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THE HONOURABLE GUY CHARBONNEAU
SPEAKER

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GENERAL AGREEMENT ON TARIFFS AND TRADE

STATUS OF NEGOTIATIONS ON CANADIAN MARKETING BOARDS

Hon. H. A. Olson: Honourable senators, I would ask the deputy leader to take notice of another question. The Minister of Agriculture and the Minister for International Trade are in Geneva, or at least they were yesterday. The Minister of Agriculture is quoted as saying that he did not get exactly an enthusiastic response to his representations for the retention of the protection provided under article 11 of the GATT. I wonder if the deputy leader would take notice and bring in a reply next week, hopefully on Tuesday, as to exactly what happened, so that some of the people who are dependent on these marketing boards will know precisely what happened?

Hon. John Lynch-Staunton (Deputy Leader of the Government): Honourable senators, I will do all I can.

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**CRIMINAL CODE
NATIONAL DEFENCE ACT
YOUNG OFFENDERS ACT**

BILL TO AMEND—SECOND READING—DEBATE ADJOURNED

Hon. Mabel M. DeWare, moved the second reading of Bill C-30, to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof.

She said: Honourable senators, I am pleased today to speak in support of this bill to amend the Criminal Code provisions relating to mentally disordered offenders, which is the product of ten years of development and extensive consultation. For too long our criminal law has tended to forget about the mentally disordered offenders, leaving their fate to be determined by the pleasure of the provincial lieutenant governors. We have been fortunate, though, in recent years at least, that the lieutenant governors, aided in most instances by advisory review boards, have exercised their pleasure in a considered and humane way.

Little credit for that can be attributed to the Criminal Code provisions which are terribly out of date, show little concern for the rights of the mentally disordered persons appearing before the criminal courts and leave many practical problems unanswered. Today I would like to deal with some of those shortcomings and show how this bill that we have before us would improve the situation, not only for the mentally disordered accused but for the public as well.

One of the problems with the current legislation provisions is that they are simply out of date. For the most part they are borrowed from English legislation dating from the latter half of the nineteenth century. The language is Victorian, as are the concepts underlying the provisions. The terms "insanity" and "natural imbecility" are no longer used by psychiatrists, who prefer to use the term "mental disorder"; the concept of insane delusions is a separate form of mental disorder, for which a separate provision is required as is the case now in subsection 16(3) of the Criminal Code. It has been discredited, and the rule that requires that persons who are found to be

either "unfit to stand trial on account of insanity", or "not guilty on account of insanity", be held in custody "until the pleasure of the Lieutenant Governor of the province is known", is at best anachronistic.

• (1440)

The bill that is before us modernizes the law by using the term "mental disorder", and by eliminating the unnecessary provisions regarding "insane delusions". More importantly, it does away with the role of the provincial Lieutenant Governor in this process, transferring the decision-making power in respect of the care and detention of the mentally disordered accused persons to an expert review board, chaired in most instances by a judge or a retired judge.

The Criminal Code has for some years contained a section permitting the creation of a board to review, and the making of recommendations with respect to cases of persons being held under the authority of the Lieutenant Governor. Such boards have been created in most provinces, and the experience with them indicates that their creation should be made mandatory in all provinces and territories. Moreover, as the ones who hear the evidence have direct contact with the mentally disordered person during the hearing and have the expertise to determine the appropriate disposition, they should be making the decisions, rather than merely advising the Lieutenant Governor.

I will not go into detail concerning the operation of the review boards under the proposed legislation. Let me simply say that with this legislation, the reconstituted boards will provide better protection for the rights of both the mentally disordered and the general public.

This leads me to a second group of problems associated with the existing law, namely, that it displays little regard for the rights of the mentally disordered. Let me give a few illustrations.

Section 615 of the Criminal Code empowers the court to order that the accused be remanded in custody for up to 30 days—indeed, in extraordinary circumstances for up to 60 days—for psychiatric observation in order to assist the court in determining whether the accused is unfit to stand trial on account of insanity. While the law does state that this is a maximum period, and that a remand in custody is not required, in the great majority of cases the courts do in fact remand the accused in custody for 30 days. But experts agree that an assessment of whether a person is fit or unfit to stand trial can be done in a very short period of time, and a couple of days is normally ample. Therefore, in most cases, the additional 28 days is completely unnecessary.

Not only does this extra time on remand in custody cost the public purse a great deal of money and tie up hospital facilities that are in scarce supply, but it also constitutes a major interference with the freedom of the accused who, but for this order, in most instances would be released pending trial. Nor is this concern with the freedom of the accused a purely abstract or theoretical one, for detention in custody may also interfere with a person's family life, livelihood or education.

The proposed legislation deals with this problem by setting a time limit of five days, exclusive of holidays, for a fitness examination, unless the prosecutor and the defence agree on a longer period. In order to accommodate the special needs of remote areas, this five-day period is also exclusive of travel time to and from the place where the assessment is to take place.

The bill also contains two other protections for the accused. First, it provides that the order for an assessment is non-custodial, unless the court is satisfied that one of the prescribed criteria for a custodial remand is met. Second, it limits the absolute right of the prosecution to apply for a fitness remand to cases that are being prosecuted by way of indictment—that is to say, serious cases. In other cases, the prosecution may only apply for a fitness remand where the issue has been raised by the accused, or the prosecution alleges that there are substantial reasons to doubt that the accused is fit to stand trial.

Another problem exists in relation to the admissibility of statements that the accused may have made to the psychiatrist or others in the assessment team during the course of a fitness evaluation. Under the present law, such statements are generally admissible in evidence against the accused, even though he or she may have thought that they were being made in confidence. Although it may be surprising to some honourable senators, statements made in the course of a doctor-patient relationship are not considered to be confidential for purposes of the criminal law, and therefore the doctor may be compelled to testify as to what his or her patient told him. Such statements could, of course, have disastrous effects upon the case for the defence at trial. As a result of this risk, there is a tendency for defence lawyers to advise their clients to say nothing to the examining psychiatrist, and this, of course, undermines the whole purpose of court-ordered examinations. Therefore the current law is neither fair nor practical.

The proposed law remedies the situation by declaring that statements made by the accused to a psychiatrist or others during the course of a court-ordered psychiatric examination are inadmissible in evidence without the consent of the accused. There are exceptions to this general rule. Since the purpose of the assessment is to determine the fitness of the accused to stand trial, it would be illogical to exclude statements which help the court to answer that question. However, they should be admissible only for that purpose and not for the purpose of establishing the guilt of the accused.

There are other exceptions which are designed to discourage the accused from committing perjury, or telling a different story to the court than he told to the psychiatrist. These exceptions only apply if the accused testifies at his trial. So the proposed amendments provide protection for the accused, but at the same time are designed to prevent the accused from positively misleading the court.

A third example of how the present law shows little regard for the rights of the accused is its lack of guidance on the procedures which are to be followed in assessing what to do with the accused while he or she is "awaiting the pleasure of

the Lieutenant Governor." The Criminal Code leaves it to the Lieutenant Governor to determine whether the accused should be detained in "safe custody", or whether "it would be in the best interests of the accused and not contrary to the interest of the public" to discharge the accused, either absolutely or subject to such conditions as the Lieutenant Governor may prescribe in subsection 617(1) of the Criminal Code. However, the Criminal Code imposes no criteria for exercising this discretion, requires no regular hearing—in fact requires no hearing at all—and does not provide for an appeal. It is true that section 619 of the Criminal Code sets out certain procedural rules with respect to the holding of hearings by an advisory review board. However, these are minimal, and in any case, as I mentioned earlier, there is no obligation under the present law to set up a review board. Even if one is set up, the Lieutenant Governor is not bound to follow its recommendations.

The only bright spot, as far as the mentally disordered accused is concerned, is that the courts recently have imposed a requirement on the review boards to act fairly, and they have placed an onus on the Lieutenant Governor to assure that the procedure before the board was fair.

The proposed legislation provides much more protection for the mentally disordered accused. It sets out a greater range of dispositions which can be made, and it says that the one that is the least restrictive so far as the accused is concerned should be chosen, so long as it is consistent with the protection of the public. It sets out basic rules of procedure to be followed, to assure that the procedure will be fair and will be applied with a greater degree of uniformity across the country than has been the case in the past. It eliminates the role of the Lieutenant Governor in relation to the mentally disordered accused, transferring the decision-making power to the review boards, and it makes the establishment of review boards mandatory in all provinces and territories.

Undoubtedly the most fundamental problem with the present system of keeping a mentally disordered person in custody until "the pleasure of the Lieutenant Governor is known" is that the custody could continue indefinitely. The bill imposes an outer limit or "cap" on the length of time a mentally disordered accused can be held under the authority of the criminal law. Thus, there is a cap of "life" for murder, because the minimum sentence for murder is life imprisonment; for offences involving danger to the lives or safety of persons, or threatening the security of the state, the cap is the lesser of 10 years or the maximum sentence for the offence; and for all other offences, the cap is the lesser of two years or the maximum sentence.

There may be some cases where the behaviour of the accused is marked by repetitive or persistent aggression, or the offence itself was of such a brutal nature that if the accused were sane and had been convicted, it would have been appropriate for the Attorney General to ask the court to find the accused a "dangerous offender" and to impose an indeterminate sentence.

The bill will allow the Attorney General to make a similar application in relation to persons found "not criminally responsible on account of mental disorder"; and if the court is satisfied that the accused should be designated a "dangerous mentally disordered accused", the 10-year cap will be increased to a maximum of life. The transitional provisions of the bill allow similar applications to a commissioner in relation to mentally disordered accused who are on Lieutenant Governor's warrants at the time this bill comes into force.

It should be understood, of course, that the cap, just like a sentence, is an outer limit, and the person may be released earlier if the review board is satisfied that he or she no longer constitutes a danger to the public. On the other hand, unlike a sentence, if at the time the outer limit is reached the individual still is dangerous on account of mental disorder, that person can be committed to a hospital under the authority of the provincial mental health legislation. Hence there is greater protection for the public in relation to the mentally disordered accused than in relation to the sane offender.

I think that the capping provisions represent a very fine compromise between the need to protect the rights of the mentally disordered accused and the need to provide adequate protection for the public. They provide a greater degree of equivalence in the way in which the criminal law treats the sane offender and the mentally disordered, in a manner consistent with the "equality" section of the Charter of Rights and Freedoms. They recognize the appropriate roles of the federal and provincial governments in relation to "criminal law" and "health" respectively. In order to give the provinces the opportunity to modify their mental health legislation to dovetail with the new federal legislation, the Minister of Justice has assured her provincial counterparts that the proclamation of the capping provisions will be delayed for a reasonable length of time.

• (1450)

Finally, there is another problem area that is not dealt with in the existing legislation and which the bill addresses in a unique way. It is the question of hospital orders. In some instances the accused is found fit to stand trial, is convicted, but at the time of sentencing is found to be suffering from a mental disorder in an acute phase, which if not treated immediately is likely to result in a significant deterioration in the mental or physical health of the offender, or in the offender causing serious bodily harm to himself or others. At the present time the court has no power to order that the offender be sent to a hospital or other treatment facility. All that the judge can do is to make a recommendation to the authorities in charge of the prison where the offender is to serve her or his sentence that appropriate psychiatric care be provided to the offender on an urgent basis.

As a result of advice received during a very extensive consultation process, the government is proposing to give the courts the power to order that the offender spend up to the first 60 days of his sentence receiving treatment in a hospital or other treatment facility, at the end of which time he or she would be transferred to the prison to complete their sentence,

unless some other arrangement were made between the prison and the hospital for further care and treatment. Thus, what is proposed in the bill is a relatively short period of treatment designed to stabilize the offender's mental condition so that it does not pose a threat either to the offender or to others.

There are other differences as well. The Canadian proposal, unlike the United Kingdom one, would require the consent of the offender and the hospital before such an order for treatment could be made; the British scheme only requires the consent of the hospital. The Canadian proposal would limit the availability of hospital orders to situations where the mental disorder was in an "acute phase", requiring immediate treatment on an urgent basis; the British scheme allows an order to be made where "appropriate". The Canadian proposal has more exclusions: Those serving a term of imprisonment of less than 60 days or serving a sentence on an intermittent basis and those whose term of imprisonment is imposed in default of complying with an order to pay a fine or an amount by way of restitution.

Despite these limitations on the application of the order proposal, a number of the provinces expressed concern that this implementation might have serious financial implications for them. The Minister of Justice has therefore proposed to her provincial counterparts that the proclamation of the hospital order scheme on a national basis be deferred, and that instead it be proclaimed in one or two provinces which are willing to have it implemented on a pilot project basis. This would allow the scheme to be assessed and evaluated in operation over a two to three year period before a decision is taken to implement it nationally.

There is a great deal more that we could say about this bill, for not only is it a large bill, but it also represents a major social advance in the way in which we deal with the mentally disordered who have come into contact with the law. I urge honourable senators to give this important legislation speedy passage so it can be implemented in the shortest possible time, particularly in light of the short extension—until February 5, 1992—given to Parliament by the Supreme Court of Canada as a result of an application by the Federal Government to extend the original six month period set out by the court in *Swain versus the Queen*.

On motion of Senator Stanbury, debate adjourned.

Hon. John Lynch-Staunton (Deputy Leader of the Government): Honourable senators, I would like the clerk to revert to the Orders of Business and call the report of the banking committee at this stage.

**INSURANCE COMPANIES BILL
COOPERATIVE CREDIT ASSOCIATION BILL
TRUST AND LOAN COMPANIES BILL
BANK BILL**

REPORT OF BANKING, TRADE AND COMMERCE COMMITTEE—
DEBATE ADJOURNED

The Senate proceeded to consideration of the third report of the Standing Senate Committee on Banking, Trade and Com-