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The Differential Treatment of Adolescents as a Principle of Fundamental Justice: An Analysis of
R. v. B. (D.) and C. (A.) v. Manitoba

Cheryl L. Milne*

I. INTRODUCTION

This paper began as a reflection on the Supreme Court of Canada’s decision in R. v. B. (D.),¹ in particular its finding that a presumption of reduced moral blameworthiness for adolescents was a principle of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms² in the context of Canada’s youth criminal justice system. The discussion points raised by the Court’s characterization of adolescence, or the “constitutionalization of adolescence” as Professor Nicholas Bala describes it,³ included at the time the nature of the criteria established by the Court as to what constitutes a principle of fundamental justice, as well as concern about the implications of the decision on a pending case which also focused on the nature of adolescent decision-making in the child health and welfare context: C. (A.) v. Manitoba (Director of Child and Family Services).⁴ This paper now expands upon those initial comments by following upon the release of the Court’s decision in C. (A.) v. Manitoba and addresses the evidentiary aspects of the Court’s judicial notice of the psychological underpinnings of its

decision in both cases in addition to an analysis of how the Court applies the criteria to establish what is a principle of fundamental justice in these two cases. Ultimately, both cases establish a relatively consistent view of adolescence as a trajectory toward adulthood, but not quite there yet, and limits autonomous rights and adult responsibility accordingly. Arguably, the Court is less consistent in its application of the legal rules to arrive at this conclusion.

II. STATUTORY TREATMENT OF YOUNG PEOPLE AS ADULTS

The Canadian criminal justice system’s response to young people who commit the most serious violent offences has always allowed for the treatment of some young people as adults, either in the trial proceedings or in sentencing. The age at which adult treatment has been applicable has fluctuated over the years, but the availability of life sentences for murder, for example, has always been part of the juvenile justice system. In the past youth have been subjected to both a trial in the adult system as well as the possibility of an adult sentence. Under the Juvenile Delinquents Act, young people were treated like adults automatically at age 16 with the possibility of such treatment at age 14. Under the Young Offenders Act, youth aged 16 and older could be subjected to an adult trial.

The Youth Criminal Justice Act, enacted to replace the YOA, established a new procedure for the treatment of young offenders as adults in the case of specified serious criminal offences. Whereas under the YOA the young person was subjected to a transfer hearing prior to trial to determine whether he or she would be tried in adult court, under the YCJA the determination takes place following the trial in youth court and, therefore, on the basis of a finding of guilt. The YCJA also established a presumption in favour of adult sentences for young people 14 years or older for certain violent offences, called presumptive offences. The offences include murder, attempted murder, manslaughter, aggravated sexual assault and a third conviction for a serious violent offence (“three strikes”). It is up to the young person to seek a youth sentence in those circumstances.

7 S.C. 2002, c. 1 [hereinafter “YCJA”].
8 Id., s. 71.
9 Id., s. 2(1).
The various transfer provisions of the previous legislation were subjected to Supreme Court scrutiny, but had never been subjected to a challenge under the Charter. In \textit{R. v. M. (S.H.)},\textsuperscript{10} the Court examined the nature of the onus on a party seeking transfer to an adult court under the YOA. No Charter issues were raised, and McLachlin J. (as she then was) held that it was not a heavy burden on the Crown. Thus, when the government of Quebec brought a reference to the Quebec Court of Appeal on the constitutionality of the new provisions of the YCJA that Court was not bound by earlier precedent in respect of the treatment of youth as adults in our criminal justice system.\textsuperscript{11} The Court struck down the provision, finding that it breached the young person’s rights under section 7 of the Charter contrary to the principles of fundamental justice that it defined as follows:

- Young offenders must be dealt with separately from adults;
- Rehabilitation, rather than suppression and dissuasion, must be at the heart of legislative and judicial intervention with young persons;
- The justice system for minors must limit the disclosure of the minor’s identity so as to prevent stigmatization that can limit rehabilitation;
- It is imperative that the justice system for minors consider the best interests of the child.\textsuperscript{12}

The federal government chose not to appeal this decision, announcing that it intended to amend the legislation to align it appropriately with the Charter.\textsuperscript{13} This was never done, and the constitutionality of these sections of the YCJA remained live issues in the other provinces. In Ontario, the case of \textit{R. v. B. (D.)} was the first to address the issue and essentially followed the reasoning of the Quebec Court of Appeal. However, there had been intervening decisions of the Supreme Court of Canada as to the definition of a principle of fundamental justice and more importantly as to the finding that the legal principle of the “best interests of the child” was not such a principle.\textsuperscript{14} Following on the heels of \textit{R. v. B. (D.)} was \textit{R. v. M. (S.H.)}.\textsuperscript{10}
v. T. (K.D.), a decision in British Columbia which came to opposite conclusions. In Ontario the Attorney General appealed the decision to the Supreme Court of Canada to finally obtain clarity in the law, something that the federal Department of Justice had neglected to do in the Quebec Reference case.

### III. R. v. B. (D.)

D.B. was 17 years old at the time of the incident that resulted in his being found guilty of manslaughter. In what appeared to be an unprovoked attack, D.B. punched R. and knocked him unconscious. By the time paramedics arrived R. had no vital signs and D.B. had fled the scene. He was arrested the following morning at a friend’s house. He pleaded guilty to manslaughter, a “presumptive offence”, and challenged the constitutionality of the “onus provisions” in the presumptive offences regime relying upon the reasoning of the Quebec Court of Appeal in Quebec Reference. The trial judge allowed the challenge on the same grounds as the Quebec Court of Appeal and sentenced D.B. to the maximum youth sentence that included an intensive rehabilitative custody and supervision order for a period of three years.

The Ontario Court of Appeal upheld the decision but being bound by the Supreme Court’s decision in Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), held that the best interests test was not a principle of fundamental justice. Instead the Court found the presumption was contrary to the principle of fundamental justice that young offenders should be dealt with separately and not as adults (one of the principles enunciated by the Quebec Court of Appeal) as well as the principle that the Crown must bear the burden of proving aggravating factors in seeking a harsher sentence for the accused. The Ontario Attorney General appealed to the Supreme Court of Canada.

In a split decision, the Supreme Court of Canada also struck down the provisions on the basis that they infringed the young person’s rights under section 7 of the Charter. However, the Court, unanimous on this point, found that the applicable principle of fundamental justice was not as was found by either the Quebec Court of Appeal or the Ontario Court

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16 Supra, note 14.
18 Id., at paras. 55, 63.
of Appeal, *i.e.*, neither the best interests principle nor the presumption of separate treatment. Rather, Abella J. described the principle as the entitlement of youth to a “presumption of reduced moral blameworthiness” or “culpability” flowing from their heightened vulnerability, lesser maturity and reduced capacity for moral judgment. Justice Rothstein for the minority concurred on this point but held that the principle was not breached by the legislation. It should be noted that none of the parties to the appeal argued that this was the principle at stake. The Appellant Attorney General had argued that it was a principle of fundamental justice that any person is entitled to recognition of his or her reduced maturity based upon age. The Respondent, D.B., supported the reasoning of the court below.

IV. APPLICABLE PRINCIPLES OF FUNDAMENTAL JUSTICE

In rejecting the Quebec Court of Appeal’s conclusions, the Supreme Court (as well as the Court of Appeal) followed the reasoning in *Canadian Foundation* that applied the following criteria in *Malmo-Levine* for assessing whether a legal principle is a principle of fundamental justice:

1. It must be a legal principle.
2. There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate [central to our societal notion of justice].
3. It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

In *Canadian Foundation* the Court determined that the principle of the best interests of the child failed to pass muster on the aspect of the test that required that it be central to our societal notion of justice. It also

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19 *Supra*, note 1, at para. 41. Justice Abella also concluded that the presumption of adult sentencing breached another, non-youth justice oriented principle of fundamental justice that the Crown must bear the burden of demonstrating the factors that support the need for a harsher sentence. This conclusion was disputed by Rothstein J. in his dissent.
20 *Id.*, at para. 106.
23 *Supra*, note 14.
24 *Id.*
25 *Supra*, note 1, at para. 46.
lacked sufficient precision, due to its contextual nature, to meet the test. In *R. v. B. (D.)* the Court also rejected the notion that the presumption of a separate youth justice system was such a principle and instead reasoned that it was the rationale for such a system that was in fact the guiding legal principle.

In reaching the latter conclusion, Abella J. notes that “it is widely acknowledged that age plays a role in the development of judgment and moral sophistication”. She cites legal scholars on sentencing and youth justice, as well as at least one text that summarizes the social science literature, for the “reality of reduced moral culpability on the part of young people”. Thus the principle she enunciates, the presumption of diminished moral blameworthiness, meets the second prong of the *Malmo-Levine* test according to her reasoning:

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

Her comments in respect of the third prong of the test illustrate the difficulty with the *Malmo-Levine* test which presumes more precision in general legal principles than is often demonstrable. Justice Abella’s reasoning here comes very close to saying that a principle is deemed to be sufficiently precise simply because the Court says so:

> 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.

Justice Rothstein in his dissenting reasons, in fact, reveals the lack of precision inherent in the principle. Although he concurs in the finding

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26 *Id.* , at para. 62.
27 *Id.* , at paras. 62-67.
28 *Id.* , at para. 68.
29 *Id.* , at para. 69.
that a presumption of reduced moral blameworthiness of adolescents is a principle of fundamental justice, he takes issue with the meaning he attributes to the principle within the majority’s reasoning. He asks, “is a presumption of lower sentences for young offenders a necessary attribute of this presumption of reduced moral blameworthiness?” While he does not state that the majority would go this far, he does interpret Abella J.’s reasoning as dictating a presumption of “youth sentences”. Finding that this is the problematic conclusion of Abella J.’s reasoning, he would find otherwise and hold that affording the young person the ability to apply for a youth sentence is sufficient to meet the presumption.

V. WHAT DOES REDUCED MORAL BLAMEWORTHINESS MEAN?

Moral blameworthiness is considered an essential element of both the criminal offence, in respect of the commission of the offence, and the quantum of sentence. The Court stated in R. v. Ruzic, a case that examined the defence of duress, that it has “recognized on a number of occasions that ‘moral blameworthiness’ is an essential component of criminal liability”. However, in commenting on the concept of “blamelessness”, the Court expressed caution in introducing such uncertainty into the law:

The undefinable and potentially far-reaching nature of the concept of moral blamelessness prevents us from recognizing its relevance beyond an initial finding of guilt in the context of s. 7 of the Charter. Holding otherwise would inject an unacceptable degree of uncertainty into the law. It would not be consistent with our duty to consider as “principles of fundamental justice” only those concepts which are constrained and capable of being defined with reasonable precision. I would therefore reject this basis for finding that it is a principle of fundamental justice that morally involuntary acts should not be punished.

Professor Martha Shaffer, cited in R. v. Ruzic, noted the ambiguity surrounding the notion of moral blameworthiness in an article focusing on moral involuntariness and the defence of duress, stating:

While the Supreme Court of Canada has invoked the concept liberally throughout its s. 7 jurisprudence, it has never discussed the meaning of moral blameworthiness in any comprehensive way. As a result, it is not

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30 Id., at para. 126.
32 Id., at para. 41.
clear whether the court views moral blameworthiness as restricted to questions regarding the fault element of offences — generally whether the mental element of an offence is constitutionally adequate — or whether the court’s conception would also encompass issues arising after the constitutionally required fault element is determined.33

 Regardless of the ambiguity expressed in these contexts, moral blameworthiness is most often considered to play a part in the sentencing stage of proceedings. As Lamer C.J.C. held in R. v. M. (C.A.): “It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender.”34 In Malmo-Levine, Arbour J., in dissent, states, “It is a fundamental principle of sentencing that both the severity of the offence and the moral blameworthiness of the offender should dictate the quantum of sentence.”35 Thus, it follows that a presumption of diminished moral blameworthiness must equate with a presumption of a lesser sentence. However, even on this point Abella J. equivocates somewhat in R. v. B. (D.) and states, “[t]his does not make young persons less accountable for serious offences; it makes them differently accountable.”36

VI. SOCIAL SCIENCE SUPPORT FOR THE LEGAL PRINCIPLE OF REDUCED MORAL CULPABILITY

Although the concept of moral blameworthiness within the criminal law context is clearly part of the legal principles governing sentencing, as set out above, the principle, as defined by Abella J., of a “presumption of diminished moral culpability” has attributes of a psychological conclusion specifically applicable to adolescence. Arguably it is only supportable to the extent that the science of developmental psychology supports it. If the studies were to show that all adolescents reach rational and psychosocial maturity by age 13, for example, the presumption would fail. Without stating so clearly, the Court takes judicial notice precisely of the fact that the evidence supports the presumption and, in effect, helps to define it. Citing primarily legal commentators, Abella J. draws her conclusions as to age and the development of judgment and moral

35 Supra, note 14, at para. 234.
36 Supra, note 1, at para. 93 (emphasis in original).
sophistication; but as articulated by the majority of the Court the conclusions could also be considered somewhat of a simplification of the developmental psychology that underlies the justification for a separate youth justice system with enhanced protections and different approaches at various stages, the principle rejected by the Court.

There are a number of evidentiary aspects to the Court’s ruling that warrant discussion of the courts’ handling of complex social science evidence in cases such as this one with significant social policy implications. While it may be that the literature is now sufficiently robust to unequivocally support the conclusions drawn by the Supreme Court in respect of the blameworthiness of adolescents, the factual foundation that would normally be part of the Court record is in essence third hand conclusions of which the Court takes judicial notice. No evidence was called at any stage of the proceedings in R. v. B. (D.) as to the current social science evidence on moral development or adolescent developmental psychology. The evidence is primarily summarized by Nicholas Bala in *Youth Criminal Justice Law*, cited heavily in the majority judgment. Some of the attributes of adolescence that certainly impact on judgment are accepted without controversy: heightened vulnerability, tendency to act on impulse, importance of peer influence and tendency to engage in risky behaviour. However, there is less agreement in the literature in respect of the Court’s conclusion in respect of the capacity for moral judgment. The issue is summarized by Doob and Cesaroni, in *Responding to Youth Crime in Canada*, one of the few such authorities cited by the Court:

One of the mistakes people sometimes make is to assume that the reason we have a separate justice system for youths is that there is a belief that youth do not understand that certain acts are morally wrong. This does not seem to be the case. Very young children are likely to be able to understand that certain acts are wrong. Few would suggest that ordinary 11- or 17-year-olds do not understand, almost as well as adults understand, that either taking something from a store without paying for it, or stabbing someone, is not morally acceptable.  

The social science research suggests more subtle differences between adolescents and adults that nonetheless supports significantly different

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37 Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) [hereinafter “Bala, *Youth Criminal Justice Law*”].  
responses to criminal behaviour. A more comprehensive review of the literature was undertaken by the U.S. Supreme Court in *Roper v. Simmons*, a case not cited in *R. v. B. (D.*) but clearly touching on the same conclusions regarding the nature of adolescence and the imposition of adult penalties. The U.S. Supreme Court relied heavily on the research conducted by Steinberg and others in its decision striking down the death penalty for offenders under the age of 18. A significant amount of research material was provided by way of Brandeis briefs from *amicus curiae* such as the American Psychological Association and the American Psychiatric Association, among numerous others. In a paper that surveys the social science as of 2003, and was relied upon by the Court, Steinberg and Scott concluded:

Thus, there is good reason to believe that adolescents, as compared to adults, are more susceptible to influence, less future oriented, less risk averse, and less able to manage their impulses and behavior, and that these differences likely have a neurobiological basis. The important conclusion for our purposes is that juveniles may have diminished decision-making capacity compared with adults because of differences in psychosocial capacities that are likely biological in origin.\(^{40}\)

Additional research also supports differential treatment in other aspects of the youth criminal justice system beyond just sentencing. For example, research supports the view that the tendency toward experimentation with risky behaviour during adolescence and the development of identity through the adolescent years support the argument that the labelling of young persons as criminal into their adulthood is unwarranted given the often transitory nature of adolescent offending behaviour.\(^{41}\) Doob and Cesaroni have noted that the research demonstrating the lack of understanding that young people generally have as to the nature of rights, the consequences of waiving their legal rights, including their right to counsel, as well as their understanding of the trial process, suggest that “we cannot assume that young people have sufficient knowledge of the legal system and the criminal law provisions that govern proceedings in the youth justice system to fully and freely participate in criminal proceedings against them”.\(^{42}\) It is these more

\(^{39}\) 543 U.S. 551, 161 L.Ed. 2d 1 (2005).


\(^{41}\) Id., at 1014.

\(^{42}\) Doob & Cesaroni, *supra*, note 38, at 36-40.
complex differences that suggest the need for a separate youth justice system, not just separate youth sentences.\footnote{Anjeev Anand, “Catalyst for Change: The History of Canadian Juvenile Justice Reform” (1999) 24 Queen’s L.J. 515-59, at para. 92 [hereinafter “Anand”].}


Finally — and this comment concerns the overall approach to youth justice — the effect of the objectives of the Act is that the judge is asked to favour rehabilitation, reintegration and the principle of a fair and proportionate accountability that is consistent with the young person’s reduced level of maturity. As for the adult criminal justice system, it places greater emphasis on punishment. There is no doubt that how the judge conducts the trial will reflect these different objectives. It would be much more difficult to maintain an approach favourable to a young person if he or she were being tried together with an adult, and the presumption of diminished moral blameworthiness to which the young person is entitled could be undermined as a result.\footnote{Id., at para. 75.}

Thus, her reasoning seems to suggest that the principle of diminished moral blameworthiness applies to more than simply the sentencing of young people and affects the entire procedural approach to youth criminal justice. This is precisely the conclusion that split the Court in \textit{R. v. B. (D.)}, which really turned on the implications of the principle. Those implications are at the heart of the second criterion in the \textit{Malmo-Levine} test which examines the social acceptance of the principle in the way it affects how the legal system “ought fairly to operate”\footnote{Supra, note 14, at para. 113.}.

\section*{VII. Societal Consensus for the Principle of Fundamental Justice}

Despite ostensibly agreeing on the applicable principle of fundamental justice, the majority and the minority disagree as to the societal consensus on the appropriate response to youth crime. The differences lie in their respective approaches to determining societal consensus for the principle and to balancing competing interests within the section 7 analysis. Once
again the Court’s use of evidence outside of the record before the Court as well as a somewhat selective approach to the analysis of the legislative history demonstrate the complexities of the issues in the section 7 analysis and, arguably, the limitations of the Malmo-Levine test, particularly in respect of its requirement of “precision”.

Justice Rothstein points to public calls for harsher penalties for young people as an indication that societal consensus does not agree with the conclusions reached by the majority. Citing Doob and Cesaroni, he notes that “studies on public perceptions of youth crime suggest that the prevailing views of the public are that youth crime is rising, particularly violent youth crime, and that young offenders are handled too leniently by youth justice courts.” 47 However, he never addresses the basic problem with accepting this as societal consensus: the opinions are based on erroneous assumptions of the facts as to the impact of rehabilitation and the youth crime rate, and the studies cited suggest more complex attitudes and assumptions at play, often related to the manner in which youth crime is covered in the media. 48 If misleading media coverage can skew public sentiment such as to negate by popular opinion a principle of fundamental justice, does this not call into question the very concept of the rule of law?

Justice Abella places greater emphasis on the legislative history, legal precedent, academic commentary and Canada’s international obligations to support her conclusion of a broad consensus, essentially ignoring public sentiment. Justice Rothstein accurately identifies points in her reasoning of selective analysis of the legislative history in respect of the treatment of some young people as adults, whereas his own selective analysis of juvenile justice developments in Canada suggests a rejection of the child welfare approach of early delinquency legislation in favour of more accountability by young people. However, it ignores the fact that the more recent legislation balances this accountability with a more rights-based approach that was found wanting in the Juvenile Delinquents Act, which would not likely have withstood Charter scrutiny. 49

The differences between the two decisions lay as much in the definition of the principle of fundamental justice at play, as in how the

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Court should balance the respective rights of the individual young person with the state interest in protecting the public. Justice Abella’s judgment signals a willingness to do the balancing under section 1 of the Charter, an approach that is consistent with the line of reverse onus cases from the early 1990s. Justice Rothstein clearly takes the opposite approach, finding that the impugned provisions do not infringe the principle of fundamental justice enunciated when balanced against the societal interest of public safety.

The case is clearly at the fulcrum of the incredible tension in youth justice policy in this country, between political decisions influenced by headlines fuelling public sentiments toward retribution and policy approaches with a rehabilitation focus based upon research and consultation with experts. The YCJA was carefully designed to attempt to balance the two competing interests, but according to the majority of the Supreme Court, weighed too favourably on the side of those seeking a more retributive form of justice. The case illustrates, in its divisive judgment, society’s ambivalent views about adolescents. On the one hand, the public tends to want to limit rights based upon assumptions as to decision-making capacity, assumptions that seem to have considerable scientific support, and on the other hand, to bring the full range of adult responsibility to bear when young people commit crimes. The Court’s subsequent decision in C. (A.) v. Manitoba, again a split decision focusing on adolescent development, is arguably consistent in its ambivalent approach to adolescent autonomy.

VIII. C. (A.) v. MANITOBA (DIRECTOR OF CHILD AND FAMILY SERVICES)

In its long-awaited decision, C. (A.) v. Manitoba (Director of Child and Family Services), Abella J. for the majority of the Supreme Court rendered a judgment that is consistent with R. v. B. (D.) in its “constitutionalization” of adolescence. The presumption of reduced capacity for judgment, in this case as it relates to medical decision-making, is preserved by the majority’s finding that such a presumption does not infringe a child’s rights under section 7 to liberty and security of the person. The “constitutionalization” of adolescence in effect means

51 Id., at para. 143.
52 Supra, note 4. The decision was released more than a year after the hearing of the appeal.
protecting young people by not treating them as adults and thereby not affording them adult rights under the Charter.

A.C. had challenged the Manitoba legislation that had been interpreted by the courts below as providing courts with the power to order medical treatment contrary to her wishes. A.C., a mature 14-year-old girl, asserted her rights under the Charter to make a religiously motivated medical decision to refuse a blood transfusion. The treatment was deemed by the doctors and held by the lower court to be medically necessary as there was “immediate danger as the minutes go by, if not [of] death, then certainly [of] serious damage”.53 A.C. suffered from Crohn’s disease which caused intestinal bleeding. She had arrived four days prior to the court hearing at the emergency department of the hospital, where she was initially stabilized without the need for a transfusion, but through the night of the third day in the hospital she appeared to have suffered another bleed and was in serious need of hemoglobin. She was apprehended and an emergency protection hearing was convened wherein the Director of Child and Family Services sought an order under the Manitoba Child and Family Services Act54 for an order authorizing qualified medical personnel to administer blood transfusions to A.C. as deemed necessary by the attending physician, without her consent or that of her parents. It had been argued by Manitoba that her consent was irrelevant to the court proceedings as the legislation permitted the court to order the treatment regardless of her capacity.

The decision of the majority finds that there were no breaches of A.C.’s Charter rights under section 2(a), section 7 or section 15.55 However, the fact that A.C. was found to have capacity to make the decision by psychiatrists who had assessed her, and the argument that adolescents demonstrate varying degrees of maturity and capacity in respect of these types of decisions, could not be ignored by the Court. Instead, Abella J., for the majority, reads into the legal test of the best interests of the child, the obligation to take into account the child’s views and wishes in accordance with his or her evolving capacities. The test is to be interpreted so that a young person is afforded a degree of bodily autonomy and integrity commensurate with his or her ability to exercise

53 Id., at para. 12.
54 C.C.S.M., c. C80.
55 Justice Binnie was the lone dissent in the case on the issue of the violation of A.C.’s rights, taking a stronger rights-based stance that questions the appropriateness of taking a best interests approach when the capacity of the person is not in question.
mature, independent judgment. In a thoughtful decision that canvasses much of the literature in regard to adolescent decision-making capacity (a significant amount of which was not pleaded by the parties), Abella J. grapples with the dilemma presented by a mature young woman who wishes to make what is presumed to be a bad decision.

IX. ANALYSIS OF THE PRINCIPLE OF FUNDAMENTAL JUSTICE IN C. (A.) v. MANITOBA

The principle of fundamental justice against which the deprivation of A.C.’s liberty and security of the person is measured is that laws should not be arbitrary. Justice Abella unequivocally states “given the significance we attach to bodily integrity, it would be arbitrary to assume that no one under the age of 16 has capacity to make medical treatment decisions.” As in R. v. B. (D.) the social science literature is central to Abella J.’s analysis of the purported arbitrariness of the law. However, in this case, the Court took it upon itself to conduct an independent review of the literature. Under the subheading of academic literature Abella J. quotes extensively from both commentary and studies into the nature of decision-making by adolescents and the ability of health practitioners to assess capacity. Arguably, this goes far beyond the judicial notice taken of the unique circumstances of adolescence in R. v. B. (D.).

Despite any concerns one might have about the majority’s independent fact-finding mission, the conclusions drawn are not particularly controversial in that they acknowledge the complexity of assessing capacity in adolescents, thereby requiring an individualized approach:

Clearly the factors that may affect an adolescent’s ability to exercise independent, mature judgment in making maximally autonomous choices are numerous, complex, and difficult to enumerate with any precision. They include “the individual physical, intellectual and psychological maturity of the minor, the minor’s lifestyle … [and] the nature of the parent-child relationship” (Manitoba Law Reform Commission, Minors’ Consent to Health Care, p. 32). While it may be relatively easy to test cognitive competence alone, as the social

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56 A review of the secondary sources cited by the majority suggests that only approximately 15 per cent of the sources used were cited in the facta of any of the parties or intervenors.
57 Supra, note 4, at para. 107.
scientific literature shows, it will inevitably be a far more challenging exercise to evaluate the impact of these other types of factors.\textsuperscript{58}

Ultimately, Abella J. finds that a presumption against capacity for those under 16 years of age, with a positive obligation to consider the views and wishes of a particular young person, on a sliding scale of scrutiny that encompasses both the maturity of the adolescent and the seriousness of the decision,\textsuperscript{59} is not an arbitrary violation of the young person’s liberty or security of the person. Chief Justice McLachlin, concurring in the decision, goes further in her support of the law in question and suggests that using age as a proxy for independence does not infringe the substantive principle of fundamental justice against arbitrariness. In her reasons she refers to the majority’s decision in \textit{R. v. B. (D.)} as recognizing “as a principle of fundamental justice that young persons must generally be treated differently from adults by virtue of their ‘reduced maturity and moral capacity’”,\textsuperscript{60} an arguably broader take on the majority’s decision in that case and precisely the principle enunciated by the Court of Appeal and rejected by the Supreme Court as insufficiently precise. The criterion for precision in the identification of the principle is thus shown to be more malleable than one might expect. However previous decisions have acknowledged flexibility in the interpretation of other fundamental principles. For example, Iacobucci J. in \textit{R. v. S. (R.J.)} stated that “the principle against self-incrimination may mean different things at different times and in different contexts”.\textsuperscript{61}

X. Conclusion

As in \textit{R. v. S. (R.J.)}, the principle of a presumption of diminished moral culpability has already been shown to have a different meaning, albeit at the same time and in the same context. The blame may be attributed to the Court’s reliance upon the social science evidence to attempt to establish societal consensus for too narrow a principle. A more comprehensive review of the literature demonstrates the need for differential treatment in many aspects of the criminal justice system. Similar evidence appears to ground the Court’s section 7 analysis in

\textsuperscript{58} \textit{Id.}, at para. 78.
\textsuperscript{59} \textit{Id.}, at para. 22.
\textsuperscript{60} \textit{Id.}, at para. 145.
C. (A.) v. Manitoba, 62 which in essence, reinterprets the legislation to maintain its constitutionality.

Arguably the two cases, read together with the Court’s earlier decision in Canadian Foundation, 63 suggest an entirely distinct reading of Charter rights for children, a reading that eschews autonomy and establishes paternalism as a principle of fundamental justice. In R. v. B. (D.), 64 the principle is narrowly construed as a presumption of reduced moral blameworthiness, which prevents the opposite presumption of harsher adult sentences. In C. (A.) v. Manitoba, the principle against arbitrariness is held not to be infringed where there is a presumption of reduced capacity for decision-making that nonetheless must consider the young person’s best interests. In both instances, there is the presumption against adult-like treatment rebuttable by the individual circumstances of the adolescent in question, including the nature of the crime committed or the seriousness of the medical decision to be made. However, it is the Chief Justice’s reinterpretation of the principle articulated in R. v. B. (D.), along with Deschamps J.’s similar expansive interpretation in R. v. L. (S.J.), 65 that together support Professor Bala’s concept of the “constitutionalization of adolescence.” 66

Child rights advocates should be wary lest this classification of adolescents as “other” lead to the erosion of their entitlement to other rights under the Charter. As Binnie J. notes in his dissenting opinion, “the rights under s. 2(a) of the Charter (religious freedom) and s. 7 (liberty and security of the person) are given to everyone, including individuals under 16 years old”. 67 This tendency is clear in the Court’s interpretation of the enumerated ground of age under section 15 of the Charter in both Canadian Foundation, where the presumed different capacities of younger children led to the conclusion that the law that excuses assaults on them does not infringe their right to equality, and in C. (A.) v. Manitoba, where the majority of the Court found no such infringement because the legislation required a determination of their best interests which permits them to demonstrate their maturity.

62 Supra, note 4.
63 Supra, note 14.
64 Supra, note 1.
65 Supra, note 44.
66 See supra, note 3.