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THE DEVELOPMENT OF THE  
LIEUTENANT GOVERNOR'S WARRANT  
IN CANADA, 1841-1988:  
A HISTORY AND A CRITIQUE

D. BRUCE BEANLANDS

Submitted to the Department of Criminology, University  
of Ottawa, in partial fulfillment of the requirements  
for the degree of Master of Arts, 1988.

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## INTRODUCTION

Throughout the history of Canada and other western societies, the mentally ill have been viewed as uncontrollable and dangerous. It was not until the mid nineteenth century that a distinction was made between the "mad" and the "bad" when considering the treatment of those persons perceived to be a threat to the social order (Griffiths, Klein and Verdun-Jones, 1980). Even today, it is still difficult for our society to make such distinctions. Because their behaviour is perceived to be bizarre and unpredictable, the mentally ill are frequently regarded as dangerous and consequently they are segregated from the community. The term "criminally insane" exemplifies the dual prejudice that exists against these individuals: they are perceived to be a threat not only because their behaviour is regarded as unpredictable and often uncontrollable, but also because they have committed, or have been charged with committing, a crime. It is this notion of criminality combined with mental illness that has hindered progress in the treatment of the mentally ill offender in Canada.

The Lieutenant Governor's Warrant System (L.G.W. System) is only one of the ways in which mentally ill offenders and other insane persons who come into contact with criminal justice system

are dealt with in Canada. It is applied to those persons found not guilty by reason of insanity, not fit to stand trial, and to some mentally disordered inmates. The principles upon which this system was based have not changed since its inception in 1851. It is characterized by indeterminate sentences, the virtually absolute discretion given to the Lieutenant Governor, and what many believe is a denial of basic civil rights in the ways in which the warrant is administered. Originally, insane convicts were considered the most dangerous class of offenders because of their criminal behaviour and mental illness. As evidenced by the court cases relating to the L.G.W. in the early 1900's, the connotation of danger was next applied to those found not guilty by reason of insanity. They were guilty of committing an indictable offence but were acquitted because they were insane at the time of its commission. This concern has also been applied to those found not fit to stand trial. The consistent inclusion of sections relating to such persons within the legislation governing the L.G.W., legislation dealing with "dangerous lunatics", illustrates this point.

In June of 1986, the Honorable John Crosbie, then Minister of Justice, announced extensive changes to the laws concerning mentally disordered offenders that would have effectively abolished the L.G.W. System. However, no change was made. Since

this was not the first attempt at reform and certainly not the first to be abandoned, the question arises as to how such a system has withstood calls for reform for so long.

A great deal of research has been conducted in the area of mental health and the law. The research pertaining to the L.G.W. System has been concentrated in three major areas:

- (1) quantitative studies investigating the characteristics of L.G.W. patients and evaluating their potential dangerousness,
- (2) research exploring the issues surrounding the System and effecting legal reform and (3) research into the history of the treatment of the "criminally insane".

In the first area, qualitative and quantitative studies have been conducted over the past twenty years. To aid further research, the federal government is in the process of establishing a national data base of L.G.W. patients (Phillips, 1987). With regard to legal issues, the second area, there have been countless calls for reform to the L.G.W. System. Several reports published by the Law Reform Commission, the Mental Disorder Project of the Department of Justice, the Canadian Association for the Mentally Handicapped, The Advocacy Resource Center for the Handicapped, and many others have evaluated the present system and found it outdated and in direct conflict with the Canadian Charter of Rights and Freedoms. It is in the third area of study that

published information on the L.G.W. System is lacking. In order to better comprehend the continued existence of this system, it is helpful to delve into its past.

Many have explored the history of the treatment of the insane in Canada. This has mostly centred on the history of asylum or the treatment of the insane in general to the exclusion of the system dealing with mentally ill offenders and other insane persons charged with criminal offenses. Much of the research published in this area only describes fragments of the history of the L.G.W. System. Even when these pieces of the history of the L.G.W. are combined, major gaps are evident. Burgess (1898) provides a detailed discussion of the history of Canadian institutions for the insane but is lacking in the area of the L.G.W. System. Hurd (1917) presents an indepth look at the institutional care of the insane in Canada and the United States and in doing so is not able to provide any detailed information concerning the L.G.W. System in Canada. In his discussion of social welfare in Ontario during the eighteenth century, Splane (1965) devotes a paragraph to the Asylum for convicts, and a few lines here and there provide some insight into the development of the L.G.W. Although Verdun-Jones and Smandych (1981) focus on the development of therapeutic confinement for the criminally insane in Canada during the latter

half of the 1800's and provide a good discussion of the laws concerning the criminally insane at that time, they do not examine the L.G.W. System in any great detail. Verdun Jones (1979) examines the evolution of the defenses of insanity and automatism in Canada and mentions the introduction of and changes to the law relating to L.G.W.'s. Despite his detailed discussion of the laws of the insanity defence, Verdun-Jones (1979) does not elaborate on the conditions surrounding the development of legislation pertaining to L.G.W.'s. Bellomo (1972) and Beattie (1977) examine the attitudes towards crime and punishment in eighteenth century Ontario, but provide no insight into the attitudes of Upper Canadians towards the criminally insane.

The shortage of published material on the history of the L.G.W. in Canada makes an investigation into the development of this system all the more important. Thus, the purpose of this thesis is two-fold: (1) to follow the development of the L.G.W. System so as to better understand the system that is in use at present, and (2) to use this information to fill in some of the gaps that exist in the study of the social control of the criminally insane in Canada and to serve as a base for future research. This thesis will also make recommendations for possible improvement of the L.G.W. System.

This investigation has been based on the idiographic as

opposed to the nomothetic method of historical research. In accordance with the second purpose of this thesis, it attempts to uncover the historical facts concerning the growth of the L.G.W. without applying a general theory of the history of the development of mental health legislation.

Chapter I presents the methodology followed in my investigation into the development of the L.G.W. System. It examines the basic tenets involved in historical research and the practical applications of these concepts, my theoretical background, the validity and reliability problems that are encountered in conducting such research and possible solutions to these problems.

The second two chapters provide essential background information to the reader. In Chapter II, I discuss the present L.G.W. System: the relevant legislation, the ways in which it is implemented and some of the general characteristics of L.G.W. patients. Because of the complexity of the issues surrounding the L.G.W., in Chapter III I summarize these issues and the concepts upon which they are based.

The fourth chapter presents the results of my investigation into the history of the L.G.W. System since 1841. It focuses on the changes in the legislation governing the L.G.W. System and changes in the operation of the System. It also looks at the way

in which L.G.W. patients have been viewed by the judiciary and others who come into contact with them.

In Chapter five I summarize the changes that have occurred in the system and the possible explanations for the change or lack of change that has taken place. In addition to this, considerations for future research and recommendations for the improvement of the L.G.W. System are provided.

## CHAPTER I

### METHODOLOGY AND THEORETICAL ISSUES

This chapter examines the "methodology" and more generally, the philosophy of research as well as the approach to theory used in this thesis. The first section compares the basic tenets involved in the historical and hypothetico-deductive methods of research, in order to show why the former is more appropriate for this study. The remaining part of this chapter concentrates on the sources of data, my basic assumptions and theoretical background and finally the problems that are encountered in this type of research.

One of the most popular methods of research is the hypothetico-deductive approach. This method makes a statement of specific expectations (a hypothesis) derived from a predetermined theory, about the nature of a phenomenon, and attempts to prove or disprove this statement (Babbie, 1979:111). While the hypothetico-deductive approach is probably the most common in social science research, it does not suit the intent of this

study. The purpose of this thesis is to provide an explanation of the development of the L.G.W. System, not to prove or disprove a statement. The purpose and nature of material leads the researcher away from the hypothetico-deductive method, towards the historical method of research. "History is a narrative of the actions of human beings in connection with the topic of research, whether it be politics, law, religion, or mechanical arts" (Vincent, 1969:159). The advantage of the historical method is that if "one is interested in learning how some contemporary event or institution came into being, an historical approach is indispensable" (Bailey, 1978:325). It attempts to discover the historical facts that can be used to construct the evolution of a phenomenon.

There are two basic models of explanation available to social scientists employing the historical method of research: idiographic and nomothetic. The idiographic model attempts to achieve the most complete understanding possible of a phenomenon, through the description of all relevant factors and relationships. The nomothetic model, on the other hand, does not involve an exhaustive description of the factors that result in the existence of a phenomenon. Its goal is to uncover general patterns that can be related to an explanation of a larger phenomenon (Babbie, 1979: 430-431). For example, specific

historical facts and relationships concerning the L.G.W. System in Canada would be selected to construct a general description of the system. The information about its history would not be in great detail, because the main purpose is not to provide any new knowledge concerning the development of the L.G.W. System, but to fuse its history as part of an explanation of a broader topic (e.g. the growth of all legislation associated with the mentally ill in Canada) according to a specific theory. It would be the theory and not the development of the L.G.W. that would be the real focus of the study. The idiographic model, however, would focus on the history of the L.G.W. and therefore attempt to provide a more complete discussion of the historical facts available. The nomothetic model is not appropriate for this thesis. This study does not attempt to explain the development of a larger topic, only to explain the development of the L.G.W. System in Canada. Thus, the idiographic historical model has been adopted.

#### Method

There are references to a tradition of a system similar to the L.G.W. System, in England, dating back to 1270 (Greenland, 1982: 2). However, to go back this far would be beyond the scope of this thesis. It aims to explain the growth of the L.G.W. in

Canada, not the comparable system in England. Therefore, I have decided to commence the history with the Act of Union in 1841. At this time, Upper and Lower Canada were joined to form one colony. This would provide an illustration of the origins of the L.G.W. and would allow me to follow its development after Canada became a nation in 1867. A brief review of the legislation dealing with mentally ill offenders reveals however, that not many changes have been made since 1841. Thus, it seems more appropriate to concentrate on the last thirty years when most of the calls for reform and changes have taken place.

With respect to the development of the L.G.W. System itself, this thesis will center on changes in the relevant legislation since 1841. A dilemma occurs in choosing the type of legislation for consideration: provincial or federal. The L.G.W. System is a federal system (under the Canadian Criminal Code). Yet the provinces have also established their own statutes that deal with the L.G.W. According to a 1972 court case (Lingly v Hickman, 1972), it was stated that where provincial legislation conflicts with the Criminal Code, the Code prevails. However, in the instance where the provincial statute discusses some aspect of the L.G.W. not dealt with by the Code, the provincial statute law is followed. For the most part, the historical discussion will focus on the changes in the Criminal Code, however; the relevant

provincial statutes that are not provided for in the Code will be examined as well.

### Sources of Data

A great deal of research in the field of law consists of explanation of the possible reasons for the enactment of specific legislation and of the process through which it was achieved. "legislative records" are the most obvious source of information. They include the statutes themselves (e.g. the Criminal Code, the provincial and pre-confederation statutes) and the records of discussion and information upon which such discussions were based. As Vincent (1969:48) notes:

Statutes themselves can provide some insight into the reasons for the enactment of legislation. A statute is frequently preceded by a preamble giving reasons for its enactment. Such a preamble has the air of fact but is most often the 'law maker's excuses' for such enactments.

Debate over the law is contained in the journals of the House of Commons, the Senate and the provincial legislatures. Reports of the various Committees and Commissions along with other documents available, court cases, the literature in the area of the L.G.W. System and any newspaper coverage provide some additional information concerning the development of the L.G.W. System in Canada. I have conducted personal interviews with persons "in the field" in an effort to obtain the most up-to-date

information. I have also sent a letter to the Lieutenant Governor of each province, asking him or her specific questions concerning the present L.G.W. System, its history, and possible factors that might have influenced its development (for greater detail, please refer to Appendix D).

Determining when a relevant section of legislation was changed can be done by referring to the statutes. At the end of every section, the date the section was changed and its previous section number are listed. The context of these changes was sought in the discussions of the federal and provincial debates using the date provided by the statute as a point of reference and working backwards. The debates supply information concerning the context of the amendment and the specific dates of discussion. However, they generally do not contain a detailed discussion of the issues. Major newspapers (listed in the Canadian Newspaper Index) were consulted to complement this information. In cases where the newspaper index did not go far enough back, the debates of discussions in the legislature were used as a reference point. Pertinent court cases were selected to show the way in which the law has been interpreted over the years, as well as the way in which the L.G.W. System has operated. Finally, relevant information was sought in government documents and other literature on the L.G.W.

### Assumptions and Theoretical Background

There are a number of assumptions that exist within the idiographic model. Similar to the nomothetic approach, it assumes a deterministic image of behaviour. Behaviour is considered to be affected by external factors over which we have no control. The same can be said of the existence of phenomena in society. Therefore, research would concentrate on the study of these external factors and their relationship to a phenomenon. Another assumption that the idiographic approach makes is that the retrospective interpretation of past events can be used to develop the most complete understanding possible of a specific topic. As in the hypothetico-deductive and nomothetic models, it contains a theory of the development of phenomena in society. Unlike these other methods, the theory is not stated. It is implied.

Since the idiographic approach attempts to explain a phenomenon in the most complete manner possible, a predetermined theory is not used because it may limit the number of relevant factors considered in the study. Nonetheless, it is impossible for a researcher to be totally objective. A "system of values, usually implicit rather than explicit, always dictates the historian's selection of materials" (Shafer, 1974:39). Everyone

has his or her own private theory for the existence of social phenomena, though s/he may not be aware of it. It is for this reason that such theories are difficult to express. However, it is essential that reader have an understanding of the assumptions that I have made in conducting this study (e.g. assumptions about the nature of nature of society and the legislative process). These assumptions will have an effect on the interpretation of the significance of historical facts with respect to the development of the L.G.W. System. Shafer (1974) provides good advice to those wishing to conduct historical research:

There are three overriding requirements in the study of...institutions and individuals:

- (1) That they can be conceived as interacting, but with the power of the individual being inhibited by the organized and established strength of the ideas and interests of men grouped in institutions,
- (2) That it be clear that the historian cannot understand an historical fact except in the context of its own culture and time period, and,
- (3) That it be clear that historians are products of their own times and cultures.

(Shafer, 1974:37)

I would go further with the assumption concerning the nature of the relationship between individuals and institutions when discussing the development of legislation. My major assumption is that institutions, and other social phenomena, develop through a series of changes into their present existence and by studying

the past of a specific phenomenon, one can learn a great deal about its nature at the present time. It is my view that our society is based on conflict of power: individuals and groups of individuals with different degrees of power all striving to achieve their own goals. When these goals clash, pressure is exerted in an effort to ensure that each group's own goal dominates. Our legislative process is no different. There are different lobby groups that are constantly trying to sway legislation to their advantage and there are factors that determine the amount of pressure that can be applied and the effectiveness of that pressure (Spector and Kitsuse, 1977). All things being equal, groups that have a larger membership, greater constituency, more money and greater discipline and organization will be more effective in pressing their claims than groups that lack these characteristics. The success or failure of collective action is often explained by referring to the group's power as measured by these characteristics (Spector and Kitsuse, 1977). Notwithstanding these fundamental features, I am not in total agreement with Spector and Kitsuse's (1977) expansion into a "natural history model" of social problems. Similar to other natural history models, they have not adequately depicted the complexity of the interaction between the various interest groups: how they respond to government action (or inaction) and

claims or actions by other groups. This typology also seems to ignore the fact that governments may have interests and agendas of their own. What is more, it does not recognize the importance of public opinion and cultural stereotypes (particularly as they are presented by the mass media) on the public's perception of the "dangerousness" of the mentally ill (Scheff, 1966).

Sensationalization of incidents involving the mentally ill often generate a high level of fear, irrational prejudices, and in many instances, an inappropriate reaction by the community. Responses to such reporting have a definite effect on the care of the mentally ill offenders already part of the L.G.W. System. The community reaction challenges the credibility of the psychiatrist as an expert, which in turn produces an increase in calls for more punitive and restrictive treatment of mentally ill offenders. (Phillips et al, 1985:375). These factors, considered, it is my belief that the process through which social policy is created and maintained is complex, involving the interaction of interest groups (including those within the government) often influenced by media coverage, traditional myths, and the fear of the unknown.

### Validity and Other Problems

The first problem that arises in any historical research is that of retrospective interpretation. In looking back into the history of a phenomenon, it is difficult not to bring the values of the present into the past. These values and definitions may not apply and therefore, may have a negative effect on the interpretation of the relationships and associations involved with the development of the L.G.W. System. Nevertheless, it would seem that this should not affect the reporting of historical facts (i.e. the date when a section of the Criminal Code was amended) relating to the growth of the L.G.W. System. The difficulty of avoiding this consequence of retrospective interpretation cannot be avoided in historical research means that the associations and relationships inferred are, at best, probable in that they can only indicate that certain events were more or less likely to be related to particular factors.

Another problem that arises is that information on the history of the L.G.W. is incomplete. When conducting historical research, one tends to find that the quality of information tends to be poorer the further back one searches. Accurate records were not always kept because the administrators were not concerned with possible future research. This casts a shadow of doubt on the internal validity of the study because the

references may be based on incomplete information. Like the problem of retrospective interpretation, this problem exists in all historical research and cannot be avoided. This is not enough to justify abandoning research into the history of the L.G.W. System. If it were, no historical research would be conducted. Supplying an understanding of the history of the L.G.W. will be of more use than no information at all. Thus, this thesis, in accordance with the idiographic model, attempts to provide as complete description of the development of the L.G.W., as the available information permits.

Because this thesis relies on a great deal of government documents and speeches, the validity of inferences drawn is placed in question.

...even the most casual conversations are made up of all kinds of statements, some probably true, some probably false, some probably accurate, some probably inaccurate, some plausible and some implausible...

(Shafer, 1974:40)

It is up to the researcher to judge every statement on varying degrees of probability. The decision must be through a comparison with other evidence (historical facts).

Theoretically, one should be able to determine the reasons for a specific change in the law through the debates. However, this only determines the plausibility of the statement and not whether it is true. The debates omit major influencing factors that

exist in any legislature. Party principles, desires of constituents, and the personal interest of the Member are not always evident in the transcript. The debates, at most, illuminate the prominent issues for and against the enactment of a certain bill (Vincent, 1969:147). "At best, single statements may be evaluated as no more than probably true and accurate..." (Shafer, 1974:42).

A further problem encountered, is the fact that the assumptions made concerning the nature of policy making may not hold to be true in the late 1800's or earlier. Canada was a newborn nation and the elaborate and complex system that exists today had not yet evolved. There were not many groups, if any, that attempted to lobby on the behalf of the mentally ill offender. This does not mean that conflict between different groups over changes to the L.G.W. System did not exist, only that it is more difficult to uncover.

Finally, there is the difficulty that exists with respect to the external validity of this study. Because the research focuses only on the legislative and administrative structure pertaining to the L.G.W., generalizations about the development of all legislative and correlative structures dealing with the criminally insane cannot be made. Since the purpose of this thesis is to make inferences relating solely to the L.G.W.

System, the problem of external validity is not relevant in this case.

Using the historical research method has many drawbacks with respect to the reliability of information, the validity of inferences drawn, and the subjective colouring by those who record "historical facts". Despite these drawbacks, the need for published information on the development of the L.G.W. System in Canada outweighs the problems encountered.

We do not abandon politics because statesmen fall out, or resort to witch doctors because medical doctors dispute or repudiate science as its new findings cancel some of the old...

(Shafer, 1974:37)

## CHAPTER II

### THE PRESENT LIEUTENANT GOVERNOR'S WARRANT SYSTEM

Before embarking upon a detailed investigation into the history of any institution, it is helpful to have a general understanding of how it operates, an analysis of key contemporary issues, as well as some information on the persons affected by it. This chapter provides an introduction to the existing L.G.W. System: how it operates, the various laws that regulate it, the concepts upon which it is based and some of the general characteristics of L.G.W. patients. It does not discuss the problems associated with this method of managing the mentally ill or disordered persons that come into contact with the criminal justice system. The major issues surrounding the L.G.W. System are examined in the following chapter.

This chapter has been divided into three parts: The first section provides an overview of the system, the legislation involved in its operation and how the System is applied to young offenders. The second part presents the various provincial approaches to the L.G.W. System and the legislation that has been

enacted dealing with the L.G.W. The final section discusses the general characteristics of L.G.W. patients.

Part A: Overview of the L.G.W. System

The Lieutenant Governor's Warrant System is essentially a mechanism through which "insane criminals" are held in custody and later released. An L.G.W. is an authorization for such persons to be discharged or held in custody "until the pleasure of the Lieutenant Governor is known". More specifically, the L.G.W. is administered only to those persons who are found not fit to stand trial by reason of insanity (N.F.S.T.), not guilty by reason of insanity (N.G.R.I.), to be a mentally disordered inmate in a prison (M.D.I.), or brought up for discharge for want of prosecution and found to be insane (W.P.I.).

The philosophy behind the concept of N.F.S.T. is that the accused, encumbered by his mental state, is incapable of instructing his counsel, understanding the trial proceedings or appreciating the moral implications of the alleged offence. Proceeding with a trial of such an individual would be tantamount to trial in absentia (Parker, 1975:7). The accused person is presumed innocent but his mental state may require him to be held in custody under an L.G.W. in his and the public's best interest. The accused is returned to trial as soon as the Lieutenant Governor believes that his mental health has improved to the

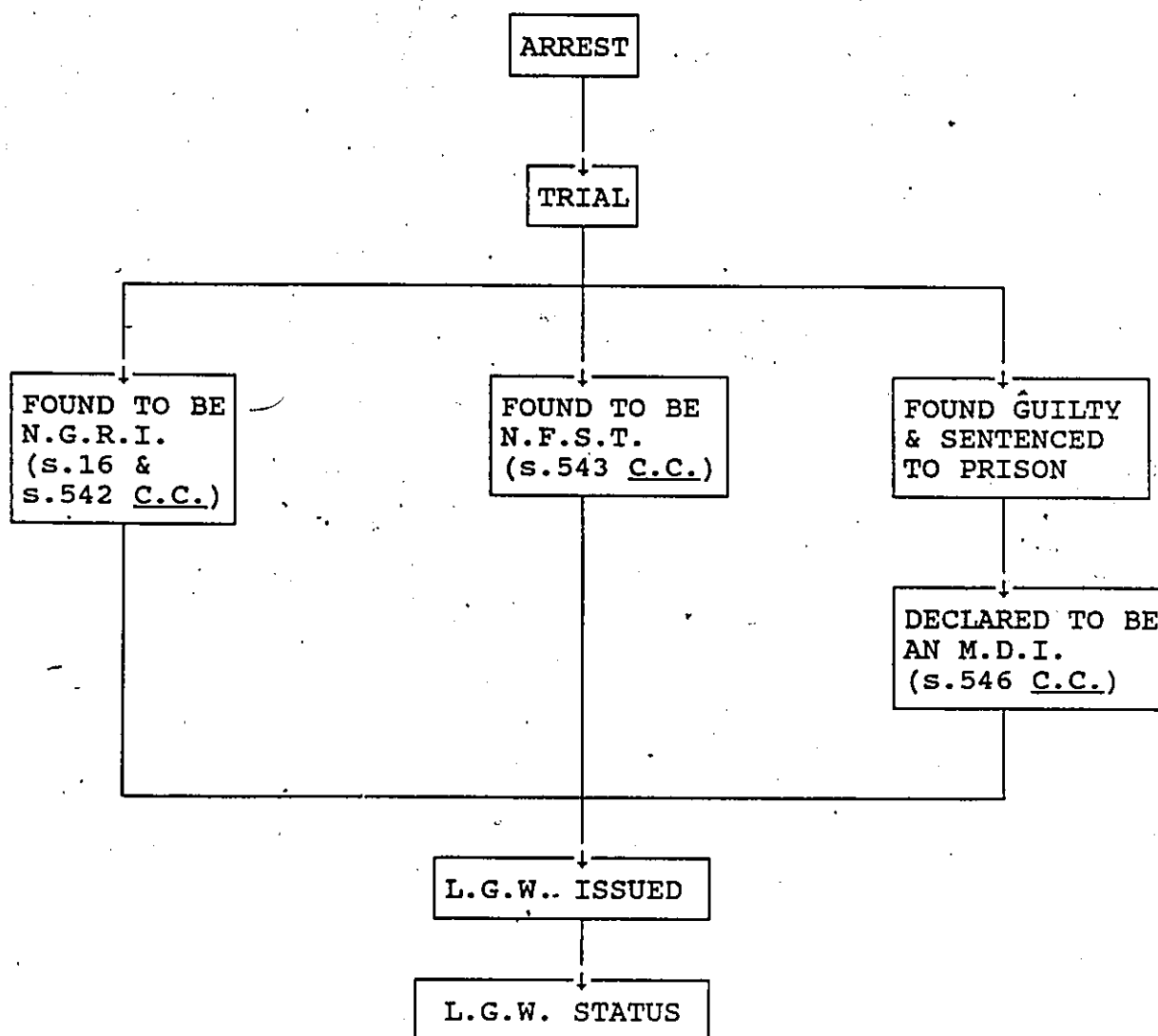
extent that he appears to be able to understand the proceedings and is able to instruct his counsel.

In the case of a person found N.G.R.I., the trial of the individual has already been completed, however; because of his mental condition, the person is acquitted. When a person is found N.G.R.I. of an indictable offence, the court cannot discharge the individual, but must order that he be kept in strict custody until the pleasure of the Lieutenant Governor is known. The person is held until it is deemed that he has recovered and it is in the best interests of the individual and the public that he be released.

For those persons found to be M.D.I.'s, the L.G.W. is used as an order to transfer the provincial inmate from prison to a provincial mental health facility. The warrant is used only when the prison facilities are judged to be incapable of providing the treatment the inmate needs. When the Lieutenant Governor is satisfied that the inmate has recovered, he may order that the person be returned to prison. In the event that the inmate is not liable to further custody in prison, the Lieutenant Governor may order that he be discharged so long as it is in the best interest of the individual and not contrary to the interests of the public. The emphasis is on the public protection over individual liberty. (Figure-1 provides an illustration of the

Figure-1

THE PRESENT PROCESS THROUGH WHICH A PERSON  
BECOMES AN L.G.W. PATIENT



Source: Michael S. Phillips, Mentally Ill Offenders: Implications for the Administration of Psychiatric Hospitals, Toronto:METFORS/Clarke Institute of Psychiatry (unpublished thesis), 1986, p.77 and the Canadian Criminal Code.

process through which a person becomes an L.G.W. patient).

Each warrant must take into account the needs of the individual patient and the protection of the community. In almost all cases, the individual is sent to a psychiatric hospital to receive treatment. "It is essential to appreciate that the patient is being hospitalized and not penalized." (Haines, 1984:4). These institutions, regardless of their level of security, are operated by the provincial ministry of health. Under a warrant, the Hospital Administrator has complete control over the patient. He is charged with the safe keeping and the supervision of patients and given some discretion in their release into the community on a conditional basis. The Lieutenant Governor makes his initial disposition without being required to hold a hearing or follow any formalized procedure (Department of Justice, 1985:38). Because of the authority given the Lieutenant Governor with regard to release, the L.G.W. has been described as an indefinite hospitalization (Williams and Waters, 1975:56).

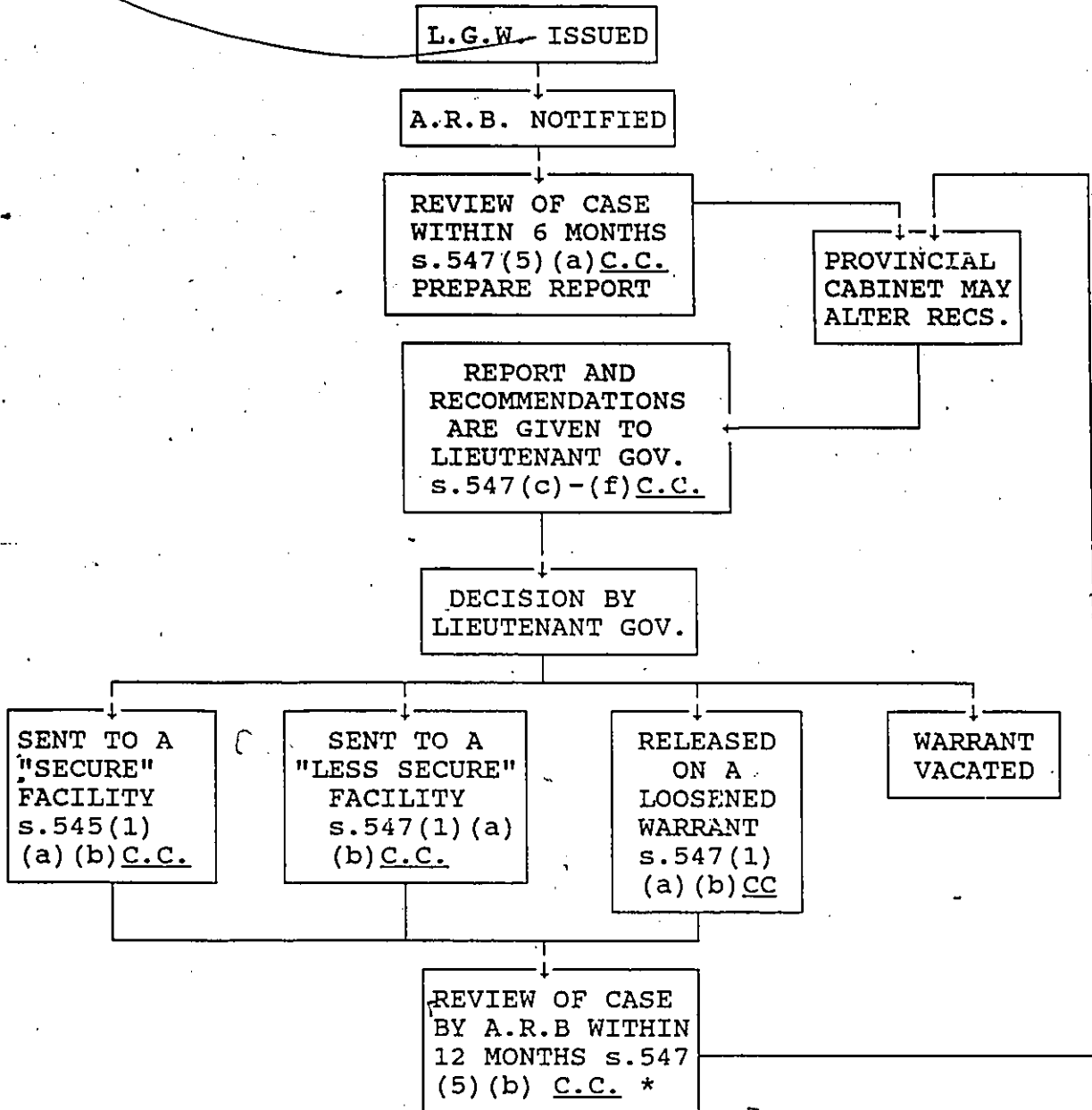
However, it does not suffice to say simply that all L.G.W. patients are held for an indefinite period. Warrants are often "loosened" (either giving the patient a conditional discharge or reducing the restrictions on liberty specified in the warrant) for those patients who have shown some progress in their

recovery. Every loosened warrant contains what (Haines, 1984:14) has called a "yoyo" provision. In the event that the patient regresses, the Regional Administrator has the discretion to return the patient to the psychiatric hospital for the criminally insane. This provision serves to protect the patient and the community from potential harm from such regression (Haines, 1984:14).

The Lieutenant Governor of a province has the option available to him of appointing an Advisory Review Board (A.R.B.). The A.R.B. is an independent board that evaluates L.G.W. patients on a regular basis and reports to the Lieutenant Governor in Council (the provincial Cabinet). The Board's recommendations are presented to the Cabinet through the provincial "health minister". The Board does not direct the treatment of the patient. Its report is advisory only and may be accepted or modified by the Cabinet. The Cabinet then makes its recommendation to the Lieutenant Governor who issues the warrant for continued detention or the release of a patient. However, this process varies from province to province. These differences will be discussed in greater detail later in this chapter. An Advisory Review Board to the Lieutenant Governor has been created in each province (Department of Justice, 1985:50; Phillips, 1986: 80). Every A.R.B. is composed of a chairman, two psychiatrists

Figure-2

THE PRESENT REVIEW PROCESS FOR  
L.G.W. PATIENTS



\* IT IS IMPORTANT TO NOTE THAT THE LIEUTENANT GOVERNOR, UNDER S. 545, MAY ORDER A REVIEW OF AN L.G.W. PATIENT IN ADDITION TO THOSE UNDER s. 547.

Source: M.S. Phillips, Mentally Ill Offenders: Implications for the Administration of Psychiatric Hospitals, Toronto: METFORS/ Clarke Institute of Psychiatry (unpublished thesis), 1986, p.80,

(not of the facility where the patient is being held), a lawyer and a layperson. A depiction of the present review process instituted in most provinces is provided in Figure-2. The purpose and the role of the A.R.B. were enunciated in the case of Abel et al v Advisory Review Board, (1980):

The whole purpose of the establishment of an Advisory Review Board was to create an independent body, bringing to its task a considerable and varied expertise of its own...with the hope that no one be kept indefinitely in a mental institution, half-forgotten, and with his situation reviewed, except by the staff of the institution. It is inherent in the concept and operation of such a Board that the recommendation will virtually always be accepted.

(Abel et al v Advisory Review Board, 1980:153)

Similar to the Lieutenant Governor, few guidelines are laid down with respect to the operation of the Review Board. The A.R.B. is not required to hold hearings but in most cases it does. The review is not intended to be a trial or an adversarial proceeding. The A.R.B. has no counsel and there are no pleas made by the patient. The review commences with notification of the psychiatric facility, the patient and his lawyer. The administrator of the facility prepares a report that contains the following points: (1) identification of the patient, his offence and diagnosis, (2) details of his offence, personal history of the patient (which includes previous hospitalizations, and the patient's medical and criminal records), (3) the course of the patient's recovery since his admission to the hospital and (4)

recommendations of the Hospital Administrator as to the future terms of the warrant. The A.R.B. also has access to Orders, reports and psychiatric evidence that have existed in the Board's file since the inception of the warrant. The counsel for the patient has access to similar information but the Chairman of the Board has the discretion as to what details will be disclosed to the patient himself. The Chairman makes the decision to withhold information from the patient on the grounds that it is not in the best interest of the patient or that it might put a third party at risk (Haines, 1984:8-9).

#### The Relevant Legislation

The Lieutenant Governor of a province represents not only the Crown but also the federal government. He is appointed and paid by the federal government under section 9 of the British North America Act (B.N.A. Act). As a representative of the Crown, the Lieutenant has the obligation to:

...open, prorogue, and dissolve the legislature, assent to (or withhold assent from) provincial legislation, approve orders-in-council, consent in advice to money bills and exercise the formal prerogative...to complement provincial legislative authority.

(Saywell, 1976:298)

Some of the other powers of the Lieutenant Governor are provided for in sections 55 to 62 and section 90 of the B.N.A. Act. Section 55 read in connection with section 90 gives the

Lieutenant Governor the power to withhold assent to or to reserve bills of the provincial legislature. The authority of Lieutenant Governor may be superceded by the Governor General. The framers of the B.N.A. Act wished to ensure that the legislative enactments of the provinces would remain subject to the superintendence of the federal government (Harvey, 1987). This power to overrule the Lieutenant Governor does not seem to be available with respect to an L.G.W.

The powers of the Lieutenant Governor have decreased over the years, and his role is now more symbolic than instrumental (Harvey, 1987). It is in the L.G.W. System that the Lieutenant Governor still exercises a great deal of authority.

The Lieutenant Governor's Warrant System is interesting in that it bridges the jurisdictions of the federal and provincial governments with respect to criminal justice and mental health. These fields of legislative authority are defined under sections 91 (for the federal government) and 92 (for the provincial government) of the B.N.A. Act:

Section 91

27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters;

28. The Establishment, Maintenance and Management of Penitentiaries.

## Section 92

6. The Establishment, Maintenance and Management of Public and Reformatory Prisons in and for the Province;

7. The Establishment, Maintenance and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province other than Marine Hospitals;

13. Property and Civil Rights in the Province;

14. The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction...;

15. The Imposition of Punishment by Fine, Penalty of Imprisonment for Enforcing any Law of the Province made in relation of any Matter coming within any of the Class of Subjects enumerated in this Section.

(B.N.A. Act, 1987:s. 91 and 92)

The Lieutenant Governor is given the authority to write warrants for insane person under the Federal Statute, The Canadian Criminal Code. By virtue of section 92 of the B.N.A. Act, the warrant is administered by the provinces. The provinces have developed their own system of review. It is not surprising that some provinces have developed legislation concerning the administration of the L.G.W. in addition to that which already exist in the Criminal Code. The development of such legislation has created great deal of controversy concerning who has jurisdiction over L.G.W. patients and the procedures that must be followed when reviewing cases and making recommendations. For example, does a Review Board appointed under the Criminal Code

have to follow the procedures set out in the Manitoba Health Act?

Warrants of the Lieutenant Governor are administered relating to five sections of the Criminal Code: section 542 through to section 546. Section 542 states that where an accused person is charged with an indictable offence and is found N.G.R.I., the court shall order that he be kept in strict custody in a place and manner that the court decides "until the pleasure of the Lieutenant Governor is known". Here, the onus is on the accused to prove his insanity and only when the court is satisfied that the accused comes within the special conditions of this section does he escape a finding of guilt.

Those found to be N.F.S.T. are dealt with under section 543(6) and are ordered by the court to be kept in strict custody "until the pleasure of the Lieutenant Governor of the province is known". Section 544 deals with those persons who are declared insane by court but are discharged for want of prosecution. In this case, the Code directs that the person be handled in the same way as a person found N.F.S.T. so far as the section can be applied. The loosening or tightening of warrants is provided for in section 545(1)(a) and (b). This allows the Lieutenant Governor to discharge an accused conditionally or absolutely, "if in his opinion, it is in the best interest of the accused and not contrary to the interests of the public".

Section 546 allows for the transfer of individuals from a provincial prison to a psychiatric facility. When a inmate, serving a sentence in an prison, is found to be mentally ill, feeble-minded or mentally deficient by the Lieutenant Governor of that province, the inmate may be ordered to a place of safe keeping by the Lieutenant Governor. However, if the psychiatric facilities of the prison are deemed adequate, the inmate may receive his treatment in the prison. Section 546(3) states that where the Lieutenant Governor believes that the inmate has recovered, he may order (a) that the person be returned to the prison from which he was removed, if his sentence has not expired or (b) the release of the inmate if the sentence has expired. If the Lieutenant Governor is not satisfied that the patient recovered, and is not liable to further detention in prison:

...he may order that person shall be subject to the direction of the minister of health for the province, or such other person as the Lieutenant Governor may designate and the minister of health or other person designated may make any order or direction in respect of the custody and care of the patient he considers proper.

(Canadian Criminal Code, 1987:s.546(4))

In this section, a prison means any institution other than a penitentiary and includes an industrial and reformatory school. An inmate from a penitentiary (a federal institution) cannot be transferred to a mental hospital under an L.G.W. In this instance the federal authorities must transfer the inmate

according to section 19 of the Penitentiary Act and negotiate a federal-provincial transfer or a transfer to a provincial mental health facility. "In either case, the offender is not on L.G.W. status. Instead, such cases are theoretically deemed to be confined in a penitentiary." (Wormith, 1983:23).

The option of appointing an A.R.B. is given to the Lieutenant Governor under section 547 of the Code. The Lieutenant Governor is not bound to appoint a Board nor is he bound to follow its recommendations. Once a Board is designated, it must consist of not less than three and not more than five members, at least two of which must be qualified psychiatrists and one, a member of the Bar. The A.R.B. is bound by this section to review the case of every L.G.W. patient no later than six months after the warrant is issued. After this primary review, the Board is required to review each case at least once a year.

#### Young Offenders and the L.G.W. System

The legislation that determines how long young people who come into conflict with the law are dealt with is the Young Offenders Act (Y.O.A.). It is used in cases where a juvenile is charged with an offence listed in a federal statute (i.e. the Criminal Code, the Food and Drug Act, and the Narcotics Control

Act) but does not apply to provincial or municipal laws. Also, in order to be considered under the Y.O.A., a youth must be older than twelve but less than eighteen years of age (Y.O.A., 1987: s.12). The Y.O.A. was designed to hold young people responsible for their actions but at the same time recognize the fact that they have special needs and should not always be held as accountable as adults (Phillips and Thompson, 1986).

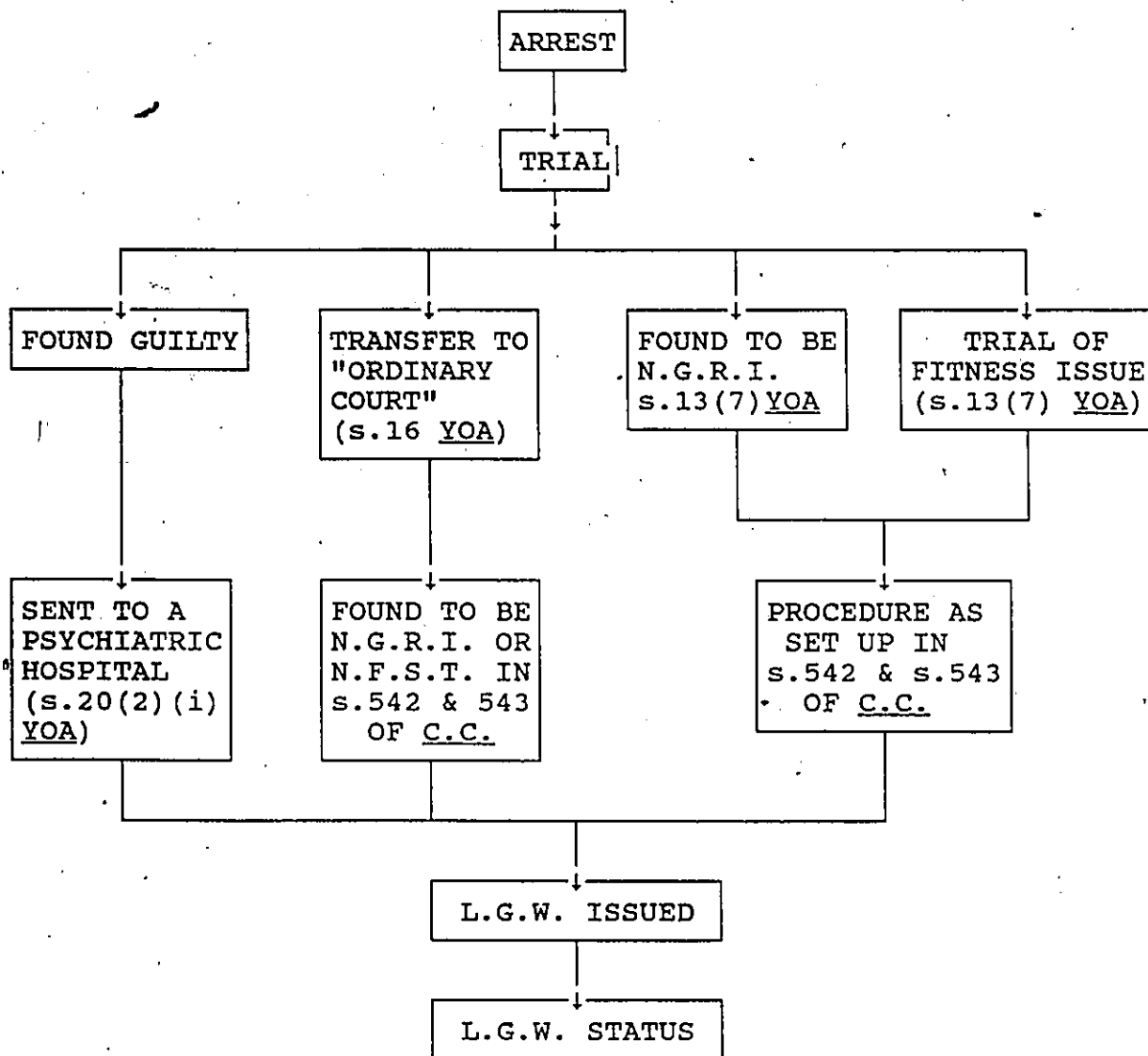
There are essentially four sections in the Y.O.A. that could lead to L.G.W. status for a juvenile: section 7(3), section 13, section 18, and section 20. Section 7(3) states that "no young person who has been arrested shall be detained...in any part of a place in which an adult who has been charged with or convicted of an offence against any law of Canada or a province is detained or held in custody" (Y.O.A., 1987:s.7(3)) unless the juvenile has been found guilty and a disposition has been made under section 20. The premise is that the use of separate facilities for the treatment and assessment of adolescents charged under the Y.O.A. would be in accordance with the Act's philosophy (Phillips and Thompson, 1986:20). Nonetheless, juvenile offenders are held in psychiatric institutions with adult offenders.

Section 13 offers the possibility of such treatment while at the same time avoiding some of the procedural difficulties that may be encountered in being found N.G.R.I. or N.F.S.T. (Phillips

and Thompson, 1986:22). It is under this section that young offenders may be found N.G.R.I. or N.F.S.T. In either case the section would be used in conjunction with the applicable sections of the Code that do not contradict the Y.O.A. provisions or are not included in the Y.O.A. (Y.O.A., 1987:s. 51). Figure-7 presents a depiction of the process through which a young person becomes an L.G.W. patient. A youth court may, at any stage of the proceedings, for the purposes of determining the sanity of an accused (either N.G.R.I. or N.F.S.T.), require that the youth be examined by a qualified person. The application for such a report may be made by the accused, the Crown or the Court as long as there are "reasonable grounds" to believe that the juvenile may be suffering from: a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability, or mental retardation, and where the court believes that a medical, psychological, or psychiatric report would be helpful in making any decision pursuant to the Y.O.A. (Y.O.A., 1987:s.13(a)(e)). The court, under section 13(7), may direct that the issue of fitness to stand trial be tested where it appears that the young person is incapable of conducting his defence on account of insanity. Section 13(8) states that the trial of the fitness issue must be made in accordance with section 543 of the Criminal Code. If the young person is found

Figure-7

THE PRESENT PROCESS THROUGH WHICH A YOUNG  
OFFENDER ENTERS THE L.G.W. SYSTEM



Source: C. Spears and M. S. Phillips, The Lieutenant Governor's Warrant and the Young Offender, Working Paper 67, Toronto: METFORS, 1983 (approximate date), p.39 and the Young Offender's Act.

unfit to stand trial, he will be held under an L.G.W.

The transfer to "ordinary court" for trial of the fitness issue is provided for in section 16. Here, the "interests of society" and "the needs of the young person" are used as criteria in deciding whether the case should be transferred to adult court. In addition to these, other factors include:

- (a) the seriousness of the alleged offence and the circumstances in which it was committed;
- (c) the adequacy of the Act and the Criminal Code or other Act of Parliament that would apply in respect of the young person if an order were made under subsection (1);
- (d) the availability of the treatment or correctional resources;
- (e) any representations made to the court by or on the behalf of the young person or by the Attorney General or his agent; and
- (f) any other factors the court considers relevant.  
(Y.O.A., 1987:s.16(2))

Thus, a mentally ill juvenile charged with an offence may be sent to an adult institution because the relevant Criminal Code sections are better suited to deal with the case, the facilities available for treatment are better in an adult institution or because of the recommendations of the report made under section 13(1) of the Y.O.A.

"Dispositions" are dealt with in section 20. Subsection (1)(i) states that an adolescent may be detained for treatment

subject to the appropriate considered by the court, in a hospital or other available facility a report submitted under section 13 recommends treatment. Section 22(1) states that no such order can be made unless the court has obtained the consent of the youth, the parent or guardian and the hospital. However, section 22(2) allows the court to dispense with the consent of the parent only if the parent is not available or it is believed by the court that the parent is not taking an active part in the proceedings. Under the Y.O.A., no disposition of a young offender is to exceed three years and for those transferred to adult court, the punishment cannot exceed the maximum for an adult charged with the same offence (Y.O.A., 1987:s.20(3), (4) and (7)).

No matter what route a juvenile offender takes to L.G.W. System, once an L.G.W. status is achieved, all the provisions of the Criminal Code relating to the loosening of warrants and reviews, would apply.


#### Part B: Provincial Approaches to the L.G.W.

Due to the lack of formal guidelines that govern the operation of the A.R.B., different provinces employ different procedures. This section examines the review process of L.G.W. patients in most of the provinces. Manitoba, New Brunswick,

Newfoundland and P.E.I. did not provide detailed discussion of the operation of the A.R.B. However, the review processes used in these provinces will be discussed using the available information. (Various provincial systems of review are illustrated in Figure-3 through Figure-6 in Appendix A).

The Honourable Helen Hunley, Lieutenant Governor Alberta, states that the L.G.W. System functions as a safety mechanism to ensure that proper procedures are followed and that patients are not improperly detained. The System achieves this today merely by way of its presence, rather than by way of functional intervention (Hunley, 1987).

In Alberta, a Provincial Mental Health Advisory Council is established and appointed by the Lieutenant Governor in Council under section 5 of the Mental Health Act. The Council reviews all cases involving patients held under an L.G.W. on an in-patient basis, every six months. Patients on loosened warrants are reviewed once a year. The Council also holds special sittings for those patients whose status has changed since their last review or where a need for a change in the terms of the warrant has been expressed by the hospital administrator. The contact between the Lieutenant Governor and the Advisory Council is solely through the recommendations made to the Lieutenant Governor. In the rare circumstances in which clarification or



further information is sought, the Lieutenant Governor seeks such information from the Ministry of the Attorney General. Although records are kept of the decisions made, they are not available to the public in order to ensure the optimum treatment of the patient and to protect the overall interests of the patient and board members. As a result, records of L.G.W. patients are treated in the same manner as other health records (Hunley, 1987). The decision by the Lieutenant Governor to change a warrant is based on the recommendation of the Board.

[I]t is customary in the province for the Lieutenant Governor to accept the recommendations of the Board of Review. This is done after consideration of the recommendation and the background of the case and is not merely a 'rubber stamp' process.

(Hunley, 1987:correspondence, March 13).

British Columbia provides for the appointment of an assessment committee under section 10 of the Mental Health Act. The Lieutenant Governor in Council may, but is not bound to, appoint such a committee. The assessment committee may prospectively or retrospectively reduce or cancel charges for the care, treatment and maintenance of a patient. Section 25 of the Mental Health Act states that where a person is found to be N.G.R.I. or N.F.S.T. and is ordered to be detained in a provincial mental health facility, the person will receive the appropriate psychiatric treatment authorized by the director of the psychiatric institution. Section 34 of the same Act

provides that patients detained in provincial mental health facilities under the Criminal Code are exempted from the leave and release sections set out in the Mental Health Act. There is no specific discussion in the legislation of the release or review of L.G.W. patients nor the transfer of mentally disordered inmates from prison to a mental hospital.<sup>1</sup>

The A.R.B. in British Columbia makes its recommendations to the provincial Cabinet for an Order-in-Council, which is then approved by the Lieutenant Governor. This is consistent with the constitutional requirements to act only on the advice of the Cabinet.<sup>2</sup> The Board conducts its hearings an inquisitorial process. The patient is interviewed by the Board and is entitled to be represented by counsel. The patient is also entitled to have family members, friends and other persons attend. The various levels of release range from strict to safe custody, safe custody to conditional discharge level 1, from conditional discharge level 1 to conditional discharge. All of these levels are based on the patient's ability to meet specific criteria (McDiarmid, 1987). The A.R.B. operates on a medical model and evaluates the patients according to the following criteria:

- (1) Rehabilitation measures must be both in the best interest of the patient and not contrary to the public interest.

(2) It must be clear that when a patient is finally discharged, his mental illness is in full remission (whether as a result of medication or otherwise) and he is no longer considered to be a danger to the public.  
(McDiarmid, 1987:correspondence, May 14)

In Nova Scotia, the Lieutenant Governor's warrants are considered to be personal acts of the Lieutenant Governor. If a person is found to be N.G.R.I., the court orders that the accused be held in custody at Nova Scotia Hospital until the pleasure of the Lieutenant Governor is known. At that time, the Attorney General's Department prepares a report to the Lieutenant Governor and drafts a warrant for the patient. Both are then taken to the Lieutenant Governor for approval. After this, the cases are reviewed by the A.R.B. in accordance with section 547 of the Code. Following the review, a report is sent to the Lieutenant Governor advising that no action should be taken, that there is a need for a change in the warrant or that the person should be released from custody. A copy of this report is also sent to the Attorney General's Department. The Lieutenant Governor does not take part in the deliberations but "acts on the recommendations of the Review Board" (Gale, 1987:correspondence, February 20).

Section 18(b) of the Mental Health Act of New Brunswick states that any person detained under the authority of an L.G.W. may be admitted to, detained in, and discharged from a psychiatric facility in accordance with the law as stated in the

Criminal Code.<sup>3</sup> Section 30 states that there must be one or more Review Boards appointed by the Lieutenant Governor-in-Council. Section 34 discusses the review of L.G.W. patients. Subsection (2) state provides that the Board shall review the case of any L.G.W. patient upon the written request of the provincial Minister of health. Subsection (3) states that the patient has the right to be personally present at the hearing; unless the Board decides it would be detrimental to his health, in which case, the patient has the right to be represented by counsel. It also provides that the Board may hold the hearing in camera for the purpose of receiving oral testimony. Section 34(4) states that the Chairman of the Board must prepare a written report of the recommendations to the Lieutenant Governor-in-Council upon the completion of the hearing.<sup>4</sup>

The mandate of the Review Board in the province of Quebec is to examine the case of every L.G.W. patient in the province. This A.R.B. also views itself as performing a kind of Ombudsman function for the mentally ill who come into contact with the criminal justice system (Perron, 1987b). The reviews are periodical: six months after the initial warrant was issued and thereafter once a year. The date for each examination is set up to four to eight weeks in advance, and the hospital is informed as soon as the date has been set. On the date set for the

review, the hospital must ensure the presence of the treating physician or of a replacement physician who knows the patient. The hospital must also provide a report written and signed by the treating physician. This report must include the pertinent information relating to the health of the patient, his progress, the treatment program and recommendations. After each hearing, the Board must prepare a report and present it to the Lieutenant Governor. This report must, in part, include the results of the review and fulfill the requirements set out in section 547 the Criminal Code. The Quebec A.R.B. uses different criteria for evaluating different types of warrants: for those found to be N.F.S.T., the Board considers the whether the person has sufficiently recovered to be able to stand trial; for those found to be N.G.R.I., the Board must believe that the patient has recovered and it is in the best interest of the patient and in the interest of the public that the person be discharged absolutely or conditionally; and for those inmates declared to be M.D.I.'s, the Board bases its recommendations on whether the inmate has recovered.<sup>5</sup> The seriousness of the offence with which the person was charged, is also considered in every case. During the review, the Board discusses the patient's file and the report made by patient's physician. Although the Quebec A.R.B. prefers to stick to the schedule for reviews determined by the Code, it

does accept requests to make exceptions. These requests must be precise and accompanied by an up-to-date medical report on the patient.

According to the Honourable Monique Perron (1987b), the role of the Lieutenant Governor with respect to the L.G.W. System in Quebec is largely symbolic: the Board's recommendations are given to the deputy Attorney General, and the warrant (with or without changes) is made up by the Board and the Lieutenant Governor signs it with "no real questions asked".

The Ontario Review Board has established its own procedure for reviewing the cases of L.G.W. patients. The Honourable Edson Haines has described this process as the "conference method" (Haines, 1981:10). Prior to the hearing, the Board psychiatrists examine the patient and review his file. The report of the Hospital Administrator is given to the Board for consideration and then given to the patient or his counsel. Before the review hearing commences, the Board members have access to the patient's file and may interview the patient as well. The attendance of the patient at the hearing is at the discretion of the Lieutenant Governor, as is the presence of his counsel unless the patient does not attend. In practice, all patients are seen by the Review Board unless they are absent without leave (Phillips, 1986). There is no right of cross examination on the

part of the patient's lawyer but it may be allowed with the permission of the A.R.B. The Board meets "in camera" to prepare the recommendations and consider whether the patient has recovered sufficiently to be released into the community. Due to the fact that the A.R.B. is only advisory to Lieutenant Governor, it does not release its report to the public. Only after the Lieutenant Governor has completed the warrant, may the recommendations be disclosed. The recommendations involve weighing the interests of the patient against the interests of the community. However, the public interest is clearly paramount (Phillips et al, 1985:376-377). The Board reviews each case using the following criteria:

- (1) Has the patient recovered enough to stand trial or to be allowed back into the community?
- (2) Is he a danger to himself or the society?
- and (3) Is it in the best interest of the public to release this individual?

Persons held under an L.G.W. in Ontario are rarely released from a maximum security hospital directly into the community. They are placed on a loosened warrant and sent to a medium or "no-security" regional psychiatric hospital, where they are gradually integrated back into the community before the warrant is completely vacated (Phillips, et al, 1985:374).

Ontario also has what is known as a psychiatric consulting program. A psychiatrist who is not a participating member of the

Board at the time of the hearing, acts as a consultant to the patient. After receiving the patient's permission, the psychiatrist examines him, reviews the Board and hospital files, and prepares a report which is filed as an exhibit at the hearing. The patient, his counsel, or any other interested parties may examine the report. The presence of the consultant does not preclude the L.G.W. patient from retaining his own psychiatrist (Phillips, 1986, 1987).

In Saskatchewan, it is the provincial Health Minister who is obliged to appoint review panels under section 29 of the Mental Health Act of Saskatchewan. Similar to B.C. and Manitoba, the recommendations of the Review Board are referred to the provincial Cabinet for approval. The Lieutenant Governor then issues an Order-in-Council in terms of the decision by the Cabinet. The present Lieutenant Governor of Saskatchewan has noted: "[W]hen an Order-in-Council providing for a warrant or varying a warrant is placed before me, I really have no discretion in the matter since I am acting on the advice of my Ministers." (Johnson, 1987: correspondence dated February 20). The Board only makes recommendations for the release of a patient when it is certain that the individual no longer presents a danger to either himself or the community. The Review system used in Saskatchewan is very similar to that of B.C. in that the

there is a tendency for the recommendations of the Board to be accepted by the provincial Cabinet.

The transfer of mentally disordered inmates to mental hospitals in Saskatchewan is dealt with in section 22(1). The provincial Cabinet is authorized

...upon evidence satisfactory to [it] that a person in any prison, reformatory, training school, or other correctional institution for an offence under any Act of Saskatchewan, or imprisoned for safe custody charged with an offence, or imprisoned not finding bail for good behaviour or to keep the peace, is mentally ill or mentally retarded, may order his removal to an institution for safe custody and treatment; and person shall remain there or in such other institutions as the Lieutenant Governor-in-Council may designate, until his complete recovery. The Lieutenant Governor-in-Council may then order the person back to imprisonment if then liable thereto, or, if otherwise, that he be discharged.

(R.S.S., 1978 c. M-13, S.22(1)).

### Part C: Characteristics of L.G.W. Patients

This section consists of a discussion of recent data on the general characteristics of L.G.W. patients. It has been included in this chapter to provide additional insight into the operation of the L.G.W. System and the persons most affected by it. As of September 1985, there were 1,080 persons held under a Warrant of the Lieutenant Governor across Canada (St. Croix et al, 1985:1). According to the Department of Justice (1985), this number has been steadily increasing since the 1960's.

The most recent national survey of the L.G.W. population in Canada was conducted by Webster Phillips and Stermac (1985). The data was extracted from patient files by staff of the various provincial Review Boards in 1983. At the time of their study, there were 867 persons held under an L.G.W. in nine provinces of Canada (P.E.I. had no such patients and none were held in the Yukon or the Northwest Territories).

The average age of L.G.W. patients was in the early thirties at the time the warrant was issued. The majority of the patients had a high school level education or less (high school 33%, elementary or less 57%). Sixty-nine percent of the total L.G.W. population were unemployed when they were placed on a warrant (Webster Phillips and Stermac, 1985:29). Most of the patents were found N.G.R.I. by the courts (85%) rather than N.F.S.T. (14%) or M.D.I. (1%). The N.F.S.T. group contained relatively more retarded cases (18%) than did the N.G.R.I. cases (5%). However, both groups had an almost identical proportion of patients diagnosed as psychotic (N.F.S.T. 79%, N.G.R.I. 78%) (Webster Phillips and Stermac, 1985:30). The number of inmates placed on L.G.W. status has decreased over the past ten years and is rare today (Wormith, 1983; Webster, 1985; Phillips, 1986, 1987). Interestingly enough, there have been no references to patients placed on L.G.W. status under section of the Criminal

Code (W.P.I.) (Jobson, 1969; Quinsey and Boyd, 1977; Boyd, 1980; Wormith, 1983; Webster Phillips and Stermac, 1985; Phillips, 1987).

Some of the findings of Webster et al (1985) are illustrated in Table-1. The majority of patients (79%) were charged with crimes against the person, while only 15% were charged with property offenses. Ontario, Quebec and B.C. account for approximately 87% of all the L.G.W. patients in Canada (Ontario with 48%, Quebec with 33% and B.C. with 16%). These figures were calculated from Table-1. The overall amount of time a patient spent on a warrant in all provinces was approximately 5 years. The authors state that there were notable differences in L.G.W. characteristics from province to province and these differences indicate that criteria are applied across Canada in evaluating warrants (Webster et al 1985:29). For example, the average number of months a patient spent on L.G.W. status varied from 14 months in Nova Scotia to 104 months in Saskatchewan. This disparity is further exemplified by the level of security under which L.G.W. patients are held: a "full" warrant where the patient cannot leave the hospital, a "hospital loosened" where the patient lives in the hospital and works in the community, and a "community loosened" warrant where the patient lives and works in the community. In almost all the provinces (except

Table-1

Selected Characteristics of Canadian L.G.W.'s by Province, 1983

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	B.C.	Alta.	Sask.	Man.	Ont.	P.Q.	N.B.	N.S.	Nfld.	Total
MEAN MONTH OF DETAINMENT	86	58	104	65	75	40	90	14	15	61*
DETAINMENT %										
Under 1yr	9	19	16	16	7	24	7	71	75	15
1 - 2	7	10	5	10	12	18	0	0	0	12
2 - 3	5	14	16	21	26	17	14	14	0	18
3 - 5	18	21	16	32	37	20	21	14	25	27
5 - 10	20	40	26	11	10	15	17	36	0	-
Over 10	23	10	37	10	3	4	21	0	0	8
N	256	84	29	19	286	276	56	12	8	896
SECURITY LEVEL OF L.G.W. %										
Full/Hospital	100	100	77	57	80	73	95	79	47	
Community loosened	0	0	23	43	20	27	5	21	53	
INDEX OFFENCE % vs.										
person	79	88	89	89	88	67	64	86	75	79
property	22	10	11	0	9	25	29	0	25	15
N	149	42	19	19	332	285	14	7	8	868
L.G.W. CATEGORY										
% N.F.S.T.	6	2	37	26	5	26	21	43	0	14
% N.G.R.I.	94	96	63	74	95	74	71	57	38	85
% M.D.I.	0	0	0	0	0	0	7	0	62	1
N	141	42	19	19	332	284	14	7	8	866

\* Calculated from the figures provided by Webster, Phillips and Stermac (1985) p.30 and rounded off to the nearest decimal point.

Source: Webster, Phillips and Stermac, "Persons Held on Warrants of the Lieutenant Governor in Canada," Canada's Mental Health, Vol. 33, No. 3, 1985, p. 30.

Newfoundland with 47%) the majority of patients were held on full or hospital loosened warrants. These percentages ranged from 57% in Manitoba to 100% in B.C. and Alberta.

The average person held under an L.G.W. is male, in his early thirties, has a high school education or less and was unemployed at the time the warrant was issued. He has most likely been charged with a crime against the person and found not guilty by reason of insanity by the court. Upon admission to the hospital, the L.G.W. patient is most often diagnosed as psychotic (Webster, Phillips and Stermac, 1985:29-31).

The findings of this survey of the Canadian L.G.W. population reveals some major problems in the L.G.W. System. The disparities in the treatment of patients across Canada further support the notion that different criteria are used in exercising and evaluating warrants. The major question that arises out of studies such as this pertains to the dangerousness of L.G.W. patients. Are these people a danger to the public and/or themselves? Webster, Phillips and Stermac (1985) do not attempt to address this issue; however, there is a great deal written in this area and is considered to be one of the principle issues that are associated with the L.G.W. System.

4

NOTES FOR CHAPTER II

1. The transfer of mentally disordered inmates is provided for in the B.C. Act but these inmates are charged under provincial statutes. Therefore, such transfers do not apply to L.G.W. patients who are charged under the Criminal Code.

2. Similarly, there is a constitutional convention in place in Manitoba that requires the Cabinet to advise the Lieutenant Governor; the Cabinet is in turn advised by the A.R.B. (Whitley, 1987). In this area of the provincial approaches to the L.G.W., I was forced to rely on correspondence to provide this information. I was not given any other details concerning the L.G.W. System in Manitoba. The Lieutenant Governors of New Brunswick, Newfoundland and P.E.I. have not replied to my letter and hence, I have no first hand information concerning the operation of the L.G.W. System in these provinces.

3. Similar authorization for the admission, detention and release of L.G.W. patients exists under section 19(b) of the Mental Health Act of Ontario, section 18(b) of the Mental Health Act of P.E.I. and 20(b) of the Mental Health Act of Saskatchewan. Unfortunately, these statutes do nothing to clarify the procedures of the L.G.W. System.

4. Similar provisions can be found in section 34 of the Mental Health Act of Ontario and section 29 of the Mental Health Act of P.E.I.

5. There have been no recent cases of inmates being placed on L.G.W.'s. Such cases are usually dealt with under provincial legislation. (Perron, 1987a: correspondence april 10).

CHAPTER IIIISSUES SURROUNDING THE L.G.W. SYSTEM

The purposes of the present system are ill-considered, predicated on a medieval perception of mental illness and profoundly disrespectful of human rights and human dignity.

(Lepofsky, 1982:2)

An overview of the L.G.W. System and its clientele indicates some major problems are apparent. The L.G.W. is uniquely Canadian with its jurisdictional complexity, indeterminacy, non-reviewability, problems of termination vague legislation and differences in the level of formalization of procedures between provinces (Law Reform Commission of Canada, 1976:36). Such problems have led to a great deal of criticism of the System and many recommendations to improve it. This chapter focuses on these and other issues associated with the L.G.W. It does not attempt to resolve any of the difficulties within the System. Recommendations for improvement will be made in the final chapter.

One of the fundamental issues surrounding the L.G.W. is that

it cuts across the constitutional jurisdiction of the federal and provincial governments (Law Reform Commission of Canada, 1976:36). It has been argued that the Criminal Code sections relating to the L.G.W. are ultra vires the Parliament of Canada because they are not a valid exercise of criminal law power given to the federal government under the BNA Act. The Code oversteps its authority because the intent of the legislation is to ensure that the persons handled under these sections are treated as psychiatric patients and not criminals (Law Reform Commission of Canada, 1975). Thus, the responsibility of custody and review should be given to the provinces under section of the BNA Act. This issue was put forward in the recent case of Regina v Swain (1986) with respect to section 547(2) of the Code. However, the appeal was denied:

...(T)he legislation in the case at the bar has the two-fold purpose of preventing crime and protecting the public, and therefore, in my opinion, is a valid exercise of the criminal law under s. 91(27)...

(Regina v Swain, 1986:560)

Section 546 of the Code relating to mentally disordered inmates has often been criticized as being redundant and unnecessary. It is considered redundant because similar provisions exist in the provincial and federal correctional legislation (Law Reform Commission of Canada, 1976:27). Section 546 has also come under fire with the accusation that the federal

authorities were using mental hospitals as "warehouses" for troublesome prisoners about to be released on expiration of their sentences (Jobson, 1969:199). However, this is not likely to be so today. Psychiatric facilities available in prisons today have improved to the point where transfers to mental hospitals are no longer necessary because the prisons can provide mental services to meet the needs of the majority of mentally disordered inmates (Phillips, 1987). In addition, the use of the section of the Code has steadily decreased and is used rarely if at all (Quinsey and Boyd, 1977; Wormith, 1983; Webster et al, 1985; Department of Justice, 1985; Phillips, 1986; 1987; Hunley, 1987). As a result it is unnecessary and should be removed for the Code (Law Reform Commission of Canada, 1975; Schiffer, 1977; Department of Justice, 1985; McKague, 1987).

Also, the detention of persons under an L.G.W. found to be N.F.S.T. is contrary to section 11(d) of Canadian Charter of Rights and Freedoms which states that "Any person charged with an offence has the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal." Persons declared to be N.F.S.T. are the most likely to be charged with less serious offenses than other L.G.W. patients, yet their detention often surpasses the maximum sentence for the crime of which they were

accused (Jobson, 1969; Law Reform Commission of Canada, 1973; Quinsey and Boyd, 1977; Hodgins, 1983; Phillips, 1986, 1987).

The law governing the L.G.W. System is not clear and concepts are left poorly defined. For example, There is no explanation of the varying degrees of custody under which a person may be held, under section 542, 543 and 546 of the Criminal Code. What exactly do "strict custody", "safe custody", and "a place of safe keeping" mean? Because there is no clarification of these concepts in the Code, any place that the Lieutenant Governor directs would be acceptable under the law. This is exemplified in the case of Jollimore v the Attorney General of Nova Scotia (1986) (see Appendix C for a copy of the case)<sup>1</sup> in which Justice Hallett states:

There are no limitations as to where the Lieutenant Governor may determine is the proper place for safe custody of a person found to be insane, he may send the detainee to a maximum security penitentiary if that is what is necessary in the opinion of the Lieutenant Governor to ensure his safe custody.

(Jollimore v the Attorney General of Nova Scotia, 1986: 174)

Another problem that concerning the legislation exists with the concept of "recovery". It was decided in the case of Lingley v the New Brunswick Board of Review (1973) that "recovery" means that the person is free from mental illness, deficiency or other psychopathic disorder and is no longer a threat to society or himself. However, "partial recovery" was not defined. Inherent

in the concept of recovery are two fundamental assumptions: (1) that there is an ascertainable phenomenon called "mental illness" and (2) that there is an ascertainable phenomenon known as "mental health" towards which some mentally ill individuals can be helped and which can also be detected once achieved (Lepofsky, 1982:3). "If any of these factual assumptions are disproven, then the goal of rehabilitation loses any rational foundations and must be rejected as fanciful and irrelevant." (Lepofsky, 1982:3). This is crucial because psychiatry has not yet been able to completely cure mental illness. Schizophrenics are most often discharged from hospital as "in remission", not as "cured". Also, the maintenance of a manic depressive patient's mental stability is usually reliant upon taking prescribed medication. Persons with such disorders cannot be guaranteed to be free from further episodes of mental illness and therefore, may not be recommended for release by the A.R.B. In fact, the A.R.B. of Ontario will not recommend the discharge of any patient unless there is some indication that s/he will continue to take the prescribed medication.

Furthermore, the law does not recognize that mental deficiency is not now, and perhaps never will be amenable, to treatment. Individuals found to be N.F.S.T. are most often diagnosed as mentally retarded (Quinsey and Boyd, 1977; Webster,

Phillips and Stermac, 1985; Phillips, 1986). For such cases "recovery", if it occurs at all, occurs within a short period of time (Roesch and Golding, 1979:355). However, there are a great many persons found to be N.F.S.T. who do not recover and will remain in custody for an indefinite period of time (Jobson, 1969; Parker, 1975; Law Reform Commission of Canada, 1973; Griffiths et al, 1980; Phillips, 1987). Thus, the present legislation cannot guarantee that such persons will be returned for trial. What is more, often when individuals are declared to be unfit for trial and detained over a long period of time, often the necessary evidence to justify a trial no longer exists (Law Reform Commission, 1973; Parker, 1975; Schiffer, 1978; Department of Justice, 1985).

The issue of recovery is further complicated by the fact that the A.R.B. does not have jurisdiction over a patient once declared to be "recovered". Under section 547(5)(f) of the Code, the A.R.B. may make recommendations "in the interest of recovery" but only with regard to those persons who have not recovered. Once the Board has found a person to be recovered, it may recommend the patient be discharged with specific conditions, but it must recommend release. It has been stated that the desirability of maintaining jurisdiction over an L.G.W. patient may make the Board reluctant to find that an individual has

recovered. As a result, detention is continued for many patients even though there is a consensus of medical opinion that their cases may not warrant it (Phillips, 1986:89).

The phrase "in the public interest" has also been the subject of criticism. The importance of the inclusion of this concept is exhibited in the implicit assumption made in the law that L.G.W. patients pose a danger to the community. It is for the safety of the public that such persons be confined to a place where they cannot harm members of the community and be kept there until they no longer threaten the safety of the public (Regina v Swain, 1986). Despite such clarifications, "in the public interest" is ill defined in the Code.

The expression 'achieving the public interest' is ostensibly meaningless...(I)t is a legal term which is used when a legislature cannot decide what it wants to do. Anyone can advance their interests by framing them as serving the public interest...The inclusion of 'in the public interest' is not only unhelpful, it is completely inconsistent with the desire to have a federal commitment system devised with clear, articulated Objectives.

(Lepofsky, 1982:12-13)

It has been argued that the indefinite detention of mentally ill offenders under an L.G.W. is in the public interest because it keeps dangerous, i.e. potentially violent, individuals away from the public. On the other hand, it could be argued that the public interest is being served by incarcerating as infrequently as possible because it costs the tax payer less and does not

infringe upon the civil liberties of L.G.W. patients (Lepofsky, 1982:13). It has also been stated that confinement of L.G.W. patients is in "their own best interest". This too can be broadly interpreted. Thus, any length of confinement is doubly justified: for the protection of the community and the patient. As a result some L.G.W. patients have spent many years in custody (Jobson, 1969; Parker, 1975; Schiffer, 1978; Department of Justice, 1985; McKague, 1987; Phillips, 1987).

The question whether the L.G.W. is a punishment or a treatment has long been debated. Because the L.G.W. is ordered under the Criminal Code, it has been considered to be a criminal sentence and hence a punishment. Release of L.G.W. patients is predicated on the occurrence of the patient's recovery, but most importantly, it must not be "contrary to the interests of the public". This is contradictory to the usual criminal sentence which is for a fixed period of time. On the other hand, the L.G.W. has also been deemed to be treatment. Certainly, from a psychiatrist's viewpoint and perhaps even that of the Court's, treatment is intrinsically good because it attempts to cure the patient of sickness (mental or physical) and for all intensive purposes, may continue indefinitely. From the point of view of the patient confined to a maximum security ward of a psychiatric hospital, the distinction between these different aims of

confinement may not matter because the experience is the same (Law Reform Commission of Canada, 1976:37; Brannigan, 1984:35).

The view of the L.G.W. as a treatment appears to conflict with the way it is considered in section 546 of the Criminal Code. Confinement of an M.D.I. under this section is equated with a prison sentence in that the inmate's "time" is still running while s/he is under an L.G.W. When the patient is finally discharged from hospital, s/he must be discharged "if he is not liable to further custody in prison". Such "punitive treatment" of mentally disordered individuals has been criticized because it denies L.G.W. patients equal treatment under the law, contrary to section 15(1) of the Charter of Rights and Freedoms (Lepofsky, 1982:9).

Despite the treatment function of the L.G.W. put forth in the case law, there is nothing in the Code to stipulate that the patient will receive treatment for his or her mental illness. In fact, in order to receive treatment, L.G.W. patients in Ontario are committed civilly in addition to being placed on an L.G.W. (McKague, 1987; Phillips, 1987). Without a civil commitment order treatment cannot legally be provided to the patient (Dier, 1987; McKague, 1987; Phillips, 1987).

The advances that have occurred in the field of psychiatry have led to the emergence of two parallel rights in the United

States: (1) the right of prison inmates and involuntary patients to receive the appropriate treatment and (2) the right of such persons not to have certain forms of treatment forced upon them. These rights have been won through litigation in some states and statutorily enacted in others (Schiffer, 1977:269-271). The fact that these rights are provided for and protected in the United States has been the impetus for calls for similar rights in Canada (Schiffer, 1977; Griffiths et al, 1980; McKague, 1987). Despite these demands, the "right to treatment" and the "right to refuse treatment" have not received the same support by the courts and legislatures in Canada. The right of a mental patient to refuse treatment raises the general policy question of the focus law relating to the L.G.W.: Is the patient being treated for his/her own sake, for the sake of society or both? Even though the Code states that the goal of confinement of mentally disordered offenders is both, the courts have decided that the "interests of the public" are paramount. Because the emphasis is on the protection of the community, the treatment provided for L.G.W. patients will definitely be affected. A prime example is that of the budgetary decisions made by psychiatric institutions and the provincial ministries of health. If a facility has treatment as its first priority, then it will devote more money for medical treatment, social workers, vocational training and

the like. However, since the primary goal is public protection, the hospital will devote more time and effort to effect security (Lepofsky, 1982:13).

Because punishment plays a pervasive part in the hidden agenda of the current L.G.W. System, it would be appropriate not only to reject it as a purpose of a... federal commitment system, but do explicitly. The temptation to turn a medical hospital into a prison can be great because of obvious penal trappings including security guards, locked doors and the like...

(Lepofsky, 1982:10-11)

Notwithstanding the unpleasantness of confinement, some still argue that the L.G.W. is not, in reality, an indeterminate sentence, and that it is not even a sentence. Patients are released conditionally or absolutely despite the lack of a predetermined period of confinement (Haines, 1976, 1981, 1984) and the various studies conducted in this area illustrate this point (Jobson, 1969; Quinsey and Boyd, 1977; Quinsey, 1981; St. Croix et al, 1985; Hodgins et al, 1986; Phillips, 1986, 1987).

Detention of L.G.W. patients is made more complex by the fact that once a person is placed on an L.G.W., there is no appeal against the indeterminate incarceration and Canada's courts have generally demonstrated their unwillingness to challenge the authority of the Lieutenant Governor (Griffiths et al, 1985:325). Section 10(c) of the Charter of Rights and Freedoms states that "Everyone has the right upon arrest or detention to have the validity of their detention determined by

was of habeas corpus and to be released if the detention is unlawful". Under a writ of habeas corpus, it would have to be proved that the patient is insane or in need of treatment in order to remain in custody. However, habeas corpus is of no avail for L.G.W. patients (Dier, 1987). In the case of Ex Parte Kleinys (1965), the accused was found to be N.F.S.T. and directed by the Lieutenant Governor to be confined in a mental hospital. He appealed the warrant under habeas corpus, but the Supreme Court of British Columbia decided he was serving a valid indeterminate sentence. Producing the warrant signed by the Lieutenant Governor was, and still is, an accepted response to such a writ (Dier, 1987; McKague, 1987; Phillips, 1987).

Mandamus may be used to compel the execution of a legal duty owed to the appellant. However, this writ does not have the power to force the Lieutenant Governor to exercise his official in any particular manner (Schiffer, 1977:294).

In spite of these difficulties, an L.G.W. was successfully appealed by Jollimore in 1986. The warrant was quashed on the grounds of the unfairness of the procedure that the Lieutenant Governor followed in making his decision. In this case, the Lieutenant Governor issued a new warrant (on the advice of the Attorney General) before the A.R.B. had made its recommendations. The court stated that it was the duty of the Lieutenant Governor

to receive and consider the recommendations of the Board. If he rejects the recommendations, he must advise the patient of his reasons and provide the patient with the opportunity to make representations to the Lieutenant Governor on the issue of the patient's custody and rehabilitation (Jollimore v the Attorney General of Nova Scotia, 1986). Despite the success of the Jollimore appeal, the original warrant was still considered to valid and the patient remained in custody. The essential power of the Lieutenant Governor to write a warrant was not questioned.

The Jollimore case raises some important issues. First, even though the Lieutenant Governor must consider the recommendations of the Board, s/he is not obliged to follow them. Secondly, the criteria upon which s/he makes the decision are not set out in the Code and may vary from case to case, province to province and year to year. This has been criticized as being contrary to section 9 and 15(1) of the Charter of Rights and Freedoms.<sup>3</sup> Section 9 states that everyone has the right not to arbitrarily detained or imprisoned. Section 15(1) states that "Every individual is equal before the law and under law, has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on ...mental or physical disability." (Canadian Charter of Rights and Freedoms, 1987:s.15(1)).

An appeal was made under these two sections in Regina v Swain (1986). With regards to section 9 of the Charter, it was argued that "section 542(2) of the Code authorizes the arbitrary detention of an insanity acquittee because the detention is automatic and potentially unnecessary for the treatment of the acquittee or the protection of the public." (Regina v Swain, 1986:558). Justice Thorson did not agree and stated that the section was not arbitrary in that:

Some period of time is required before an assessment can be made by the authorities of the acquittee's dangerousness and therapeutic needs...Furthermore, the finding of not guilty by reason of insanity raises what I accept to be a reasonable concern that the accused may remain a danger to the public and in need of further treatment. Under the statute, it is only after such a finding that the state acquires the right to deprive him of his liberty in order that these matters may be properly assessed under conditions that ensure the protection of the public...

(Regina v Swain, 1986:558)

With regard to section 15(1), it was argued that (1) it creates a classification that differentiates insanity acquittees and all other acquittees, in that only those found N.G.R.I. are deprived of their liberty, (2) It exposes insanity acquittees to a system characterized by great disparity in treatment between the provinces, (3) It also exposes L.G.W. patients to harsher treatment than all other persons suffering from the same mental disorders (Regina v Swain, 1986:559). Not surprisingly, Justice Thorson stated that the circumstances faced by an L.G.W. patient

under section 542(2) of the Code and other acquittees or other insane persons were not similar. His reason was that the individual had been found guilty of the crime with which he was charged and at the time of the offence, he was insane. This raises the question of the insanity acquittee's dangerousness to society. He is not only dangerous because he is insane but also because he has committed a crime while he was insane. This makes him more dangerous than other acquittees and other insane persons (Regina v Swain, 1986:559).

What is more, these and other rights supposedly guaranteed by the Charter, are subject to the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under section 1 of the Charter. Even if the appeal of an L.G.W. under the Charter were to be valid, it would most likely be disallowed because confinement under an L.G.W. "constitutes a reasonable limit on the relevant rights guaranteed by the Charter" (Regina v Swain, 1986:560). As in other cases, such denial of civil rights is based on the assumed dangerousness of L.G.W. patients, and the belief that incarceration under an L.G.W. is in the best interests of the patient. It is not surprising that, as a result of these assumptions, the majority of the avenues for appeal have been blocked. In addition to this, decisions made by the Provincial Supreme Courts are not

necessarily binding for the Lieutenant Governor because the L.G.W. System is a federal commitment system. Nonetheless, such decisions are often used as a guide for the operation of the L.G.W. System (Dier, 1987; McKague, 1987).

A third issue that arises out of the Jollimore case is the that of "political interference" in the decision making process of the L.G.W. System. The provincial Cabinet or the Attorney General actually make the decisions in some provinces. Though most often they follow the recommendations of the Board, they can, and sometimes do, disregard the Board's recommendations for "political reasons" that have nothing to do with the medical justification for not discharging an L.G.W. patient (Law Reform Commission of Canada, 1976; Greenland, 1978; Boyd, 1980; Petrunik, 1982). No politician, mindful of his career, would recommend that an insane person convicted of brutal crimes be released into an unprotected community. This "politicization" of the decision making process is exemplified by the statement made by the Honourable Norman Levy (former Minister of Human Resources in British Columbia) when he admitted that he and other Cabinet members were reluctant to release mental patients considered cured by psychiatrists: "There certainly were politics involved in the decision...If something happens, it all falls on the Government. The public believes that if you commit a mad act,

you are always mad." (Gray, 1977:F11). Also, Justice Jack Maher (Chairman of the Saskatchewan Patient Review Board) stated that he almost resigned in 1975 because of political interference in the release procedures for the mentally ill (quoted by Greenland, 1978:213).

One of the safeguards put into place to ensure that the civil rights of L.G.W. patients are not abused is the Advisory Review Board. The provisions governing the at the federal and provincial levels do not ensure that the A.R.B. is appointed by the Lieutenant Governor. Even when an A.R.B. is appointed, there is no legislative requirement that the Board follow certain procedures in conducting its hearings. As a result, the A.R.B.'s across Canada differ in the resources available, the criteria they employ for release recommendations, the procedures followed, and the rights they allow the patients during review. In some ways, there are more differences than similarities between the various provincial A.R.B.'s (Law Reform Commission of Canada, 1976). This also has been depicted as being contrary to section 15(1) of the Charter (Law Reform Commission of Canada, 1975, 1976; Lepofsky, 1982; Whitley, 1984; McKague, 1987; Phillips, 1986, 1987).

As mentioned earlier, the Lieutenant Governor does not have to follow the recommendations of the Board. Similarly, the A.R.B.

does not have to act on the recommendations and reports submitted by the hospital. This opens the System to even more "political interference" in that the Board may arrive at a recommendation against releasing an L.G.W. patient based on public pressure to keep the criminally insane locked up.

Another key issue relating to the A.R.B. is the disparity between the information available to the patient and the information available to the Review Board. The patient does not have access to hospital records and the Chairman of the Board has the right to withhold information from the patient and his counsel (Haines, 1984:8-9). The information provided for the Board and the opinions of the Board psychiatrists are not known by the patient nor are they tested by cross-examination. Thus the Board may make its decision based on evidence the patient is not even aware of. According to Phillips (1986), there are four major concerns surrounding the disclosure of information to patients: First, where the hospital files contain details that, if disclosed, would impair the patient's treatment or place his doctor or therapist at risk "the conveying of some information could well result in violence" (Phillips, 1986:90). Second, the information may be of such a nature that if disclosed, it would be misinterpreted or misunderstood. Third, if information is provided in confidence on the condition that it not be conveyed

to the patient or anyone on his behalf, the disclosure of such information might identify the informant or feed the patient's paranoia. Fourth, giving a mentally ill patient access to his clinical records might, in some cases, be "courting disaster" for those who contributed to the file. Generally speaking, mental illness impairs an individual's ability to appreciate that he is mentally ill. He may believe that it is others who are insane and are wrongfully confining him (Phillips, 1986:90-91). Therefore, the release of information to the patient or his counsel is not as black and white as some critics of the L.G.W. System would have us believe.

Nonetheless, the belief that the patient or his counsel should be allowed to refute damaging reports or opinions and expert testimony is being used to justify the making of evaluations and reports more readily available to the representatives of L.G.W. patients. However, this information is often provided the day before or the morning of the hearing, hardly enough time for the patient's lawyer to examine the report and present a solid case to the Board (McKague, 1987).

In Ontario, a psychiatric consulting program exists for the patients being reviewed by the A.R.B. A psychiatrist (who is not a member of the Board) takes on the role of consultant with the patient's permission. The presence of a consultant does not stop

the patient or his counsel from appointing their own psychiatrist (Phillips, 1986, 1987).

Often the A.R.B. is not willing to relinquish its authority over an L.G.W. patient by finding him to be "recovered". The Board may not be selfishly concerned with the preservation of its power over mentally ill offenders, but rather genuinely concerned about the safety of the public from such "dangerous persons". Regardless of the decision making power of the Board "...it would seem quite natural to expect the persons with longer criminal histories and diagnoses other than schizophrenia, would remain on 'full' restricted warrants for long periods." (Phillips et al, 1985:383).

As previously recognized, confinement under an L.G.W. is mostly predicated on the "dangerousness" of the individual and the threat s/he poses to the community. How can we be sure that such persons are dangerous?

Most layman know that what a man has done repeatedly in the past, he is apt to do in the future; and every psychiatrist has a healthy respect for his patient's psychiatric history for violence. While psychiatrists will tell you that their most difficult task is to predict whether an individual is dangerous, they can say that certain psychiatric disorders are more prone to violence than others.

(Haines, 1976:379)

Petrunik (1984) discusses three major notions of dangerousness, the first being an association of mentally ill or

retarded persons with bizarre, irrational or unpredictable behaviour that may result in the harm of themselves or others. This notion of dangerousness is central to the mandate of the state to commit individuals civilly against their expressed will. Another popular conception of dangerousness Petrunik notes relates to a state of being in which a person presents a high risk of engaging in any criminal or anti-social behaviour. Finally, he states that there is a notion of dangerousness that refers to individuals who pose a threat to the community because of their alleged propensity for violent or "non-consensual sexual offenses". Often this tendency is associated with some form of mental illness (Petrunik, 1984:2-3). It is this third notion that is most commonly assigned to L.G.W. patients. Thus, mentally ill offenders are feared as both crazed and criminal. The danger need not be the possible occurrence of an act of violence. It is enough if there is compelling evidence that the patient may commit any criminal act because any such act will injure others (Rubin, 1965:50). Research conducted in this area, however, is not conclusive. Some studies have found that mentally ill offenders are a serious threat to public safety, while others have found that they are no more dangerous than the general population.<sup>2</sup>

The debate over the dangerousness of L.G.W. patients is

further compounded by the growing skepticism with respect to the accuracy and validity of the prediction of violent behaviour.

Hence, there have been many conflicting opinions concerning the usefulness of predicting violence through the assessment of the dangerousness of individuals.<sup>3</sup>

Despite the importance of the concept of dangerousness and contrary to scholarly and public expectations, there is no empirical research currently underway... that could increase the accuracy of both the statistical and clinical predictions or analyzing the implications that are not accurate.

(Steadman, 1983:399)

Furthermore, there is the problem of false positives (assessing the individual as dangerous and predicting acts of violence which do not occur) and false negatives (assessing a person as not dangerous who subsequently commits violent crimes). Both of these problems have serious implications. In the first case, the individual is subjected to unwarranted confinement and loss of civil rights. This person's predicament is worsened by the indeterminate nature of detention under an L.G.W. and the fact that the warrant is not amenable to appeal. In instances where the psychiatrists make false negative predictions, members of the community are subject to serious harm. A choice has to be made on the part of psychiatrists when evaluating the dangerousness of patients between erring in the favour of the patient or in favour of the protection of the community.

Psychiatrists do not make this decision without some influence from the media and political factors. Contrary to most research reports and their concern with false positive levels, most media reports focus, often dramatically, on the problem of false negatives. In addition to this, the social perception of the deaths of thousands in a foreign nation tends to have less of an impact us than a highly publicized sex murder of a child in our community. There are also certain widespread beliefs held by the public and the media that relationships exists between violence and mental disorder (Petrunik, 1982:245, 235-247). This is where the old adage "better safe than sorry" comes into play.

Psychiatrists tend to over predict violence in order to avoid being known as the doctor who let a "psycho" go free and commit some inhuman crime against an innocent victim (Phillips, 1987).

In addition to all the aforementioned issues, concern has been expressed with respect to the detention of juveniles under an L.G.W. It is said to contradict one of the basic tenets of the Young Offender's Act in that no disposition given to a young offender be open-ended and allow the youth to be held in custody for indeterminate periods (Solicitor General of Canada, 1986:11).

The treatment and disposition of the mentally disordered in the criminal justice system are vital issues because of the

growing number of L.G.W. patients and the feeling of cumulative prejudice against the mentally ill in Canada (Del Buono, 1976: 302). The complications encountered in the termination of an L.G.W. demonstrate that the detention of a patient under an L.G.W. may be indefinite. What makes matters worse is that the courts refuse to challenge the authority of the Lieutenant Governor nor do they recognize the political nature of the decision making process of the L.G.W. System. The mentally disordered have been put at a disadvantage by the media, the politicians and the public because of an assumed (i.e. unproven) dangerousness.

Unfortunately, our society has difficulty accepting the existence of violent behaviour without attributing it to mental derangement in the individual perpetrating the act; the fact that such violent behaviour may be precipitated by external social factors such as poverty and over-population does not readily enter our minds.  
(Raetzen, 1977:13)

Many critics of the L.G.W. System believe that with the enactment of the Charter of Rights and Freedoms, it is only a matter of time until the L.G.W. System is declared to be unconstitutional (McKague, 1987). If this occurs, what does the future hold for mentally ill persons who come into contact with our criminal justice system? Can we be sure that the political interference that has plagued the L.G.W. will not alter the reform of this system? The only way to address these concerns is

through a deeper understanding of the L.G.W. System. This can be achieved by delving into its past and constructing the growth of the L.G.W. System as it exists today: what the circumstances were surrounding its creation and the possible reasons for the lack of change. Not only will this enable us to make more accurate statements about the future of the L.G.W. but it will also enable would-be reformers to modify their recommendations in order to deal with the fundamental problems that have been consistently left unaddressed throughout the history of the L.G.W. System.

NOTES FOR CHAPTER III

1. All page numbers cited concerning this case relate to the appended pages of this thesis.

2. Over the past twenty years, countless studies have been conducted that attempt to measure and predict the dangerousness of mentally ill offenders, many of which contain conflicting results. For example, Quinsey et al (1975) found that there was only one variable that really differentiated between patients who were violent upon release and those who were not: Violent patients were more likely to be persons who were violent before they entered the institution. Hodgins (1983:409) found that young male patients with a prior history of non-violent criminal activity were most likely to recidivate by committing a non-violent crime. However, Quinsey and Boyd (1977) challenged the traditional the traditional belief of the L.G.W. patient as dangerousness "... (I)t appears that, as a group, the L.G.W. patients are either less dangerous than other patients in security hospitals or are about as dangerous as other patients, but are certainly not more dangerous." (Quinsey and Boyd, 1977: 274).

3. More and more researchers seem to be discovering the unreliability of predicting dangerous behaviour (Szaz, 1963; Greenland, 1972, 1978; Law Reform Commission of Canada, 1975; Ericson, 1976; Mechanic, 1978; Ewaschuk, 1978; Boyd, 1980; Monahan, 1981; Conrad et al, 1982).

When research on judgement of dangerousness has been conducted the results have been quite consistent...The predictive accuracy rarely exceeded the base rate of behaviours predicted...i.e. 40% of the total group from whom predictions were made exhibited the criterion behaviours. Thus, the clinical prediction of attaining 40% accuracy would have been attainable strictly by chance alone.

(Steadman, 1983:385)

CHAPTER IVTHE HISTORY OF THE L.G.W SYSTEMIN CANADA: 1841-1988

This chapter presents the findings of my investigation into the history of the L.G.W. in Canada. It has been divided into three time periods: 1841-1899, 1900-1949, and 1950-1988. The first section presents a description of the system of dealing with the "criminally insane" in the Province of Canada, and then the Dominion of Canada, the relevant legislation that was passed and the prevalent concepts concerning L.G.W. patients from 1841-1899. The second section focuses on the interpretations of these laws and the nature of the L.G.W. System as expressed by various court cases, as well as any major developments that took place from 1900-1949. The final section follows any changes in the legislation with respect to the L.G.W., major court cases that took place, and concentrates on the explosion of calls for reform to the L.G.W. System from 1950-1988.

The research was conducted using an idiographic model of

historical research. The purpose of the research was to document the development of the L.G.W. System and put forth possible relationships that would most probably explain why certain changes did or did not occur. This investigation relied upon a number of primary, secondary and tertiary sources: ; the Criminal Code, the House of Commons Debates, Committee minutes, Government Reports, Newspaper articles, documentation in the literature, and interviews where possible.

Even though this thesis does not and cannot fully explain the specific changes that have occurred within the L.G.W. System, it does describe the legislative revisions and changes in the System, some of which previously were not documented.

In Canada, the legislation governing the "criminally insane" has remained almost completely unchanged for over one hundred years. Our justice system today with its laws, procedures, and philosophies has its roots in English Common law. Such is the case with the Lieutenant Governor's Warrant System.

There are references to legal procedures and philosophies similar to those of the L.G.W. System dating as far back as the thirteenth century in England. The case of Richard Cheddestan in 1270 is a prime example. He was found not guilty by reason of insanity and held in prison for six years. King Edward I ordered a group of his officials to examine him and to report his

condition:

The same Richard is well enough; but it cannot be safely said that he is so restored to soundness of mind that there would be no danger in setting him free.

(as quoted in Greenland, 1982: 2)

Greenland (1982) suggests that with some minor modifications, the equivalent of this statement might well be a part of a report by a Board of Review to the Lieutenant Governor or a province. It certainly illustrates the concern over the potential harm that a "criminally insane" person, if released, may cause; this concern is still emphasized in recommendations of A.R.B.'s today.

Another tradition that we have inherited from England is the obligation of the Crown (or the state) to act as parens patriae to those persons who cannot take care of themselves (i.e. children and the mentally ill). Because of the legal and mental disability of the insane, they are in need of special care for their protection, and therefore any detention of insane persons is for their benefit (Phillips, 1986: 13). This philosophy has been reiterated throughout the centuries in English case law (Swadron, 1962).

The Criminal Lunatics Act of 1800 had a more direct influence on the development of the L.G.W. System in Canada (in that it was the basis for the construction of the statutory provisions dealing with the criminally insane in the Province of

Canada. The Criminal Lunatics Act was the direct result of the Hadfield case in 1800. James Hadfield was charged with treason for an attempt on the life of King George III. The judges found him not guilty by reason of insanity but did not know what to do with him. Ordinary lunatics were usually sent to Bethlehem Hospital; however, the security there was lacking and there was no legal justification for holding him in jail because he had been acquitted. As a result of this case the Criminal Lunatics Act of 1800 was passed within a month after the Hadfield case. Those who were found not fit to stand trial or not guilty by reason of insanity could be ordered to be detained in close custody until the pleasure of His Majesty was known. This Act gave those defined as criminal lunatics a special status for the first time and their detention was authorized for life if necessary (Swadron 1962: 202).

The Criminal Lunatics Act combined the tradition of the sovereign acting as parens patriae to persons of unsound mind with the fear of the dangerousness of the criminally insane. This fear is exemplified in the preamble to the Act:

Whereas persons charged with High Treason, Murder or Felony may have been or may be of unsound mind at the time of committing the offence...and by reason of such insanity may have been or may be found not guilty of such offence and it may be dangerous to permit persons so acquitted to go at large...

(Criminal Lunatics Act, 1800 preamble).

In addition to this, the system of dealing with the criminally insane that developed during the nineteenth century was closely related to the development of the asylum. It was the development of this institution that would dramatically affect attitudes toward the criminally insane and ultimately the treatment they received. Confinement of lunatics underwent some major changes from 1830 to 1875. From the date of Upper Canada's inception in 1791, until about the 1830's, the plight of the mentally ill was not given much consideration (Smandych and Verdun-Jones, 1986: 171). During this time insane persons were considered to be "dangerous" and were confined to jails along with criminals and debtors (Verdun-Jones, 1981).<sup>1</sup> The confinement of lunatics in the Common Gaol was generally regarded as unsatisfactory, and continuous efforts were made to establish a Provincial Asylum (Splane, 1965). "The protests of district sheriffs, condemning existing institutional facilities and demanding the creation of a provincial 'lunatic' asylum, were echoed in numerous petitions and reports submitted to the provincial government throughout the 1830's" (Smandych and Verdun-Jones, 1986:171). These views are exemplified in the statement made in John Connolly's book, Indications of Insanity in 1830:

[T]he present regulations for the protection of the insane are at once insufficient for the protection of

the insane themselves, and dangerous to the public; that it results from them, that some are improperly confined, and others improperly at large; whilst the eccentric are endangered, those that are actually mad are often allowed a dangerous liberty; in that the public are dissatisfied, and medical men harassed and perplexed.

(As quoted in Greenland, 1978: 211)

In 1831, a Select Committee was appointed to investigate the best method for establishing a Lunatic Asylum in Upper Canada. The Report on Asylums in 1836, produced by Dr. Charles Duncombe, argued that a Provincial Lunatic Asylum would serve as a curative institution and would also be more economical for the community. Furthermore, Duncombe, as well as the majority of the advocates of the insane asylum, was of the opinion that once lunatics had recovered, they would become productive members of society (Smandych and Verdun-Jones, 1986: 172). It was this reform movement that resulted in the eventual establishment of the first temporary asylum in Toronto in 1841 (Smandych and Verdun-Jones, 1986: 171).

#### Part A: 1841 to 1899

With the Act of Union in 1841, Upper and Lower Canada were joined to form the Province of Canada. This new province stretched from Gaspé to Lake Superior. The policies of Upper and Lower Canada would now be decided by the new provincial legislature (Careless, 1967). During the nineteenth century

Lower Canada was the only province that did not establish a public asylum system. Instead, it implemented a "contract system" with private and religious organizations (Verdun-Jones and Smandych, 1981: 94).

The pressure from improved facilities continued through the 1840's. It was not until the early 1850's that a specially designed building for the criminally insane was in operation (Splane, 1965: 33). In 1843, the McNaughten case in England created a new class that bridged the criminal and the insane. The "McNaughten Rules" established procedures and criteria for determining the sanity of a person accused of a crime. The decision by the judges of the case "to recognize the expertise of medical practitioners and their right to participate as witnesses in criminal trial is highly significant." (Verdun-Jones, 1979: 7). It gave the emerging discipline of psychiatry a key role in the criminal trial process. Psychiatry was viewed as a "science", able to detect symptoms of madness that eluded the untrained, and to assess the dangerousness of the insane (Foucault, 1978; Verdun-Jones, 1979). It was not until the early 1850's that practical effects of the McNaughten case could be seen when legislation dealing with criminal lunatics was established (Solicitor General of Canada, 1973; Verdun-Jones, 1979; Verdun-Jones and Smandych, 1981; Wormith and Borzeki, 1985).

The calls for penal reform in the Province of Canada culminated in the Brown Commission Report in 1849. The Report was also influenced by the reform movement that developed in the United States and Europe. In fact the Commissioners who wrote the 1848-49 Royal Commission Report stated that they had "earnestly turned to reform systems in other countries with a view of culling the best portions of each and adopting them to the conditions and requirements of our own land" (as quoted in Bellomo, 1972: 21). The Brown Commission endorsed a philosophy of treatment and separation, a philosophy that would soon be applied with great zeal to criminal lunatics in Canada:

The example of a man being hanged could not touch this diseased population: indeed it could only brutalize them further. What was required - as with any infectious disease - was the isolation and treatment of the patient.

(Beattie, 1977: 34-35).

In 1851 the Province of Canada passed An Act to authorize the confinement of Lunatics in cases where their being at large may be dangerous to the public (Confinement of Dangerous Lunatics Act 1851). This Act was a virtual carbon copy of the English Statute of 1800 in its provisions concerning those found N.G.R.I., N.F.S.T. and those who were to be discharged from custody for want of prosecution but found to be insane (W.P.I.) (Verdun-Jones and Smandych, 1981: 89) and reflects similar fears of the insane.

The Act focused on the protection of the community from dangerous lunatics, as evidenced by the title of the Statute, and created four categories of criminal lunatics: those found to be N.G.R.I., those found to be N.F.S.T., those found to be M.D.I. and those persons found to be "dangerous".

For those found N.G.R.I., charged with any offence, section 1 of the Act states that the Court before whom the trial was held must order that the individual be kept in strict custody in such a place and manner as to the Court seem fit, "until Her Majesty's pleasure be known." Thus, it appears that all lunatics who came into contact with the law were considered a threat to the public safety. It also provided that the Governor of the Province may act on behalf of the Queen during Her Majesty's absence. This was provided for in all the sections of the Statute except section 5.

In the case of those found N.F.S.T. under section 2, the Statute also included these persons indicted for any offence. The individual was also to be held in strict custody in the place and manner in which the Court directed, until Her Majesty's pleasure was known. The same provision was made in section 2 for those persons brought before the court to be discharged for want of prosecution but judged to be insane (W.P.I.). With minor modifications these sections exist in the Criminal Code today.

For persons found to be M.D.I. the procedure was quite different. In section 4 an individual could be held under any type of confinement other than that of the Civil process and be considered under this section. However, it was not up to the Queen or the Governor to decide the sanity of the inmate:

...if it shall be certified by such Justice and Physicians or Surgeons that such person is insane, it shall be lawful for the Governor of this Province...to direct by Warrant...that such person be removed to such public Lunatic Asylum or other receptacle for insane persons as he may judge proper...until it shall be duly certified to the Governor... by two Physicians or Surgeons that such person has become of sound mind  
(Confinement of Dangerous Lunatics Act, 1851: section 4).

If the person were to be certified as being of sound mind and his sentence had not expired, then under section 4, the Governor of Canada could order him back to the place from which he was taken. In the instance that the individual was not liable to further imprisonment he would be discharged.

Section 5 provided for the confinement of "dangerous lunatics". Here, two or more Justices of the Peace could order that "...persons who, by lunacy or otherwise, are furiously mad, or so disordered in their senses as to endanger their own persons or property, or the person or property of others, if permitted to be at large...(be) kept safely locked up in some secure place..." This was by far the largest group that was created by the legislation. After Confederation, this category was no longer

considered to fall within the realm of the "criminally insane" and it was subsumed by the civil commitment process established by the legislation of the provinces (Verdun-Jones and Smandych, 1981: 98).<sup>2</sup>

The Prison Inspection Act was passed in the same year and constituted what amounts to the first Review Board of Canada's L.G.W. System.<sup>3</sup> The Inspectors were to report on the "state of the Institution and the patients therein, and the times of their admission or discharge." (Canada, 1851: 1). However, because of the contract system instituted in Lower Canada, asylums in Québec only fell partially within the jurisdiction of the Board of Inspectors (Verdun-Jones and Smandych, 1981: 95). The Reports of the Inspectors discussed only the peculiar cases that occurred in any detail. The amount of information and emphasis on treatment of criminal lunatics varied with the different authors of the Reports during the nineteenth century. Nonetheless, these Reports as a whole provide an excellent description of the operation of the L.G.W. System.

During this time it was still standard practice to confine lunatics in the local gaols and then transfer them to the nearest asylum when space became available. In 1852, a Criminal Lunatic Asylum was established for the specific purpose of housing lunatic convicts separate from the general inmate population

(Wormith and Borzeki, 1985: 7). It was not until 1859 that mentally ill prisoners in the penitentiaries were sent to the asylum in Toronto (Splane, 1965: 148).

A Nova Scotia case in 1854 suggests that even though similar legislation did not exist in the Maritimes, similar procedures and concepts were followed. A prisoner was tried for murder and found N.G.R.I. but there was no Statute in Nova Scotia that dealt with this area. The Chief Justice found that the Crown had an inherent prerogative as parens patriae and the right to keep in custody all insane persons for the purpose of protecting the public. Thus, the prisoner was to remain lawfully in the custody of the government (Swadron, 1962: 203-204).

As a result of the Prison Inspection Act of 1857, a medical superintendent of the criminally insane was appointed and an Act to provide for all insane inmates in the penitentiary seemed imminent (Splane, 1965: 148). The Rockwood Estate was purchased by the government in 1858 in order to establish such an asylum. The practice of sending mentally ill offenders to the Toronto Asylum was discontinued in 1859.

The Rockwood Asylum is intended for the reception of convicts who may have become insane during their confinement in the Penitentiary, and of that class of lunatics whom medical men call 'dangerous' but whom by a contradiction of terms, the law designates 'Criminal Lunatics'.

(Canada, 1859: 19)


The legislation that provided for the creation of Rockwood Criminal Lunatic Asylum was passed in 1857 and was entitled An Act for establishing Prisons for Young Offenders - for the better government of Public Asylums, Hospitals and Prisons, and for the better construction of Common Gaols (Criminal Lunatic Asylum Act 1857). Under section 30 of the Act, the Asylum could be used as a Lunatic Asylum or a place of safe keeping for those persons kept in custody under the Confinement of Dangerous Lunatics Act 1851. Section 28 of the Act stated that the Criminal Lunatic Asylum to be established would be within the limits of the City or Township of Kingston. Section 29 provided for the admission of insane convicts from the Penitentiary. Here, the power to transfer an M.D.I. to this Asylum was not vested in the Governor. An inmate had to have been certified as insane by the Surgeon of the Provincial Penitentiary and the Medical Superintendent of the Criminal Lunatic Asylum before s/he could be transferred. Only then could the Warden of the Provincial Penitentiary authorize the transfer of the M.D.I. This obviously conflicts with the procedure set forth under section 4 of the Confinement of Dangerous Lunatics Act 1851. However, it is not certain who exercised authority over insane convicts from the Penitentiary. Despite this confusion, the authority of the Governor of the Province in releasing an insane convict was recognized in the

final sentence of section 29:

...if the term of imprisonment of any convict shall expire while he is detained in the said Asylum, he may, nevertheless, be detained therein until discharged sane, or delivered to his friends under a warrant of the Governor to that effect.

(Criminal Lunatic Asylum Act 1857: section 29)

The enactment of such legislation presents some interesting points for consideration. First, insane convicts would seem to have been considered to be more dangerous than those found to be N.F.S.T. or N.G.R.I., thus warranting separate confinement and treatment.<sup>4</sup> Also, there appeared to be a difference in the level of dangerousness between insane prison inmates and insane penitentiary inmates. This was implied through the specific stipulation that the Criminal Lunatic Asylum was to be used primarily for the safe keeping and treatment of insane convicts from Kingston Penitentiary. These views were the basis for continued calls for separate wards for criminal lunatics in the Reports of the Inspectors of the Asylums, Prisons, &c. during the eighteenth century.<sup>5</sup> Second, this statute represents a shift in the authority over mentally ill inmates. The Warden of the Penitentiary, instead of the Governor of the Province, was given the power to transfer insane convicts to a mental hospital. This shift in authority was made complete after Confederation when the responsibility for Penitentiaries was placed in the hands of the federal government.<sup>6</sup> The transfer of responsibility for insane



penitentiary inmates to the Warden is a particular point of interest. It constitutes a break with the traditional obligation of parens patriae of the Crown with respect to criminal lunatics.

On January 16, 1857, a letter to the editor of the Globe, signed by James Magar, was published describing many atrocities that supposedly occurred at the Provincial Lunatic Asylum in Toronto. In his letter, Magar (1) charged the Steward of the Asylum with "...seducing and having illicit communication with a patient...", (2) accused the Asylum of allowing the bodies of dead patients to be dissected and their brains removed for the use of doctors not connected with the Asylum and (3) stated that a pregnant patient, confined under a warrant of the Governor, was put in a strait jacket when she went into labour. The day after the letter was published, James Magar was fired by Dr. J. Workman, Medical Superintendent of the Provincial Lunatic Asylum (Canada, 1857). A month later there was an official enquiry by the Commissioners of the Provincial Lunatic Asylum:

...[W]e carefully examined into the statements made by the said James Magar, and examined all the witnesses produced by him; and after the most careful investigation, we came to the unanimous conclusion that the charges made were utterly without and completely void of truth, so far as any criminal charge against the Steward or any other person in the Asylum.

(Canada, 1857)

With respect to the pregnant patient, the Commissioners based their decision on the report submitted by Dr. Workman and made no

mention of investigating the matter any further. The Commissioners also did not discuss the practice of dissecting dead patients by doctors not associated with the Asylum. Because of the lack of information provided on these charges, one cannot be certain that such atrocities did not take place. In fact, it is common knowledge that the conditions for the confinement and the treatment of lunatics during the nineteenth century were deplorable.

The provisions of the Criminal Lunatics Act 1851 were consolidated in 1859: An Act respecting the confinement of Lunatics whose being at large may be dangerous to the public (Confinement of Dangerous Lunatics Act 1859). Sections 1 to 9 were restated almost verbatim as the first four sections of the 1851 Act relating to the "criminally insane".

A new section was included that provided for the confinement of "dangerous lunatics" in addition to the old provision that was incorporated under section 10 of the new Act. This section reveals the continued fear of the insane and how this fear was closely associated to the potential for crime. It stated that:

If any person has been discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, such person would be liable to be indicted, and any of Her Majesty's Justices of the Peace before whom such person may be brought, thinks fit to issue a Warrant for committing him as a dangerous person suspected to be insane...

(Confinement of Dangerous Lunatics Act 1859, section 7)

Also in 1859, the Legislature of the Province of Canada passed an Act respecting a Lunatic Asylum for Criminal Convicts. This statute was a reenactment of the Criminal Lunatic Asylum Act 1857 and remained virtually unchanged.

According to the Preliminary Report of the Board of Inspectors of Asylums, Prisons, &c. in 1859, the buildings intended for the Criminal Lunatic Asylum at Rockwood were not yet completed (Canada, 1859: 19). In fact, there was only enough room for female lunatics, and plans had to be made to house the male lunatics. Insane convicts were confined in the basement of the Kingston Penitentiary where they received care from the medical superintendent of Rockwood when he had the time. The poor conditions that existed in the penitentiary resulted in a mortality rate triple that of the women confined in Rockwood Criminal Lunatic Asylum. This arrangement did not change until early 1865 (Splane, 1965: 148).

Those persons confined under the other sections of the Confinement of Dangerous Lunatics Act of 1859, however, were held in the Rockwood Asylum. Not surprisingly, there were abuses of these persons as well. It appears that the admissions from the local gaols of lunatics to Rockwood were mostly classified as "Dangerous Lunatics to be confined by warrant of the Justice of

the Peace" (under section 7 of the Confinement of Dangerous Lunatics Act 1859). The families of the confined individuals as well as the Justices of the Peace, misused the proceedings for "dangerous lunatics" in order to ensure that the insane would be kept in safe custody. Furthermore, there was no public asylum for eastern Upper Canada and many relatives attempted to have such persons admitted to Rockwood so they would not have to pay for the family member's "treatment" (Verdun-Jones and Smandych, 1981: 99).

Similar abuses of the commitment process occurred during the 1860's at the Provincial Lunatic Asylum in Toronto and Rockwood Criminal Lunatic Asylum (Verdun-Jones and Smandych, 1981: 99). The Report of the Board of Inspectors for 1866 reiterates this point. Dr. Litchfield, Medical Superintendent of Rockwood, stated that the majority of the patients admitted under a Warrant of the Governor of the Province of Canada of in 1866 were "dangerous to be at large" and that "...the practice of sending ordinary cases of insanity under warrant, has been to some extent an evasion of the law. The great pressure on public Asylums of the Province...has no doubt been the cause of this evasion" (Canada, 1868: 126).

This report also provides some insight into the operations of the Governor's Warrant System at this time and suggests that

politics played a role in deciding whether a Governor's Warrant patient should be released:

At present when an ordinary case of insanity is made criminal by tacking on to it the charge of assault, or the other grave offence of not being able to give bail for good behaviour, the insane offender is forthwith committed to gaol as the preliminary step to a transfer to a Criminal Lunatic Asylum...[A]fter the so-called criminal lunatic has recovered his reason, and before a discharge can be made out from the Asylum, the details of the case have to be considered by the government and the warrant has to be rescinded. It is true that each successive Government has given prompt and paternal attention to the claims of these most melancholy of human supplicants. But in General Asylums, and in ordinary cases of Mania, not complicated with grave and serious crime, the question of the admission and discharge of a patient from an Hospital for the Insane, is viewed as a purely medical question...

(Canada, 1868: 126-127)

According to this Report, thirty-five criminal lunatics were admitted to Rockwood in 1866 (see Table-6). The majority of these patients (83%) were transferred under warrant of the Governor from gaols, 15 were transferred from the Penitentiary and one was a juvenile transferred from the Reformatory at Penetanguishene. Table-6 indicates that all of the lunatics transferred from gaols were charged with violent offenses. This suggests that the abuses of the system may not have been as grievous as Dr. Litchfield or Verdun-Jones (1981) would have us believe. Considering the offenses with which these persons were charged (as noted in Table-6), it would seem logical that they were considered to be "dangerous to be at large".

7

Place Table-6 here

Dr. Litchfield discusses four cases where criminal lunatics had improved to such an extent that they were able to assist in the operation of the Asylum. However, the remarks he makes concerning one patient who murdered his mother illustrate the fact that psychiatry could not guarantee the behaviour of the patient when released and thus, all potentially dangerous patients, especially those who had committed a crime should be kept in safe custody indefinitely:

He deeply deplores the delusions which resulted in the death of his mother, and sought by an industrious and useful life to make atonement for his involuntary offence. But his disease will probably recur, and possibly with it the homicidal propensity, and it may be a duty to society to keep this young man in a place of safety for the remainder of his life.

(Canada, 1868: 130)

After Confederation, the new Canadian Parliament, in an attempt to exert its exclusive jurisdiction over various aspects of criminal procedure, passed the Criminal Procedure Act of 1869 (Verdun-Jones and Smandych, 1981: 89). Essentially, the provisions set out in the Confinement of Dangerous Lunatics Act of 1851 were reproduced. However, there was one modification: The discretionary power to order the custody and release of the "criminally insane" was given to the Lieutenant Governor of the province. By virtue of Section 92(7) of the B.N.A. Act jurisdiction over the mentally ill and their incarceration was given to the provinces. Yet, the Crown still had the prerogative

of acting as parens patriae to persons of unsound mind. Since the prerogative of the Crown followed the division of legislative authority set out in the B.N.A. Act, the wardship of insane persons was vested in the Lieutenant Governor (Phillips, 1986: 13). Persons held in custody under sections 99 to 104 of the Criminal Procedure Act of 1869 were subject to confinement in the place and manner that the Lieutenant Governor deemed fit, until the pleasure of the Lieutenant Governor was known. Section 105, relating to M.D.I.'s, remained the same except that the certificate of the insanity of the inmate was to be given to the Lieutenant Governor, and he decided where the inmate was to be held.

Also, the control of the Rockwood Asylum fell under the Director of Penitentiaries because it was considered part of Kingston Penitentiary. However, arrangements were made with the federal government for L.G.W. patients to be confined at Rockwood, at the expense of the Province (Canada, 1875).

Section 105 was amended in 1873 in An Act further to amend the law respecting certain matters of procedure in criminal cases (the Criminal Procedure Act of 1873). Under the Statute, any person imprisoned for an offence, imprisoned for safe custody, charged with an offence or for not finding bail and found to be insane would be subject to confinement under section 105. This

was essentially the same as the Confinement of Dangerous Lunatics Act of 1851. However, what is interesting is that the authority of the Lieutenant Governor was broadened, so that it was no longer necessary to obtain a certificate by two physicians or surgeons. The new section also stated that an inmate was to be detained until his complete or partial recovery. Again this was subject to the consideration of the Lieutenant Governor:

...upon such evidence of any person imprisoned..., as the Lieutenant Governor shall consider sufficient, (he) may order the removal of such insane person to a place of safe keeping; and such person shall remain there, or in such other place of safe keeping, as the Lieutenant Governor may from time to time order, until his complete or partial recovery shall be certified to the satisfaction of the Lieutenant Governor, who may then order such person back to imprisonment, if then liable thereto, or otherwise to be discharged

(Criminal Procedures Act of 1873).

This amendment initiated new legal procedures for the committal of insane persons, that have virtually remained unchanged. The Lieutenant Governor, as in all the sections governing the criminally insane, was given the final decision as to their release. It is difficult to determine what exactly the intent of the amendment was. It is safe to assume, however, that the changes to section 105 were an attempt to make the authority of the Lieutenant Governor consistent with that of the other sections. If the Lieutenant Governor acts as parens patriae to those insane persons under the other sections, he should do the

same for mentally ill inmates.

From the first of July, 1867 to September 30, 1875, 511 L.G.W. patients were admitted to Rockwood of whom 132 were discharged, 101 died, 3 were transferred to the Toronto Asylum, 2 escaped and one was sent home on a "probationary leave of absence" (Ontario, 1875:27). This was the first reference made to the actual conditional release of an L.G.W. patient. It was still the practice during this time to send L.G.W. patients to gaols until space was available in an asylum. However, this practice had come under increasing criticism since the early 1860's. Too many people were being committed to gaol "without good cause" and the conditions of confinement were totally inadequate (Canada, 1868: Ontario, 1875).

The fear of confining insane criminals in the same ward with "ordinary" lunatics was stressed again in the 1875 Rockwood Asylum Report for the Province of Ontario. It was stated that such an "indiscriminate mixture...is productive of bad results, in the display of the greater amount of viciousness than is witnessed in any other Asylum of the Province." (Ontario, 1875: 27). However, it appears that the consideration given to L.G.W. patients had improved somewhat. In fact, an attendant who was struck by an L.G.W. patient was dismissed after he returned the blow (Ontario, 1875: 27).

Rockwood was purchased by the province of Ontario in 1877 and, because of the increasing need for a "general asylum" in the eastern part of the province, no longer served as an institution for the "criminally insane". Some L.G.W. patients were transferred to the various gaols and asylums of the province that had room (Ontario, 1880: 38). However, a Small Asylum for Criminal Lunatics was maintained at Rockwood. It was not until 1890 that another asylum was established from criminal lunatics when the reception hospital of the Hamilton Asylum was set "aside" for the detention of the criminal insane of the province..." (Hurd, 1917: 166).

In 1879, the North West Territories, which at this time included Saskatchewan and Alberta, passed An Ordinance Respecting Dangerous Lunatics. It stated that:

When a person was found to be insane or dangerous to be at large, the Justice of Peace would direct that the person be conveyed to the North West Mounted Police or to the Keeper of the Common Gaol and safely keep him until the pleasure of the Lieutenant Governor be known or until he shall be discharged by law.

(Hurd, 1917: 231)

This is significant in that it illustrates that the prerogative of the Lieutenant Governor to act as parens patriae for insane persons was recognized in other parts of Canada that were outside the Dominion. Whenever any person was to be held "until the pleasure of the Lieutenant Governor be known", it was the

procedure for the Lieutenant Governor to order that person removed to and confined in any asylum or other place of safe keeping. In many instances the insane person was sent to an asylum in Manitoba; in such cases the Lieutenant Governor of Manitoba would decide when the person would be released (Hurd, 1917: 231).

In 1886 criminal procedures were revised again. The sections relating to the L.G.W. System were changed to section 252 to 258, but that was all that was changed. The wording of the sections remained the same.

The enactment of the Canadian Criminal Code in 1892 provided for the L.G.W. System under section 736 through 741. In section 736, the Code specified that only those persons found N.G.R.I. for any indictable offence could be subject to confinement under a Lieutenant Governor's Warrant, thus greatly reducing the number of people found N.G.R.I. that could be held under an L.G.W. In the case of persons found N.F.S.T., the Code provided, under section 737 (4), that "no such proceeding shall prevent the accused from being afterwards tried on such indictment" (An Act Respecting the Criminal Law, 1892). The provision relating to persons brought before the Court for discharge for want of prosecution and found to be insane was not changed under section 739. Another change made provision for M.D.I.'s in Section 741.

It was amended to exclude "any person imprisoned in a penitentiary for an offence." It was not clear why such a change was made. This was most likely linked to the development of procedures in the Penitentiary Act pertaining to mentally ill inmates in penitentiaries.

The issue of the confinement of criminal lunatics with "ordinary lunatics" was still being stressed. Criminal lunatics were considered to be a dangerous class of patients that had detrimental effects on other classes of patients. This view is exemplified in the Ontario Asylum Report on the Small Asylum for Criminal Lunatics in Kingston in 1899:

Ordinarily, the insane convict is not much more trouble than any other insane person, but when we come to dealing with the homicidal criminal lunatic, it is a very different thing. It is almost criminal to allow them to mix with patients of such an institution as this, and the evil effects of such association are ever present. These human monsters are quite irresponsible and should be kindly cared for, although carefully secluded from their fellow beings who do not suffer from the criminal instinct.

(Ontario, 1899: 103)

The legislation of the nineteenth century dealing with the "criminally insane" underwent some significant changes; however, social attitudes towards the mentally ill did not. The mentally ill offender continued to be feared by the community. The development of the asylum in 1841 may have spared the "criminally insane" formal punishment by the criminal justice system but they

still suffered the "pains of imprisonment" (Verdun-Jones and Smandych, 1981). Dangerousness was incorporated as a legal concept at the beginning of the 1800's and "became a medico-legal concept when physicians, partly psychiatrists, accepted the responsibility for the assessment of dangerousness through their involvement in legal proceedings as expert witnesses, in commitment procedures for mentally ill individuals and the management of offenders" (Harding and Adserballe, 1983: 391-392).

Although the nineteenth century witnessed a sharp shift in the government control mechanism employed by Canadian society, to dispose of the insane, it could be argued with some justification that conditions in both the penitentiary and the asylum were not markedly dissimilar, in spite of the assumption that the penitentiary was intended for 'punishment' and the asylum was intended for 'moral treatment'

(Verdun-Jones and Smandych, 1981: 104)

#### Part B: 1900-1949

By the end of the nineteenth century, a system of dealing with those persons defined as "criminal lunatics" by law was firmly established in Canada. The next phase in the development of the present L.G.W. System was the appeal and interpretation of the law in court cases. It was through these cases that the inherent concepts and functions of the L.G.W. System were refined.

From 1900 to 1949, several landmark decisions were made

defining the jurisprudence with respect to the L.G.W. in Canada. These cases represent the official acceptance by the judiciary of the fears concerning the confinement and treatment of criminal lunatics that were expressed throughout the nineteenth century. Very few calls for reform of the L.G.W. System were made during this period. This is not surprising, when one considers the major events that occupied the concerns of the Canadian government and public (i.e. the Great War, the Great Depression, and World War II). What is more, no legislation had been enacted to protect the civil rights of Canadians.

Perhaps the earliest of the landmark cases was that of King v. Duclos (1907). It was asserted in the appeal that, because of the changes in the section of the Code in 1892 relating to the L.G.W. System, the Lieutenant Governor did not have the authority to issue a warrant. Prior to 1892, the authority to issue a warrant was provided in each section. The warrant was appealed because such authorization was not specifically stated in section 736 of the 1892 Code, the section that was applied to Duclos. However, it was stated in section 740 of the 1892 Code that "[i]n all cases of insanity so found the Lieutenant Governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit" (Criminal Code, 1892: section 740). It was decided that this

power applied to section 736 to 739 and the appeal was quashed (King v. Duclos 1907: 281). This case also provides some meaningful insight into the legal theory upon which the L.G.W. System was based. It indicated a change in the perception of L.G.W. patients from that of the 1800's. It assumed that if a person was found to be N.G.R.I., he was also placed in the class of dangerous or criminally insane:

The theory of law..is that the fact of having committed that offence puts him in the class of dangerous or criminal lunatics. It insists that there should be full subsequent observation and enquiry as to whether his delirium or his emotional state of mental responsibility has run its full course...

(King v. Duclos, 1907: 282).

In 1910, in the case of King v. Trapnell, a significant decision was made concerning the nature of the confinement under an L.G.W. The case involved the escape of three men found N.G.R.I. from the Provincial Asylum at Hamilton. It was decided that they were serving a criminal sentence under section 969 of the Code and therefore, their custody was as criminals.

The men were, therefore, in my opinion, in lawful custody under sentence of imprisonment for a crime...The order at the trial of each was that he be kept in strict custody until the pleasure of the Lieutenant Governor should be known; the order was that he be conveyed to and detained in the Provincial Asylum at Hamilton. These things surely amount to a sentence of imprisonment and none the less so because 'indeterminate'. It is less than imprisonment for life, because, although it may last for life, yet it may be a day shorter, a month, a year or years.

(King v. Trapnell, 1910: 350-351)

The issue was raised that they should be confined as lunatics because the men were acquitted on the grounds of insanity. However, the Judge stated that they were only in a sense acquitted because they committed the crime with which they were charged but were at the time insane. Thus, it is safe to assume that confinement under an L.G.W. for a person found N.G.R.I. was not intended to treat his or her mental illness. It seems logical that the same consideration would be extended to the confinement of insane convicts because they have been found guilty of a crime and were already serving their sentence.

While a system of handling L.G.W. patients had already developed in Ontario and Quebec, there is some indication that the system developing in the newer provinces was taking a different course. For example, in 1917 in Saskatchewan, it appears that a great deal of power was placed in the hands of the Attorney General. "If the justice is satisfied that the person before him is insane and dangerous to be at large, he shall commit him to the nearest jail. The Attorney General may, by his warrant, order and direct the removal to any asylum of any person committed to jail" (Hurd, 1917: 226).

In 1922, in the case of Delorme v. the Sisters of Charity in Quebec, establishment of the absolute authority of the Lieutenant Governor was laid out. Delorme appealed his confinement under

and L.G.W. under a writ of habeas corpus. He was found N.F.S.T. but was later certified by the Medical Superintendent of the St. Michael-Archange Asylum to be "...in a sufficiently lucid mental condition to understand thoroughly the management of his affairs and to take care of his person" (Delorme v. the Sisters of Charity, 1922: 219). However, the judge stated that he had no jurisdiction as it was a matter solely for the Lieutenant Governor. Thus, even though he was declared fit by the Medical Superintendent of the Asylum, he could still lawfully be confined under an L.G.W. The decision of the fitness of a person found N.F.S.T. was within the discretion of the Lieutenant Governor.

In the 1927 Revision of the Criminal Code, the provisions of the 1892 Code were reenacted as sections 966 to 970 with no change. In the same year, the discretion of the Lieutenant Governor was further elaborated upon in Regina v. Coleman as well as the function of the confinement of those found N.G.R.I. of murder and was ordered to be confined for safe custody indefinitely in the Halifax county jail by the Lieutenant Governor. The warrant was appealed on the basis that confinement in a jail was not the intention of the law. However, the judge did not agree:

The Lieutenant Governor has the widest discretion as to the place and manner of confinement ordered. The prisoner is presumed to be insane under the circumstances and it is the duty of the Crown

represented by the Provincial Government to keep in safe custody for the purpose of protecting the community.

(Regina v. Coleman, 1927: 148)

In Ontario, a high security facility for the criminally insane was established at Penetanguishene in 1933 as part of the psychiatric hospital there. It is still in operation today (under the name of Oak Ridge). However, L.G.W. patients had little hope of release and consequently lived out their lives at the asylum (Hucker et al, 1984: 2).

In 1938, the Archambault Report on the Penal System of Canada came up with one of the first major criticisms of the L.G.W. System. It stated that there was no such class of person as the "criminally insane". They were in no way to be considered criminals because their violent and criminal tendencies were due to mental disease. The Commission concluded that as diseased persons they should be the responsibility of the province. Thus, provisions for their custody should be made under provincial rather than federal legislation (Canada 1938). "It is a grave reflection on our penal system that several insane persons should be confined in our penitentiaries, caged like wild beasts, where there is neither means for proper treatment nor personnel with experience to deal with them" (Canada, 1938: 158). However, the provinces were not of this opinion and made their views known to the Commission.

The Provinces ought not be asked to maintain mental institutions for insane criminals; also the mental institutions in the provinces are in the nature of hospitals to which law abiding citizens are sent for treatment, and it is unfair to these citizens to be confined in the same institution with dangerous criminals who have committed serious crimes  
(Canada, 1938: 155)

This attitude expressed by the provinces shows that the fear of mixing criminal lunatics with "ordinary lunatics" that had been such a major concern in the early stages of the development of the L.G.W. System in the nineteenth century was still prevalent.

The exclusive jurisdiction of the Lieutenant Governor "not subject to control on the part of the courts" was again upheld in Champaign v. Plouffe (1940). However, an L.G.W. was quashed in another case in the same year. In Trenholm v. The Attorney General of Ontario (1940), the appellant was charged with murder on January 3, 1938 and remanded to the Toronto gaol until January 10, 1938. A warrant was issued by the Lieutenant Governor for the confinement of Trenholm to the Ontario Hospital on January 12, 1938. Nonetheless, according to section 970 of the Code, the Lieutenant Governor was authorized to issue a warrant if the person was "imprisoned in any prison other than a penitentiary for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behaviour to keep the peace" (Rogers, 1929: section 970). Because the warrant was dated two days after the expiry date for his confinement set

by the Magistrate, it was decided that the Lieutenant Governor could not issue a warrant. In this case, the appellant was not "imprisoned in safe custody charged with an offence".

In 1947, Saskatchewan continued to develop its own system with the establishment of two advisory review committees. Each committee was composed of a local judge, a representative of the Attorney General, the Director of Psychiatric Service, the Superintendent of the Mental Hospital concerned and the Superintendent's Clinical Director. L.G.W. patients found to be N.G.R.I. or N.F.S.T. had the right to an appeal once a year and the Superintendent of the Hospital could suggest that a patient's case be reviewed at any time (Swadron, 1962: 207). This was the first Advisory Review Board specifically for the review of L.G.W. patients.

In the first half of the twentieth century the precedent was established that because of the inherent obligation of the Crown to act as parens patriae, the authority of the Lieutenant Governor over the "criminally insane" was above appeal. The fear of the "criminally insane" was perpetuated through the classification of L.G.W. patients as "dangerous" by the courts. Also, this stage in the development of the L.G.W. System witnessed the further individualization of the System from province to province.

Part C: 1950-1987

This period is marked by a dramatic increase in the interest in the plight of the mentally ill who come into contact with the criminal justice system. Improvements in the treatment available to the mentally ill along with the increased awareness of the lack of ability of psychiatry to predict violent behaviour, and changes that occurred in the United States and England led to criticisms of the L.G.W. System and increased calls for reform. These demands for change indicated a change in the attitude toward the nature of the detention of L.G.W. patients. It was no longer viewed as confinement solely for the protection of the public; it had a conjunctive purpose of being of some benefit to the L.G.W. patient. However, the traditional attitudes concerning the dangerousness of L.G.W. patients did not change. In fact, Quinsey and Boyd (1977) illustrate that those found N.F.S.T. had been added to this class of "dangerous lunatics". Despite the attempts to safeguard the rights of L.G.W. patients, the law pertaining to the L.G.W. did not essentially change and the absolute authority of the Lieutenant Governor was not really challenged.

The sections of the Criminal Code relevant to the L.G.W. were changed to sections 523 and 527 in 1954. However, the only

change made pertained to mentally ill inmates (section 527). The section was divided into five subsections. In 527(1) the terms mentally ill, mentally deficient and feeble-minded were added. These terms were added to the section so that the case law previously decided that had developed in this area could be retained (Canada, 1954: 2855). No matter what was attached to the four conditions of 547(1), there appeared to be no limits imposed upon the Lieutenant Governor, with respect to the type of evidence "satisfactory to him" (Swadron, 1964: 333). Subsection (3) states that where the Lieutenant Governor is satisfied that an inmate has recovered he may order that the person (a) be returned to prison if liable to further custody in prison, or (b) be released if he is not liable to further custody in prison. This is the same as the previous section in 1927. However, in the instance that the Lieutenant Governor is satisfied that the inmate has only partially recovered (in subsection (4))

...he may, where the person is not liable to further custody in prison, order that the person shall be subject to the direction of the Minister of Health for the province, or such other person as the Lieutenant Governor may designate, and the Minister of Health, or other person designated may make an order or direction in respect of the custody and care of the person that he considers proper.

(An Act Respecting Criminal Law, 1954).

This amendment is interesting in that it allows for civil commitment of a mentally disordered inmate, under an L.G.W.,

whose prison sentence has expired. Section 527 was primarily used for the transfer of persons, serving a sentence in a prison, to a mental institution (Swadron, 1964: 333). However, this section was the cause of major concern in later years. It was made possible that a person charged with an offence may be held "in custody in a prison" and therefore be subject to removal to a "place of safe keeping" under section 527(1). Liability to further custody in section 527(3) and (4) could even be applied to a person merely charged with an offence, in as much as he is liable to further custody to await his trial. What is more, an order under section 527 could be made without any judicial finding and even without the accused being brought to court at all (Swadron, 1964: 333-335).

Not surprisingly, there was increasing pressure for the improvement of the system governing the "criminally insane". Two years after the 1954 amendment, the Fauteux Report on the principles and procedures of the remission service of the Justice Department was published. A special note was made of the lack of psychiatric services for inmates in both provincial and federal prisons (Canada, 1956: 28). In 1957, the McRuer Commission, inquiring into the insanity defence of the Criminal Code, recommended two, at the time seemingly radical, changes to the L.G.W. System:

(1) It is suggested that the trial judge should be given jurisdiction to hear evidence after the verdict (of N.G.R.I.) as to the mental condition of the acquitted person and decide whether he should be committed to a hospital or released.

(2) ...that the provincial authorities consider some regular review of cases where persons have been committed after the verdict of a jury, and if complete recovery can be established with assurances, provision should be made for their release...and [they] should be reviewed at least once a year whether a request is made to appear before a committee or not  
(Canada, 1957: 42-43).

In the 1960's the pressure for change was increased. The Canadian Bill of Rights was passed in 1960. This was the first federal legislation in Canada concerned with protection of individual civil rights and, as such, was the catalyst for many challenges to authority of the Lieutenant Governor both in the judiciary and in the literature. Section 2 of the Bill of Rights provided that every law of Canada must not be administered in such a way that it constitutes an abridgement of the rights and freedoms specified in the Act, such as the right not to be subjected to arbitrary detention or confinement, cruel and unusual punishment or treatment, and the right to have detention determined valid under a writ of habeas corpus.

With the promising new treatments in use at psychiatric hospitals in the early 1960's, medical superintendents were prompted to explore the possibilities of transferring L.G.W. patients who had recovered to less secure hospitals (Hucker et

al, 1984: 2). However, such transfers were not provided for in the Criminal Code. It was not until 1972 that the "loosening of warrants" was provided for in the Code. Also in the early 1960's, Barry Swadron wrote a number of articles (Swadron (1962), (1964),) criticizing the treatment of the "criminally insane" and proposing many changes to the L.G.W. System.

The practical implications of the Canadian Bill of Rights were felt in 1961, when some limits were placed on the authority of the Lieutenant Governor in the case of Brooks v. the Queen. The discretion of the Lieutenant Governor could not be exercised in an arbitrary manner against section 2 of the Canadian Bill of Rights. "If an arbitrary decision were made, I feel that the matter could then be reviewed by way of habeas corpus under the common-law right of the Crown to intervene where the liberty of the subject is involved" (Brooks v. Queen, 1961: 210).

In 1964, the Ontario Ministry of Health ordered a comprehensive study of the provincial mental health legislation. The study's findings were presented to the Ontario government in 1966 and helped precipitate the establishment of A.R.B.'s to the Lieutenant Governor in Ontario in 1968 (Boyd, 1980: 154).

The case of Ex Parte Kleinys, in 1965, provides more insight into some of the concepts surrounding the L.G.W. and to what extent the Bill of Rights had authority over the Lieutenant

Governor in these matters. Here, it was stated that the Lieutenant Governor does not have criminal jurisdiction over L.G.W. patients, but "acts as agent for the Federal Government in a field in which he has an inherent power to decide when it is safe to allow a person found to be of unsound mind to return to society" (Ex Patre Kleinys, 1965: 106). For this reason, the Lieutenant Governor supervises the detention of the "prisoner" who is serving an indeterminate sentence imposed by the Criminal Code and not the Lieutenant Governor. The view of the L.G.W. as a criminal sentence and the L.G.W. patient as a prisoner was again extended to the L.G.W. System. As a result, it was decided that detention under and L.G.W. was not cruel and unusual punishment (contrary to section 2(b) of the Bill of Rights). In the Court's view the appellant was serving a valid indeterminate sentence. The Court also expressed disagreement with the decision of Brooks v. the Queen (1961) concerning the power of the judiciary to hear an appeal of an L.G.W. on the basis of an Arbitrary decision made by the Lieutenant Governor.

At the same time, there were a number of cases in Canada and the United States that brought the conditions in which the mentally ill were treated to the attention of the public. In 1962 two orderlies at the Cole Harbour Mental Hospital in Nova Scotia were convicted of abusing mental patients. And in 1967,

at the same hospital, allegations were made that patients recommended for release were still being held on an L.G.W. (Jobson, 1969: 186). In the United States, in the case of Baxstrom v. Herold in 1966, the issue of the right of a mentally ill individual having served a prison sentence to be treated in a civil rather than a prison type of hospital was debated. The trial judge stated that the dangerousness of the mentally ill had been greatly exaggerated (Ewaschuk, 1976: 372). In 1968 in the case of Whitney v. the State of New York, a patient was awarded \$300,000 for wrongful confinement (Greenland, 1969: 345-346).

In 1968, Ontario enacted legislation to authorize the establishment of Boards of Review for L.G.W. patients. Prior to this date, a direct application to the Lieutenant Governor was the sole means of a review of the status of L.G.W. patients in Ontario (Phillips et al, 1985: 375). Also in 1969, the Ouimet Commission published its report on corrections in Canada. It discussed several of the problems of the L.G.W. System and made three basic recommendations concerning the system:

(1) Amend the Criminal Code to allow the accused to present evidence of innocence before the fitness issue was tried.

(2) Amend section 526 of the Code to make clear that the Lieutenant Governor can discharge a person from custody in the initial disposition.

(3) That there be an adequate review provision made in the Code and be mandatory at least once a year.

(Canada, 1969: 231-234)

On June 27, 1969, the Criminal Code was amended and a new section 527A was added. This established the prerogative of the Lieutenant Governor to appoint a Board to review the case of every person in custody on an L.G.W. The Board was to consist of not less than three and not more than five members. At least two members had to be psychiatrists practicing in the province and at least one other member had to be a member of the bar. Each case was to be reviewed no later than six months after the initial disposition and at least once every six months following the date of the first review. After each review the Board was required to report to the Lieutenant Governor and state the following: where the person was found N.F.S.T., if in the opinion of the Board he has recovered; where the person was found N.G.R.I., if in the Board's opinion the individual has recovered and if it was in the best interest of the public and the individual that he be discharged absolutely or conditionally; and where the person was an M.D.I., if in the opinion of the Board, he had recovered or partially recovered. In addition to these mandatory reviews, the A.R.B. must review any case referred to it by the Lieutenant Governor and report to him accordingly.

Also in 1969, K.B. Jobson published his study on the "Commitment and Release of the Mentally Ill under Criminal Law."

He strongly criticized the L.G.W. System as practically overlooking the civil rights of the mentally ill, and questioned the dangerousness of such persons (Jobson, 1969: 196). It was one of the first attempts to examine the characteristics of L.G.W. patients. Jobson's study appeared at a time when there was still a great deal of public concern about the sordid-revelations of conditions for mental patients in Nova Scotia two years earlier (Greenland, 1969: 344-345).

Jobson was concerned that some individuals might be held under an L.G.W. for long periods of time despite the fact that they had not committed a serious criminal offence and were currently no longer mentally disordered (Webster, Phillips and Stermac, 1985: 28). He documented several cases where the offence or alleged offence prompting confinement under an L.G.W. was minor. Eight of the sixty-six L.G.W. cases studied were charged with summary conviction offenses and three of these were charged with vagrancy. These three accounted for the longest terms in the hospital: 33 years, 22 years, and 5 years (Jobson, 1969: 197). He stated that there were five distinct groups of offenses: homicides, breaking and entering, theft, sexual offenses, and arson (see Table-7). Table-7 illustrates that there was an almost equal split between the number of cases charged with crimes against the person (21) and the number of

cases charged with crimes against property (19). This was quite different from the characteristics of L.G.W. patients depicted in the 1866 Asylum Report for Ontario. However, the majority of the criminal categories (3 out of 5) were crimes of violence. As depicted in Table-7, the average term seemed to be longer for those patients charged with a violent crime (i.e. 10.7 years for homicides, 7 years for sexual offenses and 13 years for arson versus 4.3 years for break and enter, and 5.2 for theft)>

Table-7

CHARACTERISTICS OF L.G.W. PATIENTS

IN JOBSON'S FIVE CATEGORIES 1967-1969

OFFENCE	NUMBER OF CASES	NUMBER OF RELEASES	AVERAGE TERM
Homicide	7	2	10.7 yrs.
Break and Enter	10	3	4.3 yrs.
Theft	6	nil	5.2 yrs.
Sexual offenses	14	5	7.0 yrs.
Arson	3	nil	13.0 yrs.

Source: Jobson, K.B., "Commitment and Release of the Mentally Ill Under Criminal Law" Criminal Law Quarterly, Vol. 11, 1969, p. 197.

In his study, Jobson also charged that the federal government had been using mental hospitals as warehouses for troublesome prisoners to be released on expiration of their sentences (Jobson, 1969: 199). However, he did not offer any proof to back up this point. He also made a statement that is

representative of the beliefs of those who call for changes in the L.G.W. System: that society's concern for the protection of life and property against potentially violent or unpredictable persons of unsound mind had led to the enactment of legislation that practically overlooks the civil rights of a person who was mentally ill (Jobson, 1969: 196).

Section 545 of the Criminal Code was amended on June 15, 1972. This section was changed to give the Lieutenant Governor the power to loosen warrants of L.G.W. patients "if, in his opinion, it was in the best interest of the accused and not contrary to interest of the public." This amendment was a direct incorporation of the second recommendation of the Ouimet Commission (Canada, 1972: 7, 31). This seems to indicate that detention under an L.G.W. was no longer considered to be solely for the protection of the public. The view that release of the patient (conditional or otherwise) was incorporated as a basic concept in the System.

After the establishment of the Law Reform Commission of Canada in 1971, the L.G.W. came under even sharper criticism. In 1973, the Law Reform Commission recommended that no accused should be subject to confinement as unfit unless there were strong reasons for which he committed the crime with which he was charged. The fact that a person was found N.F.S.T. should lead

directly to commitment. The Commission also recommended that the power to order the disposition of those found "N.F.S.T." should be exercised not by the Lieutenant Governor but by the trial judge and according to specific criteria. As well, it was recommended that the length of time an unfit accused was committed should be proportionate to the maximum sentence that the accused would have received if found guilty (Law Reform Commission of Canada, 1973: 19).

Despite the increase in criticism of the L.G.W. System, the changes that were made did not affect the authority of the Lieutenant Governor. While the reform movement did receive some public support, it was hampered by sensational cases of L.G.W. patients or criminals with a history of mental illness being released and committing crimes. The amount of power that the Lieutenant Governor actually exercised was not dramatically reduced in some provinces. Instead, increased power was taken on by the provincial government. Fear of the dangerousness of released L.G.W. patients by the public had serious repercussions with respect to government interference in the decision making process of the L.G.W. System. Justice Jack Maher, Chairman of the Saskatchewan Patient Review Board, stated in 1975 that he almost resigned his position out of frustration from political interference:

They, the New Democratic Party, wouldn't let us release anyone... Both Victor Hoffman, a mass murderer...and Moss McCallum, another Saskatchewan slayer...had previous psychiatric treatment before the slayings and both were criminally insane. They had inflamed public opinion against the release of any mental patient. Because of this, 'strong political implications' blocked the release of normally freeable incarcerated mental patients.

(as quoted in Greenland, 1978:213)

The provisions relating to L.G.W.'s were amended for the last time in 1976. Section 545 was again revised to allow the Lieutenant Governor to order the transfer of an L.G.W. patient to any other place in Canada for the purpose of rehabilitation, with the consent of the person in charge of such place. This meant that L.G.W. patients in provinces with psychiatric facilities deemed to be inadequate could be transferred to another facility where proper treatment could be given, even if this facility was in another province. Section 546, dealing with M.D.I.'s, was amended so that only prisoners who were serving sentences in a prison in that province and found to be insane could be held under Warrants of the Lieutenant Governor. Finally, the provision for the establishment of an A.R.B. (section 547) was altered so the Board could make any recommendations that it considered to be desirable in the interest of recovery and not contrary to the interest of the public. The reviews were changed from semi-annual to annual because not all the Boards could review every case in six months.

Also in 1976, in a Report to Parliament, the Law Reform Commission again criticized the L.G.W. System. However, these recommendations were much stronger. It recommended the abolishment of the L.G.W. altogether, as well as the A.R.B. as constituted in section 547 of the Code (Law Reform Commission of Canada, 1976: 38). Justice Haines, Chairman of the Ontario Advisory Review Board, wrote, in defence of the L.G.W. System that the fear of an innocent person being forgotten in an Ontario mental hospital was illusory. "It is my opinion that the thinking in this area has been muddled by what has happened south of the border, where men awaiting trial have been permitted to remain there for years. It does not happen here." (Haines, 1976: 380).

The study conducted by Quinsey and Boyd (1977) was the first national survey of Canada's L.G.W. population and also the first study to deal with the dangerousness of the L.G.W. patient. They found that of their sample of 650, patients found N.F.S.T. were less likely to be charged with a crime against the person but were more likely to be held under an L.G.W. for more than five years. These patients were also the most likely to be diagnosed as retarded (Quinsey and Boyd, 1977: 271). It seems that these patients were held longer not because they were more dangerous but because they were not as amenable to treatment. As

illustrated in Table-8, the majority of L.G.W. patients were charged with crimes against the person. It also suggests that there were marked differences in the L.G.W. populations held in the different provinces. The average number of months detained ranged from 56 in Quebec and Alberta to 134 in Manitoba. These findings were similar to those of Jobson (1969).

Quinsey and Boyd concluded that L.G.W. patients were either less dangerous than involuntary (civilly committed) patients, or almost as dangerous but certainly not more dangerous. They also found that patients who were found unfit to stand trial were more disadvantaged than the N.G.R.I. group: they were less likely to have been charged with a crime against the person, more frequently diagnosed as retarded and yet they were held in custody longer (Quinsey and Boyd, 1977: 274).

The findings of this study are significant for several reasons. First, it was the first Canadian study of L.G.W. patients that challenged the traditional concept of the dangerousness of the L.G.W. patient. This finding alone was used in many calls for reform of the L.G.W. System. Second, their results suggest that those found N.F.S.T. were also placed in the class of "dangerous lunatics" that had developed in the 1800's. It appeared to be dangerousness through association. Those persons found unfit were treated as dangerous because they were

/ Table-8

CHARACTERISTICS OF L.G.W. PATIENTS BY PROVINCE 1974

	B.C.	Alta.	Sask.	Man.	Ont.	P.Q.	N.B.	N.S.	Nfld,	Total
Average time spent under warrant (months)	-	56	118	134	60	56	101	105	67	
Number of L.G.W. patients	62	27	29	12	200	219	24	34	36	643
L.G.W. CATEGORY										
% N.F.S.T.	37	7	38	33	11	32	67	53	42	28
% N.G.R.I.	40	78	52	67	84	52	17	24	11	57
% M.D.I.	23	15	10	0	2	0	17	15	47	8
INDEX OFFENCE										
% v. person	43	93	47	100	87	67	75	65	47	73
% v. property	40	7	3	0	11	24	13	32	44	21

Source: Quinsey and Boyd, "An Assessment of the Characteristics of Dangerousness of Patients Held on Warrants of the Lieutenant Governor" Crime and Justice, 1977, p. 271-272.

processed under sections of the Code that were intended for the criminally insane. Although this association was most probably made long before Quinsey and Boyd's study, this was the first indication that such an association was being made. Third, their study brought to light the disparity in the actual operation of the L.G.W. System across the country (this being exemplified in the wide range in average number of months in custody).

In 1982, the case of Egglestone and Mouseau v. Ontario Advisory Review Board raised several questions concerning the practices and procedures followed by the Ontario A.R.B. In this case, the appellant sought to obtain access to the hospital file, or at least for his lawyer to review the notes made by the Board's psychiatrist during the hearing. An application was also made to the Chairman of the A.R.B. to compel the Hospital Administrator to make a copy of the patient's history at the hospital available to the patient and his counsel (Phillips, 1986: 91). In making its decision, the Appeal Court ruled: (1) that the patients should have limited access to certain hospital and A.R.B. records with non-disclosure where the information may be harmful to himself or a third party; (2) that the information arising out of the interview by the A.R.B. psychiatrist should be shared with the patient's counsel and discretionary cross examination be allowed; (3) that the patient's counsel did not

have the right to see the notes of the Board members nor did he have the right to cross-examine Board members during the hearing (Phillips, 1986: 91-92). As a result of this case, the Ontario A.R.B. instituted the procedure of making available, at each hearing, the reports to the A.R.B. by the Psychiatric Hospital; the recommendations of the Board to the Lieutenant Governor with copies of all exhibits filed at the hearing; the opinions of each psychiatric members of the Board. The Review Board also instituted the consulting program whereby a psychiatrist, who at the time of the hearing is not a member of the Review Board, examines the patient as well as the hospital records and prepares a report. This report is presented at the hearing and the patient's counsel has the right to cross examine the psychiatric recommendations stated in the report.

Since 1976, there have been increasing concerns about the civil rights of individuals caught in the L.G.W. System. The Charter of Rights and Freedoms in 1982, has generated even more interest in the protection of the mentally ill against deprivation of liberty without a fair hearing, as well as using the least intrusive diagnosis and treatment as possible (Phillips, 1986: 108). Webster et al (1985) point to a number of other factors promoting "meaningful" change in the L.G.W. System:

- (1) Some provinces were in the position that they had minimal or outdated facilities for L.G.W. patients.

(2) Rulings in the United States had led to the abrupt release or transfer of large groups of L.G.W.-type patients with no appreciable harm to the public.

(3) An ever-growing literature that questions the ability of mental health professionals to reliably predict dangerousness.

(4) The fact that the L.G.W. population is steadily increasing.

(Webster et al, 1985: 3-5).

These concerns were reflected in the Report of the Mental Disorder Project in 1985. It recommended that the role of the Lieutenant Governor be abolished. In fact, the most recent attempt to amend the L.G.W. System incorporated almost all of the Project's recommendations.

On June 25, 1986, John Crosbie (Minister of Justice) announced sweeping legislative changes dealing with the mentally disordered offender in Canada. It was proposed that the establishment of Review Boards be mandatory across Canada and that the Boards be responsible for making decisions with regard to persons found N.F.S.T. or N.G.R.I. The Courts would make the initial disposition for a period of three months with the Board being responsible for subsequent decisions. This would dispose of the present L.G.W. System and replace it with one more responsible to the courts. Changes were also proposed with respect to outer limits for the commitment of mentally disordered offenders: For those charged with first degree murder the outer

limit would be life; for crimes against the person the outer limit would be ten years or the maximum penalty (whichever is shorter); in all other offenses, a mentally ill offender who continues to require treatment and is a danger to himself and others would be committed civilly under provincial legislation (Phillips, 1986: 113-114). This bill was to be introduced in the fall of 1986 but died on the order paper. This was most likely due to the replacement of John Crosbie as Minister of Justice with Ray Hnatyshyn, and Mr. Hnatyshyn's not making reform of the L.G.W. an immediate priority.

Despite the increasing attempt at reform of the L.G.W. System, the judiciary refuses to challenge the fundamental issue of the absolute authority of the Lieutenant Governor. Some significant changes have occurred with respect to the responsibility of the Board and the arbitrary nature of the L.G.W. but such improvements have not altered the amount of power given the Lieutenant Governor. The cases of Regina v. Swain (1986) and Jollimore v. the Attorney General of the Province of Nova Scotia (1986) paint a more realistic picture of the future of the continued authority of the Lieutenant Governor.

In the case of Regina v. Swain (1986), the warrant was appealed as being in conflict with sections 7 (the right to liberty and security of the person), 9 (the right not to be

arbitrarily detained), 12 (the right not to be subjected to cruel and unusual punishment) and 15(1) (the right to equal benefit and protection under the law) of the Charter of Rights as well as being ultra vires the Parliament of Canada.<sup>7</sup> Suffice to say that the authority of the Lieutenant Governor and the dangerousness of L.G.W. patients were not called into question. Despite all the advances in psychiatry L.G.W. patients are still perceived to be a threat to society: "The finding of not guilty by reason of insanity raises what I accept to be reasonable concern that the accused may be a danger to the public and in need of further treatment." (Regina v. Swain, 1986: 558).

In the case of Jollimore v. the Attorney General of Nova Scotia (1986), an L.G.W. was appealed successfully. The Lieutenant Governor made his decision (on the advice of the Attorney General) concerning a patient's warrant before the Board had given him its recommendations. It was decided that the patient should be allowed make representations to the Lieutenant Governor on the issue of the patient's custody and rehabilitation. While the court quashed an L.G.W. because it was unfair to the patient, it did not challenge the legality of the original L.G.W. Furthermore, the power of the Lieutenant Governor to write and make decisions concerning L.G.W.'s was not questioned. In fact, Justice Hallett reaffirms the authority of

the Lieutenant Governor over the "criminally insane": "There are no limitations as to where the Lieutenant Governor may determine is the proper place for safe custody of a person found to be insane..." (Jollimore v. the Attorney General of the Province of Nova Scotia, 1986: 174).

A recent incident, related to the Jollimore case, which was reported in the Globe and Mail serves to further illustrate the tendency of our courts to perpetuate a problematic system of managing L.G.W. patients. On January 12, 1988, the Supreme Court of Ontario made a decision that supposedly "stripped away the arbitrariness of the L.G.W. System" and ensures that the Lieutenant Governor (of Ontario) can no longer "rubber stamp" the A.R.B. recommendations. The Lieutenant Governor must ensure that the A.R.B. "has employed fundamental fairness in arriving at its recommendations to him." (Makin, 1988: A4). Similar to the Jollimore case the judge (Justice Callaghan) stated that:

...when the Lieutenant Governor is going to adopt a recommendation which diminishes liberty or the liberty interests, there is a duty to inquire and satisfy himself that the board proceeded fairly.

(As quoted by Makin, 1988: A4).

Also as in the Jollimore case, the judge did not question the fairness of a system that gives one person absolute authority over others. The Lieutenant Governor may have to check up on the activities of the A.R.B., but there is nothing to compel him to

follow the Board's recommendation or release a patient.

Therefore, this case does not seem to constitute the milestone decision that Makin (1988) would have us believe.

The last thirty years of the L.G.W. System illustrate a dramatic increase in the demands for reform. The development of civil rights legislation in Canada (i.e. The Canadian Bill of Rights in 1960 and The Canadian Charter of Rights and Freedoms in 1982) has served as the impetus for several changes to the L.G.W. System. However, the precedent set by the appeal cases in the first half of this century and the continuing fear of the mentally ill by the public and the judiciary, have minimized these improvements: the authority of the Lieutenant Governor is still above question and L.G.W. patients are still viewed as "dangerous".

NOTES FOR CHAPTER IV

1. New Brunswick established the first asylum in Canada, a temporary institution for the insane in 1835. In 1845, P.E.I. established its first asylum near Charlottown. Nova Scotia was the last of the original British North America Colonies to erect an asylum in 1858. It remained the only institution for the confinement of dangerous lunatics in the province during the nineteenth century (Verdun-Jones and Smandych, 1981:93-96). In Manitoba there were no provisions for the insane prior to 1871. From 1871 to 1877, dangerous lunatics were "cared for" in an old stone house at the Manitoba Penitentiary. These dangerous lunatics were transferred with the convicts when everything was moved to Stoney Mountain in 1877 (Hurd, 1917:26-27). There were no attempts to establish lunatic asylums in Western Canada during the nineteenth century. The first institution for the criminally insane was opened in B.C. when a provincial jail was transformed for this purpose in 1919 (Verdun-Jones and Smandych, 1981:102). In the early days of British Columbia, lunatics were placed in the colonial jail in Victoria. There were not many cases of insanity at this time. However, cases of insanity became more frequent in the late 1850's during the rush to the Caribou gold fields. The majority of the people passing through were from California and "[i]t was owing to this that the authorities began to send the insane back to California, where there were the nearest asylums." (Hurd, 1917:9). This practice continued until the Americans stated that they would not accept more lunatics without an arrangement for B.C. to pay for the care of these patients. This offer was not acted upon and lunatics were held in the Victoria jail (Hurd, 1917:8-9). Prior to 1905, both Alberta and Saskatchewan were part of the Northwest Territories. All cases of insanity that occurred within the Territories were sent to provincial asylums in Manitoba under special arrangement with the federal government (Hurd, 1917:1, 218).

2. Similar legislation respecting the confinement of dangerous lunatics existed in New Brunswick in 1854:

Any person so disordered in his senses as to be dangerous to be at large, may, on evidence of the fact, be apprehended and conveyed to the Provincial Lunatic Asylum, on a warrant issued by two Justices of the County...

(Of Dangerous Lunatics, 1854:s.1).

3. A prime example occurs in the Asylum Report for Ontario in 1875. Here, the case of a Governor's Warrant patient, transferred from a prison to Rockwood, was reviewed and a recommendation concerning the patient's release was made:

The case of the prisoner removed to this Asylum from the Central Prison was under consideration. the circumstances of his case are these: When in Sandwich Gaol he committed a murderous attack upon the gaoler, for which he was sentenced to the Central Prison for a year and a half. While there, he displayed such unreasonable violence of temper that he was considered insane, and upon being so certified by the examining authorities, he was transferred to this Asylum. The Medical Superintendent stated that since his reception he had not been able to detect the slightest evidence of insanity, unless an uncontrollably bad temper can be so construed. As in my personal examination of the man, I could see no evidence of insanity in conversation or manner, his return was recommended.  
(Ontario, 1875:28).

4. The dangerousness of the patient was considered to be related to the seriousness of the offence with which he was charged (Canada, 1868:131). Calls for separate detention of "criminal lunatics" were also expressed in the New Brunswick Asylum Report for 1856: "The moral effect of criminal patients in a Hospital for the Insane, is highly injurious, and it is very desirable that arrangements should be made for them elsewhere (New Brunswick, 1856: cccvii).

5. This view was not shared by all those involved in the treatment of criminal lunatics. Dr. Litchfield, Medical Superintendent of Rockwood in 1866, believed that criminal lunatics should not be confined in isolation (Canada, 1868:131). Similar opinions were expressed by experts in England as well. Dr. W.C. Hood, Commissioner of Lunacy in England, believed that:

[I]f the object be to cure the afflicted lunatic, whatever offenses he may have committed, his convalescence will depend very much upon his moral treatment, and if he be condemned...to be associated with criminals who have committed equal or perhaps greater crimes than himself, what chance can there be of recovery?

(Canada, 1868:131).

6. The authority over mentally ill penitentiary inmates is now vested in the Solicitor General. Section 19(1) of the Penitentiary Act states:

The Minister may, with the approval of the Governor in Council, enter into an arrangement with the government of any province to provide for the custody in a mental hospital or other appropriate institution, of persons who, having been sentenced or committed to a penitentiary, are found to be mentally ill or mentally defective at any time during confinement in the penitentiary.

(Penitentiary Act, 1985:s.19(1)).

7. The details of this case and Jollimore v. The Attorney General of Nova Scotia (1986) were discussed in detail in Chapter II.

CHAPTER V  
CONCLUSIONS

Throughout the history of the L.G.W. System, two traditional factors have remained constant: the obligation of the Crown or its representative to take custody of the "criminally insane", and that perception that these people pose a threat to society. "Part of the problem of the mentally ill in Canada stems from their isolation and lack of understanding on the part of the public" (Whitley, 1984b: 279). We have a tendency to fear that which we do not understand or cannot control. It is not surprising that during the nineteenth century dangerous or criminal lunatics were considered to be monsters with a "criminal instinct". In many instances, as is the case today, the nature of the crime with which the person was charged was a major factor in determining his sanity. "Connected with the question of general Diagnosis of Insanity is that of Unnatural Crime, which in this country is so strange and uncommon as to lead to the supposition that the persons guilty of it must be out of their minds" (Bucknell and Tuke, 1874:483).

There appeared to be two different classes of dangerous lunatics throughout the development of the L.G.W. in Canada: those who were considered to be "dangerous to be at large" and those defined as "criminal Lunatics". The first class of lunatics consisted of those persons found to be N.G.R.I and N.F.S.T. under the legislation of the day. According to the Asylum Reports in Ontario from 1841-1899, these patients were not considered to be a major threat to the safety of the public and should not have been confined with truly dangerous lunatics. The criminal lunatics class consisted solely of mentally disordered inmates. These individuals were thought to be the most dangerous because they had been convicted of a crime (thereby demonstrating their criminal propensity) and had later been declared insane, further adding to their potential for dangerous behaviour. It was for this reason that a Criminal Lunatic Asylum was established at Rockwood in the late 1850's.

The class of criminal lunatics was gradually extended to include persons who had been found not guilty by reason of insanity. The court cases relating to L.G.W.'s from 1900 to 1949 provide some indication that his class had been expanded: "...the fact of having committed the offence puts him in the class of dangerous criminal lunatics." (Regina v Duclos, 1907:282).

Today, when a person comes into contact with our criminal

justice system and is found to be mentally ill or mentally disordered, he is deemed to be in need of help from the state. When it comes times for this individual to be released from the psychiatric hospital, the state may be reluctant to release him and the community reluctant to receive him. Even with the increasing number of studies of L.G.W. patients, (Jobson, 1969; Williams and Waters, 1975; Quinsey and Boyd, 1977; Hodgins, 1983; Webster, Phillips and Stermac, 1985; Phillips et al, 1985 - to name only a few) a distinct fear of these people still exists. This fear is exemplified in the description of L.G.W. patients given by Justice Haines, former Chairman of the Ontario Board of Review: these people "constitute the most dangerous collection of individuals, not only because of their criminal acts, but because at the time they were insane." (Haines, 1984:3). Despite such attitudes, the treatment of the criminally insane has improved and because of the increasingly sophisticated psychiatric techniques and medication since the 1800's, treatment is no longer synonymous with confinement in an asylum. There has also been an increasing emphasis on treatment of the mentally ill in the community instead of an institution, although institutionalization is still considered to be necessary in a significant number of cases (Griffiths et al, 1980:330-331).

Over the last thirty years the demands for reform have

increased in number and intensity. Groups such as the Canadian Mental Health Association and the Advisory Resource Council for the Handicapped have formed to protect the rights of the mentally ill in Canada, as expressed in the Canadian Charters of Rights and Freedoms such as: the right not to be subjected to cruel and unusual punishment, the right to equality before the law, the right to be presumed innocent until proven guilty, and the right not to be arbitrarily detained. There have been calls for changes to the L.G.W. as far back as the late 1930's. Why, then, has the legislation remained essentially unchanged for over one hundred years? The treatment of the "criminally insane" has not been a high priority for the government or the public. The only thing that mattered was that these persons were locked up and not running about freely in the community. Also, there is a substantial unwillingness on the part of the government and the courts to break with tradition. Such notions as parens patriae, part of our inheritance from the English Common Law System, have been in use for centuries. The fact that our legal system is based on precedence illustrates this tendency as well. In addition, this reluctance may be due to the amount of power that the L.G.W. System vests in the hands of the provincial governments. They exercise a great deal of authority in deciding whether an L.G.W. patient should be released. In some provinces,

the Lieutenant Governor performs a purely symbolic role and it is the Attorney General of the Cabinet that makes what amounts to the final decision. It is not likely that control over "dangerous Lunatics" would be relinquished easily.

On the other hand, it has been suggested that there has been no need to change the L.G.W. because it has functioned well: the Review Boards ensure that the rights of the patient are maintained while at the same time ensuring the safety of the public (Hunley, 1987). What is more, it has been suggested that the Lieutenant Governor has taken over the role of watching over the A.R.B.:

Although at its inception, the Lieutenant Governor's warrant system may have been developed for the purpose of maintaining control over individuals that have been found [N.G.R.I.], the system had developed to the stage where the most important function of the Lieutenant Governor in the system is to maintain a supervisory capacity over the Board of Review.

(Hunley, 1987:correspondence dated March 13).

This does not seem a likely reason for the lack of change given the admitted symbolic role of the Lieutenant Governor in many provinces and the nature of the complaints against the System.

The reform of the present L.G.W. System is at a very delicate stage. For the past thirty years almost all the publicity and the demands for change have been for the benefit of the L.G.W. patient (re: the inhumanity of indeterminate

sentences, the right to be treated equally before the law, and the right not to be subjected to arbitrary detention). The attitudes of the public are sufficiently fickle that a single case of a released L.G.W. patient committing a violent crime might sway public opinion in the opposite direction. Through the media, such a case could initiate similar demands by the public as those that resulted in reaction to the serious offenses committed by person released on mandatory supervision in 1987. The sensationalization of such events generates fear and irrational prejudices within the community. Politicians respond to this overstated reporting, which in turn effects the care given to the L.G.W. patients already in the System. The reaction on the part of the public and politicians also challenges the credibility of psychiatry in its treatment and control of these patients and would consequently incur demands for a more punitive policy in the treatment of the "criminally insane" (Phillips et al, 1985: 375).

The proposed changes in June of 1986 are consistent with the present trend toward the creation of procedures providing for greater judicial supervision in matters that have been previously handled on an administrative basis. Even though new provisions would require more formalized procedures than exist at present, they would most likely not vary significantly from those followed

today. It is not likely that a new system will have a significant impact upon L.G.W. patients (Hunley, 1987). If the trend continues, there can be no doubt that the L.G.W. System will be abolished and similar provisions to those proposed in 1986 will be enacted. Hence, the advancement of civil rights would see the end of another anachronism in Canada's criminal justice system.

#### FUTURE CONSIDERATIONS

A great many proposals have been made through government reports and by experts in the field, to improve the L.G.W. System. They have ranged from increasing the level of responsibility of the Lieutenant Governor to the abolition of the L.G.W. System. There can be no doubt that changes in the legislation governing this System are imperative: the lieutenant Governor should not be allowed to exercise absolute authority over these individuals, L.G.W. patients should be allowed to appeal their custody under a writ of habeas corpus, the patient or his council should be allowed to cross examine the Board, it should be specified in the legislation that the intention of custody under an L.G.W. is the treatment and hopeful recovery of the patient and that the system of treating the "criminally insane" should be consistent across Canada. There are other

issues to be considered: Should L.G.W. patients be placed under federal or provincial supervision? Should their confinement be subject to judicial review? If any meaningful change is to be made and maintained, the archaic views towards the mentally ill must change.

Meaningful reform of the L.G.W. System is likely to be achieved, but not within the near future. The process of changing this system has been hampered by our courts. The judiciary is rooted in the past and applies the views taken toward the cases in the early 1900's to today's cases. Even if the L.G.W. System were abolished, the courts might still be able to indefinitely confine some mentally ill offenders (and in the opinion of some, deny them their civil rights) by using the Dangerous Offender sections of the Criminal Code. I am not suggesting that our justice system be abandoned, only that any new legislation enacted relating to mentally ill offenders must take this point into account and specify more clearly and unequivocally the purpose of the system and how it should benefit the patient as well as protect society.

The history of the L.G.W. in Canada is by no means complete. This thesis only scratches the surface of its development. As evidenced in Chapters II and IV, the provinces manage the L.G.W. System differently and each provincial system has its own

history. The next step in the investigation of the L.G.W. System in Canada, is to conduct a more detailed contextual analysis of the evolution of the various provincial systems. This will enable future researchers to better understand the regional disparities that presently exist and make more specific policy recommendations for reform.

REFERENCES

Abel et al v Advisory Review Board (1980) 56 CCC 153.

An Act for establishing Prisons for Young Offenders - for the better government of Public Asylums, Hospitals and Prisons and for the better construction of Common Gaols (1857) Province of Canada Statutes 20 Vic., C. 28.

An Act to the authorize the Confinement of Lunatics where their being at large may be dangerous to the public (1851) Province of Canada Statutes 14-15 Vic., C. 23.

An Act respecting a Lunatic Asylum for Criminal Lunatics (1859) Province of Canada Statutes 22 Vic., C. 108.

An Act respecting the confinement of Lunatics whose being at large is dangerous to the public (1859) C.S.C. 22 Vic., C. 109.

An Act further to amend the law respecting certain matters of procedure in criminal cases (1873) R.S.C. 36 Vic., C. 54.

An Act respecting procedure in criminal cases (1886) R.S.C. 49 Vic., C. 174.

An Act respecting the criminal law (1892) S.C. 55 Vic., Vol. 1-2, C. 29.

An Act respecting the criminal law (1954) S.C. 1-2 Eliz. II, C. 51.

An Act to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act, and to make certain sequential amendments to the Combines Investigation Act, the Customs Tariff and National Defence Acts (1969) S.C. 17-18 Eliz. II, C. 38.

An Act to amend the Criminal Code and to make related amendments to the Criminal Code 1967 Amendments Act, the Criminal Records Act, National Defence Act and the Visiting Forces Act (1972) R.S.C. 21 Eliz. II, C 13.

Attorney General of British Columbia (1987) Statistics of the British Columbia Review Board for the Period 1977-1986.

Babbie, E. (1979) The Practice of Social Research, Belmont: Wadsworth Publishing Company.

Bailey, K. (1978) Methods of Social Research, 2nd edition, New York: Free Press.

Beattie, J. (1977) Attitudes Towards Crime and Punishment in Upper Canada, 1830-1851, Toronto: University of Toronto.

Bellomo, J. (1972) "Upper Canada Attitudes Towards Crime and Punishment (1832-1851)" Ontario History LXIV, 11-26.

Berk, R., Brackman, H. and Lesser, S. (1977) A Measure of Justice: an Empirical Study of the Changes in the California Penal Code, 1955-1971, New York: Academic Press.

Black, R. (1976) Behaviour of Law, New York: Academic Press.

Black Aird, J. (1985) Loyalty in a Changing World: The Contemporary Function of the Lieutenant Governor of Ontario, Toronto: Office of the Premier.

Blumer, H. (1971) "Social Problems as Collective Behaviour" Social Problems, 18, winter, 298-306.

Boyd, N. (1980) "Ontario's Treatment of the 'Criminally Insane' and the Potentially Dangerous: The Questionable Wisdom of Procedural Reform" Canadian Journal of Criminology, 22, No. 2, 151-167.

Brannigan, A. (1984) Crimes, Courts and Corrections : An Introduction to Crime and Social Control in Canada, Toronto: Holt, Reinhart, and Winston of Canada.

British North America Act (1867) 30-31 Vic., C. 3.

Brooks v. The Queen (1961) 133 C.C.C. 204.

Bucknell, J. and Tuke, D. (1874) A Manual of Psychological Medicine, London: J. And A. Churchill.

Burgess, T. (1898) "A Historical Sketch of Our Canadian Institutions for the Insane" Proceedings of the Royal Society of Canada, IV, Sec.II.

Canada (1857) "Annual Report of the Bursar of the Provincial Lunatic Asylum, Toronto, for the Year 1856" Sessional Papers, Appendix No. 12.

Canada (1859) "Preliminary Report of the Board of Inspectors of Asylums, Prisons, &c." Sessional Papers, Appendix No. 32.

Canada (1868) "Sixth Annual Report of the Board of Inspectors of Asylums, Prisons, &c. for the Year 1866" Sessional Papers, Appendix No. 40.

Canada (1938) Report of the Royal Commission to Investigate the Penal System of Canada, Ottawa: King's Printer.

Canada (1949a) Report of the Royal Commission on Dominion-Provincial Relations, Book 1, Ottawa: Queen's Printer.

Canada (1949b) Report of the Royal Commission on Dominion-Provincial Relations, Book 2, Ottawa: Queen's Printer.

Canada (1954) House of Commons Debates, First Session, 33rd Parliament, 2-3 Eliz. II, Ottawa: Queen's Printer.

Canada (1956) Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice, Ottawa: Queen's Printer.

Canada (1957) Royal Commission on the Law of Insanity as a Defence in Criminal Cases, Ottawa: Queen's Printer.

Canada (1969) Report of the Committee on Corrections, Ottawa: Queen's Printer.

Canada (1972) Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Ottawa: Queen's Printer.

Canadian Criminal Code, (1987).

Canadian Charter of Rights and Freedoms, (1987).

Careless, J. (1967) The Union of the Canada's, Toronto: McClelland and Stewart.

Champaign v. Plouffe (1940) 77 C.C.C. 87.

Cocozza, J. and Steadman, J. (1974) "Some Refinements in the Measurement and Prediction of Dangerous Behaviour" American Journal of Psychiatry, 131, 1012-1014.

Conrad, J. et al (1982) Careers of the Violent, Toronto: Lexington Books.

Conrad, J. (1985) Dangerousness and the Endangered, Toronto: Lexington Books.

Del Buono, V. (1976) "Mental Disorder: A Crime" Canadian Journal of Criminology, Vol. 18, No. 4, 302-318.

Delorme v. The Sisters of Charity (1922) 40 C.C.C. 218.

Department of Justice (1985) The Mental Disorder Project, Ottawa: Department of Justice.

Dier, T. (1987) Counsel for the Ontario Advisory Review Board, Interview February 24.

Draper, G. (1974) The Law and Mental Disorder, (Vol. III) Edmonton: University of Alberta.

Ericson, R. (1976) "Working Paper 14. The Criminal Process and Mental Disorder" Ottawa Law Review, Vol. 8, 365-370.

Ewaschuk, E. (1976) "The Criminal Process and Mental Disorder" Ottawa Law Review, Vol. 8, 371-376.

Ex Parte Kleinys (1965) 3 C.C.C. 102, 49 D.L.R. (2nd) 579.

Foucault, M. (1978) "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry", in David Weisstub ed., Law and Psychiatry, New York: Permagon Press.

Gale, G. (1987) Director, Department of the Attorney General of Nova Scotia, Criminal Division, correspondence dated February 20.

Gray, M. (1977) "Killers Back on the Streets" Globe and Mail, November 10, F11.

Greenland, C. (1969) "Treatment Under Compulsion" Canadian Psychiatric Association Journal, Vol. 14, 342-348.

Greenland, C. (1971) "Violence and Dangerous Behaviour Associated with Mental Illness: Prospects for Prevention" Canadian Journal of Criminology and Corrections, Vol. 12, 331-339.

Greenland, C. (1972) "Dangerous Sexual Offenders in Canada" Canadian Journal of Criminology and Corrections, Vol. 14, 44-54.

Greenland, C. (1978) "The Prediction and Management of Dangerous Behaviour: Social Policy Issues" International Journal of Law and Psychiatry, Vol. 1, No. 1, 205-221.

Greenland, C. (1982) "Reflections on Dangerousness and Mental Disorder" in Webster et al eds., Dangerousness and Prediction, Psychiatry and Public Policy, (draft).

Griffiths, C. et al (1980) Criminal Justice in Canada: An Introductory Text, Toronto: Butterworths.

Haines, E. (1976) "The Criminal Process and Mental Disorder" Ottawa Law Review, Vol. 8, 377-381.

Haines, E. (1981) The Ontario Lieutenant Governor's Advisory Review Board, (Second Edition), Toronto: Government of Ontario.

Haines, E. (1984) The Ontario Lieutenant Governor's Board of Review, (Third Edition) Toronto: Government of Ontario.

Harvey, L. (1987) Secretary, Lieutenant Governor of Newfoundland, correspondence dated March 13.

Health and Public Welfare Act of Newfoundland, 1986.

Hodgins, S. (1983) "A Follow-Up Study of Persons Found Incompetent to Stand Trial and/or Not Guilty by Reason of Insanity in Quebec" International Journal of Law and Psychiatry Vol. 6, 399-411.

Hodgins, S. et al (1986) "Women Declared Insane: A Follow-Up Study" International Journal of Law and Psychiatry Vol. 8, 203-216.

Hucker, S. et al (1984) Oak Ridge: A Review and an Alternative A Committee Report to the Ontario Ministry of Health.

Hunley, H. (1987) Lieutenant governor of Alberta, correspondence dated March 13.

Hurd, H. (1917) the Institutional Care of the Insane in the United States and Canada, Vol. 4, Baltimore: John Hopkins Press. (Reprinted in 1973 in New York by Arno Press).

Jackson R. and Atkinson, M. (1978) The Canadian Legislative System, Toronto: Macmillan Canada.

Jobson, K. (1969) "Commitment and Release of the Mentally Ill Under Criminal Law" Criminal Law Quarterly Vol. II, 186-203.

Johnson, F. (1987) Lieutenant Governor of Saskatchewan, correspondence dated February 20.

King v. Duclos (1907) 12 C.C.C. 278, 8 Que.P.R. 372.

King v. Leys (1910) 17 C.C.C. 198.

King v. Trapnell (1910) 17 C.C.C. 346.

Law Reform Commission of Canada (1973) Criminal Law General Principles: Fitness to Stand Trial, Ottawa: Queen's Printer.

Law Reform Commission of Canada (1975) The Criminal Process and Mental Disorder, Working Paper 14, Ottawa: Queen's Printer.

Law Reform Commission of Canada (1976) A Report to Parliament on Mental Disorder in the Criminal Process, Ottawa: Law Reform Commission of Canada.

Law Reform Commission of Canada (1980) Medical Treatment and Criminal Law, Working Paper 26, Ottawa: Law Reform Commission of Canada.

Law Reform Commission of Canada (1985) Behaviour Alteration and the Criminal Law, Working Paper 43, Ottawa: Law Reform Commission of Canada.

Lepofsky, R. (1982) "Policies and Purposes of a Federal Commitment System" Discussion Paper 8 of the Mental Disorder Project, Ottawa: Department of Justice.

Lingley v. Hickman, (1972) 33 D.L.R. 3rd, 593 (F.C.T.G.).

Lingley v. The New Brunswick Board of Review (1973) 13 C.C.C. (2d) 303.

- Mahar, J. (1987) Chairman, Saskatchewan Board of Review, correspondence dated March 23.
- Makin, K. (1988) "Hearings on Confining Mentally Ill Must Be Fairer, Ontario Court Says" Globe and Mail, Wednesday, January 13, A1, A4.
- Martin, J. (1955) The Criminal Code of Canada Toronto: Cartwright and Sons Ltd.
- Martin, J. (1969) The Criminal Code of Canada Toronto: Cartwright and Sons Ltd.
- Mc Diarmid, N. (1987) Chairman, Order-in-Council Review Board of British Columbia, correspondence dated May 14.
- McKague, C. (1987) Counselor with the Advocacy Resource Centre for the Handicapped, interviewed February 23.
- Mechanic, D. (1978) "Explanations of Mental Illness" The Journal of Mental Disorder, Vol. 166, 381-386.
- Mewett, A. (1967) "The Criminal Law 1867-1967" The Canadian Bar Review, Vol. 45, 726-740.
- Monahan, J. (1981) Clinical Prediction of Violent Behavior, Washington: DHHS.
- New Brunswick (1856) "Provincial Lunatic Asylum: Report of the Commissioners for the Year 1856" Journals of the House of Assembly of New Brunswick, ccciii-cccviii.
- Of Dangerous Lunatics (1854) Revised Statutes of New Brunswick, 19 Vic., C. 89.
- Ontario (1870) "Third Annual Report of the Inspector of the Asylums, Prisons &c. for the Province of Ontario" Ontario Sessional Papers, 34 Vic., Appendix No. 6.
- Ontario (1875) "Eighth Annual Report of the Inspector of Asylums, Prisons &c. for Ontario" Ontario Sessional Papers, 39 Vic., Appendix No. 4.

Ontario (1880) "Twelfth Annual Report of the Inspector of Asylums, Prisons &c. and Public Charities for the Province of Ontario" Ontario Sessional Papers, 44 Vic., Appendix No. 8.

Ontario (1899) "Thirty-Second Annual Report of the Inspector of Prisons and Public Charities Upon the Lunatic and Idiot Asylums of the Province of Ontario" Ontario Sessional Papers, Appendix No. 34.

Parker, R. (1975) Fitness to Stand Trial (A Brief arising out of a Western Regional Workshop on the Mentally Disordered and the Law) Saskatoon, Sask.: Saskatchewan Association for the Mentally Retarded, February 23-25.

Pasework, R. et al (1982) "Criminal Recidivism Among Insanity Acquittes" International Journal of Law and Psychiatry Vol. 5, 365-374.

Perron, M. (1987a) la presidente de la Commission d'examen du Quebec, correspondence date April 10.

Perron, M. (1987b) la presidente de la Commission d'examen du Quebec, Interviewed April 23.

Petrunik, M. (1982) "The Politics of Dangerousness" International Journal of Law and Psychiatry Vol. 5, 225-253.

Petrunik, M. (1984) The Makings of Dangerous Offenders: The Origins, Diffusion and Use of Legislation for Dangerous Offenders in Europe and North America No. 1987-74, Ottawa: Solicitor General of Canada.

Phillips, M. et al (1985) "The Advisory Review Board and Characteristics of Patients on Warrants of the Lieutenant Governor of Ontario" Bull. Am. Acad. Psychiatry Law Vol. 13, No.4, 373-384.

Phillips, M. and Thompson, L. (1986) "Psychiatric Assessments Under the Young Offender's Act" Dimensions Vol. 47, June, 20-22.

Phillips, M (1986) Mentally Ill Offenders: Implications for the Administration of Psychiatric Hospitals, Toronto: Metropolitan Toronto Forensic Service/Clarke Institute of Psychiatry (unpublished thesis).

Phillips, M. (1987) Interviewed February 24.

Price, R. (1970) "Mentally Disordered Offenders and Dangerous Persons Under the Criminal Law" Canadian Journal Of Corrections, Vol. 12, No. 3, 241-264.

Quinsey, V. (1975) "Psychiatric Staff Conferences on Dangerous Mentally Disordered Offenders" Canadian Journal of Behavioral Science, Vol. 7, 60-69.

Quinsey, V. et al (1975) "Released Oak Ridge Patients: A Follow-Up Study of Review Board Discharges" British Journal of Criminology, Vol. 15, No. 3, 264-270.

Quinsey, V. and Boyd, N. (1977) "An Assessment of the Characteristics and Dangerousness of Patients Held on Warrants of the Lieutenant Governor" Crime and Justice, February, 268-274.

Quinsey, V. (1979) "Assessment of the Dangerousness of Patient Held in Maximum Security" International Journal of Law and Psychiatry, Vol. 2, 389-406.

Quinsey, V. (1980) "Long Term Management of the Mentally Abnormal Offender" in S.J. Hucker et al ed., Mental Disorder and Criminal Responsibility, Toronto: Butterworths, Ch. 8, 137-156.

Raetzen, M. (1977) "Diversion of the Mentally Disordered Offender - 'A Rose by Any Other Name'" University of British Columbia Law Review, Vol. 11, No.1, 119-143.

Rappaport, J. (1967) Clinical Evaluation of the Dangerousness of the Mentally Ill, Springfield, Ill.: C.C. Thomas.

Regina v. Coleman (1927) 47 C.C.C. 148.

Regina v. Saxwell (1980) 123 D.L.R. (3rd) 369 (Ont. C.A.).

Regina v. Swain (1986) 00 C.R. (3rd) 000 (Ont.C.A.).

Roesch, R. and Golding, S. (1979) "Treatment and Disposition of Defendants Found Incompetent to Stand Trial" International Journal of Law and Psychiatry, Vol. 2, 349-370.

Rogers, A. (1929) Tremear's Annotated Criminal Code, 1929, Toronto: Burroughs and Cob Ltd.

Rubin, S. (1965) Psychiatry and the Criminal Law, New York: Oceana Publications Inc.

Saywell, J. (1976) "The Lieutenant Governors" in D.J. Bellamy et al eds., The Provincial Political Systems: Comparative Essays, Toronto: Methuen, 295-309.

Scheff, T. (1966) Being Mentally Ill: A Sociological Theory, New York: Aldine.

Schiffer, M. (1977) "Psychiatric Treatment of Mentally Disordered Offenders: The Canadian Cookoo's Nest" Saskatchewan Law Review No. 1, 269-301.

Schiffer, M. (1978) Mental Disorder and the Criminal Trial Process, Toronto: Butterworths.

Shafer, R. ed. (1974) A Guide to Historical Method, Homewood, Ill.: The Dorsey Press.

Solicitor General of Canada (1973) The General Program for the Development of Psychiatric Services in Federal Correctional Services in Canada, Ottawa: Queen's Printer.

Solicitor General of Canada (1986) The Young Offender's Act Highlights, Ottawa: Ministry of Supply and Services.

Smandych, R. and Verdun-Jones, S. (1986) "The Emergence of the Asylum in 19th Century Ontario: A Study in Segregative Control" in N. Boyd ed., The Social Dimensions of Law, Scarborough, Ont.: Prentice-Hall Canada, 166-181.

Spears, C. and Phillips, M. (1983) The Lieutenant Governor's Warrant and the Young Offender, Working Paper 67, Toronto: METFORS.

Spector, M., and Kitsuse, J. (1977) Constructing Social Problems, Don Mills, Ont.: Cummings.

Splane, R. (1965) Social Welfare in Ontario 1791-1893: A Study of the Public Welfare Administration, Toronto: University of Toronto Press.

St. Croix, S. et al (1985) Patients Under Warrants of the Lieutenant Governor in Alberta: A Statistical Summary with Comments on Release Procedures, Discussion Paper presented at the Annual Meeting of the Lieutenant Governor Boards of Review, September.

Steadman, H. (1983) "Predicting Dangerousness Among the Mentally Ill: Art Magic and Science" International Journal of Law and Psychiatry, Vol. 6, 381-390.

Swadron, B. (1962) "The Legal Aspects of Compulsory Confinement of the Mentally Disordered" Criminal Law Quarterly, Vol. 5, 175-209.

Swadron, B. (1964) Detention of the Mentally Disordered: Including the Applicable Criminal Law, Toronto: Butterworths.

Szaz, T. (1963) Law, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practice, New York: Macmillan.

Tremear, W. (1902) The Criminal Code and the Law of Criminal Evidence in Canada, Toronto: Canada Law Book Company.

Trenholm v. The Attorney General of Ontario (1940) S.C.R. 301, 1 D.L.R. 477.

Upper Canada Law Journal (1860) "Insanity in Criminal Proceedings" Upper Canada Law Journal, Vol. 6, 248-249.

Verdun-Jones, S. (1978) "Not Guilty by Reason of Insanity: The Historical Roots of the Canadian Insanity Defence, 1843-1920" in L. Knafla ed., Crime and Criminals in Europe and Canada, Calgary: The Calgary Institute for the Humanities, 179-218.

Verdun-Jones, S. (1979) "The Evolution of the Defence of Insanity and Automatism in Canada from 1843-1979" University of British Columbia Law Review, Vol. 14, No. 1, 1-74.

Verdun-Jones, S. and Smandych, R. (1981) "Catch 22 in the Nineteenth Century: The Evolution of Therapeutic Confinement for the Criminally Insane in Canada 1840-1900" Criminal Justice History, Vol. 2, 85-101.

Vincent, J. (1969) Aids to Historical Research, Freeport, N.Y.: Libraries Press.

Walker, N. (1968) Crime and Insanity in England, Vol. 1, Edinburgh: Edinburgh University Press.

Warding, T. and Adserballe, H. (1983) "Assessments of Dangerousness: Observations in Six Countries." International Journal of Law and Psychiatry, Vol. 6, 391-398.

Webster, C., Phillips, M. and Stermac, L. (1985) "Persons Held on Warrants of the Lieutenant Governor" Canada's Mental Health, Vol. 33, No. 3, September, 28-32.

Webster, C. et al (1985) Feasibility of Establishing a Canadian Data Base for Forensic Patients Held Under Warrant of the Lieutenant Governor, Ottawa: Department of Justice, Research and Statistics Division.

Whitley, S. (1984a) "The Lieutenant Governor's Advisory Boards of Review for the Supervision of the Mentally Disordered Offender in Canada: A Call for Change" International Journal of Law and Psychiatry, Vol. 7, 385-394.

Whitley, S. (1984b) "Watching for the Hellebore: The Role of the Advisory Board of Review" Manitoba Law Review, Vol. 14, No. 2, 259-280.

Whitley, S. (1987) Director, Office of the Attorney General of Manitoba, Constitutional Law Division, correspondence dated February 27.

Williams, J. and Waters, K. (1975) The Mentally Ill Offender in Nova Scotia, Halifax, N.S.: Department of the Attorney General of the Province of Nova Scotia.

Wormith, J. (1983) Processing the Mentally Ill Offender: Bridging a Social Service, Working Paper (Draft) for the Mental Disorder Project of the Department of Justice.

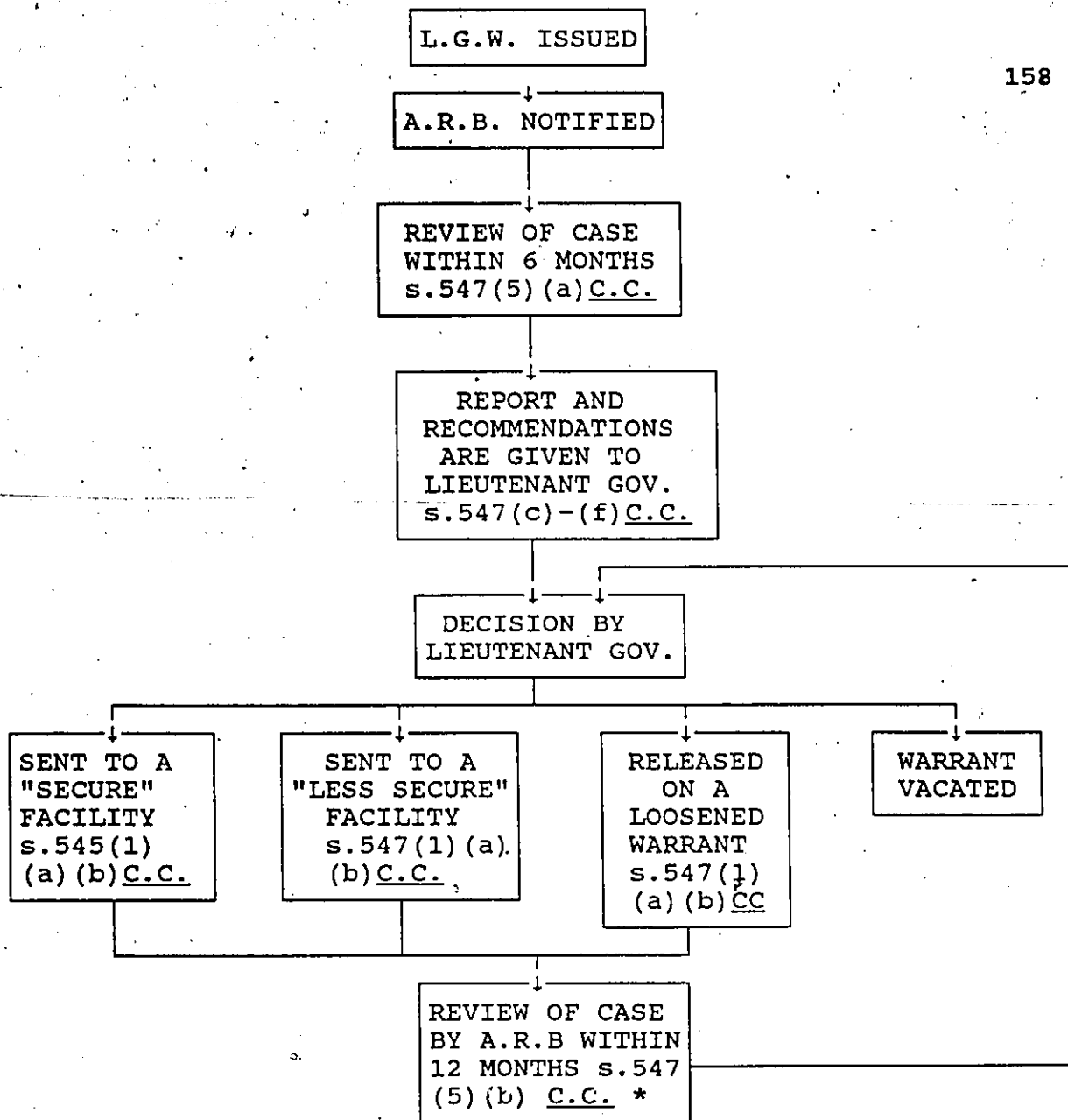
Wormith, J. and Borzeki, M. (1985) Mental Disorder in the Criminal Justice System, Working Paper 1985-4, Ottawa: Solicitor General of Canada.

Young Offenders Act, (1987).

APPENDIX A

Figure-3

THE PRESENT REVIEW PROCESS IN ALBERTA  
AND ONTARIO FOR L.G.W. PATIENTS

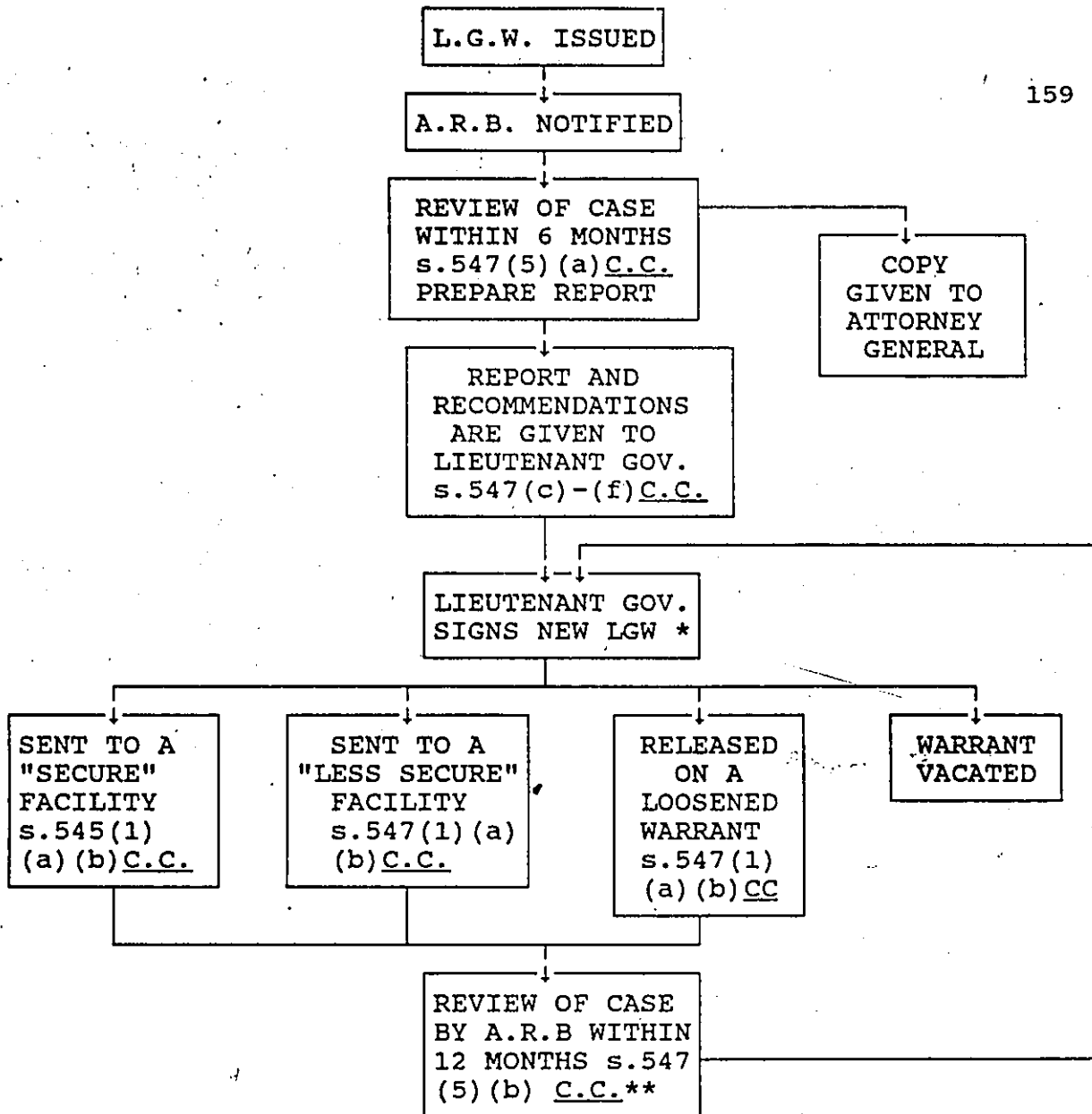


\* IT IS IMPORTANT TO NOTE THAT THE LIEUTENANT GOVERNOR, UNDER S.545, MAY ORDER A REVIEW OF AN L.G.W. PATIENT IN ADDITION TO THOSE UNDER s.547.

Source: M.S. Phillips, Mentally Ill Offenders: Implications for the Administration of Psychiatric Hospitals, Toronto: METFORS/Clarke Institute of Psychiatry (unpublished thesis), 1986, p.80, H. Hunley, correspondence dated March 13, 1987 and the Code.

Figure-4

THE PRESENT REVIEW PROCESS IN  
NOVA SCOTIA OF L.G.W. PATIENTS



\* THE WARRANT (WITH OR WITHOUT CHANGES) IS MADE UP BY THE A.R.B. AND "THE LIEUTENANT GOVERNOR ACTS ON THE RECOMMENDATIONS OF THE REVIEW BOARD".

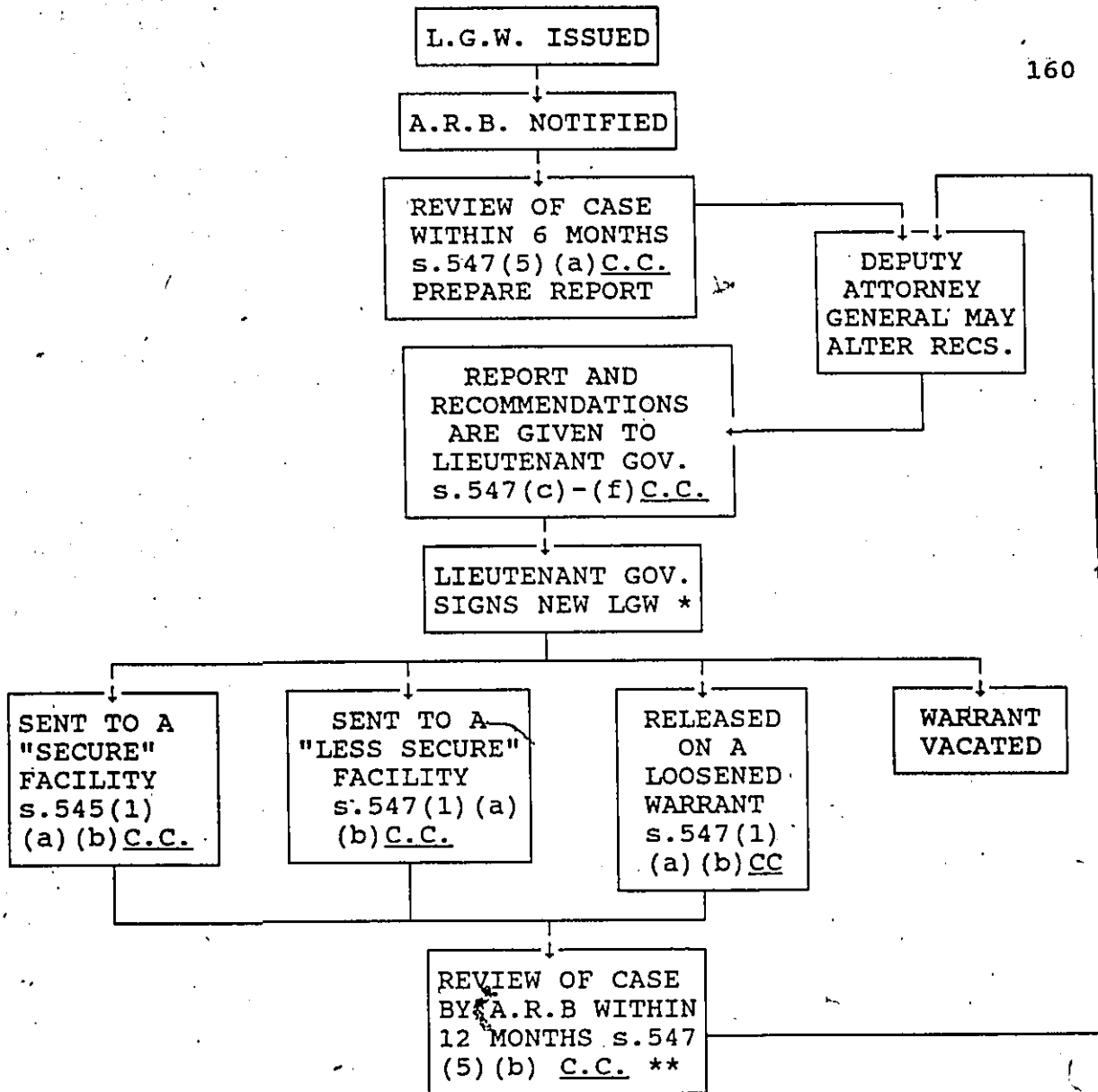
\*\* IT IS IMPORTANT TO NOTE THAT THE LIEUTENANT GOVERNOR, UNDER S.545, MAY ORDER A REVIEW OF AN L.G.W. PATIENT IN ADDITION TO THOSE UNDER s.547.

Source: Gordon Gale correspondence dated February 20, 1987 and the Criminal Code.

Figure-5

THE PRESENT REVIEW PROCESS IN  
QUEBEC OF L.G.W. PATIENTS

160



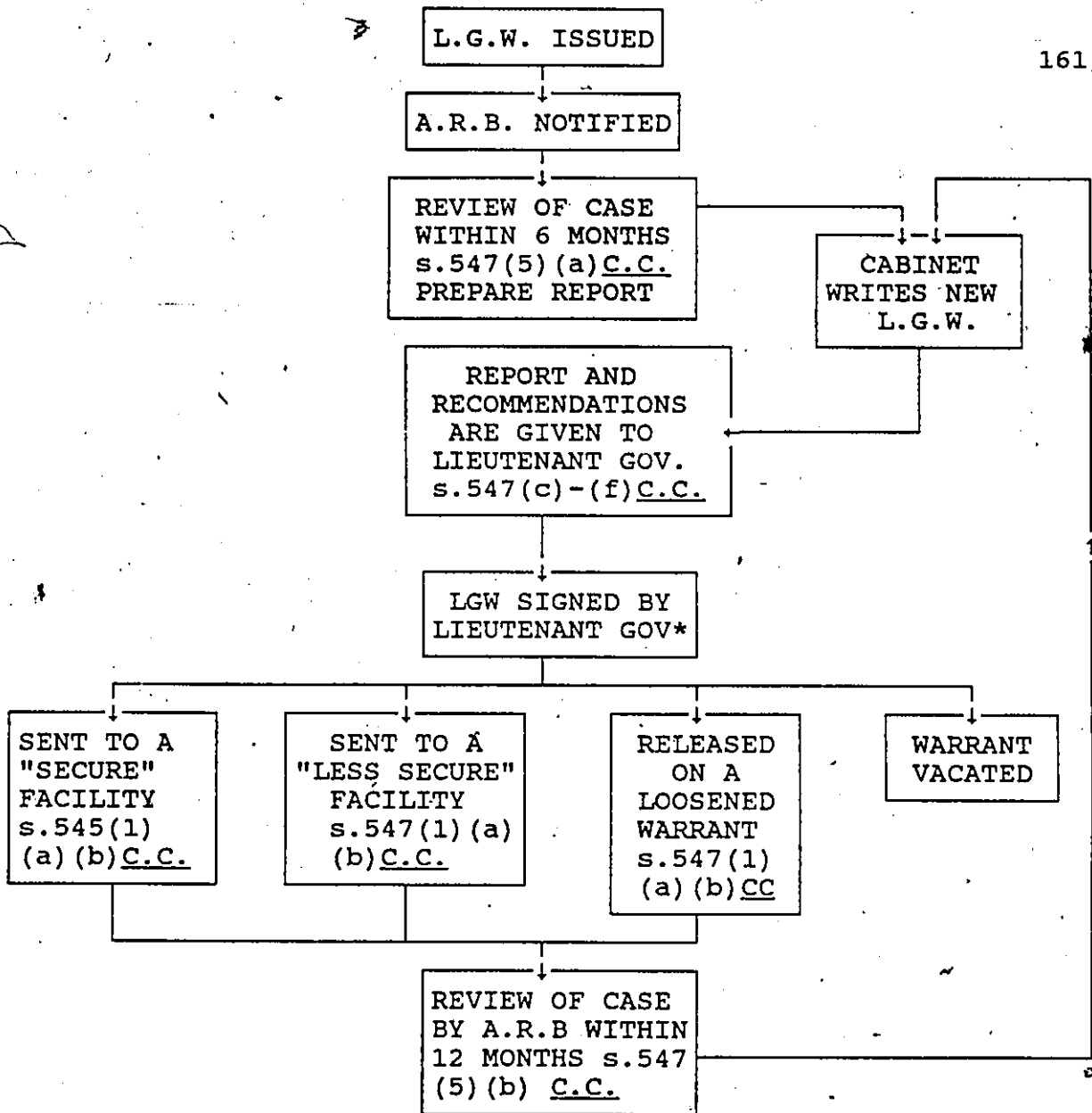
\* THE WARRANT (WITH OR WITHOUT CHANGES) IS MADE UP BY THE A.R.B. AND THE LIEUTENANT GOVERNOR SIGNS IT, "NO REAL QUESTIONS ASKED".

\*\* IT IS IMPORTANT TO NOTE THAT THE LIEUTENANT GOVERNOR, UNDER S.545, MAY ORDER A REVIEW OF AN L.G.W. PATIENT IN ADDITION TO THOSE UNDER s.547.

Source: Monique Perron, correspondence dated April 10, 1987a, Monique Perron, interviewed April 23, 1987b and the Criminal Code

Figure-6

THE PRESENT REVIEW PROCESS IN B.C. AND SASKATCHEWAN OF L.G.W. PATIENTS



\* THE RECOMMENDATIONS OF THE A.R.B. ARE REFERRED TO THE CABINET FOR APPROVAL AND THE LIEUTENANT GOVERNOR THEN ISSUES THE WARRANT IN TERMS OF THE DECISION BY CABINET.

Source: J. Johnson, correspondence dated February 20, 1987 and N. McDiarmid correspondence dated May 14, 1987.

APPENDIX B

Table-2

CHARACTERISTICS OF L.G.W. PATIENTSIN ALBERTA - 1985

<u>Type of Warrant</u>	<u>Number</u>	<u>Percent</u>	163
NGRI	43	89.6	
NFST	5	10.4	
N = 48			
<u>Charge</u>			
Armed robbery	1	2.1	
Arson	4	8.3	
Assault/attempted	5	10.4	
Kidnapping	1	2.1	
Murder/attempted*	36	75.0	
Theft	1	2.1	
N = 48			
<u>Victim</u>			
Aquaintances/friends	5	10.4	
Fellow patients	2	4.8	
Neighbours	4	9.5	
Police officers	3	7.1	
Professionals	3	7.1	
Property (arson/theft)	6	14.2	
Relatives	19	45.2	
Strangers	6	14.2	
N = 48			
<u>Previous Criminal Record</u>			
Yes	30	62.5	
No	18	37.5	
N = 48			
<u>Diagnosis**</u>			
Paranoid schizophrenic	27	56.3	
Other psychotic disorders@	21	43.7	
N = 48			

\* Includes first and second degree murder, manslaughter, and attempted murder.

\*\* All the patient were diagnosed as psychotic.

@ Includes psychosis, chronic schizophrenia, psychotic depression etc.

Source: S. de St. Croix, R. Dry and C.D. Webster, Patients on Warrant of the Lieutenant Governor in Alberta: A Statistical Summary with Comments on Release Procedures, A Discussion Paper presented at the Annual Meeting of the Lieutenant Governor Boards of Review, 1985, Table-1.

Table-3

CHARACTERISTICS OF L.G.W. PATIENTS  
IN THE PROVINCE OF QUEBEC - 1985/1986

164

<u>Type of Warrant**</u>	<u>Number</u>	<u>*Percent</u>
N.G.R.I.	239	67.1
N.F.S.T.	117	32.9
N = 356		
<u>Status of Patient***</u>		
N.F.S.T.		
in Strict Custody	63	17.9
Returned to Trial	54	15.2
N.G.R.I.		
in Strict Custody	47	13.2
Modified Custody	23	6.5
Conditional Discharge	73	20.5
Transfer to Another Hospital	28	7.9
Vacated	60	16.9
<u>Charge+</u>		
Minor Offences++	117	32.9
Murder/Attempted Murder	117	32.9
Other Violent Offences+++	117	32.9

\* These figures were calculated from the numbers provided by the Rapport D'Activites Pour L'Annee 1985-1986, p.12.

\*\* Based on the information provided by Perron (1987), it was assumed that there were no mentally disordered patients for this period.

\*\*\* These categories were translated from French in the Rapport D'Activites Pour L'Annee 1985-1986.

+ The numbers for these categories were based on the fraction of the total (1/3) indicated in the Rapport D'Activites Pour L'Annees 1985-1987 p.13.

++ Includes disturbing the peace and other summary offences.

+++ Includes such violent and potentially violent offences as arson, robbery and possession of a firearm.

Source: M. Perron, Rapport D'Activites Pour L'Annee 1985-1986, correspondence dated April 10, 1987 and M. Perron, personal interview, April 23, 1987.

Table-4

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L.G.W. PATIENT INTERVIEWS

FOR BRITISH COLUMBIA

1986

<u>Recommendation</u>	<u>Number of Recommendations made by A.R.B.*</u>	<u>Acted on</u>	<u>Outstanding</u>	<u>Rejected by Cabinet</u>
No Change	165	165		
Safe Custody	11	9	2	
Conditional Discharge (Level One)	7	2	3	2
Conditional Discharge	6	6		
Absolute Discharge	12	10	2	
Fit to Stand Trial	21	21		
Unfit to Stand Trial	10	10		
No recommendations Made Regarding Fitness	4	4		

\* A total number of 236 cases were reviewed from January 1 to December 31, 1986 and of this total 95 had their case reviewed once and 141 had their case reviewed on two or three occasions.

Source: N.A. Mc Diarmid, British Columbia Review Board Statistics (1977-1986), correspondence dated April 14, 1987.

Table-5.

CHARACTERISTICS OF JUVENILE L.G.W.PATIENTS FROM 1977-1985

<u>CHARGE</u>	<u>NUMBER</u>	<u>PERCENT</u>
Arson	7	3.8
Assault/threatening	39	21.1
Murder/attempted	4	2.2
Offensive Weapons	14	7.6
Sexual Offence	7	3.8
Theft	80	43.2
Other/not recorded	34	18.4
N = 185		

Diagnosis

Adjustment reaction	55	29.7
Alcohol/drug addiction	17	9.2
Mental retardation (epilepsy)	5	2.7
Not mentally ill	6	3.2
Personality disorder/neurosis	91	49.2
Psychosis	6	3.2
Sexual deviation	2	1.1
No diagnosis recorded	3	1.6
N = 185		

Criminal History\*

Detained in correctional institutions	44	23.8
Training school residence	22	11.9
History of drug abuse**	139	75.1
History of alcohol abuse	93	50.2

\* These figures were calculated from approximations provided by Phillips (1986) p.33 and rounded off to one decimal point.

\*\* Includes street drugs such as: cocaine, hashish, marijuana, heroin, amphetamines, depressants, LSD and glue sniffing.

Source: M. Phillips, Mentally Ill Offenders: Implications for the Administration of Psychiatric Hospitals, Toronto: METFORS/Clarke Institute of Psychiatry, 1986, p.33-35.

APPENDIX C

1986

S. H. No. 57296

IN THE SUPREME COURT OF NOVA SCOTIATRIAL DIVISION

BETWEEN:

JAMES PAUL JOLLIMORE,

Applicant,

- and -

ATTORNEY GENERAL FOR THE PROVINCE  
OF NOVA SCOTIA,

Respondent.

HEARD: in Chambers at Halifax, Nova Scotia before the  
Honourable Mr. Justice C. Doane Hallett, Trial Division,  
on July 15, 1986.

DECISION: July 15, 1986 (Orally at conclusion of hearing)

COUNSEL: Mr. W. B. Smith, for the applicant; Mr. K. Fiske, for  
the respondent.

1986

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S. H. No. 57296

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

JAMES PAUL JOLLIMORE,

- and -

ATTORNEY GENERAL FOR THE PROVINCE  
OF NOVA SCOTIA,

Applicant,

Respondent.

HALLETT, J.: (Orally at conclusion of hearing)

I will render my decision on this application to quash the Lieutenant Governor's warrant of June 18, 1986, transferring the applicant to Dorchester Penitentiary Pursuant to Section 545 of the Criminal Code, R.S.C. 1970, c. C-34 as amended.

I think counsel are well aware of the direction in which my thinking is taking me. I feel the decision of the British Columbia Court of Appeal in the McCann case and the decision of the Supreme Court of Canada in Cardinal and Oswald are particularly relevant to the issues before me. I have concluded

- 2 -

that procedural fairness required that Mr. Jollimore should have been advised of the intended decision of the Lieutenant Governor not to follow the recommendations of the Review Board established under the Criminal Code and before making a decision to follow the recommendation of the Attorney General that was contrary to the Review Board (in that the Attorney General recommended Mr. Jollimore be sent to Dorchester rather than Pinel). Mr. Jollimore or his counsel should have been an opportunity to make representations to the Lieutenant Governor. Mr. Jollimore was not afforded this opportunity. There is a common law requirement for procedural fairness in such circumstances.

I do not see that this case is really any different from that which was before the Supreme Court of Canada in Cardinal and Oswald. The procedural unfairness as a result of this failure to give Mr. Jollimore and his counsel an opportunity to be heard, prior to making a decision that was contrary to the recommendation of the Review Board, constituted procedural unfairness and was a breach of fundamental justice.

Certiorari is available to Mr. Jollimore to have this Court review the legality of the warrant. Having reviewed the return and having reviewed material filed by counsel, I am satisfied that the warrant should be quashed.

D

- 3 -

I would to make it very clear that there is no personal criticism of the Lieutenant Governor with respect to this matter. He normally acts on the advice of the Attorney General and presumably was not advised of the necessity of affording a hearing to Mr. Jollimore in view of intended decision to disregard the recommendation of the Review Board.

It is not necessary to deal with the issue of habeas corpus nor the grounds raised in the Notice of Motion. As to ground 5 of the Notice of Motion, although phrased in a manner that would indicate that Mr. Jollimore was raising as the issue the failure to have been allowed by the Attorney General to have made representations to him, I do not see that there would be any particular merit in dismissing the Motion on this technical ground. The issues are clearly before the Court and I am sure the Attorney General's representatives are well aware of the fundamental issues that are involved in this hearing. I would allow an amendment of ground 5 to allege that the "Lieutenant Governor" failed to act with procedural fairness in issuing the warrant transferring Mr. Jollimore to Dorchester rather than to the Pinel Institute in Montreal as recommended by the Review Board.

- 4 -

Possibly for the record I should state that the direction of the Lieutenant Governor under Section 545(1) of the Criminal Code is very broad and, as long as the procedures followed are fair, this Court certainly would not have the jurisdiction to question any decision made by the Lieutenant Governor, so long as, in arriving at it, he did not offend the principals of fundamental justice.

There are probably a number of other matters that were touched upon that may be of some relevance during the discussion between myself and counsel, but I do not feel there is any necessity of repeating them nor to deal specifically with the other four grounds raised to quash the warrant.

The essence of my decision is that I am following the dictates of the Supreme Court of Canada in Cardinal and Oswald, which, to me, cannot be distinguished in any meaningful way from the case before me.

Halifax, Nova Scotia,

July 15, 1986.

1986

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S. H. No. 57296

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

JAMES PAUL JOLLIMORE,

Applicant,

- and -

ATTORNEY GENERAL FOR THE PROVINCE  
OF NOVA SCOTIA,

Respondent.

HEARD: in Chambers at Halifax, Nova Scotia before the  
Honourable Mr. Justice C. Doane Hallett, Trial Division,  
on July 15, 1986.

DECISION: July 15, 1986 (Orally at conclusion of hearing)

COUNSEL: Mr. W. B. Smith, for the applicant; Mr. K. Fiske, for  
the respondent.

1986

S. H. No. 57296

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

JAMES PAUL JOLLIMORE,

Applicant,

- and -

ATTORNEY GENERAL FOR THE PROVINCE  
OF NOVA SCOTIA,

Respondent.

HALLETT, J.:

This is a supplemental decision to my oral decision rendered at the conclusion of the hearing. There were a number of issues raised on this application to quash the Lieutenant Governor's warrant transferring the applicant to Dorchester Penitentiary that it was not necessary to deal with in granting the motion. However, it might be useful to deal with those issues in that the matter of Mr. Jollimore's custody will apparently be subject to further legal proceedings.

1. The first four grounds raised in the applicant's motion are without merit. While that Lieutenant Governor must consider

- 2 -

the report of the Review Board made under section 547 of the Code, the warrant need not state on its face that he has considered it. The Lieutenant Governor may act on the recommendations of the Attorney General. Safe custody is always a factor to consider under section 545 of the Code. The Warden of Dorchester Penitentiary had the authority to consent to the transfer of the applicant to that institution.

2. The Attorney General has the right to make recommendations to the Lieutenant Governor with respect to the Lieutenant Governor's consideration of where a person should be held in safe custody pursuant to Section 545 of the Criminal Code.

3. There are no limitations as to where the Lieutenant Governor may determine is a proper place for the safe custody of a person found to be insane; he may choose to send the detainee to a federal maximum security penitentiary if that is what is necessary in the opinion of the Lieutenant Governor to ensure safe custody.

4. The Lieutenant Governor is entitled to, but does not have to follow the Attorney General's recommendation just as the Lieutenant Governor does not have to follow the recommendation of the Review Board appointed under Section 547 of the Criminal Code.

5. Parliament, by enacting Section 545(1) and (2) of the Criminal Code, has imposed on the Lieutenant Governor the duty of making the decision respecting an insane person's custody and rehabilitation; the Lieutenant Governor is the decision maker, not the Attorney General. The Lieutenant Governor is not a figurehead with respect to matters which he is obliged to deal with under this Section of the Criminal Code.

6. Where the Lieutenant Governor intends to reject the recommendation to him of the Review Board appointed under Section 547 of the Criminal Code with respect to the custody of any insane person and the consequences of such rejection are serious as in this case, he must advise the person affected of the reasons for his tentative intention and give that person or his counsel the opportunity, however informal, to make representations to the Lieutenant Governor on the issue of the detainee's safe custody and rehabilitation if the latter is the issue. The principle in issue in this case is the same as in Cardinal and Oswald v. Director of Kent Institute (1986), 23 C.C.C. (3d) 188 (S.C.C.) where the Supreme Court of Canada held that the failure of a Director of a penitentiary to give a detainee in special a hearing where the Director did not follow the recommendation of a board of review that the detainee be released from that form of confinement

- 4 -

was a breach of procedural fairness.. A warrant issued under such circumstances may be quashed on an application in the nature of certiorari (Martineau (No. 2)).

Halifax, Nova Scotia,

July 21, 1986.

1986

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S. H. No. 57296

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

JAMES PAUL JOLLIMORE,

Applicant,

- and -

ATTORNEY GENERAL FOR THE PROVINCE  
OF NOVA SCOTIA,

Respondent.

HEARD: at Halifax, Nova Scotia (in Chambers) before the  
Honourable Mr. Justice C. Denne Burchelle, Trial  
Division, on March 7, 1986.

DECISION: (Orally on March 11, 1987)

COUNSEL: Mr. W. B. Smith)  
Mr. B. W. Evans) For the applicant

Mr. K. Fiske, )  
Mr. J. Embree.) For the respondent

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

179

JAMES PAUL JOLLIMORE,

Applicant

- and -

ATTORNEY GENERAL FOR THE  
PROVINCE OF NOVA SCOTIA,

Respondent

BURCHELL, J.: (Orally)

This application is stated as having been made pursuant to the Liberty of the Subject Act, R.S.N.S. 1967, c. 164, for an order in the nature of habeas corpus with certiorari in aid, quashing, or alternatively, an order in lieu of certiorari, declaring void, Warrants of His Honour the Lieutenant Governor of Nova Scotia dated December 2, 1985 and February 26, 1986. The earlier Warrant directed that the applicant be transferred from the Nova Scotia Hospital in the City of Dartmouth, Nova Scotia, to the Halifax County Correctional Centre at Lower Sackville, Nova Scotia, and the later Warrant directed that the applicant be transferred to Dorchester Penitentiary in the Province of New Brunswick.

Facts:

The relevant facts are not in dispute, and, borrowing largely from the memorandum filed on behalf of the applicant, I state them as follows:

The applicant was found not guilty by reason of insanity on three charges of first degree murder. On September 28, 1984,

Mr. Justice Hallett, pursuant to Section 542 of the Criminal Code, ordered that the applicant be held in strict custody at the Nova Scotia Hospital "until such time as the pleasure of the Lieutenant Governor of Nova Scotia be known." By Warrant of His Honour the Lieutenant Governor dated the 9th day of October, 1984, the applicant was ordered to be held at the Nova Scotia Hospital until further order. 180

Early in the morning of November 8th 1985, the applicant, in company with several other inmates, made an unsuccessful attempt to escape from the Nova Scotia Hospital, assaulting an orderly in the process.

The Board of Review appointed by Order in Council Number 85-1206 pursuant to Section 547 of the Criminal Code of Canada, considered the applicant's case during the month of November 1985. On November 20th, the Chairman of the Board made a preliminary report to the Lieutenant Governor, stating inter alia as follows:

"As we reported earlier, Mr. Jollimore's insanity is of a marginal kind and does not affect his general thinking, nor his ability to act. Treatment has not had any effect on him. He is refusing suggested treatments and is neither medicated nor on any kind of rehabilitation program at the moment. The problem he presents is purely one of security. Mr. Jollimore is dangerous, a high security risk and totally unsuited to the Hospital. As long as he is in the Hospital, further attempts at escape are inevitable and the consequences of any escape or attempted escape, may be fatal. He is without remorse for what he has already done and entirely capable of killing again. Security cannot be obtained in the Hospital and he ought to be placed in a Correction Centre where there are the facilities and the trained professional staff."

On November 27th 1985, the Board held a hearing that was attended by the applicant and his legal counsel and, following that hearing, the Chairman of the Board of Review made a further report

to the Lieutenant Governor recommending as follows:

"That the place of safe custody under s. 545. (1) (a) of the Criminal Code, be changed to a Correction Centre until such time as a further recommendation and order may be made for his transfer to an appropriate psychiatric institution elsewhere. We will have a specific recommendation to make concerning his transfer to such an institution and will review the matter with him beforehand."

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In the same report the Board of Review stated -

"Mr. Jollimore's main concern about a transfer to another Province was his separation from his family. His mother and brother visit him regularly and are a support to him. While his family connection is important, our view is that it will be much better for him to be in a facility where he has access to programs, recreation, work activities, and the necessary psychiatric treatment. We have no such institution in Nova Scotia, or even in the Maritimes. As a result, if he remains in Nova Scotia given what he has done and his escape attempts, there is really no alternative but to keep him in tight security with little or no activity or therapy for him. We are of the opinion that anyone, and particularly someone with Mr. Jollimore's intelligence and his relative degree of sanity, would deteriorate in such a restricted environment. There is no question in our minds that it is in the interests of his rehabilitation to be placed in an appropriate psychiatric institution where he may securely be given the liberty to participate in programs, recreation and work activities, and receive psychiatric treatment as well."

On December 2, 1985, His Honour The Lieutenant Governor issued a Warrant directing that the applicant be transferred to the Halifax County Correctional Centre, and the Warrant states on its face that the Lieutenant Governor had been advised to do so for security reasons.

Later, on February 7th 1986, the Chairman of the Board of Review, visited the Pinel Institute in Montreal and sent a memorandum to Mr. Gordon Gale of the Attorney General's Department, to Doctor Syed Akhtar of the Nova Scotia Hospital and other members of the Board of Review on February 12th 1986, reporting that he was<sup>182</sup> very impressed with the Pinel Institute. He further reported that the Institute was prepared to accept the applicant and that the possibility of transferring the applicant to the psychiatric unit at Dorchester was -

"A very poor alternative to Pinel. In any event, it appears that we will have two alternatives to present to Mr. Jollimore at our review of him."

On February 20th 1986, the Attorney General of Nova Scotia announced publicly that the applicant was being transferred to the Federal Maximum Security Institution at Dorchester in the Province of New Brunswick. On February 25, 1986, the Attorney General made a report to the Lieutenant Governor reviewing the bare facts of the applicant's detention until then and stating further by way of preamble, and I quote -

"And whereas the Attorney General has advised that for security and rehabilitation reasons, James Paul Jollimore be transferred to Dorchester Penitentiary at Dorchester in the Province of New Brunswick."

(The phrase "has advised" that appears in the passage just quoted, is peculiar, since the document is a report by the Attorney General himself. It may be that the intended phrase was "has been advised" but I do not suggest that anything of significance turns on this minor point.)

The report of the Attorney General concluded with a recommendation that the Lieutenant Governor direct that the applicant be transferred from the Halifax County Correction Centre to Dorchester

Penitentiary, which is described in the recommendation as a place of safe keeping. On February 26, 1986, His Honour the Lieutenant Governor issued a Warrant directing the transfer of the applicant to Dorchester Penitentiary and the Warrant stated on its face that it was based on the advice of the Attorney General and that the transfer should be made: 183

"...for security and rehabilitation reasons".

No disclosure of the report of the Chairman of the Board of Review was made to the applicant prior to the decision being taken to transfer the applicant to Dorchester Penitentiary. No opportunity was given to the applicant to respond to his proposed transfer from the Halifax Correctional Centre prior to the decision being taken to transfer him to Dorchester Penitentiary.

Submissions:

I have before me an extensive submission on behalf of the Attorney General of Nova Scotia, as to the scope of enquiry permitted, and the limits upon the remedies that may be sought, in an application of this kind. It is said, relying upon comments of Chief Justice MacKeigan, as he then was, in Bell v. Director of the Springhill Medium Security Institution et al (1977), 19 N.S.R. (2d) at 216, that in criminal matters the Liberty of the Subject Act is of doubtful validity. The contention is that habeas corpus and certiorari in aid, are only available in the form in which those remedies existed at common law; that the subject Warrants can only be attacked on the basis of want of jurisdiction, bias or fraud. As to certiorari, it is said that a Court cannot consider the evidential basis upon which an applicant may have been committed, except in cases where there is an entire absence of evidence to support an exercise of jurisdiction.

Counsel for the applicant submit that the present case is distinguishable from the Bell case where the applicant was a person who had been convicted of a criminal offence. That is not so in the present case. The applicant has been found not guilty by reason

of insanity. Thus it is said that, while the legislation dealing with his confinement is a Federal Statute, the provisions of the Criminal Code of Canada relevant to this case have not been adopted in any exercise of exclusive Federal jurisdiction. It is submitted, in other words, that the broad scope of review permitted under Section 8 of the Nova Scotia Liberty Of The Subject Act is applicable in the case of a person found not guilty by reason of insanity. Interesting as that submission may be, I think there is greater merit in the submission for the applicant, that, whatever may have been the former limits upon relief by way of prerogative writ or order, very broad review and remedial powers are now conferred by the Canadian Charter Of Rights And Freedoms in cases involving the liberty of the subject, or, to borrow the language of several decided cases, where an individual may be subjected to "pains and penalties", or may be adversely affected in some such way. The specific reference in the submission for the applicant is to Charter Sections 7 and 10(c), and, as to the broad scope of possible remedies, I note the provisions of Section 24 sub-section (1). I also accept the submission of the applicant that, in a line of recent cases, the Courts in Canada have recognized a general duty upon tribunals and administrators to act with fairness whether the function under review be judicial, quasi-judicial, or purely administrative. On this point I have been referred to Nicholson v. Haldimand - Norfolk Regional Board of Commissioners of Police (1979) 1 S.C.R. at 311; Martineau v. Matsqui Institution Disciplinary Board (No. 2) (1980) 1 S.C.R. 602 and Re Able and Advisory Review Board (1981) 56 C.C.C. (2d) at 153.

The duty to act fairly may be limited by the nature or terms of the Statute under which a power to act is conferred, and as was said by Estey, J. in Attorney General of Canada v. Inuit Tapirisat of Canada (1980) 115 D.L.R. (3d) page 1 at page 13 -

"It is still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness."

With that reservation, it is my opinion that the subject Warrants are open to review on grounds of want of jurisdiction, bias, fraud, or lack of procedural fairness.

The submissions on behalf of the applicant can be summarized briefly. There is no suggestion that bias or fraud were involved in the issue of either of the Warrants under review. 185-186  
It is submitted, however, first, that the Lieutenant Governor had no jurisdiction to issue the Warrants, and, secondly, that in exercising his authority, the Lieutenant Governor did not meet the requirement of procedural fairness.

Conclusions:

I find that the submission concerning want of jurisdiction is without merit. It is based on the language of Section 542 subsection (2) of the Criminal Code, which provides that an insane person detained in safe custody may, by Warrant of the Lieutenant Governor, be transferred for the purposes of his rehabilitation, to any other place in Canada specified in the Warrant, with the consent of the person in charge of such place. It is said that, on an analysis of the facts already reviewed, it is apparent that the real reason for both Warrants was to provide for security of the applicant and the submission is that a transfer is only authorized under the Criminal Code for the purposes of rehabilitation.

Section 545(1)(a) of the Criminal Code provides, however, that after an accused person has been found not guilty by reason of insanity, the Lieutenant Governor may make an order for his detention in safe custody. If I were to accept the submission on behalf of the applicant, it would follow that only one order under Section 545(1)(a) is authorized, and, once made, considerations of security or safe custody would cease to be relevant, no matter how inadequate the facility initially selected might prove to be.

My opinion is that the power conferred by Section 545(1)(a) is a continuing one that is not exhausted when exercised for the first time, and I think that considerations of security or safe custody,

both from the stand point of the person in custody himself, and from the stand point of the public, are relevant and indeed, matters of first priority in the case of any order, whether made pursuant to Section 545 (1)(a), or Section 545 (2) of the Criminal Code

I note in particular that the Warrant dated December 21<sup>st</sup> 1985, was issued on the basis of a recommendation of the Board of Review made with specific reference to Section 545 (1)(a).

On the same reasoning as to the continuing relevance of security or safe custody considerations, my finding is that the second Warrant dated February 26<sup>th</sup>, 1986, is not bad on its face or jurisdictionally tainted because it purports to have been issued for security as well as for rehabilitation reasons.

The main submission for the applicant, however, is that the Lieutenant Governor did not proceed fairly when he issued the Warrant dated February 26<sup>th</sup> 1986. That is the document under which the applicant is to be transferred to Dorchester Penitentiary in the Province of New Brunswick.

The relevant facts have already been stated, but I note again the reliance placed on the fact that the report of the Chairman of the Board of Review concerning the Pinel Institute was not disclosed to the applicant or his counsel, and they were given no opportunity to respond to any proposal that the applicant be transferred to Dorchester Penitentiary. It is also apparent that the Lieutenant Governor acted on the recommendation of the Attorney General before the Board of Review had ceased to function, and before it had formulated any final recommendation as to transfer to an appropriate psychiatric institution: That the work of the Board was incomplete when the second Warrant was issued, and further, that the Board intended to afford the applicant another opportunity to be heard, is apparent from the final paragraph in Mr. Thompson's report of February 12<sup>th</sup> which I have already quoted in part. The

report states -

"On Thursday, the day I left for Montreal, I received a call from Gordon Gale advising that he had received a call from the Provincial Department of Correctional Services advising that a transfer through the penitentiary system could be arranged to place Jollimore on the psychiatric unit at Dorchester. While Dorchester is certainly a better alternative than the present one and maybe much cheaper than Pinel, it seems to me to present a very poor alternative to Pinel. In any event, it appears that we will have two alternatives to present to Mr. Jollimore at our review of him. Perhaps I should also arrange to visit Dorchester beforehand."

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I have already referred to the jurisprudence that establishes the general requirement of procedural fairness, and I have mentioned as well the necessity that the relevant Statutory Provisions be examined to determine the extent to which procedural fairness may be an imperative in a given case.

Here the relevant provision is Section 547 of the Criminal Code. The first point to be noted is that the very appointment of a Board of Review is discretionary, but, as noted, that discretion has been exercised and a Board of Review was, in fact, in existence and functioning in the present case when the second Warrant was issued. Section 547 sub (5) provides that a Board shall review the case of every person such as the applicant. The direction, I should note, is mandatory. Section 547 sub-paragraph (5) goes on to say -

"forthwith after each review the board shall report to the Lieutenant Governor setting out fully the results of such a review and stating..."

(in the case of persons such as the applicant)

"...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."

Counsel for the Attorney General stresses the point that the Lieutenant Governor is not bound to accept the recommendations of the Board of Review, and I interpret the legislation in the same way. I note further that, as far as it was 189 permitted to function, the Board itself appears to have acted with strict and scrupulous fairness, reporting in great detail the concerns of the applicant as far as they were then known, and its own concern as to his rehabilitation. It also appears that the Board gave and intended to give the applicant full opportunity to be heard.

What is obvious, however, is that the Board was not permitted to carry out its statutory function and my conclusion is that, the Board having been established and being in the process of a review provided for under the Statute, the Lieutenant Governor had a duty to receive and consider its recommendations. The Lieutenant Governor may have a right to disregard any such recommendations, but could not in procedural fairness, cut off or preempt the function of the Board.

In passing I would comment that, where a Board is guilty of inordinate or unreasonable delay, it may be possible to conclude that it has ceased to function, but there is no suggestion that there was any such delay in the present case.

To the foregoing I would add that, if the second Warrant did not effectively terminate the jurisdiction of the Board (and, indeed, the jurisdiction of the Lieutenant Governor himself), I would have been inclined to regard the second Warrant as a proper measure under Section 545(1)(a), for the interim safe custody of the applicant pending the final recommendations of the Board of Review, even as, in my opinion, the earlier Warrant was valid for that kind of purpose. The insurmountable difficulty with that approach is that, because the second Warrant would remove the applicant from this Province to the Province of New Brunswick, the Board's capacity to deal with his case and, in particular, its capacity to make any final recommendation, would terminate since the powers of

a Board of Review constituted under Section 547 of the Criminal Code, relate only to a person in custody in the Province for which the Board is appointed. The interruption of the Board's function caused by the second Warrant, is, therefore, absolute if the second Warrant is allowed to stand. 190

I make only passing reference to several cases cited by counsel for the Attorney General to the effect that, where the Lieutenant Governor has not yet exercised his discretion as to the release or conditional release of an applicant, a court should not interfere. The inference is that no exercise of discretion is involved in the case of a transfer under Criminal Code Section 545(1(a) or 545(3). I do not agree. My opinion is that a Lieutenant Governor has the same duty to receive and consider the recommendations of a Board of Review made pursuant to Section 545(5)(f) as exists in relation to recommendations relative to release or conditional release, or fitness to stand trial, made pursuant to the other subsections of that section of the Criminal Code.

I should add by way of footnote that, generally as to the duty to proceed fairly in cases of this kind, I rely on Re McCann and The Queen (1982) 47 C.C.C. (2d) 180, and on Re Able and Advisory Review Board (1980) 56 C.C.R. (2d) at 153.

My conclusion is that the Warrant of the Lieutenant Governor dated February 26, 1986 transferring the applicant from the Halifax Correctional Centre to Dorchester Penitentiary in the Province of New Brunswick, should be quashed. The earlier Warrant under which the applicant was transferred from the Nova Scotia Hospital to the Halifax Correctional Centre, is, of course, still valid authority under which the applicant may be kept in that place in safe custody pending any valid future Warrant or order of the Lieutenant Governor made pursuant to Section 545 of the Criminal Code of Canada.

My views as to the duty of the Lieutenant Governor to receive and consider the recommendations of the Board of Review

made pursuant to Section 547(5)(f) of the Criminal Code need not be repeated. I will only note again that the Lieutenant Governor is not bound to accept any such recommendations and, as long as he exercises the powers conferred upon him under the Criminal Code with procedural fairness and without fraud or bias, the choice 191 of any other suitable place of detention in Canada is his alone to make. That may eventually prove to be a choice in favour of Dorchester Penitentiary where I note that psychiatric therapy is evidently available; but, until the Lieutenant Governor has received and considered the recommendation of the Board of Review, any assumption as to how he will exercise his authority would be improper.

A handwritten signature in cursive script, appearing to read "J. [Name]", is written over a faint circular stamp.

Halifax, Nova Scotia  
March 11, 1986

1986

S.H. No. 55787

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

192

BETWEEN:

JAMES PAUL JOLLIMORE,

Applicant

- and -

ATTORNEY GENERAL FOR THE  
PROVINCE OF NOVA SCOTIA,

Respondent

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OPAL DECISION OF BURCHELL, J.

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APPENDIX D



February 13, 1987

The Honourable Lincoln M. Alexander  
Lieutenant Governor  
Room 131, Legislative Building  
Queen's Park  
Toronto, Ontario  
M7A 1A1

Your Honour,

I am a graduate student in Criminology at the University of Ottawa. My Thesis topic is the History and Use of the Lieutenant Governor's Warrant in Canada. However, it has been difficult to find documentation of the L.G.W. System as it exists today. It would be greatly appreciated if you could provide information on how the L.G.W. System operates in your province. For example, is there any documentation or statistical information on the mandates, policy, administrative procedures on the cases reviewed by your office? Due to the lack of published information on the L.G.W. System, any details you could provide would be appreciated. I also have a number of specific questions for which I need answers. Some of these questions are listed on the attached questionnaire.

I would be grateful for the chance to discuss these questions personally with you and your staff. I can be reached by writing to the following address. Thank you very much for your time and consideration.

Sincerely,

Bruce Beanlands

4 Kitimat Crescent  
Nepean, Ontario  
K2H 7G5  
(613) 829-6706

L.G.W. Questionnaire

1. What exactly is your role in the issuing and loosening of warrants?
2. What criteria or guidelines do you use in deciding on the recommendations of the Advisory Review Board?
3. Is a consistent procedure followed in this process?
4. Do you meet directly with the board to discuss the cases being considered? If so, is some kind of formal process followed?
5. Are there circumstances where you meet directly with the person (or their legal counsel) whose case is being reviewed?
6. Are there records kept of the decisions made? Are they available to the public?
7. What do you believe are the positive points of the L.G.W. System?
8. In your opinion, why has the L.G.W. System changed very little in more than one hundred years?
9. Is there anything about the L.G.W. System you would like to change? Why?

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1987-05-14

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Mr. Bruce Beanlands  
4 Kitimat Crescent  
Nepean, Ontario  
K2H 7G5

Dear Mr. Beanlands:

Your letter of February 13, 1987 addressed to His Excellency the Lieutenant-Governor has been referred to the writer for attention as chairman of the Order-in-Council Review Board.

I regret the long delay in responding to your letter, but quite frankly, was not quite sure how to deal with it.

In British Columbia, the board makes recommendations to the Cabinet for an Order-in-Council which is approved by the Lieutenant-Governor. This is in keeping with his Constitutional requirements to act only on the advice of his Cabinet. In this light, you can see that many of your questions directed to the Lieutenant-Governor are not pertinent to British Columbia, but may reflect the Ontario experience.

For your information, I am enclosing a copy of the statistics of the British Columbia Review Board for the period 1977-1986.

The Review Board in British Columbia acts on the inquisitorial process. The patient is interviewed personally and is entitled to be represented by counsel and to have family members, friends, or other persons attend.

The question of the status of the patient is dealt with on the basis that we are operating a medical model. Our criteria therefore are as follows:

(1) Is any step towards his rehabilitation to the community in the best interest of the patient and not contrary to the public interest, i.e. dangerousness

(2) The various<sup>a</sup> levels of release are from strict to safe custody, safe to conditional discharge level one, conditional discharge level one to conditional, and are all based on the patients ability to meet these criteria at certain specific times in his rehabilitation

It is clear that the application of these criteria requires that, when he is finally discharged, his mental illness is in full remission (whether as a result of medication or otherwise) and he is no longer considered to be a danger to the public.

I trust that this may be of some use to you.

Yours truly,

N. A. McDiarmid, Q.C.  
Chairman  
Order-in-Council Review Board

NAM/blw

Enclosure

c.c. Mr. P. A. Insley



Quebec, April, 10, 1987

Mr Bruce Beanlands  
4, Kitimat Crescent  
Nepean ONTARIO  
K2H 7G5

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Dear Sir,

Your letter addressed to the Lieutenant-governor was referred to me for reply.

Here enclosed you will find some documents regarding "La Commission d'examen du Québec":

- Historique de la Commission
- Procédure concernant les personnes sous ordonnance du Lieutenant-gouverneur
- Rapport d'activités 1985-1986

If you want more information, I will be in Ottawa next week and will contact you by phone and if it is advisable, I could meet you on April 13rd in the morning to complete the information.

Hoping this will be helpful to you.

I remain,

Yours truly,

La Présidente, -

MONIQUE PERRON

MP/cd



\*March 23, 1987

199

Mr. Bruce Beanlands  
4 Kitimat Crescent  
NEPEAN, Ontario  
K2H 7G5

Dear Mr. Beanlands:

His Honour F. W. Johnson, the Lieutenant Governor of the Province, has referred your letter of February 13th to me as Chairman of the Saskatchewan Advisory Review Board appointed pursuant to the provisions of section 547 of the Criminal Code.

I am not certain whether you are aware that Saskatchewan and British Columbia are the only provinces where recommendations of a review board are referred to cabinet for approval. The Lieutenant Governor then issues the Order-in-Council in the terms of the approval by cabinet.

I am not certain I can answer all of the questions set out in your questionnaire but I have been chairman of the Saskatchewan Board since the year 1970 and perhaps the experience of the Board in this Province might be of some assistance to you.

In the late sixties, in two cases individuals charged with mass murder were found not guilty by reason of insanity. One had shot to death a family of nine and the other axed to death a family of seven. The incidents took place within a period of about two years and both were in the northern part of the Province. At the time I assumed chairmanship of the Board, the Attorney-General and the cabinet of the day were somewhat reluctant to accept our recommendations for release and with that knowledge the Board was careful to only recommend release in cases where it was certain that the individual no longer presented a danger, either to himself or to the public.

Since the year 1971, we have not made a recommendation that has failed to receive cabinet approval. In some instances there have been requests for further information which has been supplied but the approval has always been received.

Mr. Bruce Beanlands  
Page 2  
March 23, 1987

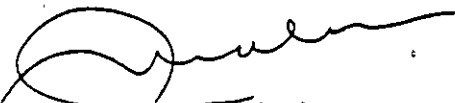
Since I assumed chairmanship of the Board, we have had approximately 90 persons found either unfit to stand trial or not guilty by reason of insanity and of that number, between 55 and 60 have been released. Approximately 45 were released into the community and the remainder were either detained by reason of illness or had to be certified under provincial mental health legislation.

advised  
in  
Cline's  
view

As you are no doubt aware, amendments to the Criminal Code have been prepared following studies undertaken by a mental disorder project of the Department of Justice under the chairmanship of E. F. Tollefson. The recommendations of the committee as set forth in the proposed amendments would abolish L.G.W.s and substitute boards of review who would be empowered to order the release of persons detained following a finding of unfitness for trial or insanity. It may be some time before the amendments are approved by Parliament but I am reasonably certain L.G.W.s as we presently know them are on the way out.

If I can be of any further assistance in your studies in this area, I would be pleased to hear from you.

Yours truly,



J. H. Maher, Chairman  
Saskatchewan Advisory Board of Review



OFFICE OF THE LIEUTENANT GOVERNOR  
LEGISLATIVE BUILDING  
EDMONTON, ALBERTA, CANADA T5K 2B6

201

March 13th, 1987.

Mr. Bruce Beanlands,  
4 Kitimat Crescent,  
Nepean, Ontario. K2H 7G5.

Dear Mr. Beanlands:

I am writing in response to your letter of February 13th, 1987, in which you requested information regarding the Lieutenant-Governor's Warrant system in Alberta.

The procedures which have been established in the Province of Alberta are, needless to say, patterned upon the statutory provisions found in Sections 542 - 547 of the Criminal Code of Canada. The number of persons subject to Lieutenant-Governor's Warrants in the Province of Alberta ranges, on average, between 40 - 50 at a time. This number is divided between those who are being held on Warrants on an in-patient basis and those who have been released subject to conditional discharges.

The Board of Review in Alberta reviews all cases involving individuals held on an in-patient basis every six months. The cases of those released on conditional discharges are reviewed once a year.

Beyond those regular sittings, the Board meets to review the cases of those who are found not guilty by reason on insanity, or unfit to stand trial, if there is no scheduled sitting of the Board of Review available in a short period after the committal. The Board of Review will also hold special sittings in relation to individuals whose status has changed since the issue of the last Warrant, where such change suggests a need for a change in the terms of the Warrant.

Once the Board of Review has considered the circumstances of an individual held on a Lieutenant-Governor's Warrant, a recommendation is then drafted and forwarded to the Lieutenant-Governor.

In response to your specific questions, I would offer the following:

1. What exactly is the role of the Lieutenant-Governor in issuing and loosening of Warrants?

2. What criteria or guidelines do you use in deciding on the recommendations of the advisory review board?

As these two questions are closely related it is logical to answer them together. The decision of the Lieutenant Governor is based upon the recommendations of the Board of Review. As the Board of Review has an excellent record for making suitable recommendations, it has become customary in this province for the Lieutenant Governor to accept the recommendations of the Board of Review. This is done after consideration of the recommendation and the background of the case, and is not merely a "rubber stamp" process. Occasionally the Lieutenant Governor will, in fact, ask for clarification of the recommendation or further information regarding the case.

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3. Is a consistent procedure followed in this process?

Subject to the special circumstances referred to above, the same procedure is followed in all cases.

4. Do you meet directly with the Board to discuss the cases being considered? If so, is some kind of formal process followed?

The contact between the Board of Review and the Lieutenant Governor is solely through the recommendations made to the Lieutenant Governor by the Board of Review. In circumstances in which clarification or further information is sought, the Lieutenant Governor seeks such information through the Attorney General's Department.

5. Are there circumstances where you meet directly with the person (or their legal counsel) whose case is being reviewed?

This has not occurred in recent memory.

6. Are there records kept of the decisions made? Are they available to the public?

Although records are kept of the decisions made they are not available to the public. In many situations it would be detrimental to the treatment of the person being detained to have his or her case the subject matter of public discussion. As a result, records of this sort are treated in the same manner as other health records.

7. What do you believe are the positive points of the L.G.W. System?

Although at its inception the Lieutenant Governor's Warrant system may well have been developed for the purposes of maintaining some degree of political control over individuals who have been found not guilty by reason of insanity, the system had developed to the stage at present where the most important function of the Lieutenant Governor in the system is to maintain a supervisory capacity over the Board of Review. It functions simply as a safety mechanism to ensure that proper procedures are followed, that individual cases are not neglected or forgotten and to ensure that individuals are not improperly detained. The Lieutenant Governor's Warrant system fulfills this capacity at this time merely by way of its presence, rather than by way of functional intervention.

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8. In your opinion, why has the L.G.W. system changed very little in more than one hundred years?

While I cannot speak for the operation of Lieutenant Governor Warrant system in other provinces, there has been no motivation to change the system in this province as it has functioned very well, ensuring that a proper balance is struck between the rights of those detained by Lieutenant Governor Warrants and the protection of the public.

9. Is there anything about the L.G.W. System you would like to change? Why?

It would appear from these questions that you may not be aware of the imminent change to the system for detaining individuals who have been found unfit to stand trial or not guilty by reason of insanity. The Federal Government has drafted proposals for changing the Criminal Code provisions dealing with mentally disordered offenders. One of the effects of these changes will be to remove the necessity of warrants signed by the Lieutenant Governor for the detention of the mentally disordered offenders and replace those warrants with orders from the Board of Review which will be sufficient authority for detention. The supervisory capacity of the Lieutenant Governor which exists in the present system will be replaced by a procedure for judicial supervision by allowing appeals of Board of Review decisions to superior courts. This change is consistent with the present trend towards the creation of procedures for judicial supervision in matters that have been handled on an administrative basis up until now. Although the provisions will require more formalized procedures than are presently provided for in the Criminal Code, these procedures will not be significantly different than the

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Mr. Beanlands

procedures that have been established in this province. It is not anticipated that these changes, which have been developed after considerable study and consultation with groups involved in the process, will significantly affect procedures in this province, nor will they have significant impact upon those who are actually detained as a result of a finding of insanity during a criminal process.

Sincerely yours,

  
W. Helen Hunley,  
Lieutenant-Governor of Alberta.



ONTARIO

OFFICE OF

THE LIEUTENANT GOVERNOR'S  
BOARD OF REVIEW

700 BAY STREET  
24<sup>TH</sup> FLOOR  
TORONTO, ONTARIO  
M5G 1Z6

(416) 963-1391

March 9, 1987

205

Mr. Bruce Beanlands  
4 Kitimat Crescent  
Nepean, Ontario  
K2H 7G5

Dear Mr. Beanlands:

The Lieutenant Governor has forwarded to me a copy of his reply of February 19th to your letter of February 13th. I certainly concur in his decision that it would be inappropriate to answer your questionnaire. Very substantial legislative amendments to the present warrant system are being considered and it is generally thought that they will be approved in the reasonably near future. If you wish to obtain information concerning the proposed amendments, you might communicate with Ms Tara Dier, Ministry of the Attorney General, 18 King Street East, Toronto, Ontario, M5C 1C5, (416) 965-3912.

Yours very truly,

The Honourable Mr. Justice T.P. Callon  
Chairman  
The Lieutenant Governor's  
Board of Review

TPC:djc



Office of The Lieutenant Governor

Government House  
4607 Dewdney Avenue  
Regina, Saskatchewan  
S4P 3V7

February 20, 1987

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Mr. Bruce Beanlands  
4 Kitimat Crescent  
NEPEAN, Ontario  
K2H 7G5

Dear Mr. Beanlands:

In response to your letter of February 13th, I think that I should refer your inquiry to Mr. Justice J.H. Maher, c/o Court House, 520 Spadina Crescent East, Saskatoon, Saskatchewan S7K 3G7.

Until 1983 I was Chief Justice of the Court of Queen's Bench in this Province, and Mr. Justice Maher was designated by me to sit on the Committee dealing with prisoners held under Lieutenant Governor's Warrants. Mr. Justice Maher is still on that Committee and I am sure that he would be able to give you much more detail than I.

In brief, the granting or variation of Lieutenant Governor's Warrants is similar to other acts carried out by the Lieutenant Governor on the advice of his or her Ministers.

I am of course, aware of how the system works, but when an Order-in-Council providing for a Warrant or varying a Warrant is placed before me, I really have no discretion in the matter since I am acting on the advice of my Ministers.

You have undertaken a very interesting study. I wish you well.

Yours sincerely,

F. W. Johnson  
Lieutenant Governor  
Province of Saskatchewan



Department of  
Attorney General

PO Box 7  
Halifax, Nova Scotia  
B3J 2L6

Our file no: 09-85-0225-11

Our phone no: 424-4032  
207

February 20, 1987

Mr. Bruce Beanlands  
4 Kitimat Crescent  
Nepean, Ontario  
K2H 7G5

Dear Mr. Beanlands:

Your letter of February 13th to His Honour Alan R. Abraham, Lieutenant Governor of Nova Scotia, has been referred to me for reply.

As in all other provinces, Lieutenant Governor's Warrants are governed by the provisions of Sections 542 to 547 of the Criminal Code. Pursuant to Section 547 of the Criminal Code a Review Board has been established consisting of five persons and chaired by Mr. J. Walter Thompson, who is a lawyer. The only unique feature in regard to Lieutenant Governor's Warrants in Nova Scotia is that we consider them to be the personal act of the Lieutenant Governor rather than the act of the Lieutenant Governor in Council which pertains in all other provinces. If a person is found unfit to stand trial or found not guilty by reason of insanity then the Court orders that person to be held in custody at the Nova Scotia Hospital until the pleasure of the Lieutenant Governor be known. At that time, this Department prepares a report to the Lieutenant Governor and drafts the Lieutenant Governor's Warrant and both are taken to the Lieutenant Governor and if he is in agreement then he signs the Lieutenant Governor's Warrant. After that the cases are reviewed by the Review Board under Section 547 of the Criminal Code as required by that Section. Following the review of each case a report is sent to the Lieutenant

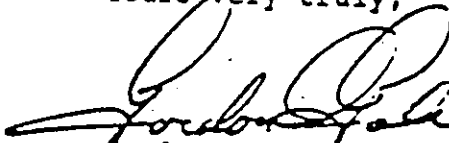
Governor which may advise that there is no action to be taken, that there is to be a change in the Warrant or that the person is to be released from custody. Such reports are copied to this Department and we then draft the Warrant in the terms of the report and present it to the Lieutenant Governor. At that stage the Lieutenant Governor acts on the recommendation of the Review Board. The Lieutenant Governor does not take part in the Board's deliberations.

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Questions involving the numbers of cases, policy and administrative procedure should be directed to the Chairman, Mr. J. Walter Thompson at the following address:

Mr. J. Walter Thompson  
Chairman  
Board of Review  
P. O. Box 307  
Halifax, Nova Scotia B3J 2N7

Yours very truly,



Gordon S. Gale  
Director (Criminal)

GSG:jd



ONTARIO  
OFFICE OF

THE LIEUTENANT GOVERNOR  
QUEEN'S PARK, TORONTO  
M7A 1A1

TEL 416 965-2005

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February 19, 1987

Dear Mr. Beanlands:

Thank you very much for your kind letter of February 13, 1987 and questionnaire enclosed.

His Honour was very pleased to hear from you, particularly on being advised that the "History and Use of the Lieutenant Governor's Warrant in Canada" is the topic of your Thesis.

In light of the position of the Lieutenant Governor, over and above his function in the Lieutenant Governor's warrants, it would not be appropriate, nor is it expected, that His Honour answer questionnaires.

On the other hand, in order to assist you, your letter and questionnaire are being forwarded to Mr. Justice T. Callon, Chairman, Lieutenant Governor's Board of Review, for his attention and I know he will be in touch with you in due course.

Once again, thank you for your interest.

Yours sincerely,

*Barbara Marshall*

(Mrs.) B.A. Marshall  
Executive Assistant

Mr. Bruce Beanlands  
4 Kitimat Crescent  
Nepean, Ontario  
K2H 7G5

cc: The Honourable Mr. Justice Thomas P. Callon



Attorney General

Constitutional Law

4th Floor  
Woodsworth Building  
405 Broadway  
Winnipeg, Manitoba, CANADA  
R3C 3L6

February 27, 1987

Mr. Bruce Beanlands,  
4 Kitimat Crescent,  
NEPEAN, Ontario.  
K2H 7G5

Phone: (204) 945-2856

210

Dear Mr. Beanlands:

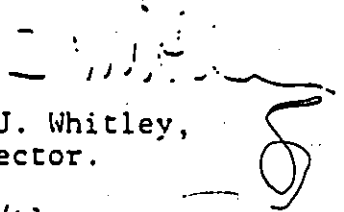
Your letter dated February 13, 1987 has been referred to me. I am counsel to the Lieutenant-Governor's Advisory Board of Review in this province.

There is a constitutional convention in place which requires that cabinet advise His Honour, and cabinet in turn is advised by the Advisory Board. It is therefore not appropriate that His Honour comment or otherwise deal with the issues you have raised, since de facto these are the concerns of the Board.

You are probably aware that during the last session Parliament introduced a bill for first reading which would have obviated the present ceremonial role of the Lieutenant-Governor. As to the other issues you have raised, I am enclosing a copy of a paper I wrote on this subject which provides some detail on the Board's operation.

I hope this is of assistance.

Yours truly,

  
S. J. Whitley,  
Director.

SJW/cl

encl.



Mr. Bruce Beanlands,  
4 Kitimat Crescent,  
Nepean, Ontario  
K2H 7G5

211

Dear Mr. Beanlands,

Your letter of 13 February 1987 addressed to His Honour has been passed to me for attention.

I have taken the liberty of forwarding a copy of your letter to the Assistant Deputy Attorney General of British Columbia. He has acknowledged receipt and has advised that Mr. Hal Yacowar of the Criminal Justice Branch in the Ministry, whose responsibilities include the operations of the Order-in-Council Patients' Review Board, will handle your letter. Mr. Yacowar is in a position to provide answers to your questionnaire and you may, therefore, anticipate receiving a reply directly from him or his designate.

His Honour has directed me to extend his warmest best wishes to you in preparing your thesis.

Yours very truly,

A handwritten signature in cursive script, appearing to read "J. Michael Roberts".

J. Michael Roberts  
Secretary

c.c. Mr. H. Yacowar

## ABSTRACT

This thesis presents a descriptive discussion of the history of the Lieutenant Governor's Warrant (L.G.W.) in Canada from 1841-1988. Despite the great number of studies that have been conducted concerning characteristics of persons held in custody under an L.G.W., as well as the increasing demands for legislative reform of the L.G.W. System, an indepth understanding of its development is lacking in the present literature. Thus, the purpose of this thesis is twofold: (1) to fill in some of the gaps that exist in the study of the history of the social control of the criminally insane in Canada, and (2) to follow the development of the L.G.W., from 1841 to the present, so as to provide a better understanding of the present operation of the L.G.W. System.

An idiographic analysis of the history of the L.G.W. in Canada reveals that this System has not undergone meaningful change since its inception in 1851. Minor modifications have been made to the legislation governing the L.G.W., but L.G.W. patients are still defined as "dangerous" to themselves and to society. The precedents set by the appeal cases in the first half of this century and the continuing fear of the mentally ill by the public and the judiciary, have minimized any changes that have taken place.

The authority over "persons dangerous to be at large" and "criminal lunatics" was vested in the Governor of the Province of Canada. After Confederation, this power was transferred to the Lieutenant Governors of the different provinces. There appeared to be two different classes of lunatics throughout the development of the L.G.W. in Canada: those considered to be "dangerous to be at large" and those defined as "criminal lunatics". Originally, the criminal lunatics class consisted solely of mentally ill inmates. The court cases of the early 1900's illustrate that this class of criminal lunatics was gradually extended to include persons found not guilty by reason of insanity. These cases also illustrate the fact that an L.G.W. was not open to appeal. After 1950, there was a dramatic increase in the calls for reform. This can be related to many factors: increasing study of the mentally ill and particularly L.G.W. patients, the enactment of the Canadian Bill of Rights in 1960, the enactment of the Canadian Charter of Rights and Freedoms in 1982, and cases in the United States and in Canada decided favour of the civil rights of the mentally ill. The L.G.W. System came under increasing attack and in 1969, a new provision was added to allow for the appointment of an Advisory Review Board by the Lieutenant Governor. However, the Lieutenant Governor did not, and does not now, have to follow the Board's recommendations. The most recent appeals of the Lieutenant Governor's Warrant have resulted in some minor reforms: the Lieutenant Governor must receive the recommendation of the Review Board before he makes his decision, patients have the right to appeal the recommendation of the Board before the Lieutenant

Governor and that the Lieutenant Governor may no longer "rubber stamp" the recommendations of the Review Board. Nonetheless, the absolute power of the Lieutenant Governor to write warrants and make decisions concerning L.G.W. patients has not been questioned.

The reform of the present L.G.W. System is at a very delicate stage. For the past thirty years almost all demands for change and the publicity have been for the benefit of the patient. A single case of a released L.G.W. patient committing a violent crime would sway public opinion in the opposite direction. Reform of the L.G.W. System will be achieved, but not within the near future because our justice system still applies the views exhibited in the cases of the early 1900's toward the mentally ill of today.

This thesis only scratches the surface of the development of the L.G.W. in Canada. Further investigation into the development of the various provincial systems is necessary.