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CRIMINAL LAW
GENERAL PRINCIPLES

FITNESS TO STAND TRIAL

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LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

CRIMINAL LAW

GENERAL PRINCIPLES

FITNESS TO STAND TRIAL

A STUDY PAPER

prepared by the Project

on the General Principles

of the Criminal Law

May 1973

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INTRODUCTION

The Criminal Code of Canada provides that a person may not be tried if he is unable to understand the purpose and meaning of the trial or if he is unable to rationally present his defence because of some mental disability. This exemption from trial, derived largely in both substance and form from the common law, has been widened by an increasing judicial concern for the mentally disordered accused. The present study memorandum examines the fitness rule as it has been developed in Canada in relation to mental disorder and makes recommendations for its reform.

Reappraisal of the fitness rule is one part of a review of the law and mental disorders which the Project on the Principles of the Criminal Law has undertaken. Other study papers which consider the defence of insanity and the mentally disordered prisoner are being prepared. These and the present paper are closely related to each other and to collateral subjects such as civil commitment and the court's powers to remand for psychiatric examination. As a result, the Project has considered the potential impact which suggested changes in the fitness rule might have on related areas of the law. Nevertheless, as it is always difficult to foresee every consequence which may flow from the implementation of a given reform, the Project would appreciate comments concerning the effect of its recommendations on related procedures and practices.

The study memorandum is being distributed for two reasons; to present the problems and principles of the fitness rule as they have been perceived by the Project, and to elicit comment and criticism which will be helpful in the formulation of the recommendations which will eventually be submitted to the Law Reform Commission. We are hopeful that the memorandum will accomplish these ends.

THE PRESENT LAW

At common law an accused who was unable to act rationally in his own defence or to understand the nature and object of the proceedings against him could not be tried. This exemption from trial was a result of the ban against trying a person in his absence; the accused's mental awareness was considered to be as important to the fairness of the proceedings as his physical presence. As well as the mentally disordered, persons with physical handicaps, such as the deaf and dumb, and even persons with linguistic and cultural differences could be found unfit. As technological and social developments improved the participation at trial of physically handicapped and culturally different persons, the disabilities which caused unfitness were restricted to mental impairment. This narrowing of the scope of the fitness rule was accompanied by a corresponding broadening of its application to mental disorders because of increased concern for mental illness.

In Canada, the Criminal Code codifies the fitness rule in section 543(1), which states in part:

> "A court may, when it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand trial."

The issue of fitness may be raised by the prosecution or the defence, despite the objections of the other party; or by the court despite the objections of either party. The fitness of the accused may be brought into question more than once at trial and again on appeal, and the party alleging unfitness must prove it on a balance of probabilities.

Fitness is determined by the trier of fact, whether the judge sitting alone, or the jury in a trial by jury. The same jury usually tries both fitness and guilt, but the jurors are resworn for the fitness hearing and a different oath is administered. If, however, the issue arises before the accused is given in charge of the jury, a separate jury is empanelled to decide it alone. These initial jurors, if they find the accused fit, do not in practice sit on the jury which decides guilt.

The presiding judge or magistrate decides whether an inquiry into the accused's fitness is warranted. He may refuse to hold a hearing if he concludes that the allegations are unfounded. But, if a hearing is necessary, trial on the merits is delayed and does not continue unless the accused is declared fit.

Prior to 1969, the accused's fitness was considered as soon as it was brought into question. However, an amendment in that year to section 543 of the Criminal Code empowered the presiding judge or magistrate to defer consideration of the matter up to the close of the case of the prosecution. The defence may, therefore, test the validity of the charges against the accused and, if he is acquitted, no inquiry as to fitness is made.

A decision by the trial judge to hold a fitness hearing is usually accompanied by an order made pursuant to section 543(2), remanding the accused to a medical facility up to 30 days for observation. If the accused has shown symptoms of mental disorder at arraignment or preliminary inquiry, he may be remanded for up to 60 days for observation under sections 465(c) and 738(5). Although the Code does not prescribe the procedure to be followed after the accused has undergone the required observation, the report of the examining doctor usually forms the basis of the court's decision concerning the accused's fitness.

If the accused is found fit, trial on the merits resumes; if the accused is found unfit, the judge sets aside the plea of the accused, discharges the jury, and orders the accused detained until "the pleasure of the lieutenant governor is known". The accused has a statutory right to appeal a finding of fitness or unfitness. Once the avenue of appeal has been exhausted, the courts have nothing further to do with the unfit accused until such time as he is returned to trial by the lieutenant governor.

The discretion of the lieutenant governor has usually been exercised by committing an unfit accused to a mental institution for an indeterminate period. As a result of a recent amendment to the Criminal Code, however, an unfit accused may now be discharged either absolutely or subject to conditions where the lieutenant governor thinks that such an action would be in the best interests of the accused and not contrary to the interests of society. The Criminal Code also empowers the lieutenant governor to create a Review Board which systematically considers the case of all persons detained in the province under Executive Warrant. The Board reports the progress of accused detained as unfit and makes recommendations concerning their return to trial or the need for further treatment. Such recommendations are not, however, binding upon the lieutenant governor, and not all provinces have Review Boards.

THE NEED FOR REFORM

The criticisms of and changes recommended by the Canadian Committee on Corrections, the Canadian Mental Health Association and other public and private bodies, as well as legal writing on the subject, indicate the need for reform of the law concerning fitness to stand trial. The disaffection stems from the unsatisfactory effects of the present procedure on the trial process and the rights of the accused. Ostensibly the unfitness exemption protects the accused and promotes the accuracy and integrity of the criminal trial; in reality it often does neither.

The Accused and Unfitness

The general concern for the rights of the accused which led to the inception of the fitness rule is not always reflected in practice. This is especially so when it is in the accused's interest that his trial proceed. Present procedure does not make adequate allowance for the accused who, although perhaps unfit, has grounds for attacking the criminal charge on its merits.

A valid answer to the accusation may arise in four situations. First, the prosecution may be barred as a matter of law; an example would be lack of jurisdiction. Second, the charge may be defective in law because, for example, of a defect in the indictment, or lack of evidence of an essential element of the offence charged. Third, the accused may have a defence not involving his participation. Last, the accused may have a defence which requires his participation.

In the first two situations the judge's power to postpone the issue to the end of the prosecution's evidence allows the defence to present legal objections to the charge and requires the prosecution to establish a prima facie case. If the accused is acquitted, no fitness inquiry is held.

This protection, however, is only partial because there is presently no assurance that a mentally disordered accused will be dealt with under the Criminal Code. In many Provinces, alternative procedures exist. In Ontario, for example, section 15 of the Mental Health Act empowers a judge to commit an accused whom he believes to be mentally disordered to a mental hospital for up to two months. A committal under this Act has been held to be a civil matter and not connected with the criminal process. Therefore, the protection afforded the accused by the trial judge's power under the Criminal Code to postpone the issue of fitness is seriously compromised.

Where the accused has a defence to the charge the present law does not allow it to be heard after fitness has been raised. This is the case even though counsel may be able to establish a defence through testimony of third parties without the participation of the accused.

It might be argued that an unfit accused committed before verdict suffers no prejudice as he will eventually be returned to trial. However, the delay occasioned by a remand for examination or a commitment may result in serious consequences for an unfit accused who alleges that he will not be convicted on the merits. Important elements of his case may disappear, witnesses die or move away, material evidence be lost or destroyed and memories fade or change. The prosecution's case may be similarly prejudiced but the consequences are more serious for the accused without investigative facilities. Nor may defence evidence be preserved by disposition. Even if the delay would not be prejudicial, there is no guarantee that the accused will ever be returned to trial. During the period of the remand the accused may be certified under provincial legislation, with the result that he is extracted from the criminal process altogether.

In sum, present fitness procedure may be more of an obstacle than a protection for an accused with a possible defence.

The Unfit Accused

Originally, a finding of unfitness was intended to only temporarily delay the proceedings until the accused recovered. Presently, it may result in the accused being detained indefinitely in a mental institution with no assurance that he will be returned to trial. A person accused of a minor offence may be found unfit and committed to a mental hospital for a lengthy period, sometimes for the rest of his life. Even if the culpability of the accused is assumed, the disparity between being found guilty and being found unfit may be great as there is no relationship between the length of commitment and the maximum sentence for which an accused would be liable if guilty.

Where an accused is incurably unfit (as is often the case with the mentally retarded) a mental institution is bound to accept a patient for whom little can be done and who would not have been committed under provincial legislation. As a result, the accused may never be released from custody. His detention does not further the aims of the criminal process and also unnecessarily taxes already over-worked medical facilities.

Commitment is intended to help the accused regain fitness so that he may be returned to trial. Treatment, however, is not mentioned in the section of the Criminal Code which empowers the lieutenant governor to commit the accused. Safe custody is the only expressed standard. Even when detention in a mental institution will be detrimental to the accused's recovery, he is committed.

Once the lieutenant governor issues a committal warrant, the accused has no control over the duration, conditions, or location of his detention. There is at present no method by which a committed accused may ensure that he will receive treatment, or that he will be returned to trial if he becomes fit. There have been cases where an accused able to prove that he was sane and fit to stand trial was unable to compel his return to court.

The review boards created under the Criminal Code may prevent cases such as the above from reoccurring. These boards systematically review the status of all persons detained in the provinces under a lieutenant governor's warrant. Their recommendations are, however, only advisory and do not bind the lieutenant governor. Paradoxically, a recommendation of a review board may be appealed to the Federal Court, although the discretion of the lieutenant governor is not reviewable. In other words, an unfit accused may appeal a review board's decision not to recommend his release and have it varied to advise his return to trial, but he has no legal recourse if the lieutenant governor refuses to act upon the amended recommendation.

Another undesirable consequence of commitment as unfit is the stigma which ultimately may attach to detention in a psychiatric institution. Because the accused is not usually returned to trial, this stigma is aggrevated by a pending criminal charge.

In sum, it appears that the net result of the present law is to further handicap the unfit accused rather than to return him for trial as soon as possible.

Procedural Abuse of the Fitness Hearing

Present law permits the fitness hearing to be used for purposes for which it was never designed. Fairness dictates that an accused should not be prevented by a mental disorder from defending himself. It is also reasonable that a person who is so mentally deranged as to be a menace to himself and others should be detained. But it does not follow that the fitness hearing, which is an integral part of the criminal process, should be used as a device to commit mentally disordered persons. Nevertheless, such may be its result.

Because the validity of a charge is not tested before an accused is liable to be committed as unfit, the fitness hearing may be used as an alternative to more complex civil commitment procedures. In order to commit a person under provincial legislation, it must be shown that he is dangerous to himself and others or unable to care for his own needs. The fitness hearing, more flexible with less rigorous standards, provides a less difficult but equally effective means of committing the accused. As a result, an unsubstantiated charge

could be used to force an individual into a psychiatric institution.

The fitness hearing may be used by the prosecution to avoid the defence of insanity. It is easier and quicker to have an accused committed as unfit than to proceed with the question of criminal responsibility. Because an unfit accused is always detained in a psychiatric hospital, his detention is just as certain as if he were convicted.

The present finality of the fitness hearing also leads to abuse. A finding of unfitness may be treated as a disposition instead of a deferral of the trial. Few unfit accused are returned to court, and of those, only a fraction are tried. After a lengthy commitment the charges are usually dropped for reasons which have little to do with the accused's guilt or innocence. (It is difficult to produce evidence and witnesses so long after the alleged offence; moreover, the time spent in an institution is equated with a prison term). As a result, instead of being a temporary protective device until the accused is ready for trial, the fitness hearing may become an alternative to regular trial process.

Fitness and Medical Evidence

Another matter of concern is the court's use of psychiatric evidence to determine fitness. Fitness to stand trial is a legal, not a medical concept. The psychiatrist is to advise the court providing information useful to the judge in making his decision. He is a medical expert and should not be expected to apply legal criteria in his reports or his testimony.

Presently the provisions of the Criminal Code dealing with medical testimony do little to attain this objective. A remand for medical observation does not determine the form, content, or disposition of reports sent to the court, nor does it even require that a psychiatric report be made. While some psychiatrists make detailed reports for the courts, many tend to report only the conclusions of the examination with regard to the legal issue to be determined. Such a report is of little use. What is needed to help the judge to make a decision on fitness is information regarding how the accused's mental disorder prevents him from participating at trial.

Nevertheless, some judges adopt without question the opinion expressed in the psychiatric report, however cursory that report may be. The judge, in effect, abdicates his role of adjudicator of the fitness issue to the psychiatrist.

Fitness and Doctrinal Confusion

Many of the undesirable consequences of the present procedure arise from ambiguities in the substantive law concerning unfitness. The rationale of the exemption has become clouded and is not clearly discernable from either the statute or the case law. Vague references to "reasons of humanity" or "the dignity of the proceedings" are repeated without explaining how preventing mentally disordered accused from standing trial ensures a fairer procedure. The uncertainty of the scope and application of the rule has led to incomplete and imprecise drafting of the fitness provisions of the Criminal Code. Much of the confusion regarding the differences between fitness and the defence of insanity, and fitness and civil certification could be avoided by clear enunciation of principles.

The problems raised in the above paragraphs cannot be remedied through piece-meal patching of existing procedures. A fundamental reappraisal of all facets of the fitness exemption is in order.

GOALS AND OBJECTIVES OF THE PROPOSED REFORM

Recognizing the need for reform of a law and formulating of the reform are two different processes, the latter being far more difficult than the former. It is always easier to know what is wrong with a system than to propose those changes which are necessary to make it right. This section of the memorandum discusses the principles which the Project thinks should be embodied in a fitness procedure.

The Rationale of the Fitness Rule

The fundamental questions are whether the reasons which led to the inception of the fitness rule remain valid and whether there are not now more efficient ways of dealing with the mentally disordered accused. Should the unfitness exemption be preserved and, if so, for what reasons and in what form? The reasons traditionally used to justify the fitness rule fall into three categories; to ensure the accuracy of the trial, to preserve the dignity of the trial proceedings and for reasons of humanity.

(1) To ensure the accuracy of the trial. This justification is related to the nature of accusatorial justice. The basic feature of an adversarial procedure is a well regulated contest between opposing parties. The system's effectiveness depends upon each party being represented with equal skill, benefiting from equivalent rights and priviliges. If one of the litigants suffers from a mental disorder which impairs his participation, the balance between the parties is disrupted and the fairness of the result is put in question. Not only will the accused's lack of participation make the trial one sided, it may also prevent him from revealing a fact or circumstance which might have an important bearing on the proceedings. An accused might be the only person aware of circumstances which would exonerate him from responsibility for the offence with which he is charged, but on account of his mental disorder, he may not reveal the necessary facts to his counsel of the court.

Although the accuracy of a trial is promoted by the fitness rule, the Project thinks that this does not justify the present exclusion of an unfit accused from trial. Accuracy as a justification may lead to misinterpretation and improper application of the fitness rule. The example of an accused suffering from amnesia illustrates the problems which may arise. It is often held that an accused must be able to instruct counsel to be considered fit. Instructing counsel is tied to the accused's participation at trial and implies the ability to rationally communicate. Consideration of the accuracy of the litigation when determining fitness, however, may extend "instructing counsel" to include the ability to give a detailed account of every event which transpired before,

during, and after the alleged offence. This has been the case in some jurisdictions where recollection is necessary before the accused is considered fit to stand trial.

The Project thinks that this requirement departs from the intent of the fitness rule which, springing as it did from the ban against trials in absentia, was directed toward mental competency to participate at trial. Other instances where an accused may be unable to instruct his counsel as to the circumstances of the offence do not act as a bar to trial proceedings. Drunkenness, for example, at the time of the alleged offence might cloud an accused's recollection of events, but is not a reason to exempt him from trial. The Project, therefore, concluded that a determination of fitness should be based on the accused's mental abilities at the time of trial and not on any consideration of his recollection of the offence. A person who claims to be unable to recall the crime with which he is charged but who otherwise is mentally sound at the time of trial, should not be considered unfit.

(2) Maintaining the dignity of the proceedings. The dignity of the proceedings is closely related to the notion that the trial must be and appear just. As the accused's inability to defend himself properly brings into question the fairness of the trial, so does it also reflect on the propriety of the proceedings. If a mentally disordered accused conducts his defence in a bizzare or frivolous manner, the decorum of the court is disrupted. Even if the accused remains passive, his lack of participation affects the proper functioning of the court and the trial appears inappropriate and unfair.

While respect for the court is important, the Project thinks that notions of courtroom decorum are over-emphasized and should never preclude a mentally disordered accused from being tried. Preservation of the dignity of the proceedings is an incidental consequence of the fitness rule, not a justification for the rule itself. The adverse effect of trying an unfit accused derives not from a lack of decorum at trial, but from the accused's inability to participate. When it is in the interests of an unfit accused that his trial continue he should not be exempted because he may affect the dignity of the proceedings. If an accused causes a disturbance and his mental disorder would not, of itself, preclude him from being tried, he should be dealt with in the same manner as a sane person.

(3) Reasons of humanity. The courts have long held that it would be morally wrong to try, convict, sentence, or punish an individual who does not appreciate what is happening to him. Modern concepts of punishment and individual deterrence are based on the convicted person's realization of the reprehensibility of his conduct. The accused's involvement in the trial helps bring about this realization. When the accused neither understands the purpose of the proceedings nor will derive any

benefit from the result, it is inhumane to bring the weight of society to bear upon him. To avoid such an occurrence it is, therefore, justifiable to exclude a mentally disordered accused from trial.

However, the Project believes that the humanity of a procedure must be measured in terms of practical consequences as well as theoretical intent. The fitness rule presently protects an unfit accused from being tried but may result in his indeterminate detention in a mental institution. It also deprives an unfit accused who would not be found guilty of the charge from being acquitted. Such undesirable results of the rule reflect upon its "humanity".

The Project is of the opinion that the purpose of the fitness rule is to protect a mentally disordered accused from the consequences of trial rather than trial itself. Proceeding to trial does not compromise this purpose if the accused is not convicted or sentenced. Postponement of the question of fitness, for example, is contrary to the prohibition against trying an accused as it permits litigation on the merits in spite of unfitness. From a consequential point of view, however, postponing the fitness issue makes the procedure fairer without making it less "humane". In order to allow trial to proceed in appropriate circumstances, the Project thinks that the fitness exemption should protect an unfit accused from only conviction or sentence without depriving him of a trial on the merits.

After carefully considering the reasons for and the alternatives to a fitness rule, the Project has concluded that it is necessary for a fair criminal procedure. A mentally unfit accused is not suffering from minor disabilities which may be compensated for by procedural devices; he is bereft of the ability to understand or participate in the proceedings. Conviction or sentence of such an accused serves no valid purpose and may only result in the disrepute of the trial process. The justification of the rule, however, must be clearly founded on preserving the accused's right to make full answer and defence, and protecting the unfit accused from conviction or sentence. Other beneficial consequences of the application of the fitness rule, such as facilitating proper adjudication and promoting the dignity of the proceedings, should not be used to justify the rule itself.

Scope of the Fitness Rule

Although now restricted to mental disabilities, at one time the fitness rule also included physical impairment and cultural differences. A case can be made for again extending the rule to all disabilities which affect the accused's participation at trial. It can be argued that an accused unable to understand the proceedings or to communicate with his lawyer because he neither speaks nor understands the

language of the court, is in the same situation as a mentally unfit accused. As such, he also should be exempted from trial until his ability to participate is ensured.

On the other hand, it may also be argued that the present restriction of the rule to mental impairment should be maintained. There is a fundamental difference between unfitness on account of mental disorder and "unfitness" on account of cultural difference. The mentally disordered accused suffers from an intrinsic defect. The problem is with the accused himself. For this reason, the accused is exempted from trial and treated. With cultural "unfitness", however, there is nothing inherently wrong with the accused. His inability to participate is caused by an external situation which is easily remediable. "Fitness" may be achieved by changing the situation, but the accused remains the same. Rather than treating such an accused as unfit, indicating some shortcoming on his part, the better approach is to give the accused the right and the means to participate at trial. This is, in fact, the present law. For example, the Bill of Rights gives every accused who does not understand or speak the language of the court the right to an interpreter and the right to a fair hearing in accordance with the principles of fundamental justice. The right to make full answer and defence is also included in section 577(3) of the Criminal Code.

The present study memorandum is concerned with unfitness caused by mental disorder. The Project recommends that the fitness rule be applied to disabilities caused by mental disorder without suggesting any limit on its scope. For the purposes of this memorandum, the question of whether the application of the fitness rule should be broadened is left open, and will be discussed in a future paper.

Clarification of Standards

The legislation creating the unfitness exemption should clearly distinguish fitness from its more illustrious cousin, the defence of insanity and from its civilian look-alike, certification. Although all three issues deal with similar individuals for similar reasons with similar results, there are important differences which distinguish them one from another.

(1) Fitness to stand trial and civil commitment. The legal criteria governing civil commitment are distinct from those relating to fitness to stand trial. Fitness concerns the appropriateness of a criminal trial when the accused's ability to participate effectively is impaired; civil commitment is based upon the danger of a person to society or himself and his ability to care for his own needs. Fitness is a legal question decided by a criminal court; certification is a medical question determined by medical personnel. Often an accused found unfit to stand trial may also be committed under

the civil standards. It is possible, however, for an accused not civilly committable to be unfit to stand trial; and conversely, for a person certifiable under provincial legislation to be fit to stand trial.

While there has been a tendency in some jurisdiction (such as Scotland and New Zealand) to fuse the criteria of the two concepts, the Project supports keeping them distinct. It is to be expected that there be differences between the two when each is directed toward a different end. A person charged with a criminal offence should, wherever possible, be tried, even if he is mentally disordered but legally fit to proceed.

(2) Fitness to stand trial and the defence of insanity. The criteria concerning fitness to stand trial and the defence of insanity are often confused. Although similar in some respects, these two legal concepts evolved from different sources. The defence of insanity is related directly to criminal responsibility and notions of punishment, while the fitness rule stems from the common law ban against trials in absentia. Both are concerned with the defendant's mental state, but at different times and for different reasons. Consequently the purpose, standards, and result of each are often distinct.

Related to the mental condition of the accused at the time of the alleged offence, the defence of insanity precludes the defendant from being held responsible for his acts. Fitness, on the other hand, is concerned with the mental capacity of the accused to assist his counsel and to understand the nature and object of the proceedings. Because of the differences between the two "tests", a defendant could conceivably fall within the ambit of one and not the other. An accused may not have been able to appreciate the nature or quality of his acts when committing an offence, yet be able to direct his defence and understand the charges against him. Conversely, he may appreciate right from wrong but be unable to assist in his defence or understand the nature of the charges against him.

Unless the criteria for fitness are clearly enunciated, the present confusion between fitness, certification and criminal irresponsibility will continue. The Criminal Code should set out the mental incapacities which may constitute unfitness. This will have the effect of clearly defining fitness and of distinguishing fitness from other similar legal and civil concepts.

Trial on the Merits

The fitness procedure would be fairer if there were the possibility of adjudicating the charge brought against the accused. Trial on the merits lessens the chances of an accused who would not be convicted on the merits being detained as unfit. It also discourages the use of the fitness hearing

as a commitment device or as a means of avoiding the defence of insanity. Despite these benefits, it is difficult to incorporate adjudication of the merits into fitness procedure because it violates the traditional prohibition against trying an unfit accused. The two may, however, be reconciled.

The Project believes that the unfitness exemption should protect a mentally disordered accused from the consequences of trial, but not necessarily from the trial itself. If "trying the accused" is divorced from conviction and sentence, proceeding on the merits becomes compatible with both the purposes of the fitness rule and the right of the accused to make full answer and defence. In Canada, this is not a new position as the present law permits an unfit accused to be tried up to the end of the case for the prosecution.

When should the merits be adjudicated? There are two alternatives. The merits may be tried either before or after the resolution of the fitness issue. In England and Canada a postponement provision permits some consideration of the charge before fitness is determined. The American Law Institute, on the other hand, favors a post-commitment hearing. In its Model Penal Code the Institute provides for litigation on the merits only after resolution of the fitness issue. When an unfit accused has a legal objection or a defence to the charge he applies for a post-commitment hearing. If the accused is acquitted, the commitment order is quashed.

Trying the merits after the accused has been found unfit has a number of disadvantages. A fitness hearing may be a long, drawn-out affair. Remands for psychiatric examination and a lengthy hearing may unduly delay trial on the merits, and thereby adversely affect the accused's chances of acquittal. This procedure may also result in an accused being committed as unfit even when he will later be acquitted and released. If an accused is not guilty of the charge he should not be detained as unfit, even for a short period. A post-commitment hearing would be used only for unfit accused, and could be considered as something less than a full trial on the merits. The temptation to treat the hearing more lightly than a regular trial may occur when the accused is already in detention.

Postponing the issue, on the other hand, has the advantage of not interrupting the trial if fitness is raised. An accused who is found innocent of the charge would not be committed as unfit prior to his acquittal. In such a case, the fitness hearing is avoided altogether.

The Project thinks, therefore, that adjudication of the merits should precede consideration of the accused's fitness. Trial of an unfit accused should be the same as for any other accused, the only difference being the ultimate consideration of fitness if the accused is not acquitted.

To what extent should the merits be adjudicated? There are differences of opinion over the extent to which a trial should continue if the accused is, or is suspected to be, unfit. Canada and England permit only the presentation to raise legal objections to the charge. It does not, however, allow the defence to present its own case.

The American Law Institute goes one step further in an alternative proposal of the Model Penal Code, and would allow the court to hear any defence which does not involve the accused's participation. Although an improvement, this procedure would not permit an accused to testify in his own cause. For example, an unfit accused who wishes to raise a defence of alibi could only do so through third party witnesses. He would not be able to personally take the stand.

The unwillingness to allow an unfit accused to testify is due to a number of factors. In most jurisdictions the evidence of a mentally incompetent witness is not admissible. In addition, there is the traditional ban against trying, in the active sense, an unfit person. Nevertheless an accused, although unfit, may be able to give testimony which could influence a finding of guilt or innocence. It is difficult to understand why an accused who can give pertinent information to the court should not be allowed to testify.

Although present Canadian law does not permit a mentally incompetent person to testify, the Evidence Project of the Law Reform Commission suggests that this be changed. In its study paper, "Competency and Compellability" the Evidence Project recommends that mental incompetency no longer be a bar to testifying and that the trier of fact should take such an incapacity into account only when assessing the weight to be given the testimony. If mentally incompetent witnesses are allowed to testify there would be no objection to an unfit accused taking the stand in his own defence. Even, however, if the present restriction on a mentally impaired witness is maintained, a strong case may be made for allowing an unfit accused to testify. There are significant differences between testimony of an accused and that of a third party witness. The accused is more likely to adversely affect the presentation of his defence; and the interests of third parties are not involved if he testifies.

The Canadian experience has shown that although litigation on the merits makes the fitness procedure fairer, partial litigation does not fully achieve the desired result. Postponement of the fitness issue to the end of the case of the prosecution permits accused with legal objections to the charge to be acquitted, but is of no assistance to those accused who have a valid defence. The Project, therefore, recommends that adjudication on the merits proceed as fully as is consistent with the protection of the rights of the

accused. This includes, in appropriate circumstances, the presentation of the defence and testimony from the accused himself.

Remands for Examination

A judge or magistrate is interested in the mental state of the accused for two reasons; to assess his ability to stand trial, and to determine if he is criminally responsible for his acts. Before trial, only the accused's fitness is important. For this reason the Project thinks that pre-trial and trial remands for examination should be based upon and connected to the accused's fitness to stand trial. The remands should also be accompanied by a procedure which requires that the accused be returned to court. Or at least, when it would be detrimental for the accused's mental health to be sent back to court, that the issue of fitness be decided by the court.

The Project also thinks that all individuals appearing before a judge, magistrate, or justice by virtue of a criminal charge, should be dealt with under the provisions of the Criminal Code.

Medical Evidence and Fitness

It is often said that fitness to stand trial is a legal concept and should be decided by the court. The fitness legislation should therefore be drafted so as to ensure that the determination of fitness is an exercise of judicial judgment, assisted by medical evidence.

The remand provisions of the Code should require a full psychiatric report with answers to specific questions directed toward determining fitness. This will furnish the trial judge or magistrate with the necessary information to make his decision and will allow the psychiatrist to testify as a medical expert.

Disposition Once Unfit

An accused found unfit to stand trial is presently detained under a lieutenant governor's warrant in a psychiatric facility for an indeterminate period. His unfitness leads automatically to commitment. The Project thinks that this should not be the case. The reasons for interrupting trial because of an accused's unfitness are not the same as those which justify the involuntary commitment of a mentally deranged person. We see no reason why the former should invariably lead to the latter.

An accused is found unfit because he lacks the mental ability to participate in his trial. Trial is thus postponed until the accused becomes fit. From a therapeutic point of view a commitment is beneficial only if it facilitates the accused's recovery and allows him to return to trial with a minimum of delay. Commitment ensures treatment, but it should perhaps also be stipulated that before commitment is considered the accused should be capable of being cured and that the treatment received will help him become fit. If there is little likelihood that committal will promote recovery, or if an alternative treatment is more likely to benefit the accused, the justification for automatic detention in a mental hospital is dubious.

If insane under civil standards, the accused should be detained pending a fitness hearing and committed if found unfit. An unfit accused who has been charged with a violent or dangerous crime should also be detained as a precautionary measure. But when committal will not therapeutically benefit the accused, when the accused is not insane by civil standards, and when the offence charged is one for which bail would normally be granted, society and the accused are best served if a form of treatment not involving detention is relied upon.

A finding of unfitness should not always lead to commitment. There should be several alternatives regarding the treatment and detention of the accused, some of which would involve only minimal deprivation of the individual's liberty.

Presently the Criminal Code delegates the disposition of unfit accused to the lieutenant governor. The Project recommends that this power no longer be delegated and that it be exercised by the trial judge or magistrate. Under the proposed legislation, the trial judge or magistrate is in an excellent position to rationally dispose of an unfit accused. He has at his disposal a full medical report, psychiatric testimony, and his own experience with the accused at trial. It would also be easier for an unfit accused to have his treatment or detention reviewed if they are ordered by a trial judge or magistrate in accordance with criteria outlined in the Code. Presently, the discretion of the lieutenant governor is beyond judicial scrutiny.

The review boards created under the Code would report their recommendations directly to the court which ordered the treatment of the accused. The Project thinks that the court would be more responsive to such recommendations than the lieutenant governor.

Length of Commitment

The Project is of the opinion that commitment of an unfit accused should not be indeterminate. Because the lieutenant governor's warrant is open-ended, an unfit accused may not reasonably predict the length of his detention. There is no relationship between commitment as unfit and the maximum sentence for which an accused would be liable had he been found guilty. Significant disparities between the consequences of unfitness and conviction may result. For example, an accused found guilty of an offence for which the maximum sentence is two years, will probably be at liberty in less than a year; an accused charged with the same offence but found unfit spends an indeterminate period in a mental institution which may and often does last several years.

As was explained in the previous section, the Project has concluded that commitment of an unfit accused is justified only when the accused needs to be treated in custody, or when the accused is charged with an offence for which precautionary detention is advisable. In either instance indeterminate detention is not necessary.

Although not technically imprisonment, commitment closely resembles incarceral detention. When an unfit accused has been committed as unfit for a period proportionately equal to the maximum time he would have been emprisoned if convicted, the Project thinks that the accused should no longer be held as unfit, or that the criminal charge against him should continue. In such a case, detention may not be justified on the basis of precautionary protection. And if further psychiatric treatment is necessary it should be justified by the accused's mental illness, not by the existence of a criminal charge. If he is medically certifiable, his detention may be continued through certification under the provincial mental health legislation, which may be accomplished by the medical authorities without any help from the judiciary or the lieutenant governor.

SUMMARY OF RECOMMENDATIONS

The objectives of the Project in redrafting the fitness procedure can be summarized as follows:

(1) The rationale of the fitness rule should be based upon preservation of the accused's right to make full answer and defence and upon preventing the conviction or sentence of an unfit accused.

(2) Fitness to stand trial should be clearly defined in the Code to avoid confusion with insanity and civil certification.

(3) No accused should be subject to detention as unfit unless there are strong reasons to believe that he has committed the offence with which he is charged. Adjudication on the merits should be proceeded with as completely as is consistent with the protection of the rights of the accused to make full answer and defence.

(4) Remands for medical examinations should be based upon the criteria of fitness to stand trial and stipulate that the accused must be returned to court.

(5) The judge or magistrate, assisted by medical evidence, should determine an accused's fitness.

(6) A finding of unfitness should not lead automatically to commitment. A variety of dispositions, some involving no or little detention, should be available. The decision regarding disposition of the unfit accused should be based on consideration of treatment so as to ensure a speedy return to trial and protection of the public.

(7) The power to order the disposition of an unfit accused should be exercized by the trial judge or magistrate in accordance with criteria outlined in the Criminal Code.

(8) Where an unfit accused is committed to a psychiatric facility, the length of the commitment should be proportionate to the maximum sentence an accused would have received if found guilty.

DRAFT LEGISLATION

The Project was somewhat hesitant as to whether a draft code should be included in the study memorandum. It was decided with some reservations that draft legislation would be helpful in focussing and crystallizing the discussion of the problems and principles raised in the body of the paper. It also suggests one possible legislative formulation of the fitness procedure.

At first glance the draft seems somewhat lengthy and invites the reaction that it complicates rather than simplifies the fitness procedure. Admittedly, the legislation is longer and more complex than that presently in use. It is also, in the opinion of the Project, more understandable.

The recommended procedure is more complex because of the possibility to completely adjudicate the merits. Allowing the fitness issue to be postponed to the end of the trial created new procedural problems. For example, what is to occur when the trial is by jury? Or by judge sitting alone? These and many other situations had to be taken into account when formulating the draft.

The legislation is longer than the present section 543 for a number of reasons: Additional sections were needed to clearly enunciate the new procedure to be used when postponing the issue of fitness. Sections of the Code concerning fitness (such as remands for examination) were integrated into the procedure. The fitness rule itself is defined in the legislation. And sections concerning the form of the medical report, the procedure of the fitness hearing, the disposition of the unfit accused, and the length of commitment were also included. None of these provisions are part of the fitness procedure of the Criminal Code, and the Project thinks that they all are necessary if present problems are to be corrected.

OUTLINE OF THE LEGISLATION

Definition of the Fitness Rule

The legislation does not restrict the fitness rule to unfitness caused by mental disorder. Section 1(1) states the rule generally, that unfit persons shall not be convicted or sentenced. Section 1(2) then stipulates that "mental disorder" may cause unfitness. It is possible, therefore, for other categories (such as linguistic or physical unfitness) to be added to the fitness rule.

Section 1 removes from the traditional statement of the fitness rule the prohibition against trying an unfit accused. Proceeding with trial although the fitness issue has been raised, ensures that the charges are well founded and allows the possibility of acquittal.

"Mental disorder" replaces "insanity" which was formerly used to describe the mental state of mind of an unfit accused. Admittedly, there is no magic in the term and the confusion surrounding the use of "insanity" stems not from the word itself but from its lack of definition. Nevertheless, it was thought advisable, because of the "loaded" connotation presently attached to "insanity", to select a fresh phrase to describe the state of mind of an unfit accused.

Procedural Questions

Who should raise the issue? Before drafting section 2(1), the Project considered four alternatives, the accused only, the accused and judge but not the prosecution, the accused, judge and prosecution, and a panel of experts.

Because he has the most to risk, it was suggested that only the accused should be able to raise the issue. The Project concluded that the unfitness of the accused is important to both parties and to the court, and that the interests of the accused should not be considered in isolation from the interests of society. In addition, if the accused is unfit, his ability to raise the issue may be questionable.

It was also suggested that the prosecution not be allowed to raise the issue because the fitness hearing could be manipulated to attain ends other than those for which it was created. Although the Project realizes that misapplication of the fitness hearing is possible, such abuses may be avoided by other methods (such as postponing the fitness issue).

It was also suggested that the prosecution be barred from raising the issue when it cannot provide the facilities for adequate therapy. The Project is of the opinion that the adequacy of therapeutic facilities may be better questioned

if a finding of fitness does not automatically lead to committal. Section 12 of the draft legislation enables a variety of dispositions of an unfit accused, and stipulates that the likelihood of the accused becoming fit is to be considered when making the order.

More interesting than the above was the suggestion that the issue be raised by a panel of experts. This would entail the automatic psychiatric examination of certain classes of accused. Depending on the results of the examination, the issue of fitness would be raised by the examining board. However, automatic examination does not permit the court to discern between accused who need psychiatric attention, and those who do not. For this reason, the Project concluded that this procedure was not flexible enough and could result in unnecessarily burdening medical facilities and the trial process.

What is important is that all accused needing to be examined are examined. With a variety of remand provisions which may be applied at any time from arraignment to verdict, the draft legislation ensures that all accused showing signs of mental disorder will be examined.

In sum, the Project concluded that both parties and the court should be able to raise the issue, as is the case under the present law.

When should the issue be raised? Although an accused suffering from a mental disorder would probably show signs of his impairment soon after his arrest, under present procedure the question of an accused's fitness may only be raised at trial. Sections 465(c) and 738(5) allow a justice to make a remand for a medical examination before trial, but these powers are not expressly linked to a consideration of fitness. Not raising the issue before trial may result in an unfit accused waiting for trial in jail, being at liberty without the benefit of therapy or being remanded for observation under a provision not expressly dealing with fitness. The Project concluded that it should be possible to raise the fitness issue at any time from arraignment to verdict so as to ensure immediate attention for a mentally disordered accused. Early examination of the accused will also facilitate the fitness hearing as it puts at the disposition of the court and the parties a recent psychiatric evaluation directed specifically at the fitness issue.

When should the issue be decided? Although it may be raised before trial, section 2(2) stipulates that fitness is to be determined at trial.

When the issue is raised before trial, the examination of the accused is ensured, but pre-trial decision on fitness would deprive an accused of the right to make full answer and defence to the alleged charges. Only at trial may an accused be acquitted. Provisions for postponement of the issue to allow litigation on the merits (see sections 6, 7 and 8) becomes ineffective if there is the possibility of pre-trial determination of fitness. If he is committed as unfit before trial, an accused will not be able to test the validity of the accusation or raise a defence to the charge. This, in turn, may lead to procedural abuse and use of the fitness issue as an alternative civil commitment. For these reasons the Project recommends that fitness be determined exclusively at trial.

Who should decide the issue? Fitness hearings tend to be very technical. Often it is necessary to distinguish between questions of fitness, insanity at the time of the alleged offence, insanity not amounting to unfitness, and the guilt of the accused. Juries easily confuse these similar but distinct issues, especially when the defence of insanity has been raised. Because of its technical nature and because there is no consideration of the accused's culpability, the Project recommends that fitness be determined by the presiding judge, magistrate or justice.

Who decides if a hearing should be held? The presiding judge, magistrate or justice decides whether an accused is likely to be unfit to stand trial. He is not required to remand the accused or hold a fitness hearing unless he has reason to believe that the accused is unfit.

Remands for Examination

If, before trial or at trial but before the presentation of any evidence, the judge, magistrate or justice has reason to believe that an accused is unfit, he may remand him in accordance with paragraphs (a), (b), (c) and (d) of section (3). This section is intended to eliminate two problems in the present law.

The first problem is the possibility that a mentally disordered accused will not be dealt with under the Criminal Code. Some provinces have enacted mental health legislation empowering judges to remand for mental examination any person appearing before them charged with an offence. Because it does not require a supporting medical opinion the provincial remand is frequently employed. A remand of this type extricates the

accused from the criminal process and deprives him of the safeguards of the Criminal Code. The provision in the draft legislation empowering a justice to remand the accused uses the mandatory "shall" rather than the permissive "may" so that all persons appearing before a judge, magistrate, or justice by virtue of a criminal accusation will be dealt with under the Criminal Code and the integrity of the criminal process is thus ensured.

The second problem is the unnecessary deprivation of personal freedom which often results from a remand for medical examination. The majority of those presently remanded are found fit to stand trial although they may have been in custody for up to sixty days. In most cases, only a fraction of this time is actually spent in examination of the accused. There is presently no provision in the Code for examination without detention. By providing for a wide range of possible orders, some of which entail only a minimum of restraint on individual liberty, the draft legislation allows the justice to tailor the remand to fit a particular accused.

Postponing the Fitness Issue

Section 6 concerns the power of the presiding judge or magistrate to postpone the fitness hearing. He may postpone the hearing to the end of the case of the prosecution or to the end of the trial, but not to some point in between.

If the judge or magistrate has reason to doubt the validity of the charge, he should postpone consideration of fitness to the end of the case of the prosecution. He then has three alternatives: he may acquit the accused, he may order the fitness hearing be held, or he may further postpone the hearing. He should avail himself of the third alternative only if the defence gives him reason to believe that it has a case to present.

Postponing the fitness hearing to allow presentation of the case of the defence is relatively simple when the trial is by magistrate or judge sitting alone. Consideration of fitness is postponed to the end of the trial. After having heard all the evidence and the summations of both parties, the presiding judge or magistrate has two alternatives; he may order the accused to "stand as charged" and direct the fitness hearing be held.

"Stand as charged" is a conditional verdict. It is equivalent to a conviction, subject only to the fitness of the accused. If the accused is found fit to stand trial, the conditional verdict becomes absolute and the judge sentences the accused. If the accused is found unfit, the judge sets aside the conditional verdict and the trial proceedings, and

makes an order for the detention and treatment of the accused. The Project thinks that use of a conditional verdict simplifies the procedure, especially when the trial is by jury.

Under present law, postponing fitness to the end of a jury trial would be very complex. Because the jury decides both fitness and guilt, the trial judge would have to direct the jury as follows; that they should first consider whether the accused should be acquitted on the merits and, if not, whether he is fit to stand trial and, if fit, whether he is guilty. There is also the possibility that there will be a lengthy delay between a finding of fitness and consideration of the merits. A new jury may need to be empanelled and trial on the merits would have to start all over. The procedure is greatly simplified, however, when the jury only considers guilt or innocence and may deliver a conditional verdict.

With these two changes the procedure is as follows: the trial judge postpones the issue until all the evidence at trial has been heard. He then directs the jury to consider the guilt or innocence of the accused. If the jury delivers a verdict of not guilty, the accused is acquitted and there is no fitness hearing. If, on the other hand, the jurors think the accused is guilty of the charge, they deliver the conditional verdict that the accused "stand as charged". The jury is then dismissed and the trial continues as if it were by judge sitting alone.

Notwithstanding the procedural problems involved, the Project thinks that the possibilities of injustice warrant postponement of the fitness issue to the end of the trial. When fitness is determined by the judge and when the jury may deliver a conditional verdict, the procedure is workable and will attain the desired ends with a minimum of confusion.

The Medical Report

Whether an accused is fit to stand trial is a judicial decision based upon medical and other evidence. Section 5 outlines the essential medical information needed to decide the question of fitness. Care has been taken, however, that the report will not draw the judge's conclusions for him.

Because unfitness and the defence of insanity are closely related and are often raised together, section 5(3) provides for the possibility of both being considered in the psychiatric report. This raises a number of contentious ancillary issues, such as the confidentiality of the psychiatric report, the psychiatrist-patient relationship, and control of the insanity plea by the defence. These issues are not dealt

with beyond acknowledging that they exist and will be considered. To a great extent, the status of sub-section (3) is dependant upon the form of the insanity defence and how it is to be considered by the courts. Insanity and how it affects criminal responsibility is presently being considered by the Project in another study.

The report also provides information which would be useful to the judge when deciding upon the disposition of an unfit accused.

The Fitness Hearing

Absence of the jury. Because fitness is decided by the judge, the fitness hearing should be held in the absence of the jury if there is one. As is the case with a voir-dire, the jury does not take part in the deliberation and the proceedings of the fitness hearing could influence a jury's decision on the merits.

Presence of the accused. There may be circumstances in which it would be detrimental to the mental health of the accused for him to be present during a fitness hearing. The Project thinks that a judge, relying on medical advice, should be able to proceed with the fitness hearing in the absence of the accused.

Expert Testimony. Viva voce medical evidence will only be heard if the psychiatric report is contested. Oral medical testimony is time consuming and expensive and should be avoided whenever possible. The thoroughness of the psychiatric report and distribution of the report to both counsel will lessen the abuse of medical testimony in this area.

Burden of Proof. The Project thinks that a balance of probibilities is the most appropriate evidentiary burden in a fitness hearing. Because the hearing does not involve a consideration of guilt or innocence, the criminal burden of proof was thought to be too stringent.

Under section 10(5) the onus of proof always falls upon the prosecution. Fitness to stand trial is treated not as a defence to be raised at the wish of the accused but as a fact, the determination of which is vital to the trial process. It is for this reason that the issue of fitness may be raised by either party or by the court. Once the issue has been raised and there exists some doubt as to the accused's mental capacity to stand trial, a hearing is held and may be neither waived nor stayed by the defence. The issue of fitness becomes as independant of the accused as a question of jurisdiction. It would be difficult, therefore, to harmonize the autonomy of the fitness issue with the "sine qua non" of the accused proving his own unfitness when the defence raises the

issue. If the "raison d'être" of the unfitness exemption is the protection of the accused, the onus of proof should always fall upon the prosecution.

There is also a practical reason why the accused should not be called upon to prove his unfitness. Assuming the possibility that the accused is unfit, the same disabilities which render the accused unfit to stand trial will also impede him from proving his unfitness.

The Unfit Accused

Section 12 concerns the disposition of an unfit accused. A finding of unfitness has two important consequences. First, the court proceedings to that point are set aside and the accused is treated as if he had never been brought to trial. Secondly, the trial judge, magistrate or justice makes a court order concerning the unfit accused. Under section 12 there are a variety of orders available to the court. The Project recognizes that different conditions of custody and treatment are necessary for different types of unfit accused.

THE LEGISLATION

AND

EXPLANATORY NOTES

EXPLANATORY NOTE

Section 1

Section 1(2) defines "mental disorder" or section 1(1) in relationship to fitness to stand trial. The definition is phrased in terms of the negative effect which a "mental disorder" has upon the abilities of the accused. In an earlier draft the mental capacity of an accused to "conduct his defence" was included. This was deleted as it was felt that very few persons understand the complexities of trial procedure and the law.

Paragraph 3 specifically exempts recollection of the alleged infraction or its circumstances as a determinant element of fitness. If loss of memory is accompanied by or results in mental disabilities falling within paragraph (2), the accused may be found to be unfit; but lack of recollection alone will not result in a finding of unfitness.

DRAFT LEGISLATION

FITNESS TO STAND TRIAL ON ACCOUNT OF MENTAL DISORDER

Section 1

Statement of Principle

(1) A person who is unfit to stand trial shall not be convicted or sentenced so long as such unfitness endures.

(2) A person is unfit to stand trial if, on account of a mental disorder, at the time of his trial he, in the opinion of the trial judge,

(a) lacks the mental capacity to understand the nature or the object of the proceedings against him, or,

(b) lacks the mental capacity to understand his relationship to the proceedings against him, or,

(c) lacks the mental capacity to communicate with counsel.

(3) A person is not unfit to stand trial if he suffers from a disorder, mental or otherwise, whose sole effect is to deprive him totally or partially of recollection of the circumstances of the offence alleged against him.

Section 2

Raising the Issue

(1) The presiding judge, magistrate or justice, the prosecutor, the accused or his counsel may raise the issue of fitness to stand trial whenever necessary from arraignment to verdict. Failure to raise the issue at the first opportunity does not bar raising the issue later.

(2) The fitness issue shall be determined at trial by the presiding judge, magistrate or justice.

EXPLANATORY NOTE

Section 3

Sub-section (1)(a) provides for a remand of five days for the purpose of a psychiatric examination. No medical testimony is necessary. Five days should be long enough for an adequate examination, yet short enough not to greatly infringe on the accused's freedom. Originally, the Project suggested a three day remand but this was lengthened in light of the distances between certain judicial districts and proper psychiatric facilities. In the larger urban centers, however, it is to be expected that the examination will be completed before the maximum duration is spent.

The examination required by sub-section (1)(a) is not as complete as for the other remands. (see section 5(8)). It was indicated to the Project that five days would be insufficient for the complete report of section 5. For this reason, the examination is concerned only with fitness and omits consideration of the accused's treatment, criminal responsibility, etc.

Where effective examination is possible, paragraph (b) permits the psychiatric report to be made without detention. This is consistent with the desire to maintain the accused's rights to personal liberty to the fullest possible extent. If the crime charged is one for which bail would normally be granted, and the accused will be of no danger to society, he may be released with a condition of his freedom being completion of the psychiatric examination.

Paragraphs (c) and (d) empower remands for thirty and sixty days respectively. Medical testimony is required. The Project considered making the five day remand mandatory as a condition precedent before allowing a more lengthy remand, but concluded that such a provision is unnecessary when the court may consider medical opinion at the outset.

DRAFT LEGISLATION

Section 3

Appreciation of Issue Before Trial

(1) Where the issue of fitness is raised before trial, the justice, where he has reason to believe that the accused may be unfit to stand trial, shall:

(a) Remand the accused by order in writing to an approved hospital or psychiatric facility for a period not to exceed five days for the purpose of a psychiatric examination made pursuant to section 5(8);

(b) Remand the accused by order in writing to attend a psychiatric or an out-patient facility, for a period deemed by the court to be appropriate, but not to exceed 90 days, for the purpose of a psychiatric examination pursuant to section 5, where, in the opinion of at least one medical practitioner, it is possible to effectively examine the accused without hospitalization, and where the accused would ordinarily be released on bail or on his own recognizance.

(c) Remand the accused, by order in writing, to an approved hospital or psychiatric facility for a period not to exceed 30 days for the purposes of a psychiatric examination, pursuant to section 5, where the justice is satisfied that observation is required, and his opinion is supported by the written or oral report of at least one medical practitioner; or

(d) Remand an accused, by order in writing, to an approved hospital or psychiatric facility for a period of more than thirty days, but less than 60 days for the purposes of a psychiatric examination pursuant to section 5, where the justice is satisfied that observation is required and his opinion is supported by the written or oral report of at least one medical practitioner.

(2) Where a remand has been made pursuant to sub-section (1)(a) of this section,

(a) If, in his opinion, a longer period of time is required to examine the accused properly, the examining medical practitioner shall, in addition to filing the report pursuant to section 5(8), state his opinion in writing as to the additional period required to examine the accused properly;

(b) Where the examining medical practitioner is of the opinion that a longer period of time is required to examine the accused properly the justice may further remand the accused pursuant to sub-sections (1)(b), (c) and (d) of this section.

EXPLANATORY NOTE

Section 4

Where the issue is raised after the prosecution opens its case, lengthy remands are discouraged. Under the suggested procedure the issue of fitness will almost always be raised either before or at the outset of the trial. For the few cases which occur at trial, a five day remand should be sufficient. This insures as speedy a trial as possible.

If a further examination becomes necessary, the judge may remand the accused a second time. If the fitness hearing is postponed and the trial results in an acquittal, no remand will be necessary.

Sub-section (3) is to make clear that a psychiatric report made before trial is to be considered sufficient medical evidence to proceed directly to the fitness hearing. The judge would remand the accused for a second psychiatric report only in exceptional circumstances.

DRAFT LEGISLATION

Section 4

Issue raised at trial before any evidence is received

(1) Subject to section 6, where the issue of Fitness is raised at trial before any evidence has been received, the judge, magistrate or justice, where he has reason to believe that the accused has not been remanded for a psychiatric examination pursuant to section 5, shall remand the accused as if the issue of fitness had been raised before trial in accordance with section 3.

(2) Subject to section 6, where the issue of fitness is raised after the opening of the case of the prosecution, the judge or magistrate, where he has reason to believe that the accused may be unfit to stand trial, and where the accused has not been remanded for a psychiatric examination pursuant to section 5, shall remand the accused by order in writing to an approved hospital or psychiatric facility for a period not to exceed five days for the purpose of a psychiatric examination pursuant to section 5(8). Where, in the opinion of the examining medical practitioner, a longer period of time is required to examine the accused properly, the court, judge or magistrate may further remand the accused pursuant to sub-section (1)(b), (c) and (d) of section 3.

(3) Where the accused has been remanded for a psychiatric examination pursuant to section 5, no further remand need be ordered unless, in the opinion of the judge, magistrate or justice, such a remand is necessary.

EXPLANATORY NOTE

Section 5

Sub-sections (1) and (2) provide the court with the information needed to decide fitness. Sub-section (1) permits the psychiatrists to testify without legal restrictions, while sub-section (2) requires reasoned answers to the type of questions traditionally asked in a consideration of fitness.

Where the defence of insanity will be raised at trial, sub-section (3) requires the psychiatric report to include consideration of the accused's mental state at the time of the offence.

DRAFT LEGISLATION

Section 5

Psychiatric report

(1) Whenever an accused, due to mental disorder, has been remanded for a psychiatric examination, the report of such examination shall contain:

(a) a description of the nature of the examination,

(b) a general diagnosis of the mental health of the accused,

(c) any additional information the examining psychiatrist considers pertinent to the court.

(2) An examining medical practitioner shall state his opinion and the reasons therefor, of the extent, if any, to which the mental disorder of the accused prevents him from:

(a) appreciating the nature of the charge,

(b) appreciating the consequences of conviction,

(c) understanding the importance of telling the truth in a trial proceeding,

(d) communicating with counsel,

(e) understanding the evidence given at trial.

Criminal Responsibility

(3) Where the accused or his counsel have indicated that the defence of insanity will be raised, the examining medical practitioner shall also:

(a) state his opinion as to the mental state of the accused at the time of the alleged offence, and

(b) (The exact wording of this paragraph depends upon the "test" that will be adopted to determine the criminal responsibility of a mental disordered accused. The insanity defence is presently under consideration by the Project. The purpose of this paragraph is to require the examining medical practitioner to examine the accused for both fitness and criminal responsibility.)

(4) Where an examining medical practitioner is of the opinion that the accused suffers from a mental disorder, he shall indicate,

(a) the likelihood of recovery,

(b) the period of time necessary for treatment,

(c) the kind of treatment which the accused should be given,

(d) whether the accused should be kept in custody for reasons other than the commission of an offence, and

(e) the length of his detention in order to assure the security either of himself or others.

(5) If the unwillingness of the accused precludes examination, the report shall so state. An opinion as to whether such unwillingness or lack of co-operation is the result of mental disorder shall be included in the report.

(6) The report of the examination shall be filed in triplicate with the Court Clerk who shall cause copies to be delivered to the prosecution and defence counsel.

(7) After the completion of a mental examination made pursuant to this section, the accused shall be returned to trial.

(8) Sub-sections (3) and (4) do not apply to remands made pursuant to sections 3(1)(a) and 4(2).

DRAFT LEGISLATION

Section 6

(1) The judge, magistrate or justice may postpone the fitness hearing to the close of the case of the prosecution or until all the evidence has been presented at trial.

(2) In making a decision to postpone the judge, magistrate or justice shall consider:

(a) the probability that the case of the prosecution defective in some essential matter, or

(b) the probability that the accused may benefit from some defence to the accusation, or

(c) any other condition which the judge, magistrate or justice believes is required to preserve the right of the accused to make full answer and defence.

Section 7

Postponed to close of

Where the fitness hearing has been postponed to the close of the case of the prosecution, judge, magistrate or justice may,

(a) where he finds that the charge against the accused is defective in law, direct that the fitness hearing not be held and acquit the accused;

(b) where he finds that the charge against the accused is not defective in law,

(i) direct that the fitness hearing be held, or

(ii) if he thinks it necessary in the interests of justice that the case of the defence be heard, postpone the fitness hearing until all the evidence presented at trial has been heard.

Section 8

Trial without jury

(1) Where a fitness hearing has been postponed until all the evidence has been heard, and the trial is not a jury trial, the presiding judge, magistrate or justice shall,

(a) acquit the accused, or

(b) order that the accused stand as charged.

EXPLANATORY NOTE

Section 9

This section requires a fitness hearing if, after postponement of the fitness issue, the accused is found not guilty by reason of insanity. Because it does not result in the freedom of the accused, and because it is closely related to fitness, an acquittal by reason of insanity will not have the effect of eliminating the fitness hearing.

Trial by jury

(2) Where a fitness hearing has been postponed until all the evidence has been heard, and the trial is a trial by jury, the presiding judge shall direct the jury to consider the evidence, and the jury shall,

(a) acquit the accused, or

(b) recommend that the accused stand as charged.

(3) Where the accused is acquitted, there shall be no fitness hearing. Where the accused stands as charged, the presiding judge, magistrate or justice shall order a fitness hearing.

Section 9

If the accused is found not guilty by reason of insanity the judge, magistrate, or justice shall direct that a fitness hearing be held.

DRAFT LEGISLATION

Section 10

(1) The fitness hearing shall be a full and formal hearing, subject to the rules of evidence and procedure otherwise in effect in the court, except as otherwise provided for in this section.

Absence of

(2) The jury shall be excluded from the fitness hearing.

(3) When the accused is not represented by counsel, the court shall assign counsel to act on his behalf.

(4) The accused shall be present during the hearing unless, in the opinion of the judge, magistrate or justice, on the basis of the oral or written opinion of at least one medical practitioner, it would be detrimental for the mental health of the accused for him to remain.

Psychiatric Report

(5) The presiding judge, magistrate or justice shall receive into evidence a report made pursuant to section 5. If the report is uncontested by the parties, no further medical testimony shall be heard, unless requested by the court.

Report Contested

(6) If a psychiatric report is contested, the contesting party may summon and cross-examine the examining medical practitioner who made the report.

Witnesses

(7) The prosecutor and the accused may call witnesses and produce evidence.

(8) The judge, magistrate or justice shall determine the fitness issue on a balance of probabilities.

Burden of Proof

(9) The burden of proving the fitness issue is always on the prosecution, whoever alleges it.

(10) An accused may appeal a finding of unfitness or fitness to stand trial. When hearing the appeal, the court of appeal may consider whether the fitness issue should have been postponed.

EXPLANATORY NOTE

Section 11

Sub-section (2) shows the effect of the conditional verdict of "stand as charged" when the accused is found fit to stand trial. The verdict is treated as a conviction of the accused.

Section 12

Three different orders are possible under section 12. The judge must make an order, but he may choose between the three possibilities. The judge's choice is to be based upon the criteria listed in sub-section (3).

Paragraph (a) of sub-section (1) is for the incurably unfit accused who is of no danger to himself or society. In such a case treatment is a waste of time and resources and detention serves no purpose. It is best to let the accused go. If the accused is insane by civil standards, he should be committed under provincial legislation.

Paragraph (b) of sub-section (1) is for the unfit accused who is not dangerous and whose prognosis for recovery is good. He may be treated without being removed from society.

Paragraph (c) is for the unfit accused who, because of the nature of his mental disorder or the crime of which he is accused, should be detained. In such a case the accused is committed to a mental institution. His commitment, however, is for a definite term based upon two thirds of the maximum sentence he would have received had he been found guilty. If, at the end of his commitment, the accused is so mentally deranged as to warrant further detention, he should be committed under provincial mental health legislation; otherwise, he is released.

DRAFT LEGISLATION

Section 11

(1) When a fitness hearing results in a finding of fitness, the trial continues as if the issue of fitness had not been raised.

(2) Where the jury finds that the accused stand as charged, and subsequently the accused is found fit to stand trial, the presiding judge shall enter the conviction and sentence the accused accordingly.

Section 12

(1) Where the accused is found unfit the judge, magistrate or justice shall set aside any plea that may have been pleaded and any verdict which may have been rendered and make one of the following orders:

(a) Where, in the opinion of the presiding judge, magistrate or justice, the accused is neither dangerous to himself or society and unlikely to benefit from treatment, the judge, magistrate of justice may release the accused forthwith, subject to reindictment and trial if he later becomes fit to stand trial.

(b) Where, in the opinion of the judge, magistrate or justice, the accused is neither dangerous to himself or society and may be treated effectively without hospitalization, the accused may be released on the condition that he be treated as an out-patient of a psychiatric facility until he regains fitness or until such time as the period of his treatment equals two thirds of the maximum sentence for which he would have been liable upon conviction. No accused shall be required to furnish his own psychiatrist as a condition of such release.

(c) Where, in the opinion of the presiding judge, magistrate or justice, the accused is either dangerous to himself or society, and would be best treated through hospitalization, the judge, magistrate or justice may commit the accused to an approved hospital or psychiatric facility until such time as he becomes fit or until

Section 12

(1) (c) the period of his commitment equals two thirds of the maximum sentence for which he would have been liable upon conviction.

(2) Where an accused receiving treatment or committed to an approved hospital or psychiatric facility pursuant to section 12(1)(b) or (c) has spent the full term of his treatment or committal and is still considered to be unfit, the charges against the accused shall be withdrawn and, if need be, the relevant provincial legislation shall apply.

(3) In deciding upon the order, the judge, magistrate or justice shall consider:

(a) the gravity of the offence charged,

(b) the danger the accused represents to himself and society,

(c) the likelihood of the accused regaining sufficient mental capacity to be considered fit,

(d) the recommendations of the medical personnel for treatment which would best facilitate the recovery of the accused.

(4) In making his decision, the judge shall consider the safety of the public and the interest of the accused so that the nature and duration of the treatment bear a reasonable relationship to the purpose for which the accused is being detained.

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