SCC No. 40868

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

B E T W E E N :

I.M.

Appellant

- and -

HIS MAJESTY THE KING

Respondent

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ALBERTA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, JUSTICE FOR CHILDREN AND YOUTH, QUEEN'S PRISON LAW CLINIC, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), PEACEBUILDERS CANADA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

(*style of cause continued on next page)*

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

LAROCHELLE LAW
201-4133 Fourth Avenue
Whitehorse, YT Y1A 1H8

Vincent Larochelle
Safiyya Ahmad

T: 867-456-2325
E: info@larochellelaw.ca

Counsel for the Intervener,
British Columbia Civil Liberties Association

CHAMP & ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy

T: 613-237-4740
E: broy@champlaw.ca

Agent for the Intervener,
British Columbia Civil Liberties Association

SCC No. 40873

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

B E T W E E N :

S.B.

Appellant

- and -

HIS MAJESTY THE KING

Respondent

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ALBERTA, DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES, JUSTICE FOR CHILDREN AND YOUTH, QUEEN'S PRISON LAW CLINIC, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), PEACEBUILDERS CANADA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, and AFRICAN NOVA SCOTIAN JUSTICE INSTITUTE

Interveners

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada

COPIES TO:

STOCKWOODS LLP
77 King Street West, Suite 4130
Toronto-Dominion Centre, TD North Tower
Toronto, ON M5K 1H1

Nader R. Hasan
Stephen Alyward
Alexandra Heine

T: 416-593-1668
F: 416-593-9345
E: naderh@stockwoods.ca

Counsel for the Appellant in
SCC File No. 40868, I.M.

JURISTES POWER
50 rue O'Connor bureau 1313
Ottawa, ON K1P 6L2

Maxine Vincelette

T: 613-702-5573
F: 613-702-5573
E: mvincelette@juristespower.ca

Agent for the Appellant in
SCC File No. 40868, I.M.

DERSTINE PENMAN
CRIMINAL LAWYERS
302 – 559 College Street
Toronto, ON M6G 1A9

Dirk Derstine
Laura Remigio
Kristen Dulysh

T: 416-304-1414
F: 416-304-1345
E: derstine@derstinepenman.com

Counsel for the Appellant in
SCC File No. 40873, S.B.

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K1P 0R3

Marie-France Major

T: 613-695-8855 Ext: 102
F: 613-695-8580
E: mfmajor@supremeadvocacy.ca

Agent for the Appellant in
SCC File No. 40873, S.B.

ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9

Alexander Alvaro
Justin Reed

T: 416-326-4600
F: 416-326-4656
E: alexander.alvaro@ontario.ca
justin.reid@ontario.ca

Counsel for the Respondent,
His Majesty the King

PROCUREUR GÉNÉRAL DU CANADA
Complexe Guy Favreau
200, boul. René Lévesque Ouest
5e Étage, Tour Est
Montréal, QC H2Z 1X4

Ginette Gobeil
Roy Lee

T: 514-496-8115
F: 514-496-7372
E: ginette.gobeil@justice.gc.ca

Counsel for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 O'Connor Street, Suite 500, room 556
Ottawa, ON K2P 6L2

Christopher Rupar

T: 613-941-2351
F: 613-954-1920
E: christopher.rupar@justice.gc.ca

Agent for the Intervener,
Attorney General of Canada

JUSTICE AND SOLICITOR GENERAL
Appeals and Specialized Prosecutions Office
3rd Floor, Centrium Place
300, 332-6 Avenue W
Calgary, AB T2P 0B2

Sarah Clive

T: 403-297-6005
F: 403-297-3453
E: sarah.clive@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt

T: 613-786-8695
F: 613-788-3509
E: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

ADDARIO LAW GROUP LLP
500-30 Duncan Street
Toronto, ON M5V 2C3

Samara Secter
Cori Goldberger

T: 416-649-5063

E: ssecter@addario.ca

Counsel for the Intervener,
Canadian Civil Liberties Association

GOLDBLATT PARTNERS LLP
1400-270 Albert Street
Ottawa, ON K1P 5G8

Colleen Bauman

T: 613-482-2459
F: 613-235-3041
E: cbauman@goldblattpartners.com

Agent for the Intervener,
Canadian Civil Liberties Association

JUSTICE FOR CHILDREN AND YOUTH
55 University Avenue, Suite 1500
Toronto, ON M5J 2H7

Mary Birdsell
Katherine Long
Jin Chien

T: 416-920-1633 Ext: 8229
F: 416-920-5855
E: stewartja@lao.on.ca

Counsel for the Intervener,
Justice for Children and Youth

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2000
Ottawa, ON K1P 1C3

Catherine Ouellet

T: 613-786-0189
F: 613-563-9869
E: catherine.ouellet@gowlingwlg.com

Agent for the Intervener,
Justice for Children and Youth

HENEIN HUTCHISON ROBITAILLE LLP
235 King Street East
Toronto, ON M5A 1J9

Stephanie DiGiuseppe
Maya Borooah

T: 416-368-5000 Ext: 196
F: 416-368-5000
E: sdigiuseppe@hhllp.ca

Counsel for the Intervener,
Peacebuilders Canada

RUBY SHILLER ENENAJOR DIGIUSEPPE BARRISTERS
171 John Street, Suite 101
Toronto, ON M5T 1X3

Annamaria Enenajor
Heather Gunter

T: 416-964-9664
F: 416-964-8305
E: aenenajor@rubyshiller.com

Counsel for the Intervener,
Queen's Prison Law Clinic

MARTIN BARRISTERS
130 Spadina Avenue, Suite 606
Toronto, ON M5V 2L4

Maija Martin
Jolene Hansell

T: 416-361-9609

E: maija@martincriminaldefence.ca

Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

T: 613-695-8855 Ext: 102
F: 613-695-8580
E: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Criminal Lawyers' Association (Ontario)

DIRECTEUR DES PURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC
Complexe Jules-Dallaire
2828, boulevard Laurier, Tour 1, Bureau 500
Québec, QC G1V 0B9

Julie Nadeau
Philippe Desjardins

T: 418-643-9059 Ext: 20844
F: 418-644-3428
E: julie.nadeau@dpcp.gouv.qc.ca

Counsel for the Intervener, Director of Criminal and Penal Prosecutions

DIRECTEUR DES PURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC
Palais de justice de Gatineau
17, rue Laurier, Bureau 1.230
Gatineau, QC J8X 4C1

Isabelle Bouchard

T: 819-776-8111 Ext: 60442
F: 819-772-3986
E: isabelle.bouchard@dpcp.gouv.qc.ca

Agent for the Intervener, Director of Criminal and Penal Prosecutions

AFRICAN NOVA SCOTIAN JUSTICE INSTITUTE
5832 Bilby Street
Halifax, NS B3K 1V8

Brandon P. Rolle

T: 902-492-5619

E: brandon.rolle@ansji.ca

Counsel for the Intervener in
SCC File No. 40873,
African Nova Scotian Justice Institute

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

T: 613-695-8855 Ext: 102
F: 613-695-8580
E: mfmajor@supremeadvocacy.ca

Agent for the Intervener in
SCC File No. 40873,
African Nova Scotian Justice Institute

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. "Homicide is evidence of maturity and capacity for moral judgment."

2. This **incontrovertibly false statement** is nonetheless the logical terminus for the reasoning contained in the decisions under appeal.

3. A reasoning which – in a clear departure from the principles enunciated in this Court's decision of *R. v. D.B.* – factors the seriousness of the offence in the judicial inquiry mandated not only by s.72(1)(a) of the *Youth Criminal Justice Act ("YCJA")*, but more importantly by s.7 of the *Charter*.

4. In fact, by losing sight of the constitutional principles and factual premises that support the presumption of diminished moral blameworthiness, sentencing judges will not only erode the constitutional protections afforded to youth, but also pave the way to an inconsistent and irregular application of s.72(1)(a).

5. In the BCCLA's respectful submission, the question of whether to impose an adult sentence on a young offender is of utmost importance. It must be infused and guided by principle, and supported by an evidentiary record commensurate with the seriousness of what is at stake: youth.

6. A principled application of s.72(1)(a) of the *YCJA* must consider the factual foundation for the presumption of diminished moral blameworthiness, and factor only that evidence which tends to prove or disprove this foundation. Anything else is irrelevant to the analysis.

7. An attentive reading of *D.B.* reveals that the presumption under issue reflects the recognized (i) vulnerability, (ii) lack of maturity, and (iii) lack of capacity for moral judgment of youth.

8. Accordingly, the factual inquiry under s.72(1)(a) must be exclusively focused on these three premises of the Presumption.

9. Put simply, the BCCLA asks that this Court place the constitutional imperatives underlying *R. v. D.B.* at the centre of the s.72(1)(a) inquiry and clearly enunciate those principles that must guide an analysis performed under this section to ensure a fair, consistent, and constitutionally compliant youth penological system.

PART II – QUESTIONS IN ISSUE

10. In this intervention, the BCCLA takes position as follows:

i. The presumption of diminished moral culpability flows from s.7 of the *Charter*. Any attempt at codification of this principle of fundamental justice, such as s.72(1)(a) of the *YCJA* must be subject to an interpretation which leans heavily on s.7 jurisprudence. From a first-principles application of *D.B.* and subsequent cases, the judicial inquiry into whether the presumption of diminished responsibility has been rebutted under s.72(1)(a) of the *YCJA* must be focused **exclusively** on the young person's vulnerability, maturity, and capacity for moral judgment – these are the facts that are presumed to exist by virtue of s.7 of the *Charter*, and from which diminished moral responsibility arises.[1]

ii. On this same first-principles approach to *D.B.*, social context evidence such as S.B.'s experiences as a Black teenager is highly relevant to analyzing the presumption of diminished moral culpability, as it provides the Court with evidence concerning S.B.'s vulnerability, immaturity, and capacity for moral judgement. Moreover, the Ontario Court of Appeal's prior decision in *R. v. Morris* has established that the impact of anti-Black racism is relevant to determining an offender's circumstances, life choices, and degree of personal responsibility.[2]

[1] *R. v. D.B.*, 2008 SCC 25, para 41. [*D.B.*]
[2] *R. v. Morris*, 2021 ONCA 680, paras 91-94. [*Morris*]

PART III – STATEMENT OF ARGUMENT

A. Section 72(1)(a) of the *YCJA* and its constitutional roots

12. A sentencing judge seized with an application for the imposition of an adult sentence under s.64(1) of the *YCJA* must be satisfied, inter alia, that the young offender is no longer protected by the presumption of diminished moral blameworthiness or culpability (the "**Presumption**") before imposing an adult sentence.

13. This Presumption is constitutionally rooted, statutorily undefined, and otherwise inherently vague. Moreover, the concept of "moral blameworthiness" which is at the heart of the Presumption makes a routine appearance in sentencing judges' work as a component of the cardinal principle of proportionality in sentencing, albeit in a different, highly unconstrained, and almost purely discretionary statutory context.

14. To further confuse matters, amendments to s.72(1) made in 2012 essentially: i) condensed the previous iteration of the test into s. 72(1)(b); ii) repealed the list of factors previously applicable to this test; and iii) added an entirely new and conjunctive criterion under s.72(1)(a) in the form of the Presumption. No statutory factors for consideration by judges are enacted in relation to either of the two criteria under s.72(1).

15. It is therefore unsurprising that the exercise of discretion for findings made under s.72(1) of the *YCJA* as presently framed lacks consistency and uniformity, for the section itself is wanting in guiding principles, definitions, and criteria.

16. One need look no further than both decisions under appeal, written by the same panel of the Ontario Court of Appeal, to find illustrations of this lack of consistency. On the one hand, at paragraph 68 of the *S.B.* decision, the Ontario Court of Appeal found that a lack of insight is indicative of reduced moral blameworthiness.[3] On the other hand, the same panel of the Ontario Court of Appeal found that I.M.'s lack of insight heightened the risk of reoffending and increased I.M.'s blameworthiness at paragraph 67 of that decision.[4] The dicta is hard to reconcile.

[3] *R. v. S.B.*, 2023 ONCA 369, para. 68. [*S.B.* ONCA]
[4] *R. v. I.M.*, 2023 ONCA 378, para. 67. [*I.M.* ONCA]

17. The BCCLA's intervention is prompted by this lack of consistency and principle, and is primarily aimed at making the following observations:

i. Only s.72(1)(a) of the *YCJA* represents a codification of the decision in *R. v. D.B.* Section 72(1)(b) is a conjunctive criterion that plays an entirely different analytical function and possesses no connection to the Presumption;

ii. The inquiry under s.72(1)(a) must consider only those factors that are relevant to the factual underpinnings of the Presumption, as articulated in *R. v. D.B.* and subsequent cases: namely, the young person's vulnerability, maturity, and capacity for moral judgment;

iii. On a first-principles understanding of s.72(1)(a), social context evidence in the form of an EPSR or similar evidence is by nature highly relevant and probative of the issues to be considered under the s.72(1)(a) inquiry.

Anatomy of Section 72(1) and conjunctive criteria

18. Section 72(1) of the *Code* creates a **conjunctive** test before an adult sentence can be imposed on a young person. The BCCLA first considers here Section 72(1)(b), to then better contextualize and contrast the criteria enacted under s.72(1)(a).

19. Section 72(1)(b) requires a judge to be satisfied that the imposition of a sentence in accordance with ss. 3(1)(b)(ii) and 38 of the YCJA would not be of sufficient length to hold the young person accountable for their behaviour. As the Court of Appeal for Ontario observed in *M.W.*, the premise of s.3(1)(b)(ii) connects the Presumption's focus on maturity with accountability in sentencing.[5]

20. Thus s.72(1)(b), as drafted, requires a judge to consider what sentence would be imposed *assuming* that the Presumption applied, and to then consider whether such a sentence would be of sufficient length to hold the young offender accountable.

21. To this extent, s.72(1)(b) resembles an appellate fitness analysis, with a focus on accountability. The sentencing judge could plausibly find that a young person should not be

[5] *R. v. M.W.,* 2017 ONCA 22, para. 104. [*M.W.*]

entitled to the protection of the Presumption, and yet still determine that the youth sentence is sufficient and appropriate under the circumstances.

22. By contrast, s.72(1)(a) requires the Presumption to be rebutted by the Crown. Neither the concept of "diminished moral blameworthiness or culpability", nor the factors that bear some relevance to establishing or rebutting this state of being, are defined by the *YCJA*.

23. Unlike s.72(1)(b), however, the language contained at s.72(1)(a) does not draw on previous iterations of the *YCJA*. It would therefore be wrong to simply use the previously iterated statutory criteria in the context of this new and clearly distinct inquiry.

24. Like all statutes, s.72(1)(a) must be given a *Charter*-compliant interpretation by the courts.

25. Given the complete lack of statutory guidance or definitions regarding the circumstances when or factors relevant to assessing how the Presumption will be rebutted, and the explicit reference to the principle of fundamental justice under s.7 of the *Charter,* this Court's ruling in *D.B.* necessarily plays a critical role in filling the definitional ambiguity left by Parliament in enacting s.72(1)(a) of the *Code.*

26. In the BCCLA's respectful submission, this Court must provide concrete and clear guidance on how judicial discretion is to be exercised under s.72(1) of the *YCJA*, and in particular under subsection 72(1)(a).

27. An unprincipled and unguided exercise of discretionary power under s.72(1)(a) will lead to an irregular and uncertain application of a constitutional principle, a situation which cannot be countenanced by this Court.

28. Furthermore, this Court is already well-acquainted with the reluctance of sentencing judges to embrace rehabilitative and alternative approaches to sentencing when faced with serious or violent offenders. Indeed, despite this Court's clear decision in *Gladue,* and the undeniable crisis which motivated that decision, this Court later noted and intervened to rectify the "irregular and uncertain" application of *Gladue* principles to serious or violent offenders in its decision *Ipeelee*.[6]

[6] *R. v. Ipeelee*, 2012 SCC 13, para 84. [*Ipeelee*]

29. Without clear guidance, the same fate of irregularity and uncertainty overshadows the youth sentencing regime for serious and violent offenders.

30. In the BCCLA's respectful submission, the *Charter* rights of young offenders can only be protected if this court places the maturity, capacity for judgement, and vulnerability of the offender at the heart of the s.72(1)(a) inquiry.

31. This understanding of the inquiry to be performed under s.72(1)(a) – and factors relevant to this inquiry – flows from the jurisprudence of this Court, to which the BCCLA now turns.

Factors relevant under s.72(1)(a)

32. Any interpretation of s.72(1)(a) must first consider this Court's decision in *D.B.*, in particular the following key portion of that decision that elaborate on the justification for the Presumption:[7]

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

33. In the BCCLA's submission, for a factual finding to have some relevance to the Presumption, and therefore to the s.72(1)(a) inquiry, it must address the vulnerability, maturity, or capacity for moral judgment of the young offender. This is the critical - and indeed potentially the only - constraint on the nature of the inquiry to be conducted under s.72(1)(a).

34. Examples of relevant evidence for these types of factual findings are infinitely variable. Teachers, social workers, friends, family, employers, colleagues may all be able to offer insight to the Court on the young offenders' mental make-up around the time of the offending behaviour. So too may police officers or other justice workers who have witnessed the offender's behaviour and social skills throughout the judicial process. The Crown may also find it necessary to call expert evidence in the form, for example, of a psychologist, neurologist, or psychiatrist.

[7] *D.B.*, *supra* note 1, para 41.

35. The twin cases before the Court illustrate a coalescence and confusion of the inquiries to be conducted under ss. 72(1)(a) and (b) respectively. The result is an erosion of the Presumption, despite its constitutionally protected status.

36. This confusion stems from the failure of appellate courts to articulate with precision the distinctive nature of the inquiries to be conducted under ss.72(1)(a) and 72(1)(b) respectively, and from the use of a myriad of purportedly relevant factors to these respective inquiries.

37. For example, the Court below endorsed the view that the two prongs under s.72(1) raised "related but distinct questions, and although similar factors are applicable to both, there is not a complete overlap."[8]

38. Yet while heralding the distinctive nature of the inquiries and warning against the dangers of a blended analysis, the appellate court in these matters nonetheless applies only one set of factors relevant to both inquiries.[9] This single list of factors is the list of statutory factors previously contained in s.72(1). The Ontario Court of Appeal reintroduced these factors, verbatim, as being relevant to both aspects of the s.72(1) inquiry in its 2017 decision *M.W.*[10]

39. These now-repealed statutory factors cannot all be relevant under s.72(1)(a), given the entirely new language found at this section, and its obvious connection to the *D.B.* decision. Moreover, the danger of sentencing judges erroneously engaging in a blended analysis with this single list of factors for both branches of s.72(1) is too glaring to be ignored.

40. Accordingly, this Court must firmly articulate the distinctive inquiries to be conducted under s.72(1) and dispel the notion of an overlap between them. As submitted above, the inquiry into whether the Presumption has been rebutted must hearken back to the dicta of this Court in *D.B.*, and focus exclusively on the vulnerability, maturity, and capacity for moral judgment of the offender.

41. When this focus is properly established, some factors found by appellate courts to be central to the rebuttal of the Presumption are obviously marginally relevant or irrelevant.

[8] *S.B.* ONCA, *supra* note 3, para. 59.
[9] *Ibid*. *I.M.* ONCA, para. 81.
[10] *M.W.*, *supra* note 5, paras. 98, 105.

42. For example, the decisions below considered the seriousness of the offence, the role played by the offender in the commission of the offence, the offender's criminal record, age, lack of rehabilitation in pre-trial custody, post-offence conduct while detained, and post-offence conduct such as an attempt to conceal evidence or attempt to kill a witness.

43. The BCCLA considers here one of these factors, as it was afforded a critical role in both decisions under appeal, namely the seriousness of the offence.

Seriousness of the offence

44. It is difficult to comprehend why the seriousness of the offence committed, in and of itself, will reflect on the maturity of an offender. If anything, one might reasonably believe that the more serious the offence, the greater the lack of insight or reduced capacity for moral judgment of the offender might be.

45. Put differently, there is nothing obvious that correlates the seriousness of the offence to an offender's capacity for moral judgment or maturity. Serious and violent criminality may well be the consequence of youth, and the inability to fully comprehend the seriousness and consequences of one's actions.

46. It is therefore imperative to carefully guide the exercise of discretion under s.72(1)(a) to avoid a repeat of *Gladue* and *Ipeelee*: i.e. a judicial reluctance towards imposing youth sentences for serious crimes coalescing around an overemphasis of this sole factor.

47. By introducing and emphasizing this factor into the analysis, sentencing judges would in effect be reversing the burden of proof for offences which they perceive as serious, forcing defendants to show that their offending behavior was a result of immaturity. This would defeat the entire premise of the Presumption, and run afoul of this Court's ruling in *D.B.*

48. It will be readily apparent from a close reading of *D.B.* that Crown counsel must carefully consider what evidentiary record is required to rebut the Presumption. For instance, while the BCCLA has not intervened on the issue of whether expert evidence is required, this type of evidence may be a crucial component of a s.72(1)(a) inquiry, and facilitate a just determination of the issue.

49. Finally, the BCCLA turns to the relevance of social context evidence in relation to the inquiry conducted under s.72(1)(a).

B. Social context evidence

50. The BCCLA does not intend to duplicate the submissions of the Intervener the African Nova Scotian Justice Institute, which deal at length with the origins, purpose and relevance of social context evidence presented to a sentence judge performing a s.72(1) analysis. Accordingly, the BCCLA's submissions on this point will be short.

51. When returning to first-principles and to the nature of the inquiry to be conducted under s.72(1)(a), namely the diminished moral blameworthiness or culpability of the offender owing to their immaturity, vulnerability, and capacity for moral judgement, it is immediately obvious that social context evidence will be highly relevant and probative.

52. Indeed, the entire premise of social context evidence, as explained in *Gladue* and in *Morris,* is that it assists the court in understanding the "moral blameworthiness" of an offender.[11] To borrow the Nova Scotia Court of Appeal's words in *Anderson*:

> [146…] Sentencing judges should take into account the impact that social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options may have had on the offender's moral responsibility.[12]

53. In the underlying case for the Appellant S.B., the Court of Appeal ultimately found that the social context evidence of anti-Black racism faced by S.B. throughout his life carried "limited" probative value. More specifically, the Court of Appeal found that this evidence explained S.B.'s "poor choices" but did not suggest he lacked judgement or moral capacity.[13]

54. This determination seems to go against both the Ontario Court of Appeal's own prior case law on anti-Black racism, as established in *Morris*, as well as the foundational principles underlying the Presumption, as established by this Court in *D.B.*

[11] *R. v. Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385, paras. 66-68; *Ipeelee*, *supra* note 7, para. 73; *Morris*, *supra* note 2, para. 179; *R. v. Hills*, 2023 SCC 2, para. 87.
[12] *R. v. Anderson*, 2021 NSCA 62, para. 146.
[13] *S.B.*, *supra* note 3, para. 66.

55. In the BCCLA's view, it is impossible to imagine how the maturity, capacity for moral judgment or vulnerability of a young offender can be assessed without first understanding and contextualizing the obstacles which life and society have strewn in their path towards adulthood.

56. Where an individualized assessment of a young person's development is placed at the heart of the s.72(1)(a) inquiry, the relevance of social context evidence will be immediately apparent and highly probative, as it will explain the circumstances in which the young person grew up.

57. Vague generalities, such as the seriousness of the offence, prior criminal records, and the age of the offender, are inadequate substitutes for an in-depth, individualized, and genuine assessment of a young person's development.

58. Only the latter type of assessment can protect the s.7 rights of young people and ensure that no child is sent to federal jail for life for what has turned out, after all, to be a serious childhood mistake.

PART IV – COSTS

59. The BCCLA takes no position on the ultimate outcome of this appeal, nor on the application of the facts of this case to the legal principles put forward by the BCCLA.

60. The BCCLA seeks no costs and respectfully requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of June, 2024 at Whitehorse, in the Yukon Territory.

Vincent Larochelle
Safiyya Ahmad

Counsel for the Intervener
British Columbia Civil Liberties Association

PART VII – AUTHORITIES

Case law	Paragraph where cited
1. *R. v. Anderson*, 2021 NSCA 62	52
2. *R. v. D.B.*, 2008 SCC 25	10, 32
3. *R. v. Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385	52
4. *R. v. Hills*, 2023 SCC 2	52
5. *R. v. I.M.*, 2023 ONCA 378	16, 38
6. *R. v. Ipeelee*, 2012 SCC 13	28, 52
7. *R. v. Morris*, 2021 ONCA 680	10, 52
8. *R. v. M.W.,* 2017 ONCA 22	19, 38
9. *R. v. S.B.*, 2023 ONCA 369	16, 37, 53