Date: 19971021 Docket: C.A.C. 138341

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. K.W., 1997 NSCA 174

Roscoe, Hart and Jones, JJ.A.

BETWEEN:

K.W., a young person within the meaning of the **Young Offenders Act (Can)**	W. Andrew Ionson for the Applicant
Applicant	
- and -	
	Robert E. Lutes, Q.C. and V. Blaine Allaby, Q.C.
HER MAJESTY THE QUEEN	for the Respondent
Respondent	Appeal Heard: October 3, 1997
	Judgment Delivered: October 21, 1997

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Application denied per reasons for judgment of Hart, J.A.; Jones and Roscoe, JJ.A. concurring.

HART, J.A.:

This is an application pursuant to **s. 16** of the **Young Offenders Act**, R.S.C. 1985, c. Y-1 for a review of the order of the Honourable Associate Chief Judge Comeau of the Family Youth Court directing that the applicant be transferred to ordinary court for proceedings against him on two charges of first degree murder. The applicant was fourteen years old at the time of the alleged offences.

At the commencement of this application it was pointed out that an order had been made in the Youth Court pursuant to **s. 17** of the **Young Offenders Act** restricting publication of any information presented at the transfer hearing and that order was confirmed by the Court of Appeal.

Upon a review of a transfer order the Court of Appeal, pursuant to **s. 16(9)** of the **Young Offenders Act** "may, in its discretion, confirm or reverse the decision of the Youth Court".

This statutory direction to an appeal court was considered in depth by the Supreme Court of Canada in **R. V. M.(S.H.)** (1989), 50

C.C.C. (3d) 503, where McLachlin J., speaking for the majority of the Court, stated at p. 548:

> I agree with the view taken by the Court of Appeal. Section 16(9) and (10), by conferring on the reviewing court the "discretion" to confirm or reverse, establishes different rules for the review than normally apply on appeals, where the court is limited to correction of error. The reviewing body's function must be to "review" the decision, and then, "in its discretion", confirm or reverse it. This involves evaluation, not only of whether the court below made an error of law or jurisdiction, but of whether its conclusions are correct based on the factors set out in the Act. In short, the reviewing tribunal can go into the merits of the application. If this review leads to the conclusion that the decision below was wrong for any of these reasons, the reviewing court in the exercise of its discretion may substitute its own view for that of the judge below.
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> There is, however, an important limit on the power of the review tribunal. Because it has not heard the evidence, it must accept the youth court's findings of fact and defer to it in matters involving the credibility of witnesses. Parliament has conferred on the review court a discretion to confirm or reverse the youth court judge's decision, but it has left the task of hearing and evaluating the evidence entirely to the youth court judge. As Laycraft C.J.A. pointed out, it is a fundamental rule that review tribunals which have not had the advantage of hearing and seeing the witnesses should defer to the trial judge who has had this advantage. Nothing in the Act suggests that Parliament intended to abridge this long-standing and eminently reasonable principle.

The burden on an applicant seeking transfer of a young offender to the ordinary courts was also discussed in the **R. V. M.(S.H.)** case. McLachin J. discussed this burden at p. 546:

> I share the view that application of the concepts of burden and onus to the transfer provisions of the *Young Offenders Act* may not be helpful. The question is basically one of statutory interpretation. Parliament has declared that unless otherwise ordered, young offenders will be tried in youth court. That is the *status quo*. The party seeking transfer to ordinary court must persuade the court that, having regard to the factors set out in s. 16(2) and (3) of the Act, the case should be transferred. In this sense there is a burden on the party seeking transfer.
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> What then is the standard of proof which the applicant must meet? The Court of Appeal rejected the view of the judge below that there was a "heavy onus" on the party seeking transfer. I agree that it would be wrong as a matter of law to say that the applicant must meet a heavy onus. That term carries with it the connotation that only in exceptional or very clear cases should an order for transfer be made. But Parliament did not say that. Parliament set out in detail the factors which must be weighed and balanced, and stipulated that if after considering them the court was satisfied that it was in the interests of society and the needs of the young person that he or she should be transferred, the order should be made. The requirement of the French version of s. 16 that the transfer to adult court "s'impose", while arguably stricter than the wording of the English version, does not, when read together with the English text, support the view that transfer must be confined to exceptional cases. Rather, it is consistent with the conclusion that transfer must appear as the right or proper solution. This language does not require that the case for transfer be exceptional or unusually clear.

It is the responsibility of our Court of Appeal, therefore, to review the hearing conducted by Judge Comeau and determine in light of all of the evidence before him and the Statutes by which he was bound whether we should confirm or reverse his exercise of

discretion to grant the order requested by the Crown to have the young offender transferred to regular court to face the two charges of first degree murder against him.

At the time that Judge Comeau dealt with the application of the Crown to transfer this young offender to adult court the legislation governing his decision was as follows:

> ***16*** (1) Subject to subsection (1.01), at any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an indictable offence other than an offence referred to in section 553 of the *Criminal Code* but prior to adjudication, a youth court shall, on application of the young person or the young person's counsel or the Attorney General or an agent of the Attorney General, determine, in accordance with subsection (1.1), whether the young person should be proceeded against in ordinary court.
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> ***16*** (1.1) In making the determination referred to in subsection (1) or (1.03), the youth court, after affording both parties and the parents of the young person an opportunity to be heard, shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth being under the jurisdiction of the youth court, and
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> (a) if the court is of the opinion that those objectives can be so reconciled, the court shall
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> (i) in the case of an application under subsection (1), refuse to make an order that the young person be proceeded against in ordinary court, and
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> (ii) in the case of an application under subsection (1.01), order that the young person be

proceeded against in youth court; or

(b) if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall

(i) in the case of an application under subsection (1), order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence, and

(ii) in the case of an application under subsection (1.01), refuse to make an order that the young person be proceeded against in youth court.

16 (1.11) Where an application is made under subsection (1) or (1.01), the onus of satisfying the youth court of the matters referred to in subsection (1.1) rests with the applicant.

16 (2) In making the determination referred to in subsection (1) or (1.03) in respect of a young person, a youth court shall take into account

(a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed;

(b) the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the Juvenile Delinquents Act, chapter J-3 of the Revised Statutes of Canada, 1970, or previous findings of guilt under this Act or any other Act of Parliament or any regulation made thereunder;

(c) the adequacy of this Act, and the adequacy of the Criminal Code or any other Act of Parliament that would apply in respect of the young person if an order were made under this section, to meet the circumstances of the case;

(d) the availability of treatment or correctional resources;

(e) any representations made to the court by or on behalf of the young person or by the Attorney General or his agent; and

(f) any other factors that the court considers relevant.

When considering **s.16(2)(c)**, the penalty provisions of the

Young Offenders Act and the **Criminal Code** must be kept in mind.

The provisions of the **Criminal Code** are:

> ***745.1*** The sentence to be pronounced against a person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and who is to be sentenced to imprisonment for life shall be that the person be sentenced to imprisonment for life without eligibility for parole until the person has served
>
> (a) such period between five and seven years of the sentence as is specified by the judge presiding at the trial, or if no period is specified by the judge presiding at the trial, five years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;
> (b) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and
> (c) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence.

There is power under the **Criminal Code** (**s. 746.1(3)**) for the young offender to apply for day parole after having served all but one-fifth of his period of imprisonment he is to serve without eligibility for parole.

The provisions of the **Young Offenders Act** are:

> Where a youth court finds a young person guilty of an offence, it shall ..... where the offence is first degree murder or second degree murder within the meaning of section 231 of the

> Criminal Code, the court shall make the disposition referred to in paragraph (k.1) and may make such other disposition as the court considers appropriate:
> *(k.1)* order the young person to serve a disposition not to exceed
> (i) in the case of first degree murder, ten years comprised of
> (A) a committal to custody, to be served continuously, for a period that shall not, subject to subsection 26.1(1), exceed six years from the date of committal, and
> (B) a placement under conditional supervision to be served in the community in accordance with section 26.2, and

There is also a requirement under **s. 28** of the **Young Offenders Act** for the review of any disposition imposed after one year when the offender will be brought back before the court and the judge must consider whether there should be any variation in the disposition. It should be noted that the penalty for first degree murder under the **Young Offenders Act** is not a minimum penalty and the reviewing judge would be able to impose a lesser disposition if it was considered appropriate.

Other legislation that must be considered by a Youth Court Judge in this circumstance deals with the place where any penalty may

be served if tried as an adult. **Section 16.2(1)** applies:

> ***16.2*** (1) Notwithstanding anything in this or any other Act of Parliament, where a young person who is proceeded against in ordinary court ..... is convicted and sentenced to imprisonment, the court shall, after affording the young person, the parents of the young person, the Attorney General, the provincial director and representatives of the provincial and federal correctional systems an opportunity to be heard, order that the young person serve any portion of the imprisonment in
> (a) a place of custody for young persons separate and apart from any adult who is detained or held in custody;
> (b) a provincial correctional facility for adults; or
> (c) where the sentence is for two years or more, a penitentiary.

Such custody may be reviewed from time to time under the provisions of **s. 16.2(4)** of the **Act**:

> ***16.2*** (4) On application, the court shall review the placement of a young person in detention pursuant to this section and, if satisfied that the circumstances that resulted in the initial order have changed materially, and after having afforded the young person, the provincial director and the representatives of the provincial and federal correctional systems an opportunity to be heard, the court may order that the young person be placed in
> (a) a place of custody for young persons separate and apart from any adult who is detained or held in custody;
> (b) a provincial correctional facility for adults, or
> (c) where the sentence is for two years or more, a penitentiary.

The place of custody of a young offender convicted by the Youth Court is in a youth facility operated by the Province. It may also

be reviewed under the provisions of **s. 24.5(1)**:

> ***24.5*** (1) Where a young person is committed to custody under paragraph 20(1)(k) or (k.1), the youth court may, on application of the provincial director made at any time after the young person attains the age of eighteen years, after affording the young person an opportunity to be heard, authorize the provincial director to direct that the young person serve the disposition or the remaining portion thereof in a provincial correctional facility for adults, if the court considers it to be in the best interests of the young person or in the public interest, but in that event, the provisions of this Act shall continue to apply in respect of that person.

The non-custodial portion of the young offender's disposition by the Youth Court may be converted to custodial time under the provisions of **s. 26.1(1)**:

> ***26.1*** (1) Where a young person is held in custody pursuant to a disposition made under paragraph 20(1)(k.1) and an application is made to the youth court by the Attorney General, or the Attorney General's agent, within a reasonable time prior to the expiration of the period of custody, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court and the youth court may, after affording both parties and the parents of the young person an opportunity to be heard and if it is satisfied that there are reasonable grounds to believe that the young person is likely to commit an offence causing the death of or serious harm to another person prior to the expiration of the disposition the young person is then serving, order that the young person remain in custody for a period not exceeding the remainder of the disposition.

It can be seen from the above legislation that should the young

offender here be convicted of first degree murder and be tried in the Youth Court he would be subject to incarceration in a youth facility for six years to be followed by four years of conditional supervision to be served in the community. This disposition is a maximum sentence and it would not be necessary for the Youth Court Judge to impose such a disposition. It would be served in a youth facility until such time as the young offender reaches the age of 18 years when he may be transferred to a provincial correctional institute for adults. After one year the disposition could be reviewed and altered to suit the circumstances then existing. When the sentence is completed he would be released. If he should be transferred to the ordinary courts, the young offender upon conviction for first degree murder would be sentenced to life imprisonment without eligibility for parole for 5-7 years as determined by the trial judge. The imprisonment would take place in either a youth facility, a provincial correctional facility for adults, or a penitentiary, or a combination of two or more consecutive placements as determined by the trial judge. This placement may be reviewed from time to time as circumstances change. When the young offender becomes eligible for parole, he must apply to the parole board and any

release would be subject to the conditions imposed by that board. This parole could be revoked and the offender would remain under the control of the parole board for life.

With this legislative background in mind, it is now necessary to turn to the factual situation faced by Judge Comeau when hearing the application for transfer of the proceedings against this young offender to adult court. It must be kept in mind any facts released here are not for publication and are simply assumed to be true for the purposes of this procedure. Neither counsel for the applicant, nor for the respondent, has taken any exception to the facts as found by the trial judge and set forth at the beginning of his decision and I will repeat them here:

> THE CHARGES:
>
> > The accused is charged that he on or about the 22nd day of September, A.D., 1996; at, or near *, in the County of *, Province of Nova Scotia, being a young person within the meaning of the Young Offenders Act did: *"Commit first degree murder upon the person of D.G.B., contrary to Section 235(1) of the Criminal Code."*
> >
> > The accused if further charged that he on or about the 22nd day of September, A.D., 1996; at, or near * , in the County of *, Province of Nova Scotia, being a young person within the meaning of the Young Offenders Act did: *"Commit first degree murder upon the person of*

T.M.B., contrary to Section 235(1) of the Criminal Code."

FACTS:

On the evening of September *, 1996 at about 5:25 the accused decided he was going to shoot the B's. He then dressed in dark clothes, black jeans and black shirt and put black shoe polish on his arms and face. A t-shirt was placed over his head like a mask. He then smashed the window on a door of the victims' home with a crowbar, reached in and opened the door. When he got inside he grabbed a rifle from the rifle rack and there was a clip underneath the rifles for the twenty-two which he loaded along with a twenty gauge shotgun. Following this action he looked around the house and waited for the B.'s to come home from church.

Around 8:00 p.m., after waiting in the house for two hours, the accused heard the victims' vehicle drive in. He hid behind the fridge until Mrs. B. came in the house. There were no lights because he had taken the fuses out of the fuse box. When Mrs. B. came in the kitchen she tried to turn on the lights stating to Mr. B. behind her that the light was out and there was glass on the floor.

At this point in time the accused started pulling the trigger on the gun and Mrs. B. fell at this moment, her husband also got hit and he stated limping and he started to run and the accused shot him two or three times in the back. He fell on the ground and he said "God help me" and the accused put the gun to his head and pulled the trigger. The accused then went back in the house and shot Mrs. B. in the back.

After this he went upstairs and got the other rifle (shotgun) and went out to Mr. B.'s truck (the keys were by the body) and tried to start it but he could not drive a standard. He left the shotgun in the truck and went to his home next door with the twenty-two rifle and ammunition. There he attempted to clean himself up, went to his room and put some clothes in his bookbag. He tried to load the rifle but the clip would not fit. This action was with the intent, he said, he had to shoot his family. He changed his mind for two reasons; he couldn't get the bullets in the clip and did not think he could be able to shoot them and decided to write a note to his parents which he left on the kitchen table as follows:

Dear Mom & W.

This is no joke T. and D. are dead by my hands, I broke into their house when they went to church. I took some guns and when they came back I shot them. D. is lying in front of his truck - T. is in the house. D.'s last words were "God help me" then I shot him in the head. I think I am crazy. I didn't even feel bad when I done it - but I do now - call the Cops and tell them I have about 600 rounds of .22 cal ammunition. I have a knife too. I am bringing some food with me. I love all of you - Goodbye for now.

V.

The accused left his parents' home with the (22) rifle with a loaded clip in it. He also had a pouch of bullets and two knives, one a swiss army knife, and then proceeded to walk down the road for a considerable distance during which he saw a police car go by. Eventually the police car came back, stopped and placed him under arrest.

After setting forth the facts Judge Comeau referred to all of the provisions of the **Young Offenders Act** and the **Criminal Code** that I have mentioned and concluded that the purpose of the transfer hearing was to determine whether the objectives of rehabilitation of the accused and the protection of the public can be reconciled. He correctly stated that if such reconciliation could not be attained that the transfer to ordinary court was mandatory. Counsel for the applicant has argued that this conclusion was improper as it unfairly placed the burden on the

applicant to contest the transfer rather than on the Crown to convince the judge to grant the order. I reject this argument as the legislation is clear that once the application is made by the Crown under **s. 16** of the **Young Offenders Act** the Court is directed to consider the interests of society which includes the objectives of affording protection to the public and rehabilitation of the young person and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the Youth Court. If they cannot be reconciled the protection of the public shall be paramount and the Court shall order that the young person be proceeded against in ordinary court.

Judge Comeau then proceeded to take into account the various factors referred to in **s. 16(2)** of the **Young Offenders Act** for the purpose of making his determination of whether the conflicting interests could be reconciled. He considered the seriousness of the alleged offences and properly concluded that they were the most serious offences known to the **Criminal Code**. He recognized that the applicant was only 14 years of age at the time of the offence but found that he was mature for his age although he tended to be withdrawn.

Apparently no emotion or remorse was displayed for the killings. After reviewing his family background he concluded that he was a typical teenager and average student and enjoyed playing with video games and had a fascination with guns, knives and with killing. Judge Comeau then considered at length the psychiatric and psychological evidence presented to the Court.

Dr. John S. Bishop, the Consultant Psychologist with the Nova Scotia Youth Centre, summarized his report on the applicant as follows:

> 1. This young offender is competent to stand trial. He fully understands the nature and quality of his act and fully understands the difference between right and wrong. He is capable of assisting his lawyer in his own defence.
>
> 2. He is not suffering from any mental disorder. His basic thought processes are in tact and his contact with reality is unimpaired. He does not have any delusions or hallucinations. He has no significant anxiety or depression. He does not meet the criteria for a conduct disorder or oppositional defiant deficit/hyperactivity disorder. There is no evidence that he experiences an impulse-control disorder.
>
> 3. In terms of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), he is best diagnosed as: code #V71.02 adolescent antisocial behaviour. As the DSM-IV describes the condition “this category can be used when the focus of clinical attention is antisocial behaviour in a child or adolescent that is not due

> to a mental disorder (e.g., conduct disorder or an impulse-control disorder). Examples include isolated antisocial acts of children or adolescents (not a pattern of antisocial behaviour)."

Dr. Rhodri Evans, a psychiatrist specializing in the field of child and adolescent psychiatry agreed with Dr. Bishop that the applicant was not suffering from a mental illness at the time he committed the offences. In his report he states:

> In the absence of mental illness or disability it is difficult to discuss prognosis and rehabilitation from a psychiatric perspective. If [V.'s] behaviour prior to the killing is used to estimate future behavior then we can expect an unremarkable and positive development. However the episodes of deadly violence gives cause for extreme caution from a prognostic perspective. In the absence of disability or disorder the concept of rehabilitation becomes somewhat redundant. In the absence of a clear cut disorder I cannot offer the court assurance that any difficulties evident now or in the near future could be addressed effectively within the three year time frame of confinement available under the Young Offenders Act.

Dr. Evans apparently was unfamiliar with the change in the penalty provisions and in his testimony when it was pointed out to him that the disposition now would be for ten years with six in custody and four under supervision he responded:

> **Q.** Can you say with any degree of certainty that, at the

> end of that period, [V.] would not be a threat to society?
>
> **A.** I think it's difficult to say anything with absolute certainty. Ah, but I would be much more comfortable at the end of ten years than I would have been at the end of five years under the old arrangements in the Act. And probably more importantly I, I think I would be more comfortable with ten years, having spent six years in the Young Offenders Facility than the fifteen years having spent a good portion of time in an adult correctional facility because I really fear for this vulnerably young man. The context of his rehabilitation is crucial and if he is located in an adult facility with offenders who are chronically disturbed, behaviourialy, then I fear that that may well end up as his final pathway.

Dr. Clyde Chamberlain is a psychiatrist who has specialized with adolescents and young adults. His report concluded:

> Previous examiners have concluded that this boy does not suffer from an emotional or psychiatric disorder. The absence of any pattern of antisocial conduct eliminates conduct disorder and any of the personality disorders including antisocial personality. Abnormal affects such as anxiety or depression are not present and neither are there abnormalities of thinking such as are found in major psychotic disorders. Absent the one horrible episode of killing his neighbours, [V.] would seem a most unremarkable young man. It is my opinion, however, that the degree of inability to experience strong feelings, particularly anger and sadness and to express these feelings and the pervasive boredom and apparent inability to engage with commitment to relationships or activities suggest the existence of a significant emotional disorder. In over 30 years of practice, I have seen this pattern with a fairly large number of immature younger adolescents who, while superficially compliant and anxious to please, suddenly lose control of aggressive or sexual impulses and are subsequently at a loss to explain them. Indeed they often describe the actual events as occurring in a dreamlike detached state feeling somewhat like an observer rather than the actor. It is quite possible, in my view, that [V.] learned to isolate and suppress his conscious awareness of anger and

> sadness as a way of coping with traumatic life experiences and that he harbours impulses to retaliate which he has poorly integrated within his personality and of which he is thus not ordinarily aware.
>
> It would be my recommendation that [V.] would best be placed in an environment where an attempt could be made to provide him with treatment for this condition and beyond this it would be my view that an adult correctional setting would be more likely to consolidate this adaptive style rather than to remedy it. At fourteen years of age, this boy can be expected to mature emotionally over the next few years, particularly if he is in a supportive environment. His tendency to suppress strong feelings and to avoid situations that provoke them should be challenged and once challenged, a therapeutic atmosphere is necessary to help him integrate them. I think it is more likely that these purposes could be carried out within the youth system than the adult system.

After considering the reports of the expert witnesses and their testimony at the hearing Judge Comeau concluded that the applicant was not suffering from any treatable mental illness and that the specialists were not prepared to give any firm prognosis as to whether he would offend again. Dr. Chamberlain felt he had an emotional disorder that could be treated over the long term with a confrontational type of therapy but this is unlikely to be available in either system.

Judge Comeau then looked at the facilities available in both systems and compared a maximum of ten years of incarceration under

the youth system with the life time control in the adult option. He concluded:

> A review of the evidence of rehabilitative services, reports of the professionals and factors with respect to the accused and seriousness of the crime makes it difficult for the court to reconcile the objects of rehabilitation and affording protection to the public. Where this occurs protection of the public is paramount.
>
> In the ordinary court system the trial judge has far greater flexibility in arriving at a disposition (as to parole eligibility) and the place of custody that would better serve the security and protection of the public. (See section 16.2 YOA)
>
> The sentence review provisions of the Young Offenders Act are not conductive to the principle of protection of public as the sole criteria for review of sentence is progress by the accused and reviews can take place a minimum of six months into the sentence. In the ordinary court (adult) system the parole provisions would enable society to have the necessary controls over the offender. It is clear the accused will need considerable time before his rehabilitation can be reconciled with the protection of the public.
>
> It is conceivable that in the ordinary court system the accused sentenced to life imprisonment might serve only five years before eligibility for parole (section 742.1). In the youth court six years would be the custodial time with automatic reviews every year. The criteria for review release and parole release are different the latter being more concerned with protection of the public.
>
> It is also a very real possibility that the accused convicted in ordinary court will spend all his custodial time in a youth facility where the process of rehabilitation has been started. However, it is important to promote protection of the public that those provisions of jurisdiction given to the trial judge in ordinary court (parole eligibility time and place of incarceration) which are more conductive to that principle being applied by transferring the accused to ordinary court.
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> The court orders that on both charges, pursuant to

> section 16(b)(i), that the accused be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offences of first degree murder.

The principal grounds of review advanced on the hearing in this Court were that Judge Comeau misapprehended the test to be applied when determining if a transfer should take place; and secondly, that he paid too little attention to the matters required to be taken into account under **s. 16(2)**. I have already indicated that, in my opinion, Judge Comeau properly followed the directions of the controlling legislation when he attempted to reconcile the objectives of protecting the public and rehabilitating the applicant before determining that a transfer was appropriate. The second ground also fails. I am satisfied that Judge Comeau considered all of the matters required before exercising his discretion to grant the order that he did.

Having considered the complete record before the Youth Court Judge, his reasons for judgment, and the legislation controlling a transfer of a young offender to adult court, I would exercise my discretion to confirm the Order of Judge Comeau.

Hart, J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.