AGE AND AGEISM IN THE SENTENCING OF OLDER ADULTS

by

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Abstract

As Canada's population ages, judges will increasingly have to determine what sorts of sentences are appropriate for aged criminal offenders. This thesis sought to uncover current trends in judicial practices by asking the research questions: Does old age have an impact on a sentence? When, why, and in what way? Are these practices ageist?

This thesis investigates these important questions by first comparing the sentences handed down to older adults (those aged older than 60 years) with those handed down to younger adults (those aged under 60 years) to see if old age has an impact on the duration of penal sentences. While the duration of the sentences handed down to older adults compared to younger adults are not significantly different, in many cases, judges explicitly state that old age operates as a factor that commands leniency in a sentence.

Next, a qualitative analysis of the legal texts of the judgments examines when, why and in what way old age influences sentencing practices. These practices are then submitted to an age based critique. Old age impacts sentencing practices in a variety of ways, and can either increase or decrease the duration of a prison term. This paper concludes that, in most cases, judges adopt an age-neutral approach to sentencing.
Preface

I was responsible for writing this thesis, none of the parts of this thesis were written by co-authors.

The t-tests of statistical significance and related box-plot graphs contained in Chapter 4 of this work were performed by Hongyang Zhang, a graduate student with the UBC Department of Statistics. I was responsible for collecting and coding the data from the case law that was used for these t-tests.
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1 Introduction

Over twenty years ago, R.A. raped his 13 year old daughter on three separate occasions. Since then, he hasn’t committed any more crimes, but the attacks have had a lasting devastating effect on his daughter’s life.

Now 71 years old, R.A. stands convicted of the crimes against his daughter. The intervening years haven't been kind to R.A. He is wheelchair bound with crippling muscular dystrophy and in need of around-the-clock medical care.\(^1\)

What sort of sentence would be appropriate for this offender? Do the extraordinary circumstances of the offender justify a departure from the usual rule that a father who commits major sexual assault on his daughter goes to jail? Since he is a first time offender, should the judge consider the possibility of rehabilitation, despite his age? While there is no doubt that the crime is serious, is it right to send a 71 year old wheelchair bound man to jail? Should his sentence be any different just because it has taken 25 years to uncover his crimes? Would the considerations be different if he were younger?

R.A.’s case illustrates the tough decisions that face sentencing judges every day. In the judgment, Twaddle J.A. began with a quote from Sophocle’s *Electra*:\(^2\)

> In the case at bar, let there be no doubt, the offence merits imprisonment. Not one of the antiquity of the offence, the age of the offender or his infirmity alters that. Yet, when these three factors are considered together, have we not reached the point where “even justice becomes unjust”?

The Court ran through the purposes of sentencing and decided that incarceration was not appropriate in R.A.’s case. Being wheelchair bound and in need of constant medical care, R.A. was no longer a danger to the community and so there was no need for individual deterrence or rehabilitation. General deterrence was not required because surely a person would “not wish to

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qualify for lenient treatment by being struck down by disabili

ting muscular dystrophy.”

Turning finally to the principle of general deterrence, Twaddle J.A. found guidance in an ancient proverb: “In making law, severity; in administering laws, clemency.” The Judge held:

The accused has suffered the stigma of a conviction for a repugnant offence. Ordinarily that would not be enough. But he already suffers in his old age, through the force of destiny, from a debilitating illness. Prison for this man would be a far worse punishment than for others. And, from a public point of view, one may well ask whether there is any purpose to be served in paying for him to be hospitalized for the duration of his sentence.

The Court allowed R.A.’s appeal, suspended his two year prison sentence, and directed that the accused serve an unsupervised term of probation for two years. R.A.’s case is but one example of how the accused’s age, albeit combined with his illness, allowed him to avoid a term in a penitentiary.

R.A.’s case illustrates not only how tough it is to balance the needs of the offender and the offence when coming up with a penal term for an aged offender, but Twaddle J.A.’s reliance on proverbs and ancient philosophy also highlights the need for the establishment of guidelines and transparent practices by the judiciary on how to deal with these difficult issues in the context of older offenders. This thesis proposes to fill this gap and uncover what the impact advanced chronological age has on the determination of a penal sentence and whether judicial practices in the area of sentencing are ageist. Grounded in the concept of ageism, the purpose of this research is to improve transparency and accountability in the exercise of judicial discretion relating to the sentencing of older adults.

In this introductory chapter I lay the foundation for the thesis. I first provide a brief

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3 Ibid. at para. 43.
5 Ibid. at para. 46.
6 There is conceptual difficulty defining “age” or “old age”, which will be explored further in Chapter 3 of this work. For the purposes of this discussion, I am using these concepts within the chronological dimension.
overview of the concept of ageism and how it operates in Canadian society. Ageism can have both positive and negative effects, and is prevalent in North America. It is important to study ageism because it has a significant impact, not only on individuals, but on society as a whole.

After introducing the concept of ageism, I then discuss aspects of the justice system that have already been subjected to an age based critique. Existing work in the legal arena has largely focused on age based discrimination in legislation. There is little literature on whether judicial practices are ageist. This thesis proposes to address this need in the discrete, but important, area of sentencing.

The third part of the chapter argues that it is important to study ageism in sentencing practices because: (1) sentencing is highly discretionary, making it susceptible to judicial bias; and (2) sentencing impacts individuals in a fundamentally important way. Judicial practices in sentencing should be transparent, and judges should be accountable for any tendencies that perpetuate negative stereotypes about older adults or practices that may exist that favour aged individuals.

The final part of this chapter describes my research project. My research questions are: Does the chronological age of an offender have an impact on the penal sentence handed down for a criminal offence? If so, when, why, and in what way does old age impact a sentence? It is in answering the latter questions that latent ageism may become apparent in judicial practices, which leads me to the final inquiry of this thesis: Are these practices ageist?

To the extent that my personal bias may reveal itself in this research, at the outset I would like to be will be transparent about my belief that individualized sentencing practices are desirable and that a legislative requirement that reduces a sentence based on age alone should be avoided because it would fail to take into account the individual circumstances of an offender.
1.1 Ageism in Canada

Canada’s population is aging. In 2010, the median age in Canada was 39.7 years old, significantly older than it was in 1971, when the median age was 26.2 years. This trend is expected to continue over the next couple decades as fertility rates have decreased and life expectancy has increased. Currently, seniors make up Canada’s fastest growing age group with 4.8 million people aged over 65. Within the next 25 years, this number is expected to double to 10.4 million people. By 2031, 25% of the Canadian population will be over 65. As Canada’s population ages, society will be presented with the challenges of how to meet this demographic shift.7

1.1.1 Positive and negative ageism

A related area of concern among social scientists and legal academics is systemic societal prejudice and discrimination against older adults called “ageism”.8 Ageism has been defined as stereotyping of and discrimination against older people based on the belief that aging makes people less attractive, intelligent, sexual, and productive.9 The term was first coined by Robert Butler, who set out that ageism is a combination of prejudicial attitudes towards older people, old age, and the aging process; discriminatory practices against older people; and institutional practices and policies that perpetuate stereotypes about older people.10 The type of ageism referred to in Bulter's definition is widely known as “negative ageism” because it focuses on the negative stereotypes and discriminatory practices against older adults.

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7 The phenomenon of aging is not uniquely Canadian, it is a global trend. In fact, Canada is considered “younger” than many nations, due in part to immigration, see United Nations Department of Economic and Social Affairs, Population Division, “World Population Ageing 1950 – 2050”, online: United Nations <http://www.un.org/esa/population/publications/worldageing19502050/>.
While Butler’s early definition focuses on negative aspects of ageism, recent definitions incorporate the notion that ageism can benefit older adults. Erdman Palmore defines ageism as “any prejudice or discrimination against or in favour of an age group”.\textsuperscript{11} Palmore’s definition encompasses both prejudice, which he equates with attitudes, beliefs, and stereotypes; as well as discrimination, which relates to the treatment of a group. Known as “positive ageism”, prejudice or discrimination in favour of an age group could include positive stereotypes, for instance, the belief that older adults are wise. Positive ageism can also exist where negative stereotypes create a positive result for older adults.\textsuperscript{12} For example, the negative stereotype that older adults have lower incomes could result in tax benefits based on old age.\textsuperscript{13}

1.1.2 What does ageism look like?
In society, ageism is present in a variety of behaviours. In “Time for Action: Advancing Human Rights for Older Ontarians”, the Ontario Human Rights Commission sets out two types of behaviours that can be considered ageist. The first type of ageist behaviour involves the social construction of age and incorrect assumptions and stereotypes about older persons.\textsuperscript{14} For the present research, an example of ageism of this type would be if judges assumed that older adults were more vulnerable and less likely to survive a prison term. In this example, a judge may reduce a prison sentence based on this negative stereotype, however the overall result would be positive. Accordingly, the reduction of a sentence based on an older adult’s vulnerability presents an example of positive ageism.

The other form of ageist behaviour is the tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of

\textsuperscript{12} \textit{Ibid.} at 41.
\textsuperscript{13} For example, in Ontario the Senior Homeowner’s’ Property Tax Grant, Ontario Ministry of Revenue online; <http://www.rev.gov.on.ca/en/credit/shptg/>.
\textsuperscript{14} Spencer, \textit{supra} note 8.
An example in the sentencing context would be if an older offender were sentenced to a penitentiary term that did not take into account the special circumstances of the accused. In such a case, the positive belief that older adults are just as capable and able bodied as younger adults could result in an overall negative outcome for a particular offender because the sentencing judge would have failed to take into account the special needs of the aged offender.

1.1.3 Why study ageism?
Ageism should be studied because of its prevalence and the detrimental impact it has on individuals and society. Ageism is common in North America. A recent study conducted by Erdman Palmore surveyed 375 readers of the “CARPnews Report on Aging” who were aged 50-plus. The study found that 91% of the Canadian respondents and 84% of the American respondents had experienced one or more incidents of ageism. The prevalence of ageism supports one psychologist’s assertion that it is so implicit it is “one of the most socially-condoned and institutionalized forms of prejudice, such that researchers may tend to overlook it as a phenomenon to be studied.”

Apart from its prevalence, ageism has a significant impact on individuals and on society as a whole. At the individual level, the impact of ageism on older adults is serious: older adults presented with negative images of age may display psychological issues such as depression, as well as negative physiological effects such as a decline in memory performance and a heightened cardiovascular response to stress. There is also economic impact not only to individuals but society as a whole, as ageism prevents older adults from participating to the fullest in economic

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and cultural experiences. Many aspects of our culture support ageism, yet as a society we have been so conditioned by it that we often fail to acknowledge its existence. Because of its prevalence and its detrimental impact on both individuals and society, it is important to shed light on ageist practices.

1.2 Ageism in the Canadian justice system

Despite the important impact ageism has on both individuals and on society, an age based critique has yet to be conducted on many of our institutions to ensure they do not perpetuate ageism. One such institution is the justice system. The “justice system” is comprised of all of the various components of the law-related institutions, including courts, lawyers, police, parole, corrections facilities, laws and policies. When attempting to determine whether the justice system as a whole is ageist, it is necessary to consider the existence of stereotypes, assumptions or structural inequality that may exist in the various components of law related institutions. Answering whether or not the justice system is ageist involves unpacking all of these disparate aspects of the justice system and subjecting each aspect to an age based critical lens. Some aspects may be ageist, positive or negative, while others will not be.

To date, much of the attention to the interaction between age and the law has focused on legislative aspects of the justice system, namely, whether legislation draws discriminatory age distinctions or whether age-neutral legislation has an uneven application that has a discriminatory impact against older adults. The balance of this section will briefly review some of the recent developments in these areas.

1.2.1 Age discrimination in legislation

Not every age distinction drawn in a statute is discriminatory. Section 15(2) of the

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21 For example, Hall supra note 8.
Charter provides that a law, program or activity that ameliorates the disadvantages facing members of an enumerated or analogous group will not constitute discrimination against a person or a group. An example where an age based distinction was found not to be discriminatory in the case law is in Gosselin v. Quebec (Attorney General). In that case, the Supreme Court of Canada found that the age distinction in Quebec's welfare legislation that provided fewer benefits to those under age 30 unless they were enrolled in an education or job training program was not discriminatory. The majority held that since younger individuals did not suffer from pre-existing disadvantage and the legislation had an ameliorative purpose, the age distinction was justifiable. Writing for the majority, McLachlin C.J. stated:

Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.

The Court held that the age based distinction had the ameliorative purpose of “enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives.” One may disagree that this legislation truly ameliorates the position of economically disadvantaged young people, but nonetheless Gosselin shows that certain age distinctions are legally permissible.

While not all age distinctions in the law are discriminatory, in the absence of an ameliorative purpose, a distinction that reinforces pre-existing stereotypes and is inconsistent with the actual capacities of older adults will be considered age discrimination. A cogent example is provided in the case of mandatory retirement. The issue of mandatory retirement was

22 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 15(2) [Charter].
23 Gosselin v. Quebec (Attorney General), 2002 SCC 84 [Gosselin].
24 The legislation was repealed by the time the matter was heard by the Supreme Court.
25 Gosselin, supra note 23 at para. 68.
26 Ibid. at para. 70.
judicially considered by the Ontario Superior Court in *Association of Justices of the Peace in Ontario v. Ontario (Attorney General)*. At issue in that case was the mandatory retirement provision requiring justices of the peace to retire at age 70. Justice Strathy distinguished the case from the mandatory retirement cases heard by the Supreme Court of Canada in the early 1990’s noting that the social context, the consciousness of ageism and its effects had changed dramatically since the earlier cases had been decided:

> In the sixteen years since the Supreme Court of Canada’s decision in *McKinney*, there has been a sea change in the attitude to mandatory retirement in Ontario, led by the efforts of the [Ontario Human Rights] Commission. The Legislature has confirmed that mandatory retirement is a serious form of age discrimination and has abolished it in the public and private sectors. The rights of the individual Applicants, and of their colleagues in the Association, must be considered in this context.

In light of the current recognition of the pervasive effects of ageism, the Court concluded that mandatory age based retirement was discrimination because it (a) reinforced pre-existing ageist stereotypes; (b) was inconsistent with the actual needs, capabilities and circumstances of the applicants; (c) the ameliorative purpose did not make it any less discriminatory; and (d) the fundamental dignity of the applicants was at stake. The *Association of the Justices of the Peace* case provides a cogent precedent for determining whether future legislation based on age will be considered discriminatory.

Since the *Association of the Justices of the Peace* case, the *Ending Mandatory Retirement Statute Law Amendment Act* was enacted, amending the Ontario *Human Rights Code* and prohibiting age discrimination in employment after age 65. Similar amendments have since

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30 I note here that there was an exemption to the application of *Human Rights Code* to the provincial workers compensation schemes. Accordingly, discriminatory age based distinctions continue to be made in the provision of workers compensation benefits. For a full treatment of this topic, refer to John MacKinnon, “Age Based Discrimination in Ontario's Workers Compensation Laws” a paper presented at the 2010 Canadian Elder Law
been made in all of the provinces.\textsuperscript{31}

1.2.2 Uneven application of a law

The second aspect of the legal system that has been subject to age based critique is where a law, policy, or program that is ‘age-neutral’ on its face disproportionately impacts older adults.\textsuperscript{32} Advocacy groups like the Canadian Centre for Elder Law, the Advocacy Centre for the Elderly, the Ontario Human Rights Commission and the Law Commission of Ontario, have examined the impact of legislation governing areas as diverse as coroner's proceedings, predatory lending, guardianship, housing, capacity, substitute decision making, and elder abuse (to name only a few) on older adults. Some of the scholars working in the area of elder law have chipped away at the differential impact of legislation in housing and health care,\textsuperscript{33} elder abuse and capacity decision making,\textsuperscript{34} workers compensation,\textsuperscript{35} tax law,\textsuperscript{36} and pensions.\textsuperscript{37} What their work has uncovered is that in many cases the laws that appear neutral on their face are in practice ageist because they have a disproportionate impact on older adults.

Recent literature in elder law has suggested a framework for determining when a piece of legislation has an uneven application to older adults. Margaret Hall suggests adopting the process first articulated by the Supreme Court of Canada in \textit{Granovsky v. Canada}\textsuperscript{38} to determine if age-neutral legislation is in practice ageist:\textsuperscript{39}

An age-based lens includes the following questions:

\begin{itemize}
\item Hall, \textit{supra} note 8 at 4.
\item Spencer, \textit{supra} note 8.
\item Hall, \textit{supra} note 8.
\item MacKinnon, \textit{supra} note 30.
\item Granovsky \textit{v. Canada} (Minister of Employment and Immigration, 2000 SCC 28 [Granovsky].
\item Hall, \textit{supra} note 8 at 5.
\end{itemize}
• Does the legislation include or refer to, explicitly or implicitly, ageist stereotypes and/or paternalistic attitudes?
• Are there sufficient mechanisms provided for by the legislation to prevent or protect against the legislation being implemented in an ageist manner (including the acting-out of individual ageism, given the prevalence of ageist attitudes)?
• Does the legislation respond appropriately to the real needs of older persons as a group (understanding that older adults are extremely diverse), recognizing that older adults generally are situated differently from younger people and have different needs?

In order to determine if a law that is neutral on its face is, in practice, ageist, Margaret Hall’s “age based lens” suggests that the law must be subjected to a three part inquiry: (1) whether the legislation explicitly or implicitly refers to ageist or paternalistic attitudes; (2) whether it provides a mechanism to prevent itself from being applied in an ageist manner; and (3) whether it responds appropriately to the real needs of older persons as a group. Submitting future legislation to the rigors of this age based lens may help to inform and improve future policy and regulation.

1.2.3 The importance of studying age based sentencing practices
As the preceding section demonstrates, critical attention on ageism in the justice system to date has largely focused on how legislation has had a differential impact on older adults. However, legislation is only one aspect of the law. Judge made principles of the common law should also be subjected to this type of age-based critique to determine if judicial practices are ageist and need to be revised.

One of the many types of judge made law that has yet to be subjected to an age-based consideration in the Canadian context is sentencing. Sentencing is “the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.”\(^{40}\) As the definition suggests, after an accused person has been found guilty, or pleads guilty, to a criminal offence,

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they are convicted of that offence. Following conviction, a sentencing hearing takes place where a judge determines what the punishment should be.

It is important to subject sentencing practices to an age based lens because sentencing is a highly discretionary exercise, which makes it susceptible to individual bias. Judges are not immune to individual bias, and studies have shown that judges attribute meaning to past and future behaviour consistent with stereotypes associated with membership in various social categories. The impact of individual bias is especially acute in the sentencing process, which has the hallmark of flexibility. In Canada, judges are given broad discretion to determine what sort of sentence is appropriate based on the facts of a particular case and the particular offender appearing before them, and appeal courts are reticent to interfere with the decisions of trial judges. It is this broad discretion that is accorded to trial judges that makes sentencing decisions particularly susceptible to individual bias. Accordingly, it is worthwhile to expose sentencing patterns relating to age to provide judges and the public with information about sentencing practices in their own province and across the country.

Another reason why it is important to understand the interaction between age and sentencing practices is because of the significant impact it has on the individual offenders appearing in the courts. In their book, Julian Roberts and David Cole highlight this aspect of sentencing:

Judges have the power to intervene in the lives of citizens to an extent largely unknown in other areas of civic life. Nowhere is the power of the state more apparent than when it deprives others of their liberty. But the consequences of imprisonment go far beyond mere physical confinement....people who are sentenced to prison are exposed to environmental forces that place them at risk for a wide range of negative events, including divorce, ill health, assault, homicide, and suicide. To take just one of these, research has shown that suicide rates of prisoners are many times higher than rates for comparable individuals at liberty. Short of execution, imprisonment is the ultimate intrusion into a person’s

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41 Gary Fontaine and Catherine Emily, “Causal Attribution and Judicial Discretion” (1978) 2 Law and Human Behaviour 323.
42 Allan Manson et. al., Sentencing and Penal Policy in Canada (Toronto: Emond Montgomery, 2000) at 58.
life, and we should accordingly know a great deal about how it is being ordered and why [citations omitted].

Sentencing has an acute impact on the lives of those involved, not just because of any loss of freedom that goes along with a prison sentence, but in the widespread collateral impacts a sentencing decision has on an individual offender's life. Because it is of fundamental importance to those involved, judicial practices in this area should be transparent. If age has an impact on a penal sentence, good or bad, those before the Court should have the benefit of this information.

1.3 Research questions and thesis Outline

1.3.1 Purpose and research questions
The purpose of this thesis is to address the current lack of information about the relationship between old age and sentencing, if any exists, by providing information on how the age of an offender influences the sentencing practices of judges. Informed discussion and future policy initiatives can be enhanced by a deeper understanding of how age interacts with the decision making processes of judges.

To investigate how age interacts with sentencing, I address each of the following research questions: (1) Does the chronological age of an offender have an impact on the penal sentence handed down for a criminal offence? (2) When, why, or in what way? (3) Are these practices ageist? I investigate these questions with a variety of methodological approaches. I anticipate that this research will uncover that age will be a mitigating factor in sentencing, and that this judicial practice will provide an example of positive ageism.

1.3.2 Thesis outline
Chapter 2 of this thesis sets out the statutory and common law foundation of sentencing practices in Canada. While most commentary is silent on how advanced age factors into

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sentencing,\textsuperscript{44} those sources that do mention old age suggest that it is a mitigating factor in sentencing.\textsuperscript{45} The literature on the topic is scarce, and a review of the cases used to support the proposition that age is a mitigating factor are less than conclusive on when, why, and in what way age may operate to reduce a sentence. Chapter 2 concludes with a brief review of the statutory framework, common law and commentary on the topic of sentencing older offenders from the United States. While the policy framework is significantly different, the comparatively more developed framework in the U.S. highlights the need for future research on this area in the Canadian context.

Chapter 3 describes the research methodology employed to investigate the impact of old age on sentencing practices. The research design involves both a quantitative analysis and a qualitative analysis. The aim of the quantitative study of Canadian sentencing decisions is to see if penal sentences handed down to older adults were shorter than those handed down to younger adults (those aged younger than 60 years) for four different types of offences (sexual offences, drug related offences, driving offences, and theft or fraud). Quantitative research tells us whether old age operates to reduce a sentence, but does not tell us about the content of the judgments or underlying judicial reasoning. The qualitative case law analysis of legal texts addresses these shortfalls.

Chapter 4 describes the results of the quantitative study, which explored the research question: “Does the chronological age of an offender have an impact on the penal sentence handed down for a criminal offence?” While judges explicitly stated that age was a mitigating factor in over a third of the sentencing decisions involving older adults, the overall difference in the duration of the sentences between older adults and younger adults was not statistically


\textsuperscript{45} For example, Paul Nadin-Davis and Clarey Sproule, \textit{Canadian Sentencing Digest}, (Toronto: Carswell, 2010) (looseleaf).
significant.

Chapter 5 is dedicated to the analysis of the texts of judgments where older adults are sentenced. It explores the remaining research questions: “When, why, or in what way does age impact a penal sentence? Are these practices ageist?” Despite the finding there is generally little difference in the duration of the sentences handed down to older adults and younger adults, the texts of the judgments show that age does have an impact on judicial decision making in certain circumstances. When these judicial practices are submitted to an age based lens, they are generally age neutral or result in positive ageism.

Chapter 6 outlines the major findings of this research and discusses how they add to, or differ from, existing literature on the topic. I conclude with my personal opinion that an age-neutral approach to sentencing should be adopted.

Taken together, the six chapters of this thesis form a departure point for further discussion and potential policy changes relating to judicial practices in the area of sentencing older adults. As Canada’s population ages, judges will increasingly be asked to balance the unique needs of older offenders appearing before them with the societal need to protect the public from harmful offenders. Increasing the transparency of existing practices could provide helpful insight into this phenomenon that could assist with the disposition of these tough cases in the future or shed light on areas that are in need of policy reform.
2 Canadian Sentencing Principles

2.1 Introduction

The preceding chapter provided a brief overview of the concept of ageism and how this issue has been explored in the legal context. In this chapter, I review the legislative framework and current commentary on sentencing practices in relation to older adults.

I first provide a brief overview of the legislative history and statutory framework for sentencing in Canada. While the principles, purposes, and objectives of sentencing contained in the Criminal Code\textsuperscript{46} are helpful guidelines for judges, the Code is silent on what effect, if any, the advanced age of an offender should play in the determination of a sentence.

Next, I review commentary on the topic of advanced age in the exercise of judicial discretion in sentencing. Many of the secondary sources on the Canadian law of sentencing reviewed in this part do not mention advanced age as a factor to be considered in the sentencing process. Those that do mention age suggest that it operates as a mitigating factor in sentencing. The Canadian literature on the topic is scarce, and a review of the cases cited in these authorities shows that judicial discretion is exercised in a variety of ways when it comes to the advanced age of an offender.

The second section concludes with a discussion of advanced age in the sentencing practices of American courts. While the statutory framework in the United States is quite different from that in Canada, the United States has developed policy statements and, in some states, legislation, that explicitly provides guidance on when advanced age may allow for a departure from standard sentencing practices. Empirical studies on the issue from the United States suggest that older offenders are treated more leniently than younger offenders by the Courts. Commentary from

\textsuperscript{46} Criminal Code, R.S.C. 1985, c. C-46, s. 718 [the Code].
the States advocates leniency with regard to older offenders or, alternatively, that Courts take an age neutral approach. The scarcity of commentary on the topic in Canada, contrasted with the more developed framework in the United States, points to the need for more research and discussion on this side of the border.

2.2 Canadian statutory framework

2.2.1 Legislative history
Prior to 1996, the Code did not contain any provisions providing for the principles, purposes, or objectives of sentencing. Subject to certain statutory maximums and minimums for specific crimes, sentencing remained entirely up to the discretion of judges and the application of common law principles. This level of flexibility allowed for judges to craft individualized sentences that fit the offender, the offence, and the administration of justice generally. However, it also caused disparity in sentencing practices between judges and even between regions of the country.47 This disparity led the Federal Government to investigate sentencing practices with the objective of establishing an authoritative statement that could provide a primary source of guidance to decision makers for sentencing.48

The Federal Government used reports created by the Canadian Sentencing Commission and a parliamentary commission called the Daubney Committee as the basis for further consultations with the provinces and interest groups in the late 1980s and early 1990s.49 In 1996, their efforts resulted in Bill C-41, the Sentencing Reform Act. The objectives of Bill C-41 were: (1) to provide a consistent framework of policy and process in sentencing matters; (2) to implement a system of sentencing policy and process approved by parliament; and (3) to increase public

47 Manson, supra note 42 at 87.
48 For example, the Ouimet Committee, the Law Reform Commission of Canada, the Royal Commission on Sentencing, and the House of Commons Standing Committee on Justice.
accessibility to the law respecting sentencing. Bill C-41 came into force on September 3, 1996, creating what are now sections 718 – 718.2 of the Code.

2.2.2 The purpose of sentencing

Section 718 of the Code provides that the fundamental purpose of sentencing is to contribute to “respect for the law, and the maintenance of a just, peaceful, and safe society by imposing just sanctions.” The objectives of sentencing include the denunciation of unlawful conduct; general and specific deterrence; the separation of offenders from society where necessary; to assist with rehabilitation; to provide reparations to victims of the community; and finally to promote a sense of responsibility in offenders of the harm done to victims and the community.

Denunciation and deterrence are sentencing aims that focus on punishment. Denunciation is the public condemnation of something or someone. Deterrence is preventing future crimes by threatening punishment. The difference between general and specific deterrence is that general deterrence aims to discourage other offenders engaging in crime (i.e. it “sends a message” to other potential wrongdoers) whereas specific deterrence focuses on the offender being sentenced. General deterrence might be used as justification for imposing a harsh sentence on crimes that are considered to be particularly morally reprehensible. Specific deterrence might be invoked to argue in favour of a harsher penalty for a re-offender.

The other sentencing objectives contained in section 718 of the Code focus on repairing the harm done to victims and society as a result of a crime. Incapacitation is the common law term for the sentencing aim that seeks to remove the offender from the community to prevent

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50 Ibid.
51 Ibid, supra note 46, s. 718.
52 Ibid.
54 Roberts and Cole, supra note 43 at 6.
him or her from doing harm.\textsuperscript{56} Rehabilitation as a sentencing goal is aimed at changing an offender into a law abiding citizen and returning him or her as a contributing member to the community. Reparation is literally paying back those victims of a crime, and is usually deployed in cases that involved property damage or theft, where it is possible to compensate victims financially for their loss. Along with reparation, the promotion of a sense of a responsibility in an offender (known as “retribution”) seeks to restore the victims of a crime, or society, to the position it was before the harm was inflicted upon them by the offender.

\textbf{2.2.3 Principles of sentencing}

Principles of sentencing, as distinguished from the purposes of sentencing, are “substantive rules that shape how judicial discretion is applied to assign priority to these objectives and to determine the relevant sentencing choices.”\textsuperscript{57} Section 718.1 of the \textit{Code} sets out that the fundamental principle of sentencing is that a “sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”\textsuperscript{58} Also known at common law as the “principle of proportionality”, this section provides sentencing judges the guideline that severity of any punishment should be directly proportional to the seriousness of the crime committed and the moral blameworthiness of the offender.\textsuperscript{59}

\textbf{2.2.4 Sentencing objectives contained in the Code}

The individual circumstances of the offender are weighed in the application of subsection 718.2(b) of the \textit{Code}, which provides: “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.”\textsuperscript{60} Section 718.2(c) also takes into account the circumstances of the offender where it provides that consecutive

\textsuperscript{56} Roberts and Cole, \textit{supra} note 43 at 9 state that “incapacitation is assumed to do little or nothing for the offender; it is directed exclusively towards the interests of society.”
\textsuperscript{57} Manson, \textit{supra} note 42 at 66.
\textsuperscript{58} \textit{Code supra} note 46, s. 718.1.
\textsuperscript{59} Roberts and Cole, \textit{supra} note 43 at 10.
\textsuperscript{60} \textit{Code, supra} note 46, s. 718.2.
sentences shall not be unduly long or harsh in relation to the offences committed and the circumstances of the offender. While both sections 718.1 and 718.2 require that the circumstances of the offender are taken into consideration when crafting an appropriate sentence, neither explicitly sets out how advanced age can or should impact a sentence.

Section 718.2 of the Code sets out aggravating and mitigating circumstances in sentencing.\textsuperscript{61} Aggravating circumstances increase the seriousness of the crime, and include where the offender abuses a spouse or common law partner or a person under eighteen years of age; if an accused abuses a position of trust or authority; evidence that an offence is tied to organized crime or terrorism; or evidence that the offence was motivated by bias, prejudice or hate based on race, sex, age, mental or physical disability or other similar factor.\textsuperscript{62} Interestingly, the advanced age of an offender is not a personal characteristic that is listed as an aggravating or a mitigating factor in section 718.2 of the Code. Given the Code is silent on the impact of age on sentencing considerations, the common law is relied upon for guiding principles relating to how an offender’s advanced age should be weighed by sentencing judges.

2.2.5 Judicial discretion and the application of the Code sentencing provisions

In Canada, judges are given broad discretion to determine what sort of sentence is appropriate based on the particular facts of the case and the offender appearing before them. This broad discretion accorded to trial judges is not lightly interfered with by appellate courts. In \textit{R v. Shropshire}, the Supreme Court of Canada confirmed the standard of review that a court of appeal should adopt in reviewing the fitness of a sentence under section 687(1) of the Code:

An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order should be made. The formulation of a sentencing order is a

\textsuperscript{61} \textit{Code, supra} note 46, s. 718.2.
\textsuperscript{62} \textit{Code, supra} note 46, s. 718.2 (a).
profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable. 63

Described as a “profoundly subjective process” sentencing decisions are to be given a wide breadth by appellate courts. While the upside of this flexibility is that the decision maker who has had the advantage of hearing the trial crafts an appropriate sentence, the downside is that there remains discrepancies in sentencing practices between judges. 64

The interpretation of the principles, purposes, and objectives of a sentence are subject to definition by the trial judge. Julian Roberts and Dennis Cole point out the practical implications of differing judicial philosophies in the determination of a sentence for the offender: 65

The nature of the sentencing purpose will determine the nature and severity of the sanction imposed. This has been conclusively demonstrated by American research. Robert McFatter (1978) employed a sample of judges in a sentencing simulation. He found that different judges did indeed favour different sentencing purposes for the same case, and that their preference resulted in different sentences. In order to eliminate all possible explanations, McFatter randomly assigned some judges to sentence from a deterrence perspective, others from a rehabilitation perspective. They were then given the same case to sentence. Results showed that the judges assigned to a deterrence-oriented perspective favoured very different sentences than judges assigned to other sentencing purposes.

Broad parameters of judicial discretion render the sentencing process susceptible to individual bias depending on a sentencing judge’s fundamental philosophy. Those judges who subscribe to a retributivist philosophy will be more likely to interpret the “protection of society” as requiring a penitentiary term. Whereas another judge that subscribes to a utilitarian approach may be more

64 Manson, supra note 42 at 57 points out that “the interpretation of these aims is often uncertain or contradictory, partly because they allow for conflicting views about appropriate outcomes.”
65 Roberts and Cole, supra note 43 at 11-12.
open to sentencing goals that look towards the rehabilitation of the accused or the retribution to society for the harm done. The impact of this philosophical underpinning means that there is disparity in practice on how sentences are handed down for the same crime. It is thus not surprising, as I will discuss in detail in Chapter 5, that there are a variety of different approaches to sentencing older adults.

Having the purposes, principles, and objectives of sentencing clearly stated in the Code ensures some consistency in practice, while respecting flexibility necessary to ensure that a sentence fits the individual circumstances of the offender. No two people are exactly the same. Equally, no singular approach can answer to the highly individualistic exercise of sentencing.

2.3 Age as a mitigating factor in sentencing in the Canadian context

In Canada, whether age is a factor that should result in leniency in sentencing is up for debate. Much of the academic writing on the topic of sentencing fails to consider whether age is, or should be, a mitigating factor in sentencing. However, the few articles that do address age suggest that it should be a mitigating factor for a variety of reasons: (1) because a sentence would disproportionately impact an offender considering the remaining lifespan of that offender; (2) because older offenders often have associated health issues; or that (3) old age can be a mitigating factor where it is accompanied by evidence of good character, but it will not be a mitigating factor if an accused is found guilty of a lengthy period of wrongdoing or of a violent or serious crimes.

In the paragraphs that follow, each of these themes relating to age and sentencing is discussed with reference to the academic writings and the case law relied upon therein. This literature review highlights the uncertainty of whether it is age, illness, or both that operate to

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66 For example, Renaud, *supra* note 44; Manson, *supra* note 44; and Clewey, *supra* note 44.
67 Kent Roach, *Criminal Law* (3rd ed.) (Toronto: Irwin, 2004) at 354 is one source that lists old age as a mitigating factor but does not provide any further elaboration on when or why old age will operate to mitigate a sentence.
reduce a sentence. The uncertainty in both the case law and commentary in this respect prompted me to focus on the issue of illness, or other factors that might be confounded with old age in the textual analysis in Chapter 5.

2.3.1 Disproportionate impact of lengthy sentence in light of remaining lifespan

In his article on sentencing older offenders, Gilles Renaud relies on the Supreme Court of Canada case *R. v. M. (C.A.*) as authority that courts will consider the offender’s remaining lifespan in reducing a term of imprisonment for older adults. In *R. v. M. (C.A.*), the leading case on the principle of totality, the accused pleaded guilty to numerous counts of sexual assault, incest and assault with a weapon against children. In upholding the trial judge's sentence of 25 years, the Supreme Court of Canada provided some direction on the issue of sentencing older adults.

In the process of determining a just and appropriate fixed term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span. Accordingly, in exercising his or her specialized discretion under the Code, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value.

While it did not operate in favour of the accused in *R. v. M (C.A.*), Lamer J.’s statement suggests that where appropriate, the totality principle can be triggered to reduce a global sentence if the combined total sentence handed down to the accused exceeds the likely remaining lifespan of

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69 *M. (C.A.*) supra note 68 at para. 74. (Lamer J.).
In his article on the topic, Renaud highlights other cases that have adopted this principle, such as, *R. v. A. (R)*, where Twaddle J.A. found: “Advanced age is usually a mitigating feature. There are two reasons for this. The older a person is the harder it is to serve a prison term and the less is that person's life expectancy after prison.”  

Renaud also relies on the Manitoba Court of Appeal decision *R. v. C. (E.)* as another example where the Court thought to consider the remaining life span of the accused as a means of reducing the sentence handed down to a 61 year old offender. In that case, the offender had committed child abuse and sexual abuse for close to 20 years, resulting in the award of a sentence of 25 years at the trial level. On appeal, the Court reduced the defendant’s global sentence to 20 years imprisonment, finding that: 

A sentence of 25 years surpasses by large measure the “expected remaining life span” of the accused. In that sense, and only in that sense, can it be said that “traditional goals of sentencing have all but depleted their functional value”, and that, therefore, the sentence in its totality was demonstrably unfit.

Other commentary cites the case *R. v. Monette* as an authority for the proposition that a sentence may be reduced in light of the remaining life span of an accused. In that case, the Ontario Court of Appeal dealt with an appeal by a 90 year old offender who was sentenced to five years imprisonment for a number of sexual and other assaults. The Court of Appeal reduced the prison term to a reformatory term to be served within the community without any special conditions, holding “…en pratique, une sentence de cinq ans au pénitencier serait pour lui une sentence à perpétuité.” That is, practically speaking, a five year sentence for this man amounts

71 *A.R., supra* note 1 at para. 35.
75 *Monette, supra* note 74 at para. 15.
to a life sentence.

With the exception of the accused in *R. v. M. (C.A.)* (who did not have his sentence reduced), all of the offenders in the cases discussed above suffered from some sort of illness, which weakens the proposition that old age alone acts as a mitigating factor in a sentencing decision. Indeed, in *Sentencing Law and Practice*, Kevin Boyle and Michael Allen suggest that “age may be relevant in relation to an older offender where the court out of mercy may reduce the sentence, especially if the offender has a limited life expectancy or ill health.”

### 2.3.2 Age is a mitigating factor because of poor health

In the *Canadian Sentencing Digest*, Paul Nadin-Davis suggests, “Only rarely are the Courts called upon to consider old age as a mitigating factor in isolation. More frequently, it is discussed in connection with illnesses or age-related degeneration of the brain.” Mr. Justice Renaud echoes “sentencing courts appear to approach the question of age by asking for information about an offender's well-being...advanced age is merely an incident to the question of the offender's state of health.”

These sources rely on several cases to support the proposition that age and ill-health operate together to mitigate a prison sentence, including *R. v. Lysack,* where the Ontario Court of Appeal set aside a prison term and substituted a suspended sentence plus probation for a 66 year male appearing before them on charges of sexually assaulting young students he had been teaching. The accused's advanced age and poor health were considered to be mitigating factors by the Court that held: “His health is fragile. He requires constant medication and monitoring. At the time of his sentencing he collapsed, hyperventilating, and required hospitalization. It

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77 Nadin-Davis and Sproule, *supra* note 45.
78 Renaud, *supra* note 68 at paras. 6 and 11.
appears that he may not survive any period of incarceration.”\textsuperscript{80}

The academic sources also rely on \textit{R. v. V. (F)}, as authority for the proposition that age and ill health operate to mitigate a sentence. \textsuperscript{81} In that case, a grand-father was found guilty of four counts of sexual interference against his grand-children and was awarded a suspended sentence. Riordan J. found:\textsuperscript{82}

\begin{quote}
It is very difficult to determine the appropriate penalty in a case such as this. This is a very serious offence but, as in all cases, there are special circumstances, and in this case, it is, above all, the age of the accused. He is now 82 and will be 83 years old very shortly. This is a man with medical problems – heart problems for the past five or six years, and because of his medical condition, he must take medication regularly.
\end{quote}

Even though the accused breached a position of trust, committed the offences over an extended period of time (from 1988 – 1993) and the crimes were very recent (the accused sat at his sentencing trial in 1994), the older offender was given a suspended sentence.

In Renaud’s article, he relies on a final example of the age operating with illness to reduce a sentence, \textit{R. v. McCrystal},\textsuperscript{83} where a 71 year old physician was found guilty of fraud against a medical health plan. In \textit{McCrystal}, the defendant successfully appealed the 12 month sentence handed down by the trial court judge, which was reduced to time served. The sentencing of Dr. McCrystal gave the Court of Appeal “anxious concern” due to his health issues. Dr. McCrystal suffered from heart disease, asthma, an ulcer, and at the time of the hearing he was in the hospital. In these circumstances, the Court of Appeal accepted evidence that to send Dr. McCrystal to jail could cause emotional anxiety that could set off his severe asthma episodes or cause him to have a heart attack, holding: “The appellant's health has

\textsuperscript{80} \textit{Ibid.}
\textsuperscript{81} \textit{R. v. V. (F).} (1994), 156 N.B.R. (2d) 161 (Q.B.).
\textsuperscript{82} \textit{Ibid.} at para. 12.
deteriorated since the time of sentencing and the risk of incarceration is higher now than it was then. Our concern is that to require the appellant to serve a custodial term could well amount to the imposition of the death sentence.”

Illness mitigated a sentence in these cases because the Courts characterized the accused's illnesses as sufficiently serious that a prison term was not appropriate. In *Lysack* and *McCystal* the seriousness of the health condition was demonstrated by the need to be hospitalized at the time of the hearing. In *V.F.*, the accused's condition was deemed to be serious because it required constant monitoring and medication. While both the ill health and the age of the accused were cited as reasons for leniency in these cases, it is uncertain whether it is really just the ill health of the accused that justified the reduced sentences. Put another way, these cases may just be examples where illness operates to reduce a sentence and the defendant happens to be old.

Indeed, it is unclear from the commentary and the cases relied upon whether it is age, illness, or both of these characteristics that operate to reduce a sentence. For example, in his article which reviews the themes of sentencing older adults Mr. Justice Renault writes “if there are no health problems or if these are not significant, the simple fact of being an elderly offender may not weigh heavily in the balance.” One case he relies upon is *R. v. Dinn*, where the 79 year old offender was found guilty of a variety of serious abuses against the foster children she was responsible for. She appealed her sentence of two years, and in dismissing her appeal, the Newfoundland Court of Appeal noted: “...had the appellant been younger and in good health, the jail term would have been considerably longer”. Later on in the judgment, the Court found

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84 *Ibid.* at para. 11.
that the ill health of the accused was not a relevant consideration because incarceration would not cause imminent danger to the accused:

While the appellant has for some time been subject to certain chronic disorders, it has not been shown that she is in any imminent danger from these disorders. It is thus not strictly relevant. If while she is in prison her state of health deteriorates, that may properly be looked at by the prison and correctional authorities and it will be their decision as to what should be done.\(^87\)

Taken together, these cases and the secondary sources suggest that age, in and of itself, may not be the mitigating factor. In these circumstances, illness could be operating alone in mitigation. It is unclear whether it is both age and illness, or just illness that commands leniency and to what extent each may operate.

### 2.3.3 Age and good character

A final theme put forth in the literature is that age is more likely to be a mitigating factor when it is combined with good character.\(^88\) Clayton Ruby suggests, “The age of an offender, particularly past 60 years, is a serious factor to be considered in mitigation, especially where it is combined with evidence of good character.”\(^89\)

A corollary proposition put forth in the commentary is that old age will not operate as a mitigating factor where it is accompanied by poor character – as demonstrated by a lengthy period of wrongdoing or in cases involving violent or serious crimes.\(^90\) Academic literature draws support for the proposition that a lengthy period of wrongdoing will not allow age to

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\(^87\) \textit{Ibid.}


\(^89\) Ruby, \textit{supra} note 74 at 5.144. See also Canadian Association of Provincial Court Judges, \textit{Canadian Sentencing Handbook} (Ottawa: Canadian Association of Provincial Court Judges, 1982) at 48.

\(^90\) Renaud, \textit{supra} note 68 at para. 18.
mitigate a sentence is found in *R. v. Cameron*\(^{91}\) where a 61 year old woman had been committing social assistance fraud for over 60 months (from 1989 to 1994). Lee J. imposed a 30 month period of imprisonment even though the woman had, from 1965 until 1989, legitimately been in receipt of those benefits.

In his article on the themes that emerge from sentencing older offenders, Mr. Justice Renaud suggests that serious offences do not command leniency, regardless of the health or age of the offender.\(^{92}\) He relies on the Manitoba Court of Appeal case, *R. v. R. (J.D.)*\(^{93}\) where the Court of Appeal refused to reduce the sentence handed down to a 74 year old man who suffered from diabetes, was blind in one eye, and was not fluent in English because he had committed repeated acts of sexual violence against children 15 years earlier. Despite a medical report that stated that a prison term could be fatal to the offender, the majority of the Court of Appeal found that the offender posed a threat to the community, and any lesser disposition was not fit to sanction such violent crimes.\(^{94}\)

Another example of serious offences preventing leniency cited in the literature on the topic is the B.C. Court of Appeal Case, *R. v. Lehoux*\(^{95}\) where the 71 year old offender committed aggravated assault when he chopped his lawyer three times in the head and neck with a machete during the course of a hearing. Though the attack was completely unprovoked, after the fact, he showed little or no remorse at all for what he had done. The British Columbia Court of Appeal dismissed his appeal against the seven year sentence awarded at trial, noting the existence of serious aggravating factors (like the attack on the administration of justice) outweighed the

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\(^{91}\) *R. v. Cameron* 1999 ABQB 160 [*Cameron*].
\(^{95}\) *Lehoux, supra* note 92.
appellant's age and health, especially since the appellant's leukemia wasn't immediately life threatening.\textsuperscript{96}

A final example cited in support of this principle is the case \textit{R. v. J. (O.)},\textsuperscript{97} where an 80 year old offender found guilty of incest could not rely on his age to reduce the sentence because of the seriousness of the crime:\textsuperscript{98}

> In passing sentence the court has to consider the competing interest of denunciation, deterrence, and rehabilitation. Because of the seriousness of the sexual assaults as well as the abuse of the position of trust by the father towards his daughter the emphasis in sentencing has to be on denunciation and deterrence. Under the circumstances a significant period of incarceration has to be imposed. While the advanced age of the accused is a mitigating factor, I am unable to give it any degree of significance as it would only condone elderly men sexually abusing their daughters. The message has to be quite clear, that is, sexual abuse by fathers against their daughters will attract a significant period of incarceration, no matter what the father's age.

Together, the relevant authorities cite the case law above as support for the proposition that old age and illness will not command a more lenient sentence for very serious offences.

However, there is also conflicting commentary and case law that supports the opposite proposition, that old age combined with ill health may mitigate a sentence, even in serious cases like sexual assault.\textsuperscript{99} Clayton Ruby relies on the case \textit{R. v. R. (A.)}, where Twaddle J.A. for the Manitoba Court of Appeal found:\textsuperscript{100}

> The accused was recently convicted of having sexual intercourse with his 13-year-old daughter without her consent on three occasions in the early seventies. As a result, he was sentenced to what in ordinary circumstances would have been an extremely lenient sentence of 30 months

\textsuperscript{96} \textit{Ibid.} at para. 6. 
\textsuperscript{97} \textit{R. v. J. (O.)}, \textit{supra} note 92. 
\textsuperscript{98} \textit{Ibid.} at para. 4. 
\textsuperscript{99} Ruby, \textit{supra} note 74 at 5.145, p. 250, relying on \textit{A.R. supra} note 1 at para. 2. 
\textsuperscript{100} \textit{A.R.}, \textit{supra} note 1 at para. 2.
imprisonment. But the circumstances are not ordinary. The accused, who has no criminal record aside from this matter, is now 71 years of age and suffers from muscular dystrophy. He is wheelchair bound and also requires round-the-clock attention. Any prison term he is required to serve will almost certainly be served in a hospital like setting within a prison or in a secure care home.

The Court found that the accused's infirmity warranted a reduction in an otherwise meritorious sentence. Founded on the premise that denunciation lost its effectiveness once an accused was in a certain state of ill health, Twaddle J.A. found: “I doubt that any prospective offender would be encouraged to commit a similar crime by the imposition of a non-incarceratory sentence in this case. Such a person would surely not wish to qualify for lenient treatment by being struck down by disabling muscular dystrophy.”\(^{101}\)

Another case relied on by the literature that provides contrary authority is *R. v. Harris*, where the accused's age and poor health mitigated a sentence, even though he had committed fraud over a lengthy period of time.\(^ {102}\) The accused was a high ranking officer who took advantage of his position of trust to defraud his employer of over two million dollars. Though he was 68 years old, suffered from a variety of serious medical conditions, and had already made restitution to his employer, Borins J. nonetheless found that a prison term was required to achieve the requisite deterrence:\(^{103}\)

I consider Mr. Harris' age and poor health to be very significant considerations. Without intending to be prosaic, I can say with complete candour that it is no joy to have to send a white haired grandfather to jail. Indeed, no Court willingly sentences a person of 68 years to spend a large part of his remaining years in prison. In some cases extremely modest sentences are imposed as an act of mercy to the defendant. Considering the age and state of health of Mr. Harris, a sentence in the range of 7 to 9 years would almost amount to a life sentence, if not a death sentence. A jail sentence to

\(^{101}\) *Ibid.* at para. 43. See also Ruby, *supra* note 74 at 5.145 – 5.148 who, relying on the *A.R.* case, suggests that generally courts find ‘no useful purpose’ was served by sending a senior citizen to jail.

\(^{102}\) *Harris, supra* note 92.

\(^{103}\) *Ibid.* at para. 5.
a person of the defendant's age is much more severe than it would be to a younger person and to a person in better health.

Mr. Harris would have been sentenced to 7 to 9 years in jail had he been a younger man. Given his age and health condition, the Court found that a sentence of 18 months coupled with a fine of $200,000 was appropriate.

In sum, the proposition that old age will not operate to mitigate a sentence for serious crimes is unsettled and the case law not cohesive. With commentary supported by case law on both sides of the proposition, Courts in their discretion may decide to allow age to mitigate even in cases where serious crimes have been committed, or refuse to do so, depending on the circumstances.

2.4 Sentencing older offenders in the United States

The impact of age on sentencing decisions has been given more consideration in the United States than in Canada. Despite the very different legislative and policy landscape, the American experience could inform future policy directions in Canada. Accordingly, a brief review of the American experience is useful in advancing the discussion on age and sentencing.

2.4.1 Statutory framework

Unlike Canada, where the criminal law is governed by Federal legislation, in the United States, criminal law is governed by both Federal and state law. For Federal Courts, the United States Sentencing Commission put forth a non-binding policy statement to guide the exercise of judicial discretion in relation to advanced age which states:

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart
downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.104

In her article on sentencing older adults, Molly Fairchild James suggests that “Federal court decisions focus more on the first sentence – that age is not ordinarily relevant – than on the lowering of sentences because of age.”105 The guidelines do not leave much room to consider age a mitigating circumstance due to the high onus placed on defendants to establish that they are sufficiently “elderly and infirm” to come within the exception.106 After a review of the relevant case law, Fairchild James concludes that for “a defendant to be elderly and infirm, he or she would probably have to be at least sixty and currently experiencing the effects of a debilitating disease.”107 For the purposes of the guidelines, it is not enough to show a serious, or even fatal diagnosis or sympathetic recent medical history.

Criminal law in the United States is also administered by state courts, governed by state statutes.108 Many states have statutes that expressly provide that the “age of the defendant at the time of the crime” can be a mitigating factor in sentencing.109 Alaska’s statute calls for not only age, but whether age caused physical or mental infirmities that were responsible for the accused’s behaviour, providing that age can be a mitigating factor in a sentencing when “the conduct of an aged defendant was substantially a product of physical or mental infirmities

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106 Arguably, in these circumstances it is not age at all, but illness that is the mitigating consideration. Further discussion of this theme is developed in Chapter 5, where the issue of age and illness and the confusion between these two concepts is canvassed in greater length.
107 Fairchild James, supra note 105 at 1028.
108 For a federal court to have jurisdiction, the crime to be prosecuted must either have been created pursuant to an express or implied constitutional grant of authority (for example, evasion of federal taxation laws), or must have been committed in an area owned by or under the exclusive control of the federal government. Examples of crimes that are based on areas owned by or under the exclusive control of the federal government include crimes committed in the District of Columbia, in U.S. Territories, in U.S. National Parks, in federal courthouses and federal prisons, and aboard airplanes (regulated by the Federal Aviation Administration) and ocean-going vessels.
resulting from the defendant's age”. To assist with the interpretation of these statutes, some states have guidelines in place for sentencing judges.

The statutory framework in the United States differs a great deal from that in Canada. The most significant difference between the two countries is in the degree of judicial discretion afforded to Canadian judges in comparison to that afforded to judges in the United States. In Canada, flexibility is the cornerstone of sentencing, with only select crimes having mandatory maximum and minimum sentences determined by the Code. On the other hand, the United States has a comparatively higher legislated context of sentencing both statutorily and with policy guidelines relating to sentencing, including mandatory sentences for drug crimes and the ‘three strikes’ and truth in sentencing laws, which create diminished role of judicial discretion in the determination of a sentence.

2.4.2 Common law developments and commentary from the U.S.

The presence of federal policy guidelines and state statues providing for the consideration of age in sentencing makes the common law in the U.S. less arbitrary than that in Canada. For those states that do not expressly have interpretive policies or statutes, the common law allows judges to take into account the age of the accused. As is the case in Canada, there is disparity in why, when or how age will operate to mitigate a sentence at common law in the

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111 For example, the Arizona Judicial Branch, State Sentencing Guide, Arizona Judicial Branch online: <http://www.supreme.state.az.us/courtserv/CrtProj/capsentguid/G5Age.htm>.
112 There are currently only 40 crimes in the Code that provide for statutory maximum and minimum sentences, and they can be classified generally as offences involving a firearm, sexual offences against children, and driving offences, see Wade Riordan Waalab, “In Brief: Mandatory Minimum Sentences” (Ottawa: Library of Parliament, 2006) online: <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdp/EB-e/prb0553-e.pdf>.
115 Bevins v. Commonwealth, 712 S.W. 2d 932 (Ky. 1986).
In her article on the topic, Molly Fairchild James concludes that in the U.S., age alone is rarely a reason for a judge to sentence outside the statutory guidelines, however age can be a reason for sentencing a defendant on the minimum statutory range. Consistent with Fairchild James’ legal analysis, empirical studies on the sentencing of older offenders in the U.S. suggest that older offenders are treated more leniently in sentencing than young offenders. One study by Steffensmeier and others on the impact of age, race, and gender in sentencing found that adults aged less than 20 years old and offenders aged over 50 years received the most lenient sentences, with offenders in their 30s receiving peak sentences. The researchers posited that the more lenient treatment for older offenders was due to the judge’s perception that they were less dangerous to the community and would be more expensive to incarcerate given their health care needs. Gender also appeared to interact with age, with the largest differences in sentences between older and younger male offenders, and negligible age effects across female offenders.

Beyond these empirical studies, only a small number of U.S. scholars have asked the normative question of whether older offenders should be treated differently by the courts in sentencing. An early article by Professor Fred Cohen on the topic suggests that there are four potential ways to approach the sentencing of older offenders. First, is that older offenders

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116 For example, in State v. Coppens, 1990 Wisc. App. Lexis 641 at para. 3 a Wisconsin appeal court found that “the worsening of a degenerative condition in a defendant who was old and in bad health at the time of sentencing does not constitute a factor justifying the reduction of a sentence.” Other cases have accepted that age can operate to mitigate a sentence, where an aged person is infirm (State v. Waldrip, 533 P. 2d 1151 (Ariz, 1975)).
117 Fairchild James, supra note 105 at 1035.
120 Ulmer and Kramer, supra note 119 at 786 - 787.
121 Ibid. at 786.
should be punished more severely than younger adults because they “should have known better”. In her article, Molly Fairchild James makes both retributivist and utilitarian arguments in favour of this approach. From a retributivist standpoint, the increased moral culpability (based on the positive stereotype that older adults are ‘wiser’) should result in harsher penalties. From a utilitarian standpoint (based on the negative stereotype that older adults’ capacity diminishes with age) older adults would need a longer punishment in order to protect society because they would be more difficult to rehabilitate.

A second approach is that older adults should be punished less severely than younger adults. Falling under this category would be the practice of reducing sentences for older adults based on the offender’s remaining life span. Because statistically older adults have a shorter period of time left to live, penal sentences should be reduced to reflect the proportion of the remaining life that is appropriate given the underlying offence. This approach is preferred by Fairchild James, who suggests that statutes should include provisions permitting shorter sentences for those offenders who are old enough to be “cognizant of their closeness to death”.

A third approach, canvassed by Fred Cohen, is that older adults should not be punished at all. While admittedly dubious in the contemporary context, Cohen explores this possibility based on practices in China’s Ch’ing dynasty in the early 1900’s that provided that adults aged 70 and were privy to decreased responsibility under the law.

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123 Ibid. at 11.
124 Fairchild James, supra note 105 at 1039.
125 Cohen, supra note 122 at 13.
126 Fairchild James supra note 105 at 1044.
127 Cohen, supra note 122 at 14.
128 Ibid.
Fourth is an age neutral approach to the law.\textsuperscript{129} Preferred by Professor Cohen in his article, under this approach age as a factor to be considered in sentencing in and of itself is rejected, however functional impairments associated with age may be considered in mitigation of a sentence.\textsuperscript{130}

Despite the different legislative framework, the consensus in both Canada and the U.S. commentary that older age is a factor that, in some circumstances, should allow for a more lenient penal sentence. The circumstances that were mentioned in both jurisdictions are where the sentence would have a disproportionately harsh impact on an offender in light of the remaining life expectancy and where an offender currently suffers from an illness or debilitating disease.

2.5 Chapter 2 summary

In Canada, the issue of if, how, when, and in what way old age impacts sentencing is unsettled. The Code's statutory guidelines provide that the circumstances of the offender must be taken into account, but apart from this general direction, no specific guidelines on the effect of advanced age in sentencing practices exists. Judges are provided with a wide breadth of discretion in order to ensure that a sentence fits the circumstances of the particular offender and the offence.

At common law, whether age is a factor that commands a more lenient sentence is up for debate. Most of the secondary sources on the topic of sentencing do not address whether old age is a mitigating factor.\textsuperscript{131} However, commentary and case law that do address the issue provide several justifications for advanced age to operate as a mitigating factor: (1) because a sentence

\textsuperscript{129} Ibid. at 25.
\textsuperscript{130} Ibid. at 15.
\textsuperscript{131} For example, Renaud, supra note 44; Manson, supra note 44; and Clewey, supra note 44.
would disproportionately impact an offender considering the remaining lifespan of that offender; (2) because older offenders have associated health issues; or that (3) old age can be a mitigating factor where it is accompanied by evidence of good character, but it will not be a mitigating factor if an accused is found guilty of a lengthy period of wrongdoing or of a violent or serious crime.

In the United States, the case law and commentary on the issue is somewhat more settled than in Canada. Whether old age operates as a mitigating factor has been fleshed out in government policy, state law, and commentary that has studied the impact of advanced age on sentencing practices. While the common law suggests that old age will rarely operate to reduce a sentence, empirical studies in the area suggest that older adults are generally given more lenient prison terms than younger adults. Commentary suggests that old age should be a mitigating factor in some circumstances, such as when it is the cause of physical or mental impairments that led to the commission of the crime or where the offender’s remaining lifespan would make the impact of a sentence disproportionately harsh for an older offender. Before guidelines like those in the U.S. can be established in Canada, there needs to be a deeper understanding of how this phenomenon operates in the Canadian context.

The scarcity of Canadian authorities on the topic points to the need for more informed discussion and understanding of the impact older age has in sentencing practices. On the basis of the literature review conducted in this chapter, I believe that old age is a mitigating factor in sentencing. Furthermore, if the justifications for the lenient treatment provided by the commentary and the cases that it relies upon prove to be representative of the practices of judges, the reasons for mitigating a sentence or refusing to do so will likely not be ageist. In the chapters that follow, I will investigate this hypothesis by looking at general trends in sentencing practices
as well as by conducting a legal analysis of case law where the issue has been judicially
considered.
3 Research Methodology

3.1 Introduction

In the previous chapter I reviewed the legislative framework as well as academic commentary on the sentencing of older adults. While most of the secondary sources are silent on whether advanced age is a factor to be considered in sentencing, those that do mention old age suggest that it is a mitigating factor in sentencing. On the basis of this commentary, my hypothesis was that old age is a mitigating factor in sentencing.

To investigate this hypothesis, I reviewed case law involving older offenders through two methodological lenses. First, I conducted a straightforward quantitative analysis of the length of sentences of older adults. The aim of the quantitative portion of this research was to investigate the research question: Does the chronological age of an offender have an impact on the penal sentence handed down for a criminal offence? To see if the penal sentences handed down to older adults were shorter than those handed down to younger adults (those aged younger than 60 years) the duration of sentences between the two groups were compared in four different categories of offences (sexual offences against children, theft/fraud, drug related offences, and driving offences).

Second, I undertook a qualitative analysis of the texts of Canadian sentencing judgments to examine the research questions, “why?” “when?” and “in what way?” advanced age may operate to influence penal terms handed down to older offenders. This textual analysis explains trends that became apparent from the quantitative analysis and highlights themes that emerged once the content of the decisions were examined. Furthermore, the themes that emerged from the textual analysis were submitted to an age based test to see if the judicial practices were ageist. The combination of research methodologies addressed the potential shortfalls of proceeding

132 Renaud, supra note 44; Manson, supra note 44; and Clewey, supra note 44.
133 For example, Nadin-Davis and Sproule, supra note 45.
exclusively with either a quantitative or a qualitative approach.

This chapter describes these research methodologies in detail. First, I describe my research design. I then describe how I gathered the data for this study and my data collection process, first for the qualitative study and then for the quantitative study. Finally, I describe the statistical test that was used to analyze the data in the quantitative analysis.

3.2 Research design

Sentencing is a highly discretionary exercise. A sentence depends on a number of factors including: whether an offender pleaded guilty, the circumstances surrounding the commission of the offence, the gravity of the offence, evidence of good character, psychological profile, victim impact statements, expressions of remorse, existing criminal record, the prevalence of a particular type of the offence in the community (i.e. if breaking and entering is on the rise, a stiffer penalty may be warranted), eligibility for parole, and the underlying philosophy subscribed to by the sentencing judge.\(^{134}\) The presence, absence, or weight to be given to any one of these factors impacts a sentence and may cause a sentence to be reduced or lengthened. In the present study, relying on existing sentencing decisions makes it virtually impossible to measure or control for all of these factors and establish with certainty that advanced age alone caused a reduction in a sentence.\(^ {135}\) Accordingly, the objective of the present research is to investigate whether there is a correlation between advanced age and the duration of a prison sentence. Once this relationship has been investigated quantitatively, a textual analysis will help explain trends and explore when, why, how, and in what way age may impact the exercise of

\(^{134}\) Fiske, *supra* note 88 at 297.

\(^{135}\) Wing Hong Chui, “Quantitative Research Design” in Mike McConville and Wing Hong Chui Eds., *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) at 50 cites Thomas Cook and David Campbell, *Quasi-experimentation: Design and Analysis Issues for Field Settings* (Boston: Houghton Mifflin, 1979) for the proposition that in order to establish causation one must be able to show that (1) the cause (the independent variable) precedes the effect (the dependent variable) in time; (2) there is an empirical association between the two variables; and (3) there is no plausible alternative or explanation on the covariation of the independent and dependent variables. Using real life sentencing decisions, I could not establish that there is no plausible alternative or explanation for the covariation between age and the duration of a penal sentence.
judicial discretion in sentencing and if these practices are ageist.

In this study, the relationship between advanced age and penal sentences is first investigated using a quantitative analysis applying simple coding rules. In order to explore whether penal sentences were reduced for older adults, the sentences handed down to older adults are compared to those handed down to younger adults (those aged younger than 60 years) for four different classes of offences (sexual offences, drug related offences, driving offences, and theft or fraud). Comparing the average prison sentence handed down for each group identifies whether older adults were incarcerated for shorter periods of time than younger adults found guilty of the same type of crime. This quantitative analysis uncovers general trends in sentencing practices over 30 years, through all the provinces of Canada. Given the degree of variability in sentencing decisions, this stage of my research allows me to make generalizations over a large population of data to explore if there is a relationship between age and the length of a prison sentence.

The results of the quantitative study, which will be reported in Chapter 4, will form the jumping off point for the analysis of the texts of sentencing judgments contained in Chapter 5 of this thesis. To facilitate the interpretation of the quantitative results and investigate when, why, and in what way age may have an impact on sentencing decisions, I examine the judicial reasoning that may have justified a departure from standard practices. These judicial practices are then submitted to an age based test to see if they are ageist.

In the paragraphs that follow, I describe how I collected my data. I then present the information that was collected from the judgments that allowed me to investigate if age is a mitigating factor in sentencing, first, for the qualitative study and then for the quantitative portion of my research.

136 The coding manual is contained in Appendix 1.
137 While all the provinces of Canada were included in the search, the search was conducted in English which will exclude case law from Quebec and New Brunswick which was written in French only.
3.2.1 Data source

The texts that I analyzed were written judgments available on the commercial database, QuickLaw. Using a commercial database like QuickLaw is an essential methodology for analyzing trends in judicial interpretation. While QuickLaw does not include all judicial decisions, it is an appropriate research tool as Susan McDonald and Andrea Wobick explain:138

The decisions provided on QuickLaw do not equal total decisions in Canada... These decisions, however, are those that are reported and because they are available through the QuickLaw database, they become precedents for future case law. Lawyers and judges would look to the decisions reported on QuickLaw for their precedents and would rarely have other information on cases available to them.

Decisions that are reported on QuickLaw are the ones that are chosen as precedents for future judicial decisions and will influence the evolution of the common law. Judges will look to other case law as precedent to determine what is appropriate for a given offender, and they will turn to QuickLaw to find those cases.

While a more thorough collection practice could be to combine a QuickLaw search with a records search of each courthouse for unreported decisions, this practice would be time consuming, expensive, and beyond the scope of the current research. Furthermore, even this data collection practice would be incomplete as it would omit cases that were not recorded. Using QuickLaw as the source of my case law in the present study allowed me to conduct a search of cases spanning decades in an accessible, fast, and relatively low cost manner.

Despite these advantages, one weakness of relying on decisions reported on QuickLaw is that reported decisions may not constitute an accurate sampling of the range of situations where a sentencing decision was made because they are more likely to be written down or recorded where a judge finds an issue to be in the public interest.139 Susan MacDonald and Andrea

Wobick explain, “Decisions are usually provided orally. Unless a particular request is made, oral reasons are not usually transcribed or published.”\textsuperscript{140} Those cases that were not transcribed and sent to QuickLaw will not be included in the sample for this study. The risk is that my sample may fail to take into account a potentially large number of cases that represent routine dispositions and may represent only a portion of sentencing practices for older adults.

The implication of this limitation on my research is that it limits the range and the nature of the information that is gathered. The nature of my data is limited to those sentencing situations that a trial judge, or other decision maker, has deemed significant enough to record and publish. The consequence is that my research will study only those offences that were egregious enough to pursue and important enough to record.

3.2.2 Selection process

As described in section 3.1 of this chapter, my research design involves two strategies - a quantitative as well as a qualitative portion. The data selection process was substantially the same for both aspects of the study, with only three notable differences: 1) the quantitative study collected data relating to younger offenders, as well as older offenders, while the qualitative study was limited to cases that only involved older offenders; 2) the quantitative study limited the level of court to trial level courts whereas the qualitative study included judgments from all levels of court; and 3) the quantitative sample excluded cases that involved offences outside of the stipulated categories (sexual offences, drug related offences, driving offences, and theft/fraud) whereas the qualitative study did not limit the types of offences involved in the decisions that were analyzed. Because there is significant overlap with the additional limitations placed on the data for the quantitative study, to avoid duplication I will first explain the data selection process for the qualitative research. I will then explain the selection process for the

\textsuperscript{140} McDonald and Wobick, \textit{supra} note 138 at 15.
quantitative study, and the implications of these choices for my research results.

### 3.2.3 Data selection: qualitative study

#### 3.2.3.1 Age 60 as “old age”

For both the qualitative and the quantitative aspects of this research, I was interested in sentencing decisions that involved older adults. Secondary sources suggest that the range for when old age starts is somewhere between the ages of 50 and 65. At the early end of the spectrum are those who consider old age to begin at age 50, including Erdman Palmore, a gerontologist who specializes in the field of ageism, who believes that age 50 is when society perceives older adults to be a deviation from the young norm, and begins to treat individuals of this age differently.\(^{141}\) Correctional Services Canada (CSC) also considers 'older offenders' to be those aged 50 and older.\(^{142}\) In his article, “Sentencing Older Adults: A Thematic Review of the Principles”, Gilles Renaud suggests that courts have begun to consider old age to begin as early as 55, with Courts in the U.K. starting 'old age' at age 60.\(^{143}\) Mainstream society considers “older” to begin at about 60 or 65, because this is the age of retirement from the workforce, when the effects of aging become more apparent, and because it represents the age for eligibility for national income security programs.\(^{144}\) For the purposes of this research, I set old age at the midpoint of ages suggested in the literature reviewed above, age 60.

#### 3.2.3.2 Jurisdiction

Because I was interested in sentencing decisions, I limited the case law relied on to

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141 Palmore, supra note 16.
143 Renaud supra note 68 at paras. 23 – 24.
decisions that involved criminal law and penal sentences. All of the provinces and territories of Canada were included in my search. However, given my search was conducted only in English, I will miss decisions that were written in French. This means that Quebec and New Brunswick will be under-represented in the data sample.

3.2.3.3 Time limits

I set a thirty year time limit on the collection of case law. Such a long time frame was required because sentencing decisions involving older offenders are relatively rare. Accordingly, it took a long period of time to accumulate enough cases involving older adults from which to draw generalizations.

By tracking decisions available on QuickLaw between January 1, 1981 until February 28, 2011, I traced developments in sentencing practices for fifteen years before and after the sentencing provisions of the Code came into force in 1996. I chose this time period so that there was an equal number of years where the common law principles of sentencing alone were being applied by judges and number of years where the principles of sentencing were, in part, codified in sections 718 – 718.2 of the Code. Though the Code provides general guidelines, the common law remains important as it provides precedent for sentences imposed for “similar offenders for similar offences committed in similar circumstances”.145

This time limit did not result in an equal number of cases included in the sample from before and after the codification of the sentencing provisions. In fact, there was a greater number of sentencing decisions available from the most recent 15 years, likely because QuickLaw only started including unreported decisions in the mid-1990s.146 Before then, QuickLaw only contained reported decisions, which were decisions the publisher of the report regarded to be of

145 Code supra note 46, s. 718.2 (b).
146 For the qualitative study, less than 100 of the 498 decisions dated prior to 1996. For the quantitative study, 458 of the 590 decisions were reported in 1996 or more recently.
some significance. Accordingly, there is an under-representation of cases from the 1980s in the data sample.

For the quantitative analysis (which used the cases from the qualitative analysis, with additional limitations described immediately below in section 3.2.4 of this chapter), the larger the sample of sentencing decisions, the more the distribution of length of sentences and other extraneous factors in that group approached the ‘idealized' random sample.\textsuperscript{147} While a large sample size is not required in simple research with strict controls,\textsuperscript{148} a large sample size is especially crucial in sentencing decisions because it increases the even distribution of factors other from age that are taken into account in any given judgment. This increases the probability that differences in the two groups can be attributed to age and not competing factors.\textsuperscript{149} For example, if a sample were to include ten sentencing decisions, where nine of them involved sentences of one or two months and one of them involved a declaration that an accused was a dangerous offender (which is recorded as a sentence of 300 months)\textsuperscript{150} this would have a larger impact on the average counts and length of sentence than if a dangerous offender was one of 100 cases included in a sample. Given the complexities of sentencing and the variation of the factors that judges take into account, it was important to collect as many cases as possible so that the distribution of these extraneous circumstances across the data could be as normal as possible.

While the advantage of collecting judgments over such a long time frame is that it allows for the even distribution of extraneous factors, the disadvantage is that cases that are outdated are included in the data sample. With the common law in a constant state of development, whether

\begin{footnotesize}
\begin{enumerate}
\item[147] Joseph McGrath, “Methodology Matters: Doing Research in the Behavioural and Social Sciences” in Ronald Baeker et al. Eds., \textit{Readings in Human-Computer Interaction: Toward the Year 2000}, 2\textsuperscript{nd} Ed. (San Francisco: Morgan Kaufman Publishers Inc., 1995) at 162 states: “The larger the number of things to be allocated by some random procedure, the more the distribution of those cases will approach the idealized random distribution.”
\item[149] McGrath, \textit{supra} note 147 at 163.
\item[150] Dangerous offenders are sentenced to serve an indeterminate term in a penitentiary. 300 months is the number that I selected to represent an indeterminate penal term because 25 years is the minimum non parole period for first degree murder, the most serious crime in the \textit{Code}.
\end{enumerate}
\end{footnotesize}
sentencing principles developed thirty years ago and inferences drawn on these cases will remain relevant in the present day is questionable. Nonetheless, older cases warrant consideration here because they provide the precedent that sentencing judges may rely on when trying to find “similar offenders for similar offences committed in similar circumstances.”

3.2.3.4 Computerized search

I conducted a Boolean search on QuickLaw using the terms “6* year* old” & sentence, and included a time limit of cases since 1/1/1981 to 2/28/2011, and all jurisdictions. The “*” is a wildcard function in QuickLaw, which means that placing this behind the six would catch any judgments where six was used before another number, or alone. The use of the number six automatically includes where this number is included in numerical form or where a number is spelled out (i.e. sixty or 60 would both be included). This search yielded all of the reported decisions that included the phrase “sixty-[any number] year old” and “sentence” in the judgment, which I believed would effectively catch most of the sentencing judgments that mentioned the age of an offender. This search was repeated for seventy year old offenders (by using “7* year* old & sentence”), eighty year old offenders (by using “8* year* old & sentence”), and ninety year old offenders (“9* year* old & sentence”).

While I believe this search could catch the large majority of cases, I will miss judgments where the age of an offender was not mentioned in the judgment or where different phraseology was used by the sentencing judge (i.e. “The Accused, aged 62 years, committed the offence...”).

3.2.3.5 Summary of data: qualitative study

There were no further limitations placed on the selection of cases for the qualitative

\[151\] Code supra note 46, s.718.2(b).
\[152\] A full coding manual is included in Appendix 1.
study. I was interested in judgments involving all types of criminal offences from all levels of courts. The data used in the qualitative analysis was comprised of 362 trial level decisions plus 136 cases that had been delivered by appeal courts, for a total data pool of 498 cases. Of the 498 cases, 212 explicitly considered the advanced age of the offender in the written judgment. Those 212 included cases where old age was just listed along with other mitigating factors, without including any elaboration on the topic that was useful for the legal analysis. For the purposes of the textual analysis, only those cases where the court explicitly discussed the issue of advanced age were included.

### 3.2.4 Data selection: quantitative study

For the quantitative study, I sought to compare the sentencing practices relating to older adults (those aged over 60) to younger adults (aged less than 60 years old). This chronological division was based on the research, discussed earlier in section 3.2.3.1 of this chapter, which suggests that old age begins at the age of 60 years old. These two groups were further subdivided according to predetermined categories of crime. Time limits and limits as to the level of court were placed on the selection of case law for this part of my research.

A downfall of assigning cases to pre-determined categories during the selection process is that, in manipulating the data in the selection process on the basis of age, I compromised the ability to establish causality in these research findings. The results of this study will not establish that age causes a sentence to be reduced; they will only be able to suggest if there is co-variation between these variables of age and the duration of a sentence.

The cases for older adults were collected using the process outlined in section 3.2.3 of this chapter, however there were additional limitations placed on the sample for the quantitative study, which I will describe immediately below. Once I had the case law involving older adults

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153 McGrath, *supra* note 147 at 167.
and knew how many cases I had for each type of crime, I collected the case law for the younger adult group using customized search strategy depending on the type of crime (described in full in Appendix 1). This was to ensure that I collected an equal number of cases involving younger adults as I had cases involving older adults for each type of crime.

3.2.4.1 Categories of offences

For the quantitative study, I compared older adults and younger adults who had committed similar crimes. I chose to group offences into categories for the purpose of making sentencing comparisons because there are hundreds of offences in the Code and a direct comparison on an offence by offence basis would likely result in individual sample sizes that were too small to illuminate general trends.

The categories of offences that were compared are: (1) sexual offences; (2) drug related offences; (3) driving offences; and (4) theft or fraud. “Sexual Offences” are offences that have a sexual basis and include inappropriate touching, possession, distribution, or making child pornography, incest and the other offences found in Part V of the Code in sections 150 – 182 as well as sexual assault, which is found in sections 266 – 269 of the Code. The category “Drug Related Offences” includes contraventions of sections 4 – 7 of the Controlled Drugs and Substances Act. The “Driving Offences” category includes sentencing decisions where an offender contravened sections 249 – 250 of the Code. And finally, the category “Theft or Fraud” includes cases where the offender contravened the offences found in part IX of the Code, sections 321- 380. Cases where an offender had been charged with crimes that did not fall within these categories were classified as “other” and no comparison was made between older and younger adults because the offences within this category were too diverse, the sample for each offence would have been too small to allow for reliable results to be obtained.

154 Controlled Drugs and Substances Act, R.S.C. 1996, c. 19, s. 4 – 7.
These categories were chosen because they were cited as the most common offences that resulted in the incarceration of older adults reported in a 1997 CSC report on older offenders. While this approach is not as comprehensive as a comparison of all crimes, it allows for ease in interpreting the findings. Furthermore, often offenders are charged with more than one particular crime and grouping offences into categories allowed me to capture where offenders committed different, but similar offences. The limitation is that by restricting my sample to these four categories of crimes, it limited the applicability of my results to those subsets instead of all crimes.

While many of the cases involved multiple offences, I assigned each to one of the four identified categories, relying on the concept of a “primary offence”. The primary offence is defined as the type of offence where the offender was found guilty of the greatest number of counts. Only cases where the primary offence was a sexual offence, drug related offence, theft/fraud, or driving offence were included in the sample for the quantitative study.

The implication of tracking only the primary offence for each case is that it provided limited insight into multiple-offence cases because the non-principal offences were not recorded in the database, although their associated sentences were included. This inevitably led to bias in my sample by overstating sentences attached to primary offences. For example, a case involving two counts of sexual assault and one count of armed robbery would be coded as a sexual assault case, even though the sentence that was associated with the armed robbery might have been longer.

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155 Uzoaba, supra note 142 at 18. Homicide was not included in this study because of the mandatory life sentences awarded for this crime, there is little judicial discretion to investigate.

156 The coding manual provided for offenders having an equal number of counts between types of offence, but this only occurred once, and this case was excluded from the sample.

157 Note an alternative way to have coded for the primary offence is to define the primary offence as the offence with the highest sentence, as was done by M.K. Dhani and K.A. Souza, “Sentencing and its Outcomes Project: Part One Pilot Study Report” (London: Ministry of Justice, 2009) online: <http://www.sentencing-guidelines.gov.uk/docs/pilot_report_update.pdf>.

158 Cases where there were equal counts or where ‘other’ was the primary offence were excluded from the sample.

have been greater than the sentence for the two sexual assaults.

Originally, 206 cases involving older offenders were classified as sexual offences. This was subsequently reduced to 200 as I chose to exclude the six cases that did not involve sexual offences against a child. As indicated in Chapter 2, the Code provides that it is an aggravating factor when an offence involves a victim who is less than 18 years of age. Because the overwhelming majority of the sexual cases with older offenders involved children, I controlled for this aggravating circumstance by excluding those cases that did not involve a child and by comparing this sample with sexual offences for younger adults that involved a child victim.

3.2.4.2 Level of court

For the quantitative study, I limited the courts and tribunals that were involved in my search to provincial courts of first instance (Provincial Court and provincial Superior Courts).

This limitation was imposed in the quantitative study - but not the qualitative study – to avoid the duplication of sentencing decisions relating to the same offender for the same crime. As well, appeals could be reversed on a number of grounds that did not have anything to do with the trial judge’s sentence or the advanced age of an offender. These concerns with duplication and reversal were not relevant to the qualitative analysis because textual analysis is not compromised by duplication. Having more cases that spoke to the impact of old age on sentencing was desirable in the qualitative study because it allowed for the collection of a greater number of judicial pronouncements on the topic, including ones from Appeal Courts which are considered to be more authoritative.

3.2.4.3 Summary of data: quantitative study

With these limitations in place, the sample for the quantitative study included 295 sentencing decisions for each age group (590 total), broken down as follows: 200 sentencing

\[160\] Code, supra note 46, s. 718.2.
decisions for each age group in the sexual offence category; 22 sentencing decisions for each age group relating to drug related crimes; 51 cases for each age group for theft or fraud; and 22 cases for each age group where individuals were sentenced for driving related offences. Excluded from the analyzed data were 67 sentencing decisions that fell into the 'other' category, involving a range of offences from operating a hunting lodge without a licence to armed robbery.

3.3 Information tracked in judgments

Because of the inherent limitations of the data relied on and the variability in the factors and weight to be attributed to them in any sentencing decision, I was limited in the range of variables I was able to record in the quantitative study. I tracked the following variables in the judgments: (1) level of court; (2) type of offence; (3) age of offender; (4) gender of offender; (5) whether the judge explicitly comments on the effect of age as a mitigating factor; (6) duration of penal sentence; (7) whether the offender was Aboriginal; and (8) whether the judge explicitly comments on the health of the accused. I kept track of only those factors that were capable of being gathered from a written judgment, so latent information that potentially had a significant impact on a sentencing decision was not accounted for. For example, I could not record the community sentiment surrounding the seriousness of the offence or the impact of a particular witness statement on a decision. This limits my results because, arguably, these factors could have a more significant impact on any given sentence than the factors that I did record.

161 The size of the sample reflects all of the cases involving older adults that I was able to gather using the search strategies described in this chapter and Appendix 1. The cases involving older adults were matched with an equal number of cases that were randomly selected involving younger adults. Excluded from the sample were 67 cases that fell within the ‘other’ category; as well as 6 cases in the sexual offence category that did not involve the sexual abuse of a child. These cases were not matched with cases for younger adults or included in this analysis.

162 Lee Epstein and Andrew Martin, “Coding Variables” in Kimberley Kempf-Leonard, Ed., Handbook of Social Measurement (Maryland Heights, MO: Academic Press, 2005) online: <http://epstein.law.northwestern.edu/research/codingvariables.pdf> at 3 suggest that any more than 10 percent of your data falling into the ‘other’ category indicates that the categories should be reconsidered, in the current study these cases were excluded from the sample.

163 A. Blumstein et al. Eds. “Determinants of Sentences” in Research on Sentencing: The Search for Reform (Washington D.C.: National Academy Press, 1983) at 69 – 125 suggest that the seriousness of the offence and the prior record of the accused are the most important factors that are considered in sentencing, however this source
In the paragraphs that follow, I identify the specific choices I made in each of these respects, as well as the limitations of these choices on the generalizability of my findings. These factors were chosen because they were directly relevant to the phenomenon being studied (the duration of the sentence and where the judge explicitly states that age operated as a mitigating factor) and they were factors that emerged from s. 718.2 of the Code and relevant case law as being important in determining if age is a mitigating factor in sentencing.  

3.3.1 Sentence

The duration of the prison sentence was chosen as a means of measuring whether age was a mitigating factor in sentencing because it is quantifiable and allows for inferences to be drawn about the impact of advanced age on a sentencing decision. Sentences for each offender were recorded as the total penitentiary term in months. This approach uncovers trends in the award of prison sentences and the duration of those sentences, but it does not provide any information about the types of sentences being handed down. For instance, in cases where multiple counts are being sentenced to the same offender, recording the total penal term takes into account consecutive sentences, but fails to take into account the sentences that have been ordered concurrently. Another limitation to recording the data in this way is that it does not distinguish between the types of sentences that do not involve a prison term, as fines, suspended sentences, conditional sentences, and house arrest are all recorded in the same manner (as serving 0 months of prison time), limiting the scope of my results accordingly.

3.3.2 Mitigation

If a judge explicitly mentioned the impact of age on sentencing, it was recorded. The advantage of including only explicit statements about age as a mitigating factor is that it leaves...

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164 The effect of aboriginal status is relevant after 1996 when section 718.2(e) of the Code came into force and is particularly important after the leading case law on conditional sentencing for aboriginal offenders, R. v. Gladue, [1999] 1 S.C.R. 688 [Gladue] was decided.
less room for interpretation on the part of a researcher, increasing reliability. The disadvantage is that it results in an under representation of the phenomenon in the data because in many circumstances, the impact of age is implied. For example, it was common that a sentencing decision would mention the age of an accused along with other characteristics that are generally considered to mitigate a sentence (for instance, evidence of good character or a steady record of employment). These cases would not be coded as age operating as a mitigating factor because the judge did not explicitly say it was a mitigating factor. In practice, age may operate as a mitigating factor in sentencing much more than is revealed in the quantitative part of this study.

3.3.3 Other personal characteristics of the accused

Apart from an accused's age, I recorded the state of the health of the accused, whether or not an accused was Aboriginal, and the gender of an accused. I recorded the health of the accused because the secondary sources and case law I reviewed suggested that age was much more likely to be a mitigating factor when combined with illness. Because of the common co-occurrence of illness and advanced age, in order to isolate age as a mitigating factor - as distinguished from ill health – it was necessary to keep track of cases where the health of the accused was explicitly mentioned in the judgment. I recorded the gender of the offenders in the cases for the purpose of determining if gender could have had an impact on my results.

Finally, the aboriginal status of the accused was recorded because subsection 718.2(e) of the Code provides that: “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” Recording the representation of aboriginal offenders in the sample allowed for the application of subsection 718.2(e) to be taken into account when analyzing the results.

165 Code, supra note 46, s. 718.2(e).
3.3.4 Statistical test

Once the data were collected I had a basic t-test performed to see if the differences between the duration of the sentences between older adults and younger adults were statistically different from each other. Whether the means between the two groups are statistically different depends on the amount of variability in the underlying sample. The t-test is a ratio, wherein the difference between the means of the two groups being compared (i.e. older adults and younger adults) is divided by the variability in the underlying data. The resulting number is known as a “p-value”. For the purpose of this research, the risk level is set at 0.05, which means that I accepted a 5% risk of falsely concluding that there was a relationship in the data when one did not exist. The p-value must be lower than 0.05 for me to have concluded that there was a significant difference between the two groups being compared. If the p-value was higher than 0.05, then the difference between the two means being compared was not statistically significant for the purposes of this study.

3.4 Chapter 3 summary

As Joseph McGrath states: “All methods have inherent flaws, though each has certain potential advantages.” This research employs two research methodologies in order to uncover judicial practices relating to the sentencing of older offenders. The quantitative part of this research tells us about whether old age operates to reduce the duration of a sentence, but it does not tell us about the content of the judgments or underlying judicial reasoning. This information is provided by the qualitative analysis of the texts of the judgments, which makes up the second portion of this study. Despite this advantage, the textual analysis has the inherent flaw of being unable to illustrate judicial trends on a wide scale the way the quantitative analysis does. Using

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166 All of the t-tests and box plot graphing in this study were conducted by Hong Yang Zhang, a graduate student at the UBC Department of Statistics.


168 McGrath, supra note 153 at 154.
both methodologies together provides a more complete picture of not only what is going on with
the sentencing of older adults, but how and why certain practices may have developed. The
following chapter begins this analysis by describing the results of the quantitative study.
4 The Impact of Age on Penal Sentences

4.1 Introduction

In this chapter, I describe the results of the quantitative study that I conducted, comparing the penal sentences handed down to older adults to those handed down to younger adults for four different types of offences (sexual offences, drug related offences, driving offences, and theft or fraud). First, I summarize the composition of the data sample in terms of the type of offence, gender, and aboriginal status, as well as the health of the offenders. Then, I conduct an analysis of the data for each type of offence, summarizing the general trends that emerged from the data for each category of crime.

As described in section 3.3.4 of the previous chapter, in order to determine where differences in the results were significant, I had a standard t-test conducted. A t-test measures whether the differences between the means of two sets of data are significantly different from each other. If there is a lot of variation in the underlying data, differences between two sets of data are unlikely to be significant because there would be a good deal of overlap in the underlying data. To test the significance of differences in this study, I set the risk level to 0.05, that is to say I accepted the risk that five times out of one hundred I would conclude that there was a difference between two groups when in fact none existed. If a t-test ratio (the “p-value”) was lower than 0.05, I concluded that the differences between the two groups were significant, but if the p-value was higher than 0.05, I concluded that any differences between the means of the two groups were not significant.

4.2 Summary of data sample

4.2.1 Offences

In total, the data sample included 295 sentencing decisions for each age group (590 total),
broken down as follows: 200 sentencing decisions for each age group in the sexual offence category; 22 sentencing decisions for each age group relating to drug related crimes; 51 cases for each age group for theft or fraud; and 22 cases for each age group where individuals were sentenced for driving related offences. Excluded from the analyzed data were 67 sentencing decisions that fell into the 'other' category, involving a range of offences from operating a hunting lodge without a licence to armed robbery. As well, six cases were excluded from the analyzed sample because they involved older adults that did not commit sexual crimes against children.169

Older adults were generally convicted of more counts of an offence than younger adults. As Table 1 demonstrates, a greater proportion of older adults were found guilty of more than three counts of an offence than younger adults. In the older adult sample, 64 cases involved offenders charged with five or more counts whereas in the younger adult group only 36 offenders were found guilty of more than 5 counts.

<table>
<thead>
<tr>
<th>Number of Counts</th>
<th>Older Adults</th>
<th>Younger Adults</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>40%</td>
<td>45%</td>
</tr>
<tr>
<td>2</td>
<td>19%</td>
<td>28%</td>
</tr>
<tr>
<td>3</td>
<td>9%</td>
<td>12%</td>
</tr>
<tr>
<td>4</td>
<td>9%</td>
<td>4%</td>
</tr>
<tr>
<td>5 or more</td>
<td>23%</td>
<td>11%</td>
</tr>
</tbody>
</table>

When the t-test was run on the data, there was a statistically significant difference in the number of convictions between older adults and younger adults in the sexual offence category, meaning, in the sexual offence category the difference in the number of counts between the two groups can

169 The cases were first collected for older adults, and then matched with a random sample of cases involving younger adults that had committed the same type of crime. Details about the search strategy and coding are in Appendix 1.
reliably be attributable to age. Table 2 reports the results of the t-test for the number of counts committed by older and younger adults.

Table 2: Average number of counts per offence category

<table>
<thead>
<tr>
<th>Type</th>
<th>T-test p-value</th>
<th>Mean number of counts, older offenders</th>
<th>Mean number of counts, younger offenders</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>0.002328</td>
<td>4.194030</td>
<td>2.752809</td>
<td>Significant</td>
</tr>
<tr>
<td>Drug</td>
<td>0.5142</td>
<td>1.384615</td>
<td>1.590909</td>
<td>Not significant</td>
</tr>
<tr>
<td>Driving</td>
<td>0.9935</td>
<td>6.500000</td>
<td>6.522727</td>
<td>Not significant</td>
</tr>
<tr>
<td>Theft/fraud</td>
<td>0.2054</td>
<td>1.619048</td>
<td>1.210526</td>
<td>Not significant</td>
</tr>
<tr>
<td>Overall171</td>
<td>0.09602</td>
<td>4.133663</td>
<td>3.174905</td>
<td>Not significant</td>
</tr>
</tbody>
</table>

One potential reason these results show that older adults are convicted of more counts than younger adults may be because older adults are apprehended later in life, therefore they have a longer period of time in which to accumulate criminal activity. For example, an older adult whose criminal activity is only discovered after she has been engaging in criminal conduct for twenty years will have had more time to commit criminal acts than a 20 year old that has only been tried as an adult for two years.

Another potential reason older adults in the sample were convicted of more counts than younger adults could be due to prosecutorial discretion. It is possible, though it cannot be confirmed, that prosecutors are less likely to proceed with a trial against an older adult unless the charges are serious. There are serious evidentiary hurdles relating to the prosecution of historical crimes172 and with the collection of evidence from older adults that could deter the Crown from

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170 The threshold for significance was set at $p=>0.05$, meaning that there is a less than 5% chance of concluding that there exists a difference between two groups when one does not exist.

171 Calculating the ‘overall’ difference for significance is problematic because of the unequal sample sizes for the different types of crimes. Crimes where there was a larger sample will weigh more heavily in the overall average, skewing results towards the findings from that category. Nonetheless, this line item is included to provide a general overall picture of the differences between the two groups. This comment applies where the ‘overall’ calculation is included in the t-test results tables throughout this chapter.

moving ahead with minor charges, or encourage settlement in the early stages of prosecution.\textsuperscript{173}

A related factor that was not tracked in this quantitative analysis is the criminal record of the accused. Older adults have a longer period of time in which to commit crimes, and while this analysis has tracked those that may have been charged at the same time, I did not track other convictions that may have occurred during an offender’s lifespan. Past criminal behaviour is a consideration in sentencing decisions, and the presence of an extensive criminal record has implications in sentencing that have not been accounted for in this analysis.\textsuperscript{174}

4.2.2 Gender

The data sampled for both older and younger adults contained a comparable number of women offenders. For both age groups, there were significantly more men than women contained in the sample and the highest proportion of women offenders was in the theft/fraud category of offence. Table 3 sets out the composition of the data sample by gender.

<table>
<thead>
<tr>
<th>Type of offence</th>
<th>Percentage of Women Offenders (old)</th>
<th>Percentage of Women Offenders (young)</th>
<th>Percentage of Men Offenders (old)</th>
<th>Percentage of Men Offenders (young)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual offences</td>
<td>0.5%</td>
<td>2%</td>
<td>99.5%</td>
<td>98%</td>
</tr>
<tr>
<td>Drug offences</td>
<td>0.5%</td>
<td>0</td>
<td>99.5%</td>
<td>100%</td>
</tr>
<tr>
<td>Theft or Fraud</td>
<td>27%</td>
<td>14%</td>
<td>73%</td>
<td>86%</td>
</tr>
<tr>
<td>Driving Offences</td>
<td>14%</td>
<td>0</td>
<td>86%</td>
<td>100%</td>
</tr>
<tr>
<td>Overall % of Data Sample</td>
<td>6%</td>
<td>4%</td>
<td>94%</td>
<td>96%</td>
</tr>
</tbody>
</table>

One potential reason for the increased representation of women in the theft/fraud category of offence could be due to older women being exposed to more financial hardship than men. Women live longer than men in all but a handful of countries and suffer a disproportionate

\textsuperscript{173} For example, \textit{R. v. Khelawon, 2006 SCC 57 [Khelawon].}

\textsuperscript{174} However, this issue is dealt with in the qualitative analysis in Chapter 5 in the discussion of how the accumulation of criminal behavior over a lifetime is one way judges will not consider age to be a mitigating factor.
amount of poverty due to discrimination in the workplace as well as laws and policies that devalue “women’s work”. As a result, women may turn to property crime as a means of supporting themselves.

### 4.2.3 Aboriginal status

Both the older adult and the younger adult groups contained comparable numbers of aboriginal offenders. Only one case involved an aboriginal woman, it was included in the older offender data. Table 4 shows the percentage of aboriginal offenders included in the analyzed data.

**Table 4: Aboriginal status of offenders**

<table>
<thead>
<tr>
<th>Type of offence</th>
<th>Percentage of Aboriginal Offenders (old)</th>
<th>Percentage of Aboriginal Offenders (young)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual offences</td>
<td>4%</td>
<td>6%</td>
</tr>
<tr>
<td>Drug offences</td>
<td>4%</td>
<td>0</td>
</tr>
<tr>
<td>Theft or Fraud</td>
<td>0</td>
<td>2%</td>
</tr>
<tr>
<td>Driving offences</td>
<td>9%</td>
<td>0</td>
</tr>
<tr>
<td>Overall % of data sample</td>
<td>4%</td>
<td>4%</td>
</tr>
</tbody>
</table>

The fact that the older group and the younger group contain a comparable number of aboriginal offenders is significant because subsection 718.2(e) of the Code requires that particular consideration be given to the circumstances of aboriginal offenders when considering whether sanctions other than imprisonment are reasonable. Four of the cases involving older aboriginal offenders and two of the cases involving younger aboriginal offenders were decided before this section came into force in 1996. In all of these cases, the aboriginal offenders were handed

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down sentences that involved incarceration. The use of alternatives to prison for aboriginal offenders increased in the sentencing decisions included in the sample after 718.2(e) was introduced and the case \textit{R. v. Gladue} decision was decided.\textsuperscript{178}

\subsection*{4.2.4 Old age explicitly stated to operate as a mitigating factor}

Judges explicitly stated that old age was a mitigating factor in 108 of the 295 sentencing decisions involving older adults. Table 5 shows where old age has been explicitly mentioned to mitigate a sentence on an offence by offence basis.

\textbf{Table 5: Age as a mitigating factor – older adult sample}

<table>
<thead>
<tr>
<th>Category of Offence</th>
<th>Age explicitly referred to as a mitigating factor</th>
<th>Age explicitly denied to be a mitigating factor</th>
<th>Impact of age on a sentence not mentioned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Offences</td>
<td>36%</td>
<td>9%</td>
<td>55%</td>
</tr>
<tr>
<td>Drug Offences</td>
<td>22%</td>
<td>0%</td>
<td>78%</td>
</tr>
<tr>
<td>Theft or Fraud</td>
<td>41%</td>
<td>2%</td>
<td>57%</td>
</tr>
<tr>
<td>Driving Offences</td>
<td>36%</td>
<td>4%</td>
<td>60%</td>
</tr>
</tbody>
</table>

While this finding suggests that there are many cases where sentencing judges explicitly state that the old age of an offender operated to reduce the sentence, in the majority of cases, the impact of old age on a sentence was not explicitly noted by the judge. Furthermore, in some cases, the judge explicitly found that age did not operate to reduce a sentence.

In contrast to the older adult group, age was not explicitly mentioned in the vast majority of judgments involving individuals aged under 60 years old. In the sexual offence category, age was a mitigating factor in three of the 51 cases, two of which involved adults in their early 20’s and one that involved an individual in his fifties.\textsuperscript{179} Old age was explicitly denied to be a


mitigating factor in only one of the 51 cases, for a man who was aged in his fifties. Table 6 sets out where age was mentioned to mitigate a sentence in the younger offender group.

Table 6: Age as a mitigating factor - younger adult sample

<table>
<thead>
<tr>
<th>Category of Offence</th>
<th>Age explicitly referred to as a mitigating factor</th>
<th>Age explicitly denied to be a mitigating factor</th>
<th>Impact of age on a sentence not mentioned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Offences</td>
<td>1.5%</td>
<td>0.5%</td>
<td>98%</td>
</tr>
<tr>
<td>Drug Offences</td>
<td>0%</td>
<td>0%</td>
<td>100%</td>
</tr>
<tr>
<td>Theft or Fraud</td>
<td>5.8%</td>
<td>0%</td>
<td>94.2%</td>
</tr>
<tr>
<td>Driving Offences</td>
<td>0%</td>
<td>0%</td>
<td>100%</td>
</tr>
</tbody>
</table>

4.2.5 Duration of sentence

4.2.5.1 General

The mean total sentence for older adults was longer than that of younger adults in the sexual offence and driving categories, but was shorter for drug offences and in the theft/fraud category. Table 7 reports the mean duration of sentences, in months, for each category of crime as well as the results of the t-test conducted on the data.

Table 7: Average total duration of sentence

<table>
<thead>
<tr>
<th>Type</th>
<th>T-test p-value</th>
<th>Mean duration of sentence (in months), older offenders</th>
<th>Mean duration of sentence (in months), younger offenders</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>0.2621</td>
<td>32.67662</td>
<td>28.03731</td>
<td>Not significant</td>
</tr>
<tr>
<td>Drug</td>
<td>0.9074</td>
<td>30.68182</td>
<td>32.36364</td>
<td>Not significant</td>
</tr>
<tr>
<td>Driving</td>
<td>0.5616</td>
<td>18.98039</td>
<td>21.84902</td>
<td>Not significant</td>
</tr>
<tr>
<td>Theft/fraud</td>
<td>0.5501</td>
<td>9.000000</td>
<td>7.045455</td>
<td>Not significant</td>
</tr>
<tr>
<td>Overall</td>
<td>0.3983</td>
<td>28.40878</td>
<td>25.73243</td>
<td>Not significant</td>
</tr>
</tbody>
</table>

The longer duration of penal sentences in at least a couple of the offence categories is not surprising given that older adults were found guilty of more counts (on average) in each category.

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of offence. Despite these differences apparent in the raw data, a t-test on age’s impact on the total duration of sentences for each category of offence showed that there is no significant difference between the mean sentences for older adults and younger adults. The lack of a significant difference leads to the conclusion that, statistically, there is no relationship between age and the duration of the sentence. The box plot graph in Figure 1 shows the range of data and the mean sentences for each type of offence. To read the box plot graph in Figure 1, the bottom and top of the box represent the 25th and 75th percentile in the data. The band near the middle of the box is the median (the 50th percentile). The lines emanating from the box (known as ‘whiskers’) represent the minimum and maximum of all the data. The dots located outside of these whiskers are outliers in the data.

**Figure 1: Duration of sentences for older and younger adults**
Figure 1 depicts that, in general, the range of sentences for older adults and younger adults were similar, and that the differences between the mean sentences for each group was so small that any difference could not reliably be attributable to the age of the offender.

4.2.5.2 Types of sentences awarded

Table 8 demonstrates that older adults were awarded non penal sentences more frequently than younger adults. Of the 82 older adults that did not serve penal sentences, 25 suffered from some sort of mental or physical illness. For younger adults, the impact of health on the type of sentence awarded was less dramatic, with only 8 of the 55 non penal sentences handed down to individuals who were described to be of ill health.

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Older Adults</th>
<th>Younger Adults</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Penal Sentence</td>
<td>28%</td>
<td>19%</td>
</tr>
<tr>
<td>12 months or less</td>
<td>20%</td>
<td>26%</td>
</tr>
<tr>
<td>13 – 36 months</td>
<td>30%</td>
<td>34%</td>
</tr>
<tr>
<td>37 – 60 months</td>
<td>12%</td>
<td>13%</td>
</tr>
<tr>
<td>More than 5 years</td>
<td>10%</td>
<td>8%</td>
</tr>
</tbody>
</table>

4.2.5.3 Isolating the impact of old age on the duration of a sentence

To isolate the impact of age on a sentence, independent from health, I controlled for the health of the offender by comparing the number of counts that older adults in good health were convicted of and compared it to the number of counts younger adults in good health were convicted of. The results, reported in Table 9, show that older adults were convicted of more counts of an offence on average, with higher average counts in the sexual offence and driving offence categories, the same number of counts in the theft/fraud category, and lower average counts per offender in the drug offence category. The only significant difference is in the sexual offence category, meaning, that I could only reliably conclude that the difference in the sexual
offence category is related to the age of the offender. Uncovering the differences in the number of counts is an important first step in this analysis because the difference in sentences could be attributable to the number of charges of an offence, rather than age.

Table 9: Comparison of counts committed by older adults and younger adults in good health

<table>
<thead>
<tr>
<th>Type</th>
<th>T-test p-value</th>
<th>Mean # of counts, older offenders in good health</th>
<th>Mean # of counts, younger offenders in good health</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>0.009301</td>
<td>4.159204</td>
<td>2.880597</td>
<td>Significant</td>
</tr>
<tr>
<td>Drug</td>
<td>1</td>
<td>1.590909</td>
<td>1.590909</td>
<td>Not significant</td>
</tr>
<tr>
<td>Driving</td>
<td>0.9214</td>
<td>6.078431</td>
<td>5.862745</td>
<td>Not significant</td>
</tr>
<tr>
<td>Theft/fraud</td>
<td>0.2315</td>
<td>1.636364</td>
<td>1.272727</td>
<td>Not significant</td>
</tr>
<tr>
<td>Overall</td>
<td>0.06866</td>
<td>4.111486</td>
<td>3.179054</td>
<td>Not significant</td>
</tr>
</tbody>
</table>

I then compared the duration of the sentences handed down to older and younger adults who were either said to be in good health or their health was not mentioned in Table 10.

Table 10: Comparison of duration of sentences of older adults and younger adults in good health

<table>
<thead>
<tr>
<th>Type</th>
<th>T-test p-value</th>
<th>Mean duration of sentence in months, old</th>
<th>Mean duration of sentence in months, young</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>0.02232</td>
<td>37.93657</td>
<td>26.82584</td>
<td>Significant</td>
</tr>
<tr>
<td>Drug</td>
<td>0.6498</td>
<td>40.61538</td>
<td>32.36364</td>
<td>Not significant</td>
</tr>
<tr>
<td>Driving</td>
<td>0.2887</td>
<td>16.94118</td>
<td>23.14318</td>
<td>Not significant</td>
</tr>
<tr>
<td>Theft/fraud</td>
<td>0.7868</td>
<td>8.476190</td>
<td>7.526316</td>
<td>Not significant</td>
</tr>
<tr>
<td>Overall</td>
<td>0.09371</td>
<td>31.51238</td>
<td>25.27871</td>
<td>Not significant</td>
</tr>
</tbody>
</table>

The sentences attached to sexual offences and driving offences correlate with the severity of the

\[181\] The sexual offence category has the largest sample size in the underlying data, making this the most reliable offence category from which to draw conclusions.

\[182\] Drawing the comparison between older adults and younger adults in poor health was ineffective because the underlying sample wasn’t heavily populated in several categories: it only contained one case that involved an older adult in poor health (driving offence); one younger adult with poor health (driving offence); and it did not contain any data for younger offenders with poor health (drug offences).
crime, in that older adults in good health served longer sentences, on average, than younger adults in good health at the same time they were found guilty of more charges of an offence than younger offenders.

However the results in the theft/fraud and drug categories do not follow this trend. In the drug category, older adults were sentenced longer prison terms than younger adults, despite being convicted of fewer counts of offences on average. Nonetheless, the differences between the prison terms in this category are not significantly different. Figure 2 illustrates the range of data, as well as the means between the two groups of offenders.

**Figure 2: Duration of sentences for older adults and younger adults in good health**
The results in the theft/fraud category lend support to the hypothesis that old age operates as a mitigating factor in sentencing. In this category, the health of the offender was controlled for (all offenders were in good health), as was the severity of the crime (older adults and younger adults were convicted of the same average number of counts). Nonetheless, there is a difference in the sentence awarded, with older adults serving prison terms that are approximately six months shorter than their younger counterparts. While it is not statistically significant, it does show that there is a differential treatment of older adults, even if it is not a strong one.

4.2.6 Illness

In most of the cases, the state of the accused’s health was not mentioned. Of the 295 cases in the older adult sample, 225 did not mention the health of the offender or indicated that the offender was in good health. For younger adults, the state of the accused’s health was not mentioned or the accused was stated to be in good health in 262 of the 295 cases. Table 11 represents these results as the proportion of the total sample represented:

<table>
<thead>
<tr>
<th>Age</th>
<th>Offender’s health not mentioned</th>
<th>Offender’s illness is a mitigating factor</th>
<th>Offender is in good health</th>
<th>Offender’s illness is not a mitigating factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Older Adults</td>
<td>75%</td>
<td>22%</td>
<td>1%</td>
<td>2%</td>
</tr>
<tr>
<td>Younger Adults</td>
<td>84%</td>
<td>9%</td>
<td>5%</td>
<td>2%</td>
</tr>
</tbody>
</table>

Older adults were mentioned to be in poor health in 70 of the 295 cases, whereas younger adults were explicitly said to be in poor health in only 31 of the 295 cases. Of the 70 older offenders that suffered from some sort of mental or physical illness, 64 had judges who explicitly stated that the illness operated as a mitigating factor. In the remaining six cases, the accused’s illness did not operate as a mitigating factor in the sentencing decision (either because the judge expressly stated that it would not be a mitigating factor or because it was not listed with other
mitigating factors in the judgment). Of the 31 cases where the accused was ill in the younger offender category, ill health did not operate as a mitigating factor in the sentencing decision in 25 of those cases. One possible reason for this result could be that older adults in the sample had more serious illnesses than the younger adults.

To isolate the impact of poor health on a sentence, I controlled for age and compared the average sentences of older adults in good health with the average sentences of older adults in poor health. As Table 12 reports, health had little impact on the severity of the crimes committed by older adults.

Table 12: Comparison of counts convicted for older adults in good health and older adults in poor health

<table>
<thead>
<tr>
<th>Type</th>
<th>T-test p-value</th>
<th>Mean # of counts, good health</th>
<th>Mean # of counts, poor health</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>0.8992</td>
<td>4.194030</td>
<td>4.089552</td>
<td>Not significant</td>
</tr>
<tr>
<td>Drug</td>
<td>0.3371</td>
<td>1.384615</td>
<td>1.888889</td>
<td>Not significant</td>
</tr>
<tr>
<td>Driving</td>
<td>0.7011</td>
<td>6.500000</td>
<td>5.235294</td>
<td>Not significant</td>
</tr>
<tr>
<td>Theft/fraud</td>
<td>0.7748</td>
<td>1.619048</td>
<td>2.000000</td>
<td>Not significant</td>
</tr>
<tr>
<td>Overall</td>
<td>0.9318</td>
<td>4.133663</td>
<td>4.063830</td>
<td>Not significant</td>
</tr>
</tbody>
</table>

Older adults in poor health were convicted of more counts in some categories of crimes (drug offences, driving offences) whereas older adults in good health were found, on average, guilty of more counts for sexual offences and theft/fraud. Overall, the difference between the two groups was less than one count, which is not statistically significant.

Given that older adults in good health were generally charged with the same number of counts as older adults in poor health, one would expect that they would have similar sentences. However, older adults in poor health served shorter total prison sentences overall than older adults in good health.\(^{183}\)

\(^{183}\) There was only one offender in the driving category that was in poor health, which compromises the generalizability of the finding for this type of offence.
Table 13: Comparison of duration of sentences between older adults in good health and older adults in poor health

<table>
<thead>
<tr>
<th>Type</th>
<th>T-test p-value</th>
<th>Mean duration of sentence, older adults in good health</th>
<th>Mean duration of sentence, older adults in poor health</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>0.02622</td>
<td>37.93657</td>
<td>22.15672</td>
<td>Significant</td>
</tr>
<tr>
<td>Drug</td>
<td>0.2364</td>
<td>40.61538</td>
<td>16.33333</td>
<td>Not significant</td>
</tr>
<tr>
<td>Driving</td>
<td>0.3964</td>
<td>16.94118</td>
<td>23.05882</td>
<td>Not significant</td>
</tr>
<tr>
<td>Theft/fraud</td>
<td>0.3958</td>
<td>8.47619</td>
<td>20.00000</td>
<td>Not significant</td>
</tr>
<tr>
<td>Overall</td>
<td>0.06889</td>
<td>31.51238</td>
<td>21.73936</td>
<td>Not significant</td>
</tr>
</tbody>
</table>

When the comparison is made between the categories of offences, the results in the sexual offence and drug offence categories lead to the conclusion that illness operates independently from old age to mitigate a sentence. In the sexual offence category, older adults in poor health were sentenced to significantly shorter prison terms than older adults in good health despite the fact that there was little difference in the average number of counts committed for this type of crime.\(^{184}\) Despite the small difference in severity of the crimes between the two groups, there is a spread of close to 15 months in the sentences handed down between the two groups, with older adults in good health serving average sentences of 37.94 months compared to those in poor health, who serve an average of 22.16 months. This exaggerated reduction of prison time suggests that illness, independent of age, operates to mitigate a sentence.

In the drug offence category, older adults in poor health were convicted of more counts on average but were nonetheless sentenced to total prison terms that were shorter than those for older adults in good health. This result is counter-intuitive since it naturally would follow that more severe crimes are followed by longer sentences, and supports the conclusion that illness operates as a mitigating factor, independently from age.

However, the strength of the proposition that illness operates independently from age to

\(^{184}\) Specifically, older adults in poor health committed on average 4.09 counts of sexual offences and older adults in good health committed only slightly more counts, with an average of 4.19 counts on average.
mitigate a sentence is tempered by the findings in the theft/fraud category, where older adults in poor health served longer prison terms despite committing less counts of this type of offence on average than older adults in good health.

When a t-test was conducted to see if there was a statistically significant difference between the duration of the sentences handed down to older adults in good health and older adults in poor health, the results showed that there was only a statistically significant difference in the sexual category of offence, suggesting that the overall differences in the sentences could be reasonably attributable to the health of the offender.\(^{185}\) Taken together across all offences, these results suggest that poor health can have an impact on the duration of a sentence, independent from age.

4.2.7 Summary of results per category of offence

4.2.7.1 Sexual offences

The sexual offence category presented the largest discrepancies between older offenders and younger offenders. Table 14 outlines the results as well as some of the characteristics of the offenders in the underlying data.

<p>| Table 14: Comparison of older adults and younger adults in sexual offence category |
|---------------------------------------------------------------|----------------|----------------|</p>
<table>
<thead>
<tr>
<th></th>
<th>Older Offenders</th>
<th>Younger Offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average number of counts</td>
<td>4.15</td>
<td>2.72</td>
</tr>
<tr>
<td>Average total penal sentence (in months)</td>
<td>37.16</td>
<td>27.52</td>
</tr>
<tr>
<td>Average age (in years)</td>
<td>63</td>
<td>35</td>
</tr>
<tr>
<td>Gender</td>
<td>0 women</td>
<td>3 women</td>
</tr>
<tr>
<td>Aboriginal</td>
<td>8</td>
<td>11</td>
</tr>
<tr>
<td>Age as a mitigating factor (number of cases explicitly mentioned)</td>
<td>Yes: 73</td>
<td>Yes: 3</td>
</tr>
<tr>
<td></td>
<td>No: 17</td>
<td>No: 0</td>
</tr>
<tr>
<td></td>
<td>Not mentioned: 110</td>
<td>Not mentioned: 197</td>
</tr>
</tbody>
</table>

\(^{185}\) The sexual offence category had more cases in the sample than the rest of the offences put together, making these results more reliable.
On average, older adults were found guilty of more counts of sexual offences than younger adults. Only seven of the 200 younger adults had been found guilty of more than 10 counts, whereas 18 older adults were charged in excess of 10 counts. This discrepancy in the number of counts charged per offender is reflected in the average total penal sentence, which is significantly greater for older adults than younger adults.

Forty of the 200 older adults in the underlying sample for this category served their sentences in the community, whereas only 27 of the younger adults did even though the underlying sample for younger adults contained nearly twice as many aboriginal offenders.\textsuperscript{186}

Another striking trend that emerges from the data on older offenders is the number of cases that explicitly state that age will not operate to mitigate a sentence. In the sexual offence category, in 9\% of the cases the judge explicitly rejects the proposition that age should operate as a mitigating factor (other categories show less than half of this rate of rejection).

\textbf{4.2.7.2 Drug offences}
In contrast to sexual offences, the least amount of difference between older adults and younger adults’ sentences were found for drug related crimes. Older adults and younger adults were, on average, charged with the same number of counts. The samples had similar characteristics (no Aboriginal offenders, only one woman in the older offender group), which makes it easier to draw the comparison that isolates the impact of older age on the sentencing of an adult. When the average total sentences are compared, older adults served sentences that were generally over a month shorter than younger adults as outlined in Table 15.

\textsuperscript{186} This is counter intuitive given the directions provided in section 718.2(e) of the \textit{Code}, \textit{supra} note 46, along with leading case law on conditional sentencing \textit{Gladue, supra} note 164.
Table 15: Comparison of older adults and younger adults in drug offence category

<table>
<thead>
<tr>
<th></th>
<th>Older Offenders</th>
<th>Younger Offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average number of counts</td>
<td>1.59</td>
<td>1.59</td>
</tr>
<tr>
<td>Average total penal sentence (in months)</td>
<td>30.68</td>
<td>32.36</td>
</tr>
<tr>
<td>Average Age (in years)</td>
<td>60</td>
<td>30</td>
</tr>
<tr>
<td>Gender</td>
<td>1 woman</td>
<td>0 women</td>
</tr>
<tr>
<td>Aboriginal</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Age as a mitigating factor (number of cases explicitly mentioned)</td>
<td>Yes: 5</td>
<td>Yes: 0</td>
</tr>
<tr>
<td></td>
<td>No: 0</td>
<td>No: 0</td>
</tr>
<tr>
<td></td>
<td>Not mentioned: 17</td>
<td>Not mentioned: 22</td>
</tr>
</tbody>
</table>

Age was explicitly mentioned to be a mitigating factor in the reasons provided by the sentencing judge in five of the 22 cases where older adults were sentenced for drug related crimes.

4.2.7.3 Theft/fraud

Offences dealing with theft and fraud also resulted in similar characteristics of the offenders and an average total sentence per count charged within a couple of weeks between the two groups. Table 16 compares older offenders and younger offenders in the theft/fraud category.

Table 16: Comparison of older offenders and younger offenders in theft/fraud category of offence

<table>
<thead>
<tr>
<th></th>
<th>Older Offenders</th>
<th>Younger Offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average number of counts</td>
<td>6.08</td>
<td>5.86</td>
</tr>
<tr>
<td>Average total penal sentence (in months)</td>
<td>18.98</td>
<td>21.85</td>
</tr>
<tr>
<td>Average Age (in years)</td>
<td>63</td>
<td>35</td>
</tr>
<tr>
<td>Gender</td>
<td>13 women</td>
<td>7 women</td>
</tr>
<tr>
<td>Aboriginal</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Age as a mitigating factor (number of cases explicitly mentioned)</td>
<td>Yes: 21</td>
<td>Yes: 3</td>
</tr>
<tr>
<td></td>
<td>No: 1</td>
<td>No: 0</td>
</tr>
<tr>
<td></td>
<td>Not mentioned: 28</td>
<td>Not mentioned: 48</td>
</tr>
</tbody>
</table>

What is striking about the results that emerged from the theft/fraud category of offences is the proportion of cases where the judges explicitly stated that the age of the older offender would operate to mitigate the sentence. In 21 of the 51 cases, the judges explicitly stated that old age
was a mitigating factor in sentencing compared to younger offenders, where age operated to reduce the sentence in three of the 51 cases (two of those cases involved individuals in their 20s, one involved an individual in his 50s). The proportion of cases where age was explicitly found to be a mitigating factor in sentencing is higher for theft and fraud than any of the other offence categories.

Another interesting trend that emerged in the data is that theft and fraud were the crimes committed by the greatest proportion of women. This category of offence included more than twice the number of women in the sample than any other offence category. As discussed earlier, a reason for this increase in females committing property offences could be the disproportionate amount of poverty experienced by older women due to discrimination in the workplace as well as laws and policies that devalue “women’s work”.

4.2.7.4 Driving offences

On average, older adults committed more driving offences and were given average total penal sentences that were greater than those handed down to younger adults, as set out in Table 17:

| Table 17: Comparison of older and younger offenders in driving category of offence |
|-----------------------------------|-------------------|-------------------|
|                                   | Older Offenders    | Younger Offenders |
| Average number of counts          | 1.64              | 1.27              |
| Average total penal sentence (in months) | 9                | 7.05              |
| Average Age (in years)            | 63                | 35                |
| Gender                            | 0 women           | 3 women           |
| Aboriginal                        | 2                 | 0                 |
| Age as a mitigating factor (number of cases explicitly mentioned) | Yes: 8 | Yes: 0 |
|                                   | No: 1             | No: 0             |
|                                   | Not mentioned: 13 | Not mentioned: 22 |

In 36% of the driving cases old age was mentioned by the sentencing judge to be a mitigating

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187 Dayton, supra note 36 at 46.
factor in the sentencing decision.

4.3 Chapter 4 summary

Unlike some existing literature in the field, empirically, this study found that older adults did not receive more lenient sentences than younger adults overall. In fact, when the factor of illness is controlled for, for at least one type of crime (sexual offences) older adults actually received longer sentences than younger adults. These findings revoke my hypothesis that older adults serve shorter prison terms than younger adults, and suggest that old age does not have a significant impact on the duration of a sentence.

The results imply that there is something much more complex happening in the exercise of judicial discretion than a simple correlation between age and the duration of a penal term. Some aspects of the quantitative portion of this study point to the inference that old age is a mitigating factor in sentencing while others do not. In support of the conclusion that old age operates to induce leniency, when older adults and younger adults were found guilty of the same average number of counts on the same category of crime (drug related offences), older adults served shorter average prison terms. There is also data that suggests that older adults are more likely to be awarded a non-penal sentence than younger adults, and that this tendency is not tied to illness. Furthermore, in over a third of the cases involving older adults, the sentencing judge explicitly said that old age operated as a mitigating factor in the sentence.

Despite what is being said in Court, there are other findings that suggest that old age is not a mitigating factor in sentencing. Older adults were sentenced to longer prison terms than younger adults for sex offences and driving offences. Further, there is no statistically significant difference between the overall duration of the sentences handed down to older adults and younger adults.

There are certain limitations of conducting this quantitative research that may have impeded
conclusive results for the research question: does the chronological age of an offender have an impact on the penal sentence handed down for a criminal offence? First, in order to ensure reliability, I only counted age to be a mitigating factor where a judge expressly said that age was a mitigating factor. Cases where the impact of old age was implied (i.e. it was listed along with other characteristics that are generally considered to be mitigating factors), or where the judge was silent on the impact of age were included as cases where the impact of age was not mentioned, were not counted in favour of mitigation. This limit was necessary for the purpose of ensuring consistency in my data collection processes, but it resulted in an under-reporting of cases where age operated to reduce a prison term.

A second limitation of this quantitative study is that, despite the efforts here to account for factors that are known to have a significant impact on the duration of a sentence and type of sentence awarded (i.e. the type of offence committed, gender, aboriginal status, and illness), there is clearly more going on in the judicial decision making process that cannot be tracked quantitatively. I could only count those characteristics that were capable of being measured or tracked, but I acknowledge that there are other significant factors (such as the criminal record of the accused or victim impact statements) that play a role in a sentencing decision that have impeded my ability to isolate the factor of age in these results.

A third limitation of this study is that ‘mitigation’ is assumed to be represented by a shorter prison term. For the purposes of this basic quantitative analysis, I assumed that the number of months in prison reflected the severity of a sentence, so that a shorter prison term amounted to a sentence being mitigated. This assumption oversimplifies the notion of mitigation, and fails to take into account factors beyond a prison sentence that reflect leniency by a trial judge such as parole or the type of institution where an offender might serve their sentence.

These three limitations highlight some shortfalls of this quantitative analysis. However,
quantification necessarily involves an over-simplification of the complex judicial decision making involved in sentencing. These inconclusive results highlight the benefits of the qualitative study that I will report on in the next chapter, which looks at the texts of judgments to see how judges explain the exercise of their discretion in sentencing older offenders.
5 Age and Ageism in Sentencing Practices

5.1 Introduction

The general research finding discussed in Chapter 4 suggests that, overall, there is no significant difference in the duration of prison terms handed down to older offenders compared to younger offenders.\(^{188}\) However, the quantitative review also suggests that, in many cases, judges explicitly state that the advanced age of an accused is a mitigating factor in sentencing. In this chapter I explore this apparent conflict between what is being said in Court and what is actually happening when sentences are handed down. Through a textual analysis of the judgments, I will address the research questions: When, why, and in what way does advanced age influence sentencing practices? Are these practices ageist? Unlike Chapter 4, this chapter includes decisions relating to all types of crimes and decisions that were released by Appeal Courts, which might shed further insight on the operation of advanced age in sentencing.

This chapter begins by introducing the age based test that will be applied to the sentencing practices identified throughout this textual analysis. Each of the judicial practices identified in subsequent parts of this chapter will be submitted to the following two part inquiry to determine if they are ageist: First, is there a differential treatment of the offender based on age? If so, then the second part of the inquiry asks: Is the differential treatment based on a stereotype or assumption about older adults as a group? If so, then a judicial practice will be deemed to be ageist.

Next, I explore the question: In what way does advanced age influence sentencing practices? By identifying the different ways ‘mitigation’ manifests itself in sentencing decisions involving older adults, this part suggests that advanced age influences sentencing practices in a

\(^{188}\) In the sexual offence category of crime, the duration of the sentences were longer than those for younger offenders. In this category of offence there was also a significant difference in the number of counts committed by offenders, with older adults committing a significantly greater number of counts than younger adults.
variety of ways ranging from prosecutorial discretion to the types of institutions where an accused might serve his or her sentence.

The third part of this chapter looks at when and why advanced age is a mitigating factor in sentencing decisions and submits the judicial practices that emerge to the age based test to see if they are ageist. There are a variety of reasons why advanced age may induce leniency. Many times, sentencing judges just accept age to be a mitigating factor without further elaboration. In other cases, leniency is deemed to be appropriate in light of the trifling nature of a crime or reduced remaining lifespan of an accused. Submitting these judicial practices to an age based test shows that in most cases, judicial practices are age neutral or result in positive ageism.

The fourth part of this chapter looks at cases where old age did not operate as a mitigating factor in sentencing decisions. There are a variety of circumstances where the personal characteristic of age did not carry any weight, including where there were serious or recently committed crimes, or where an offender had a long history of criminal activity. Submitting the denial of age to be a mitigating factor to the age based test provides some examples of negative ageism in judicial sentencing practices.

The fifth part of this chapter considers the ways that age caused the principles of sentencing to shift. The emphasis or reduced importance of certain principles resulted in sentences that were decreased, or in certain cases, increased on the basis of age.

The sixth part of this chapter considers other personal characteristics that were common in the case law review that suggested leniency. In many cases, the aged offender was also 1) found to be of good character; or 2) a caregiver; or 3) ill. Part four addresses how these characteristics allowed for leniency to factor into a sentencing judgment, and argues that in these circumstances, advanced age indirectly impacts the sentences of these offenders because it allows for the development of or, works in conjunction with, these other personal characteristics.
to justify the more lenient treatment of an offender. When these judicial practices are submitted to the age based test, in some cases there is evidence of positive or negative ageism.

In conclusion, the texts of the judgments suggest that in some circumstances age can act as a mitigating factor in sentencing, but there are limits to when, why, and in what way it operates. In limited circumstances, advanced age actually works against older adults. Submitting each of the reasons why age has an impact on a sentence to an age based test provides examples of positive and negative ageism, as well as age neutral practices by sentencing judges.

5.2 An age based test for judicial practices

Ageism is “any prejudice or discrimination against or in favour of an age group”. Prejudice relates to attitudes, beliefs, and stereotypes about older adults; whereas discrimination involves the uneven treatment of older adults as a group. Ageism is either positive (where it confers a benefit on older adults) or negative (where older adults are disadvantaged).

In the legal context, Margaret Hall has developed a framework for determining when a piece of legislation has an uneven application to older adults. Based on the equality framework articulated by the Supreme Court of Canada in Granovsky v. Canada, Hall’s “age based lens” subjects legislation to a three part inquiry: (1) whether the legislation explicitly or implicitly refers to ageist or paternalistic attitudes; (2) whether it provides a mechanism to prevent itself from being applied in an ageist manner; and (3) whether it responds appropriately to the real needs of older persons as a group. If legislation transgresses the first part of the inquiry, the second and third part allow for it to be justified in the circumstances.

While helpful in evaluating legislation, Hall’s framework cannot be directly applied to judgments, as written judgments do not necessarily “provide for a mechanism to prevent

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189 Palmore, supra note 11 at 4.
190 Granovksy, supra note 38.
191 Hall, supra note 8 at 5.
themselves from being applied in an ageist manner”. Furthermore, unlike legislation, judgments are tailored to fit the circumstances of the offender and the offence, so the third part of the inquiry - whether a certain practice responds to the real needs of older persons as a group - becomes less relevant in the context of written decisions. A judge can choose to apply a judgment as precedent if the facts of a given case are similar, or distinguish it as inapplicable to a case where the principles do not translate to a novel scenario. This element of choice is absent in the application of legislation.

A suitable framework to determine ageism in the sentencing context need only involve two questions. First: Is there a departure from the regular sentencing practices based on the advanced age of the accused? If there is a departure based on the advanced age of an accused, the second question then becomes: Is this differential treatment based, implicitly or explicitly, upon ageist attitudes, assumptions or stereotypes about older adults as a group? If the answer to this second question is affirmative, then a judicial practice will be ageist. The judicial practices that are identified in the remainder of this chapter are submitted to this age based test.

5.3 In what way does advanced age influence sentencing practices?

A factor is a ‘mitigating factor’ if it decreases the penal term handed down to an offender. In the analysis in the Chapter 4, this variable was calculated by the number of months an offender was required to serve in prison. However, there are other ways that mitigation manifests itself apart from shorter prison terms.

One way old age mitigates a sentence is by influencing prosecutorial discretion. In the few cases where a trial transcript was provided as the judgment in QuickLaw, it was evident that prosecutors would factor in the advanced age of the accused in requesting a reduced sentence or even in withdrawing certain charges.\(^\text{192}\) In this way, age acted as a mitigating factor by

\(^{192}\) For example, *R. v. Blauboer*, [2000] O.J. No. 2992 (Sup. Ct.) at para. 99 the Crown notes that they did not ask for a period of imprisonment even though it would have been appropriate for the type of crime due to the
influencing prosecutorial discretion, before a sentencing judge even considered the issue. This may have happened more than I was able to determine because, in the majority of cases, I did not access the trial transcript in this research. Furthermore, many cases where prosecutorial discretion factored into the decision of whether or not to proceed with charges against an older adult would not have been publicly documented.

The most common way that sentences were mitigated for older adults was by serving custodial time in the community, through suspended sentences plus probation, house arrest or conditional sentences. Advanced age reduced the perceived danger an offender posed to the community, making these types of sentences appropriate.

Mitigation also occurred through the award of concurrent (as opposed to consecutive) sentences. Sentences served concurrently allowed for overlap in the sentences handed down for multiple counts, reducing the total time spent incarceration. In some cases, old age was a factor that justified the award of concurrent, rather than consecutive sentences, even for serious crimes.

Another way that mitigation occurred was through the type of institution where an offender was ordered to serve out his or her sentence. In R. v. Plint, Hogarth J. set out how age could impact this type of judicial decision making:

The prison accommodates people of all ages, and your health, sir, will be taken

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193 This is evident in the Chapter 4, where sentences were ordered to be served in the community even in cases of serious crimes like as sexual offences, and even though average older adults were found guilty of more counts of offences than younger adults.


care of by the penal system. You need not be concerned about your health or your age in the penal system. There are prisons, Mountain Institution is one of them, William Head is another, in which each prisoner can be accommodated without the rigors of the more stringent institutions. I am taking your age into consideration, but only in light of what I have just said.\footnote{R. v. Plint, [1995] B.C.J. No. 3060 (Sup. Ct.) \textit{[Plint]} at para. 63.}

Provincial correctional institutions provide medical and therapeutic services for prisoners equivalent to those available to the public. The case law suggests that aged offenders in need of these types of services may be best accommodated in provincial penitentiaries, as opposed to federal ones.\footnote{R. v. S.P, 2003 NLSCTD 53 at para. 83 \textit{[S.P.].} See also, R. v. R.J.S., [1998] O.J. No. 6519 (Sup. Ct.) \textit{[R.J.S.] and R. v. Saikaley, [1999] O.J. No. 5462 (Sup. Ct.) at para. 22 where the trial judge indicated a preference for Ontario’s reformatory setting over a federal penitentiary given the accused’s age, angina, and need to treat an addiction to cocaine.}

In a limited number of cases, old age was actually a factor that may have increased the duration of a prison term. Where judges held the belief that rehabilitation and specific deterrence were less likely to be achieved because older adults were stuck in their ways (based on the negative stereotype that older adults’ adaptability or capacity to change diminishes with age), older adults would be sentenced to a longer prison term.\footnote{This is discussed in further detail in section 5.6 of this chapter. Cases where judges adopted this utilitarian standpoint include \textit{R. v. McDonnell}, [1991] N.J. No. 358 (Tr. Div.) \textit{[McDonnell]; R. v. Charbonneau, [1994] O.J. No. 4295 (Gen. Div.) \textit{[Charbonneau]; and R. v. Barranca, [1993] O.J. No. 1287 (Gen. Div.) at para. 6 \textit{[Barranca].} This rationale was explored by Molly Fairchild James, \textit{supra} note 105 at 1039.}} Another circumstance where age was a factor that increased a sentence was where older adults were held to a higher moral standard, making their criminal transgressions more serious.\footnote{R. v. R.B, [1996] O.J. No. 2885 (S.C.) at paras. 5 – 7 \textit{[R.B.].}}

5.4 When and why advanced age is a mitigating factor in sentencing

Courts draw the statutory jurisdiction to consider age as a mitigating factor from section 718.2(a) of the \textit{Code}, which states that a court shall take into consideration the principle that “a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender…”\footnote{\textit{Code supra} note 46, s. 718.2(a), applied as authority for mitigating circumstance of age in \textit{R. v. Coffin}, 2006}
been deemed to be a mitigating factor by Canadian courts.

5.4.1 Old age is a mitigating factor...because it just is
In some cases, the advanced age of the accused was simply listed as a mitigating factor along with other mitigating factors. In other cases, old age was not explicitly said to be a mitigating factor, but its operation as such could be implied because it was named with other factors that are generally considered to be mitigating factors (such as a good employment record, record of good behaviour, volunteerism, support from family, etc.) In these cases, the judgment did not elaborate on why or how old age operated to reduce the prison term.

Where a judge accepts old age as a factor that commands leniency in sentencing, there is a departure from regular sentencing practices for older adults based on their advanced age. In these circumstances, there is no explicit statement of a paternalistic attitude or stereotype, however implicitly this practice is based on assumptions about older adults that may be positive or negative. A positive stereotype implicit in the practice is that older adults are unlikely to commit crimes so they do not need to be incarcerated to protect the public. On the other hand, a negative stereotype that could underlie this practice is that older adults are weak or unable to cope with the prison system as well as younger adults can. Because a benefit is conferred on an accused, the practice of considering age as a mitigating factor is positive ageism.

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5.4.2 Minor crimes

Courts were more inclined to give weight to mitigating personal characteristics of an accused in cases where the underlying offence was minor. An example in the case law is the Saskatchewan Queen’s Bench decision, in *R. v. Neill*, where the judge took into account the ‘trifling’ nature of the underlying charge and ordered an absolute discharge for the older offender’s assault.²⁰⁴

This finding is supported by the conclusions in Chapter 4, where the proportion of cases where age was explicitly found to be a mitigating factor in sentencing was higher for theft and fraud than for any of the other offence categories. In almost half of the cases in the theft/fraud data sample for older adults, the judge explicitly stated that the age of the accused was a mitigating circumstance (compared to about 5% of the cases involving younger adults in this offence category). The proportion of cases where age was explicitly found to not be a mitigating factor was highest for sexual crimes. Comparing these two types of crimes, sexual crimes are considered to be very serious whereas theft and fraud cases are generally less serious.²⁰⁵

Applying the age based test to the practice of allowing age to mitigate a sentence for minor crimes, the first part of the inquiry is affirmative: there is a differential treatment based on age if minor crimes result in more lenient punishments for older adults. The reason for this differential treatment is not evident in the case law review conducted here, but could range from a concern of the conservation of judicial resources (given evidentiary issues relating to the prosecution of historical crimes or reliability issues surrounding the evidence of older adults) to concerns about attrition of parties as the case moves through the criminal justice system. Subject to the rationale of any given judge, the practice of reducing time served or not prosecuting minor charges based on age will be positive ageism (where it is based on a stereotype or assumption about older

²⁰⁵ Chapter 4, section 4.2.4.
adults) or neutral judicial practices (where it is not based on an assumption about older adults).

5.4.3 Sentence would outlast offender’s remaining lifespan

Because statistically older adults have a shorter period of time left to live, in some cases, penal sentences were reduced to reflect the proportion of the remaining life that was appropriate given the underlying offence. Hill J. in R. v. K.N. stated the principle as follows:

The offender is sixty-four years of age. The age of an older offender is often referred to in amelioration of punishment… Advanced age ordinarily merits consideration as a mitigating factor both because the older a person is the harder it is to serve a sentence, and the less is that person's life expectancy in prison [citations omitted].

Indeed, numerous cases accepted both the propositions in the passage above, that (1) it is more difficult for older adults to serve time in prison; and (2) that a sentence should be shortened to avoid the possibility that the offender would not be released before he or she died. Other cases adopted similar reasons for decreasing sentences, in that a long prison term would disproportionally impact older adults given their remaining lifespan.

This practice of a reducing a sentence based on the remaining lifespan is an example of positive ageism which is based, in part, on a negative stereotype. The negative stereotype attaches only to the first reason for adopting this practice – that prison would be harder for older adults. While it is unclear exactly why, implicit in this assumption is the paternalistic attitude that older adults are weaker or less capable of adapting to a prison environment.

The second justification for this practice is based on statistical information tied to older offenders’ lifespans, and not on any assumptions or stereotypes, and is therefore not ageist. This

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206 This approach was endorsed by Fairchild James, supra note 105, where sentences should be reduced for older adults because they are “cognizant of their closeness to death”.
approach of punishing older adults less severely is endorsed by American commentary on the topic that suggests that sentences should be reduced where offenders are old enough to be “cognizant of their closeness to death”\(^{210}\). The justification for the practice is that, statistically, older adults have a shorter period of time left to live therefore penal sentences should be reduced to reflect the proportion of the remaining life that is appropriate given the underlying offence\(^{211}\).

5.5 **When and why advanced age will not be a mitigating factor in sentencing**

There is no precept of law that states that because somebody is old, he or she cannot be sentenced to a prison term\(^{212}\). Even if a judge accepts that advanced age could provide for some leniency in sentencing an accused, there are circumstances that can cancel the mitigating effect, if any, of advanced age.

In many of the cases reviewed, the older offender was being charged with a historic crime. In some of these cases, the trial judge decided that old age would not mitigate a sentence because an offender had the benefit of living as a free person for the intervening years while his or her crime went undetected. For example in *R. v. Lasik*, Dunn J. refused to recognize age as a mitigating factor because the offender had the benefit of many ‘free years’ before his crimes surfaced:

> I am not persuaded that advancing age alone should cause any reduction in the normal range of sentence. I do not view this approach to be the "life sentence" argued by the defence. Rather, I recognize that the offender has had the benefit in his more youthful years of a free lifestyle without having been called upon to account for his criminal activities.\(^{213}\)

The decision in *Lasik* stands to counter the ‘life sentence’ justification for reducing sentences, in that, there should be no reduction in sentence because the offender has less lifespan remaining where he or she has already spent a greater proportion of his or her life as a free person.

\(^{210}\) Fairchild James *supra* note 105 at 1044.

\(^{211}\) Cohen, *supra* note 122 at 13.


Another circumstance where old age did not operate as a mitigating factor in sentencing is where advanced years revealed a pattern of criminal behavior. Just as old age allowed for offenders to demonstrate a history of ‘good behaviour’ to mitigate a sentence, it worked the other way, where old age allowed for the sentencing judge to see a pattern of poor behaviour. In R. v. Vanderispaille, the accused accumulated a history of destructive acts, as noted by Doelman Prov. J.:

The defence has asked me to take into consideration the fact that Mr. Vanderispaille is a 62 year old alcoholic who has been diagnosed with cancer. There is no indication that Mr. Vanderispaille's wealth of years has enhanced a responsible attitude, either to the environment or to the Courts.\(^ {214}\)

In this way, the Court considered a lengthy criminal record or pattern of criminal behaviour as evidence that a period of incarceration was required to prevent the accused from committing further crimes.

A related reason why old age was not a mitigating factor in some cases was because allowing it to reduce a prison term would, in effect, be rewarding the concealment of crimes. This reasoning was adopted by the New Brunswick Court of Appeal in R. v. F.S.A., where in increasing the trial judge’s sentence of 14 months’ imprisonment, Ryan J.A. held:

As a general deterrent [the 25 year term of imprisonment] also shows that crimes, hidden and dormant for many years, will not go unpunished or will be treated lighter than they ought to be once they eventually surface [citations omitted].\(^ {215}\)

Essentially, the Court in F.S.A. did not want to accord age mitigating weight because to do so would reduce deterrence. Extending this argument, another Court found that there were important potential implications to victims, in that rewarding undiscovered crimes could compound some of the guilt that victims feel for failing to come forward at an earlier time.\(^ {216}\)


A fourth reason why age was not a mitigating factor, which was mentioned in many of the secondary sources canvassed in Chapter 2 and confirmed by the quantitative review in Chapter 4, is that age will not operate to reduce a sentence for serious crimes.\textsuperscript{217} Sexual offences, especially against children, are considered to be very serious, and in these circumstances, judges may refuse to allow for the personal characteristics or condition of the offender to be given any weight.\textsuperscript{218} Beyond sexual offences, other offences that are considered particularly heinous, like large scale theft or fraud, will also cancel the weight to be given to any mitigating personal characteristics of an accused.\textsuperscript{219}

The reason why age did not permit leniency in serious crimes is because a term of incarceration was deemed to be necessary to achieve denunciation and deterrence. This is illustrated in the case \textit{R. v. J.E.L.} where an 83 year old grandfather was convicted of sexually molesting his grandchildren.\textsuperscript{220} In handing down a 9 month period of incarceration, Justice McKinnon took into account the factor of age as mitigation, but nonetheless found that incarceration, rather than a conditional sentence was necessary in light of the high degree of moral blameworthiness of the accused and the need for denunciation to reflect society’s abhorrence of the acts committed.\textsuperscript{221} In \textit{R. v. Olinyk}, the Saskatchewan Court of Appeal overturned the conditional sentence that was awarded at trial, finding that the trial judge had over emphasized the mitigating factors of age and illness of the accused, and that it failed to

\textsuperscript{217} Ewaschuk, \textit{supra} note 88; Fiske, \textit{supra} note 88 at 298; Ruby, \textit{supra} note 74 at 5.144. See also Canadian Association of Provincial Court Judges, \textit{supra} note 89 at 48 and Renaud, \textit{supra} note 68 at para. 15. In Chapter 4, section 4.2.4., in 9% of the cases in the sexual offence category, the judge explicitly rejected the proposition that age should operate as a mitigating factor (other categories show less than half of this rate of rejection). Sexual offences, especially against children, are considered to be very serious, and in these circumstances, sentences judges may refuse to allow for the personal characteristics or condition of the offender to be given any weight.


\textsuperscript{219} For example, \textit{R. v. Lebel}, [2003] O.J. No. 4725 (Sup. Ct.) (fraud where she would befriend octogenarians and then steal their money) or \textit{R. v. Jones}, 2010 QCCQ 851 (where a financial advisor stole $50M from his clients over a 20 year period)


\textsuperscript{221} \textit{J.E.L., supra} note 220 at para. 24.
“emphasize the principles of denunciation, proportionality, and general deterrence.” In R. v. O.J., Woodrow Prov. Ct. J., put it as follows: “While the advanced age of the accused is a mitigating factor, I am unable to give it any degree of significance as it would only condone elderly men sexually abusing their daughters. The message has to be quite clear, that is, sexual abuse by fathers against their daughters will attract a significant period of incarceration no matter what the father's age”.

That said, there are exceptional cases where the personal characteristics of the accused convinced sentencing judges that no useful purpose would be served by sending the accused to jail. The reasons vary, and involve a combination of the justifications why age should be a mitigating factor (i.e. that the accused no longer presents a danger to the public, that the accused is so ill his condition prevents him from committing further crimes, or that the accused was in such a frail state that general deterrence would not be accomplished).

Where crimes were recently committed, age was not a mitigating factor. Courts are required to sentence the offender that appears before them, not the offender that may have committed the crimes many years earlier. The long delay between the commission of an offence and the time of sentencing can be beneficial for an offender, in that the person who committed the offence “is not the same person now before the court”. In this way, the passage of time can result in a reduced sentence. However, in the case of recently committed crimes, the person before the court is the same person that committed the offence. The implication is that the offender does not have the benefit of showing there has been a ‘gap’ in his or her criminal behaviour, or that

224 For example, R. v. F.T., [1994] N.B.J. No. 568 (Prov. Ct.) [F.T.], the 83 year old accused with serious medical conditions justified a reduced sentence even though sexual offences against children were involved; similarly in Lysack, supra note 79, a teacher was convicted of sexually assaulting his students, but they were relatively minor assaults, which combined with his fragile health and good character up until that point suggested a conditional sentence would be appropriate.
illness or age would make them less of a threat to the community. Accordingly, age is not a mitigating factor in recently committed crimes.

Finally, a couple of cases refused to recognize age as a mitigating factor because the accused “should have known better.” In R. v. R.B., McKinnon J. of the Ontario Superior Court admonished the older adult who appeared before him convicted of charges of sexual touching of a minor:

He knew that what he had done was absolutely wrong, he knew he had overstepped the line considerably. What he should have known, and I accept he probably did know, is that this behaviour with such a vulnerable person as the complainant could have a profoundly negative influence on her life, as indeed it did.

As events transpired, the complainant dwelled upon this assault, disclosed the story to her best friend, and eventually disclosed to her mother the betrayal by the accused. Eventually, she attempted to commit suicide. The accused should have foreseen this possibility, given his intelligence and his life experience. He allowed himself to go way over the line, but it was a choice that he made and a choice for which he must pay.

These kinds of situations present daily to individuals. Trust is fundamental to the appropriate functioning of older people with younger people. Without the elevation of the principle of trust to a level of some certainty within a society, a society will break down. Thus, when trust is betrayed, and it inevitably will be betrayed on occasion, a penalty must be exacted by society, and the accused knows that.

R.B.’s life experience and otherwise blameless life aggravated his moral blameworthiness, in that it was clear that he knew what was wrong but proceeded to engage in the behaviour in any event. The sentencing judge’s reasons suggest that the advanced age of the accused engendered a sense of trust leading the crimes to result in a higher culpability on the part of the accused. In this way, the punishment for older adults may be more severe than younger adults, because by reason of

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227 R.B., supra note 200 at paras. 5 – 7.
their age, engaging in criminal acts breaches society’s expectations, increasing moral culpability, and making their transgressions worse. 228

By and large, the reasons for denying old age as a mitigating factor did not result in the departure from general sentencing practices for an older offender based on age. The practices that failed to meet this first part of the ageism inquiry include:

(1) refusing to mitigate a sentence because an accused has had the benefit of many free years since the crime had occurred;

(2) where the accused had demonstrated a long history of poor behaviour or disregard for the law;

(3) refusing to mitigate a sentence because it would reward delay or provide a disincentive to come forward and confess crimes; and

(4) where the case involved serious crimes or crimes that had recently been committed.

In fact, the only circumstance where ageism was apparent in refusing to allow age to mitigate a sentence is where it was refused because the older offender “should have known better”. 229 In these cases, there is a differential treatment of older adults in that they are held up to a higher moral standard than (to quote McLellan J. in R. v. Estabrooks) the “pathetic people I’ve met from "off the beaten track"”. 230 The retributivist argument advanced by Molly Fairchild James in favour of this approach is echoed in the sentencing judgments, where the increased moral culpability of older adults (based on the positive stereotype that older adults are ‘wiser’) results in harsher penalties. 231 The increased penalties for older adults based on the belief that they ‘should know better’ is an example of negative ageism based on a positive stereotype.

230 Estabrooks, supra note 229 at para. 46.
231 Fairchild James, supra note 105 at 1039.
5.6 The impact of age on the principles of sentencing

Advanced age caused the some of the principles of sentencing to be emphasized, while others became less important. The emphasis or decreased importance of certain principles allowed for age based distinctions to be drawn that had an impact on the duration of penal term handed down to older adults.

5.6.1 The principle of totality was prominent

The principle of totality was mentioned in many of the cases that involved older adults.\(^{232}\) The totality principle is codified in s. 718.2(c) of the Code, which provides “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.”\(^{233}\) The totality principle ensures that a sentencing judge takes into account the total time to be served when considering the aggregate sentence handed down for multiple counts of an offence. The net result is that sentences that would otherwise be served consecutively are collapsed into concurrent sentences. The case law suggests that advanced age impacts what is ‘just and appropriate’ in applying the totality principle to older offenders.

One reason that the totality principle is triggered for older adults is because a sentence will be unduly long or harsh in proportion to the offenders remaining lifespan.\(^{234}\) This line of reasoning was followed in the \textit{R. v. M. (C.A.)}, where the 52 year old offender was sentenced to a 25 year prison term for various sexual and other assaults on his children over a number of years. Lamer C.J. set out:

However, in the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span. Accordingly, in exercising his or her specialized discretion under the Code, a sentencing judge should


\(^{233}\) \textit{Code, supra} note 46, s. 718.2.

\(^{234}\) This theme was reviewed in \textit{Renaud, supra} note 68 at para. 18.
generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value. But with that consideration in mind, the governing principle remains the same: Canadian courts enjoy a broad discretion in imposing numerical sentences for single or multiple offences, subject only to the broad statutory parameters of the Code and the fundamental principle of our criminal law that global sentences be "just and appropriate".\(^{235}\)

The relationship between an offenders’ life span and age as a mitigating factor was already discussed in section 5.4.3 of this chapter, but for the purposes of the principle of totality, it is worth noting that the a sentence may be characterized as unduly long or harsh, and adjustments relating to concurrent or consecutive sentences may be made based on the remaining lifespan of an accused. While there is a differential treatment of older offenders based on their advanced age this practice is not ageist because, like actuarial tables used in the insurance business, it is based on the reduced life expectancy of older adults and not on a paternalistic assumption or stereotype about older adults.

Another potential reason for the emphasis on the totality principle in cases involving older adults could be tied to the findings from Chapter 4 that older adults are generally charged with more counts of an offence than younger adults. Because the totality principle is only triggered where there are multiple counts of an offence charged against an offender, a corollary would be the increased prominence of the totality principle. Accordingly, the judicial practice of emphasizing the totality principle is not a departure from regular sentencing practices, it is the age neutral application of a principle based on an offender being charged with multiple counts.

**5.6.2 Incarceration not required to protect the public**

Old age made offenders less dangerous to the public.\(^{236}\) The case law provided a number of reasons why the age of the offender reduced the need to protect the public from him or her. One justification was because age, in and of itself, made the offender less dangerous. An

\(^{235}\) *M. (C.A.)* supra note 68 at para. 74.

example of this reasoning is in *R. v. MacNaughton*, where the Court found that the accused’s age (70) and the fact that he lived in a quiet retirement home meant that he was not a risk to the community. This is a clear example of positive ageism, where there is a benefit conferred on older adults based on the positive assumption that older adults are less likely to commit crimes.

In many cases, illness and old age operated together to make an offender less dangerous to the public, making conditional offences appropriate as opposed to penal terms. Such was the case in *R. v. Casciaro*, where the Court found that there was little risk of Mr. Casciaro committing sexual assaults in the future due to his age, severe diabetes, vision problems, and other degenerative ailments. Where both age and illness were considered together by the Court, it was not possible to parse out to what extent age operated independently from illness in making an offender less dangerous. In these circumstances, the benefit conferred on older adults was not due to their age only, rather it was age combined with health issues that operate to make an offender less dangerous. Furthermore, the reasons why the public would not need to be protected from an older offender are tied directly to the personal circumstances of the offender, and not to any basic assumptions about older adults in general. Therefore, the belief that old and sick adults are not a danger to the public is not ageist.

For some sexual offenders, Courts accepted that old age resulted in ‘burnout’ or a reduced sexual appetite, which made them less dangerous to the community. In *R. v. M.O.B.* the offender had been found guilty of 23 counts of sexual offences taking place over a 15 year period. Paris J. found, among other things, that the age of the accused reduced the likelihood of his committing future crimes:

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237 *R. v. MacNaughton*, [1997] O.J. No. 4102 (C.A.); see also *R. v. S.W.*, [1998] O.J. No. 2867 (C.A.) [S.W.] at para. 8; and *Tedjuk, supra* note 178 at para. 20 where similarly judges state that there is no need to protect the public from an offender, based on age, without further elaboration as to why age has this impact.

238 *Gratton, supra* note 194 and *Popow, supra* note 236.


Finally, there is the factor of age or burnout alluded to by the psychiatrists. He is now sixty-five years old and, of course, will be considerably older by the time he is released from prison after serving any sentence imposed on him. One cannot say with any certainty that at any particular age he will no longer reoffend, but the psychiatrists all agree that the aging process is a factor that reduces the risk or likelihood of reoffending in the future.  

Based on the belief that sexual desire decreases with age, some sexual offenders were deemed less dangerous to the public with advanced age.  

The perception of ‘less dangerous’ older offenders is not absolute. In *R. v. McKercher*, the 70 year old accused pleaded guilty to spousal assault and uttering death threats. Sentencing the accused to 12 months of imprisonment, Read J. found that a term of imprisonment was necessary because the accused remained a danger to the community, because of his age:  

While your counsel says that you are unlikely to re-offend, their argument is based really on lack of opportunity. Because of your age, they say, you’re unlikely to get into another relationship. I’m not so certain that’s correct. 70 is not that old anymore. And anyone with any knowledge of statistics knows that women outnumber men in your age bracket.

I fear you're going to become a "hot commodity" in the retirement community, and more so over time as the number of women continues to outnumber, to a greater degree, the number of men. I expect as a consequence you may well enter into another relationship, and your inability or unwillingness to take full responsibility for your actions and your minimization of the serious consequences makes me concerned that you will offend again. I'm not satisfied, on a balance of probabilities that having you serve your sentence in the community will not endanger the community.

Read J. found that, at least for older men, there was an increased opportunity to form relationships with age. Given his offence – spousal assault - the offender was deemed to be a threat to the community because with women living longer than men, his chances of finding a woman to form a relationship with increased as time went on.  

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243 *McKercher, supra* note 212 paras. 16, 17.  
244 Other cases that rejected the ‘reduced sex drive’ argument was *R. v. J.W.R.*, 2010 BCCA 66, where the trial judge
Where a sentence is reduced based on the perceived reduction of sexual desire in older adults, there is a departure from regular sentencing practices for older offenders based on their advanced age. The justification for this differential treatment is problematic, in that it clearly perpetuates the negative stereotype that older adults are not sexual beings, when in fact, sexual desire continues throughout older adulthood with any decreases attributable not to age, but underlying physiological conditions. Making this line of reasoning less problematic is where it was followed in the case law, it was based on psychiatrists who had treated the particular offender. Furthermore, as a judicial practice, it does not seem to be accepted across the board. Accordingly, where there is no need to protect the public based on an assumption of decreased sexual desire with age (without taking into account the personal circumstances of an accused) this is a negative stereotype that results in positive ageism. However, where the belief that the public is not in danger based on the particular circumstances of an offender, this is not ageist.

5.6.3 Rehabilitation and specific deterrence became less important

The importance of the sentencing objectives of rehabilitation and specific deterrence diminished with older offenders. In some cases, rehabilitation was seen to be less likely to be successful for older adults because older offenders were ‘stuck in their ways.’ Having lived out their lives for a long time in a certain fashion, some sentencing judges thought that older offenders would be unlikely to change their behaviour in the future. For example, Gotlib J.’s in R. v. Barranca justified a term of incarceration because, “I do not have rehabilitation as a factor because it is my view that 64-year old people healthy or ill are not about to be rehabilitated, they

considered that the appellant remained a danger to society as a result of his pedophilia, notwithstanding his age; as well in Ruby, supra note 226, the trial judge finds that the accused before the Court, despite being aged, had not demonstrated any evidence of slowing sexual desires.


For example, J.S.S., supra note 242.

For example, Read J.’s judgment in R. v. McKercher, supra note 212 at paras. 16, 17.
are fixed in their ways.” Similar sentiments were echoed by Forget J. in *R. v. Charbonneau*:

Well, I go back to my previous statement which is that the age is a concern only or primarily if it relates to the length of the crime; in other words, if the offence history dates back to most of the person's years, obviously you have a problem which is much greater to deal with, because typically, it becomes a life-style kind of issue. People develop belief systems, attitudes, cognitions which they try to reconcile with their behaviour, and so the longer the behaviour goes on, the more difficult it is, naturally, to change that.

Accordingly, the principle of rehabilitation lost force because, having lived a certain way for a long period of time, older adults were deemed to be less likely to change their pattern of behaviours.

In other cases, the opportunity to commit the crime was so unlikely to re-occur that there was no need to rehabilitate or deter the offender to ensure the protection of the public. For example, in cases where an older offender had only sexually assaulted family members, once apprehended, it was unlikely that the offender would ever have the opportunity to come into contact with those family members again and commit further crimes. The lack of the need to specifically deter or rehabilitate offenders in these cases was not based on age, but on the lack of opportunity.

Rehabilitation and specific deterrence were also less important where an older adult’s physical ailments prevented him or her from re-committing crimes. In these circumstances the illness of the accused, and not only age, amounted to leniency in the sentencing judgment. In *R. v. Pannell*, the 70 year old accused had been charged with committing numerous sexual assaults decades earlier. At his sentencing, he presented to the court as an old and frail individual, whose physical ailments included impotency. In these circumstances, Halderman Prov. Ct. J. found:

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248 *Barranca, supra* note 199 at para. 6.
249 *Charbonneau, supra* note 199.
250 Another case that adopts this line of reasoning is *McDonnell, supra* note 199.
252 In this way, it is illness, and not old age that is the mitigating factor in sentencing, which will be discussed further in Section 5.7.3 of this chapter.
With respect to paragraphs 718(d), (e) and (f), regarding rehabilitation, reparation for harm, and promoting a sense of responsibility in offenders, I am of the opinion that treatment for a 70 year-old man with respect to sexual deviancy is problematic at best. This is especially so where (as I accept) Mr. Pannell is now impotent. While some impotent persons may continue to re-offend, as the pre-sentence report suggests, my conclusion in the absence of a psychologist’s or psychiatrist’s report, and based on the balance of the pre-sentence report and the submissions of counsel is that the result of impotence for Mr. Pannell is that he no longer has any sexual interest, deviant or otherwise, and that his offending behaviour was directly related to potency. Such need as there may be for treatment can be dealt with outside of a custodial sentence.\textsuperscript{253}

Age, together with illness made the offender less likely to need rehabilitation or specific deterrence because the commission of an offence was directly linked to the physical ability the accused.

Finally, living several years without committing further criminal acts also reduced the need for rehabilitation or specific deterrence in an offender, the reason being that the offender had already demonstrated that he or she could stop his or her criminal behaviour on their own.\textsuperscript{254} Known as the “gap principle” in sentencing, many crime free years can indicate less of a need to rehabilitate or deter an offender.\textsuperscript{255} While the principle is age neutral, practically speaking, older offenders have more time to build a ‘gap’ in criminal behavior than younger offenders. As with illness or lack of opportunity, this reason behind diminished need to rehabilitate or specifically deter an offender was not directly tied to age, but was nonetheless prominent in the case law dealing with older offenders.

Being less capable of rehabilitation or in need of specific deterrence had both positive and negative implications for an older offender’s likelihood of imprisonment. In some cases, the sentencing judge saw the unlikelihood of rehabilitation as a factor that increased the offender’s

\textsuperscript{254} A.R., supra, note 1 at para. 34.  
\textsuperscript{255} R. v. Murray, 2009 BCCA 426 at para. 15
risk to the community, and therefore mandated a term of incarceration.\textsuperscript{256} In other cases, the lack of the need to rehabilitate coupled with no need to specifically deter an accused worked in favour of an accused being able to serve their sentence in the community, as opposed to prison.\textsuperscript{257}

Where the circumstances of the particular accused formed the basis of the need for greater or less rehabilitation or specific deterrence the practice is not ageist. For example, where an accused was physically incapable of committing future offences, the application of the ‘gap principle’, or where the opportunity to commit similar crimes was eliminated,\textsuperscript{258} the departure from the regular sentence was not due to an offender’s advanced age, rather it was because of these other personal circumstances.

However, where sentencing judges drew on assumptions about growing older, these practices resulted in negative ageism. For example, where rehabilitation and specific deterrence were less likely to be achieved because older adults were stuck in their ways, judges adopted a utilitarian standpoint (based on the negative stereotype that older adults’ adaptability or capacity to change diminishes with age) that older adults would need a longer prison term.\textsuperscript{259} In these cases, old age was not a mitigating factor, in fact, it may have been a factor that increased the duration of a sentence.

\textbf{5.6.4 Denunciation and deterrence were emphasized}

While other purposes of sentencing lost their importance with advanced age, denunciation and general deterrence gained importance in the majority of cases involving older adults. This is likely in large part because the \textit{Code} provides that where an offence involves the abuse of a person less than 18 years of age, primary consideration should be given to the objectives of

\textsuperscript{257} For example, \textit{J.B.}, \textit{supra} note 251.
\textsuperscript{258} For example, \textit{A.R.}, \textit{supra} note 1.
\textsuperscript{259} For example, \textit{McDonnell, supra} note 199; \textit{Charbonneau, supra} note 199; and \textit{Barranca, supra} note 199 at para. 6. This rationale was explored by Molly Fairchild James, \textit{supra} note 105 at 1039.
denunciation and deterrence. Since the majority of the sentencing decisions in this case law review involved the sexual abuse of minors, it is unsurprising that denunciation and deterrence were prominent considerations. Clearly, this practice is not a departure from regular sentencing practices, rather it is an age neutral application of the relevant Code provision.

In some cases, age obviated the need for denunciation and general deterrence. For example, in *R. v. Popow*, the 75 year old accused was found guilty of his eighth driving offence. At trial, the judge sentenced Popow to a ten year driving suspension combined with an 18 month prison term. On appeal, the prison term was eliminated, because the protection of the public was assured by the driving suspension and general deterrence was not necessary given the age of the accused. In these circumstances, there is a differential treatment of an accused, based on his or her age. Age represents a characteristic that is publicly abhorrent enough that it stands as ‘punishment enough’ for the transgression of the accused. This negative stereotype results in positive ageism.

5.7 Other prominent characteristics that provided for leniency in older offenders

In many of the cases, there was a co-occurrence of the following personal characteristics with advanced age: 1) good character; 2) caregiver; and 3) illness. In some cases, age would be a mitigating factor in addition to these characteristics, while in other cases, these characteristics alone would be the mitigating factor for a particular accused. Because of the frequency of co-occurrence of these factors in sentencing decisions involving older adults, this section reviews the sentencing practices in relation to these personal characteristics and argues that age may indirectly operate as a mitigating factor in these circumstances.

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260 *Code, supra* note 46, s. 718.01.
261 *Popow, supra* note 236, see also *A.R., supra* note 1 at para. 43. Here I note that in many cases, there was a coincidence of age and poor health, both of which were mentioned to be mitigating factors that required less denunciation and deterrence. In these circumstances, it was not possible to parse out the extent to which age alone weighed in the sentencing judge’s decision.
5.7.1 The accumulation of “good character” with time

Much of the commentary on sentencing older adults identified that age was more likely to be a mitigating factor when it was combined with good character. A review of the case law shows that in these circumstances, it is the good character of the accused that is the mitigating factor in a sentencing decision, not the accused’s age. However, it was clear that the age of the accused indirectly operated as a mitigating factor because it allowed an accused to demonstrate good character by years of crime free behavior. For example, in *R. v. C.C.M.* where Douglas Prov. Ct. J. stated:

> It is my view that people who are contributing law-abiding citizens for a long period of time have garnered an account, not unlike a bank account, that they can draw upon when they need it.

Though the accused in *C.C.M.* sexually assaulted his ten year old granddaughter, the balance of mitigating factors (which included his age and good character as shown by his lack of a criminal record and the support of his spouse) persuaded the judge that exceptional circumstances justified a suspended sentence plus probation.

Accumulating good character over a number of years will benefit an accused even in cases of serious crimes. For example, *R. v. Grasskamp*, the 65 year old accused set off a bomb in city hall. Rejecting that old age should be a mitigating factor, Fleury J. nonetheless accepted that a lengthy record of good behaviour should operate to the offender’s credit:

> It has been said that a man or woman's age should be a factor in determining how long he should be sentenced for. Well, I don't agree that the fact that a man is sixty-five years of age should necessarily trigger a more lenient sentence than for a man who would be thirty-five years of age. I do not think that age is a factor in that respect. On the other hand, when a man who is sixty-five years of age has led an unblemished life for sixty-five years or so of his stay of earth, then that certainly is a significant element because he has shown that he has in the past been able to abide by the laws and there is some hope that in the future he will

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262 Ewaschuk, *supra* note 88; Fiske, *supra* note 88 at 298; Ruby, *supra* note 74 at 5.144. See also Canadian Association of Provincial Court Judges *supra* note 89 at 48; Renaud, *supra* note 68 at para. 18.
263 *C.C.M.*, *supra* note 202 at para. 9.
also be able to abide by the laws of this country.\textsuperscript{265}

The reasoning in \textit{Grasskamp} suggests that judges will balance years of wrongdoing with the years of crime free living, and older adults have the benefit of accumulating more of the latter, even when the crimes they had committed were very serious.\textsuperscript{266} The crimes of the accused are characterized as an aberration on an otherwise long and blameless life, which persuades sentencing judges that the offender is unlikely to engage in criminal activity in the future.\textsuperscript{267}

Allowing old age to indirectly benefit an accused in this way is not an ageist practice because, while it does confer a benefit on older adults, the benefit is not based on age – it is based on many years of good behaviour. Furthermore, allowing good character to accumulate for an aged offender does not rely on any assumptions or stereotypes about older adults. Old age, in itself, is not justifying a differential treatment so no ageism is perpetrated in this sentencing practice.

\textbf{5.7.2 Caregiver}

In several cases, the older offender was the sole caregiver for an aging spouse or family member, a factor that operated as a mitigating circumstance.\textsuperscript{268} In these circumstances old age is not a mitigating factor, being a caregiver is. Nonetheless, because of the frequent co-occurrence of these two characteristics, age may indirectly operate as a mitigating factor because older

\textsuperscript{265} \textit{Ibid.} at para. 7.
adults may be caregivers for their elder spouses more frequently than younger adults.

In order for the role of ‘caregiver’ to operate as a mitigating factor, the accused must be the primary caregiver and the person in need of care must be incapable of caring for themselves, in a state of “total dependency”.\(^\text{269}\) In \textit{R. v. Corbett} this threshold was not met when the trial judge distinguished between “day to day assistance” which did not warrant mitigation, in contrast to proving the “barest necessities of life”.\(^\text{270}\) Where other members of the household could take on a caregiver role, or where the person being cared for was not entirely dependent on an accused to live, being a caregiver may not suggest leniency in sentencing.

While generally, the implication of being a caregiver is that a sentence will be more likely to be served in the community rather than in a jail,\(^\text{271}\) in some cases it operated to reduce the sentence handed down to an accused.\(^\text{272}\) In these circumstances, age is not the basis for departure from regular sentencing practices. No assumptions are being made about older adults or stereotypes based on older adults as a group. Accordingly, there is no ageism in the practice of having sentences reduced for aged caregivers.

\textbf{5.7.3 Illness}

Some of the secondary sources canvassed in Chapter 2 of this thesis suggest that age only rarely operates as a mitigating factor on its own, rather it works in conjunction with ill health in requesting leniency by the Courts.\(^\text{273}\) In my review of the case law, I found that age and ill health

\begin{footnotes}
\item[269] \textit{R. v. K.N.}, \textit{supra} note 207 at para. 69. See also \textit{R. v. C.M.} [1998] N.J. No. 66 (Tr. Div.) where the accused’s spouse was characterized as an invalid and his son was handicapped. It was particularly ironic that his role of caregiver mitigated in this case because he was found guilty of abusing his children, yet it was the care of his child and wife that reduced his sentence; and \textit{R. v. J.A.}, [1997] N.J. No. 328 (Tr. Div.) where it was met when the accused was a caregiver to wife and to daughter, allowing the judge to conclude that “no useful purpose” would be served by sending him to jail.
\item[271] \textit{R. v. L.L.}, [1997] O.J. No. 5435 (Sup. Ct.) conditional sentence ordered where the wife would have to be transferred to a nursing home if the accused were sent to jail; Belanger, \textit{supra} note 203 at para. 6 where the accused was a caregiver to wife and to daughter, allowing the judge to conclude that “no useful purpose” would be served by sending him to jail.
\item[272] This is what happened in \textit{R. v. Simons}, 2002 SKCA 90 where the accused was a caregiver who administered daily medications to his wife, which supported a 2 year reduction on his sentence.
\item[273] Nadin-Davis and Sproule, \textit{supra} note 45 and Renaud, \textit{supra} note 68 at paras. 6 and 11.
\end{footnotes}
were two distinct considerations in most cases. In a minority of cases, old age and ill health were confounded. Because of the mixed interactions between illness and old age in sentencing decisions, illness has been included in this section as a personal characteristic that indirectly mitigates a sentence.

5.7.3.1 Justifications for illness as a mitigating factor

By the same token, ill health, independent from old age, operates as a mitigating factor. Unlike the US authorities discussed in Chapter 2, in Canada, there does not appear to be a threshold age for when illness will operate as a mitigating factor, nor does an accused need to be currently experiencing the ill effects of an illness. Ill health can be a mitigating factor where offenders have suffered from illnesses in the past, but that are currently being controlled with medication or other treatment. There is no need for a condition to be debilitating. Ailments falling short of this threshold that have allowed for a more lenient treatment by the Court, include:


See for example, M.(C.A.), supra note 68, S.H., supra note 179, or R. v. Coulson, 2008 ABPC 144 where the offenders were in their 50s when their age, combined with illnesses operated as mitigating factors. While it is not necessary for an accused to be currently experiencing the ill effects of an illness, this threshold has been met in some cases such as Robertson, supra note 228, Robertson's health and age were such that even when the jury was deliberating, an ambulance had to be called and Robertson had to be rushed to the hospital.

For example, R. v. Thompson, [1988] B.C.J. No. 209 (Co. Ct.) where the accused’s sentence was reduced for health based reasons where he had suffered from heart disease and strokes in the past, which were currently being treated by a pace maker and R. v. Lebreque, [2003] O.J. No. 345 (Sup. Ct.) [Lebreque] where the 68 year old defendant’s past ailments (including past heart attacks and knee replacements) were considered along with current health issues (chronic kidney problems, deafness, diabetes) in the mitigation of the accused’s sentence. Contrary authority is found in Corbett, supra note 270, where the accused’s past heart attack was not a convincing mitigating factor for the sentencing judge, in large part because his condition didn’t stop him from doing things like driving to Boston or taking young boys to the beach. Another contrary authority is R. v. R.A.B., 2006 BCPC 367 at para. 12 [R.A.B.] where the accused’s past heart attack was not given weight because it was manageable in a custodial sentence, though a jail term would interrupt his cardiac rehabilitation.
- Mental disorders, including personality issues, depression, pedophilia, stress;\(^{276}\)
- Anxiety;\(^{277}\)
- Hypertension;\(^{278}\)
- Chronic pain;\(^{279}\)
- Heart problems (general, non-acute);\(^{280}\)
- Lung problems associated with smoking;\(^{281}\)
- Poor hearing;\(^{282}\)
- Arthritis;\(^{283}\)
- Epilepsy;\(^{284}\)
- Cancer;\(^{285}\)
- Knee problems;\(^{286}\)
- Diabetes;\(^{287}\) and
- Thrombosis.\(^{288}\)

The weight to be attributed to any of these ailments depends on the other factors present in the

\(^{276}\) R. v. Murphy, 2008 ONCJ 514 (depression); J.F., supra note 202 (depression); Popow, supra note 236 (personality disorder); Ruby, supra note 226 (pedophilia characterized as mental disorder and a prison term would interrupt treatment); R. v. R.W.L., [1995] N.B.J. No. 162 (Q.B.) (stress from past war experiences); R. v. Holmes, [2002] O.J. No. 3321 (Sup. Ct.) [Holmes] (depression); R. v. Haugo, 2006 BCPC 319 (depression and suicidal ideation); Stupich, supra note 194 (dementia and stress).

\(^{277}\) Dinn PC, supra note 225.

\(^{278}\) Popow, supra note 236; J.F., supra note 202; Holmes, supra note 276 at para. 33; Lebreque, supra note 275; but see R. v. Harlos, 2005 ABPC 118 [Harlos] where hypertension was not sufficiently grave a circumstance to be a mitigating factor.

\(^{279}\) Popow, supra note 236; R. v. MacIsaac, [1998] B.C.J. No. 1946 (Sup. Ct.) (fused spine); Holmes, supra note 276; R. v. Kouznetsov, 2010 BCCA 585 [Kouznetsov]; GB., supra note 274 (neck strain following a motor vehicle accident).


\(^{281}\) Popow, supra note 236; Lebreque, supra note 275.

\(^{282}\) Dinn PC, supra note 225; M.P., supra note 203; J.F., supra note 202; Holmes, supra note 276.


\(^{284}\) Popow, supra note 236; R. v. K.L., 2004 BCSC 797; Kouznetsov, supra note 279; but see Kelly, supra note 268, where skin cancer was not sufficiently grave to operate as a mitigating factor.

\(^{285}\) M.P., supra note 203; Kouznetsov, supra note 279; Lebreque, supra note 275.

\(^{286}\) Lebreque, supra note 275; GB., supra note 274; but see Harlos, supra note 278 at para. 33 where diabetes was not a mitigating factor.

\(^{287}\) GB., supra note 274.
offender and the seriousness of the offence.

Illness operated as a mitigating factor where a sentencing judge was concerned that a prison sentence would exacerbate an existing condition or that penitentiaries would be ill equipped to care for the accused.\textsuperscript{289} Hill J. in \textit{R. v. K.N.} summarized these rationales in the reduction of a prison sentence:

The ill health of an offender is a factor worthy of consideration in sentencing. Whether leniency on account of precarious physical health is warranted becomes very much a case-specific inquiry… Quite apart from the risk of incarceration, exacerbating the accused's health status, uncertainties exist relating to the ability of the correctional system to adequately care for an individual who is now effectively house-ridden and the subject of multiple prescriptions for therapeutic drugs [citations omitted].\textsuperscript{290}

Accordingly, cases where the accused suffers from a very serious illness (defined as those that reduce the life expectancy of the accused);\textsuperscript{291} a degenerative condition;\textsuperscript{292} or an illness that requires the need for ongoing care\textsuperscript{293} a court may give an offender a more lenient treatment.\textsuperscript{294}

A related reason why illness operated as a mitigating factor was due to concern about the drain on the prison resources for prisoners that require intensive medical attention. In \textit{R. v. A.K.}, Goodearl J. voiced this concern in the context of sentencing a 62 year old man who was found guilty of three charges of sexual assault:

\textit{You presently suffer a medical condition in which you have had some of your stomach cut out, a colostomy in medical terms. That makes you a medical problem for any prison system.}\textsuperscript{295}

\textsuperscript{289} For example, in \textit{Holmes, supra} note 276 at paras. 22, 23, the 63 year old offender’s depression, chronic pain from an old back injury, arthritis, high blood pressure were taken to be mitigating factors because incarceration would be detrimental to his physical and mental wellbeing.

\textsuperscript{290} \textit{K.N., supra} note 207.

\textsuperscript{291} For example, \textit{R. v. Sylvestre}, [2006] O.J. No. 5382 (Sup. Ct.).

\textsuperscript{292} For example, \textit{J.F., supra} note 202; \textit{Arbuthnot, supra} note 268 at para. 20.

\textsuperscript{293} For example, in \textit{R. v. E.R.}, [1993] B.C.J. No. 1739 (C.A.) \textit{[E.R.],} the Court of Appeal reduced the 21 the month sentence awarded at trial to time served based on accused’s need to be hospitalized for a degeneration in his mental state and inability to transfer to long term care as long as he was in custody (at paras. 3 – 4).

\textsuperscript{294} See also \textit{R. v. R.I.S., supra} note 198 where the state of the health of the accused would have required that he serve his time in a hospital like setting in any event, which justified serving a conditional sentence in his exceptional circumstances.

The accused’s health issues, in part, justified a sentence on the lower range for the sexual assaults he was charged with because he would be a medical concern for the penitentiary. If an accused suffered from a condition that was so severe that any sentence would need to be served in a hospital like setting in any event, a conditional sentence may be deemed to be more appropriate.296

As discussed in section 5.6.3 of this chapter, another reason why illness justified a reduced prison term was because a particular health condition could reduce or eliminate the likelihood of the offender engaging in future criminal acts. For example, in R. v. Lebreque,297 the 68 year old defendant was convicted of sexual assault. Boyko J. took into consideration the myriad of health issues plaguing the accused, including the fact that he had been impotent for over ten years and suffered from enlarged prostate gland, in deciding that the risk of re-offending was low, justifying a conditional sentence for the accused.298 Similarly, in R. v. R.A., the 71 year old accused had crippling muscular dystrophy which confined him to a wheelchair, which, in part, allowed the Court to conclude that he no longer presented a danger to the community.299

5.7.3.2 Limits on illness as a mitigating factor

There were limits to when courts would accept the illness of an accused as an exceptional circumstance in sentencing. A medical condition would not operate to reduce a penal term if the condition could be managed through the provision of essential health care in the prison system. In R. v. A.W.S., A.A. Fradham Prov. Ct. J. elaborated on this point:

296 For example, in A.R., supra note 1 at para. 46 the accused’s already lenient 30 month sentence was reduced to a conditional sentence due to debilitating muscular dystrophy and the need for round the clock care. Twaddle J.A. noted the drain on prison resources: “But he already suffers in his old age, through the force of destiny, from a debilitating illness. Prison for this man would be a far worse punishment than for others. And, from a public point of view, one may well ask whether there is any purpose to be served in paying for him to be hospitalized for the duration of his sentence.” A similar rationale was provided in Saunders, supra note 320 at para. 11.
297 Lebreque, supra note 275.
298 Ibid. at para. 14. As well, in S.W., supra note 237, the offender’s advanced age combined with his serious medical issues led the Court of Appeal to conclude that he was “clearly not a danger to the community” (at para. 8).
299 A.R. supra note 1.
While I am mindful of the health issues currently being faced by the accused at bar, there is nothing before me which would lead me to conclude that his medical conditions cannot, or would not, be managed by custodial authorities. I find that the accused's medical condition should not affect what would otherwise be a proper sentence…

The federal system - if I may just take one minute to describe it - is unique in, probably the world, in that we not have a federally mandated health-care delivery system. Provincial governments are wholly responsible for the delivery of mental health systems, except for some exceptions by the Canada Health Act, which includes serving federal offenders, so that the penitentiary system has an integrated and separate health-care delivery system. So, any offender would receive the same level of care as that provided in the community. In Ontario, it would meet Ontario community standards, under contract or by our own staff, in the same way that all offenders would. We have our own hospital system and unless the gravity of the illness is such that it requires an outside hospital, in which case we have secure units within Kingston as well as Montreal, for housing individuals like that.

So, the health care issue, I don't see as being a major component because I think we have available all of the services that a normal citizen would have. 300

Similarly, in R. v. S.P, the accused was 78 years old with a heart condition, hypertrophy, and recurrent gastrointestinal issues that required frequent hospitalizations. Hartigan J. did not give these ailments significant weight because “prisons in this province are staffed and served by trained medical personnel who can meet the accused's needs. As well provincial correctional services have contractual and outreach services with medical personnel and facilities in the community to provide as high a level of care to prisoners as would be available to any member of the public.” 301

301 S.P., supra note 198. Other examples of cases where the penitentiary's ability to treat a disease reduced the mitigating weight of a health issue include: D.D., supra note 226; Plint, supra note 197 at para. 63; R.A.B., supra note 275 at para. 12 where the accused’s heart issues and potential Parkinson’s were deemed manageable both in the community and custodial setting, so were not given great weight.; E.M.S., supra note 312 at para. 28, the accused suffered from diabetes, high blood pressure, hypothyroidism and chronic heart problems. Her doctor testified that incarceration might increase her chances of having a cardiovascular event. However, these conditions did not operate to reduce the sentence as prisons were more than capable of providing essential health care to manage these conditions. Also in R. v. E.M.G., 2001 BCCA 553 at para. 13 where the accused suffered health problems which required medication, absent more, this type of health condition was not sufficient to justify a reduction in his sentence; Kelly, supra note 285 at para. 25 where, absent evidence that the accused’s skin cancer was life threatening or could not be adequately treated in prison it would not carry any mitigating weight; R.A.B., supra note 275; as well as Spencer, supra note 274 at para. 26 where the judge refused to accept
A health condition did not justify special consideration if it did not interfere with the accused’s life. In *R. v. Corbett*, McLellan J. refused to give weight to the accused’s heart attack because he had continued to be able to drive around, take young boys with him to the beach, or watch hockey games in town.\(^{302}\) In a different case, *R. v. D.E.H.*, McLellan J. again refused to give weight to the fact that an accused was confined to a wheelchair, because it had not interfered with his daily activities:

Also, the argument is made that a mitigating circumstance is that D.E.H. has been confined to a wheelchair since 1963 as a result, I gather, of having a shattered hip in a vehicle accident. Nevertheless he has been able to get around and live on his own...

The law goes to very considerable effort to treat people equally whether they are in a wheelchair or not, whether they suffer from a physical disability or not. It seems to me that the fact that D.E.H. is in a wheelchair is not a reason to treat him significantly differently than any other 65 year old who fathered a child by his daughter 20 years ago.\(^{303}\)

Adopting an argument based on formal equality, a Court may choose to give less weight to a medical condition unless it has interfered with the accused’s lifestyle to a significant degree. Absent evidence of some sort of disruption (such as taking medications regularly,\(^{304}\) needing therapy,\(^{305}\) or frequent hospital visits\(^{306}\)) it is unlikely that an illness or physical condition, in and of itself, will operate as a mitigating factor.

Another limit on the operation of illness as a mitigating factor is that illnesses that commonly occur with old age will not allow for leniency in a sentence.\(^{307}\) That is to say, if an

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\(^{302}\) *Corbett*, supra note 270.


\(^{304}\) For example, *Lebreque*, supra note 275.

\(^{305}\) For example, *E.M.S.*, supra note 312.

\(^{306}\) *E.R.*, supra note 293.

\(^{307}\) For example, high blood pressure was not sufficiently serious in *R. v. Shirose*, [1995] O.J. No. 432 (S.C.J) and in *Sauriol*, supra note 218 at para. 10, the health problems that ‘were not unusual for your age’ did not suffice to be given any mitigating weight.
accused is old, but healthy, a trial judge will not reduce a sentence.  

Finally, as discussed in section 5.5 of this chapter, the personal characteristics of the accused such as age or illness, were less persuasive where an accused was convicted of serious crimes. In *R. v. Maczynski*, the 67 year old defendant was sentenced to 16 years imprisonment despite his advanced age and myriad of health issues. Given the gravity of the offences committed by the accused and the fact that reducing the sentence from 16 years to 12 years would still not change the fact that the accused would likely die in jail, the Court of Appeal found that it was “not the type of case where health would be an appropriate sentencing factor”.

### 5.7.3.3 Ill health and old age as independent mitigating factors

Contrary to what some of the commentary suggests, age did not only operate as a mitigating factor when combined with, or as an incident to, illness. This is illustrated in the analysis in Chapter 4, where Judges explicitly stated that age was a mitigating factor in 108 of the 295 sentencing decisions involving older adults. In over half of those cases, the ill health of the accused was not mentioned or was explicitly said not to operate as a mitigating factor.

By and large, judges are aware of the independent operation of illness and advanced age as mitigating circumstances. As Browne J. in *R. v. E.M.S.* stated:

> I regard the factor of age and the factor of health as mitigating factors, individually or considered together. The Crown argued age and health should be considered as one factor. I do not agree. As I exchanged with counsel, an older person may have good health, a younger person may have bad health or as here, an 81 year old may have poor health. The age and health factors I regard as

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309 *R. v. Maczynski*, [1997] B.C.J. No. 2623 (C.A.). *Sauriol*, *supra* note 218 provides another example, where I.M. Gordon J. found that denunciation and deterrence of the sexual assaults committed by the accused needed to be emphasized despite the accused’s medical conditions (at para. 10).


311 Chapter 4, section 4.2.4.

worthy of consideration separately and in conjunction with each other as factors going to mitigation.\textsuperscript{313}

Age has been considered a mitigating factor, even where ill health did not operate as such. Illustrating the distinction between age and ill health, Borins J. accepted that the age of the accused entitled him to a ‘modest discount’ in his sentence, but refused to consider illness to be a mitigating factor in the case \textit{R. v. Carter}:\textsuperscript{314}

I agree with Mr. Bernstein's submission that Mr. Carter's age, 65 years, does entitle him to a modest discount. With respect to his health, as I have indicated there is no proper evidence before me that suggests that the impact of the sentence on his health is an appropriate consideration. In any event, there is authority to the effect that matters of this nature are properly the concern of the parole authorities.\textsuperscript{314}

This suggests that age can operate as a mitigating factor on its own, independent from any physical ailment suffered by an accused.

While generally Courts were alive to the independent operation of age and illness, in some cases sentencing judges blurred the distinction on whether it was age, poor health, or both that justified a deviation in the regular sentencing practices. In those cases, sentencing judges combined the two personal characteristics into one factor, confounding the distinction between the age and illness.

A clear example of where old age and illness are confounded can be drawn from the U.S. experience, discussed in Chapter 2 of this thesis, where policies require that in order to come within exceptional sentencing practices, an accused must demonstrate that they are both “elderly and infirm.”\textsuperscript{315} American commentary on the topic has interpreted these policies to require that an accused must “be at least sixty and currently experiencing the effects of a debilitating

\textsuperscript{313} \textit{Ibid.}
\textsuperscript{315} United States Sentencing Commission, \textit{supra} note 104.
The inability to parse out old age from illness means that old age in and of itself is not a mitigating circumstance, it is actually the accused’s illness that operates to reduce a sentence.

In Canada, there are different ways old age is confounded with ill health in sentencing judgments. One case treated old age as a trigger which signaled the sentencing judge to pay particular attention to the health of the accused:

It is proper for a court to consider the age and health of an offender at a sentencing hearing. In *R. v. Osmond* (1992) No. 209 (Nfld. C.A.) Steele, J.A. who at that time was dealing with a 74 year old offender said at page 7: "If the accused is considered elderly, to go to the other extreme, the sentencing judge is on notice to pay particular attention to the state of health and, to the extent it can be inferred, the life expectancy of the aging offender. As with the sentencing of a youthful accused, the seriousness of the offence and a criminal record are very important factors. Age is just another factor to be considered by the sentencing judge, its impact depending on all the circumstances of the case."

Where age is the beacon for considering other factors, like health and life expectancy, it is not a mitigating factor, rather it is a signal for the judge to consider whether the accused is in particularly ill health, which is the true factor operating to reduce a prison term.

Other cases acknowledged that age was a mitigating factor, but further analysis in the judgment focused on health, rather than old age. Gorman J.’s analysis in *R. v. S.P.* provides an example of this type of confusion between age and illness:

The age and health of an offender are considerations in the imposition of sentence. However, there is no evidence that S.P. suffers from a serious or life threatening illness. An inflexible rule that holds that the elderly are immune from the commission of serious offences or from the imposition of significant periods of incarceration does not exist… In this case, there is no evidence that a period of incarceration will have a negative effect on S.P.’s health or that there is any particular medical attention that he will lose access to as a result [citations omitted].

In *R. v. S.P.*, age was tied to health and absent evidence that S.P’s health would be negatively

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316 Fairchild James *supra* note 105 at 1028.
317 *W.B., supra* note 209 at para. 23 (Eason J.).
affected by a prison sentence there was no need to reduce his sentence. Similarly, in *R. v. Saunders*, a period of incarceration was not the best solution for the healthy 82 year old offender because of his age and his “probable need for competent medical care.” In these cases, while the judge says that age is a mitigating factor, it appears that it is actually illness and not age that justified the reduction of a prison term.

Where illness operates independently from old age as a factor that suggests leniency in sentencing, this practice is not based on the advanced age of the accused and can be classified as age-neutral. It is only where age and illness are confounded with each other that ageism could be said to permeate a judgment. When age and illness are confounded, there is a differential treatment of the offender based on age. In these circumstances, the characteristic of age stands in replacement for illness. This is an extreme example of the negative stereotype of older adults being sick or weak creeping into sentencing practices for older offenders. While the net outcome for older offenders is positive, judgments that confound age and illness perpetuate negative stereotypes and assumptions about older adults.

5.8 Chapter 5 summary

Despite the findings in Chapter 4 that overall, age does not amount to a shorter prison term for older adults, when the texts of judgments are analyzed it is clear that advanced age factors into the exercise of judicial discretion. Table 18 summarizes the themes that emerged from this review.

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319 The Supreme Court decision for *S.P.*, supra note 301 also appears to confound old age and illness, where Hadrigan J. states: “I have reviewed the cases to see what factors are generally considered to mitigate sentence. These are some that appear most frequently…the accused is in failing health or elderly” (at para. 70). The judge goes on to find: “Age alone is no reason to reject a prison sentence. The accused's health, though generally poor, is stable and can be maintained by regular medications and ongoing medical attention....” (at para. 83). Similar reasoning appears in the case *Weaver*, supra note 308 at para. 6, where the 69 year old offender’s old age/high blood pressure was not significant enough to dictate a lower than otherwise appropriate custodial sentence.


321 Cohen, supra note 122 at 15, 25.
<table>
<thead>
<tr>
<th>Theme</th>
<th>Table 18: Summary of qualitative research</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Severity of the crime</strong></td>
<td></td>
</tr>
<tr>
<td>Old Age as a factor that reduces sentence</td>
<td></td>
</tr>
<tr>
<td>Age as a neutral factor in sentencing</td>
<td></td>
</tr>
<tr>
<td>Old age does not reduce a sentence</td>
<td></td>
</tr>
<tr>
<td>Is this an ageist practice?</td>
<td></td>
</tr>
<tr>
<td>Age considered in the reduction of sentences</td>
<td>Old age will not command leniency for serious crimes.</td>
</tr>
<tr>
<td>for minor crimes.</td>
<td></td>
</tr>
<tr>
<td>Positive ageism (minor crimes) or age neutral</td>
<td></td>
</tr>
<tr>
<td>(serious crimes).</td>
<td></td>
</tr>
<tr>
<td>Age neutral.</td>
<td></td>
</tr>
<tr>
<td><strong>Life span arguments and the principle of totality</strong></td>
<td></td>
</tr>
<tr>
<td>In old age offenders are less dangerous.</td>
<td></td>
</tr>
<tr>
<td>Old age results in a ‘burnout’ of sexual appetite, making sexual offenders less dangerous.</td>
<td>Prominence of the principle of totality in cases in older adults is due to the fact that they committed more counts of offences, on average, than younger adults.</td>
</tr>
<tr>
<td>Old age increases the likelihood of an older man entering into a relationship with an older woman, making this type of offender more dangerous with age.</td>
<td>Older offenders have had the benefit of more ‘free’ years.</td>
</tr>
<tr>
<td>Positive ageism (based on age alone or on lack of sexual desire).</td>
<td></td>
</tr>
<tr>
<td>Age neutral (age and illness together make less dangerous offender) Negative ageism (increased opportunity to re-offend)</td>
<td></td>
</tr>
<tr>
<td><strong>Protection of public</strong></td>
<td></td>
</tr>
<tr>
<td>Old age makes general deterrence unnecessary.</td>
<td></td>
</tr>
<tr>
<td>Denunciation and deterrence important for serious crimes.</td>
<td>Old age increases the likelihood of an older man entering into a relationship with an older woman, making this type of offender more dangerous with age.</td>
</tr>
<tr>
<td>Positive ageism (based on age alone or on lack of sexual desire).</td>
<td></td>
</tr>
<tr>
<td>Age neutral (where mandated by the Code). Positive ageism when based on stereotype.</td>
<td></td>
</tr>
</tbody>
</table>
Table 18: Summary of qualitative research, continued

<table>
<thead>
<tr>
<th>Theme</th>
<th>Old Age as a factor that reduces sentence</th>
<th>Age as a neutral factor in sentencing</th>
<th>Old age does not reduce a sentence</th>
<th>Is this an ageist practice?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rehabilitation and specific deterrence.</td>
<td>Physical ailments co-occurring with old age prevent the re-commission of crimes.</td>
<td>Rehabilitation and specific deterrence are not necessary because the opportunity to commit the crime again is not likely to arise.</td>
<td>Rehabilitation will be less effective in old age because older adults are stuck in their ways.</td>
<td>Age neutral (physical ailment, lack of opportunity). Negative ageism (‘stuck in their ways’).</td>
</tr>
<tr>
<td>Caregiver</td>
<td>Caring for an older spouse or family member results in the reduction of a prison term.</td>
<td></td>
<td></td>
<td>Age neutral.</td>
</tr>
<tr>
<td>Illness</td>
<td>Old age is the same thing as illness and can result in a reduced sentence because the offender is not physically able to re-commit crimes.</td>
<td>Old age does not necessarily mean illness. Each personal characteristic should be considered independently in sentencing an offender.</td>
<td>Illness will not reduce a sentence where it does not interfere with an accused’s daily activities or decrease his or her ability to commit a crime or where the underlying crime is serious.</td>
<td>Age neutral (where old age and illness are independent considerations). Positive ageism when old age is confounded with ill health.</td>
</tr>
<tr>
<td>Passage of time</td>
<td>The passage of time should support reduced punishment because it obviates the need for specific deterrence and shows good character.</td>
<td></td>
<td>Old age will not operate as a mitigating factor where crimes were recently committed. Allowing leniency due to the passage of time awards delay in prosecution, and deters offenders from coming forward with their crimes. Furthermore, the passage of time allowed the offender to &quot;enjoy&quot; free and more youthful years.</td>
<td>Positive ageism (where no need for specific deterrence or good character). Age neutral (recently committed crimes, rewards delay, benefit of ‘free’ years).</td>
</tr>
</tbody>
</table>
The purpose of this qualitative analysis was to answer the questions: When, why, and in what way does advanced age impact a sentencing decision? Are these practices ageist? In response to the first question, when advanced age impacts a sentence, this case law review uncovers that age is more likely to be a mitigating factor in sentencing for minor crimes, and not likely to be a mitigating factor for serious crimes, where crimes were recently committed, or for types of crimes where an accused becomes more dangerous with age (i.e. spousal abuse).

In response to the second question, why advanced age impacts a sentence, the case law review provides a variety of reasons why age will or will not be a mitigating factor in sentencing. Sentencing judges were open to taking into account an accused’s age as a factor that might command a more lenient sentence, on its own, or indirectly in conjunction with other personal characteristics. In some cases, age was a mitigating factor because the sentence would have a disproportionate impact on older adults in light of their reduced remaining lifespan. In other cases, an accused had the benefit of accumulating years of good behaviour. Advanced age caused the principles of sentencing to shift, making some of the purposes of sentencing like rehabilitation or specific deterrence less important for older adults.

In response to the third question, in what way age impacts a sentence, the case law review shows that age impacts sentencing practices in a variety of ways, ranging from the Crown’s choice to go ahead with prosecution to the type of setting where an accused may serve out their sentence. Old age is not always a factor that will command leniency, and in some limited cases, it might even suggest that a penal sentence be increased.

Finally, subjecting sentencing practices to an age-based lens reveals that by and large these judicial practices are either age neutral or result in positive ageism. Only in the limited circumstances where a prison term was increased on the utilitarian basis that to do so is required to rehabilitate older adults because they are ‘stuck in their ways’ or where older adults were
punished more severely because they were held to a higher moral standard (i.e. they ‘should have known better’) was there negative ageism in judicial sentencing practices.

Ultimately, this case law review demonstrates the diverse and sometimes conflicting rhetoric relating to how old age should factor into any given sentence, which can be employed or ignored by judges depending on their own beliefs on how an offender’s advanced age should be weighed. The choice is not just whether or not old age is a factor to be considered in sentencing, but how old age should be factored into decision making. For example, there is precedent that suggests that older criminals are less dangerous because of the sexual burnout of older adults. On the other hand, the argument could be made that old age results in a growing proportion of women – making older men who prey of female victims more dangerous. Alternatively, a judge could find that old age is simply not relevant in considering the danger to the public.

The variety of ways in which old age can increase, decrease or act as a neutral factor in a sentencing decision supports the conclusion that, in practice, judges have their choice of ways which to conceptualize old age. Submitting these practices to an age based lens shows that judicial discretion is often exercised in an age-neutral manner. However, in many cases judges exercise their judicial discretion based on stereotypes or assumptions about older adults as a group, resulting in both positive and negative ageism.
6 Conclusion

The conclusions drawn from this research must be considered in light of the methodological limitations that presented themselves throughout this process. Generally speaking, this study is limited to inferences that could be drawn from written judgments accessible on a commercial database. It does not take into account the large number of factors that impact sentencing judgments that are not contained in written judgments, for instance, the community sentiment about a crime or victim impact statements that may have been very persuasive. It is also impossible to know with certainty the factors, often unexpressed, that influenced an individual judge’s decision. Specific limitations on each of the choices that were made in the collection, coding, and analysis of the data are noted throughout Chapter 3.

Together, the quantitative and qualitative research conducted in this study suggests that advanced age can have an impact on sentencing, in certain defined circumstances. Supporting the idea that age has an impact on sentencing practices include the findings in Chapter 4 where, in over a third of the judgments involving adults over 60, judges explicitly said that old age was a mitigating factor for the purposes of sentencing. In addition, in cases where older adults and younger adults were found guilty of the same average number of counts for the same category of crime (drug related offences), older adults were sentenced to shorter average prison terms. Furthermore, older adults were more likely to be awarded a non-penal sentence than younger adults, and this tendency was not a function of illness. However, despite these findings, the overall difference between the duration of sentences handed down to older adults is not significantly different from the duration of sentences handed down to younger adults. The sexual offence category of crime was the one exception. However, this result could be due to the fact that older adults committed more serious sexual crimes than their younger counterparts.
Thus, the overall conclusion drawn from the quantitative analysis is that age can be a mitigating factor in sentencing, but it is not a strong one.

The texts of the judgments shed light on these results by setting out the parameters of when, why, and the ways in which advanced age influences a sentencing decision. Advanced age can operate as a mitigating factor in many circumstances, but it will not be a mitigating factor in the case of serious crimes, where an offender has a history of criminal behavior, if to do so would reward a delay in prosecution, or if the crimes were recently committed. In some limited circumstances, advanced age is actually an aggravating factor in sentencing. For example, where the sentencing judge holds older adults to a higher moral standard, or harbours a pre-conceived notion that older adults are ‘stuck in their ways’, a longer prison term is required to rehabilitate the offender.

These findings add to, and differ in some respects from, the existing academic literature in the area. First, the existing Canadian authorities on the topic suggest that age is a mitigating factor in sentencing, but that there are certain circumstances where age will not allow for leniency (i.e. for serious crimes or when accompanied by a lengthy period of wrongdoing). This research suggests that there are actually certain circumstances where age is an aggravating circumstance in sentencing.  

Second, existing research fails to parse out the impact of age, independent from illness, on sentencing practices. The current thought is that “age may be relevant … especially if the offender has a limited life expectancy or ill health.” Or that “advanced age is merely an incident to the question of the offender’s state of health…” Contrary to these authorities, this research shows that age operates as a mitigating factor independently from the accused’s ill health. In Chapter 4, the results of the quantitative study found that in over a third of the cases

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322 Chapter 5 sections 5.5 and 5.6.
323 Boyle and Allen, supra note 76 at 273.
324 Renaud supra note 68 at para. 6
involving older adults Judges explicitly said that age was a mitigating factor in their sentencing decision. Ill health accompanied old age in less than half of those cases. Chapter 5’s review of the texts of the judgments demonstrated that judges were alive to the independent operation of age and illness as personal characteristics that might allow for lenient treatment by the Court.

A third, related, divergence in these research findings from current research in the field goes to the type of illnesses that might meet the threshold for leniency. Current research suggests that advanced age is more likely to be a mitigating factor if accompanied by “significant health problems” or an “age related degeneration of the brain”. Contrary to these authorities, the case law review in Chapter 5 uncovered a number of cases where the ill health of the accused fell well short of degeneration of the brain or a significant illness. Lenient treatment was given to offenders who suffered from a myriad of health issues, ranging from anxiety or poor hearing on the one end to more serious illnesses like cancer or heart disease, on the other. Chronic conditions like depression, stress, or arthritis were considered sufficient to qualify for lenient treatment.

Fourth, this research resolves a current issue of divergence in the literature on how age operates as a mitigating factor for serious crimes. As it stands, there are conflicting authorities on the topic, with Mr. Justice Renaud suggesting that age will not operate as a mitigating factor in serious crimes and Clayton Ruby suggesting that old age can be a mitigating factor, even in serious crimes, if it is combined with ill health. Contrary to Renaud, this research concludes that while advanced age is less likely to be a mitigating factor in serious crimes, it is still a mitigating factor in some circumstances. Unlike Ruby’s theory that age needs to be combined with illness to mitigate a sentence for serious crimes, this research reveals that age alone can be a

325 Chapter 4 section 4.2.4.
326 Chapter 5 section 5.7.3.
327 Nadin-Davis and Sproule supra note 45, Renaud supra note 68 at para. 11.
328 Chapter 5 section 5.7.3.
329 Renaud supra note 68 at para. 15; Ruby supra note 74 at 5.145.
mitigating factor in serious crimes, independent from illness. Support for these conclusions are
found in Chapter 4, where age was explicitly referred to as a mitigating factor in 36% of the
cases that involved the sexual abuse of a child (a type of offence that has been codified as a
particularly serious crime in the *Code*). In only 9% of those cases was age held not to be a
mitigating factor.\textsuperscript{330} The case law review in Chapter 5 reveals that judges are more likely to
reject advanced age as a mitigating factor for serious crimes, but that there are circumstances
where no useful purpose is served by sending the accused to jail (for example, if the accused no
longer presents a danger to the public, if the accused is so ill he or she is unable to commit
further crimes).\textsuperscript{331}

Fifth, unlike the U.S. research on the relationship between age and the duration of sentences
which concludes that older adults served shorter sentences than younger adults, this research
found that there was no significant difference between the overall length of sentences handed
down to older adults compared to younger adults.\textsuperscript{332} The lack of a significant difference is
counter-intuitive given the comparatively broader discretion afforded to trial judges in Canada
and the lack of policy statements or guidelines on this side of the border.

Sixth, this research generally adds new information to what little has been written to date
about the impact of old age on sentencing practices. The quantitative analysis in Chapter 4
illuminates interesting trends in the types of crimes committed by older adults, the seriousness of
offences committed by older adults, as well as the distribution of personal characteristics
(gender, aboriginal status, illness) in offenders aged over 60. Generally speaking, the most
common type of offence committed by adults over 60 was sexual offences against children.
Older adults committed more serious offences than younger adults, but this finding could be due

\textsuperscript{330} Chapter 4 sections 4.2.4. and 4.2.7. In the remaining 55% of cases age was not explicitly referred to by the
judge.
\textsuperscript{331} Chapter 5 section 5.6.
\textsuperscript{332} Chapter 4 section 4.2.5.
to the exercise of prosecutorial discretion earlier on in the proceedings not to go ahead with a trial unless there were serious charges to move ahead with. The overwhelming majority of sentencing decisions for adults over 60 involved male offenders, and the most common type of crime committed by female offenders was theft/fraud. Aboriginal offenders made up only 4% of the 590 cases in the data sample. In the majority of cases reviewed involving older adults, the illness of the offender was not mentioned or was not a mitigating factor in the sentencing decision.\footnote{Chapter 4 sections 4.2.1 – 4.2.3.}

Finally, qualitative research in Chapter 5 adds new information to what is currently known about sentencing practices by examining the reasoning behind judicial practices to see if ageism is manifested in the sentencing of older adults. Overall, judicial practices were age neutral or resulted in positive ageism, whereby older offenders benefitted from more lenient treatment even if this treatment was based on negative stereotypes about older adults generally. Only in limited circumstances did negative ageism put older litigants at a disadvantage.\footnote{Estabrooks, supra note 229, R. B., supra note 200, and Robertson, supra note 228.}

The many ways that this study adds to and differs from current research on the topic points to the need for additional research in this area. One area of future research could involve looking into the exercise of prosecutorial discretion in relation to older adults. Section 5.3 suggests that the advanced age of an offender influences the types of charges laid against an older offender as well as the decision of whether or not to proceed with charges in the first place. More research into these practices that occur at these earlier stages of the proceedings would provide a more complete picture of how older adults are processed through the criminal justice system.

Another area for future research could look into elder First Nations offenders. \textit{R. v. Gladue} and the many sources relied upon in that case point to an overrepresentation of Aboriginal
offenders in Canadian prisons. Recent numbers released by CSC suggest that while Aboriginal peoples comprise 2.7 percent of the adult Canadian population, approximately 18.5 percent of offenders now serving federal sentences are of First Nations, Métis and Inuit ancestry. Yet, the only 4% of the cases studied in this research involved Aboriginal offenders. Further research could resolve this discrepancy and provide more insight into sentencing practices for Aboriginal individuals later in life.

The multiplicity of ways in which old age is treated by judges, resulting in ageism in many cases; points to the need for a clear guideline that would bring some uniformity to Canadian sentencing practices. This research has prompted me to endorse an age-neutral approach to the development of future policies. An age-neutral approach would be one where age, in and of itself, is not a characteristic relevant to crafting a sentence.

My endorsement of age-neutrality stems from the inconsistent ways in which judges considered age in their sentencing judgments, which caused me to question why age is relevant in sentencing at all. While the obvious answer to this question is “because it is incumbent on a sentencing judge to consider the particular circumstances of an accused, and the age of an accused is one such ‘particular circumstance’,” I would argue that just the opposite occurs in practice. In concrete terms, age is the time that an individual has been on the planet since they were born. How this passage of time causes various personal characteristics to develop differs so widely between individuals, age in and of itself is a meaningless personal attribute when it comes to justifying a departure from general sentencing practices.

As the textual analysis in Chapter 5 makes clear, considering age as a characteristic that justifies a departure from regular sentencing practices opens the door for ageist stereotypes or

335 Gladue, supra note 164 at para. 58.
337 Section 4.2.3.
assumptions about age to factor into sentencing decisions. Age operates to stand in the place of other characteristics, like wisdom or frailty that are attributed to older adults generally and not necessarily the particular accused. Paradoxically, when age is one of the ‘particular circumstances of an offender’ it can move the sentencing inquiry away from individual considerations towards a reliance on ageist stereotypes. Instead of relying on the characteristic of ‘age’, judges should state precisely what personal trait in an offender justifies any departure from the normal sentence.

Removing age as a relevant consideration probably would not have that much of an impact on the development of the common law in this area. Apart from the rationale that age should be a mitigating factor ‘just because it is’, which clearly relies on some sort of stereotype or assumption about older adults, the circumstances where age was a mitigating factor in Section 5.4 could stand alone as reasons for lenient treatment in sentencing (i.e. minor crimes, sentence would be disproportionately harsh in light remaining lifespan). Furthermore, taking age out of the equation would allow for the more uniform application of the principles and purposes of sentencing contained in the Code. It would also increase transparency and clarity because judges would be forced to say what personal trait of an accused really justifies a departure from regular sentencing practices. Eliminating advanced age as a consideration is one way to prevent judges from, at least overtly, relying on ageist beliefs or stereotypes when crafting sentences.

While sentencing is important, it is really only one piece of the complex puzzle of ageism in the Canadian legal system. In order to eliminate ageism and age based discrimination, all aspects of the justice system, not just sentencing practices, need to be subjected to a critical lens.

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338 This is an age neutral approach as it could equally be applied to a younger offender with some sort of terminal illness, for example. It is the remaining life expectancy of the accused, and not advanced age, that justifies the lenient treatment. Similarly, perhaps the illness of the accused would lead a judge to consider the reduced lifespan. In such a case, illness and not the advanced of the accused would justify the lenient sentence.

339 See Section 5.6 for the ways age ‘shifts’ the principles and purposes of sentencing, for reasons that are often prompted by stereotypes about older adults.
Given the importance of sentencing to those individuals involved and to the administration of justice to the public generally, casting an age based lens on sentencing practices is a good place to start.
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OTHER MATERIALS


Appendix 1: Coding Manual

Across the columns from left to right

Citation (meaning the neutral citation assigned to the case or if not possible, the not QL citation)

Court (meaning the level of court handing down the sentencing decision being coded)
1 = provincial court (in the Yukon, Territorial Court)
2 = provincial supreme courts
3 = appeal court (Provincial Courts of Appeal)
4 = Supreme Court of Canada

Offence (means the primary offence that the offender in a case was found guilty of contrary to the Criminal Code of Canada or the Controlled Drugs and Substances Act where applicable)
1 = Sexual Offences (includes offences found in Part V of the Criminal Code, s. 150 - 182, plus sexual assault in sections 266 – 269 of the Criminal Code)
2 = Drug related offences (includes Controlled Drugs and Substances Act s. 4 - 7)
3 = Theft or Fraud (includes offences found in Criminal Code part IX, s. 321 – 380)
4 = Driving Offences (includes sections 249 – 249.4 of the Criminal Code)
5 = All other offences (exclude murder, manslaughter)
6 = Equal number of charges sexual and drug
7 = equal number of charges sexual and theft
8 = equal number of charges sexual and driving
9 = equal number of charges drug and theft
10 = equal number of charges drug and driving
11 = equal number of charges theft and driving

- “Primary offence” means that predominant offence committed by the offender being sentenced.
- If charges have been laid for a variety of offences, add up the total number of charges within a category to determine the number of charges applicable to that category of offence.
- If more than two categories of offence apply to the same offender then code for the category of offence where there is the largest number of charges that the offender has been found guilty of. For example, if an accused is found to be guilty of four charges of incest, three charges of indecent touching, two charges of sexual assault, and six charges of fraud - then the total number of “Sexual Offences” would be nine and the total number of offences in the category “Theft or Fraud” would be six, so the case would be classified in the “Sexual Offence” category.
- If more than two categories of offence apply to the same offender and there is an equal number of charges in each category then, where 'other' and one other category have an equal number of charges, code for the category that is not 'other'. Where there are two categories and one of them is not 'other' follow the guidelines above.
- If the offender is declared a ‘dangerous offender’ and sentenced to an indeterminate period of incarceration, record as 300 months (25 years). This is because 25 years is the minimum non parole period for first degree murder, the most serious crime in the Criminal Code.

Age (meaning the age of the offender at the time of sentencing, in years).
0 – age not mentioned in the judgment, to be excluded from the sample
1 – 19 and under (exclude cases tried under Youth Criminal Justice Act, S.C. 2002, c. 1 – must be tried under the Criminal Code as an adult).
2 – 20 - 29
3 – 30 - 39
4 – 40 - 49
5 – 50 - 59
6 – 60 – 69
7 – 70 – 79
8 – 80 – 89
9 – 90 and over

Gender (meaning the gender of the offender at the time of sentencing)
0 – other, including where age not mentioned in judgment or transgender
1 – male
2 – female

Mitigation – (meaning was age of the offender stated in the judgment to be a mitigating factor in sentencing)
0 – age was not mentioned to be a mitigating factor
1 - yes – age was said to be a mitigating factor in sentencing
2– no – age was specifically stated not to be a mitigating factor

Sentence (meaning the total duration of the time sentenced to a penitentiary term, excluding credit for any time served prior to sentencing or parole eligibility)
   record 0 if no prison sentence awarded (i.e. conditional discharge (Code s. 730), sentence to be served in community, probation, fine, etc.)
   if sentences are served concurrently, only record the total time that is to be spent in prison (i.e. if sentenced to two years on one charge, and six months on another charge to be served concurrently, then record the sentence as 2 years (24 months)).
   If sentenced to an indeterminate prison term, record as 300 months (25 years) because 25 years is the minimum non parole period for first degree murder, the most serious crime in the Code.

Aboriginal (includes Inuit ancestry, Metis, belonging to a recognized aboriginal band. Coding for this characteristic because it is singled out in section 718.2 for sentences to be served in the community)
0 – not aboriginal
1 – aboriginal

Illness
0 – illness not mentioned
   1- Poor health was a mitigating factor in sentencing
   2- Offender was in good health
   3- Poor health was not a mitigating factor in a sentencing decision

Details on how I collected the sample:
The sample included judgments recorded and contained on the commercial database, Quicklaw.

The data was collected in two batches to reflect the selection of cases that could be assigned to the two age groups “older adults” which included offenders aged 60 and over, and “younger adults” which included adults aged under 60 years of age.

First I collected the data for the older adults group, because the limited number of reported decisions for those offenders aged over 60 meant that I could collect all of the decisions involving this age cohort. The number of decisions that I collected for this age cohort would determine the number of cases that I would need to collect for the younger adults group.

To collect the cases involving older adults, I conducted a Boolean search on QuickLaw using the terms “6* year* old” & sentence, and included a time limit of cases since 1/1/1981 to 2/28/2011, and all jurisdictions. The “*” is a wildcard function in QuickLaw, which means that placing this behind the six would catch any judgments where six was used before another number, or alone. The use of the number six automatically includes where this number is included in numerical form or where a number is spelled out (i.e. sixty or 60 would both be included). This search yielded all of the reported decisions that included the phrase “sixty-[any number] year old” and sentence in the judgment, which I believed would effectively catch all sentencing judgments that mentioned the age of an offender. This search was repeated for seventy year old offenders (by using “7* year* old & sentence”), eighty year old offenders (by using “8* year* old & sentence”), and ninety year old offenders (“9* year* old & sentence”). While I believe this search would catch the large majority of cases, I would miss judgments where the age of an offender was not mentioned in the judgment or where different phraseology was used by the sentencing judge (i.e. “The Accused, aged 62 years, committed the offence...

For the thesis, all of the relevant decisions were coded. For the directed research, once I obtained the results from this search, I would screen for those cases that only involved trial level decisions of provincial courts of first instance, which would include the Court of Queens Bench, Provincial Court, or Provincial Supreme Court (no administrative tribunals, tax courts, or appeal courts).

Once the cases were coded, I sorted the data by citation so that I could screen out any duplicate entries or appeals of the same case (i.e. provincial court appeals that were heard in the Provincial Supreme Courts).

Once the data have been sorted for double entries in the aged category, I counted the number of cases that apply to each the categories “Sexual Offences” (200), “Drug Related Offences” (22), “Theft or Fraud” (51) and “Driving Offences” (22) because the number of cases in each category will be the number of cases that I will match with younger offenders in that category. For example, since there were 200 cases in the “Sexual Offences” older adults I will include 200 offences in the “Sexual Offences” category for the younger adults. The 67 cases that were classified in the “other” category were excluded from the data that was used in the quantitative study because the variety of offences in this category were too diverse to effectively compare (i.e. they ranged from animal abuse cases to robbery and arson).

Once the data in each category was counted, I will collected the case law for the younger offenders. How this data was chosen from the QuickLaw database depended on the category.
For “Sexual Offences” I conduct a Boolean search of the terms sentence & sexual & child (because all but 6 cases for the older age group in this category involved a child. Those 6 cases in the older adult group were excluded from the data sample to increase the control on the results). The same time limit, since 1/1/1981 to 2/28/2011, all jurisdictions, with the level of court limited to trial level courts (provincial and superior courts for each province and territory). For “Drug Related Offences” I conducted the Boolean search for the terms sentence & “controlled substance” with the same time limit, since 1/1/1981 to 2/28/2011, all jurisdictions, trial level courts. For “Theft or Fraud” I conducted a Boolean search using the terms sentenc* & theft fraud, which yielded judgments that include the word sentence and the word for or the word theft, again the same time limits and jurisdictional limits apply. Finally for “Driving Offences” my Boolean search involved the doing a keyword search of the terms sentence & driving with the same applicable time limits and jurisdictions.

Once the search results are received for each of the categories of offences, QuickLaw generated a list result. Using the random number generator on the website www.random.org to generate a random set of numbers, I choose the case with the corresponding number to be included in the data set, up to the maximum number of cases needed for that category. For example, where random.org generates the number 4, 33, 29, 90, 91, 117 – select these cases on the QuickLaw list.

In certain situations, cases will have to be rejected and the case corresponding to the next randomly generated number should be used instead:

- If the judgment is from an appeal level court or administrative tribunal;
- If the judgment is not a sentencing decision;
- If there is missing information in the judgment, i.e. if the age of the offender, the gender, or the sentence handed down is not included in the judgment;
- If that case has already been used in the data sample;
- If the offender is aged over 60 years of age or under 19 years of age; or
- If the offence related to a conviction that is not categorizable as a “Sexual Offence”, “Driving Offence”, “Theft or Fraud” or “Drug Related Offence”.

Once the cases are collected in each offence category, then the average prison sentence for each offence category, in months, can be measured and the results between the two age groups can be compared.