteness of the data.

[153] See, *e.g.,* Ruston, *supra* note 8.

[154] Statistics from the Parole Board of Canada show that since 1994, of those individuals serving life or indeterminate sentences who were released on full parole, only 9% have had their parole revoked for re-offending (6% for a non-violent offence and 3% for a violence offence). See Parole Board of Canada, "Performance Monitoring Report 2018-2019", online: (24 January 2022) at 99 https://www.canada.ca/en/parole-board/corporate/transparency/reporting-to-canadians/performance-monitoring-report/2018-2019.html.

[155] See, for example, *R v S(DL)*, *supra* note 89.

[156] For a critical discussion in the American context of the argument that "juveniles are different" for purposes of carving out exceptions to extremely punitive adult sentences, see Mugambi Jouet, "Juveniles

alternative is that some judges will deny young people the usual credit for time-served in order to lengthen their youth sentence. A number of appellate courts have held that the requirement in s. 38(3)(d) of the *YCJA* to "take into account" time spent in pretrial custody in sentencing a young person under the *Act* does not mean that credit must be given for that time. It can be considered as part of a decision to impose a youth sentence, as articulated in *R v P (NW)*[157] by Justice Monnin of the Manitoba Court of Appeal:

> … I am unable to conclude that the sentencing judge erred when he declined to grant the accused any credit for the time he served in pre-sentence detention. Those cases lead to the inescapable conclusion that a sentencing judge must consider the time spent in detention in determining an appropriate sentence — which he did — but that he is not bound to, especially in cases where the maximum sentence or near maximum sentence is imposed, give any credit to an accused for that time spent in detention — which is what the judge did in this case.[158]

In a number of the reported cases, defence counsel seeking to keep a client in the youth system for a murder sentence asked that credit <u>not</u> be awarded for pre-trial custody, in an effort to convince the judge that a youth sentence would be of a sufficient length to meet the statutory requirement of holding the young person accountable for their actions.[159] For example, in the Ontario second-degree murder case of *R v TJT*,[160] where the maximum youth sentence was seven years, the court decided not to grant any credit for TJT's nearly three years in pretrial custody, thereby imposing an effective sentence of 10 years (four more years in custody plus three years of community supervision, added on to the three years the young person had already served in pretrial detention). The decision is indicative of the approach taken by some judges when a young person has spent some years on remand and would, with that time credited at 1:1 or 1:1.5, be within a year or two of the maximum period of custody available under the *YCJA*. Faced with the alternative of a life sentence in adult prison, Justice Garson said:

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Are Nor So Different: The Punishment of Juveniles and Adults at the Crossroads" (2021) 33(4) Federal Sentencing Reporter 278.

[157] *R v P (NW),* 2008 MBCA 101.

[158] *Ibid* at para 23.

[159] See, for example*, R v D(CG)*, *supra* note 89 and *R v S(DVJ)*, *supra* note 89.

[160] *R v TJT*, *supra* note 120.

> In weighing and balancing the objectives enumerated under the *YCJA*, I am satisfied that T.J.T. can be held accountable for his actions by the imposition of the maximum sentence available to me under the *YCJA*. ... Simply put, the reason for not giving credit for time served in pre-sentence custody is my assessment that the maximum custodial period of four years followed by three years community supervision is required in these circumstances to hold T.J.T. accountable, protect the public, and to ensure his rehabilitation and reintegration into society. The reduced period of community supervision addresses the mitigating circumstances that a lifetime on parole would not recognize. The provisions of the *YCJA* better equip me to craft a sentence that will permit T.J.T.'s safe return into society.[161]

Similarly, in *R v TFD*,[162] Justice Ratushny declined to give credit for time served, instead emphasizing that TFD got an effective 8 ½ year sentence for the murder of a stranger.

In *R v W(M)*,[163] the Ontario Court of Appeal held that a sentencing judge erred in concluding that he was *required* to give some remand credit in calculating a youth sentence. These judges are clearly animated by a concern that, where the mandatory minimum life sentence for murder is the only alternative to a youth sentence, to require pre-trial credit to be deducted from a youth sentence would have a perverse result. It would make a youth sentence unavailable and force a judge to impose the much more severe life sentence in cases where the court had otherwise concluded that a youth sentence of just a year or two longer would be sufficient to hold the young person accountable. The practice in this line of cases runs contrary to established principles and the reasons for granting credit for time spent in pretrial custody, including to promote parity in sentencing between those who are held in remand pending trial and those who are granted bail.[164] It is one of the perverse implications of the mandatory life sentence, as applied to young people in particular, that this study reveals.

### E. Conclusion

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[161] *Ibid at* para 131.

[162] *R v TFD*, *supra* note 122.

[163] *R v W(M), supra* note 61 at para 79.

[164] See generally *R v Safarzadeh-Markhali*, 2016 SCC 14.

As van den Brink and Lynch have noted, "[c]ases of child-perpetrated murder are particularly emotive and attract a high degree of public and media interest."[165] These are not easy cases to adjudicate. Currently, Canadian legislation and the range of approaches found in the case law provide significant scope for imposing life sentences on teenagers, running contrary to the weight of evidence about their harms and to human rights principles. Even with a double burden on the Crown, these extreme sanctions are not rare, even for younger teens. The nature and seriousness of the offence tends to overwhelm the analysis.

The sledgehammer that is the mandatory minimum life sentence for murder looms large in the shadow of these cases. It is responsible for the troubling gap between the maximum youth sentence (seven or ten years) and the only available adult sentence – mandatory life imprisonment with uncertain prospects for release, lifelong supervision, and ever-present potential for reincarceration. The mandatory life sentence also hands incredible power to prosecutors to obtain guilty pleas in exchange for not seeking an adult sentence,[166] which increases the likelihood of wrongful convictions given the particular vulnerabilities of young people.[167]

The constitutional issues associated with this regime are ripe for reconsideration.[168] *DB* was not a murder case. Therefore, while the constitutionality of presumptive adult sentences generally was before the court, the particular pathologies of the mandatory life sentence were not. In addition, the law with respect to s. 7, s. 12, and s. 15, all of which are engaged by the mandatory life sentence for young people sentenced as adults, has developed significantly since 2008.[169] Most recently, the Supreme Court of Canada affirmed

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[165] van den Brink & Lynch, *supra* note 2 at 973.

[166] See, for example*, R v S(CL), supra* note 94 where two fourteen-year-old Indigenous girls pled guilty to murder in exchange for the Crown's agreement not to seek an adult sentence. Given the significant number of young people sentenced to life in Manitoba, including those who were 15 at the time of the offence, this was a significant inducement.

[167] See Redlich, Zottoli & Daftary-Kapur, *supra* note 96.

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

[169]*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44; *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42; and *R v Bissonette*, 2022 SCC 23 at paras 59–70.

in *R v Bissonnette*[170] that the s. 12 right to be free from cruel and unusual punishment prohibits "the imposition of a punishment that is intrinsically incompatible with human dignity"[171] in addition to a prohibition on punishments that are grossly disproportionate.

These and other developments, including research about the harms of life imprisonment imposed on young people and the international human rights prohibition against it, render deeply suspect the assumptions about the suitability of adult life sentences and findings of legally "mature" 15-, 16-, and 17-year-olds seen throughout the reported Canadian cases.[172] There are good arguments to be made that the imposition of life sentences on young people is incompatible with human dignity, particularly with the attention we see in *Bissonnette* to international and comparative law.[173] I was unable to find any Canadian decision in which the constitutionality of the life sentence for young people was considered by a court, although I have heard from defence counsel who have raised the issue in various proceedings in which the adult sentence was later taken off the table by the Crown through plea negotiations.[174]

In October 2024 the Supreme Court of Canada heard argument in two decisions involving the sentencing of young people as adults for murder.[175] The twin appeals present an opportunity for the Court to consider the extent to which sentencing judges and appellate courts have strayed from the constitutional

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[170] *R v Bissonette*, *ibid.*.

[171] *Ibid* at para 60.

[172] See Canlione & Abrams, *supra* note 19; Crewe, Hulley & Wright, *supra* note 19; Haney, *supra* note 19; Holman & Ziedenberg, *supra* note 19; Lynch, *supra* note 19; Ruddell & Gileno, *supra* note 24; Maddy Troilo, "Locking up youth with adults: An update", online: (27 February 2018), Prison Policy Initiative https://www.prisonpolicy.org/blog/2018/02/27/youth/; Rachel Tynan, *Young Men's Experiences of Long-Term Imprisonment* (London: Routledge, 2019).

[173] *R v Bissonette*, *supra* note 169 at paras 72 –73, 98–108. In *Mendoza et al v Argentina* (2013) Inter-Am Ct HR (ser C) No 260, the Inter-American Court of Human Rights held that the life imprisonment of children violates the American Convention on Human Rights, specifically the prohibition on arbitrary arrest or imprisonment, and that Argentina's use of the sentence also violated the prohibition on inhuman or degrading punishment. See Ratledge, *supra* note 22.

[174] Personal correspondence on file with author.

[175] *R v IM*, 2023 ONCA 378, leave to appeal granted: *IM v His Majesty the King*, 2023 SCC 40868 and *R v SB,* 2023 ONCA 369, leave to appeal granted: *SB v His Majesty the King*, 2023 SCC 40873.

principles enunciated in *DB*, including through the lower standard of proof and allowing the seriousness of some offences, including murder, to overwhelm the analysis.[176] The constitutionality of the life sentence for young people – mandatory for youth when sentenced as adults – is not before the Supreme Court. That will have to wait for another day.[177] Meanwhile, it is hoped that the Court will reckon with the extent to which sentencing young people to life has become normalized and the troubling implications of that reality.

[176] *IM v His Majesty the King*, *ibid* (Memorandum of Argument of IM on Application For Leave to Appeal) online: (25 August 2023) https://www.scc-csc.ca/WebDocuments-DocumentsWeb/40868/MM010_Applicant_IM.pdf.

[177] Nasr, *supra* note 168.

## F. Appendix: Reported Youth Murder Cases 2008-2022

*Joseph c R*, 2018 QCCA 1449

*La Reine Poursuivante c Adolescent* (7 octobre 2013), Sherbrooke 450-03-009547-119 (Cour Du Quêbec Chambre de la jeunesse)

LSJPA - 1012, 2010 QCCQ 3935

LSJPA - 1037, 2010 QCCA 1627

LSJPA - 1311, 2013 QCCS 2381

LSJPA - 1949, 2019 QCCS 5239

LSJPA - 2127, 2021 QCCQ 13876

*R c Bouchard*, 2016 QCCS 6923

*R c Goulet*, 2022 QCCQ 5642

*R c Sirois*, 2017 QCCA 558

*R v A(A)*, 2011 ABQB 598

*R v A (DR)*, 2014 MBQB 199

*R v A (KDG)*, 2014 SKQB 192

*R v A (MA)*, 2012 BCCA 402

*R v Anderson*, 2018 MBCA 42

*R v AWB*, 2018 ABCA 159

*R. v. Bagshaw*, 2010 ONCA 864

*R v B(HEJE)*, 2021 MBQB 223

*R v BSA*, 2013 BCSC 75

*R v Casavant*, 2009 ABQB 672

*R v C(CH)*, 2009 ABQB 125

*R v C (I)*, 2010 ONSC 3359

*R v CM*, 2018 ABCA 214

*R v D(CG),* 2014 MBQB 142

*R v DF*, 2017 ONCJ 495

*R v D(TP)*, 2009 NSSC 332

*R v E(D)*, 2010 ABCA 69

*R v EJB*, 2018 BCSC 739

*R v Ellacott*, 2017 ONCA 681

*R v F (TS)*, 2016 MBQB 13

*R v G (RA)*, 2011 MBPC 54

*R v Green*, 2017 MBQB 181

*R v H*, 2019 ONCJ 817

*R v H (E)*, [2009] CarswellOnt 2716

*R v Henderson*, 2018 SKPC 27

*R v Hepp*, 2014 ONCA 555

*R v H (JJ)*, 2010 MBQB 177

*R v Joseph*, 2020 ONCA 73

*R v L (L)*, 2014 ABQB 497

*R v LM*, 2017 SKQB 336

*R v Logan*, 2009 ONCA 402

*R v L (S)*, 2012 MBPC 22

*R v LZ*, 2020 BCCA 208

*R v Manitowabi*, 2014 ONCA 301

*R v McClements*, 2017 MBCA 104

*R v M (CJ)*, 2010 SKQB 103

*R v M(K)*, 2017 NWTSC 26

*R v McKenzie*, [2009] O.J. No. 1068

R v Meeches, 2021 MBCA 26

*R v MM*, 2021 ONSC 8095

*R v M(M)*, 2012 ABPC 153

*R v M (S)*, 2014 ONSC 5510

*R v Munroe*, 2013 NSPC 45

*R v NM*, 2021 ONCJ 617

*R v NN*, 2022 ONSC 1705

*R v NW*, 2018 NSPC 14

*R v Owusu*, 2021 ONCA 417

*R v P (CJ)*, 2011 MBPC 62

*R v PH*, 2017 BCSC 1105

*R v P (M)*, 2013 ONCJ 190

*R v P (MN)*, 2014 MBCA 2

*R v Prockner*, 2018 SKCA 52
*R v P(S)*, 2011 ONCA 335
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