CHAPTER ELEVEN: LIEUTENANT GOVERNOR'S WARRANTS

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I. INTRODUCTION

Although Parliament has radically changed the former system for transferring persons found not guilty by reason of insanity or unfit to stand trial to the indefinite custody of the Lieutenant Governor (L.G. warrants), one may encounter clients who have been subject to L.G. warrants in the past or who are currently subject to them under the transitional provisions of the *Criminal Code*.[1] Indeed, until the capping provisions under s. 672.64 are proclaimed in force, persons who were subject to Lieutenant Governor's warrants before the amendments came into force will continue to be subject to them.

This chapter outlines the former provisions of the *Criminal Code* that dealt with persons found not guilty on account of insanity. It also discusses the use of Lieutenant Governor's warrants to transfer detainees. Further, it outlines the transitional provisions that will apply until the capping sections of the *Criminal Code* are in place.

II. LIEUTENANT GOVERNOR'S WARRANTS

Under the former *Criminal Code* provisions (sections 614 - 617), the court was required to order an accused found unfit to stand trial on account of insanity (when charged with a summary conviction or indictable offence) or not guilty on account of insanity (when convicted of an indictable offence) to be kept in custody until the pleasure of the Lieutenant Governor of the province was known. No other disposition was possible. The *Criminal Code* required an automatic, indeterminate period of detention during which the accused awaited the decision of the Lieutenant Governor of the province.[2]

Where the court had found a person unfit to stand trial, it usually ordered that the accused be held in a provincial hospital facility at the pleasure of the Lieutenant Governor. The "pleasure of the Lieutenant Governor" could mean anything from a short hospital term to a life stay. One study indicated that those found unfit to stand trial were held on average for a longer period than those found not guilty by reason of insanity.[3] In fact, persons found unfit

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1 R.S.C. 1985, c. C-46 (hereinafter *Criminal Code*).

2 The *Criminal Code* was unclear as to whether a person found not guilty by reason of insanity for a summary conviction offence could be subjected to a L. G. warrant. However, former s. 795 was amended in 1985 to state that the indefinite detention provisions applied to proceedings taken on summary conviction. However, former s. 617, which allowed the Lieutenant Governor to transfer an indefinitely detained person, was expressly exempted in former s. 795. On the other hand, some common law cases held that an acquittal was the only possible disposition after a finding of not guilty by reason of insanity where the accused was charged with a summary conviction offence. See: *R*. v. *Crupi* (1986), 17 W.C.B. 24 (Ont. Prov. Ct.).

3 V. L. Quinsey and B.A. Boyd, "An Assessment of the Characteristics and Dangerousness of Patients Held on Warrants on the Lieutenant-Governor" (1977) 4 Crime and Justice 268 at 271 - 274 (hereinafter Quinsey and Boyd).

to stand trial could expect, on average, to be detained for a considerable period. In many cases, the detention would last longer then would have been customary or even possible had the accused been found guilty of the offence and sentenced. A national study conducted in the late 1970s indicated that the average length of detention was eight years across the country and up to eleven years in some provinces.[4]

An extreme example of a lengthy detention occurred in Emerson Bonnar's case. Bonnar was nineteen years old when charged with purse snatching. He was found unfit to stand trial in 1964 and remained in custody on a Lieutenant Governor's warrant for sixteen years (until 1980). Bonnar was released after community groups publicized his case.[5]

On the other hand, statistics gathered in 1988 indicated that of the 1007 detainees held under the Lieutenant Governor's warrant system in Canada, only two were found to have no mental disorder. Sixty-five percent of the detainees were reported to have schizophrenia; 11.9% had personality disorders; 7.6% had affective disorders; 6.9% had delusional paranoid disorders and 4.2% were mentally handicapped.[6]

Under the *Criminal Code,* the Lieutenant Governor was not obligated to review the case of someone who was detained under a warrant. If a decision was made to review a person's case, there was no obligation under the *Criminal Code* to notify the person, nor was there any requirement for a full hearing with an opportunity for the detainee to attend or make representations.

In practice, after the court made its order, there may have been a relatively long period before the Lieutenant Governor issued a warrant. For example, statistics cited in *R.* v. *Swain*[7] indicated that the time between the court's decision and the issuance of the Lieutenant Governor's warrant was over five months on average in Alberta.

The Lieutenant Governor could appoint a Review Board (discussed below) to assist in making decisions about detainees. Although the Lieutenant Governor was not required by the *Criminal Code* to follow the recommendations of the Review Board, the Lieutenant Governor often did follow these opinions.[8] If the Lieutenant Governor had appointed a Review Board, the Review Board was required to undertake periodic mandatory reviews of each person's case and to make recommendations to the Lieutenant Governor. However, the

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4 Quinsey and Boyd. For further statistics on a province by province basis, see: C. D. Webster, "Persons Held on Warrants of Lieutenant Governor in Canada" (1985) 33(3) Canada's Mental Health 28.

5 See: M. Savage and C. McKague, *Mental Health Law in Canada* (Toronto: Butterworths, 1987) at 31 - 34 (hereinafter Savage and McKague).

6 S. Hodgins et al., *Annual Report, Year 1 Canadian Data Base; Canadians Held on Lieutenant Governors Warrants* (1989), Table 5, as cited in *R.* v. *Chaulk* (1990), 62 C.C.C. (3d) 193 (S.C.C.).

7 (1991), 63 C.C.C. (3d) 481 at 538, per Lamer C.J.C. (hereinafter *Swain*).

8 Savage and McKague, at 43.

Criminal Code did not provide any guidelines as to how the Review Boards were to conduct themselves. There was no mention of the right of the detainee to the review hearing, the right to notice of the hearing, the right to attend the hearing, the right to retain legal counsel for the hearing nor the right to participate in the review hearing.[9]

Following a review hearing or after the initial court verdict, the Lieutenant Governor had the discretion to make one of two possible orders. She could order the detention of the accused in a place and manner prescribed by her (s. 617(1)(a)) or she could order the absolute or conditional discharge of the accused if she felt it was in the best interest of the accused and not contrary to the public interest (s. 617(1)(b)).

III. LIEUTENANT GOVERNOR'S BOARDS OF REVIEW

A. REVIEWS

Once an accused was detained under a Lieutenant Governor's warrant, his case would be reviewed by a Board of Review not later than six months after the L.G. warrant was issued, and every twelve months thereafter, if such a board had been appointed by the Lieutenant Governor of the province under the former s. 619.[10]

If a Review Board was appointed, former s. 619 required that it be composed of between three and five members, including at least two psychiatrists and one lawyer. The chair of the Review Board had the authority of a commissioner under the public inquiries part of the *Inquiries Act*.[11]

After each review, the Review Board reported to the Lieutenant Governor under s. 619. If the person had been in custody because she was found unfit to stand trial, the Review Board would report whether it was of the opinion that the person was fit to stand trial. If the person had been found not guilty on account of insanity, the Review Board reported whether the person had recovered and whether she should be absolutely or conditionally released. The Review Board could also make any recommendations that it considered in the interests of recovery of the person and that were not contrary to the public interest.

The Review Boards that were appointed to review the cases of persons subject to Lieutenant Governor's warrants were entirely separate from the Review Panels constituted under the various provincial *Mental Health Acts*.[12] Review Panels under Alberta's *Mental*

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9 Savage and McKague, at 46.

10 It appears that not all provinces had established Review Boards as of 1987. See: G.B. Robertson, *Mental Disability and the Law in Canada* (Calgary: Carswell, 1987) at 371 (hereinafter Robertson).

11 R.S.C. 1985, c. I-11. These powers included the ability to summons witnesses, to compel attendance and the production of documents (etc.).

12 In Alberta, S.A. 1988, c. M-13.1 (hereinafter *Mental Health Act*).

Health Act periodically review the cases of persons who are involuntarily committed under the civil commitment process.[13] Persons who had been found unfit to stand trial or not guilty on account of insanity could come under the authority of provincial Review Panels upon expiry of the Lieutenant Governor's warrant if they were civilly committed. Under s. 3 of the *Mental Health Act,* if the detention of a person found unfit to stand trial or not guilty by reason of insanity was about to expire, a physician was authorized to examine and assess the person to determine whether the criteria for civil commitment were met. Persons admitted under s. 3 could thereby come under the jurisdiction of a Review Panel.

Recommendations of Review Boards were held not to be reviewable by the courts because they were considered mere expressions of opinion that were not binding upon anyone, including the Lieutenant Governors.[14]

Procedures used by Review Boards in making recommendations to the Lieutenant Governor varied widely from province to province. In some provinces the proceedings were generally informal, while in others, they were quite formal. Rules of practice tended to be improvised, with most decisions arrived at by a process of consensus. Although this informality was not viewed as necessarily unfair, its wide scope of discretion was criticized for the potential for abuse.[15]

B. EFFECT OF THE RECOMMENDATION OF THE BOARD OF REVIEW

Although the recommendations of the Review Boards were not binding upon the Lieutenant Governor, they were generally followed.[16] In the vast majority of cases, the recommendations of the Review Board were followed in Alberta.[17]

However, there is evidence that some Review Board recommendations were disregarded or questioned. Sometimes the Lieutenant Governor brought a case to the provincial cabinet for assistance in deciding whether to accept the Review Board's recommendation. For example, in the Ontario Court of Appeal decision in *Swain,* a government official testified that in Ontario the Lieutenant Governor would ask for the advice of the Cabinet in "difficult" cases. This prompted a comment by a dissenting judge that this practice constituted a risk of using the criminal process to obtain a detention that would not be justified under the civil process (e.g., because the person was no longer

13 See Chapter One, Introduction, for a discussion of involuntary commitment.

14 *Lingley* v. *New Brunswick (Board of Review)* (1975), 25 C.C.C. (2d) 81 (Fed. C.A.).

15 S. Whitley, "Watching for the Hellebore: The Role of the Advisory Board of Review" (1984) 14 Manitoba Law J. 259.

16 See, for example: *Abel et al*. v. *Advisory Review Board* (1980) 56 C.C.C. (2d) 153 (Ont. C.A.) (hereinafter *Abel)*.

17 Per Lorraine Russel, August 28, 1991, then administrator of the Alberta Board of Review.

dangerous).[18]

The Law Reform Commission of Canada also expressed concerns about possible political abuses given the purely advisory role of Review Boards.[19] The Law Reform Commission stated that Lieutenant Governor's warrants were not usually issued by the Lieutenant Governor, but by the provincial Attorney General or the Cabinet and it was they who decided when the warrants should be terminated or varied.[20] Most often they followed the recommendations made to them by the Board of Review; however they sometimes disregarded these opinions for reasons that had nothing to do with the general philosophy behind having Lieutenant Governor's warrants. For example, the Attorney General or cabinet might have delayed releasing the person because it was politically unwise to do so at a particular time. Since the denial could not be appealed and was done behind closed doors, there was room for abuse.[21]

C. JUDICIAL CONTROL OF BOARDS OF REVIEW

Historically, decisions of the Lieutenant Governor respecting detainees were challenged in court by *habeas corpus* applications. The courts, however, tended to respect the Lieutenant Governors' exercise of discretion.[22] A few years after the Law Reform Commission noted with concern that detention under a Lieutenant Governor's warrant was not subject to judicial review,[23] a series of court decisions established the principle that at a minimum, both review boards and the Lieutenant Governor must "act fairly" in their proceedings when dealing with persons affected by a Lieutenant Governor's warrant. This development arose because of a general trend in the law that expanded the requirement for procedural fairness in administrative decisions.

Before the advent of the *Canadian Charter of Rights and Freedoms*[24] a decision of the Lieutenant Governor could not be reviewed by the courts (e.g., in a *habeas corpus* proceeding) unless the decision was "arbitrary".[25] Challenges to the powers of the Lieutenant

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18 See: *R.* v. *Swain* (1986), 18 C.R.R. 209 at 260, per Brooke J.A. (dissenting). This case was later appealed to the Supreme Court of Canada.

19 Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: Law Reform Commission of Canada, 1976) at 37-38 (hereinafter Report to Parliament on Mental Disorder, 1976).

20 Report to Parliament on Mental Disorder, 1976, at 37 - 38.

21 Report to Parliament on Mental Disorder, 1976, at 37 - 38.

22 See, for example: *Duclos* v. *L'Asile de St. Jean de Dieu* (1907), 12 C.C.C. 278 (Que. Sup. Ct.); *Delorme* v. *Sisters of Charity of Quebec* (1922), 40 C.C.C. 218 (Que. K.B.); *R.* v. *Coleman* (1927), 47 C.C.C. 148 (N.S.T.D.); *Re Brooks* (1961), 133 C.C.C. 204 (Alta. S.C.) (hereinafter *Brooks*).

23 Report to Parliament on Mental Disorder, 1976, at 36.

24 Part I of the *Constitution Act,* 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter *Charter of Rights*).

25 *Brooks*; *Re Kleinys* (1965), 51 W.W.R. 597 (B.C.S.C.).

Governor under the *Canadian Bill of Rights* were equally unsuccessful.[26] However, under the *Charter*, decisions of the Lieutenant Governor could be challenged for infringements of s. 7, s. 15, s. 9, and the like.[27]

For example, the Ontario Court of Appeal ruled that a person whose case was being reviewed by the Review Board had a right to know the substance of the facts before the Review Board, although not every detail.[28] The Review Board had the power to limit access to material that might harm the detainee or others.[29] The Court even suggested that in some cases, information might be supplied to counsel with the understanding that it not be revealed to the client. In a subsequent case, the Ontario High Court suggested that in some circumstances counsel should obtain the client's consent before accepting information on this limited basis.[30]

The courts were also concerned that detainees under Lieutenant Governor's warrants were given proper notice of review hearings. In some cases, the courts dismissed Lieutenant Governor's orders when they had occurred after the lack of procedural fairness. For example, the failure by an *ad hoc* Review Board to notify a detainee that his case was being reviewed was criticized by the British Columbia Court of Appeal as a failure to observe the principles of procedural fairness. The Court held that a subsequent Order in Council based on these recommendations should also be quashed.[31]

Further, the Nova Scotia Supreme Court quashed a Lieutenant Governor's warrant because the Review Board had not been given the proper opportunity to submit its recommendations. The Court held that although the Lieutenant Governor was entitled to disregard any Review Board recommendations, he could not cut off or pre-empt the Board from making them without breaching the requirements of procedural fairness.[32]

IV. LIEUTENANT GOVERNOR'S TRANSFERS OF PERSONS

A. TRANSFERS OF PERSONS SUBJECT TO LIEUTENANT GOVERNOR'S WARRANTS BETWEEN HOSPITALS

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26 See, for example: *R.* v. *Saxell* (1980), 59 C.C.C. (2d) 176 (Ont. C.A.).

27 See, for example: *Swain; Jollimore* v. *Nova Scotia (Attorney General)* (1986), 27 C.C.C. (3d) 166 at 174 (N.S.S.C.) (hereinafter *Jollimore)*.

28 *Abel,* at 167.

29 The powers and function of the Review Boards under the new *Criminal Code* provisions are outlined in Chapter Twelve, Sentencing.

30 *Egglestone* v. *Ontario (Advisory Review Board)* (1983), 42 O.R. (2d) 268 at 277 (H.C.) (hereinafter *Egglestone)*.

31 *McCann* v. *R.* (1982), 67 C.C.C. (2d) 180 (B.C.C.A.). It should be noted that the detainee remained subject to a previous Order in Council and was therefore not freed.

32 *Jollimore*.

Under s. 617(2), a person who was detained under a Lieutenant Governor's warrant could be transferred for rehabilitation purposes to any other place in Canada provided the person in charge of the place consented.[33]

The Ontario High Court recently discussed some of the fairness requirements of a Review Board hearing to determine whether a detainee should be transferred. In *Ontario (A.G.)* v. *Grady*,[34] the detainee was held on a Lieutenant Governor's warrant after being found not guilty of the murder of his wife by reason of insanity. In 1984, the detainee had been transferred from a restrictive mental health facility to a less restrictive facility. Just prior to a Review Board hearing, the detainee had been involved in an incident with a girlfriend involving circumstances that were somewhat similar to those of his wife's death. The Review Board recommended that the detainee be transferred back to the more restrictive facility and the Lieutenant Governor followed this recommendation, issuing a warrant. The effect of the warrant was a substantial reduction in the detainee's liberty.

At the Review Board hearing, the detainee's lawyer had requested an adjournment to explore further treatment programs and to provide a period of stabilization in light of the detainee's prehearing behaviour. The detainee also objected to the presence and participation of the Crown Attorney at the hearing. The detainee sought to quash the Lieutenant Governor warrant based on the ground that the applicant was denied procedural fairness.

The Ontario High Court quashed the L.G. warrant. There were several factors that influenced the court. First, there was no material properly before the board to support its conclusion that the detainee could not be adequately treated in the less restrictive facility, or that the best interests of the public necessitated a transfer, or that the best interests of the detainee required a transfer. Second, no notice was given before the hearing that the applicant might be transferred back to the more restrictive facility. There was no opportunity to make submissions regarding this option. Third, it was not appropriate for the Attorney General to submit victim impact statements where the detainee's lawyer could not cross-examine their authors. Further, the statements were not relevant to the detainee's treatment requirements nor the public interest. Fourth, because the detainee received no notice of the Board's main concern, he was not able to know the case that was to be met. Fifth, the Board should have asked for submissions on the impending transfer, providing the detainee with an opportunity to be heard.

Finally, the Lieutenant Governor was under a duty to remedy any breach in the rules of fairness before issuing the warrant. The duty arose from the common law and from s. 7 of

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33 Former s. 617(2) applied only to situations where the accused had been charged with an indictable offence. See earlier discussion at note 2.

34 (1988), 34 C.R.R. 289 (Ont. H.C.).

the *Charter of Rights and Freedoms*. In relying upon recommendations that were arrived at through a process in which procedural fairness was denied, the Lieutenant Governor breached the duty to exercise administrative authority fairly. Because the recommendation had the effect of diminishing liberty interests, the Lieutenant Governor had a duty to satisfy himself that the board had proceeded fairly.

In *Conway* v. *Ontario (Attorney General)*,[35] a person subject to a Lieutenant Governor's warrant was transferred from a maximum security mental health facility to a medium security hospital. The Lieutenant Governor's warrant permitted the administrator of the medium security hospital to return Conway to the maximum security facility if he proved a danger to himself or others. Conway's mental condition deteriorated and the administrator concluded that he should be transferred back to the maximum security institution. The Review Board held a hearing and issued a report to the Lieutenant Governor recommending that Conway be kept at the maximum security facility. A Lieutenant Governor's warrant was then issued that required that he be kept at the maximum security facility. Conway applied for an order quashing the new warrant and for an order that he be moved to a medium security hospital.

Conway argued that the first warrant contained an illegal delegation of powers to the administrator of the medium security hospital; that the hospital administrator breached the rules of natural justice by failing to hold a hearing before transferring him back to the maximum security facility and that the transfer back was illegal because of a denial of a hearing before the Lieutenant Governor. Conway also argued that the denial of a hearing violated his rights under s. 7 of the *Charter of Rights*.

The Ontario General Division held the discretionary return clause was not an illegal delegation of power by the Lieutenant Governor. The transfer was not invalid because Conway did not have a hearing before the hospital administrator. The Court determined that Conway's rights to natural justice and fairness were complied with because of the hearing by the review board subsequent to his transfer. However, the Court determined that the procedure followed by the Lieutenant Governor breached Conway's s. 7 rights. Since Conway's transfer resulted in a deprivation of liberty, he should have had input into the review board's decision. Therefore, Conway should be permitted to see the report that was given to the Lieutenant Governor and to submit a written response to the decision.

B. TRANSFERS FROM PRISON

1. Transfers of Prisoners from Provincial Prisons

35 (1991), 86 D.L.R. (4th) 655 (Ont. Gen. Div.).

Offenders serving sentences in provincial prisons could be transferred to "places of safe-keeping" by the Lieutenant Governor under s. 618. This section authorized the transfer of insane, mentally ill, mentally deficient or feeble-minded persons on evidence satisfactory to the Lieutenant Governor that the prisoner, confined elsewhere than in a penitentiary, was in such a state or condition. Where the Lieutenant Governor made such an order, the prisoner remained in the designated safe place until the Lieutenant Governor was satisfied of full or partial recovery. Where the Lieutenant Governor was satisfied that the prisoner had recovered, under s. 618(3), the prisoner would be returned to prison if liable to further custody or discharged if not so liable. Under s. 618(4), where the Lieutenant Governor was satisfied of partial recovery and the person was not subject to further imprisonment, she may have ordered that the person be subject to the direction of provincial minister of health or other designate, who could have made an order concerning the prisoner's custody or care.

2. Federal Prisoners

Under the former *Penitentiary Act,*[36] the Solicitor General of Canada could enter into an agreement with any provincial government for the custody, in a mental hospital or other appropriate provincial institution, of federal prisoners found to be mentally ill or mentally defective during their confinement in a penitentiary (s. 22).

V. TRANSITIONAL PROVISIONS

When the new provisions of the *Criminal Code* were enacted, it was recognized that governments would need some time to implement the new system. Thus, the transitional provisions (section 10(1)[37]) provided that Lieutenant Governor's warrants that were in effect when the new legislation was passed were to continue in force for a period of time until the proclamation of *Criminal Code* s. 672.64 (the capping provisions). Section 672.64 has not yet been proclaimed.

However, although it is possible that some persons are still subject to L.G. warrants, the amended *Criminal Code* provides a system for examination of every case involving a L.G. warrant.

First, the amended *Criminal Code* provides that L.G. warrants or orders made under former sections 614, 615 or 617 are subject to any order made by a court or Review Board under s. 672.54, which governs dispositions for accused found unfit to stand trial or those

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36 S.C. 1989, c. P-5; now repealed.

37 S.C. 1991, c. 43, *An Act to Amend the Criminal Code (mental disorder) and to Amend the National Defence Act and the Young Offenders Act in Consequence Thereof*. This statute was proclaimed in force on February 4, 1992.

found not criminally responsible on account of mental disorder.

Governments were provided with a timeline as well: by February 4, 1993, the Review Board of each province was required to review the case of every person detained in custody under an L.G. warrant or order.[38] The considerations outlined in the new *Criminal Code* provisions (ss 672.5 to 672.85) were to be applied during these reviews.[39]

In 1991, there were 1156 individuals held under Lieutenant Governor's warrants in Canada.[40] All of these cases had to be reviewed under the transitional provisions. Thus, as the new system began to be implemented, orders made under the new provisions would increasingly supersede the former L.G. warrants, even if s. 672.64 was not yet proclaimed.

The dispositions available to the Review Board are outlined in s. 672.54 of the *Criminal Code*, which provides:

> 672.54 Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
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> (a) where the verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, and in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
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> (b) by order, direct that the accused by discharged subject to such conditions as the court or Review Board considers appropriate; or
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> (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Section 672.72 permits an appeal of a disposition or placement decision made by the court or Review Board to the court of appeal of the province. There are a few decisions challenging the disposition reached by the Review Board in reviewing the cases of persons detained under L.G. warrants.

In *Orlowski* v. *British Columbia (Attorney General),*[41] the British Columbia Court of Appeal examined the Review Board's disposition of three individuals who were subject to the periodic review by the Review Board required for every patient under the transitional

38 S.C. 1991, c. 43, s. 10(2).

39 S.C. 1991, c. 43, s. 10(3).

40 S. Hodgins, C. Webster and J. Pacquet, *Annual Report Canadian Database: Patients Held on Lieutenant Governors Warrants* (August, 1991) at 1.

41 (1992), 75 C.C.C. (3d) 138 (B.C.C.A.) (hereinafter *Orlowski*).

provisions of the *Criminal Code*. The three appellants had been found not guilty by reason of insanity for various offences and were subject to Lieutenant Governor's warrants. The review hearings had ordered various dispositions regarding the accused but had not expressed any views as to whether each accused was a significant threat to society.

The British Columbia Court of Appeal considered the proper test to be applied by the Review Board under s. 672.54. The Court held that the Review Board must consider the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused when deciding whether an accused is a significant threat *and* in deciding what disposition to make. In addition, the Board must make the least onerous and least restrictive disposition considering these factors.

The B.C. Court of Appeal held that the language of s. 672.54 does not require the Board to make a finding that the accused is not a significant threat in every case. This is because the Board must first determine that the offender is not a significant threat before it can grant an absolute discharge under s. 672.54(a). Thus, the Board need not order an absolute discharge when it has doubts as to whether the accused is a significant threat.

The Court also held that where the Board finds that the accused cannot be granted an absolute discharge under s. 672.54(a), it should provide reasons for its opinion about whether the accused is a significant threat. In the absence of such reasons, the Court is entitled to remit a disposition back to the Board under s. 672.78(3) with instructions that it make findings.

The British Columbia Court of Appeal remitted the decisions back to the Review Boards to determine whether or not the Boards had an opinion on whether any of the Appellants is a significant threat to the safety of the public, and if so, what that opinion is.

In *R.* v. *Cluney*,[42] the Nova Scotia Supreme Court - Appeal Division dealt with an appeal from a Review Board hearing pursuant to the transitional provision s. 10(2). In 1984, Cluney had been found not guilty of sexual assault by reason of insanity. In a decision dated June 25, 1992, the Board reviewed the circumstances of the offence and, after considering medical reports and evidence given by the staff of the Nova Scotia Hospital and the accused, concluded that Cluney should be re-integrated into the community slowly and under supervision. The Review Board held that a conditional discharge would be premature. The Board was prepared to permit Cluney to live in a group home up to three nights a week at the hospital's discretion. He could also continue receiving weekend passes for up to two weekends per month.

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42 (1992), 116 N.S.R. (2d) 302 (N.S.C.A.) (hereinafter *Cluney)*.

On appeal, Cluney argued that the Board failed to properly address s. 672.54. In its disposition, the Board had not clearly indicted whether it opined that the accused was not a significant threat to society. The Nova Scotia Court, approving the judgment of the British Columbia Court of Appeal in *Orlowski,* allowed the appeal and remitted the matter back for the Board for further consideration on the threshold question of its opinion whether the accused is a significant threat to the safety of the public.

VI. CONCLUSION

Although this chapter was included mostly for historical information, a lawyer may come across clients who were subject to Lieutenant Governor's warrants. The indefinite nature of detention under the warrants and the fact that they could be ordered before a person was tried for an offence made them very powerful indeed. Recent decisions indicated that some court challenges of administrative decisions were being initiated by persons subject to Lieutenant Governor's warrants, but their numbers were small.

Once the transitional provisions have been completely complied with and persons found unfit to stand trial or not criminally responsible on account of mental disorder are subject to capping provisions, indefinite detention will largely be a practice of the past.

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