INDETERMINATE CUSTODY AFTER *SWAIN*

Patricia L. James

The recent landmark decision by the Supreme Court of Canada in *Swain*[1] is seen by some as reflective of a modern, enlightened view regarding mental illness and by others as evidence of "white glove liberalism" run rampant which will enable the criminally insane to stalk Canadian streets.[2]

THE FACTUAL BACKGROUND

The events giving rise to Mr. Swain's committal and encounter with the criminal justice system began the night of October 30, 1983. He arrived home late that evening and began attacking his infant children and wife while apparently suffering from what was later characterized as an acute psychotic episode. In carrying out his attacks, he believed he was protecting his family from evil spirits. Fortunately, his family's injuries were superficial. Mr. Swain was ultimately subdued by the police and taken to jail.

Subsequently, he was charged with three offences under the *Criminal Code*. On November 1, 1983, pursuant to a warrant issued under the Ontario *Mental Health Act*[3], he was transferred to the Ontario Mental Hospital at Penetanguishene where he was treated with anti-psychotic drugs. He responded well to treatment and his psychiatrist (Dr. Fleming) considered he was ready to be released back into the community. On December 18, 1983 he was released from that hospital and returned briefly to jail. Shortly thereafter, he was granted bail on conditions. He remained out in the community for 18 months prior to the date of trial. During this period he continued to take medication and to see a psychiatrist (Dr. Johnson) on an outpatient basis. In addition, he returned to his job and subsequently was re-united with his family.

During the trial, the Crown sought to adduce evidence of Swain's insanity at the time of the offence over the objections of defence counsel. The trial judge ruled that the Crown could adduce such evidence and Swain was subsequently found not guilty by reason of insanity on all three counts.

This verdict triggered the provisions of section 542 (now section 614) of the *Criminal Code*. Section 542(2) provides that, where an accused is found not guilty by reason of insanity, the trial judge shall order that he be kept in strict custody until the pleasure of the Lieutenant-Governor of the province is known. Section 545(1) (now section 617) further provides that where an accused is found to be insane, the Lieutenant-Governor of the province in which he is detained may make an order for the safe custody of the accused in a place and manner directed by him, or, if in his opinion it would be in the best interests of the accused and not contrary to the interest of the public, discharge the accused either absolutely or subject to such conditions as he prescribes.

Prior to the issuance of the trial judge's orders under section 542, defence counsel challenged the constitutional validity of that section pursuant to sections 7, 9, 12 and 15 of the *Charter*. The trial judge ruled that the appellant's constitutional rights were not infringed by section 542(2) and ordered that the accused be kept in strict custody until the Lieutenant-Governor's pleasure was known. A notice of appeal was filed in the Ontario Court of Appeal and Mr. Swain applied for bail pending the appeal.

On June 12, 1985 (two days after the trial judgment was rendered), the Lieutenant-Governor issued a warrant, detaining the appellant in a psychiatric hospital for assessment and requiring a report to the Advisory Review Board within 30 days. (An Advisory Review Board is a body which may be appointed to assist the Lieutenant-Governor concerning decisions with respect to insanity acquittals.) Since neither the appellant nor his counsel had received prior notice of this decision, they were unable to make submissions with respect to the Lieutenant-Governor's warrant.

Following the appellant's 30 day assessment, the Advisory Review Board held a review hearing pursuant to the provisions of section 547 of the *Criminal Code* (now section 619). Both the appellant and his counsel were present for this hearing. Following the hearing, the Advisory Board recommended to the Lieutenant-Governor that the appellant continue his detention in safe custody. The Lieutenant-Governor accepted these recommendations of the Board. These included a recommendation that the Mental Health Centre construct a treatment program for the appellant and that the administrator have the discretion to permit the appellant to re-enter the community at the appropriate time with conditions as to supervision and follow-up treatment as were deemed necessary.

The appellant's counsel attempted on two occasions to request the right to appear and make submissions before the Lieutenant-Governor while the Advisory Board's report and recommendations were being considered. This request was not permitted and the report of the Advisory Board was not released to the appellant's counsel until after the Lieutenant-Governor's warrant for further detention was issued. The appellant remained in safe custody until September 1986, when the Lieutenant-Governor ordered that the warrant detaining the appellant be vacated and that the appellant be discharged absolutely. He had remained in safe custody for 15 months following the trial verdict.

Swain's appeal to the Ontario Court of Appeal was dismissed by a majority of that Court.

THE ISSUES:

Leave to appeal to the Supreme Court was granted with five constitutional questions being considered by the Court, two of which will be addressed here.

1. Does it violate the *Charter* for the Crown to raise evidence of insanity over and above the wishes of the accused?

The previous writer (Professor Deutscher) has set forth the constitutional analysis undertaken by the Supreme Court in reaching the determination that the appellant's section 7 liberty rights were infringed by the common law rule which permitted the Crown to adduce evidence of insanity during the course of the trial over the objections of the accused. As noted by Professor Deutscher, the original common law rule satisfied two objectives: (1) avoiding the conviction of persons who are insane, but who refuse to adduce evidence of that insanity, and (2) the protection of the public from dangerous persons requiring hospitalization.

Lamer C.J., writing for the majority, noted that both objectives could be met via provincial committal procedures. He wrote:

> I do not wish to be taken, however, as having ruled on the constitutionality of the various provincial Mental Health Acts. I simply wish to make the point that these provincial statutes generally provide more procedural protection than does the system of Lieutenant-Governor warrants and, in that sense, they provide an alternative to the Crown when it believes that an accused was insane at the time of the offence and may be presently insane and dangerous.

He further noted that, no matter what the state of the common law rule, the availability of provincial civil commitment procedures meant that a Crown would never be in the position of having to choose between prosecuting an accused who it believes to be insane at the time of the commission of the offence and allowing someone it believes to be presently insane and dangerous to remain at large.

Notwithstanding the attractiveness of this alternative, the Court refused to consider requiring the Crown to commence civil commitment proceedings whenever it believed an accused to be insane at the time of the offence and presently dangerous. Lamer C.J. stated that it would be "unacceptable for the Court to fashion a new common law rule which makes the outcome of a criminal matter dependent upon the existence and validity of legislation coming within a provincial head of power."

While recourse to provincial committal statutes provides an attractive alternative, it should not be assumed that the provisions contained within these statutes will necessarily withstand *Charter* scrutiny. For example, in a recent Ontario case, *Fleming v. Reid*,[4] the Ontario Court of Appeal held that certain provisions in the Ontario *Mental Health Act*[5] dealing with patient consent to psychiatric treatment violated section 7 of the *Charter*. In addition, for certain mentally disordered, dangerous offenders it may not be appropriate to bypass criminal law proceedings.

The other major question addressed by the Supreme Court was the following:

2. Does the automatic detention of a person found not guilty by reason of insanity, as required by section 542(2) of the *Criminal Code*, violate the *Canadian Charter of Rights and Freedoms*?

The appellant's procedural rights under section 7 of the *Charter* were restricted by section 542(2) since there is no requirement for a hearing prior to the trial judge's issuing of a mandatory order of the insanity acquittee into "strict custody". Thus, the appellant was afforded no opportunity to adduce evidence regarding his current mental state. The procedural defect in section 542(2) is not cured by sections 545 and 547 which provide for subsequent hearings and review since the "initial remand" is made without an opportunity for a hearing. Similarly, procedural fairness afforded to the accused during the trial itself cannot offer protection during a post-acquittal process.

The substantive defects of section 542(2) arise from the fact that the detention order is automatic. There is no discretion, nor are there rational standards, as to which insanity acquittees should be released and which should be detained. While there are statutory and judicial criteria which must be present to trigger the operation of section 542(2), once met, they leave no option to a trial judge. The automatic detention order which is then mandated is arbitrary in the sense that it fails to differentiate between those acquittees who may still be dangerous and those who may not. As a result, these substantive defects infringed upon the appellant's rights under ss.7 and 9 of the *Charter*.

The provision could not be saved under section 1 of the *Charter* since the indeterminate length of detention pursuant to the Lieutenant-Governor's initial warrant did not meet the minimal impairment requirement posited in *Oakes*.[6]

In the *Swain* case, the Supreme Court recognized that a gap in time would be necessary between a finding of a verdict of not guilty by reason of insanity and a determination being made as to whether to detain or release an insanity acquittee under a Lieutenant-Governor's warrant. This is inevitable since the evidence before the court at trial is adduced solely with respect to the accused's mental condition at the time of the commission of the offence.

All other provisions in the *Criminal Code* provide for remands of fixed duration for psychiatric observation, usually for 30 days, though provision is made for 60 day orders in exceptional cases. The existence of these provisions suggested to

Lamer C.J. that Parliament was aware of the constitutional concerns raised by indeterminate detention and clearly showed that section 542(2) did not impair an appellant's section 7 right to liberty to the least extent possible.

The Court pointed out that an automatic order was "no less arbitrary" if it was for a limited period of time where there were no set criteria for its imposition. Lamer C.J. noted, however, that this state of affairs may not be disproportionate to achieving the objective. It is the indeterminate nature of the detention which "tips the balance" and fails to satisfy the proportionality requirement stipulated in *Oakes*.

The Court ordered a temporary transitional period of 6 months for section 542(2) in order to prevent the release of all insanity acquittees, including those who might be a danger to the public. During the period of temporary validity any detention ordered pursuant to section 542(2) will normally be limited to 30 days, up to a maximum of 60 days where circumstances so warrant. If orders are made without such limits, an acquittee will have the writ of *habeas corpus* available after 30 days.

THE FEDERAL GOVERNMENT'S RESPONSE

On July 10, 1991 the Honourable Kim Campbell, Minister of Justice and Attorney General for Canada, released proposals in response to the Supreme Court decision in *Swain*. These proposals are, according to the Department of Justice, an attempt to "bring the criminal law's approach to the mentally disordered accused into line with the *Charter* and contemporary health-care practices."[7] The proposals have two objectives: (1) to ensure that individuals are not deprived of their *Charter* rights by being detained for a mental disorder without a fair hearing and regul ar review of their particular cases; and (2) to protect the public from dangerous mentally disordered persons who come into conflict with the law.

In order to protect the *Charter* rights of the mentally disordered accused, proposed amendments to the *Criminal Code* include:

- Section 16 defence of insanity be repealed. In its stead is a section 16 defence of "mental disorder" which exempts anyone from criminal responsibility for any act or omission committed while suffering from a mental disorder.
- Any assessment order issued by a court to assess the mental condition of the accused to determine whether the accused was suffering at the time of the alleged offence from a mental disorder is limited to 30 days, except for a 60 day limit where a court is satisfied that circumstances exist to warrant it.
- The verdict of not guilty by reason of insanity will be replaced with a verdict that the accused committed the act but is not criminally responsible on account of mental disorder. In such cases, the accused shall be deemed not to have been acquitted or found guilty of the offence.
- The review process is improved. Disposition hearings must be held by either the court or a review board within a certain time and are effective for a limited period. The accused is to be notified, and may attend and make submissions at a disposition hearing.
- When reaching a disposition order, a court or review board shall make a disposition that is the least onerous and least restrictive to the accused. Where the accused is not a threat to the public, the accused must be discharged absolutely, or discharged subject to conditions, or detained in custody in a hospital subject to conditions.
- Indeterminate custody is replaced with maximum detention periods, e.g., life for murder.

Measures to protect the public include:

- permitting indeterminate detention in cases where the accused has been found by a court to be "a dangerous mentally accused". (As per the current dangerous offender provisions.)

PATRICIA L. JAMES, Executive Director, Health Law Institute, University of Alberta.

1. *R.* v. *Swain*, [1991] S.C.J. No. 32 (S.C.C.).
2. Ford, "Will Criminally Insane Stalk Streets?" *Calgary Herald* (13 July 1991) A4.
3. *Mental Health Act*, R.S.O. 1980, c.262.
4. *Fleming* v. *Reid* (1990), O.R. (2d) 169 (Dist. Ct.).
5. R.S.O. 1980, c.262.
6. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
7. Canada Department of Justice, Press Release (10 July 1991).

****

(Insanity and the Constitution, continued from page 102)

1. *R. v. Chaulk* (1991), 62 C.C.C. (3d) 193 (S.C.C.).
2. *R. v. Swain*, [1991] S.C.J. No. 32 (S.C.C).
3. [1977] 1 S.C.R. 673.
4. [1988] 2 S.C.R. 3.
5. [1986] 1 S.C.R. 103.
6. (1977), 35 C.C.C. (2d) 337 (Ont. C.A.).
7. (1980), 59 C.C.C. (2d) 176 (Ont. C.A.).