THE RELEVANCE OF THE FITNESS TO STAND TRIAL PROVISIONS TO PERSONS WITH MENTAL HANDICAP

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Introduction

"I believe we should continue to adhere to the principle that a person should not be tried unless he can understand the charges against him and can assist in his own defence. It might be argued that if a person is in a catatonic state—mute, immobile, and perhaps unable even to feed himself—he should not be put on trial. The point of my argument is this: The reason for not trying such a person is that he is unable to assist in his own defence—not that he is schizophrenic."[1]

Typically, Thomas Szasz pinpoints an important tip of the iceberg. People in Canada are punished for appearing to be mentally ill. Such punishment, although clearly severe punishment in the form of indefinite incarceration in a total institution, may seem to be somewhat softened by its being called "therapeutic" and through its obtaining the blessing of the criminal justice system. This article will attempt to examine the fitness to stand trial sections of the Criminal Code of Canada[2] and in the process seek to illustrate the totally confused state of the art: lack of clearly defined criteria, little or no due process, arbitrariness of detention, unsettled nature of "treatment", illogical review criteria, and, finally, whether or not this whole system accords with the provisions of the Canadian Bill of Rights.[3]

As a point of illustration throughout, the Emerson Bonnar situation will serve as a backdrop to this theme.[4] Suffice it to say that the manner in which Emerson Bonnar has been dealt with during the past sixteen years is illustrative of most of the points in this article. Neither defence counsel nor Crown attorney were present at his initial hearing. This issue of fitness to stand trial was never really addressed in any significant detail at this hearing. Subsequent reviews by the New Brunswick Board of Review did not address the criteria of his fitness to stand trial. A variety of psychiatric labels have been applied to him and a wide range of psychiatric treatments have been administered to

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[1] Thomas S. Szasz, Law, Liberty and Psychiatry (1972), p. 228.

[2] R.S.C., 1970, c. C-34, as am., ss 16, 465, 542, 543, 545, 546, 547.

[3] R.S.C., 1970, Appendix III.

[4] Unreported, Fredericton, N.B., Magistrate Court, Aug. 17th, 1964.

him during the sixteen years of his detention. At the time of his committal he was nineteen years of age, with no previous criminal record. Had he been allowed to plead guilty to the offence of attempted robbery, it is likely that he would have been a free man many years ago. The circumstances of his detention will be examined at various points in the article.

Although what follows is focused on the person with mental handicap and specifically the person who might find himself the subject of a Lieutenant Governor's Warrant, the real theme which follows is civil liberties. The universality of its message must compel us to reason that if one person's liberty is in jeopardy, does this not affect the liberties of everyone?

The analysis will proceed under the following headings: Process for determining fitness to stand trial; options for the trial judge on remand and on the finding of unfitness to stand trial; difference between fitness to stand trial on account of insanity and a finding of not guilty because of insanity; the role of the Board of Review under the Criminal Code; the role of the Lieutenant Governor under the Criminal Code; the nature of review and review criteria; the issue of due process; the issue of treatment under a Lieutenant Governor's Warrant; the applicability of the Canadian Bill of Rights.

I. *Process for Determining Fitness to Stand Trial.*

There is no definition of fitness under the Criminal Code. However, there are two sections of the Code which address this issue.

Under section 465(1)(c) a Magistrate or Provincial Court Judge may remand a person for observation if mental illness is suspected. On such a remand there must be evidence presented to the court on which the remand is based, and it is presumed that such evidence would involve the report of a duly qualified medical practitioner. Both under section 465(2)(b) and section 543(2.1) the judge has the authority to remand an accused for observation for a period not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case, and his opinion is further supported by the evidence, or with the consent of the Crown Attorney and the accused person, by the written report of at least one duly qualified medical practitioner.

Section 465(3) provides a basis upon which the judge may direct the trial of an issue of fitness to stand trial if it appears to him that, as a result of the observations made after remand, there is sufficient reason to doubt the accused is, on account of insanity, capable of conducting his defence. Procedure for this trial of the issue is discussed under section 543.

Section 543 deals with the question when a judge may decide to try the issue of fitness. He may do so, at any time before verdict, and where the issue arises prior to the conclusion of the Crown's case, he may require the Crown Attorney to put in his evidence up to the opening of the case for the defence. The judge is required to assign counsel to act on behalf of any accused not represented by counsel before trying the issue of fitness.

Section 543 makes it clear that the issue of fitness must be tried. This language denotes a hearing, although no procedure is set out in the Criminal Code as to how such a hearing ought to be conducted. In at least one reported decision, the British Columbia Court of Appeal[5] stated that the hearing under this section is strictly an enquiry on behalf of the Queen in order to determine the status of a subject and not an adversary proceeding. This appears to be a somewhat unusual attitude toward the nature of this hearing, since the subject's liberty is seriously at risk. However, more will be said below regarding the nature of the due process which ought to be required in determining fitness to stand trial.

Although no criteria are listed in the Criminal Code as to what a judge must address himself to in determining the issue of fitness to stand trial, there are certain well established criteria, which include the following: the ability of the accused person to assist his lawyer in his defence; an understanding of the nature of the trial and its consequences; an awareness of the court proceedings; an understanding of the offence under which the accused person is charged; and a medical condition sufficient to enable the accused person to be present in court. If there is to be a full and fair trial of the issue from the accused person's perspective, all of these criteria must be addressed in the context of sufficiently grounded evidence presented by the relevant expert witnesses and in the presence of the accused person, in order that he may make full answer if he so chooses. None of this occurred in respect to the trial of Emerson Bonnar. In fact, not only was the finding made on extremely sketchy psychiatric opinion, as is discussed elsewhere, but the usual criteria set out above were never even addressed.

Finally, because the language which is used under the fitness to stand trial sections of the Criminal Code has a distinct medical model connotation, and it specifically refers to someone who may be believed to be *mentally ill*, persons with low intellectual functioning or borderline mental illness are at a serious disadvantage. Although the Alberta Supreme Court decision of *R.* v. *Hughes*[6] holds clearly that an

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[5] *R.* v. *Roberts* (1975), 24 C.C.C. (2d) 539, [1975] 3 W.W.R. 742.

[6] (1978), 43 C.C.C. (2d) 97.

inability to communicate properly is not relevant to a finding of unfitness to stand trial on account of insanity, one must doubt a judge's ability always to make this kind of distinction. One must certainly wonder how much the trial judge in *Emerson Bonnar's* case was influenced by the psychiatrist's comments that Emerson Bonnar was "mentally retarded-moron level", rather than by any examination of the legal criteria for determining fitness.

II. *Options for the Trial Judge on Remand and on a Finding of Unfitness to Stand Trial.*

When a judge remands an accused person whom he suspects is mentally ill for observation, section 465 of the Code leaves him two options. He may either direct the accused person to attend in a place or before a person specified in his order and with a time specified for observation, or in the alternative, he may remand the accused to such custody as the judge directs for observation for a period not exceeding thirty days. In other words, the judge's discretion is quite broad within the parameters of these two options. Defence counsel should be more cognizant of the fact that there are more alternatives than simply a remand period in a total institution for a time up to thirty days. Defence counsel may make submissions that the accused person should be remanded to his own house or community, subject to his attending outpatient facilities at a clinic or hospital in order to determine the extent of his mental illness.

In fact, during this initial hearing when a judge may suspect a factor of mental illness, defence counsel, acting on behalf of a client with mental handicap, should insist that a judge hear from appropriate witnesses in the field of developmental disabilities rather than rely exclusively upon evidence produced by a psychiatrist. Section 465 explicitly refers to the phrase "mentally ill", and this is really a misnomer when dealing with an accused person who may have a low intellectual functioning level or a communication problem. In such a case, defence counsel may be well advised to argue quite vigorously that a remand period for the purposes of observation is irrelevant, and if the judge feels that there is an issue of fitness to stand trial, he should order the trial of such an issue without any prerequisite observation. At such trial, defence counsel should insist upon the appropriate evidence from the relevant experts in the field in order to decide the issue of his client's fitness to stand trial.

Pursuant to section 543 of the Code, where an accused person is adjudged unfit on account of insanity to stand trial, the judge shall order that he be kept in custody until the pleasure of the Lieutenant Governor of the Province is known, and any plea that has been pleaded shall be set aside and jury shall be discharged. A literal

interpretation of this section would mean that the trial judge has only one option in the event of such adjudication, and that is an order of indeterminate custody pending further detention by the Lieutenant Governor of the province in a hospital for the criminally insane. Very recently, however, in Brampton, Ontario, Provincial Court Judge Kenneth Langdon, following adjudication[7] wherein he held that the accused, Mr. Kaj Saxell, was not guilty on account of insanity, stated that this particular section of the Code, requiring automatic commitment under a Lieutenant Governor's Warrant, was in violation of section 2(b) of the Canadian Bill of Rights in that it "imposes or authorizes the imposition of cruel and unusual treatment or punishment". In the particular instance, Mr. Saxell who had been charged in July 1979 with possession of a dangerous weapon, had already spent almost a year in custody prior to his trial. Had he simply been found guilty in the regular course of events, Mr. Saxell would probably have been given credit for this time which had already been served while awaiting trial, and would most likely have received a sentence of shortened duration, considering the nature of the offence. However, automatic committal under a Lieutenant Governor's Warrant would result in an indefinite sentence, potentially lifelong, only to be terminated at the pleasure of the Lieutenant Governor. This, Judge Langdon held to be contrary to the Canadian Bill of Rights which prohibits the imposition of cruel and unusual treatment or punishment.

In declining to make an order pursuant to section 542(2) of the Criminal Code of Canada, Judge Langdon instead ordered the Peel Regional Police Force to take Mr. Saxell to the Metropolitan Toronto Forensic Psychiatric Unit for a period of assessment not to exceed seven days, pursuant to section 9(1) of the Ontario Mental Health Act.[8] The judge's ruling was immediately appealed by the Attorney General to the Supreme Court of Ontario for a Writ of Mandamus ordering Judge Langdon to comply strictly with section 542(2) of the Criminal Code and an order that Mr. Saxell be kept in custody pending the pleasure of the Lieutenant Governor of the Province. That particular application, heard before Mr. Justice Osler of the Supreme Court of Ontario, failed on the ground that Judge Langdon's interpretation was a proper judicial interpretation and, whether it was right or wrong, it was not for Mr. Justice Osler to interfere with. The learned Justice also held that the proper route would be to the Ontario Court of Appeal.[9]

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[7] *R.* v. *Saxell,* unreported decision rendered March 17th, 1980, by His Honour Judge Kenneth Langdon in Brampton Provincial Court, Brampton, Ontario.

[8] R.S.O., 1970, c. 269, as am.

[9] Unreported decision of Mr. Justice Osler, July 2nd, 1980.

That has since occurred, and on July 29th, 1980 the Ontario Court of Appeal ordered a new trial for Mr. Saxell on the ground that His Honour Judge Langdon made an erroneous finding on the evidence before him that Mr. Saxell was insane.[10] The court also held that certain psychiatric evidence which only became available following Judge Langdon's verdict, should have been admitted following the verdict, inasmuch as the determination of a man's sanity is a matter of utmost public interest. Thus, Judge Langdon erred in not re-opening the trial in order to permit the defence to present this additional psychiatric opinion. Finally, the Court of Appeal opined, without offering extensive reasons, that in the event of a subsequent finding of insanity following the new trial, the trial judge would have no option but to execute the order required pursuant to section 542(2) of the Criminal Code.

Thus, a novel ruling by a trial judge has only thus far resulted in the ordering of a rehearing. However, this writer ventures to say that the matter will not rest there and that undoubtedly the Court of Appeal will have this issue before it once again in the future, and perhaps it will even find its way to the Supreme Court of Canada.

III. *Difference Between Fitness to Stand Trial on Account of Insanity and the Finding of Not Guilty Because of Insanity.*

Fitness is always qualified in the Criminal Code of Canada as "fitness on account of insanity". This should not be confused with the criteria to be followed when determining whether an accused person is not guilty by reason of insanity. This latter state is defined pursuant to section 16 of the Criminal Code as "a state of natural imbecility or disease of the mind to an extent that it renders the person incapable of appreciating the nature and quality of an act or omission or of knowing an act or omission is wrong". The state of insanity described in section 16 of the Code refers to the time of the offence itself. Expert witnesses, usually psychiatrists, are called upon to testify whether they believe that the accused person's state of mind at the time of the offence would have put him within the context of section 16. When fitness is tried as an issue, one should not be concerned with the question of whether or not the accused person was insane at the time of the offence, but rather, given his examined state of mind at the time of the trial, whether he is capable of meeting the usual criteria of fitness to stand his trial.

In the Emerson Bonnar situation, these usual criteria were either not addressed at all at his hearing, or addressed in the following fashion:[11]

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[10] Unreported decision of the Court of Appeal, July 28th, 1980 by Jessup, Martin, and Weatherston JJ.A.

[11] *Supra*, footnote 4, transcript, p. 3.

Question [from the trial judge]: "Would he be capable of instruction to counsel in his defence?"

Answer [from the psychiatrist]: "I hardly think he would be able to instruct counsel or give a coherent, and logical story which would be acceptable to the Court."

This brief exchange has been taken from the transcript. The question was not further elaborated, and no specific details are given concerning the psychiatrist's assertion. This assertion came at the end of the testimony that provided no clear reason as to why Emerson Bonnar should have been considered unfit to stand trial. On the basis of that brief exchange, Emerson Bonnar has been incarcerated for sixteen years.

Defence counsel representing clients with mental handicap should be constantly vigilant to maintain the difference between the trial of an issue of fitness and section 16 of the Code. They should also constantly remind the court of the difference between a developmental disability and the kind of mental illness envisaged under the various sections of the Code dealing with fitness to stand trial. If Emerson Bonnar had had the benefit of competent counsel who could have made submissions on his behalf at the original hearing, then a great injustice that presently exists may have been avoided.

IV. *The Role of the Board of Review.*

A Board of Review obtains its legal existence from section 547 of the Criminal Code. Pursuant to that section, the Lieutenant Governor of the Province *may* appoint a Board to review the case of every person in custody in that province by virtue of an order made by the Lieutenant Governor, either under section 545, where an accused person has been found to be insane (and therefore either unfit to stand trial or acquitted after being tried), or under section 546, where a prisoner has been found to be either insane, mentally ill, mentally deficient, or feeble minded during the service of his sentence. Once the Lieutenant Governor has set a Board of Review into motion under section 547 of the Code, the Board of Review *shall* review the case of every person held under a Lieutenant Governor's Warrant (a) not later than six months after the making of the order and (b) at least once in every twelve months as long as the person remains in custody under the order. Furthermore, the Board of Review is required after each review to report to the Lieutenant Governor setting out fully the results of such review and stating the opinion of the Board as to the following matters:

1) where the person in custody was found unfit on account of insanity to stand his trial, whether that person has recovered sufficiently to stand his trial;

2) where the person was found not guilty on account of insanity, whether that person has recovered and, if so, whether it is in the interests of the public and of that person for the Lieutenant Governor to order that he be discharged

absolutely or subject to such conditions as the Lieutenant Governor may prescribe;

3) where the person in custody was removed from a prison and placed under a Lieutenant Governor's Warrant, whether the person has recovered or partially recovered; or

4) any recommendations that are considered desirable in the interests of the recovery of the person to whom such review relates that are not contrary to the public interest.

The Board of Review has no power to make a decision about the continuing of the custody of the person. The Board can only make a recommendation which the Lieutenant Governor may or may not adopt. However, one point should be made absolutely clear. It appears that the intent of the legislators was to have the Boards of Review treat the issue of unfitness to stand trial on account of insanity and the issue of the finding that the accused was not guilty on account of insanity as separate issues. This intent is apparent in the wording of two distinct clauses of section 547 which deal with the nature of the review. Section 547(5)(c) implies that, if the person was found unfit to stand trial, the Board is only authorized to report whether he is now fit to stand trial. Section 547(5)(d), on the other hand, authorizes the Board to recommend for or against the discharge of the person from custody on the basis of "the interest of the public and of that person". This latter subsection calls for much broader considerations than are involved in relation to a person's being able to understand the nature of his legal proceedings. When addressing the issue of not guilty on account of insanity, a finding under section 16 of the Code, public interest considerations are understandable. Here the Board deals with a state of mind of the accused person which caused him to perpetrate a certain offensive act. The element of public safety is a very appropriate consideration. However, a finding of unfitness to stand trial on account of insanity is a much narrower issue, requiring only a consideration of the present state of mind of the accused person in dealing with the judicial process in relation to the charge before the court.

I would submit that this is an extremely important distinction, and one which cannot be merged under the more general provisions of section 547(5)(f) dealing with recommendations which the Board of Review might make regarding the recovery of an individual in custody. The subsection concerning unfitness on account of insanity to stand trial is a specific provision and should take precedence over any other more general provision. Where a person's fitness to participate in his trial has been questioned and he is placed under a warrant, that is the only issue—not his dangerousness to society.

In a letter dated July 17th, 1980, in response to a petition on behalf of Emerson Bonnar adopted by the participants of a workshop

on law and mental retardation held in Fredericton, Mr. H.W. Hickman, Chairman of the New Brunswick Board of Review, stated:[12]

> One of the conditions the Board of Review is required to consider before recommending release from a Lieutenant Governor's Warrant is whether, in its opinion, it would be in the interest of the patient and of the public to do so.

It is submitted that, in the case of a person like Mr. Bonnar, who has been found unfit to stand trial, the Board of Review is not required to apply a "public interest" test to its consideration of whether he has recovered sufficiently to stand his trial. The Board *may*, pursuant to section 547(5)(f) make recommendations in the interests of the *recovery* of such a person, and such interim recommendations are not to be contrary to the public interest. But section 547(5)(f) does not deal with the "final" recommendation that the person *has recovered*, and should, therefore, no longer be held under the Lieutenant Governor's Warrant.

In a letter dated June 25th, 1980, in reply to a letter from Mr. David H. Vickers, Vice President of the Canadian Association for the Mentally Retarded, in relation to the actions of the Board of Review and the Minister of Justice in Emerson Bonnar's case, Mr. Gordon F. Gregory, the Deputy Attorney General for the Province of New Brunswick further demonstrated this confusion regarding the role of the Board of Review. The following paragraph is a direct quote from Mr. Gregory's letter:[13]

> . . . you take issue with the Minister's statement wherein he refers to the interests of the public and conclude that the statement is "legally incorrect". In this respect, I suggest that you are referring to Section 547(1)(c) [sic] which requires the Board of Review to report as to whether an individual found unfit on account of insanity to stand his trial has recovered sufficient to stand his trial. While it is certainly arguable that this is the only issue which should be considered by the Lieutenant Governor as well, nonetheless, there are additional requirements contained within Section 547(5)(f) and the overriding consideration contained within Section 545(1)(b). This latter provision, of course, allows the Lieutenant Governor to discharge an individual provided it is in the best interests of the accused and not contrary to the interests of the public.

The crux of the issue addressed in the letters of the Deputy Attorney General and the Chairman of the Board of Review for New Brunswick seems to be their understanding of the concepts of "discharge" and "release" from a Lieutenant Governor's Warrant in the case of a person found unfit to stand trial. They clearly believe that such actions imply restoring the individual to freedom. It is necessary now to examine the role of the Lieutenant Governor in order to determine whether such a conclusion is valid.

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[12] *Ibid.*

[13] *Ibid.*

IV. *The Role of the Lieutenant Governor.*

The Lieutenant Governor of the Province derives his authority under section 545 of the Criminal Code of Canada. It is important to note the wording of this section. It states that where an accused person is found to be insane, he is then given over to the Lieutenant Governor of the Province who may make an order (a) for the safe custody of the accused in a place and manner directed by him, or (b) if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribes.

Since section 545 is the only section of the Code which empowers the Lieutenant Governor of the Province to make an order, it is important to consider the wording of that section very carefully. The language is somewhat unfortunate. Section 545 refers to accused persons who are found to be insane, either as a defence to the charge or as a basis for their being found unfit to stand trial. The language used to enable the Lieutenant Governor to make a discharge order under section 545(1)(b) is practically identical to the language used to specify the kind of criteria which the Board of Review should consider in reviewing the case of someone found not guilty on account of insanity, pursuant to section 547(5)(d). The Code does not contemplate the consideration of these personal and public interest matters in relation to accused persons found unfit to stand trial. I submit that in addressing himself to a possible discharge order with regard to someone found unfit to stand trial, it is the criteria of fitness which the Lieutenant Governor should take into account, that is ability to instruct counsel, understanding of the nature of the offence, understanding of the proceedings of the trial and of the court, and so on. If both the Board of Review and the Lieutenant Governor of the Province feel, after a proper review, that the accused person can meet those criteria, then the Lieutenant Governor's Warrant should be vacated and the accused person should stand trial or have the charges against him dropped. "The interests of the public" do not enter the picture. The interests of the public can then be protected by the normal criminal process.

With regard to Emerson Bonnar, it is quite apparent from the letter of Mr. Gregory dated June 25th, 1980, as well as the independent psychiatric report by Dr. Bruno M. Cormier, Director of the Forensic Psychiatry Clinic of McGill University that the criteria concerning fitness to stand trial have not played a prominent role either with the Board of Review or the Lieutenant Governor of the Province since Mr. Bonnar was initially placed under warrant in 1964. He has been dealt with as though he had been found not guilty by reason of insanity pursuant to section 16 of the Code.

VI. *Nature of Review and Review Criteria.*

There are no hard and fast criteria other than those relating to the frequency of review, set down in the Criminal Code in describing the function of the Board of Review. It is logical to wonder about the following:

(a) How much personal knowledge does the Board of Review rely upon in its review of the person in custody?

(b) How long is the person in custody examined as a basis for the review?

(c) In the case of a person with developmental handicap, are people competent in that area involved in the review examination?

(d) To what extent does the review examination address itself to the reason for placing the person under warrant, that is, either a finding of unfitness to stand trial or a finding of not guilty on account of insanity?

(e) Is the person in custody provided with any kind of notice of the review? Are other due process criteria to be observed?

There are strong grounds to believe that at least in the case of Emerson Bonnar, the Review Board has consistently failed to address itself to the only relevant issue, that of fitness to stand trial. In February, 1980, Dr. Bruno M. Cormier, a respected Canadian forensic psychiatrist, was appointed by the Government of New Brunswick to review the status of Emerson Bonnar and, among other things, review all the files and documents available from the period during which Emerson Bonnar has been in provincial institutions. After carefully perusing all the available documents and review reports, Dr. Cormier stated in his *Report* dated March 21st, 1980 that:[14]

> At no place do I detect any attempt to determine whether this man would be able to inform a lawyer regarding his defence, could appear in court, knew what a trial was and the consequences that might ensue therefrom. . . . One has the impression that at one stage the medical authorities involved in the treatment of Emerson Bonnar acted somehow as if a diagnosis such as schizophrenia, mental deficiency and dangerosity were criteria to consider somebody unfit to stand trial. When someone is declared not fit to stand trial because of a mental condition, one has to bear constantly in mind the usual criteria to determine the fitness to stand trial and see if the nature of the mental illness is such that these criteria could not be met. . . .
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> I would simply state that the different reports and accompanying notes to justify a Review Board report most of the time stress the mental illness and the potential dangerosity. I would have liked to see clear indication in the medical records that every time he has been reviewed, one had in mind the criteria used to declare or maintain him unfit to stand trial. Dangerosity is not a criterion, and mental illness may or may not prevent one from standing trial, and whereas these usual criteria

[14] *Ibid.*

> may have been scrupulously followed, it is equally important that the reasons be clearly recorded. The usual criteria to which I am referring here are ability of the patient to assist his lawyer in his defence, an understanding of the nature of the trial and its consequences, an awareness of the court proceedings, and a medical condition to enable him to be present in court.

Is the Emerson Bonnar case an isolated instance or are there recurring examples throughout Canada where the review process neglects to address itself to the real issue?

VII. *The Issue of Due Process.*

The British Columbia Court of Appeal decision in *R.* v. *Roberts*,[15] sets the tone for consideration of due process under the fitness to stand trial provisions of the Code. The decision is authority for the principle that a hearing under section 543 (trial of the issue of fitness) is strictly an enquiry on behalf of the Queen in order to determine the status of a particular subject, and not an adversary trial. In view of the apparent meaning of the *Roberts* decision, one has to wonder at the absence from the Code of all the elements of natural justice in respect to the following details:

(a) There is no statutory right of appeal on the merits from a judge's order that an accused person be remanded for a period of observation;

(b) there is no statutory right of appeal from an order made under a Lieutenant Governor's Warrant with respect to the appropriateness of a designated location and manner for the safe custody of the subject referred to in the order;

(c) the person in custody has no statutory right to initiate a review of his status prior to or in the absence of, any review initiated by the Board of Review;

(d) since the Board's report made pursuant to section 547 is delivered to the Lieutenant Governor of the Province for his decision in the absence of proper hearing, a person in detention does not have, as of right, the opportunity to present his own independent assessment to the Review Board, to cross-examine through his counsel the evidence heard by the Board, or in general to have an independent meaningful effect upon the Lieutenant Governor's decision.

Whether he is being dealt with in the criminal justice system or the "therapeutic justice system", an individual's liberty is fundamentally at issue in any kind of determination which results in his being involuntarily detained. In the criminal justice system, there are many safeguards against the danger of unreviewable detention or incarcera-

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[15] *Supra*, footnote 5.

tion. The safeguards are contained both in the Criminal Code and in the common law. But in the "therapeutic justice" system under the disguise of "treatment" for one's own interests and for society's interests, in what has been determined to be a non-adversarial context, there are no such safeguards against the unreviewable loss of many civil liberties. The fact that Emerson Bonnar remains under detention for an indeterminate period of time, in spite of many irregularities during the process of his detention, is testimony to the problem of due process under the Criminal Code.[16]

VIII. *The Issue of Treatment under a Lieutenant Governor's Warrant.*

Generally speaking provincial mental health legislation enables a provincial mental health institution to provide reasonable and necessary treatment to a person who is civilly committed. The subject of treatment is not at all discussed under the Criminal Code. Does the provincial hospital have any legal authority to provide treatment under a Lieutenant Governor's Warrant? If so, where does it derive that authority? Since the Lieutenant Governor's Warrant is issued pursuant to federal legislation and since the particular federal legislation, the Criminal Code is completely silent on the matter of treatment, there are serious questions regarding the legal authority to treat a person detained subject to a Lieutenant Governor's Warrant.

Dr. Cormier, in his *Report* on Emerson Bonnar, refers to the many kinds of treatment to which Mr. Bonnar has been subjected.[17] He lists insulin, electroshock and many types of tranquilizing drugs among the forms of treatment he has received. Is any kind of treatment at all lawful? Are all kinds of treatment lawful? Is Emerson Bonnar's present mental state due partially to the many kinds of treatment which he has undergone while under a warrant, and if significant side-effect damage has resulted, is there a cause of action, and if so, against whom?

IX. *Applicability of the Canadian Bill of Rights.*

It is arguable that section 543(6) of the Criminal Code, requiring a judge to order automatic and mandatory commitment of a person found unfit on account of insanity to stand his trial, is in violation of the Canadian Bill of Rights. Specifically, this section of the Code:

[16] Just before Christmas, 1980, the Attorney General's office in New Brunswick agreed to lift the warrant. This decision came several days before the Canadian Association for the Mentally Retarded were to file a *habeas corpus* application in the Supreme Court of New Brunswick to secure Mr. Bonner's liberty. As of the date of publication, Mr. Bonner is back home with his family in Fredericton, and attending out patient facilities at a local hospital.

[17] *Op. cit.*, footnote 4.

(a) violates the right of the individual to due process of law under section 1(a) of the Canadian Bill of Rights;

(b) violates the right of the individual to equality before the law and protection of the law within section 1(b) of the Canadian Bill of Rights;

(c) authorizes or effects arbitrary detention or imprisonment of such an individual contrary to section 2(a) of the Canadian Bill of Rights;

(d) imposes or authorizes imposition of cruel and unusual treatment or punishment contrary to section 2(b) of the Canadian Bill of Rights.

Due Process of Law

It is contended that automatic commitment to indefinite remand and detention under section 543(6) violates due process of law guaranteed by section 1(a) of the Candian Bill of Rights. This contention is premised on the observation that the essence of procedural due process is that appropriate rights and protections be recognized prior to the deprivation of liberty.

Automatic commitment under section 543(6) makes too many arbitrary assumptions. The most arbitrary of these assumptions is that such an individual must be automatically and mandatorily committed to a total institution while awaiting his trial. It is submitted that due process requires a separate hearing following a finding of unfitness to stand trial, supported by traditional due process rights to counsel, to cross-examine and to call witnesses in order to test such arbitrary assumptions. Unless such separate hearing is conducted, it is submitted that section 543(6) offends section 1(a) of the Canadian Bill of Rights which affirms that an individual has, among other things, the right to liberty and the right not to be deprived thereof except by due process of law.

Equality Before the Law

Essentially, an individual who is found unfit to stand his trial on account of insanity has had his trial adjourned to a future date. The only difference between this type of adjournment and any other adjournment in the regular criminal justice system is the fact that his adjourned trial may never take place. He may spend the rest of his life in confinement awaiting trial, whereas a normal adjournment lasts until a fixed date for the trial to be resumed.

Obviously, an individual whose trial is adjourned on account of unfitness to stand trial, does not enjoy the same treatment before the law as takes place under ordinary circumstances where a trial is

adjourned. Only those found unfit to stand trial are subject not only to an indefinite adjournment but also to indefinite detention while awaiting an uncertain trial date. Is such a distinction reasonable? When one considers that such an individual is remanded on account of unfitness and then is subsequently reviewed, possibly, on the additional criteria of both "dangerousness" and "the public interest", one has to entertain serious doubts regarding the fairness of such an adjournment. When one further considers the fact that, unlike any adjournment in the criminal justice system, an indefinite adjournment pursuant to section 543(6) is completely beyond the power of the criminal justice system to enforce, being in the hands of the Review Board, one can entertain no pretense that individuals who are indefinitely remanded enjoy equality before the law and equal protection with all other categories of remanded individuals, nor that this is a reasonable distinction in the circumstances.

Arbitrary Detention

It would appear that section 543(6) constitutes arbitrary detention contrary to the Canadian Bill of Rights in that it is imposed automatically upon a person who has been found by a judge to be unfit to stand trial on account of insanity. The arbitrariness would appear to arise from a lack of sufficient cause for the detention having to be proved. It is sufficient that the accused person be found unfit to stand his trial. Is this the only kind of disposition possible in any and all circumstances? Why must an individual with low intellectual functioning be treated for these purposes in the same manner as an individual whose problem may be a severe and incurable mental illness? Ought not some persons having been found unfit to stand trial be allowed to live in their own homes and perhaps attend outpatient clinic facilities until a determination of their fitness to stand trial has been ultimately resolved? Why is there only one kind of detention, usually in a hospital for the criminally insane for all individuals under this section of the Criminal Code? Are differences in individual problems and personalities not worthy of differential dispositions? It is because detention under section 543(6) is so uniform, arbitrary, and without any distinction whatever that it would have to be in violation of section 2(a) of the Canadian Bill of Rights.

Cruel and Unusual Treatment or Punishment

It may be contended that the indefinite detention and indefinite remand of an individual found unfit to stand trial under conditions more harsh than those of the involuntary loss of liberty under a civil commitment order is cruel and unusual punishment. Furthermore, the fact of its being unusual is reinforced inasmuch as no other category of remanded individuals is subjected to such conditions.

In the Ontario Court of Appeal decision of *R.* v. *Shand* Mr. Justice Arnup stated:[18] "We recognize that there could be punishment imposed by Parliament that is so obviously excessive, as going beyond all rational bounds of punishment in the eyes of reasonable and right thinking Canadians, that it must be characterized as 'cruel and unusual'."

Similarly, in *R.* v. *Miller and Cockriell,* Chief Justice Laskin stated as follows:[19]

> It would be patent to me, for example, that death as a mandatory penalty today for theft would be offensive to Section 2(b) of the Canadian Bill of Rights. That is because there are social and moral considerations that enter into the scope and application of Section 2(b). Harshness of punishment and its severity and consequences are relevant to the offence involved, but that being said, there may still be a question (to which history too may be called to the aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. This is not a precise formula for s. 2(b), but I doubt whether any more precise one can be found.

At his first court appearance in 1964, Emerson Bonnar indicated that he understood the nature of the offence with which he was charged and entered a plea of guilty. His plea was accepted at that first court appearance. If it had been allowed to stand, and sentence had been imposed accordingly, as a first offender he would have faced at most several months in custody. Where does one draw the line? Should Emerson Bonnar have been treated the same way as a highly dangerous psychopath who was found unfit to stand trial? It is submitted that an indefinite term of detention for one whose offence would have yielded several months in custody at most is so disproportionate that it has to be considered cruel and unusual, contrary to the Canadian Bill of Rights.

Conclusion

A person with mental handicap, a person with the inability to communicate clearly, the hearing-impaired person who is mistaken as mentally ill, or the mentally ill person himself is caught in a web of confused wording and a lack of procedural safeguards when dealt with under the fitness sections of the Criminal Code of Canada. In any instance of law, one has to be concerned about language which is poorly drafted and ill-defined, especially in the absence of basic procedural safeguards of due process. When any person's individual liberty is at issue, the concern is urgent. Poorly drafted legislation is nonetheless still legislation, and even the most liberal minded judge is hard-pressed to go beyond the four corners of that legislation. In the

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[18] (1976), 30 C.C.C. (2d) 23, at pp. 37-38.

[19] (1976), 31 C.C.C. (2d) 177 (S.C.C.), at p. 183.

recent Ontario Court of Appeal decision in *R.* v. *Saxell*[20] we have a perfect illustration of how an appeal court found itself so constrained.

More significant, perhaps, than the limitations it imposes upon the judicial function is the danger that poorly drawn legislation opens the way for administrative abuse. What has kept Emerson Bonnar in indefinite confinement for sixteen years is only partly the ill-founded decision in 1964. He has been kept there for all these years because the Board of Review has never addressed the question of whether he should be kept there for the reason he was placed there. The fact that the usual criteria of fitness to stand trial have not even been addressed in all the review reports may be beyond the reach of judicial review. Although Dr. Cormier concludes quite strongly that Emerson Bonnar is presently fit to stand trial, such fitness is no longer subject to a judicial determination. His fitness awaits yet another prescribed status review, which, hopefully, will address the correct criteria, and yet another decision by the Lieutenant Governor of the Province, both procedures unreviewable.[21] The criminal justice system could have dealt with Emerson Bonnar sixteen years ago, since he stated initially that he understood the offence with which he stood charged and was prepared to plead guilty. It chose not to deal with him, and chose to remand him indefinitely to the therapeutic justice system.

Are Lieutenant Governor's Warrants really necessary? If insanity diminishes legal guilt, should not one revert instead to something like provincial health legislation, where the person in detention is at least provided with procedural safeguards and the hospital is authorized under statute to provide treatment? If the issue is fitness to stand trial, should we not at the very least recognize that there are different mental conditions, not only mental illness, which might interfere with an accused person's proper comprehension of the process of trial? And having recognized that, should we not provide whatever supports may be necessary to assist a person of low intellectual functioning to have his day in court? Should there not be an overriding principle that everyone, regardless of disability, should have both the right and obligation to make a full answer in defence? If additional supports are required, why not provide the supports? If extenuating circumstances prevail, such as lower intellectual functioning, or poor communica-

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[20] *Supra*, footnote 10.

[21] It is interesting to note now that "recommendations" of the Board of Review are now subject to the new rules of fairness, *i.e.*, that the reviewee must be presented with sufficient materials and be afforded sufficient safeguards as will permit him to know the case against him which he must meet. This is the thrust of the recent unreported decision of the Ontario Court of Appeal in the matter of *Robert Abel et. al. and the Advisory Review Board*, heard on September 22nd, 1980, by Howland C.J.O., and Arnup, Zuber, Weatherston, and Thorson JJ.A.

tion abilities, why not take such matters into account in the adjudicatory process or prior to sentencing?

Both Canadian and English legislation have been criticized by law reform bodies which object to automatic detention of persons in hospitals for indeterminate periods of time. The Law Reform Commission of Canada has recommended the abolition of the Lieutenant Governor's Warrant system in favour of a form of disposition which would be of determinate length, and reviewable by the individual who is subject to it.[22] In England, the Butler Committee has recommended extending the range of options available to courts dealing with individuals under indefinite detention to include orders for in-patient or out-patient hospital treatment, guardianship orders and discharges without any order.[23]

There are indeed many ways in which treatment and care of the person who needs it may be approached imaginatively, without impairing the individual's civil liberties and without subjecting him to arbitrary indefinite detention.

The fitness to stand trial provisions of the Criminal Code of Canada cry out for reform, as indeed do the provisions dealing with "Insane acquitees". The very bottom line is that the severe injustices and deprivations experienced by Emerson Bonnar should not be tolerated in our country.

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[22] Report of the U.K. Committee on Mentally Abnormal Offenders (1975).

[23] The Criminal Process and Mental Disorder (1975).