R. v. B.J.M.

Saskatchewan Judgments

Saskatchewan Court of Appeal

R. Leurer C.J.S., B. Barrington-Foote and M. McCreary JJ.A.

Heard: December 8, 2023.

Judgment: August 12, 2024.

Docket: CACR3617

[2024] S.J. No. 235 | 2024 SKCA 79

Between B.J.M., Appellant, and His Majesty the King, Respondent, and John Howard Society of Saskatchewan, Intervenor

(151 paras.)

Case Summary

Criminal law — Sentencing — Criminal Code offences — Offences against person and reputation — Homicide — Second degree murder — Non-Criminal Code and regulatory offences — Young Offenders/Youth Criminal Justice Act — Particular sanctions — Young persons — Adult sentences — Test — Procedure — Appeals — Appeal by BJM from his adult sentence imposed on grounds that he should have been sentenced as a young person, dismissed — BJM was 17 years old when he shot and killed victim — Sentencing judge was satisfied a youth sentence imposed in accordance with the purpose and principles set out in the Youth Criminal Justice Act would not be of sufficient length to hold BJM accountable for his offending behaviour — Nothing suggested sentencing judge would have reached a different conclusion had he not erred as to the standard of proof — Error in his legal analysis had no impact on the sentence BJM received.

Appeal by BJM from his adult sentence imposed on grounds that he should have been sentenced as a young person. BJM was 17 years old when he shot and killed the victim. He pleaded guilty to second degree murder. BJM was initially charged with first degree murder and breach of a firearms prohibition. Prior to the trial, the Crown gave notice it would seek an adult sentence if BJM was convicted of these crimes. At the trial, BJM pleaded guilty to second degree murder based on an agreed statement of facts. The sentencing judge concluded both prongs of the test governing the imposition of adult sentences on young persons had been met, hence BJM should be sentenced as an adult. The sentencing judge found the evidence clearly established that BJM was not in a state of dependency and immaturity at the time of the commission of the offence. BJM received the mandatory minimum sentence of imprisonment for life with no eligibility for parole for seven years. BJM asserted the sentencing judge erred in law by concluding that the satisfaction standard applied and if the judge had not applied that standard, BJM would have received a youth sentence.
HELD: Appeal dismissed.

The sentencing judge was satisfied that a youth sentence imposed in accordance with the purpose and principles set out in the Youth Criminal Justice Act would not be of sufficient length to hold BJM accountable for his offending behaviour. After careful consideration of all the relevant factors, including the high risk for future violence posed by BJM, the limited steps he had taken towards his rehabilitation despite being offered opportunities, and his poor attitude towards making any significant changes in his life, a youth sentence would not be long enough to provide reasonable assurance of BJM's rehabilitation to the point where he could be safely reintegrated into society. Although the sentencing judge did not expressly state that he had no reasonable doubt the Crown had met the onus to establish beyond a reasonable doubt that the presumption of diminished moral blameworthiness or

culpability that BJM enjoyed because he was not yet 18 years old was rebutted, the finding that he did make was nearly equivalent to it. Nothing in his reasons suggested the sentencing judge would have reached a different conclusion had he not erred as to the standard of proof. The error in his legal analysis had no impact on the sentence BJM received.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7

Criminal Code, *R.S.C. 1985, c. C-46, s. 573.1*, s. 687(1), s. 718, s. 718.2, s. 724(3)(d), s. 734(2), s. 742.1, s. 745.1(c), s. 745.63, s. 753.1, s. 753.1(1)(b), s. 753.1(1)(c), s. 753(1), s. 753(1)(a), s. 759(3)

Safe Streets and Communities Act, SC 2012, c 1

Young Offenders Act, RSC 1985, c Y-1, s. 16

Youth Criminal Justice Act, *SC 2002, c 1, s. 3*(1)(b), s. 3(1) (b)(ii), s. 10(5), s. 10(5)(a), s. 10(5)(b), s. 29(2), s. 29(2)(b), s. 29(2)(b)(ii), s. 38, s. 42, s. 64(1), s. 64(2), s. 72, s. 72(1), s. 72(1)(a), s. 72(1)(b), s. 72(2), s. 72(5), s. 74(2)

Court Summary:

Disposition: Appeal dismissed.

Counsel

Christopher Gratton for the Appellant.

Pouria Tabrizi-Reardigan for the Respondent.

Pierre Hawkins for the Intervenor.

Restriction on Publication

An order has been made in accordance with s. 74(2) of the *Youth Criminal Justice Act* directing that any information identifying the young person shall not be published until the appeal period is complete.

Reasons for judgment were delivered by R. Leurer C.J.S., concurred in by B. Barrington-Foote J.A. Separate concurring reasons for judgment delivered by M. McCreary J.A.

R. LEURER C.J.S.

I. INTRODUCTION

1 The appellant, B.J.M., was 17 years old when he shot and killed Winston Littlecrow. He pleaded guilty to second degree murder. The judge who sentenced B.J.M. concluded that it was appropriate that an adult sentence be imposed: *R v B.J.M.*, *2022 SKPC 38* [*Sentencing Decision*]. The issue in this appeal is if B.J.M. should have been sentenced as a young person.

2 Section 72 of the *Youth Criminal Justice Act*, *SC 2002, c 1* [*YCJA*], describes when a young person is to receive an adult sentence for a crime. It states in part as follows:

> **Order of adult sentence**

> **72 (1)** The youth justice court shall order that an adult sentence be imposed if it is satisfied that
>
> (a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
>
> (b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.
>
> ...
>
> **Onus**
>
> **(2)** The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is on the Attorney General.
>
> ...

3 In sentencing B.J.M. as he did, the judge rejected B.J.M.'s argument that, before an adult sentence can be imposed on a young person, the youth justice court must be satisfied beyond a reasonable doubt of the matters referred to in s. 72(1). I agree with B.J.M. that the beyond a reasonable doubt standard applies to the inquiry directed by s. 72(1)(a). However, as I will explain, the judge's legal error in concluding otherwise had no impact on the sentence B.J.M. received. The judge also did not err in his conclusion that the Crown had discharged its onus to satisfy the court that a youth sentence would not be of sufficient length to hold B.J.M. accountable for his crime. Accordingly, B.J.M.'s appeal must be dismissed.

II. BACKGROUND

4 On December 7, 2019, B.J.M. was aged 17 years, 5 months, and a member of the Terror Squad street gang. On that day, he was contacted by another member of that group, who was upset by the presence of several members of the rival Indian Posse gang in the house where she was visiting. She wanted B.J.M. "to come over and get the Indian Posse people out of the house" (*Sentencing Decision* at para 8). One person she wanted removed was Mr. Littlecrow. B.J.M. came to the home. When Mr. Littlecrow exited it, B.J.M. followed. Once they were both outside, B.J.M. shot Mr. Littlecrow in the back. Mr. Littlecrow died several hours later.

5 B.J.M. was initially charged with first degree murder and breach of a firearms prohibition. Prior to the trial, the Crown gave notice under s. 64(2) of the *YCJA* that it would seek an adult sentence if B.J.M. was convicted of these crimes. At the trial, after several days of evidence, including the tendering of video footage of the shooting itself, B.J.M. pleaded guilty to second degree murder based on an agreed statement of facts. A sentencing hearing was then held at which more evidence was led, following which the judge reserved his decision.

6 When the hearing resumed, the judge distributed the *Sentencing Decision* and summarized its contents, including its conclusion that B.J.M. should be sentenced as an adult. In the result, B.J.M. received the mandatory minimum sentence of imprisonment for life with no eligibility for parole for seven years, pursuant to s. 745.1(c) of the *Criminal Code*. The judge also made several ancillary orders that are not at issue in this appeal.

7 The *Sentencing Decision* is lengthy. After an introduction and a high-level review of the evidence, the judge structured his reasons around his consideration of three questions. The first pertained to the standard of proof the Crown was required to meet to discharge the onus under s. 72(2) of the *YCJA*. The judge concluded that in *R v W.M.*, 2021 SKCA 103 [*W.M. SKCA*], this Court had followed the lead of the Manitoba Court of Appeal in *R v Okemow*, 2017 MBCA 59, 353 CCC (3d) 141, by deciding that the "standard is one of satisfaction after careful consideration by the court of all the relevant factors" (at para 19). For ease of reference, I will refer to this as the "satisfaction standard", although, as I will discuss, I question whether the test that the judge described is a standard of proof at all.

8 The second question was whether the Crown had "rebutted the presumption of diminished moral

blameworthiness and culpability". On this, the judge found that the evidence "clearly establishes that B.J.M. was not in a state of dependency and immaturity at the time of the commission of the offence". He added that an "examination of further circumstances pertaining to the young person as well as circumstances of the offence... amply demonstrate that B.J.M. possessed and exhibited adult-like maturity at the time of the murder" (at para 30).

9 The third question was whether the Crown had "satisfied the court that a youth sentence would not be of sufficient length to hold B.J.M. accountable" for his crimes. Defence counsel had conceded that the Crown had met its burden on this prong of the statutory test. Nonetheless, the judge independently assessed the matter and determined that "after careful consideration of all the relevant factors, including the high risk for future violence posed by B.J.M., the limited steps he has taken towards his rehabilitation despite being offered opportunities, and his poor attitude towards making any significant changes in his life" he was "satisfied a youth sentence would not be long enough to provide reasonable assurance of B.J.M.'s rehabilitation to the point where he can be safely reintegrated into society" (at para 60).

10 As a bottom line, the judge concluded that "both prongs of the section 72 *YCJA* test governing the imposition of adult sentences on young persons have been met" (at para 61). On this basis he granted the Crown's application that B.J.M. be sentenced as an adult and ordered that he serve the sentence prescribed by s. 745.1(c) of the *Criminal Code*.

III. ISSUES

11 Section 72(5) of the *YCJA* directs that, for the purposes of an appeal, an order under s. 72(1) that an adult sentence be imposed on a young person "is part of the sentence". This means that the imposition of an adult sentence attracts the same standard of review as does any other sentence appeal. The implications of this were explained in *W.M. SKCA*, as follows:

> [21] ... This means that appellate intervention is justified only when the sentence is demonstrably unfit or there has been an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. Any misstep of this latter sort must have had an impact on the sentence. The weighing or balancing of factors can warrant appellate action only if it is done unreasonably. See: *R v Friesen*, 2020 SCC 9 at para 26, 391 CCC (3d) 309; *R v R.D.F.*, 2019 SKCA 112 at para 21, 382 CCC (3d) 1 [*R.D.F.*], and the authorities cited thereat. As for the purely factual dimension of a s. 72 inquiry, a sentencing judge's findings will stand unless a palpable and overriding error is demonstrated. See: *R.D.F.*at para 22.

12 In this case, B.J.M.'s appeal is predicated on the assertion that the judge erred in law by concluding that in *W.M. SKCA*, this Court had determined that the satisfaction standard applied to inquiries required by s. 72(1) of the *YCJA*. B.J.M. contends that if the judge had not applied that standard, he would have received a youth sentence. Taking account of B.J.M.'s positions, the outcome of his appeal is determined by the answers to these three questions:

(a) Has this Court already determined the standard of proof to be applied under s. 72(1)?

(b) Did the judge err in law when he determined that the satisfaction standard should be used to assess whether the Crown had discharged its onus under s. 72(1)?

(c) If the judge erred, did his error impact the sentence in this case?

IV. ANALYSIS

A. This Court has not previously determined the applicable standard

1. The issue

13 Under s. 72(2) of the *YCJA*, the Crown bears the onus of satisfying the youth justice court as to the matters referred to in s. 72(1). In *R v Henderson*, 2018 SKPC 27, the judge previously had held that "both prongs of the

section 72 test had to be proven beyond a reasonable doubt in order to satisfy the court that an adult sentence should be imposed" (*Sentencing Decision* at para 16).

14 In this case, the judge stated that he still believed in the soundness of the reasoning in *Henderson*. He also correctly observed that in *R v R.D.F.*, *2019 SKCA 112*, *382 CCC (3d) 1*, this Court had "refrained from explicitly endorsing the standard of 'satisfaction after careful consideration by the court of all the relevant factors' adopted by the Manitoba Court of Appeal" in *Okemow* (at para 17). Nonetheless, the judge concluded that in *W.M. SKCA* this Court had endorsed the satisfaction standard. Therefore, despite his "reservations about the correctness of the Court of Appeal's pronouncement on the standard of proof governing these types of applications", he found that he was bound to apply what he understood to be this Court's direction on the matter (at para 19).

15 The issue I must confront is whether this Court has previously determined that the satisfaction standard applies to s. 72 of the *YCJA*. A proper consideration of this issue requires me to retrace some legislative history. I will then review this Court's jurisprudence relating to s. 72, demonstrating that, to this point, this Court has not yet decided what standard should be applied to s. 72(1).

2. A brief historical detour

16 The *YCJA* was introduced in 2002. As explained in *R v C.D.*, *2005 SCC 78* at para 34, *[2005] 3 SCR 668*, while that Act "may be generally concerned with the protection of the public, it also has some specific goals, including restricting the use of custody for young offenders". Yet, the *YCJA* allows for the imposition of adult sentences on young persons in certain cases, as did the *Young Offenders Act*, *RSC 1985, c Y-1* (repealed) [*YOA*], and the legislation that preceded the *YOA*.

17 When it was first passed, the *YCJA* created a category of offences known as "presumptive offences". They included certain violent crimes, such as murder, attempted murder, manslaughter and aggravated sexual assault. In its original form, the *YCJA* required a youth court judge to impose an adult sentence in the case of these presumptive offences unless the young person could demonstrate that a youth sentence was of a sufficient length to hold them accountable. For other serious violent offences, the onus fell on the Crown to show that an adult sentence was appropriate. Section 72 directed the test to be applied by the youth justice court when considering an application by an offender or the Crown, depending on who bore the onus. It provided in part as follows:

> **Test - Adult Sentences**
>
> **72. (1)** In making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and
>
> (*a*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and
>
> (*b*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.
>
> **Onus**
>
> **(2)** The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is with the applicant.

18 Two decisions arising from this former regime play a role in my reasons in this appeal.

19 In *R v O.(A.)*, *2007 ONCA 144*, *218 CCC (3d) 409*, the Ontario Court of Appeal rejected an argument by a youth that under these original provisions of the *YCJA*, a youth justice court could impose an adult sentence only if the

Crown had proven beyond a reasonable doubt that a youth sentence "would not have sufficient length to hold the young person accountable for his or her offending behaviour". In its *per curiam* decision, that Court held that the language used in ss. 72(1)(b) and 72(2), which spoke to the court being "of the opinion" and being "satisfied", was not amenable to requiring proof on a standard beyond a reasonable doubt. In doing so, it relied heavily on *R v M.(S.H.)*, *[1989] 2 SCR 446*, a decision under the *YOA*. The Ontario Court of Appeal concluded its own analysis on the issue, as follows:

> [34] Section 72(1)(*b)* requires the youth justice court to weigh and balance the enumerated factors and then to decide whether a youth sentence is sufficiently long to hold a young person accountable for his or her offending behaviour. That type of evaluative decision -- making an informed judgment -- does not lend itself to proof beyond a reasonable doubt. As McLachlin J. explained in *R. v. M. (S.H.)*, *supra*, the court is not being asked to make findings of fact about past events nor to make a determination of whether a crime has been committed, which are the types of decisions for which proof beyond a reasonable doubt is normally required.

20 In rejecting the beyond a reasonable doubt standard for the purposes of what was then s. 72(1)(b), the Ontario Court of Appeal also distinguished *R v B.(D.)* *(2006), 206 CCC (3d) 289* (Ont CA) [*B.(D.) ONCA*]:

> [35] In arguing that the proper onus is proof beyond a reasonable doubt, J.M. relies upon this court's decision in *R. v. B. (D.)* *(2006), 206 C.C.C. (3d) 289*. In particular, J.M. refers to Goudge J.A.'s statement at para. 63:
>
> > [I]n sentencing, the Crown must assume the burden of demonstrating beyond a reasonable doubt that there are aggravating circumstances in the commission of the offence that warrant a more severe penalty.
>
> [36] In our view, this passage does not support J.M.'s argument. In the quoted passage, Goudge J.A. was not referring to the youth justice court's decision whether to impose an adult sentence. Rather, he was referring to the proof of aggravating circumstances relating to the offence itself. Clearly, the Crown bears the onus of proving beyond a reasonable doubt the factual circumstances that are relevant to the court's decision-making process when considering whether to impose an adult sentence. The requirement of proof beyond a reasonable doubt does not, however, extend to the ultimate decision called for under s. 72(1)(*b)*.

21 The second critical decision under the original *YCJA* regime is the Supreme Court's decision dismissing the appeal from *B.(D.) ONCA*: *R v B.(D.)*, *2008 SCC 25*, *[2008] 2 SCR 3* [*B.(D.) SCC*]. In that case, Abella J., writing for the majority, observed that, because the legislation forced the young person to rebut the presumption of an adult sentence, rather than requiring the Crown to justify an adult sentence, it created a reverse onus. She found that the onus "clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age". She added that by "depriving them of this presumption because of the crime and ***despite*** their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice" enshrined in s. 7 of the *Charter*(at para 76, emphasis in original). Justice Abella went on to observe that this did not mean that an adult sentence cannot be imposed on a young person. She identified the issue to be "who has the burden of proving that an adult sentence is justified" (at para 77). On this, she concluded as follows:

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

22 Justice Rothstein, writing for four members of the Court, expressed his agreement that "young persons are entitled, based on their reduced maturity and Judgment, to a presumption of diminished moral blameworthiness and that this presumption is a principle of fundamental justice" (at para 106). The dissenting judges departed from the

majority because, in their view, "the presumption of reduced moral blameworthiness of young persons as a principle of fundamental justice does not lead to the further presumption of a youth sentence" (at para 107).

23 I will return to discuss both *O.(A.)* and *B.(D.) SCC* at several junctures in these reasons.

24 The *YCJA* was amended in 2012 by the *Safe Streets and Communities Act*, SC 2012, c 1. While many of the changes made by that latter Act to the *YCJA* are relevant to the sentence that B.J.M. received, three amendments bear on the issue of the standard to be applied under s. 72.

25 First, Parliament codified the principle of the presumption of diminished moral blameworthiness of young persons that was recognized in *B.(D.) SCC* as a principle of fundamental justice under s. 7 of the *Charter*. Section 3(1)(b) of the *YCJA* now provides as follows:

> **Declaration of Principle *Policy for Canada with respect to young persons***
>
> **3(1)** The following principles apply in this Act:
>
> ...
>
> (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
>
> (i) rehabilitation and reintegration,
>
> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
>
> (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
>
> (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time[.]

26 Second, Parliament changed the process surrounding the imposition of an adult sentence on a youth. The amendments removed the category of offences for which an adult sentence was presumptively imposed. In their place, s. 64(1) now provides that the Crown may make an application for an adult sentence if the young person has been found guilty of "an offence for which an adult is liable to imprisonment for a term of more than two years and that was committed after the young person attained the age of 14 years".

27 Third, s. 72 was reformulated. It now explicitly includes, as part of the test for the imposition of an adult sentence, both the requirement that the presumption of diminished moral blameworthiness or culpability of the young person be rebutted (s. 72(1)(a)) *and* the requirement that a youth sentence "would not be of sufficient length to hold the young person accountable for his or her offending behaviour" (s. 72(1)(b)). Section 72 has not changed since the making of the 2012 amendments.

3. The controversy over the standard of proof

28 The courts in Alberta and Manitoba have treated the issue of the standard of proof under the amended version of s. 72 as having been decided in *O.(A.)*: *R v T.(D.D.)*, 2010 ABCA 365 at para 7, 265 CCC (3d) 49, and *Okemow* at para 61. As summarized in *Okemow*, these Courts have determined that "the standard is one of satisfaction after careful consideration by the court of all the relevant factors" (at para 61), i.e., what I have described as the "satisfaction standard". This standard was also adopted in other cases, including in *R v L.M.*, 2017 SKQB 336 at para 112. *R v Chol*, 2018 BCCA 179 at para 12, accepted this as a description of the onus resting on the Crown, without expressly describing it as a standard.

29 However, in 2018, in *Henderson*, the judge concluded that these cases were wrongly decided. He found that the law demanded that the Crown must prove the matters referred to in s. 72(1), in its amended form, beyond a reasonable doubt. He gave several reasons.

30 First, the judge distinguished *M.(S.H.)*, upon which *O.(A.)* and its progeny rest, because it was decided under the *YOA*, which operated differently than did the *YCJA*. Specifically, the *YOA* required that the issue of the transfer of a youth to the adult criminal system be dealt with before a trial was held. The judge reasoned that "given the nature of the evidence tendered and accepted at *YOA* transfer hearings, it is not surprising that the Supreme Court of Canada would eschew the standards of proof used for adjudication in civil and criminal courts when determining the appropriate onus of proof that had to be met for transferring a young person to adult court". He added that "now that the decision as to whether an adult sentence should be imposed is a post-adjudicative, or at least a post-plea, one, with all of the evidentiary safeguards in place associated with the criminal process, there is less reason to adopt the standard articulated in *O.(A.)* when determining whether or not an adult sentence should be imposed on a young person" (at para 33).

31 The second, and what he described as the "more compelling", reason the judge gave for questioning the satisfaction standard was that it "may well run afoul of constitutional requirements". He observed that *O.(A.)* had been decided before *B.(D.) SCC*, in which the Supreme Court had "acknowledged the Crown's concession that it is a principle of fundamental justice that the prosecution prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies" (at para 34, citing to para 78 of *B.(D.) SCC*).

4. This Court's jurisprudence

32 The question of the standard of proof to be applied to s. 72 of the *YCJA* surfaced as an issue before this Court in 2019. In *R.D.F.*, a youth appealed against an adult sentence. Justice Tholl prefaced the decision of the Court dismissing that appeal by stating it to be "important to observe that this matter has not been appealed on the ground that the sentencing judge applied the wrong standard of proof to the presumption of diminished moral culpability under s. 72(1)(a) of the *YCJA*". He added that "there were no submissions from either party on this issue" (at para 14). Likewise, in her dissenting judgment, Jackson J.A. took note of the controversy over the standard but stated that since "neither party raised the issues stemming from *Henderson*" she was content to decide the outcome of the appeal on other bases (at para 172). Based on the foregoing, I am confident that the judge in this case got it right when he treated the standard issue as being left open by this Court in *R.D.F.*

33 Nonetheless, the judge treated the question over the standard as having been answered two years later, in *W.M. SKCA*. As in *R.D.F.*, in *W.M. SKCA* this Court dismissed a youth's appeal against the imposition of an adult sentence. The judge grounded his conclusion that *W.M. SKCA* had decided the issue in the fact that this Court had upheld the trial-level decision that had applied the satisfaction standard and on the following passage from the judgment of Richards C.J.S.:

> [50] In summary, there is no doubt that W.M. has had a difficult and compromised life. The answer to the question raised by s. 72(1)(a) in this case is not entirely clear cut but, considering all of the factors and indicators relevant to a determination of the question raised by s. 72(1)(a), I ***am satisfied that the Crown has rebutted the presumption of reduced moral blameworthiness or culpability***. W.M.'s argument on this point therefore fails.
>
> (Emphasis added)

34 However, I do not take *W.M. SKCA* to have decided that "satisfaction" is the standard of proof to be applied to s. 72 of the *YCJA*. To conclude that it had I would need to find that, although the standard issue had been identified and left open in *R.D.F.*, the Court had disposed of it in *W.M. SKCA* by implication. I reject that interpretation of *W.M. SKCA* for two reasons. First, not only had *R.D.F.* raised and left open the issue but the Court in *W.M. SKCA* referred to *R.D.F.* and made no reference to deciding the standard issue. Second, the reasons in *W.M. SKCA* do not disclose that a potential difference in the standard was integral to the outcome of that appeal. Rather than being

the adoption of the satisfaction standard, the statement by Richards C.J.S. in *W.M. SKCA* that he was "satisfied" that the Crown had rebutted the presumption of reduced moral blameworthiness is properly understood as simply his conclusion that that element of the test was met, expressed in a manner that is commonly used by judges in that context.

5. Conclusion relating to this Court's previous decisions

35 This Court has not previously decided that the satisfaction standard applies to s. 72. I am, of course, mindful of the decisions of the other courts which have provided guidance on the issue. They are persuasive authorities, and I will discuss them at several junctures in these reasons. Nonetheless, this Court is not bound by them, and I now turn to consider what the law demands in relation to the standard issue.

B. The conditions under s. 72(1)

1. The issue

36 As explained in *R v W.(M.)*, 2017 ONCA 22 at para 94, 346 CCC (3d) 319 [*W.(M.) ONCA*], prior to the 2012 amendments, the *YCJA* allowed for a "blended analysis" of the presumption of diminished moral culpability that young people enjoy and the principle that youth be accountable for their acts "whereas the new test is expressly structured as a two-pronged test in which the Crown must satisfy both prongs". Justice Epstein, writing for the Court, determined that the two parts of the test are best approached as separate inquires that "address related but distinct questions" (at para 95). She explained that by not approaching the matter in this way, the "risk is that a factor relevant only to one of the two prongs may be relied upon to support a finding in relation to the other" (at para 106).

37 As I have also noted, in *Okemow*, the Manitoba Court of Appeal endorsed the applicability of the satisfaction standard in connection with both wings of s. 72(1) (see para 61). However, it also made clear that the two parts of s. 72(1) - (a) and (b) - represent separate inquiries that should not be blended. In doing so, the Court followed the direction given in *W.(M.) ONCA* on that issue. It also offered additional reasons for considering the two wings of s. 72(1) separately:

> [54] The two-pronged test approach also ensures that a *Charter* right is properly respected and given priority in the adult sentencing hearing as it must be. If the Crown cannot rebut the presumption of diminished moral blameworthiness, a youth justice court judge's task is completed; the Crown's application for an adult sentence must be dismissed and a youth sentence imposed (see section 72(1.1) of the *YCJA*). The Crown's application cannot be "saved" by the fact that a youth sentence may not seemingly hold a young person accountable for a very serious offence. There are no excluded offences, including murder, from the operation of the *YCJA*. Proper respect would not be shown to the young person's *Charter* rights simply on the basis that there is a perception that he or she is being treated more leniently by the law than would be the case for an adult. Accountability for a young person is reached by a different approach, but the law does not view young persons as less accountable for their behaviour than an adult (see *DB* at para 93).

38 The fact that there are two prongs to s. 72(1) does not mandate that the standard to be associated with each differ. However, in my respectful view, it does mean that the standard question must be answered separately in relation to each of its parts. As I will explain, the two separate parts of s. 72(1) serve different purposes in the overall assessment of whether a youth should receive an adult sentence.

39 I am also mindful that the only issue confronting the Ontario Court of Appeal in *O.(A.)* was whether the proof beyond a reasonable doubt standard should be applied to the question of whether the Crown had discharged its onus to demonstrate that a youth sentence "would not have sufficient length to hold the young person accountable for his or her offending behaviour". This language is practically equivalent to that now found in s. 72(1)*(b)*, which requires that before an adult sentence can be imposed the court must be satisfied that a youth sentence "would not be of sufficient length to hold the young person accountable for his or her offending behaviour". In other words, *O.(A.)* cannot be taken to have decided the standard to be applied in connection with s. 72(1)*(a)* as it was not part of the statutory test at the time that decision was rendered. While other courts have treated the test under the

reformulated version of s. 72 to have been decided by *O.(A.)*, they have done so without considering if it was appropriate to address the standard applicable to the two parts of the test separately.

40 As I will later explain, in addition to noting that *O.(A.)* did not decide the issue of how to approach s. 72(1)(a), I also interpret that decision slightly differently than several other courts in relation to *O.(A.)*'s approach under s. 72(1)(b). Before examining any of this, I must address one other preliminary point.

2. Satisfaction is not itself a standard

41 The key issue in this appeal is the correct statutory interpretation of s. 72 of the *YCJA*. It is, therefore, appropriate to begin with the ordinary meaning of the words used in that section. I do so, starting with the words "satisfied" (as used in s. 72(1)) and "satisfying" (as used in s. 72(2)) because these two words are the basis for what I have called the "satisfaction standard". In my respectful view, satisfaction is not a standard of proof, at all.

42 The first meaning given by the *Oxford English Dictionary Online* (Oxford University Press, 2024) [OED] to the verb "satisfy" is: "To meet or fulfil (a desire, wish, expectation, etc.)". Two of the specific examples given are "To provide (a person, a person's mind, etc.) with adequate or convincing proof or information; to free from doubt or uncertainty; to assure, convince" and "To answer the requirements of (a law, regulation, etc.); to accord with (a condition)". "Satisfied" is defined in the OED in similar ways, as both a verb and as an adjective.

43 Other common dictionaries offer similar definitions. The *Cambridge Dictionary* (online), for example, defines "satisfy" as "to make someone believe that something is true" (Cambridge University Press & Assessment, 2024). The *Merriam-Webster Dictionary*(online) defines "satisfied" as "persuaded by argument or evidence" (Merriam-Webster, Incorporated, 2024).

44 Based on these dictionary definitions I take the ordinary meaning of both words to import the same notion, namely that they require that the judge making the decision about whether to order an adult sentence to be *convinced* or *persuaded* that the conditions described in s. 72(1) have been met. In other words, the statement in s. 72(1) that the imposition of an adult sentence requires that the youth justice court be "satisfied" of two matters means nothing more than the court must *conclude* that the conditions have been met. It is describing a result (the court's satisfaction or the fact that it has reached a conclusion) not *how* the court reached this state.

45 My approach to s. 72(1) is consistent with how the courts regularly approach the interpretation of statutes that describe decisions that are based on a court or judge being "satisfied" as to certain conditions. I offer several examples of similar statutory formulations to further illustrate this point. They are all drawn from the realm of sentencing. Taken together, they illustrate the applicable standard is not defined by the use of the word "satisfied".

46 The first example comes out of s. 734(2) of the *Criminal Code*. That provision states that, except where an offence provides for a minimum fine, a court may order a fine "only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736". In *R v Topp*, 2011 SCC 43 at para 24, [2011] 3 SCR 119, the Supreme Court concluded that in "determining whether the record contains sufficient evidence to 'satisfy' the court that the offender can afford to pay the contemplated fine, the trial judge must be satisfied, *on a balance of probabilities*, of the offender's ability to pay" (emphasis in original).

47 The Court offered two justifications for this conclusion. First, it said that it "would make little sense for a trial judge to be satisfied that an offender could pay a contemplated fine, but not believe that the offender was, more likely than not, able to pay it" (at para 25). Second, it said that "the balance of probabilities standard accords with s. 724(3)*(d)* of the [*Criminal*] *Code*" (at para 26). This latter provision states that where there is a dispute with respect to any fact that is relevant to the determination of a sentence, "subject to paragraph *(e)*, the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence". Paragraph (e) states that aggravating facts must be proven by the Crown beyond a reasonable doubt. The Court reasoned that the "finding that an offender is able to pay a fine is not an aggravating fact" (at para 26), thus rendering s. 724(3)(d) applicable.

48 The second example relates to s. 753(1) of the *Criminal Code*. It directs that "the court shall find the offender to be a dangerous offender if it is satisfied" that certain conditions are met, one of which is that the "offender constitutes a threat to the life, safety or physical or mental well-being of other persons" based on evidence establishing certain things (s. 753(1)(a)). The section does not describe the degree to which the judge making this decision must be "satisfied", that is, "how satisfied" the judge must be. Nonetheless, this section, and its predecessors, have been interpreted to require proof beyond a reasonable doubt. Therefore, in *R v Currie*, *[1997] 2 SCR 260* at para 25, Lamer C.J. said that a judge has to "be satisfied beyond a reasonable doubt of the likelihood of future danger that an offender presents to society before he or she can impose the dangerous offender designation and an indeterminate sentence". See also: *R v Boutilier*, *2017 SCC 64* at para 36, *[2017] 2 SCR 936*.

49 A third example drawn from the law of sentencing shows the use of the concept of satisfaction in a context where no standard is implied at all, but rather simply the exercise of discretion. Under s. 742.1 of the *Criminal Code*, a court may impose a conditional sentence if it is "satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2". In *R v Proulx*, *2000 SCC 5* at para 120, *[2000] 1 SCR 61*, Lamer C.J. explained that "s. 742.1 does not attribute to either party the onus of establishing that the offender should or should not receive a conditional sentence. To inform his or her decision about the appropriate sentence, the judge can take into consideration all the evidence, no matter who adduces it". Part of the justification for not imposing a particular burden was the fundamentally discretionary nature of the judge's ultimate disposition as to the appropriate sentence. As Lamer C.J. put it, in "matters of sentencing, while each party is expected to establish elements in support of its position as to the appropriate sentence that should be imposed, the ultimate decision as to what constitutes the best disposition is left to the discretion of the sentencing judge" (at para 121). He went on to suggest that "in practice, it will generally be the offender who is best situated *to convince the judge that a conditional sentence is indeed appropriate*" (at para 122, emphasis added).

50 Finally, s. 753.1 of the *Criminal Code* provides an example of the use of the word "satisfied" having several connotations relating to standard of proof in the same statutory context. That provision governs the imposition of a long-term offender status:

> **Application for finding that an offender is a long-term offender**
>
> **753.1 (1)** The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is *satisfied* that
>
> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (b) there is a substantial risk that the offender will reoffend; and
>
> (c) there is a reasonable possibility of eventual control of the risk in the community.

51 It is well established that s. 753.1(1)(b) imposes an onus on the Crown on the beyond a reasonable doubt standard (see *R v L.M.*, *2008 SCC 31* at para 40, *[2008] 2 SCR 163*), while s. 753.1(1)(c) calls for a determination that is not subject to a standard of proof at all (see *R v Moosomin*, *2008 SKCA 169* at para 40, *320 Sask R 100*; *R v F.E.D.*, *2007 ONCA 246* at paras 50-54, *222 CCC (3d) 373*, leave to appeal to SCC refused, 2008 CanLII 18933; and *R v Wormell*, *2005 BCCA 328* at paras 62-63, *198 CCC (3d) 252*, leave to appeal to SCC refused, 2006 CanLII 1110).

52 In the cases I have just reviewed, the courts did not look to the word "satisfied" to define the onus of proof resting on any party. They also did not look to the word "satisfied" to define the standard of proof pertaining to the question that the court was required to answer. Instead, in each case, the courts simply equated the word "satisfied" as being an expression equivalent to the idea that the judge or court making the decision must be convinced. The courts found the definition of the degree of proof or the degree to which the judge or court making the call had to be convinced with reference to the question or issue that the judge or court making the call was required to answer. As I have discussed, the Supreme Court in *Topp* found the standard to be a balance of

probabilities. In *Currie* and *Boutilier*, the Court found the standard to be beyond a reasonable doubt. In *Proulx*, the Court directed the sentencing judge to make a discretionary decision. Finally, in the cases interpreting s. 753.1, the courts found that two different tests are applicable.

53 In overall summary, the point I draw from these cases is that, where a statute says that a court or judge must be "satisfied", it can be taken as saying that the court or judge must be *convinced to the degree required to make the decision that the statute or rule mandates* to be made. Said differently, "satisfaction" itself is not the standard.

54 I would point out, as well, that this notion is consistent with the common understanding that it is possible to describe *degrees* of satisfaction. For example, a person can be only *somewhat* satisfied, more satisfied than not, or even certain. This also supports the idea that satisfaction is not a standard in any ordinary or usual sense of the word. Rather, it is a statement of a result, or a conclusion.

55 I find further support for this as a proper understanding of s. 72 of the *YCJA* in other parts of that Act. In this regard, s. 72(1) stands in contrast to some other sections of the *YCJA* in which Parliament has prescribed a standard associated with the decision the court is called to make after being "satisfied".

56 Under s. 10(5), charges against a youth must be dismissed if the youth justice court is "satisfied on a balance of probabilities" that the youth has totally complied with the terms and conditions of extrajudicial sanctions (s. 10(5)(a)). They may be dismissed if the court is satisfied on a balance of probabilities both that the youth has partially complied with them and that, "in the opinion of the court, prosecution of the charge would be unfair having regard to the circumstances and the young person's performance with respect to the extrajudicial sanction" (s. 10(5)(b)).

57 Section 29(2)(b), which deals with the detention of a young person, uses the balance of probabilities standard in a context where at least part of what is at issue is somewhat less concrete, including that "detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence" (s. 29(2)(b)(ii)).

58 I do not take from s. 10(5) and s. 29(2) that the absence of the use of the balance of probabilities standard elsewhere in the *YCJA* means that all other parts of the Act should be read as containing *no* standard. The word "satisfied" appears 59 times in the present form of the *YCJA*, including s. 72. The only sections that Parliament has defined the standard to be used to determine the degree of satisfaction are s. 10(5) and s. 29(2). Because Parliament has not defined the degree to which a youth justice court must be "satisfied" of the matters referred to in the other sections of the *YCJA*, including in s. 72(1), it falls on the Court to provide that definition in the context where the question arises, as was done in the cases I have reviewed.

59 I would offer one last point in relation to this approach. I do not find it helpful to say that the standard is "satisfaction" or one of "satisfaction after careful consideration by the court of all the relevant factors". To state that the court must be "satisfied" simply repeats the words of the statute, which according to an ordinary understanding of the words merely means that the court must be convinced. To state that the court must be satisfied or convinced "after careful consideration by the court of all the relevant factors" simply adds to this that it must be convinced after it has accounted for the relevant considerations.

60 The so-called satisfaction standard therefore does not assist in defining how the youth justice court should approach the inquiries that s. 72(1) demand be made. With all due respect to the courts and judges that have viewed the issue differently, it is not the answer to the question as to what standard should be applied under the two parts of s. 72(1).

3. Section 72(1)(a)

61 As I will explain, it is my conclusion that, before an adult sentence can be imposed on a young person, the

youth justice court must be satisfied *beyond a reasonable doubt* that the presumption of diminished moral blameworthiness or culpability of the young person has been rebutted.

62 Since *B.(D.) SCC*, it is unquestionable that young people enjoy a presumption that they have diminished moral blameworthiness or culpability. As I have noted, while the Supreme Court divided on other issues, both the majority and dissent joined in concluding that this presumption is a principle of fundamental justice within the meaning of s. 7 of the *Charter*. I have already quoted from parts of the majority reasons on this point. Justice Rothstein, writing for the four dissenting judges, emphasized their agreement with this conclusion and also pinpointed the crux of disagreement between the majority and the dissent when he wrote as follows:

> [106] I agree with Abella J. that young persons are entitled, based on their reduced maturity and Judgment, to a presumption of diminished moral blameworthiness and that this presumption is a principle of fundamental justice. It is on the issue of whether this principle of fundamental justice creates further presumptions of youth sentences lower than adult sentences ... that we disagree.
>
> (Emphasis added)

63 The Supreme Court was, therefore, unanimously of the view that s. 7 of the *Charter* demands that, before an adult sentence can be imposed on a young person, the Crown must displace this presumption. It was also clear that this onus must be discharged beyond a reasonable doubt.

64 Beginning at paragraph 37 of her judgment in *B.(D.) SCC*, Abella J. explained the operative principles of fundamental justice, as enshrined in s. 7 of the *Charter*. After concluding that each of the criteria applicable to the identification of principles of fundamental justice had been met, she identified the only remaining issue to be "whether the presumption of an adult sentence in the onus provisions is consistent with the principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability" (at para 70). Her analysis of this issue leaves no room for any conclusion except that the beyond a reasonable doubt standard must be applied to the inquiry demanded by s. 72(1)(a) of the *YCJA*.

65 Following her identification of this issue, Abella J. reviewed how the onus worked under the *YCJA* prior to the 2012 amendments. She then explained why the onus provision violated s. 7:

> [76] No one seriously disputes that there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences. But the onus provisions in the presumptive offences sentencing regime stipulate that it is the offence, rather than the age of the person, that determines how he or she should be sentenced. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption because of the crime and ***despite*** their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice.
>
> (Emphasis in original)

66 After Abella J. stated this conclusion, she emphasized that this "does not mean that an adult sentence cannot be imposed on a young person" and she reiterated that the issue in the case was "who has the burden of proving that an adult sentence is justified" (at para 77). She then moved to a discussion that was predicated on the application of the beyond a reasonable doubt standard. In the next paragraph, Abella J. associated the onus resting on the Crown to discharge the presumption with the principle of proof beyond a reasonable doubt (repeated for ease of reference):

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

67 Following this, Abella J. discussed the case law that emphasizes the centrality of the beyond a reasonable doubt standard in relation to factors that aggravate sentence. In this context, she first identified that this had been recognized prior to the *Charter*, in *R v Gardiner*, *[1982] 2 SCR 368*. Justice Abella quoted from that case, including the statement by Dickson J. (as he then was) of that, "because the sentencing process poses the ultimate jeopardy to an individual enmeshed in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process" (at 415, quoting from John A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 CR (3d) 97 at 121).

68 Justice Abella next quoted from *R v Pearson*, *[1992] 3 SCR 665* at 686, in which the Supreme Court had confirmed that this is a *Charter*-protected right. Chief Justice Lamer stated in that case "it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt", citing to the parts of *Gardiner* to which Abella J. herself had referred. Finally, she reproduced the following statement by Lamer C.J. (at para 80, quoting from *Pearson* at 686):

> Although, of course, *Gardiner* was not a *Charter* case, the problem it confronted can readily be restated in terms of ss. 7 and 11*(d)* of the *Charter*. While the presumption of innocence as specifically articulated in s. 11*(d)* may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle in s. 7 almost certainly would.

69 After this review of applicable case law, Abella J. concluded on the issue before the Court as follows:

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

70 I can only understand these reasons as a direction by the Supreme Court that, as a principle of fundamental justice, before a young person can be ordered to suffer from an adult sentence, the Crown must establish beyond a reasonable doubt that the presumption that young persons have a reduced moral blameworthiness or culpability on account of their age is rebutted.

71 Of course, *B.(D.) (SCC)* was a *Charter* case interpreting an earlier version of the of the *YCJA*, not one interpreting s. 72(1) in its current form. However, s. 72(1) was among the amendments made to the *YCJA* in response to that decision. Considering this fact, I am convinced that the analysis of what that case demands is required by the *Charter* should be taken as dictating the proper approach to the interpretation of *YCJA*. This is consistent with the "presumption that Parliament intended to enact legislation in conformity with the *Charter*" (*R v Sharpe*, *2001 SCC 2* at para 33, *[2001] 1 SCR 45*). Therefore, applying the reasoning in *B.(D.) (SCC)* to the words of s. 72(1)(a), the youth justice court must be satisfied beyond a reasonable doubt that the presumption has been rebutted.

72 This interpretation of s. 72(1)(a) sees its operation as being akin to the test that applies when there is an application for an order designating a dangerous offender. As I discussed, s. 753(1) of the *Criminal Code* directs that "the court shall find the offender to be a dangerous offender if it is satisfied" that certain conditions are met, one of which is that the "offender constitutes a threat to the life, safety or physical or mental well-being of other persons" based on evidence establishing certain things. Judges have had no difficulty in applying the reasonable doubt standard even in relation to the requirement being "satisfied beyond a reasonable doubt of the likelihood of future danger that an offender presents to society before he or she can impose the dangerous offender designation and an indeterminate sentence" (*Currie* at para 25).

73 Yet, the Crown resists this approach to s. 72(1)(a). It does so, in part, by simply pointing to the conclusions of the Courts in cases like *T.(D.D.)*, *Okemow*, *Chol* and *L.M.* However, none of those cases considered the implications of *B.(D.) SCC* to the onus or standard of proof issues. Instead, the Courts simply proceeded on the basis that the issue had been decided in *O.(A.)*. As I have already explained, this issue was *not* addressed in *O.(A.)*. I will also discuss later in these reasons why s. 72(1)(b) is to be approached differently than that under s.

72(1)(a) and how the reasoning in *O.(A.) does* bear on the proper interpretation of the second part of the test under s. 72(1)(b).

74 The Crown also argues that it is inappropriate to frame the requirement that the Crown discharge the onus of displacing the presumption in terms of proof beyond a reasonable doubt because a young person's moral culpability or blameworthiness is not a fact that is amenable to proof according to the standards applicable to the proof of facts. It writes in its factum that by the time the analysis under s. 72(1)(a) begins "matters that could have been proven on precise standards, such as the fault element or any aggravating factors, are behind us". It also asserts that the section "requires the judge to make *qualitative* assessments about culpability as expressed on the imprecise notions of child-like or adult-like sophistication" (emphasis in original). I cannot agree.

75 In *B.(D.) SCC*, Abella J. emphasized "*why* we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral Judgment" (at para 41, emphasis in original). Therefore, contrary to the Crown's suggestion otherwise, the vulnerability, the level of maturity and the capacity of a young person to exercise moral judgment, all of which bear on whether they have diminished moral blameworthiness or culpability, are fundamentally matters that are subject to determination by a judge or court called to decide the matter.

76 The Crown's argument to the contrary is also answered in the reasons given in that decision for finding the presumption to be a principle of fundamental justice. As I have also noted, *B.(D.) SCC* holds that the presumption that young persons enjoy of diminished moral culpability is a principle of fundamental justice. In reaching this conclusion, the majority judgment in *B.(D.) SCC*, concurred on this issue by the dissent, identified the three criteria that define when a principle is one of fundamental justice. One of these is that the principle "must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person" (at para 46 of *B.(D.) SCC*, referring to *R v Malmo-Levine*, 2003 SCC 74 at para 113, [2003] 3 SCR 571). The reasons given by the Supreme Court for finding that this criterion was met answers the argument made by the Crown that the rebuttal of the presumption calls for the kind of qualitative assessment that is not amenable to a standard applicable to proof of facts. On this, Abella J. wrote as follows:

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

77 The confirmation by the Supreme Court that the presumption "is readily administrable and sufficiently precise to yield a manageable standard" provides a complete answer to this Crown argument that the inquiry under s. 72(1)(a) is not amenable to proof beyond a reasonable doubt. It is equally possible to apply the standard of proof beyond a reasonable doubt in an assessment of a young person's capacity for moral judgment as it is to establish proof of criminal negligence (s. 219 of the *Criminal Code*) or any of the other criminal offences that depend on proof of a breach of a standard of conduct.

78 Standing back, I also see no difficulty in the application of the reasonable doubt standard to the inquiry directed by s. 72(1)(a) of the *YCJA*. For a youth justice court to be "satisfied" that the Crown has discharged the onus of displacing the presumption, the judge must simply ask and answer that question with reference to the level of certainty that is described in the leading cases that define such standard, such as *R v Lifchus*, [1997] 3 SCR 320, and *R v Starr*, 2000 SCC 40, [2000] 2 SCR 144.

79 In support of its argument that the beyond a reasonable doubt standard should not be found to apply to any part of s. 72(1), the Crown points out that when Parliament first looked at reforming the *YCJA* in response to *B.(D.)*

SCC, a bill was introduced that would have expressly incorporated the beyond a reasonable doubt standard into the provision (Bill C-4, *An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts*, 40th Parl, 3d Sess (16 March 2010). The Crown observes that this Act did not pass before Parliament prorogued. When the amendments to the *YCJA* were next introduced, the reference to this, or any, standard was removed from draft legislation. This is the version that was ultimately passed. The Crown says that this legislative history shows that Parliament considered, but rejected, the application of the beyond a reasonable doubt standard. However, I view it differently. The history shows nothing more than that Parliament left it to the courts to define the standards to be applicable to s. 72(1).

80 For the reasons I have given, before an adult sentence can be imposed on a young person, the youth justice court must be satisfied beyond a reasonable doubt that the presumption of diminished moral blameworthiness or culpability of the young person has been rebutted.

4. Section 72(1)(b)

81 In my respectful view, the inquiry under s. 72(1)(b) stands on a different footing than s. 72(1)(a). To reiterate, s. 72(1)(b) requires, as a second precondition to the imposition of an adult sentence, that a youth sentence "would not be of sufficient length to hold the young person accountable for his or her offending behaviour".

82 Section 72(1) states that an adult sentence *shall* be imposed if the two conditions it specifies have been met. Understood in proper context, the two parts of that section serve different purposes. The requirement under s. 72(1)(a), that the court be satisfied that presumption of diminished moral blameworthiness that a young person enjoys has been rebutted, serves to render it *permissible* that the young person be sentenced as an adult. The displacement of this presumption is an aggravating fact that, as I have explained, must be proven by the Crown beyond a reasonable doubt. The requirement under s. 72(1)(b)), that the court be satisfied that a youth sentence would not be of sufficient length to hold the young person accountable for his or her offending behaviour, serves to render it *necessary* that an adult sentence be imposed. This is akin to determining that, for the sentence to be fit, an adult sentence must be imposed. As I will explain, it is therefore not something that is amenable to proof beyond a reasonable doubt or, for that matter, on a balance of probabilities.

83 Before providing my explanation for this conclusion, one preliminary question must be answered: Should this Court address the issue of the standard under s. 72(1)(b) at all? This question arises because, as I have noted, at sentencing B.J.M. conceded that if the judge found that the Crown had discharged its burden in connection with s. 72(1)(a) the threshold created by s. 72(1)(b) had been crossed and he did not argue otherwise in this Court. Nonetheless, B.J.M., the intervenor who supported him, and the Crown, quite clearly brought the issue of the standard under s. 72(1)(b) to this Court for resolution.

84 In this Court, although he did not challenge the finding that the threshold under s. 72(1)(b) had been crossed, B.J.M. urged us to conclude that the judge had nonetheless erred in not applying the beyond a reasonable doubt standard to the inquiry under that provision. He was supported in this position by the intervenor, John Howard Society of Saskatchewan. The Crown, on the other hand, maintained that the judge had correctly rejected the use of the beyond a reasonable doubt standard in connection with either part of s. 72(1). The Crown also presented written and oral submissions as to why the two branches of s. 72(1) should not be found to be subject to different standards of proof. Accordingly, the question of the standard under s. 72(1)(b) *and* the subsidiary issue as to whether that standard was the same, or different, than that prescribed under s. 72(1)(a), were squarely presented by the parties to this Court for determination.

85 Of course, simply because parties have raised an issue with this Court does not compel us to address it. However, I have found it to be ineffectual to attempt to resolve the question of the standard under s. 72(1)(a) without coming to an understanding as to the effect of s. 72(1)(b). This is in part because the differences in the standards applicable to the two subsections help explain, at least to me, the approach taken by the Supreme Court of Canada and other appellate-level courts in the leading jurisprudence interpreting s. 72(1) and the provisions that preceded it.

86 Having set out why I intend to address the issue of the standard applicable to s. 72(1)(b), I begin my explanation for treating that provision differently than s. 72(1)(a) by observing that *B.(D.) SCC* did not identify, as a principle of fundamental justice, that a young person receive a sentence of a particular length. Moreover, *M.(S.H.)* and *O.(A.)* provide persuasive guidance as to how to approach s. 72(1)(b).

87 As I have noted, *M.(S.H.)* discussed the onus resting on a party seeking a transfer to adult court under the *YOA*. Section 16 of that Act allowed this to occur "if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court". Justice McLachlin (as she then was), writing for the majority in that case, posed the question, "What then is the standard of proof which the applicant must meet?" She agreed with the Court of Appeal of Alberta that "it would be wrong as a matter of law to say that the applicant must meet a heavy onus", because the "term carries with it the connotation that only in exceptional or very clear cases should an order for transfer be made" (at 462-463). She then continued:

> ... But Parliament did not say that. Parliament set out in detail the factors which must be weighed and balanced, and stipulated that if after considering them the court was satisfied that it was in the interests of society and the needs of the young person that he or she should be transferred, the order should be made. The requirement of the French version of s. 16 that the transfer to adult court "s'impose", while arguably stricter than the wording of the English version, does not, when read together with the English text, support the view that transfer must be confined to exceptional cases. Rather, *it is consistent with the conclusion that transfer must appear as the right or proper solution. This language does not require that the case for transfer be exceptional or unusually clear*. ... The judge charged with the task of making this decision must consider the factors set out in s. 16(1) and (2) in the context of the philosophy of the Act toward young offenders to the end of determining whether the applicant has satisfied him that a transfer should be ordered. The task, involving as it does the balancing of conflicting factors, is not easy. But it will not be rendered lighter, in my opinion, by imposing on the scheme set out in the Act an overlay of concepts such as "heavy onus" or "very heavy onus".
>
> (Emphasis added)

88 Later, she offered similar comments, in the context of discussing the nature of the onus under this provision (at 464):

> Nor do I find it helpful to cast the issue in terms of a civil or criminal standard of proof. Those concepts are typically concerned with establishing whether something took place. It makes sense to speak of negligence being established "on a balance of probabilities", or to talk of the commission of a crime being proved "beyond a reasonable doubt". But it is less helpful to ask oneself whether a young person should be tried in ordinary court "on a balance of probabilities". One is not talking about something which is probable or improbable when one enters into the exercise of balancing the factors and considerations set out in s. 16(1) and (2) of the *Young Offenders Act.* The question rather is whether one is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court.

89 The several references in these two passages to the need for the judge ordering the transfer to be satisfied that the transfer is appropriate, and the particular concluding words of the second passage, are the source of what I have referred to as the satisfaction standard. Nonetheless, I do not read *M.(S.H.)* as establishing the satisfaction standard as a standard of proof or measure of the onus resting on the Crown. Rather, to the extent that the judgment expresses a standard at all, it appears to fall within the previously quoted statements that the "transfer must appear as the right or proper solution" and it is not required that "the case for transfer be exceptional or unusually clear." (at 463). Taken together, these comments describe an evaluative decision, based on consideration of the relevant factors, that on balance, is "the right or proper solution".

90 This is precisely the approach taken by the Ontario Court of Appeal in *(O.)A.* That decision rejected the proof beyond a reasonable doubt standard to the question as to whether a youth sentence would be of sufficient length to hold the young person accountable for their offending conduct. As I see it, the core of the analysis of the Court on that issue is found in the following passage (repeated here for ease of reference):

> [34] Section 72(1)(*b)* requires the youth justice court to *weigh and balance the enumerated factors* and then to decide whether a youth sentence is sufficiently long to hold a young person accountable for his or her offending behaviour. *That type of evaluative decision -- making an informed judgment --* does not lend itself to proof beyond a reasonable doubt. As McLachlin J. explained in *R. v. M. (S.H.)*, *supra*, the court is not being asked to make findings of fact about past events nor to make a determination of whether a crime has been committed, which are the types of decisions for which proof beyond a reasonable doubt is normally required.
>
> (Emphasis added)

91 I find this passage to be more helpful than simply stating that the court must be "satisfied after careful consideration of all the relevant factors" because it describes the task facing a youth justice court called to make the determination required by s. 72(1)(b). Specifically, understanding that the decision is ***evaluative*** underscores that the decision is a discretionary one, in the same way that the fixing of any sentence involves "the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing" (*R v Lacasse*, *2015 SCC 64* at para 1, *[2015] 3 SCR 1089*). Understood in this way, s. 72(1)(b) requires the youth justice court to *weigh and balance the enumerated factors*, thus emphasizing that the judge is to examine the length of sentence that can be ordered under the *YCJA* to assess if it would be sufficient to hold the young person accountable for their offending conduct.

92 At the end of the day, while I eschew describing satisfaction as a standard, I agree with those courts that have looked to *M.(S.H.)* and *(O.)A.* as defining the nature of the onus falling on the Crown under the current version of s. 72(1)(b) of the *YCJA* and the test that is created by that section. My only small point of departure from those cases is that I do not describe satisfaction as a standard because it does not assist in understanding the obligation assigned to the youth justice court under that provision.

93 In this appeal, B.J.M. takes issue with the reliance by the Court of Appeal for Ontario on *M.(S.H.)* because, under the *YOA*, the transfer hearing was held before trial. In substance, this argument repeats the reasons given by the judge in *Henderson* for applying the beyond a reasonable doubt standard to both parts of s. 72(1). The submission is that, because the transfer decision under the *YOA* was made before trial, the quality of evidence that was available under that regime did not lend itself to the application of the standard of proof beyond a reasonable doubt.

94 I cannot give effect to this argument. Rather, I agree with the Crown when it submits that the quality of the evidence under that *YOA* regime is a red herring. The direction given in *M.(S.H.)* relating to the standard to be applied to the question of whether a youth sentence would be sufficient to hold the offender accountable was not predicated on the quality of the evidence available to the court, nor did the Court of Appeal for Ontario in *O.(A.)* reason on that basis. Instead, the analysis in both *M.(S.H.)* and *O.(A.)* was premised on the proof beyond a reasonable doubt standard being inappropriate and therefore inapplicable when a judge or court undertakes the nuanced balancing of factors inherent in making a decision that is akin to fixing an appropriate sentence. Simply put, proof beyond a reasonable doubt is inapplicable to this issue, regardless of the depth or quality of the evidence.

95 Section 72(1)(b) asks whether a youth sentence "in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38" is sufficiently long to hold the young person accountable. Subparagraph 3(1)(b)(ii) speaks about fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity. Section 38 lists a wide range of principles, including familiar sentencing principles such as proportionality, parity, restraint, denunciation and deterrence, and public protection. Many of these pit societal values against the circumstances of the offender, requiring the youth justice court to balance competing principles such as rehabilitation versus public protection, or denunciation and deterrence versus restraint. All of this operates much like the determination of a fit sentence.

96 Justice Wagner (as he then was) introduced the majority judgment in *Lacasse* by describing sentencing as "one of the most delicate stages of the criminal justice process in Canada". He observed that while the task is governed

by applicable statutory provisions which "guide the courts and are clearly defined" - in that case, ss. 718 et seq of the *Criminal Code* - sentencing "nonetheless involves, by definition, the exercise of a *broad discretion* by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing" (at para 1, emphasis added). The same must be said of the inquiry demanded by s. 72(1)(b) of the *YCJA*. I can see no workable basis upon which the Crown can be asked to prove the balancing of the applicable principles that bear on the accountability of young persons for their crime beyond a reasonable doubt or, for that matter, on a balance of probabilities. As I have noted, this stands in distinction to the inquiry called for under s. 72(1)(a).

97 As the Crown points out, understanding the nature of the inquiry demanded by s. 72(1)(b) in this way fits with how courts approach other issues relating to sentencing. As a comparable discretionary decision in the sentencing context, I would reiterate my earlier reference to *Proulx*, where Lamer C.J. declined to impose a particular standard of proof where a court considers imposing a conditional sentence. He relied in part on the nature of a discretionary decision that must balance the principles listed s. 718 (see para 121).

98 A further similar example is provided by s. 745.63 of the *Criminal Code*. That section provides for a review by a jury of an offender's term of imprisonment without eligibility for parole. It asks the jury to consider a variety of factors, including the offender's character, conduct during imprisonment and the nature of the offence. In considering an earlier version of this provision, Lamer C.J. in *R v Swietlinski*, *[1994] 3 SCR 481* at 493-494, noted that the jury must exercise its discretion in considering whether to reduce the offender's period of parole eligibility with regard to the listed factors and by coming to its best decision on the evidence. This type of discretionary decision could not be equated to a decision requiring a standard of proof. I find the following discussion particularly helpful in explaining this point (at 494):

> ...When legislation lists various factors that a decision-maker must take into consideration a finding reached upon one or all of the factors does not necessarily mandate a conclusion leading to a specific decision. They are instead factors some of which may work in favour of the applicant and some against him, and which must be assessed and weighed as a whole in arriving at a conclusion. This is quite different from a trial where very strong evidence of one aspect of an offence cannot offset the weakness of evidence of another aspect.
>
> Accordingly, the concepts of burden of proof, proof on a balance of probabilities, or proof beyond a reasonable doubt are of very limited value in a hearing pursuant to s. 745, where the decision lies exclusively in the discretion of the jury. The jury must instead make what it, in its discretion, deems to be the best decision on the evidence. (On this point see also *R. v. M. (S.H.)*, *[1989] 2 S.C.R. 446*, at p. 464.)

99 Therefore, returning to the issue at hand, the Crown is not required to prove an adult sentence under Part XXIII of the *Criminal Code* or a regular youth sentence under s. 42 of the *YCJA* beyond a reasonable doubt because such decisions involve the weighing and balancing of sentencing principles and objectives. This type of a decision is incongruous with demanding a standard of proof. It is fundamentally a discretionary decision, bounded by the statutory criteria that govern the exercise of that discretion.

100 While I largely accept the Crown's argument in relation to the proper approach to s. 72(1)(b), it is necessary for me to address its attempt to use this conclusion as a bootstrap reason for why the beyond a reasonable doubt standard should not be applied to the inquiry in connection with s. 72(1)(a). It makes two submissions in this regard.

101 First, the Crown asserts that the approach I have set out results in giving the word "satisfied" two different meanings in the same section, which it says is in contravention of canons of statutory interpretation. However, in my respectful view, this is not at all the result. This point is well-illustrated by the case law interpreting s. 573.1 of the *Criminal Code*. As I have reviewed, that section requires that a court be satisfied of three conditions, but it has been interpreted to import proof beyond a reasonable doubt in connection with at least one of those conditions, and a discretionary decision in connection with another. There is no suggestion in the cases that have found s. 573.1 to impose two different standards that the word "satisfied" somehow does not have a singular meaning. As I have explained, the word "satisfied" can be equated with the word "convinced". The difference in approach between s.

72(1)(a) and s. 72(1)(b) is therefore not located in the word "satisfied". Instead, it is found in the application of the two clauses; the word "satisfied" retains a single meaning in s. 72(1).

102 Second, the Crown asserts that it is impractical for there to be different standards of proof for each branch of s. 72(1) because of what it describes as "the substantive overlap between the two branches", referring to the incorporation into s. 72(1)(b) of s. 3(1)(b)(ii). The latter provision states as follows (repeated for ease of reference):

> **Declaration of Principle *Policy for Canada with respect to young persons***
>
> **3(1)** The following principles apply in this Act:
>
> ...
>
> (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
>
> ...
>
> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity[.]

103 However, the analysis embedded in s. 3(1)(b)(ii) is only engaged if the threshold inquiry called for in s. 72(1)(a) has been crossed. Therefore, the impracticality that the Crown alleges does not arise.

104 In conclusion, as a condition to the imposition of an adult sentence on a young person, s. 72(1)(b) requires that the youth justice court, having weighed and balanced the relevant factors, is satisfied that a youth sentence imposed in accordance with the purpose and principles set out in s. 3(1)(b)(ii) and s. 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.

105 In this case, it is evident that the judge *was* satisfied, after having weighed and balanced the relevant factors, that a youth sentence imposed in accordance with the purpose and principles set out in s. 3(1)(b)(ii) and s. 38 would not be of sufficient length to hold B.J.M. accountable for his offending behaviour. As I have explained, B.J.M.'s trial counsel had conceded that a youth sentence imposed in accordance with the purpose and principles set out in s. 3(1)(b)(ii) and s. 38 would not be of sufficient length to hold B.J.M. accountable for his offending behaviour. The judge nonetheless conducted his own analysis of the evidence before he concluded that "after careful consideration of all the relevant factors, including the high risk for future violence posed by B.J.M., the limited steps he has taken towards his rehabilitation despite being offered opportunities, and his poor attitude towards making any significant changes in his life, I am satisfied that, on balance, a youth sentence would not be long enough to provide reasonable assurance of B.J.M.'s rehabilitation to the point where he or she can be safely reintegrated into society" (at para 60). This finding was made by the judge in a manner that is consistent with the approach I have concluded should be adopted in connection with s. 72(1)(b).

5. Conclusion as to the proper approach under s. 72(1)

106 For the reasons I have given, before an adult sentence can be imposed on a young person, the youth justice court must be satisfied:

(a) beyond a reasonable doubt that the presumption of diminished moral blameworthiness or culpability of the young person has been rebutted; and

(b) having weighed and balanced the relevant factors, that a youth sentence imposed in accordance with the purpose and principles set out in s. 3(1)(b)(ii) and s. 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.

107 In this case, the judge erred in law in his statement of the first part of this test. However, he correctly applied its second part.

C. The judge's error had no impact on the sentence

108 The powers of this Court in an appeal against sentence are defined in s. 687(1) of the *Criminal Code*, which provides as follows:

> **Powers of court on appeal against sentence**
>
> **687 (1)** Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > **(a)** vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> **(b)** dismiss the appeal.

109 This provision has been interpreted to give an appellate court two options: (1) to vary the sentence; or (2) to dismiss the appeal (see *R v Abdelrazzaq*, *2023 ONCA 231* at para 3, and *R c Pelletier* *(1989), 52 CCC (3d) 340* (WL) (QCCA) at para 18). In this regard, s. 687(1) differs from s. 759(3) of the *Criminal Code*, which applies to an appeal of a dangerous offender designation and allows an appellate court to order a new hearing (see *R v Walsh*, *2018 BCCA 222* at paras 14-16). I also do not see this as a case where there is a need to enhance the record in some other way. My conclusions about this are tied to the evidence that was before the judge and the findings that he made based on that evidence. Together, this record leads me to find that the judge's error did not have an impact on the sentence in this case. In this regard, as I have previously noted, under the applicable standard of review, a judge's error of law relating to the standard of proof provides a basis for appellate intervention only if that error had an impact on the sentence that was imposed "regardless of its impact on the trial judge's reasoning" (*Lacasse* at para 43). In this case, although in my respectful view the judge did not apply the correct standard in connection with the inquiry under s. 72(1)(a) of the *YCJA*, his error had no impact on the sentence that B.J.M. received because I am satisfied the record shows that the Crown had discharged its onus in relation to s. 72(1)(a) beyond a reasonable doubt. However, were I to view it differently, and conclude that the judge's error did affect the sentence he imposed, I would nonetheless impose the same sentence in any event. I will expand on these two conclusions.

110 In his examination of whether the Crown had discharged its onus under s. 72(1)(a), the judge oriented himself with reference to this Court's decision in *R.D.F.* In that case, Tholl J.A. explained that, for the Crown to rebut the presumption of diminished moral blameworthiness, "it must establish the offender demonstrated the level of maturity, moral sophistication and capacity for independent judgment of an adult". He then emphasized that this inquiry is made by examining the evidence "of the circumstances of the offender (age, maturity, intelligence, mental health issues, moral capacity, background, *Gladue* factors, previous criminal record and any other relevant factors) and the circumstances of the offence (actions taken in relation to the offence, planning, sophistication, role played, motivation and any other relevant factors)" (at para 37).

111 Having framed his analysis in this way, the judge carefully considered each of these factors. He found that "the Crown [had] rebutted the presumption of reduced moral blameworthiness or culpability common to all young people because of their youth so as to make an adult sentence appropriate" in this case (at para 48). I see no room in any part of the judge's analysis of B.J.M.'s circumstances for a reasonable doubt over this finding. I will highlight only parts of the judge's reasons to illustrate this conclusion.

112 The judge began his analysis of the evidence by noting that B.J.M. was 17 years and 5 months old when the offence was committed and "almost an adult in chronological terms" (at para 21). He observed that B.J.M suffered from some intellectual impairments, but after a consideration of the evidence he concluded there to be "no evidence that [B.J.M.'s] learning difficulties played a role in this offence" (at para 22). Indeed, B.J.M.'s counsel had *not* argued that B.J.M.'s cognitive difficulties had any effect on his moral culpability for committing the offence. In this part of his analysis, the judge also observed that s. 72(1)(a) "is founded on reduced moral blameworthiness or culpability ***as a result of youthfulness***" (at para 24, emphasis added). He adopted the direction given in *Chol* that a "young person's cognitive limitations and emotional and mental health, while relevant to this prong, should not

overwhelm the analysis" and in "some cases it may be that it is more appropriate to take these factors into account in the s. 72(1)(b) analysis, or in determining an appropriate sentence" (at para 61).

113 B.J.M. had a history of substance abuse. However, as the judge noted, it "is not clear from the evidence how this history can be said to impact the variables relating to B.J.M.'s maturity or impulsiveness" (at para 25). The judge reviewed B.J.M.'s substantial criminal record and accepted that it was possible to "draw a straight line from colonialism to residential schools to the '60s scoop and to B.J.M. being here today" (at para 27, quoting from the Crown's argument). Therefore, he concluded that "B.J.M.'s *Gladue* circumstances have a profound impact in reducing his moral blameworthiness for his offences and must inform the analysis required under section 72(1)(a) of the *YCJA*" (at para 28). He quoted paragraph 32 of *W.M.*, in which this Court had cautioned not to confuse a reduction of moral culpability on account of *Gladue* factors with "the presumption of reduced moral blameworthiness common to *all* young people because of their *youth*" (emphasis in original). The judge's explanation for why the presence of *Gladue* factors did not impact his determination that the Crown had discharged the onus under s. 72(1)(a) also provides the basis for my conclusion that the Crown had established beyond a reasonable doubt that B.J.M. did not have a reduced moral culpability on account of his youth. In this regard, the judge stated as follows:

> [30] Nonetheless, a comprehensive analysis of the implications of the Court of Appeal's statements in para 32 of *W.M.* and their application to B.J.M.'s case is not necessary because the evidence tendered at the sentencing hearing *clearly establishes that B.J.M. was not in a state of dependency and immaturity at the time of the commission of the offence*. An examination of further circumstances pertaining to the young person as well as circumstances of the offence, both of which are discussed below, amply demonstrate that B.J.M. possessed and exhibited adult-like maturity at the time of the murder.
>
> (Emphasis added)

114 I see no need to summarize the remaining eight pages of the judge's detailed consideration of the evidence that supported his conclusion that the evidence before him "clearly establishes that B.J.M. was not in a state of dependency and immaturity at the time of the commission of the offence" (at para 30). What the judge presented was an overwhelming description of an offender as a person under 18, but who could not in any way be said to suffer from a reduced moral culpability or blameworthiness because, at the time of the offence, he had not yet lived the final seven months before he had attained that age. In the circumstances of this case, although the judge did not expressly state that he had no reasonable doubt that the Crown had met the onus resting on it under s. 72(2) to establish beyond a reasonable doubt that the presumption of diminished moral blameworthiness or culpability that B.J.M. enjoyed because he was not yet 18 years old was rebutted, the finding that he did make is nearly equivalent to it. There is nothing in his reasons to suggest that he would have reached a different conclusion had he not erred as to the standard of proof under s. 72(1)(a) and, as I have noted, I see no error at all in his conclusion in connection with s. 72(1)(b).

115 In conclusion, the error in the judge's legal analysis in connection with s. 72(1)(a) had no impact on the sentence that B.J.M. received. In any event, were I to sentence B.J.M. afresh, I would impose the same sentence as did the judge in this case.

V. CONCLUSION

116 For the reasons I have given, B.J.M.'s appeal must be dismissed.

R. LEURER C.J.S.
M. MCCREARY J.A.:— I concur.

B. BARRINGTON-FOOTE J.A. (concurring)

I. INTRODUCTION

117 I agree with my colleagues that the standard of proof in relation to the condition specified by s. 72(1)(a) of the *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*], is beyond a reasonable doubt [criminal standard] and that the

judge accordingly erred in finding that the standard is one of "satisfaction after careful consideration by the court of all the relevant factors" (*R v B.J.M.*, *2022 SKPC 38* at para 19 [*Sentencing Decision*]). Like my colleagues, it is my opinion that Abella J.'s reasoning in *R v D.B.*, *2008 SCC 25*, *[2008] 2 SCR 3* [*D.B.*], effectively mandates that result. Like them, I would dismiss the appeal, as it is my view that while the error did impact the judge's decision, the presumption of reduced moral culpability had been rebutted.

118 I also concur with my colleagues' conclusion that the standard of proof that applies to s. 72(1)(a) and s. 72(1)(b) of the *YCJA* should be addressed as separate questions, despite the relationship between a finding that the presumption of reduced moral culpability is rebutted and the question of whether a youth sentence would be of sufficient length to hold the young person accountable. That approach accords with the fact that, as this and other courts have found, it is an error to conduct a blended analysis when answering the questions posed by those two provisions: *R v R.D.F.*, *2019 SKCA 112* at para 30, *382 CCC (3d) 1*.

119 However, with the greatest respect, I am unable to concur with my colleagues' reasons as to the standard of proof that applies to the accountability question posed by s. 72(1)(b). That question does not arise in this case. B.J.M. conceded this issue at the sentencing hearing and has not appealed the finding by the judge that this aspect of the two-part test was satisfied, on this or any other ground. For that reason, the s. 72(1)(b) issue should be deferred to a case where it must be decided and has been fully argued, which it was not in this case. The question as to whether the standard of proof should be found to differ in relation to s. 72(1)(a) and s. 72(1)(b) was raised. However, that was so only in a very limited fashion. As a result, key issues were not canvassed. Among other things, the Court did not have the benefit of complete submissions by the parties or the intervenor as to why, in light of the case law relating to the meaning of the question posed by s. 72(1)(b), the criminal standard could not apply.

120 I would be less concerned with this question if I agreed with the reasoning on which my colleagues' conclusion as to s. 72(1)(b) is based. However, I am unable to do so. Section 72(5) of the *YCJA* confirms that "for the purposes of an appeal in accordance with section 37, an order under subsection [72](1) or (1.1) is part of the sentence". However, that does not mean that this binary decision is of the same sort as the final decision as to what sentence, among a range of possible outcomes, should be imposed. To the extent their conclusion that there is no standard of proof in relation to s. 72(1)(b) is based on s. 72(5), it is my view that their reasoning is flawed.

121 Further, I am not persuaded that the fact that a judge must find the facts and weigh a variety of factors when deciding if an adult sentence should be imposed - and for that reason can be described as "discretionary" - precludes the application of the usual criminal standard of proof. Such a decision is a mixed question of fact and law. The criminal standard applies to many decisions of that kind, including, of course, not only the useful examples listed by my colleagues, but in every case, the ultimate question as to whether the Crown has proven that an accused person is guilty. Why is the s. 72(1)(b) mixed question of fact and law different in kind and, if it is not, why does that characteristic support the conclusion that criminal standard does not apply?

122 While I need not - and for the reasons I have stated, have concluded that I should not - finally determine the standard of proof in relation to s. 72(1)(b), I have great difficulty with the notion that mere satisfaction is enough. This is, after all, not only a very important decision due to its effect on the potential sentence, but one that directly impacts the principles of fundamental justice as they relate to youth.

123 My reasons for these conclusions follow.

II. ANALYSIS

124 For ease of reference, I will once again quote the relevant parts of s. 72(1), (1.1) and (2):

Order of adult sentence

72 (1) The youth justice court shall order

that an adult sentence be imposed if it is satisfied that

> **(a)** the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
>
> **(b)** a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.
>
> **Order of youth sentence**
>
> **(1.1)** If the youth justice court is not satisfied that an order should be made under subsection (1), it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed.
>
> **Onus**
>
> **(2)** The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is on the Attorney General.

125 To begin, and as noted above, *D.B.*- which was not taken into account by other appellate courts in the decisions that have adopted the satisfaction standard - is of central importance when determining the standard in relation to the s. 72(1)(a) question. That is so despite that the issue in *D.B.* was whether the version of s. 72 of the *YCJA* that was then in effect [former s. 72] offended s. 7 of the *Charter*, while the question before us is the proper interpretation of the amended version of s. 72 [current s. 72] that was in effect when *B.J.M.* was sentenced.

126 It is helpful to be clear why *D.B.* mandates proof of diminished moral blameworthiness or culpability beyond a reasonable doubt. Prior to the amendments that responded to *D.B.*, a young person charged with a presumptive offence had to apply pursuant to s. 63 of the *YCJA* if they wished to be sentenced as a youth. The former s. 72(1) directed the sentencing judge to decide such an application on the basis of the accountability question, after considering the factors described in that section, as follows:

> **Test - adult sentences**
>
> **72. (1)** In making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and
>
> (*a*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and
>
> (*b*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.

127 The former s. 72(2), in turn, imposed "the onus of satisfying the youth justice court as to the matters referred to in subsection [72](1)" on the offender.

128 This scheme was found to be contrary to s. 7 of the *Charter*, as it infringed at least two principles of fundamental justice. As Professor Janine Benedet noted in her case comment on *D.B.*, "the Court unanimously identifies two new principles of fundamental justice: that young people who engage in criminal conduct should be presumed to have less moral blameworthiness and culpability than adults, and that the Crown must prove aggravating factors on sentencing". She also asserts that the majority also concluded that there is a third principle of fundamental justice relating to youth sentencing, in that it "uses the first of its two principles to constitutionalize a presumption of lower sentences for young offenders" (*D.B.*, Annotation, *56 CR (6th) 203* at 205).

129 In his dissenting reasons in *D.B.*, Rothstein J. agreed that the majority had found that there was a third presumption, stating that "Abella J. focusses solely on the age of the young offender to conclude that the

presumption of reduced moral blameworthiness requires the further presumption of a lesser youth sentence for serious violent offenses" (at para 148). However, he did not agree that there was a third presumption of this kind. Professor Benedet nicely encapsulates his view of this issue, as follows:

> The dissent appears to be in agreement as to the principles of fundamental justice at stake, but rejects the majority's fusion of lesser blameworthiness with a presumption of lower sentences. The dissent places the presumption in the context of the entire *YCJA* and finds that it provides ample protection for young persons so as to ensure that an adult sentence is not imposed where it is not merited. The dissent also convincingly explains that the presumption does not relieve the Crown of its burden to prove aggravating facts on sentencing, since the Crown will still have to prove those facts under either regime.

130 Justice Abella concluded that the reverse onus created by the former s. 72 deprived youth of the presumption of reduced moral blameworthiness. She also held that this scheme contravened the principle that "the Crown is obliged to prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies" (at para 78). She explained the latter conclusion as follows:

> [81] In the case of presumptive offences, it is the young person who must satisfy the court of the factors justifying a youth sentence, whereas it is normally the Crown who is required to satisfy the court of any factors justifying a more severe sentence. A maximum adult sentence in the case of presumptive offences is, by definition, more severe than the maximum permitted for a youth sentence. A youth sentence for murder cannot exceed ten years; for second degree murder, seven; and for manslaughter, three. The maximum adult sentence for these offences is life in prison.
>
> [82] A young person should receive, at the very least, the same procedural benefit afforded to a convicted adult on sentencing, namely, that the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case. The onus on the young person reverses this traditional onus on the Crown and is, consequently, a breach of s. 7.

131 The amendments that resulted in the current s. 72 were intended to deal with the impact of *D.B*. As my colleagues have explained, Parliament was aware that there was an issue as to the standard of proof but did not resolve it, choosing instead to leave it to the courts as a matter of statutory interpretation. The modern principle of statutory interpretation accordingly governs. However, given the underlying *Charter* issue identified in *D.B.*, the modern principle is supplemented here by the presumption that the legislature intends to comply with limits on its jurisdiction: see Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at §16.01. The meaning of this "presumption of compliance" where the issue results from the jurisdictional limits imposed by the *Charter* was described as follows by McLachlin C.J.C. in *R v Sharpe*, *2001 SCC 2*, *[2001] 1 SCR 45*:

> [33] ... Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the *Charter*: see [Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994)], at pp. 322-27. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted: see *Slaight Communications Inc. v. Davidson*, *[1989] 1 S.C.R. 1038*, at p. 1078; *R. v. Swain*, *[1991] 1 S.C.R. 933*, at p. 1010; *R. v. Nova Scotia Pharmaceutical Society*, *[1992] 2 S.C.R. 606*, at p. 660; *R. v. Lucas*, *[1998] 1 S.C.R. 439*, at para. 66.

132 What, then, does the presumption of compliance mean in relation to the standard of proof for to factors identified by s. 72(1)(a) and s. 72(1)(b)? In *D.B.*, Abella J concluded that the principles of fundamental justice require that the Crown bear the onus of rebutting the presumption of diminished moral culpability and of proving aggravating circumstances beyond a reasonable doubt. I agree with my colleagues that her reasons are properly read as specifying that the criminal standard applies to s. 72(1)(a).

133 Importantly, *D.B.* can also be read as requiring that the same standard be imposed in relation to s. 72(1)(b). I note, in particular, the following reasoning:

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

> *absence* of aggravating factors in order to justify a youth sentence, rather than on the Crown to prove the aggravating factors that justify a lengthier adult sentence, reverses the onus.
>
> (Emphasis in original)

134 It is arguable that the use of the phrase "*factors* in s. 72(1)" (emphasis added) refers to the introductory words of that subsection, which directed a sentencing judge to consider *facts* such as the circumstances of the offence and the offender's criminal record and "any other factors that the court considers relevant". However, Abella J. described the issue as "the onus on the young person of satisfying the court of the *sufficiency* of the factors in s. 72(1)" (emphasis added). That language mirrors the question asked by the section, which was whether a youth sentence "would have sufficient length to hold the young person accountable for his or her offending behaviour". This is not a question of fact, but a conclusion reached by applying the criterion specified in the former s. 72(1)(b) to the facts. This interpretation of paragraph 78 would also be consistent with Abella J.'s summary of her conclusions on this point, which was as follows:

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

135 Notably, this does not describe the Crown's burden as a requirement to prove aggravating facts or "factors" beyond a reasonable doubt, but to demonstrate why a more severe sentence is necessary. That result can only be achieved under s. 72(1) by both rebutting the presumption of reduced moral culpability and proving that a youth sentence would not be sufficient to hold the youth accountable, both of which raise mixed questions of fact and law.

136 Courts have identified various concerns with the imposition of a standard of proof to the accountability question beyond the satisfaction standard. They all appear to be conceptually similar. In *R v M.(S.H.)*, *[1989] 2 SCR 446* at 464 [*M.(S.H.)*], for example, which has been treated as an important decision in this context, McLachlin J. (as she then was) said this:

> Nor do I find it helpful to cast the issue in terms of a civil or criminal standard of proof. Those concepts are typically concerned with establishing whether something took place. It makes sense to speak of negligence being established "on a balance of probabilities", or to talk of the commission of a crime being proved "beyond a reasonable doubt". But it is less helpful to ask oneself whether a young person should be tried in ordinary court "on a balance of probabilities". One is not talking about something which is probable or improbable when one enters into the exercise of balancing the factors and considerations set out in s. 16(1) and (2) of the [*Young Offenders Act*, SC 1980-81-82-83, c 110]. The question rather is whether one is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court.

137 Two points bear emphasis here. First, s. 16 of the *Young Offenders Act*, SC 1980-81-82-83, c 110, asked a far less focussed question than the current s. 72(1). Section 16(1) provided that a judge could order that the proceedings be in accordance with the law applicable to an adult "if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court". Under s. 72(1), the question is whether the criteria specified by s. 72(1)(a) and (b), as interpreted by the case law, have been met. Those are certainly answers that can be found to be more or less probable, or in relation to which a judge could be more or less satisfied.

138 Second, McLachlin J. did not suggest that a standard of proof can only apply to proof of facts. She noted, by way of example, that standards of proof apply to findings of negligence and that a crime has been committed. Many crimes have essential elements that could be characterized as no less precise than s. 72(1)(b) of the *YCJA*. I note, for example, the nuanced questions that can arise when deciding whether duties of care have been breached in a criminal negligence case or whether a person has departed markedly from the standard of a reasonable person in criminal driving offences. The requirement to prove a breach of the duty imposed by s. 215(2) of the *Criminal Code*

to provide the necessaries of life is another notable example. The legal test that applies in that context was described as follows by Lamer J. in *R v Naglik*, *[1993] 3 SCR 122* at 143:

> What parts of the offence must be objectively foreseeable? In this appeal, Naglik was charged under ss. 197(2)(*a*)(ii) and 197(3) (now ss. 215(2)(*a*)(ii) and 215(3)) of the *Criminal Code*, which make the failure to fulfil the duty to provide necessaries an offence where "the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently". *I would hold that s. 215(2)(a)(ii) punishes a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child.*
>
> (Emphasis added)

139 This test incorporates societal norms and values which are affected by matters such as culture, religion, how and why parenting duties are shared, and the role of other caregivers and members of the extended family, as well as challenges that impact a parent's ability access to medical and or other necessary resources.

140 The requirement to prove the criterion specified in s. 753(1)(a) of the *Criminal Code* beyond a reasonable doubt before declaring an offender to be a dangerous offender is also a striking example of the application of the criminal standard to an "evaluative" decision. A judge cannot make such a declaration unless they are satisfied that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons" (s. 753(1)(a)). They can only make that finding if the Crown has proven all of the dangerousness criteria beyond a reasonable doubt, including that the offender poses a high likelihood of harmful recidivism and that the offender's conduct is intractable. As Côté J. explained in *R v Boutilier*, *2017 SCC 64*, *[2017] 2 SCR 936* [*Boutilier*]:

> [46] In sum, a finding of dangerousness has always required that the Crown demonstrate, beyond a reasonable doubt, a high likelihood of harmful recidivism and the intractability of the violent pattern of conduct. A prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention. This necessarily involves the consideration of future treatment prospects. ...

141 See also the exploration of this issue in *R v Bird*, *2023 SKCA 40* at paras 36 *et seq*. As Jackson J.A. there notes:

> [38] As I read *Boutilier* and [*R v Starblanket*, *2019 SKCA 130*, *[2020] 6 WWR 288*], the assessment called for at the designation stage requires a sentencing judge to consider all evidence concerning past and likely future behaviour that is relevant to the continuing nature of the offender's risk. This necessarily includes consideration of the offender's future treatment prospects. And, in the case of Indigenous offenders, it also calls for sentencing judges to consider whether and to what extent culturally specific treatment and programming can serve to reduce the offender's risk (*R v Ballantyne*, *2022 SKCA 13* at para 23; [*R v Napope*, *2023 SKCA 1*, *421 CCC (3d) 447*] at para 27).

142 *R v O.(A.)*, *2007 ONCA 144*, *218 CCC (3d) 409*, has also been treated as a leading case in relation to this issue, despite the fact that it was decided before the clarification of the principles of fundamental justice in *D.B.* and, of course, before s. 72 was amended. The Court of Appeal for Ontario in *O.(A.)* followed *M.(S.H.)* on this point, reasoning in this manner:

> [34] Section 72(1)(*b)* requires the youth justice court to weigh and balance the enumerated factors and then to decide whether a youth sentence is sufficiently long to hold a young person accountable for his or her offending behaviour. That type of evaluative decision - making an informed judgment - does not lend itself to proof beyond a reasonable doubt. As McLachlin J. explained in *R. v. M. (S.H.)*, *supra*, the court is not being asked to make findings of fact about past events nor to make a determination of whether a crime has been committed, which are the types of decisions for which proof beyond a reasonable doubt is normally required.

143 Based on this reasoning, *O.(A.)* adopted what my colleagues have referred to as the satisfaction standard -

that is, satisfaction after careful consideration by the court of all the relevant factors. The Court of Appeal of Manitoba followed *O.(A.)* in *R v Okemow*, 2017 MBCA 59, 353 CCC (3d) 141, as did the Court of Appeal of Alberta in *R v D.D.T.*, 2010 ABCA 365, 265 CCC (3d) 49.

144 I would again note that *O.(A.)*, like *M.(S.H.)*, considered a very different *YCJA* provision than the current s. 72. The former s. 72, among other things, expressly stated that a youth sentence could be imposed if the sentencing judge was "of the opinion" that the specified accountability standard had been met. That is a material difference, given that this phrase was removed when s. 72 was amended. Further, for the reasons I have explained, there is a sound argument that, in *D.B.*, the majority squarely rejected the conclusion in *O.(A.)* that "[t]he requirement of proof beyond a reasonable doubt does not ... extend to the ultimate decision called for under s. 72(1)(b)" (*O.(A.)* at para 36). That is so because Abella J. held that "the burden is on the Crown to demonstrate why a more severe sentence is necessary and appropriate in any given case" (*D.B.* at para 82). I note that in *R v Henderson*, 2018 SKPC 27 at para 35, the sentencing judge well and succinctly explained this point. Finally, the fact that a decision can be described as "evaluative" is also of limited assistance, as many such decisions are subject to the criminal standard.

145 Respectfully, it is also my view that the words "careful consideration" add nothing to the word "satisfied". They provide no additional guidance to a sentencing judge as to the level of satisfaction they must achieve or how they should reach it. How else would a judge who is applying the law to the facts determine if they are satisfied that a specified standard has been met - particularly, but not only, in relation to such a weighty matter - other than carefully? That is part and parcel of acting judicially.

146 I would finally reiterate that the decision as to whether the s. 72(1)(b) criterion has been met is very different than determining what sentence should be imposed. For that reason, the fact that the criminal standard does not apply to the determination of a sentence is of very little assistance in this context. Sentencing engages many purposes and principles - many of which are inherently flexible - that must be applied to facts that can be complex and are always unique. As a result, sentences generally, but not invariably, fall within established ranges. There is no single answer to the question of what sentence should be imposed. A sentence need only be "fit".

147 That is not the process that occurs when a judge considers the accountability question posed by s. 72(1)(b). A judge does not decide what sentence they would impose if the offender were to be sentenced as a youth, or that which would be imposed under the adult regime. That complete and final analysis occurs only when the sentence is finally being determined.

148 In light of this, it is difficult to understand why the black-and-white, either/or question of sufficient accountability could not be determined under the criminal standard. Justice Côté's comment in *Boutilier* that the "prospective assessment of dangerousness ensures that only offenders who pose *a tremendous future risk* are designated as dangerous" is a helpful example of what is possible (at para 46, emphasis added). An approach of that kind would ensure that adult sentencing is reserved for the clearest of cases. That would be consistent with both the criminal standard and the principles of fundamental justice that apply in this context. If a judge can decide beyond a reasonable doubt that a potential dangerous offender's risk of recidivism and intractability cannot be sufficiently mitigated by future treatment, why could they not, for example, assess on a youth's prospect for rehabilitation - an element of the accountability analysis - on the same basis? Importantly, this and other elements of the s. 72(1)(b) question will only be engaged in relation to youth who do not have the benefit of the presumption of reduced moral culpability and, as a rule, who are close to reaching the age of 18, and have committed very serious violent offences and, in many cases, also have a significant record of prior offending.

149 As I have indicated, it is my view that I need and not and should not state a final conclusion as to the standard of proof in relation to s. 72(1)(b). To reiterate, that this issue should not be decided on this appeal. At trial, B.J.M. conceded that a youth sentence would not hold him accountable and did not challenge that finding on appeal. I have identified my key concerns with the reasoning that has been used by the majority and by other courts to justify the conclusion that there is either no standard of proof, or that the standard is satisfaction, to clarify why I am unable to concur with my colleagues' reasons in respect of this issue.

III. CONCLUSION

150 In the result, I agree with my colleagues that the standard of proof that applies to the question arising from s. 72(1)(a) is proof beyond a reasonable doubt. The judge accordingly erred in this respect. I note that he made that error only because he did not consider it to be open to him decide otherwise. He fully understood the factors that militated in favour of the adoption of the criminal standard and would have reached the same conclusion as this Court. He had well and fully explained why that was so in *R v Henderson*, *2018 SKPC 27*.

151 It is my opinion that this error impacted the result of the judge's assessment of the issue of moral culpability. I have accordingly considered this issue afresh and conclude that the Crown has discharged its onus to rebut the presumption of reduced moral culpability beyond a reasonable doubt. In substance, my reasons for reaching that conclusion mirror those provided by the sentencing judge. I would accordingly deny the appeal.

B. BARRINGTON-FOOTE J.A.
