Recent Legal Developments

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In its recent decision in *R. v. Swain*, the Supreme Court of Canada struck down subsection 614(2) of the *Criminal Code* which provided for the automatic detention of all persons found not guilty by reason of insanity until the Lieutenant Governor has either discharged the accused or ordered his or her continued detention. The Court found that the automatic detention of a person after a finding of not guilty by reason of insanity deprived a person of his or her right to liberty, and constituted arbitrary detention because the detention is automatic and no hearing is held. This decision does not affect those who have been detained under Lieutenant Governor Warrants for some time and have been subject to annual reviews by provincial boards of review.

In *Fengstad v. Scissons*, the Federal Court rejected an inmate's challenge to his continued detention in the segregation unit. The primary reason for the continued segregation was that, according to several informants, the inmate had been threatening other inmates and members of their families, trying to force them to purchase narcotics and bring them into the institution. The notification of placement in segregation restricted certain details so as to protect the identities of the informants.

The Court held that it was not unreasonable for prison authorities to consider an inmate's history - which in this case included numerous outstanding offences for very serious crimes - in making administrative decisions. It concluded that there was no breach of fairness in placing the applicant in segregation and that it would be clearly unwise and perhaps even dangerous to reveal more information to the applicant.

This decision reinforces the ruling in *Gallant v. Trono* to the effect that where informants' lives could be endangered if additional information were revealed to an offender, the Correctional Service of Canada is not required to do so in its reasons for segregating or transferring an inmate.

In *Morin v. Gauthier*, the Federal Court quashed the decision of an independent chairperson that limited the number of witnesses an inmate could call. The Court held that independent chairpersons hearing a disciplinary matter cannot arbitrarily limit the number of witnesses an accused wishes to call. In deciding whether evidence is reasonable or trustworthy, the chairperson should at least attempt to learn, from the person wishing to produce one or more witnesses, what these witnesses will be saying and whether they are in a position to give credible testimony.

In *Queen V. Fischer*, the Alberta Court of Appeal upheld the trial court's denial of the appellant's application for habeas corpus. The appellant was convicted of first degree murder in 1979 and is ineligible for parole for 15 years. He argued that his continued detention constitutes cruel and unusual

punishment and offends section 12 of the *Charter of Rights and Freedoms* which came into force in April 1982. The appellant contended that his punishment was cruel because his conviction was based upon definitions of murder which were found to be contrary to another section of the *Charter of Rights and Freedoms*.

The Court of Appeal held that to accept the appellant's argument, the *Charter* would have to be applied to events that occurred before it came into force. The *Charter* can only be applied retrospectively in certain cases where the incarceration was illegal under pre-Charter law. In such cases, the *Charter* merely offers a remedy where none existed before.