WATCHING FOR THE HELLEBORE: THE ROLE OF THE ADVISORY BOARD OF REVIEW*

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No voice divine the storm allay'd
No light propitious shone
When snatch'd from all effectual aid
We perish'd, each, alone;
But I beneath a rougher sea
And whelm'd in deeper gulphs than he

— from *The Castaway*
Cowper, 1799

Viewed allegorically, the subject of *The Castaway* is insanity, from which condition Cowper recurrently suffered, until his despair and death just following the writing of this piece. A powerful metaphor, it at once conveys the common fate of man, and the particular agony and isolation of the mentally ill. Nowhere in the fascicle of social organization can this isolation and agony be more pronounced than in the pre- and post-criminal justice system treatment of insane persons in Canada. Nor is the anguish entirely that of the mentally ill, as Cowper trenchantly observes; how best to balance the interests of the detained, with those of the community, raises much anxious consideration, the resolution of which is far from easy. What is, however, certain, is that the present means of "supervision of insane persons", to use the language of the *Criminal Code*[1] is upon examination, found wanting. The legislation is uncertain and unclear, the practice of

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* The hellebore was a mythical plant believed by the Ancient Greeks to be a complete cure for madness. Experience and the present state of human knowledge tell us that, if there is a cure, it is elusive. Dierkens ("Society, Medicine and Law" (1972), 1st Int. Symposium on Society, Medicine and Law.) relates the story of the French officer who left his home for a campaign in Germany, which proved fatal. Four years later, his wife bore a child and the devolution of the estate depended upon whether the child was that of the dead lieutenant. On the stand, his wife denied infidelity and said merely, that, having thought about her departed husband so much, she became with child. The court feeling its competence taken beyond its limits referred the question to the professors at the University of Montpellier, who concluded the explanation as acceptable, from a scientific point of view. The Court of Grenoble, on February 13, 1637, accepted this opinion, and expressly forbade anyone to challenge her on the basis of alleged infidelity. Future generations may yet chuckle over our present legal attempts to found decisions on scientific analyses of the mind. Nonetheless, it is all we have, and it is with a view to the enormous cost of state error or abuse, that the Advisory Boards of Review watch, not for cure, but the development of some insight or understanding by the patient, in order that both his interest and that of the community are promoted by his full or partial discharge. The realities of practice depart from the ideal, in part because the legislation is wanting; in part because roles, standards and principles have not been set out sufficiently. This inquiry, intentionally broad-ranging, examines some of the salient issues, most of which deserve far greater attention that space here permits. Implicitly, it will argue for more formalized approach to review practices. It will reflect, it is hoped, 4 years' experience as counsel to the Board of Review in Manitoba, and some 10 years' experience in the criminal justice system generally.

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1. *The Criminal Code of Canada*, R.S.C. 1970, c. C-34, and amendments thereto (hereinafter referred to as the *Code*).

Lieutenant-Governors' Advisory Boards widely disparate, the rights of the subject ill-defined, and the scope for judicial intervention limited. It is to these and other issues that this brief inquiry is directed; the answers, it is suggested, lie in part with a more comprehensive legislative treatment than at present exists, and in part with the boards themselves.

In 1865, the Annual Report of Inspectors of Prisons and Asylums remarked that:

> The greatest benefit which can be conferred on the insane is their restoration to reason; and this is also the greatest benefit that can be conferred upon the community . . . Every measure of legislation purporting to be for the relief of the insane should have this primary reference.[2]

This enlightened view has remained central to the philosophic stance taken by government, but as a matter of implementation, budgetary priorities place the frequent calls for improvement[3] in facilities and staff, close to the bottom of a very long list.

I. The Legislation

The legislation setting up the Advisory Board of Review came into being in 1969.[4] It was further amended some six years later, to its present form.[5] It may be useful to set out section 547 of the *Code* in full:

> s. 547 (1) The lieutenant-governor of a province may appoint a board of review the case of every person in custody pursuant to s. 545 or s. 546(1) or (2) (infra).
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> (2) The board . . . shall consist of not less than 3 and not more than 5 members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by the lieutenant-governor.
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> (3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which the board is appointed, and at least one member of the board shall be a member of the bar of the province.
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> (4) Three members of the board of review, at least one of whom is a psychiatrist . . . and one of whom is a member of the bar of the province, constitute a quorum . . .
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> (5) The board shall review the case of every person . . .
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> (a) not later than 6 months after the making of the order (for safekeeping) . . .,
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> (b) at least once in every 12 month period following . . . so long as the person remains in custody under the order,
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> and forthwith after each review the board shall report to the lieutenant-governor setting out fully the results of such review and stating
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> (c) where the person in custody was found unfit on account of insanity to stand his trial, whether, in the opinion of the board that person has recovered sufficiently to stand his trial,

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2. See, *The General Program For The Development of Psychiatric Services In Federal Correctional Services in Canada* (1972), published under the authority of Hon. W. Allmand, Solicitor-General of Canada, at p. 7. (This paper is popularly known as the *Chalke Report*, after the Chairman of the Advisory Board of Psychiatric Consultants responsible for its preparation.)
3. *Ibid.*, at 11-12; see also, the *Annual Report of the Solicitor-General* (1970) 55.
4. 17-18 Eliz. II, c. 38, s. 48.
5. 23-24-25 Eliz. II, c. 93, s. 71(1)-(4).

> (d) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person has recovered, and if so, whether in its opinion it is in the interest of the public and that of the person . . . to order that he be discharged absolutely or subject to such conditions as the lieutenant-governor may prescribe,
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> (e) where the person in custody was removed from a prison . . . whether, in the opinion of the board that person has recovered or partially recovered, or
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> (f) any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest.
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> (6) In addition to any review required to be made under s.s. (5) the board shall review any case referred to in s.s. (1) when requested to do so by the lieutenant-governor and shall forthwith after such review report to the lieutenant-governor in accordance with s.s. (5) . . .

At the outset it should be noted that the lieutenant-governor of the province is given authority to act as a free agent in the making of orders for safe custody and discharge, and that these orders are purely discretionary.[6] The reason for the guardianship of the lieutenant-governor is that the Sovereign traditionally has stood as *parens patriae* to persons of unsound mind.[7] Because of their legal and mental disability, they are in need of special care, and following legal inquiry a right to custody by the Crown could be exercised.[8] There is long historic warrant then, for the Crown's continued involvement, which is reflected in the legislation under discussion. Curiously, the statute does not specify 'in council',[9] which would subordinate the actions of the lieutenant-governor to ministerial approval. Notwithstanding this omission, numerous jurisdictions utilize the order-in-council.[10] Nor does the statute provide that the recommendations made by the board are binding upon him — nor, indeed is he compelled to act — a clear departure from the reality of actual practice. Reliance appears to be placed solely upon convention[11] that there will be ministerial involvement before the lieutenant-governor acts, and as a matter of convention he will act, and do so in accord with the recommendations of the board.

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6. See *Code*, ss. 545(1), 547(1).

7. C.P. Philips, *The Law Concerning Lunatics, Idiots and Persons of Unsound Mind* (1858) 222; see also, *R.* v. *Saxell, infra*, n. 22 at 377.

8. *Ibid.*, at 240; interestingly, a comprehensive body of statute and common law grew up to protect the interests of community and individual, as detailed by Philips.

9. See for example, the firearms section of the *Code* where the authority of the Governor-General is specifically intersected with the advice and consent of cabinet; cf. s. 82(1); s. 103(6)(a)(b).

10. B.C., Sask., Man., Ont.

11. In the *Constitutional Amendment Reference (1981)*, (1982) 39 N.R. 1 (S.C.C.), the group of six judges approved Freedman, CJM, when he said that the remedy for breach of convention, though it be higher than custom but less than law, lies elsewhere than in the courts, and may be political rather than judicial. Conventions, however, are not without judicial weight. Notwithstanding, see *Ex Parte Kleinys* (1965), 3 C.C.C. 102 at 106 (B.C.S.C.): Since the Lt. Governor is in some respects a *federal* delegate, he may act on the advice of his council; this could raise serious problems with respect to challenging the decision of the lieutenant-governor, particularly in the realm of Crown Privilege. Could this suggest the revival of the archaic writ known as the 'Petition of Right' — detention only by the law of the land and not by Royal directive? Reinforcement for these remarks is found in an address by the Minister of Health for Ontario, made two years ago; he said:

> I receive the board's recommendations and refer them to Cabinet for decision. Before I do so, however, I read every one. As my colleagues know, I am concerned about each case, *and on occasion I provide different advice to Cabinet from that contained in the recommendations by the Ontario Board* [emphasis added].

By what mandate can the courts inquire into this process? (see *Re Brooks Detention* (1962), 38 W.W.R. 51 at 53 (Alta. S.C.) How can certiorari remove this sort of decision-making into the Superior courts? See also, *Special Report on Lieutenant-Governor's Warrants* (1981), unpublished report by Canadian Mental Health Association (N.B. Div.) esp. at 21-22.

Two problems emerge from these initial observations. Firstly, from a procedural point of view, the decision of the board is apparently insulated from judicial review by this gap. Since the board's function is advisory only, no action will lie to review or supervise its decision:

> ... [M]any expressions of opinion, which are commonly referred to as decisions, do not constitute decisions ... if they do not, in law, settle a matter and have no binding effect ... A recommendation such as the one under attack lacks these characteristics. It does not purport to determine whether the person in custody is to be discharged; under the statute the determination is to be made by the Lieutenant-Governor. Moreover, the recommendation of the Board, being the mere expression of an opinion, is not binding on anyone ...[12]

Since the lieutenant-governor need not act upon the report of the board, the scope for review of his discretion is considerably narrowed. Recognizing that there may be a ministerial involvement adds force to the argument that he may refer (in addition to or instead of the board's advice) to those things which are the concern of the executive. All that is required in law is that the conditions precedent to the exercise of power be met,[13] and that there be compliance with the rules of natural justice.[14] If this is done, the decision would appear to be unassailable. The Lieutenant-Governor-in-Council for British Columbia, for example, issued an order granting land, and this grant was challenged on the basis of inadequate opportunity to show that there was no factual foundation for the grant.[15] The court held, *inter alia:*

> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, *in the absence of some conclusive reason to the contrary,* to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.[16] (emphasis added)

The problem here then, is one of responsibility, and the legislation is on its face evasive of the issue. Clearly as a matter of practice and effect the board has the responsibility — and is indeed in the best position — to make an assessment of the patient. In law, that decision lies with the lieutenant-governor; it is his act (whether in concert with cabinet or not) which confines or releases, and it is his act which an aggrieved party must challenge.

Secondly, though the board is compelled to review each case periodically (within 6 months, initially, and within each 12 month period following), the lieutenant-governor is under no such duty. Can he be compelled?

With respect to the first problem, a case from British Columbia[17] considered the nexus between board and order-in-council, in a situation where the terms of release previously authorized by the board were altered to the detriment of the patient, *in his absence.* The Court said:

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12. *Re Lingley and New Brunswick Board of Review* (1975), 25 C.C.C. (2d) 81 at 84 (C.A. Fed.).
13. *A. G. Canada v. Inuit Tapirisat of Canada* (1980), 115 D.L.R. (3d) 1 at 11 (S.C.C.).
14. *Ibid.*, at 19, referring to *Re Nicholson* v. *Haldimand-Norfolk Regin'l Board of Com'rs. of Police* (1978), 88 D.L.R. (3d) 671 (S.C.C.); see also *Re Abel et al and Advisory Review Board* (1981), 56 C.C.C. (2d) 153 (Ont. C.A.).
15. *Wilson* v. *Esquimalt & Nanaimo R. Co.* (1921), 61 D.L.R. 1 (P.C.).
16. *Ibid.*, at 10, per Duff J.
17. *Re McCann and The Queen* (1982), 67 C.C.C. (2d) 180 (B.C.C.A.). Note that B.C. has no board constituted under the *Code*, but has an *ad hoc* committee performing the same function (the Patient's Review Board).

> Clearly the Board was required to observe the requirements of procedural fairness. It failed to do so.
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> Order in Council 2061 is based upon the adoption of the recommendation of the Order in Council Patient's Review Board. It follows in my opinion that the Order in Council must be quashed. To hold otherwise, upon the basis that only the recommendation can be quashed, when the appellant had no notice of the recommendation would be to deprive the appellant of his remedy.[18]

Though this reasoning is intuitively correct, it by no means follows that the lieutenant-governor could be compelled by mandamus[19] to act in accordance with the recommendations of the board of review. In such a situation, there are problems of natural justice, Crown prerogative and legislative intent. Whether 'political' considerations are involved in the issuance of an order-in-council remains an imponderable possibility.

Other difficulties to be noted in passing upon the legislation again arise from what the legislation does not say. The defence of insanity, if successful, provides that the accused shall be "kept in strict custody"[20] until the pleasure of the lieutenant-governor is known, and the finding of unfitness to plead or stand trial demands that the accused shall "be kept in strict custody"[21] on the same terms. Nowhere in the mandate for prerogative action is it mentioned that the purpose for detention will be psychiatric therapy (concordant with protection of the public[22]); all that is mentioned is the latter, by expression of an order "for the safe custody" of the accused.[23] There is no reference to the place[24] of detention, either, though practice suggests a closed hospital wing or psychiatric range of a prison. Assuming that legislation assumes, in addition to its jurisdictional and normative modes, an aspirational aspect, no clear statement of the Act's intention in this regard is revealed. As noted by the Law Reform Commission's study in this area, words like 'hospital', 'therapy', 'treatment', do not occur.[25] Somewhere in the Act, there should be some indication of the state's aspirational goals in dealing with the mentally ill offender embraced in the criminal process. More than art or semantics is involved here; legislation in such areas can serve as both focus and reminder for all those involved in the dispositional aspect of such cases.

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18. *Ibid.*, at 187 (*per*) Hinkson J.A.

19. ". . . [W]hen the statute authorizes the doing of a thing for the sake of justice or the public good, the word 'may' means 'shall' . . ." *Welch* v. *R.* (1950), 97 C.C.C. 177 at 190 *per* Fateux J. citing *R.* v. *Bishop of Oxford* (1879), 4 Q.B.D. 245 at 258.

20. *Code*, s. 542(2).

21. *Code*, s. 543(6).

22. "There is an underlying assumption that they remain a danger to the public because they have, in fact, committed some act which would have been a crimnal act had they not been insane when the act was committed." *R.* v. *Saxell* (1980), 123 D.L.R. (3d) 369 at 381 (Ont. C.A.) (*per* Weatherstone, J.A.).

23. *Code*, s. 545(1)(a).

24. This is a separate, but equally serious problem area — the difficulties of shortages of staff and institutional facilities. The Canadian Committee on Corrections, reporting in 1969 (known as the 'Ouimet Report') observed in Chapert 12 that new and vastly improved psychiatric facilities will be required under the concept of a 'just society' (a 60's catch-phrase that caught, became cant and faded by the turn of the 70's).

25. *Report on Mental Disorder in the Criminal Process*, Law Reform Commission of Canada, E.P. Hartt, Chairman. (Predicated upon working paper No. 14, published Ottawa, 1975). Note as well that, further to *aspirational* content of statutes, "English law encourages the treatment of mentally ill abnormal offenders as persons of unsound mind, rather than convicted criminals": P.T. Muchlinski, "Menal Health Patients Rights" (1980), 5 H.R. Rev. 90 at 104, and see discussion by J. Bazak, "Involuntary Commitment of Mental Patients in Israel and the Protection of Civil Rights" (1979), 2 I.J. Med. & Law 129 at 130-32.

II. The Board

Section 547(3) sets out specific requirements for the composition of the board. It employs a tripartite approach, utilizing the legal model, the psychoanalyatic model, and the community (or "unreasonable man") model, with the psychoanalytic model having primacy by virtue of the provision calling for the appointment of two duly qualified psychiatrists, in an assembly not to exceed five in number. This 'mixing' of approaches has been observed to be a good thing by those involved in the board's review process, such as Professor Desmond Morris, Q.C., a former member of the Ontario Advisory Review Board,[26] Walter Thompson, present Chairman of the Nova Scotia Advisory Review Board,[27] Mr. Justice McDonald of the Nova Scotia Court of Appeal and former board president,[28] and Caroline Cramer, Q.C., presently chairing the board for Manitoba.[29] The principle appears to be the bringing to bear the different view points that each member of the board enjoys within his particular realm of expertise and/or experience.[30]

The operation of the board appears, with the exception of Alberta's practice, to be decidedly informal. Hearings tend to take on the tone of a fireside chat, with the patient present or absent, as the jurisdiction practice dictates. Ontario, for example, always sees the patient, and if he cannot attend, the Board goes to see him. In Manitoba, on the other hand, the patient is not necessarily present, but may be present should he express a wish to be heard. It must be remembered that the lieutenant-governor may direct an inquiry at any time,[31] and presumably, the patient or his counsel can petition for that discretion to be exercised. Rules of procedure, if any, are generally improvised.[32] The reports of the review are not published, nor are they available for public examination. And subject to the guidelines in *Abel*,[33] which principally dealt with the medical records, the reports are not available to the patient. Jurisdictions vary as to whether the police are notified of the release (temporary or otherwise) of a patient detained by reason of unfitness or insanity.[34] The Nova Scotia Board does notify police if a person who has exhibited violent behaviour is to be released, and there appears to be a process of consultation with the police with respect to community feelings and police response generally, in such cases.[35]

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26. See C. Kerfoot (ed.), *Mental Disorder and the Law* (1974) U.B.C.: Centre for Continuing Education, at p. 73.
27. Interviewed October 20, 1982 at Halifax, N.S.
28. Interviewed October 19, 1982 at Halifax, N.S.
29. Interviewed November 22, 1982 in Winnipeg, Man.
30. *Supra* n. 26, at 73.
31. *Code*, s. 547(6).
32. *Supra* n. 28.
33. *Supra* n. 14.
34. In Manitoba recently, a 19 year-old boy, who in front of his classroom chums shot and killed a fellow classmate, was permitted to visit his home on certain occasions, as it was in medical opinion, consistent with his therapy and continued improvement. It was the concern of the police that if such a person is to be released by the board, they should be notified; in the event that they are called to his neighbourhood, they may anticipate certain courses of action, having regard to past violent behaviour.
35. *Supra* n. 27; There is an argument to be made that a member of the Attorney-General's staff should be present at hearings of the Board. He would be in a position to make these inquries, and remove the police from an unnecessary and probably undesired role. The Crown lawyer could represent other state interests in the process, particularly where the patient is represented by counsel. The argument is, of course, predicated on the model of prosecutor as minister of justice, and not as adversary in its strictest sense. See, in this regard: *Boucher* v. *The Queen*, [1955] S.C.R. 16 at 23 (*per* Rand, J.). Such an input could utilize the prosecutor's discretion in a more direct manner (such as the entering of a 'stay of proceedings').

There does not appear in the different jurisdictions to be a practice of voting on decisions nor are reasoned decisions written, except through the medium of a board secretary; what appears to be the decision-making process is the notion of 'consensus',[36] which is in keeping with the informal nature of the hearing itself. Dissents as a rule are not recorded.

This relaxed inquisition appears to be the preferred mode. Whether or not it should be formalized to any extent is the subject of some debate and great disagreement. The theme of the Eighth Annual Conference of the Advisory Boards of Review in Ottawa, 1980: "Rights v. Therapy" is illustrative of this. Provincial review boards, albeit dealing with issues of civil commitment,[37] appear to have a clearer idea of what they are about, both in terms of function and purpose. Formalities are statutorily encoded. Admission practice, under the *Mental Health Act,*[38] of British Columbia, for example, speaks of "medical treatment" and control "for his own protection or welfare, or for the protection of others". In Ontario, the *Mental Health Act*[39] prescribes that the mental disorder must result in "serious bodily harm to the person; serious bodily harm to another person; or imminent and serious physical impairment of the person", in order to justify detention. The Act also refers generally to admission for any person "who is believed to be in need of the observation, care and treatment provided in a psychiatric facility".[40] Admission in Nova Scotia is covered by the *Hospitals Act*[41] and the criteria for admission are that "in-patient services" are required and that the patient is "a danger to his own safety or the safety of others".[42] Contrast this with the legislation in Manitoba, which like the federal legislation, has no clear statement of legislative aspiration;[43] yet even here, the authority to confine is couched in the terms "as a patient at a hospital . . ."[44]

Mandate for review: section 27 of the Act in British Columbia calls for full judicial review of detention upon application by the patient or "anyone". In Ontario, a review board is constituted under section 30, and a full review is conducted with regard to the criteria for detention. In Nova Scotia, the provincial review board must, within certain formal strictures,[45] review the justification for detention under section 55, as well as make recommendations for the treatment or care of the patient. Again, this is to be compared unhappily with the Manitoba legislation, which lacks such clarity of intent. From this random sampling of provincial legislation, the point is made that there is much to be said for precision and detail in an area in which absence

36. *Supra* n. 27.
37. There in fact does not appear to be much difference between civil commitment and lieutenant-governor's warrant.
38. R.S.B.C. 1979, c. 256.
39. R.S.O. 1980, c. 262, s. 9.
40. R.S.O. 1980, c. 262, s. 8.
41. R.S.N.S. 1967, c. 249.
42. R.S.N.S. 1967, c. 249, ss. 2(a), (b)(i), (ii).
43. *The Mental Health Act*, R.S.M. 1970, c. M110, s. 9(1) where a medical practitioner certifies a person "should be confined . . ."
44. *The Mental Health Act*, R.S.M. 1970, c. M110, s. 9(1).
45. See s. 59 *et seq.* — decisions must be in writing, conclusions in full, record kept, reports to the Minister on an annual basis and the rights of the patient are detailed.

of these factors can lead to abuse.[46] "Where law ends", suggested William Pitt, "tyranny begins". Kenneth Culp Davis elaborates that "where law ends, discretion begins",[47] and that the way in which law confines, structures and checks discretion will determine reasonableness or arbitrariness, justice or injustice, benificence or tyranny. There is a long way in which legislation may proceed to fashion the structuring of board discretion.[48] In the application for such an order, apart from the question of jurisdiction the court should consider questions of bad faith, malice, improper motive,[49] and negligence.[50]

In the event that the lacuna between the lieutenant-governor and the advisory board is resolved, either through an extension of the *McCann*[51] *case* or through statutory reform, consideration might be given to amending section 717 of the *Code*, providing for protective orders for magistrates, to include the board of review. The most likely means of challenging the confining warrant will be, at present, the writ of certiorari. The board ought to be confident of certain minimal protections; the trend appears to be to recognize the realities of the relationship between board and lieutenant-governor, the difficulties of nexus notwithstanding.[52] However, the common-law starting position appears to be that:

> . . . [I]f a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is . . . a fundamental principle of our law that he is protected [against civil liability in respect of the consequences of that action].[53]

Thirty-six years later, however, the same court made the observation that if the legislation contains words which are "so clear and precise that they are incapable [of misconstruction], even in the mind of a layman,"[54] and those words are in fact misconstrued, then the court may find that this constitutes evidence of lack of reasonable care, if not of bad faith on the part of the person who misconstrued the words. This nonetheless could prove to be a difficult matter for the legislation under discussion, there being no clear statutory criteria or guidelines. In England, on the other hand, "[t]he *Mental Treatment Act*, 1930, s. 16, shift[ed] the onus of proof of absence of good faith and want of reasonable care in cases of wrongful detention"[55]

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46. An interim step might be, as the result of annual conferences, perhaps some formulation of policy, setting out substantive principles that will guide the boards, the criteria to be considered, or list of characteristics of cases in which discharge will obviously be recommended, or otherwise. Could not the boards, even under their present statutory mandate, embark upon some emperical studies and analyses involving patterns of cases, and recidivism, that might be of assistance?

47. Kenneth Culp Davis, *Discretionary Justice* (Chicago, 1969) 3 *et seq.*

48. Examples are Ontario's provision that a board member must be present for the entire hearing, before participating in a decision; Nova Scotia's provision that a patient is *entitled* to counsel, and notice of that right. (Note s. 10(b) *Charter of Rights* has some provision in event of detention).

49. See *Re Royal Canadian Legion Branch 177* (1964), 44 C.R. 35 (B.C.S.C.).

50. See *Bullard* v. *Croydon Hospital Group Management Committee*, [1953] 1 Q.B. 511.

51. *Supra* n. 17.

52. See *Abel supra*, n. 14; the whole question of such an order would remain a *justiciable* one, as in the present wording of the section: *Re Royal Canadian Legion, supra* n. 49.

53. *Everett* v. *Griffiths*, [1921] 1 A.C. 631 at 695 (*per* Lord Moulton). This involved an unsuccessful suit in false imprisonment against a justice of the peace who had signed an order for the reception of a 'lunatic' in 'good faith' but negligently.

54. *Richardson* v. *L.C.C.*, [1957] 2 All E.R. 330 at 340 (*per* Parker, L.J.). (This, too, arose from the alleged unlawful detention in a mental institution).

55. See editorial note to *Re Lunacy Act, 1890; Re An Intended Action by Frost*, [1936] 2 All E.R. 182 (C.A.).

(and leave must be granted to bring such an action). In *Re Lunacy Act, 1890; Re An Intended Action by Frost,*[56] an application for leave was sought for damages as the result of detention by way of certificate issued by a doctor who had not personally examined him. In holding that there was a *prima facie* case of want of reasonable care, the court said:

> . . . [T]here was sufficient evidence to . . . conclude that in acting only upon this letter of Dr. Dean and in failing to get any medical man or expert to examine Frost before they took him into the ward . . . appellants *did* act without reasonable care.[57]

Suffice it to say that this entire area is unclear, and not in small part due to the general nature of the legislation. Consider, for example, an application for damages by a member of the community into which a patient has been returned, perhaps temporarily, by the recommendation of the board, and who has caused some harm, injury or death as a direct result. Prefatory remarks regarding the connection of the lieutenant-governor and the board must be borne in mind, and the cases referred above will be applicable here as well; but in an American case,[58] a couple was allowed to adopt a 16 year-old boy without being warned of his homicidal tendencies. He subsequently attacked his foster mother. The basic policy in formulating adoption and release practices was acknowledged to be outside the proper sphere of judicial control,[59] but carelessness, and failure to take reasonable steps[60] to make warning fall within judicial supervision, and the State Youth Authority was found liable. Inaction by officials possessed with knowledge may constitute sufficient negligence to base an action. In *Schacht* v. *The Queen*[61] the court sustained an action claiming damages from an accident which resulted from the failure of two police officers to warn traffic that detour signs in advance of construction excavation had been knocked down by an earlier mishap. The court concluded:

> . . . [T]he passivity of these two officers . . . may appear to be nothing more than non-feasance, but *in the case of public servants* subject not to a mere social obligation, but to what I feel bound to regard as a legal obligation, it was non-feasance amounting to misfeasance.[62] [emphasis added]

Note that in paragraphs 547(5)(d) and (f) of the *Code* there are references to "the interest of the public", which seems to impose considerations which bring the board's determinations within the scope of the rule in *Schacht's Case.*[63] This case tends to eliminate the clutter that exists in differentiating between misfeasance and nonfeasance on the part of public officials. Traditionally, no liability was fixed merely for nonfeasance.[64]

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56. *Ibid.*

57. *Ibid.*, at 186 (*per* Greer L.J.).

58. *Johnson* v. *State of California*, 447 P. (2d) 352 (1968).

59. See also, *Home Office* v. *Dorsett Yacht Co. Ltd.*, [1970] A.C. 1004 (H.L.), where the escape of delinquents who caused nearby damage was sufficient to fix liability on their custodians, since damage was "a manifest and obvious risk" (*per* Lord Morris of Borth-y-Gest at 1035).

60. A reasonable step might be to alert police in the event of temporary release of a patient with past violence, for example. This would be obviated where the Crown was present at the board's determination.

61. (1972), 30 D.L.R. (3d) 641 (Ont. C.A.).

62. *Ibid.*, at 651 (*per* Schroeder, J.A.).

63. For further discussion on this issue, see C.S. Phegan, "Public Authority Liability in Negligence" (1976), 22 McGill L.J. 605 at 613, *et seq.*; G. Ganz, "Compensation for Negligent Administrative Action", [1973] Pub. Law 84 at 90; *Greenwell* v. *Prison Commissioners* (1951), 101 L.J. 486 (Cty. Ct.); *Holgate* v. *Lancashire Mental Hospitals Board*, [1937] 4 All E.R. 19 (K.B.D.); B.V. Slutsky, "Liability of Public Authorities for Negligence: Recent Canadian Developments" (1973), 36 Mod. L.R. 656.

64. See for example, *Barrat* v. *North Vancouver* (1979), 5 C.C.L.T. 303 (B.C.C.A.).

III. The Hearing

The present approach by the Board has been described; the informal conference typical. The proponents of this inquisitorial approach urge that by an informal conference, the intimidating confrontation tactics common to the courtroom are avoided, in favour of a far-ranging inquiry that proceeds without the delay associated with trials. No rules of procedure or evidence intrude to limit the evidence presented. Apart from efforts to standardize procedures across the country, no articulated standards beyond the minimal requirements of the *Code* exist. The alternate model proposed is the adversarial one, which suggests a more formal and institutionalized forum, emphasizing adjudication rather than administration. In this mode, the chairman takes less of an active role, and is seen to be more impartial. The difficulties are that the patient-doctor relationship may be damaged and the nature of the recommendation reduces itself to a delicate balancing of community interests and those of the individual, rather than a 'finding' for one side or the other.[65] What does this practice do to the concept of 'due process'?[66]

It may be convenient to explore, in a cursory way, just what 'due process' means in Canada, before relating the proposition directly to the advisory boards of review. The leading case appears to be *Curr* v. *The Queen*:[67]

> . . . '[D]ue process of law' . . . is to be construed as meaning 'according to the legal processes recognized by Parliament and the courts in Canada'.[68]

This definition not only imports legislative imperatives, but brings into play more fundamental notions of the rules of natural justice, which in turn connote principles of fairness, and justice.[69] No case has diminished this initial definition; it moves one, however, to consider the principles of natural justice. It has been said that:

> Procedural fairness is what makes intensive government tolerable. A decision reached after fair consideration of every side of the case will not only appear less arbitrary: it will most probably also be less arbitrary . . . [judges are] experts in fair procedure, and in insisting on it they are in no way interfering with the substance of executive decisions.[70]

Traditionally, natural justice has involved two principles; that a decision-maker be disinterested and unbiased *(nemo judex in causa sua)* and the parties be given adequate notice and a chance to be heard *(audi alterum partem)*. Currently an all-embracing term is increasingly gaining ground: fairness.[71]

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65. See, E. Savoia, "Institutional Models for Decision-Making Utilized By Lieutenant-Governor's Advisory Review Board", an undated recent report containing a summary of views presented to the Department of Justice (Can.) Consultation Team. Savoia actually presents *four* models: adjudication, inquisition, administration and controlled administration. It would appear that the more common view is to regard the board either as adversarial (formal) and inquisitorial (informal), with various modes of these models along the continuum between.

66. Used in s. 1(a) of *The Canadian Bill of Rights*, R.S.C. 1970, Appendix III, to liberty, but which protection becomes "principles of fundamental justice" in s. 7 of the *Charter of Rights*.

67. (1972), 18 C.R.N.S. 281 (S.C.C.).

68. *Ibid.*, at 284 (*per* Ritchie J.).

69. This is supported in S. Cohen, *Due Process* (Toronto, 1977) 6; see also, W.W. Pue, *Natural Justice in Canada* (Scarborough, 1981): "It is because of its originally close links with concepts of natural law that the Anglo-Canadian equivalent of 'due process' has come to be known as 'natural justice'." See also, *Saxell supra* n. 22.

70. B. Schwartz, H.W.R. Wade, *Legal Control of Government* (Oxford, 1972) 241.

71. *Nicholson* v. *Haldimand-Norfolk supra* n. 14, and *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)* (1979), 50 C.C.C. (2d) 353 (S.C.C.).

> It is wrong . . . to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each . . . 'In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative'.[72]

To return to the hearing before the board of review: the mere fact that it is informal does not mean that it necessarily offends the broad principle of 'fairness', (but the danger exists to a greater degree than in the adversarial model).

> A review commences with notification to the facility, the patient and his lawyer. The two psychiatric members of the board attend at the facility and examine the patient, review his entire file and make all inquiries. The Administrator prepares a report . . . and where possible it is given to the patient's lawyer with the caution to use his discretion . . . A court reporter is present . . . where possible a friendly atmosphere is created . . . the patient is invited to make any submissions he deems appropriate . . . at the hearing the Administrator of the hospital is present together with the doctor in charge . . . The informality of the hearing is emphasized. All relevant matters are explored and the patient, his family, his witnesses and lawyers, are afforded full opportunity to express their views . . . The hearing is concluded (and) . . . goes *in camera.* Four of the five members must agree.[73]

The Ontario practice is not a universal one;[74] it does move away from the purely informal model, and has standardized the procedure by which it governs itself. It in this sense, perhaps, goes some distance in satisfying the obligation of 'fairness'. There are, however, a number of collateral issues which proponents of the adversarial model suggest are greater satisfied by formalization of the process. These will be considered on a one-by-one basis:

A. Role of Counsel

Section 10 of the *Charter of Rights*[75] provides that everyone on arrest or *detention* has the right to be informed of the reasons therefor, to retain and instruct counsel without delay, *and to be informed of that right.* If the trend in the case law continues, that is, to perceive the realities of the board-lieutenant-governor relationship in terms of the board's actions exclusively, then it is more than arguable that the provisions of section 10 of the *Charter* apply to the board's recommendations. That the legislation, as it presently reads stands in the way cannot be dismissed. Nonetheless, since the review operates to continue detention or to effect a release (discharge), it would appear that unless this particular group was intended to be denied the protections of the *Charter,* the boards of review are obliged to make these inquiries and afford these rights.[76] It is suggested, and the practice confirms, that the right of the patient to counsel before board hearings is assured. However, beyond assisting on the regularity of proceedings, there appears to be little agreement on what constitutes the patient's best interests:

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72. *Ibid.*, at 379 (*per* Dickson, J., approving de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973) 208).

73. Mr. Justice E.L. Haines, "The Ontario Lieutenant-Governor's Advisory Review Board" (1981) 2d ed. of a brief to the Krever Commission in 1979.

74. In Saskatchewan, for example, the patient gets notice of the first review, but not subsequently; no notice is given in Manitoba. The patient is not present at the hearing unless he requests it, in Manitoba; he may not necessarily be in Saskatchewan or Quebec, if his doctor is present. A reporter is not present in B.C., Sask., Man., or N.S.

.75 *Constitution Act, 1982,* being Schedule B to *Canada Act 1982,* c. 11 (U.K.) (hereinafter referred to as the *Charter).*

76. Constitutional freedoms are to be given an expansive and liberal interpretation, which would militate against exclusion of those under Lt. Gov. warrants. See *R.* v. *Minardi,* Ont. Dist. C. unreported, Sept. 28, 1982, Graburn, J.; foll'd *R.* v. *Hay (No.1),* Ont. Dist. C. unreported, June 11, 1982, Kurisko, J.; *British Coal Corp.* v. *The King,* [1935] A.C. 500 at 518 (P.C.); *Edwards* v. *A.G. Canada,* [1930] A.C. 124 at 136-137 (P.C.).

> He had been looked at very, very carefully and cautiously by a Review Board who had the protection of his wife and children and the public very much in their thoughts; they had refused to let him out; they had overridden one member of the Board who thought he was safe, and then you run into the lawyer in the process who, because of the traditional professional loyalty exclusively to the client, *blows up the whole thing.* [emphasis added][77]

In this area, the lawyer can be viewed as disruptive and not condusive to the conference process.[78] On the other hand, the state, in securing psychiatric treatment for those who are unable to realize this for themselves, and who may present a danger to themselves or the community, eliminate the individual's liberty. Traditionally, counsel for someone in detention is concerned with just that fact, and adopts a position against continued detention. These opposing stances offer no small amount of confusion for the lawyer, which is compounded by the fact that he is unable, in many cases, to take instructions from the patient, who may lack insight into his own problems. How is the decision made? Assuming he is instructed by his client to challenge detention, there is still an imbalance in that, usually, the state is not represented by the Crown when counsel for the patient is present.[79] Moreover, studies have been done in the United States which have examined the role of counsel before such boards:

> In various studies in six states . . . lawyers were described in terms as reticent, ineffective, ill-prepared, mostly silent, lacking interest, rarely extending any effort, . . . [and] not explor[ing] in court such elemental legal questions as whether there was any factual basis for a conclusion of dangerousness, whether medical examinations were thorough, whether a physician's recommendation was based on conclusory data and whether alternatives to involuntary hospitalization existed.[80] [footnotes omitted]

Such a wide orbit as six studies might be expected to embrace cannot simply reflect ineffective counsel; it probably indicates the uncertainty of the precise role which counsel has. In a case in the United States,[81] a cautious directive was given by the federal court, in 1972, quoting an earlier case[82] with approval:

> It matters not whether the proceedings be labelled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration . . . which commands observance of the constitutional safeguards of due process. Where . . . the state undertakes to act in parens patriae, it has the inescapable duty to . . . see that [the] subject . . . is afforded the opportunity to [have] the guiding hand of legal counsel at every step of the proceedings . . .[83]

That same court endorsed the adversarial role as distinguished from that of guardian.[84] It did not do so, however, in clear terms, because of the

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77. D. Morris, *supra* n. 26 at 70.

78. *Ibid.*, at 73 (*per* Haines, J. *supra* n. 73 at 21: "It is a conference at which the patient is afforded every opportunity to express his views and produce documents and call anyone he thinks may help. The patient and his lawyer are part of the conference.").

79. In Manitoba, the practice is to include counsel from the Attorney-General's Department when counsel appears for the patient. In Saskatchewan, the Associate Deputy Minister of the Attorney-General is actually a member of the Board.

80. V.A. Hiday, "The Attorney's Role In Involuntary Civil Commitment" (1982), 60 N.C.L. Rev. 1027 at 1030.

81. *Lessard* v. *Schmidt* 349 F. Supp. 1078 (1972); vacated and remanded (sub nom. *Schmidt* v. *Lessard)* 414 U.S. 473 (1974) (dealing with civil commitment).

82. *Heryford* v. *Parker,* 396 F. 2d 393 at 396 (10th Cir. 1968) (*per* Murrah C.J.).

83. *Supra* n. 79, F. Supp. at 1097. The court stopped short of insisting that counsel have the right to be present at psychiatric interviews, which would form the basis for the board's decision.

84. *Ibid.*

dilemma to which earlier reference was made. The pragmatic position is that:

> The lawyer, as the patient's advocate, acts in furtherance of his client's expressed interest (that is, to obtain the patient's release), but doubts whether the patient has the mental capacity to express his 'own best interest.' When the lawyer's doubts are strong enough, the 'silent defence' or acquiescence results. The question of how much patronizing is appropriate by both lawyers and doctors in civil commitment hearings is raised . . .[85]

Assuming the increasing tendency to resort to legal advice in matters involving the deprivation of liberty, it seems inevitable that the conference model is going to be dragged toward the adversarial, or more formal approach. Witness the Ontario practice, *supra.* An adversarial stance need not be exclusively directed at release; other issues exist which are worthy of adversarial attention. Such alternatives might be partial or temporary release or a transfer to provincial legislation as a condition upon which discharge of the lieutenant-governor's warrant could be based. Even transfer from one institution to another might ameliorate the patient's living conditions.[86] Cohen[87] reviews the cases which detail the function of counsel in such areas: he is the guardian of the patient's procedural rights; he may conduct his own investigation and present evidence, make representations as to the place, manner and conditions of confinement, and alternatives; he may serve to expose lax medical judgment or negligent preparation of reports, he can serve to listen to the patient and explain the consequences of the order-in-council, or warrant; he may act as 'mediator' between the socio-medical and legal model.[88]

The last argument to be made for the informal process is it relaxes the patient, that it is a clear divorce from the criminal hearing. The patient, quite apart from having come through such a formal hearing (in all likelihood, recently), has usually just been brought to the hearing from an institution that is extremely formal in the organization of his life. Nonetheless, with structure and formality, rights are in less danger of being overlooked. If the process does prove to be bewildering to the patient, a further function of legal counsel is to serve as a means of orientation, of advice and reassurance — part of the traditional role for a lawyer in any event.[89]

B. Disclosure, Confidentiality and The Right to Know

The preparation of any client's case will depend upon a thorough knowledge and understanding of the information upon which the other side's position rests. In the courtroom setting, this is the *sine qua non* of criminal defence work; it is central to the role of advancing the best interests of the accused. Access to this information in the advisory board's review hearing

85. I. Brown, "Lawyers and Psychiatrists In The Court: Afterword" (1972), 32 Md. L.R. 36 at 40.

86. Such as transfer from a psychiatric 'range' in a prison or penitentiary, to a closed wing of a mental hospital.

87. F. Cohen, "The Function of the Attorney and the Commitment of the Mentally Ill" (1966), 44 Tex. L.R. 424.

88. *Ibid.*, for an expanded discussion of these and other functions, see pp. 437-457.

89. For futher support of this view that an approach closer to the adversarial model is desirable, see R.D. Miller and P.B. Fiddleman, "The Adversary System in Civil Commitment of the Mentally Ill: Does it Exist and Does It Work?", [1981] J. of Psych. & Law 403; E.S. Engum and D.J. Cuneo "Attorney's Role as Advocate in Civil Commitment Hearings", [1981] J. of Psych. & Law 161 at 171-5.

is a different matter, in part because the patient's therapy may be affected adversely by sudden exposure to doctors' opinions, and in part because doctors expect their reports to be handled confidentially. The leading case in this area appears to be *Re Abel et al and Advisory Review Board*[90]:

> The Board has to obtain the facts to which it is going to apply its mind. If lawyers are going to represent their patient-clients adequately, they need to know the substance of those facts (. . . the Board 'need not quote chapter and verse'). There may be good reason why some of the specific facts should not be revealed. This is for the Board to decide[91] . . . What terms, if any, should be imposed when disclosure is made is also a matter for the Board to decide.[92]

The Ontario Court of Appeal went on to suggest that there could conceivably be cases in which the subject of the review ought not be provided with the details of his medical records. This has been the subject of previous comment.[93] In setting out that 'conditions' may go with the disclosure, the court appears to vest the chairman with more powers than he possesses under the *Inquiries Act*.[94] Surely, too, as a safeguard for the patient (and his family) legislation is called for which would have the same effect as subsection 142(2) of the *Code* in cases of sexual assault: board proceedings should not be published in any newspaper or broadcast. Once, however, the psychiatrist is brought before the board, he can be compelled to disclose what he knows of the subject.[95] This is hardly necessary in most cases, since the reports (or their summaries) of attending hospital staff are usually sufficient to base a review, as a matter of practice. This is an area for vigilance by counsel, since the most noble of boards are in danger of being lulled into a sense of the routine. Full disclosure to counsel is called for, with guarantees as to its proper use and confidentiality. Psychiatrists should be encouraged to provide full and frank reports in both the interest of the individual and the community, and only by making rules to balance competing interests, can the board function effectively. Proper legislation can assist in meeting this objective.

C. Dangerousness

This word[96] is not used in the *Code*. But presumably this is what a board is looking for when it considers its mandate under section 547, in formulating an opinion for recommendation that is "not contrary to the public interest". Dangerousness appears to be presently the only justification for detention pursuant to lieutenant-governor's warrant. 'Nuisance'

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90. (1981), 56 C.C.C. (2d) 153 (Ont. C.A.) (*per* Arnup, J.A.).

91. In fairness it seems that there should be a concurrent duty to inform counsel if a decision turns on something that has not been disclosed. Then what? The better course might be full disclosure with conditions placed upon the use to be made thereof. This is a difficult area, as Arnup, J.A. observed (at p. 168). Haines, J. *supra* n. 73 at 20-21, also discusses this dilemma.

92. *Supra* n. 14, at 167.

93. W. McKerrow "Privileged Communication and Disclosure In Court" (1981), 2 Health Law In Canada 28.

94. R.S.C. 1970, c. I-13, ss. 4, 5, as incorporated by the *Code*, s. 547(7).

95. See Freedman, J. "Medical Privilege" (1954), 32 Can. B. R. 1 at 20; see also, D.N. Weisstub, "Confidentiality and the Mental Health Profession" (1977), 22 Can. Psychia. Assoc. J. 319. (Proper understanding of mental-health-worker's roles). For a full discussion on confidentiality, see "Symposium Issue On Confidentiality" (1981), Vol. 2, No. 2 Health Law In Canada.

96. For an excellent historical perspective for the notion, see M. Foucault, "About the Concept of the 'Dangerous Individual' in 19th Cent. Legal Psychiatry" (1978), 1 Int. J. of Law and Psychia. 1. Should we be rethinking our ideas about this 19th century notion, in terms of moving toward a more enlightened view?

factors, and minor property offences would not be appropriate considerations, it is widely and justifiably held, to found the machinery of section 545 of the *Code*.

> The assessment of dangerousness is hardly limited to the Court . . . it is one of the most sensitive and confounding issues facing those concerned with the politics and policies of social control . . . the assessment of dangerousness has become the sole criterion for involuntary mental hospitalization.[97]

It has been admitted by the medical profession that psychiatrists are no better than laymen when it comes to predicting 'dangerousness'.[98] Nonetheless, since they are the profession diagnosing and treating human behaviour, they are the ones upon whom heavy reliance is placed in determining this particular issue. Psychiatrists resist the idea that they are the ones upon whose opinion this matter ultimately rests.[99] They go further to say that:

> . . . the prediction of 'dangerousness' where the person has never previously been dangerous is 'nil'; we have no ability to predict. The prediction of dangerousness where the person has previously been dangerous is contaminated by magic thinking . . . I don't know if any community can follow up these things long enough to give you the answers . . .[100]

Pfohl argues that research on the prediction of violent behaviour does not raise one's confidence in its reliability, and that there are low rates of prognostic accuracy, and that the essence of such determinations is that the power of the state is invoked to restrict future options of those considered harmful to the interest of others.[101] He maintains:

> Because of the serious consequences of psychiatric decision-making, we believe that the basis for its 'authority' and its dependence on a process of negotiated social interaction, should be displayed for public scrutiny . . . We are confident that the public adjudication of each attempt to confine someone as dangerous (or in need of maximum security) will represent another more permanent advance.[102]

It may be that in re-thinking the role of the boards, the notion of 'dangerousness' should be given some serious reconsideration as well. To indicate predisposition toward violence by the use of this term harks back to the last century's positivists and social control theorists, raising the spectre of public harm or threat as the direct result of character disorder or congenital mental defect. Perhaps it makes more sense for the board to inquire into the patient's sense of responsibility and insight, than to fix him with a label, albeit one endorsed by the medical model. Foucault notes[103] that even

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97. S.J. Pfohl, "From Whom Will We Be Protected? Comparative Approaches to the Assessment of Dangerousness" (1979), 2 Int. J. of Law and Psychia. 55.

98. J. T. Smith "Psychiatric Prediction of Dangerousness", [1981] Law Med. J. 53. See also a philosophical discussion of the inherent dangers, by G. Geis and I. Bunn "Sir Thomas Browne and Witchcraft: A Cautionary Tale For Contemporary Law & Psychiatry" (1981), 4 Int. J. & Psychia. 1 at 9, quoting Sir Thomas, in 1662, " 'Tis a dangerous to be sentenced by a Physician as a Judge".

99. Dr. J.P. Duffy, "Custody In Criminal Proceedings" (A Panel), *supra* n. 26, at 128. See also, C.J. Frederick (ed.), *Dangerous Behavior* (U.S. Dept. of Health, 1978) 185.

100. *Ibid.*, at 130.

101. S. Pfohl, "The Psychiatric Assessment of Dangerousness: Practical Problems and Political Implications", *In Fear of Each Other* (Conrad and Dinitz, ed., 1977) 98.

102. *Ibid.*, at 98; see also *Covington* v. *Cameron* (1969), 419 F. (2d) 617 (Dist. Ct.). Psychiatric decision-makers to reach 'reasoned' and not 'unreasonable' conclusions, employ 'proper criteria', and do 'not overlook anything of substantial relevance'. Counsel could serve a critical role here.

103. *Supra*, n. 96.

though 'dangerousness' is a pervasive theme in psychiatric expertise in France, it has yet to be legislated into existence. He says:

> Perhaps this indicates a foreboding of the dreadful dangers inherent in authorizing the law to intervene against individuals because of what they are; a horrifying society could emerge from that.[104]

The justification for continued detention, as recommended by a board, might well be footed on the basis suggested by Smith.[105] He proposed the following criteria:

i. magnitude of past harm (seriousness of offence)

ii. frequency and recurrence of past harm

iii. probability of future harm

iv. imminence of present harm

v. general attitude

vi. insight

vii. judgment

viii. is past harm to persons or property

ix. is past harm physical or emotional

x. what is the effect of external factors[106]

Harm, of course, would relate to both self and public. Of these, the probability of future harm is the factor likely to cause the greatest difficulty. After all, regardless how much reliance is placed by the non-medical members of the board on the psychiatrist, he cannot predict the event, only the state of mind, in which the offending event may or may not occur. He can relate to the board some parallels between such an apparent state of mind, and that suffered by the patient at the time of other anti-social acts. Smith, after setting out his index, proposed that each criterion might be judged by an inter-disciplinary team (which fits the present constitution of the boards), according to specific descriptions:

> *Magnitude* — Verbal assault might be one or two of just 10 while first degree murder would be 10.
>
> *Frequency and Recency* — Divide the number of incidents by the number of years, or if recent, has the dangerous behaviour been on a regular basis. One incident would rate one out of 10. A long rap would be a 10.
>
> *Probability* — This is a function of the person's level of provocation. If very impulsive and easily provoked and has 'a chip on his shoulder' he would rate 10. If he avoids trouble as a rule, he would rate one out 10.

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104. *Ibid.*, at 18.

105. J. T. Smith, "Psychiatric Prediction of Dangerousness" (1981), 10 L. Med. J. 53. Here, he lists a number of criteria which constitute a 'dangerousness index'. The proposal appears both thoughtful and useful; however, there is no need to fix them with the 'dangerousness' prefix. Although in many cases either approach will lead one to the same end, and while it is true that some diagnostic labels are useful, the use of non-medical or prejorative epithets in relation to human beings should be avoided.

106. *Ibid.*, at 58-9.

Imminence — This is pretty subjective. If the rater is afraid of the person, he rates 10. If the rater has no fear and no evidence to support any fear, he rates one.

Attitude — A generally friendly cooperative attitude rates one. A generally hostile threatening attitude rates 10.

Insight — If still delusional and totally denying mental problems, he rates 10. If there is regret and recognition of symptomatic behaviour at the time of his past harm, he rates low.

Judgment — If he cannot integrate himself with his surroundings or appraise the consequences of his acts, he rates 10. If he can consistently get along without trouble, he rates one.

Is past harm to persons or property? — Since our society places a premium on the value of the person, he would rate 10 if the harm was to persons; perhaps 1-3 if to property.

Is past harm physical or emotional? — If the harm was bodily such as murder or assault with a deadly weapon, he would rate 10; whereas infliction of emotional distress with no physical harm, might be rated 1-5.

The effect of external factors — If there is reason to believe the person will abuse drugs or alcohol, or return to a troubled marriage, or be unemployed, he would rate 10. If there are no significant external factors, he would rate one.[107]

Such a system of assessment, adopted to the needs and makeup of a particular advisory board of review, would see that all patients commence their review on an equal footing. It further requires the attendance of all patients, and the assessment of 'dangerousness', it is suggested, becomes secondary to the assessment of the person as a whole human being. A question then of 'who', rather than 'what'.

IV. Right to Require and Refuse Treatment

The right to refuse treatment, with the concurrent matter of consent to treatment is an important issue. Should a person refuse treatment, say, involving drug injections to stabilize frenetic emotional surges, with commensurate sociopathological behaviour, the only options appear either to warehouse him, or to compel treatment. Difficult alternatives indeed. In the case of *R.* v. *D.J.M.*, in Manitoba, the accused was charged with the murder of his mother, in 1977. The motive was alleged to be simply (as he said to Police) that 'everyone was better off without her'. He was found 'not guilty by reason of insanity' in 1978, and was sent to Selkirk Mental Health Hospital in Manitoba. In July, 1980, being aggressive and disruptive, he was sent to the Regional Psychiatric Facility in Saskatoon, Sask., where it was the collective medical opinion that he would be better managed in a penitentiary. He was transferred to Stony Mountain federal penitentiary where he refused testing and medication to control hallucinations which caused him to act out in a threatening fashion. He was placed in isolation for his own protection as well as that of the prison population. The board of review for Manitoba was confronted with the issue of consent to treatment, when the review took place at the Stony Mountain Institution, where in effect, the patient was 'warehoused' stubbornly resistant to taking medication.[108] What are the considerations?

107. *Ibid.*, at 59.

108. The decision was later taken to try and utilize the facility again at Saskatoon. At the hearing, the patient had counsel, and appeared to be reassured by his presence, which assisted immeasurably in the assessment.

The Citizens' Committee on Human Rights has drafted a Bill of Rights for Mental Patients which provides that (Art #5):

> The right to accept and refuse treatment and in particular the right to refuse (or one's relative to refuse) sterilization, electric shock treatment, insulin shock, lobotmy, kinarcosynthesis, transorbital leycotomy, aversion therapy and any drugs producing unwanted side effects.[109]

Extraordinary medical remedies, it seems to go almost without saying, should be the subject of consent by the patient. Where the patient perceives that medication may result in his release, however, the basis for the consent is somewhat eroded.[110] The role for the board should be expanded[111] to review the medication program, in a general way, to provide a check on possible areas of abuse. In the sense that the confinement setting is coercive, consent may be induced; the board should be watchful for situations which may involve oppressive circumstances. This is yet another reason for the physical presence of the patient at his review.

Can the board, on the other hand, countenance compulsory or surreptitious treatment? Surely such things ought to be in the report to the lieutenant-governor, in order that the executive is alerted to a situation which may ultimately involve ministerial responsibility. Can there be situations which call for therapeutic intervention by custodians, especially where the hope is to avoid the 'warehousing' of human beings, as in the case earlier touched upon? Professor R. Jobson, in 1975, speaking to the Canadian National Conference on Health and the Law[112] said:

> Under what possible circumstances can it be said that the values of human dignity and personal autonomy, or inviolability of the person should be abandoned in the interests of a doubtful or even proven treatment procedure forcibly administered to the prisoner-patient?[113]

Perhaps a middle ground in the handling of severely psychotic patients, is to have a medication hearing (before the board of review?) to determine what the patient himself would decide, had he been competent. The difficulty at this intersect of the two problems is that people can be degraded

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109. (Dick Betts) Panel on Civil Rights and Property Matters: Mental Disorder and the Law, (1974) Symposium at Instructional Resources Centre, U.B.C., B.C., at 36.

110. This was considered in *Kaimowitx* v. *The Department of Mental Health* (1973) #73-19434-AW (unrep.). The court held that consent to psychsurgery in the prison setting was void. See also, an empirical study calling into question 'consent forms' for electroconvulsive shock therapy and the like: Roth *et al*, "Competency to Decide About Treatment or Research" (1982), 5 Int. J. Law & Psychia. 29 at 48, and T. Solomon, "Informed Consent For Mental Patients" (1979), 8 Human Rts. 30, at 52.

111. As is the case under the Ontario *Mental Health Act* R.S.O. 1980, c. 262. See F.P. Stephens, "Prisoners: Gov't View Consent To Treat" (2nd Nat. Conference on Health and the Law, 1979) 50.

112. September 23-25, 1975, Ottawa. (Proceedings published by Canadian Hospital Association).

113. *Ibid.*, at 137. But this argument is not conclusive: Dr. J. C. Theriault, Medical Director of Centrecare, Saint John, New Brunswick, in November, 1982, spoke of a severely depressed patient, detained under Lt. Gov. Warrant, who refused E.C.T., was treated over objection, and within 15-16 months, not only was absolutely discharged from the warrant, but back at his old job in the shipyard (Minutes of *Symposium: Law & Psychiatry*, Nov. 24, 1982). Other physicians at this symposium generally supported the right to treat over objection in certain cases. See "Response: Right to Refuse Treatment", Dr. P. Perry, at the N.B. Symposium.

114. The decision to intervene by way of compulsory medication is the subject of discussion by L.O. Gostin; he supports the idea that if such a step is taken, the decision should not be the doctor's alone, but one which is referable to a panel ("Compulsory Treatment in Psychiatry", (1982), 7 Poly. L.Rev. 86,at 93). Note that this issue was the subject of a recommendation in the Can. Psychiatric Journal ("Ethics of Involuntary Treatment", (Feb. 1982) 60, at 73): That psychiatrists continue to be allowed, under mental health legislation, to overrule patients' objections to treatment, when it is obvious that treatment is obviously needed; and that treatment may be continued as necessary when it will result in great improvement of the patient's condition. The British Medical Journal (*Ibid.*, at p. 71) reported that the debate in the Commons concluded on

by the process of taking care of them, and degraded by not taking care of them. In the realm of medication, that which is intrusive, adversive or violative, the state should tread wearily, if at all.[114]

A final consideration in this area is the possible right of the patient to compel treatment. Section 24 of the *Charter* provides for general remedies ". . . as the court considers appropriate and just in the circumstances". It may be that the detention of someone at the pleasure of the lieutenant-governor may have access to these provisions to compel treatment in a psychiatric facility in order that his eventual release may be secured. Without treatment, detention may well be considered to be 'arbitrary' or a deprivation of liberty not in accord with fundamental principles of justice.[115]

A. Dispositions

As earlier observed, dispositions are varied in the board's recommendations, following a review. The board may recommend that the patient be detained for further treatment (or simple custody for that matter) or it may consider temporary community release programs under the supervision and monitoring process of the institution. It may see complete discharge as appropriate. The board may apply to the prosecution and petition for an exercise of prosecutorial discretion in favour of a patient, with a view to dropping the charge, in order that the way is clear to channel the patient to provincial mental health schemes, or outright release:

> Where the charge is a minor one, it seems appropriate to 'withdraw' the charge and channel the person through what could be termed 'mental health procedures'. Often nothing is gained by prosecuting cases of this nature . . . To subject the person to trial on a minor offence after he has undergone his course of treatment or training is a humiliating experience and could easily undo the good that has been done.[116]

This would appear to be a proper exercise, in appropriate circumstances, of prosecutorial discretion.[117]

One of the issues for disposition is the burden of proof. There is no standard set out by which the patient is determined sufficiently fit to be discharged, in the board's recommendation. One suspects it is an intuitive process at present. The issue fundamentally becomes one that is reflective of values in society. Perhaps that's the point. But does the board err in favour of the patient, or does it err in favour of society's protection. Can it be better to release potentially dangerous mentally ill persons, in order to increase the likelihood that those who are not dangerous will not suffer unwarranted detention? Interestingly, in a Canadian study referred by Professor Pasewark in a paper delivered June 20, 1982,[118] it was noted that

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this issue that patients' objections should be overridden to save life, prevent violence or prevent deterioration in the patient's condition. See also, M.D. Ford, "The Psychiatrist's Double Bind: The Right to Refuse Treatment" (1980), A.J. Psychia. 137-140-6 for a discussion of the dilemma in balancing patients rights and the right to treat, and a criticism of the absolute right to refuse treatment.

115. *Charter*, s. 7. See also, "Guaranteeing Treatment For The Committed Mental Patient: The Troubled Enforcement of an Elusive Right", (1973), 32 Md. L. R. 42, esp. discussion of *Wyatt* v. *Stickney*, cited therein at p. 61.

116. B. B. Swadron, *Mental Retardation, The Law-Guardianship* (1969), Toronto Nat. Inst. Ment. Retard., at 38.

117. See K.C. Davis, *Discretionary Justice* (1969) 189-190. See also, *Code*, ss. 508-732. 1(1) empowering a stay of proceedings with respect to any prosecution, at any time during the process.

118. 8th International Congress on Law and Psychiatry (1982), Quebec - as yet unpublished.

there was a very low rate of recidivism in Canada, where there is an average of eight years' confinement for patients, as opposed to a high rate of recidivism for those offenders found 'not guilty by reason of insanity' in the United States, where the average stay is two years.[119] This appears to be somewhat confirmed by an eight-year study done to follow-up lieutenant-governor warrant cases in Quebec.[120] Between 1973-75, the largest proportion of cases (77%) involved detention of less than two years, and a substantial portion (52%) received no follow-up whatsoever. When recidivism did occur in the short-term detainees, rarely did the offender come under a lieutenant-governor's warrant.[121] It was observed that the fact of little or no supervision could be in some way related, and the advisory boards should well consider the value of gradual release and adequate follow-up. The figures and the experience tend to support the view that board dispositions especially where there has been gradual release have been 'calculated risks' which in the main have paid off.[122] Can this assist in the determination of what the burden should be? At present, were it to be termed anything, the burden of demonstrating that one should be discharged, appears to be to the satisfaction of the board. If the board can say, that on the basis of its assessment, it is satisfied that partial or full release should be recommended, then confinement should no longer be justifiable. This seems to be a reasonable method of weighing relevant factors; one can only hope that it is one which is universally applied.

The disposition may be to transfer a patient from one facility to another, perhaps in a different province. The *Code* appears to transfer the responsibility for the review to the board in the receiving province. The wording of the *Code* provides that the order (for custody or discharge) may be made by the 'lieutenant-governor of the province in which he is detained'.[123] There is presently some uncertainty about the role of the original board. This could be resolved by a unified policy calling for consultation and advice.

V. Conclusion

The superiority of a review board as a means to safeguard patients against unwarranted detention and to balance against that the right of society to enjoy a certain level of protection, does not appear to be in doubt.[124] The present state of the advisory review boards in Canada reflect somewhat less than perfect attainment of the potential for such an institution. At the very least, what is required is a rationalizing of policies

119. Pasewark referred to other empirical work which suggested that in the United States there appeared to be no statistical difference in the recidivist rate between those in the prison system, and those detained by virtue of unfitness or insanity.

120. Prof. S. Hodgins "Quebec Lieutenant-Governor Warrant Cases: An Eight Year Follow-Up," as yet unpublished.

121. The figures may be deflated since not all crimes result in charges, especially minor offences.

122. "In the four years that I have worked at Riverside (B.C.), the patients' release are in the neighbourhood of 100 and not one has committed any crimes against persons after their release. This is partly due to follow-up and partly due to the fact that they have some insight . . . A few of them have killed themselves, but we consider this, in a sense, a cure because they haven't exercised that hostility against anyone else." R.J. Foulis, panel discussion, *supra* n. 26 at 106. See also, Mr. Justice Haines' monograph, *supra*, n. 73 at 15, where he writes: "The recidivism rate is less than 10%. This compares very favourably with the correctional system where it is said recidivism is nearer to 60 to 70%." Note, however, there is no correlation as to actual length of detention in either situation.

123. *Code*, s. 545(1).

124. N. Walker, "Dangerous People" (1978), 1 Int. J. Law & Psychia. 37 at 47-48.

presently followed by the divers boards, so that a citizen confined in one province pursuant to a lieutenant-governor's warrant enjoys the same kinds of protections and opportunities as does his counterpart elsewhere. This includes such basic requirements as notice, presence at hearing, access to counsel, and to be informed of his rights in such terms as may be meaningful. In the United States, a review of the jurisprudence convinces that there is clearly a move away from the *parens patriae* model, to a justification for detention based on the state's right to exercise its police power. Hand-in-hand with that realization, mentally ill offenders are seeing their confinement approached from a 'due process' basis, which ensures that the rights touched upon in this essay are not circumvented. This is not in any way to be construed as a guarantee for the release of those from whom society has every right to be protected; it goes to secure the release of those of whom, in the opinion of the board of review, the community is no longer justifiably afraid.

The Law Reform Commission, in its most recent report "On Mental Disorder In The Criminal Process" recognizes the need for standardization. It is curious that the annual conferences of the advisory boards have not yielded some basic uniform practice policies. It is stranger still that even given the lack of statutory aspirational directives, the board does not make an annual report, either to the lieutenant-governor, for the information of the executive, or to the Solicitor-General, with copies for public consumption. Part of the problems of the mentally ill stem from their isolation and lack of understanding on the part of the public. The boards could serve a particularly useful role here, in the education of the public. As reflected earlier, no board has ever commissioned a study which might be useful in future decisions, if for no other reason than to gauge the effectiveness of partial release programs. There is much than can be done under the present legislation to rationalize the board's practice on a national basis. A review of the last sets of materials from the conferences held by the board reflect concern for some of the issues here touched upon, but as yet there seems to be no move towards a unified policy of approach. It unhappily seems that, as in *Abel's Case,*[125] the stimulus for action must come from the courts.

The legislation, however, requires amendment. The board unambiguously should have the final responsibility for both review and decision, and the constitution of the board ought be framed in mandatory language, which in aspirational terms, sets out their mandate. After a period of time (which at the very least should have some relation to the time that would be served for the offence which has resulted in detention), there ought to be provisions for review by a provincial or superior court, as an additional check on the discretion of the board. This figure might even be arbitrarily set at two or three years beyond the first day of confinement.

How far have we moved toward enlightenment — that state of being informed, free from prejudice?

> The more enlightened views which obtain now concerning the nature of insanity, assure us that it is a disease like any other disease, and can be treated on well known principles which

125. *Supra* n. 14.

> must be fulfilled . . . An amount of personal liberty to the insane, commensurate with their own and their attendants' safety is necessary for treating insanity under its modern conception.[126]

These words, by Dr. Daniel Phelan in the annual Report of the Inspector of Penitentiaries, were spoken in 1899, but their optimism and foresight is timeless advice.

126. Canada, The Solicitor-General's Office, *The General Program for the Development of Psychiatric Services in Federal Correctional Services in Canada* (Ottawa, 1973) 8.