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Juvenile Delinquency -- Transfer of Juvenile Cases to Adult Courts -- Factors to be Considered under the Juvenile Delinquents Act

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JUVENILE DELINQUENCY—TRANSFER OF JUVENILE CASES TO ADULT COURTS—FACTORS TO BE CONSIDERED UNDER THE JUVENILE DELINQUENTS ACT.—Reported cases may not provide very accurate criminal statistics but recently there seems to have been an increased number of cases[1] of juvenile delinquency which have been transferred (or were sought to be transferred) to the adult

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[59] Murray Edelman, The Symbolic Uses of Politics (1964).

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[1] *E.g., Regina* v. *Simpson*, [1964] 2 C.C.C. 316 (North Bay Juv. Ct); *Re Regina* v. *Arbuckle*, [1967] 3 C.C.C. 380, (1967), 59 W.W.R. 605 (B.C.C.A.); *Regina* v. *Shoemaker*, [1966] 3 C.C.C. 79 (B.C.S.C.); *Rex* v. *H.* [1931] 2 W.W.R. 917 (Sask. K.B.); *Regina* v. *P.M.W.* (1955), 16 W.W.R. 650 (B.C. Juv. Ct); *Re L.Y. No. 1* (1944), 82 C.C.C. 105 (Man. C.A.); *Re Rex* v. *D.P.P.* (1948), 92 C.C.C. 282 (Man. Q.B.); *Regina* v. *Sawchuk* (1967), 1 C.R.N.S. 139 (Man. Q.B.); *Regina* v. *Miller* (1961), 132 C.C.C. 349 (Sask. Q.B.); *Regina* v. *M.*, [1964] 2 C.C.C. 135 (Man. Q.B.); *Regina* v. *Liefso* (1965), 46 C.R. 103 (Ont. S.C.); *Regina* v. *Cline*, [1964] 2 C.C.C. 38 (B.C.S.C.); *Regina* v. *Pagee* (*No. 1*) (1963), 41 W.W.R. 159 (Man. Q.B.); *Regina* v. *Trodd*, [1966] 3 C.C.C. 367 (B.C. S.C.).

court. The incidence of waiver cases varies from province to province and from juvenile court to juvenile court. One of the busiest juvenile courts in Canada, the court of Metropolitan Toronto, has not waived a juvenile case in the last twenty years. On the other hand, during one week in July, 1969, the British Columbia Supreme Court has considered two waiver cases.[2] These two cases provide an interesting contrast in the legal approach to the juvenile delinquent. Another waiver case from British Columbia has just been reported,[3] and provides the most balanced view of all three.

The question of waiver is considered important because we subscribe to the philosophy that a juvenile (under sixteen, seventeen, or eighteen years, depending on the provincial jurisdiction) who does some anti-social act is different from an adult criminal and should be treated accordingly. This is well expressed in section 38 of the Juvenile Delinquents Act[4] where it is laid down that a child should "be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance". This is to be achieved by therapeutic rather than punitive measures. Since its inception, the juvenile court has employed enlightened methods, such as probation, which have eventually received wider use and acceptance in the adult courts and institutions. The juvenile court has been a laboratory for ideas in handling problems of social deviance. This court for children has been strongly influenced by behaviourist and determinist ideas which denied the notions of blameworthiness and free will found in the ordinary criminal law and which are based on the classical school of criminology as practised by such strict adherents to the Judeo-Christian ethic as James Fitzjames Stephen. The founders of the juvenile court, who were dedicated to social work, had high hopes for their creation. For many reasons, including their exaggerated hopes, the juvenile court did not put an end to juvenile delinquency and, consequently, adult crime did not disappear. Perhaps the increased incidence of waiver cases can be attributed to a disillusionment among juvenile court judges who have not "reformed" delinquent children by friendly counselling, stern warnings, probation or enforced detention in training schools. These judges may also have been influenced by the popular cries of "Law and Order", "Crime on the Streets" and the adult resentment of today's freedom-loving, uninhibited, undisciplined, hedonistic, alienated and troubled Youth. This spate of contradictory adjectives may not describe a juvenile delinquent but they are no more arbitrary and inexact than the definition found in the Juve-

[2] *Regina* v. *Beeman* (1969), 69 W.W.R. 624 (B.C.S.C.) aff'd (1970), 71 W.W.R. 543 (B.C.C.A.); *Regina* v. *Proctor* (1969), 69 W.W.R. 754 (B.C. S.C.).

[3] *Regina* v. *R.* (1969), 70 W.W.R. 292 (B.C.S.C.).

[4] S.C., 1929, c. 46, now R.S.C., 1952, c. 160.

nile Deliquents Act. Section 2(h) of that legislation defines a "juvenile delinquent" as:

> . . . any child who violates any provision of the *Criminal Code* or any Dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute;[5] . . .

A delinquent is defined as less than eighteen years in some provinces (such as British Columbia) and as young as sixteen years in others (such as Ontario). The delinquent act can vary from murder, and other serious Criminal Code offences, to minor infractions of city by-laws. Fortunately, there are limitations on the cases of juvenile delinquency which can be waived to the adult courts. The child must have allegedly committed an indictable Code offence and must be "apparently or actually over the age of fourteen years".[6] The only guidance given to the juvenile court judge in making his decision to give up jurisdiction to an ordinary criminal court is that "the good of the child and the interest of the Community demand it".[7] Most of the cases have involved serious charges such as murder, arson and rape. Waiver has been upheld on appeal in about half the cases (but, of course, only a very small percentage of juvenile cases are waived in the first instance). The reasons given in these decisions show little understanding of the juvenile delinquent or of the philosophy of the juvenile court. The courts have discussed the juvenile court's inadequacy as a tribunal to try serious crimes, the lack of procedural protections in that court, the need to give a child a fair trial, the public's "right to know", the inadequacy of treatment available to the juvenile court and the community's need to see justice done in a public trial. Very few cases have made a close examination of the problem; ironically, these rare cases are ones in which waiver has been refused or quashed.

Regina v. *Beeman* is primarily concerned with procedure. Originally, an allegation had been made in the family and children's court of Vancouver that Beeman "did commit a delinquency in that he . . . unlawfully did attempt to commit an act of gross indecency with another male person". Pursuant to section 9 of the *Juvenile Delinquents Act*, the case was transferred to the ordinary courts. Beeman elected to be tried by a judge without a jury and, after a preliminary hearing, was committed for trial. Subsequently, the Crown preferred an indictment charging Beeman with counselling another to commit the offence of gross indecency, rather than attempted gross indecency. The British Columbia Supreme

[5] *Ibid.*
[6] *Ibid.*, s. 9.
[7] *Ibid.*

Court, per Macdonald J. decided that "valid proceedings had been initiated against the accused in the ordinary courts"[8] and that section 478(2) of the Canadian Criminal Code[9] could be used by the Crown to substitute the offence of counselling for that of attempt. Beeman's counsel argued that this was improper and that the case should have been returned to the juvenile court as soon as a different charge was laid. Macdonald J. took the view that section 478(2) was fatal to the appellant's case. Beeman argued that when another charge was substituted, the juvenile court should have been given the opportunity to rescind the order (as provided by section 9(2) of the Juvenile Delinquents Act). The learned judge distinguished *Regina* v. *Goodfriend*[10] on which Beeman placed strong reliance. In that case, a juvenile had originally been charged with unlawful possession of marijuana for the purpose of trafficking. When he appeared before the magistrate, the Crown withdrew this charge and substituted a charge of unlawful possession. The juvenile pleaded guilty. The Court of Appeal quashed the conviction on the submission that the magistrate was without jurisdiction. Macdonald J. distinguished this case on the basis that the initiating step in the proceedings in *Beeman* was valid and unchallenged and therefore the magistrate conducted a preliminary inquiry with full jurisdiction to do so. Therefore, in the judge's words, Beeman was "beyond recall to the juvenile court".[11]

It is not my intention to write a technical criticism of the procedural issues in this case. To one relatively untutored in the niceties of criminal procedure, the distinction between *Goodfriend* and *Beeman* seems minuscule. To someone more interested in the quality of juvenile justice, the disposition of the *Beeman* case seems a little difficult to follow. The whole basis of criminal procedure, particularly when interpreted by the vigilant eye of an appellate court, is to ensure that justice be not only done but also be seen to be done. If a juvenile is involved in the criminal process, then this judicial proverb should be applied with more circumspection, greater equity and, perhaps, less strict adherence to procedural exactness. Let us compare the two cases. In *Goodfriend*, the second charge laid against the juvenile was less serious than the original. In *Beeman*, the amended charge of counselling was more severe than the original attempt charge.[12] Goodfriend had pleaded guilty to the second charge while Beeman had sought, by means, *inter alia*, of mandamus, to defeat the indictment. The

[8] *Supra*, footnote 2, at p. 629.
[9] S.C., 1953-54, c. 51.
[10] (1968), 65 W.W.R. 189 (B.C.C.A.).
[11] *Supra*, footnote 2, at p. 629.
[12] See the following provisions of the Canadian Criminal Code, *supra*, footnote 9, s. 149 (punishment for gross indecency), s. 406 (b) (punishment for attempt), s. 407 (punishment for counselling). The punishment for counselling is twice that of attempt.

adult courts have shown that they are deeply concerned with the problem of drug-taking youth and are prepared to impose severe deterrent sentences.[13] The charge against Goodfriend involved drugs but he won his appeal. (The court's usual policy on drugs should not be condoned and the reference back to juvenile court was, no doubt, correct.) Beeman's offence was one of sexual deviance. Without knowing all the facts, one would assume that such behaviour in a juvenile calls for treatment rather than punishment and such disposition could be best dispensed by a sympathetic juvenile court. *Beeman's* case remained under the jurisdiction of the adult court.

The judgment of Macdonald J. took no account of the policy underlying the Juvenile Delinquents Act. The factors set out in section 38 seem to have been ignored by the learned judge who also ignored the social differences between the two cases as outlined above. In distinguishing *Goodfriend*, Macdonald J. should also have taken into account the social factors which McFarlane J.A. in *Goodfriend* saw as perhaps overriding the strict legalistic principles of criminal procedure. We might also note that the decision in *Goodfriend* was one of the British Columbia Court of Appeal, a superior court to that presided over by Macdonald J.

The decision in *Regina* v. *Proctor*, and the factors taken into account by Munroe J. of the British Columbia Supreme Court, are in stark contrast to the result in the *Beeman* case. While it is realized that *Proctor* was a simple waiver case, some of the judicial discretion wisely used in *Proctor* could have been profitably applied by Macdonald J. in the other case. *Proctor* has another unusual quality; it was one of those fairly rare cases where a superior court decided that the juvenile court judge should not have given up jurisdiction over the juvenile. Furthermore, Munroe J. seems to have a good understanding of the philosophy of the juvenile court.

Criticism of *Beeman* or any other waiver case should not be taken as an indication that no juvenile case should ever be waived to the adult court. In many instances, the waiver of a juvenile case should indicate that the philosophy of the juvenile court is inapplicable or that the resources of juvenile justice are inadequate or have failed in previous attempts to help the delinquent child. Such cases should be rare because juvenile institutions should have the best facilities and the authorities should be most hesitant before giving up on efforts to help juveniles. Too frequently, young men and women of sixteen to twenty-one years are incarcerated in adult institutions and learn nothing but the trade of crime from more sophisticated and old criminals. (The ideal solution may be

[13] *E.g. Regina* v. *Simpson*, [1968] 2 O.R. 270 (Ont. C.A.); *Regina* v. *Martin* (1969), 70 W.W.R. 282 (C.C. Co. Ct).

special forms of treatment for this intermediate group whose members are so impressionable and whose habits are still capable of improvement.)

Unfortunately, many waiver cases result in trials in the adult court and incarceration in adult institutions because juvenile and appellate court judges apply erroneous reasoning in ordering waiver. The rationale of section 9 of the Juvenile Delinquents Act, "The good of the child and the interest of the Community" is too frequently construed in a retributive way so that the court is really saying that the public will not tolerate this "junior criminal" being treated as a "misdirected and misguided" child. The child must be punished in "the interest of the community". On other occasions, the juvenile court judge waives a serious case because he does not want the responsibility of a trial under the adversary system applying strict rules of evidence. In some instances, which are the saddest of all, the case is waived because the jurisdiction has no treatment facilities for a seriously disturbed child or adolescent who has committed a major offence.

At first sight, the juvenile court judge appears to have made the correct decision in refusing to proceed with Proctor as a juvenile. Munroe J. of the British Columbia Supreme Court did not agree, however, and ordered the appellant to be "tried" under the Juvenile Delinquents Act. Possibly, the first judge was correct and appeals from juvenile court waivers may be unfortunate because a Supreme Court justice is not an expert in juvenile delinquency and has not had the benefit of observing the juvenile on previous occasions when he may have failed on juvenile probation or has abused the social welfare philosophy of the court for children. The indications in *Proctor* seemed most unpromising; the juvenile was seventeen years and ten months at the time of the alleged offence and was more than eighteen years at the time of the appeal. He was accused of armed robbery of a trust company. In 1965 and 1960, he had been adjudged delinquent on five occasions for thefts. At the time of the alleged robbery, he was on bail for two alleged offences of breaking and entering and theft in Toronto (where, of course, he was classed as an adult). There was further evidence that he had been adjudged delinquent in Ontario when he was eleven. Despite all these liabilities, one's instincts suggest that Munroe J. nevertheless made the proper decision.

Proctor was the product of a "broken home" and had "never known adequate parental control or discipline".[14] These factors certainly do not differentiate Proctor from many juvenile delinquents (or adult criminals) before the courts. The appellant was fortunate because Munroe J. found a unique quality in this case and took the opportunity to apply individualization of treatment.

[14] *Supra*, footnote 2, at p. 757.

While Proctor was in jail awaiting trial, he came under the influence of a Constable Foster of the Vancouver city police force. The constable, who found the young man "a fairly decent young fellow", "got to thinking that he needed a break".[15] The constable also told the court: "I have seen a lot of prisoners, young and old, go through jail in three years and this is the only one I have taken a liking to."[16] Constable Foster and his wife offered to take the juvenile into their own home and to raise him with their own children. The police officer had made arrangements for the employment of Proctor.

Munroe J.'s assessment of the juvenile can best be described in the judge's own words:

> . . . that he needs and is likely to respond favourably to supervision and discipline; that he needs the opportunity to develop self-control and to form a close tie with a substitute for a father and with mature adults, in the hope that he might absorb their standards; that he has no family, relatives or friends behind him anywhere; that he has had some training as an apprentice jockey; that he is mentally immature and emotionally insecure; that he is a lonely boy given to crying spells; that he has a heart-ache and needs affection; that in any penal institution he might find colleagues in crime, but in a home he would probably find brothers in life; that he has a potential for good; that institutional control is less likely to benefit him than is the atmosphere of a normal home; that he is susceptible to good influences as well as to bad ones, especially at this time.[17]

The learned judge also took into account that Proctor could be brought before the court by a probation officer any time before his twenty-first birthday if he should be in breach of probation. He also placed a heavy reliance on the desirability of Proctor avoiding a criminal record and that it was in the interest of the community if Proctor could be rehabilitated and kept out of penal institutions. In his wisdom, Munroe J. realised that penal institutions have a poor record of success. He referred to the Commissioner of Penitentiaries' remarks that "what is required is to put this juvenile in a setting where he can live and work next to persons who can bring out the admiration of the juvenile; whom the juvenile will try to imitate, and whom we hope he will remember as good sound sensible persons whom he would like to be like".[18] His Lordship then added the sad, but true, fact that "the major shortcoming in our prison system today is too few instructors of that calibre with too many inmates and lack of adequate training facilities".[19]

Proctor is a rare case—an enlightened judge providing, for a juvenile, an excellent placement with responsible and concerned

[15] *Ibid.*, at p. 756.
[16] *Ibid.*
[17] *Ibid.*, at p. 757.
[18] Cited, *ibid.*, at p. 759.
[19] *Ibid.*

citizens. This surely reflects the true philosophy of the Juvenile Delinquents Act.

The latest British Columbia case, *Regina* v. *R.*[20] also concerns waiver but from a different perspective. The juvenile, aged sixteen, was charged with one act of forgery and three of uttering. Eight youths were involved and all but two were juveniles. In the northern community of Prince Rupert, the judge of the family and children's court also wears another hat as adult court magistrate. The judge-magistrate waived the case of R to the adult jurisdiction without any application from the Crown, and without any evidence being taken other than proof of the child's age. On the face of it, the only factor taken into account was the magistrate's pronouncement that "under the circumstances . . . the good of the child and the interest of the community demanded"[21] the "raising" of the case as the magistrate termed it. In fact, the judge had further data although none of it was presented in court; he had consulted privately with two probation officers and had had prior knowledge of R as a result of another act for which R had been adjudged delinquent some six weeks previously. In his report to the appeal court, the judge had also intimated that one of the reasons for waiving the case was the lack of juvenile treatment facilities available in the Prince Rupert area.[22] This too had not been mentioned in court at the time of waiver.

The appellant delinquent submitted that no proper notice of the transfer was given and that there was "no evidence properly before the learned judge on which he could properly reach the conclusion he did".[23]

Rae J. upheld the appeal and made a careful examination of the case law. He found support for his decision in the judgment of Bastin J. in *Regina v. Pagee (No. 1)*[24] where the Manitoba Court of Queen's Bench held that a waiver application was a "very serious proceeding and the inconvenience of having another magistrate conduct the subsequent hearings should not interfere with a complete and searching inquiry".[25] The serious quality of the proceeding is reflected in the criteria which Bastin J. applied:

> I interpret the words "the good of the child" to mean the treatment which will provide the eventual welfare of the child by eradicating its evil tendencies and transforming its character. I interpret the word "community" to mean society at large.[26]

And:

> Is the limited treatment provided by . . . the *Juvenile Delinquents Act* of a nature to reform him or is he so mature or so incorrigible that

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[20] *Supra*, footnote 3.
[21] *Ibid.*, at p. 294.
[22] *Cf.* the citation from *Regina* v. *Arbuckle, supra*, footnote 1, at text accompanying footnote 31, *infra*.
[23] *Ibid.*, at p. 295.
[24] *Supra*, footnote 1.
[25] *Ibid.*, at p. 191.
[26] *Ibid.*, at p. 190.

his reclamation needs the harsher treatment provided by the *Criminal Code*.[27]

Similarly, Rae J. relied on *Regina* v. *Arbuckle*,[28] where McFarlane J.A., while admitting that a waiver decision required a "substantial exercise of administrative discretion",[29] decided that the judge must "establish facts and must act judicially in the sense of proceeding fairly and openly . . . giving proper consideration to the views and representations of the parties before him".[30] The inquiry would be of "a quite general nature into the background, character, conduct, education and potential of the child as well as the nature and facilities of the community".[31]

Rae J. also referred to the decisions of British Columbia courts in *Rex* v. *Benson and Stevenson*[32] and *Regina* v. *Dolbec*[33] where the hearsay evidence of probation officer's pre-sentence reports was successfully attacked. Of course, these cases were both adult cases and stricter evidentiary rules usually apply in such cases. A more informal procedure has been customary in the juvenile court. If, however, a juvenile case is likely to be waived to the adult court, then the courts should insist that the juvenile's rights are given full protection or the doubtful case should always result in the juvenile case being left in the non-criminal court.

The procedure adopted by the juvenile court judge in *Regina* v. *R.*[34] has all the ingredients found in the landmark decisions of the United States Supreme Court in *Kent*[35] and *Gault*.[36] Although the United States court did not go so far as to say that all elements of "due process" (as described in the United States constitution) should be applied to juvenile court proceedings that court did suspect, however, that the juvenile was receiving the worst, instead of the best, of the two worlds of criminal justice and social welfare which are joined in the juvenile court. Fortas J. stated that this denial of justice had to be stopped. The juvenile court judge in *Regina* v. *R.* had acted with little regard for the rights of the juvenile in that case and the greatest of the procedural sins committed was not the dual roles of juvenile court judge and adult court magistrate played by this member of the judiciary. The evidence presented in open court was minimal and the rights of the juvenile were flagrantly disregarded. The erroneous flavour of the case is that the onus of proof is upon the juvenile to show that the

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[27] *Ibid.*
[28] *Supra*, footnote 1.
[29] *Ibid.*, at p. 609.
[30] *Ibid.*, at p. 601.
[31] *Ibid.*, at p. 609.
[32] (1951), 3 W.W.R. (N.S.), 29 (B.C.C.A.).
[33] [1963] 2 C.C.C. 87 (B.C.C.A.).
[34] *Supra*, footnote 3.
[35] *Kent* v. *United States* (1966), 383 U.S. 541 (U.S. Sup. Ct).
[36] *Re the Application of Gault* (1967), 384 U.S. 997 (U.S. Sup. Ct).

case should not be waived. This is surely contrary to the philosophy of the Juvenile Delinquents Act and the need for the juvenile court to act in "the best interests of the child". The need for some semblance of due process in the juvenile court does not mean of course that sociological data should not be taken into account but these factors must be produced in open court (subject to problems of professional privilege) and must be scrutinised by the juvenile and his counsel. These protections cannot be limited to the waiver cases. A decision to send a child to a training school (or perhaps even label him a juvenile delinquent) must be given proper judicial consideration.

What is "proper judicial consideration"? In this regard, perhaps, *Regina* v. *R.* contains a hidden agenda. In *Regina* v. *R.*, Rae J. specifically states[37] that he is not concerned with the merits of the waiver decision. The learned judge makes some broad statements, however, which could have a very wide application. Although there are one or two oblique disclaimers by the judge that he is not making broad policy statements about the juvenile court, this case may have a future potential for changing the operation of juvenile courts in all their cases, not just those where an allegation of juvenile delinquency is transformed into an indictment of heinous crime.

When Rae J. discusses the behaviour of the juvenile court judge in *Regina* v. *R.*, he reminds us that the remarks of McFarlane J.A. in *Regina* v. *Arbuckle* are to be read while remembering that the case was one of waiver. Rae J. goes on, however, to discuss the important decision of the House of Lords in *Official Solicitor to Supreme Court* v. *K.*[38] and the meaning of "being administrative and ministerial". That case concerned the care and custody of wards of the court of chancery which operates on a basis of *parens patriae* which is also the supposed rationale of the juvenile court. This concept is best summarized in the phrase "the best interests of the child".

In this connexion, the remarks of Lord Devlin are cited:

> Save in so far as their powers are limited by statute, all judges do as they think fit. But what "they think fit" is not determined by their collective wisdom and embodied in judge-made rules. In the field of procedure these rules are those which Upjohn, L.J. in the Court of Appeal rightly called "the ordinary principles of a judicial inquiry". They include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only upon evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice.[39]

[37] *Supra*, footnote 3, at p. 304.
[38] [1965] A.C. 201, [1963] 3 All E.R. 191 (H.L.). [39] *Ibid.*, at p. 237.

Similarly, Lord Hodson had said in the *K* case that "it is contrary to natural justice that the contentions of a party in a judicial proceeding may be overruled by considerations in the judicial mind which the party has no opportunity of criticizing or controverting because he or she does not know what they are . . .".[40]

Both the House of Lords in the *K* case and Rae J. in *Regina* v. *R.* make it clear that the administration of the *parens patriae* jurisdiction does not preclude deciding the issue on judicial principles. Rae J. put it in these terms:

> Because the jurisdiction in the juvenile court is administrative and, in a measure, perhaps parental, does not, in my view, warrant the judge of the court acting on information and knowledge in the manner in which it was done here. The practice in question cannot pass the test of necessity, only the test of convenience or expediency.[41]

Perhaps the importance of *Regina* v. *R.* is that future waiver decisions of the juvenile court will be arrived at with much more circumspection. Despite Rae J.'s disclaimers, perhaps His Lordship's decision is of prime importance because it is putting juvenile court judges on notice that, in future, the juvenile's rights must be more stringently protected, particularly before the juvenile is thrown to the retributive wolves of the adult courts. Furthermore, the decision in *Regina* v. *R.* has the flavour of a case which is demanding minimal elements of a fair trial for all juvenile cases.

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[40] *Ibid.*, at p. 234.

[41] *Supra*, footnote 3, at p. 300.

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