CHAPTER 5: FITNESS TO STAND TRIAL, ASSESSMENTS AND APPEALS

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I. Introduction

Until the 1990s, persons who were found unfit to stand trial (UST) could be incarcerated indefinitely before they were convicted of an offence. These individuals would be held in custody at the pleasure of the provincial Lieutenant Governor. In some provinces, Review Boards advised the Lieutenant Governors as to whether detainees should be released, but the Lieutenant Governors were not obligated to follow the recommendations of these Boards. As a result, lawyers were often reluctant to raise the issue of their client's fitness to stand trial, especially for minor offences, because there was a risk that the accused would spend more time in custody under a Lieutenant Governor's Warrant than he or she would have spent incarcerated if found guilty of the offence.[1] The enactment of Part XX.1 to the *Criminal Code* has obviated some of these concerns.[2]

Prior to the enactment of Part XX.1, there were two challenges based on the *Canadian Charter of Rights and Freedoms*[3] to the *Criminal Code* provisions dealing with mental disorder. *R v Chaulk* was the first, whereby majority of the Supreme Court of Canada ruled that the requirement that the accused prove an inability to understand the nature and quality of his or her act violated the accused's right to be presumed innocent.[4] However, this violation was constitutionally saved under section 1 of the *Charter*. A second *Charter* challenge came in *R v Swain*, where the Court struck down the provision for automatic, indefinite detention of a non-criminally responsible accused on the basis that it violated the accused's section 7 liberty rights.[5]

In response to *Swain*, Parliament introduced sweeping changes to the *Criminal Code* in 1991 by enacting Part XX.1. Part XX.1 reflected an entirely new approach to the problem of the mentally ill offender that attempted to address the twin goals of fair treatment for the mentally ill and public safety. Under the new scheme, once an accused person is found to have committed a crime while suffering from a mental

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[1] Lieutenant Governor's Warrants are discussed in Chapter Eleven.
[2] *Criminal Code,* RSC 1985, c C-46 (hereinafter *Criminal Code*).
[3] *Canadian Charter of Rights and Freedoms*, *Part I of the Constitution Act*, *1982*, *being Schedule B of the Canada Act 1982 (UK)*, *1982*, *c 11 (hereinafter Charter of Rights or Charter)*.
[4] *R v Chaulk,* [1990] 3 SCR 1303.
[5] *R v Swain,* [1991] 1 SCR 933 (hereinafter *Swain*).

disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, that individual is diverted into a special stream. Section 672.22 establishes the rebuttable presumption that "[a]n accused is presumed fit to stand trial unless the court is satisfied on a balance of probabilities that the accused is unfit to stand trial." The phrase "unfit to stand trial" is defined in the *Criminal Code* s 2 as "unable on account of mental disorder to conduct a defense at any stage in the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to: (a) understand the nature of the proceedings; (b) understand the possible consequences of the proceedings; or (c) communicate with counsel." The test for fitness is whether the accused has sufficient cognitive capacity to advise his or her counsel as to the relevant facts and circumstances such that defense counsel may prepare an adequate defense.[6]

If an accused is found unfit, a verdict of unfit to stand trial is imposed, existing pleas are set aside, and a jury, if empanelled, is discharged. After a UST verdict is rendered the Crown must adduce sufficient evidence to establish, *prima facie*, that there is sufficient evidence to put the accused to trial (if the accused were fit to stand trial). This obligation arises bi-annually or in the case of young offenders, yearly, after it is first met.[7] The UST person may also request such a hearing at any time for the UST verdict. If a *prima facie* case is not met, pursuant to subsection 672.33(6) the court must acquit the accused.

UST dispositions are found in section 672.54, and may be ordered by a Review Board under subsection 672.45(2), and sections 672.47 or 672.83. There are two alternatives for a UST person: (1) a conditional discharge, or (2) detention in an approved hospital, subject to conditions. Until such time as the accused is declared fit to stand trial (FST), the accused is subject to the jurisdiction of the court in conjunction with a Review Board. If an accused is declared not criminally responsible on account of mental disorder ("NCR"), there is a third alternative available in subsection 672.54(a), which is an absolute discharge. Thus, under Part XX.1 of the *Criminal Code*, a UST

[6] See *R v Taylor*, [1992] OJ No 2394 at para 44, 77 CCC (3d) 551 (Ont CA) (hereinafter *Taylor*).
[7] See *Criminal Code,* s 672.33.

accused is treated differently than a NCR accused. A NCR accused may be absolutely discharged after a disposition hearing, while a UST accused may not. The effect is that a UST accused will either (1) be found fit, go to trial and face the charges, or (2) remain unfit, and be subject to disposition orders for possibly the rest of his or her life. This difference is founded on a key distinction. The NCR accused has been found criminally responsible, but the UST accused has not been tried on the merits of his or her case.[8] Thus, while the NCR may be freed when "cured", the UST, if not "cured" may never go free, even though he or she has not actually been adjudged guilty of any crime. In *Winko v Forensic Psychiatric Institute*, the Supreme Court of Canada held that section 672.54 is constitutional.[9] However, *Winko* was concerned with a NCR case. However, where a UST accused suffered from Fetal Alcohol Syndrome, a Yukon Territorial Court declared the mental disorder provisions of the *Criminal Code* unconstitutional as they distinguish between those who are found to be unfit to stand trial (UST) and those who are NCR in that different options exist with respect to disposition.[10]

In *R c Demers* the Supreme Court of Canada held that sections 672.33, 672.54 and subsection 672.81(1) of the *Criminal Code* are overbroad and violate the section 7 *Charter* rights of permanently unfit accused who do not pose a significant threat to society.[11] The court explained that the combined operation of these three sections means an absolute discharge is not available. Instead, they lead to an accused found unfit to stand trial having to remain in the "system" established under Part XX.1 of the *Criminal Code*, until either he or she becomes fit to stand trial or the Crown fails to establish a *prima facie* case against him or her. This case is discussed in further detail in Chapter 12.

As a rule, far more accused individuals are sent for psychiatric assessments to

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[8] See *R c Demers*, 2004 SCC 46, [2004] 2 SCR. 489 (hereinafter *Demers*).

[9] *Winko v Forensic Psychiatric Institute,* [1999] 2 SCR 625 at para 101, [1999] SCJ No 31 (hereinafter *Winko*).

[10] *R v J. (T.)*, [1999] YJ No 57, YTC (hereinafter *J. (T.)*. Section 672 was found to infringe section 7 and section 672.54 was found to infringe section 15 of the *Charter.* However, an Alberta Provincial Court Judge, following the application of the ruling in *Winko*, found that a UST's Charter rights are no more violated than an NCR's by the lawful operation of part XX.1 of the *Criminal Code* in *R v W. (C.)*, 2001 ABPC 148, [2001] AJ No 1123.

[11] *Demers,* at 64.

determine their fitness to stand trial (a UST) than are sent to determine if they were mentally disordered at the time of the offence (an NCR). A fairly large number of persons who are assessed at mental health facilities are determined not to be mentally ill. For example, in the twelve months from April 1991 to March 1992, 363 persons were admitted to the Calgary General Hospital for remand assessments. Of those persons examined, twenty-five percent (25%) were found to have no mental illness. Twenty-two percent (22%) were found to have schizophrenia, 18 percent had substance abuse problems, 10 percent had personality disorders and 10 percent had mood disorders.[12] Often, individuals will be found fit to stand trial based (at least in part) upon the results of these psychiatric assessments.

This chapter outlines the procedures that occur before an accused is actually tried for an offence. First, it briefly discusses the requirements for judicial interim release (bail). Second, it deals with assessment orders, focusing on the grounds and procedures required to obtain them.

The remainder of the chapter examines the provisions of the *Criminal Code* that deal with an accused who is unfit to stand trial (UST). It discusses the legal tests for fitness, as well as the procedures for fitness hearings. The chapter also examines the current role of Review Boards in making dispositions (sentencing) after an accused is found UST. Appeals from findings of unfitness or fitness are also discussed. The application of the fitness provisions to mentally disabled individuals is discussed. Finally, the chapter outlines some of the ethical considerations that arise because of the accused's mental condition and how it affects the lawyer's relationship with his/her client in the context of a fitness hearing.

Since the accused's mental condition may affect several important areas, the issues surrounding capacity are discussed in three chapters. Chapter Three, Solicitor and Client Issues, deals with capacity in the pre-trial solicitor-client relationship, in plea decisions, in deciding whether or not to testify and in related circumstances. Chapter Four, Confessions and Statements, deals with the effect of an accused's mental

[12] Calgary General Hospital, Annual Statistical Overview of the Department of Psychiatry, April 1, 1991 to March, 31, 1992.

condition on his ability to confess. It also examines the use of interrogation techniques on mentally disabled accused.

II. Judicial Interim Release

A. General

Once a person has been arrested, the issue of whether he/she should be detained in custody arises. It may be difficult to obtain the release of a mentally disabled accused pending trial, especially if he/she is perceived to be dangerous.

In most cases, a lengthy period of pre-trial detention makes it more difficult for the accused to maintain employment, to hire a lawyer or assist in the defence.[13] There are several sections of the *Criminal Code* that set out the limited grounds for denying bail. Further, the advent of the *Charter* in 1982 has encouraged law enforcement personnel to release accused persons. In particular, *Charter* subsection 11(e) guarantees the right of a person charged with an offence not to be denied bail without just cause.

B. Release by the Officer in Charge

If a police officer decides to keep a suspect in custody,[14] the officer in charge of the police lock-up or another peace officer is required to consider, based on reasonable grounds**,** whether the suspect should be released.[15] Generally, where the offence with which the suspect is charged carries a penalty of five years or less, the officer in charge must release the person "as soon as practicable" unless he/she believes on reasonable grounds: (1) that it is necessary in the public interest[16] that the suspect be detained in custody or (2) that if the suspect is released he or she will fail to attend court.[17]

The officer in charge may release a suspect from police custody in four ways.

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[13] C. Griffiths and S. Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 191 (hereinafter Griffiths and Verdun-Jones).

[14] The Alberta Government recently reviewed who should conduct bail hearings (e.g., police officers or Justices of the Peace?) and in what circumstances. ACLRC made a submission with respect to mentally disabled persons. It is available on request. See: Nancy Irving, Alberta Justice, *Alberta Bail Review: Endorsing a Call for Change* 29 February 2016 online: https://justice.alberta.ca/programs_services/criminal_pros/Documents/AlbertaBailReview-REPORT.pdf

[15] *Criminal Code*, s 498.

[16] See *R v Morales,* [1992] 3 SCR 711, [1992] SCJ No 98 (hereinafter *Morales*) where a similar phrase under s 515(10)(b) was struck down by the Supreme Court of Canada as infringing *Charter* s 11(e) by being too vague – see discussion under: Appearance Before a Justice).

[17] *Criminal Code*, s 498(1.1).

First, she/he may release the suspect with the intention of compelling her/his appearance by way of summons.[18] Second, he/she may release the suspect upon the suspect signing a formal document called an appearance notice.[19] Third, he/she may release the suspect upon him/her entering into a recognizance for an amount up to five hundred dollars without requiring a deposit.[20] Fourth, if the suspect is not ordinarily resident in the province where the arrest occurred or does not ordinarily reside within 200 kilometres of the place where he/she is being held in custody, the officer in charge may release the suspect if the suspect enters into a recognizance for up to $500 and if requested, the suspect deposits a sum of money or other security in an amount up to $500.[21]

These provisions appear to give police officers a fair amount of discretion. The provisions do not specify what types of circumstances will give the officer in charge "reasonable grounds" to conclude that the suspects would fail to attend for trial if he/she was released. Hagan and Morden examined the variables that were associated with refusal of the police to grant bail to a suspect. They found that prior conviction, prior incarceration, employment status, the accused's behaviour toward the police, the seriousness of the charge, the type of victim, whether a warrant had been issued and whether a statement had been taken had the most impact on the decision to release.[22] These findings may be significant for mentally disabled accused as they may exhibit several of the listed indicators. Further, a denial of bail at this stage may result in more severe punishment for the accused at a later stage of the proceedings. Griffiths and Verdun-Jones assert that the accused's bail status (e.g., a denial of bail) appears to exert a significant impact upon the verdict and sentence received in the criminal case.[23]

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[18] *Criminal Code,* s 498(1)(a) (a summons is a legal document which is directed to the accused and which sets out the charges against her and requires her to attend court at a specified time and place).
[19] *Criminal Code,* ss 498(1)(b), 501.
[20] *Criminal Code,* s 498(1)(c) (a recognizance is a document in which the accused agrees that he/she will forfeit property or money to the Crown if she does not appear in court on the specified date).
[21] *Criminal Code,* s 498(1)(d).
[22] Griffiths and Verdun-Jones, at 195.
[23] Griffiths and Verdun-Jones, at 195.

C. Appearance Before a Justice

If the police decide not to release an arrested person, in most cases, the person must be brought before a justice or provincial court judge for arraignment within 24 hours of the arrest.[24] In *R v Keats,* however, the Nova Scotia Provincial Court held that section 503 does not confer an unqualified right to keep an accused in custody for the full 24 hours.[25] In that case the police decided not to interview an arrested person until the following morning so that they would be more rested, and as a result he was detained for slightly over 22 hours before he was brought before a justice. The court held that complying with the section 503 requirement that a detained person is taken before a justice "without unreasonably delay" should have taken precedence over the questioning officers being rested and that questioning should have at least started on the evening of the arrest.[26] Whether the length of time that an individual is detained prior to being taken before a justice constitutes an "unreasonable delay" within the meaning of section 503 has been variously considered by Canadian courts and appears to depend on the context and reason for delay as well as to its length.[27]

At arraignment, a date is set for the next stage of proceedings. The accused may be released on his or her own recognizance, may have bail set with or without conditions or may be ordered held in custody. The justice or judge may immediately consider the question of bail or may adjourn the proceedings for a period of up to three days, upon the application of the prosecutor or the accused.[28]

Bail hearings are also called judicial interim release or show cause hearings. They are called show cause hearings because either the prosecutor must show cause why the accused should not be released or the accused must show cause why he/she should be released. In most cases, the prosecutor must show why the accused should remain in custody. However, in some cases, the onus is reversed, and it is the accused who must

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[24] *Criminal Code*, s 503(1) (if the accused is charged with murder, treason, sedition or piracy, only a superior court judge (Queen's Bench) may release him/her).
[25] *R v Keats*, 2014 NSPC 108 at para 69, [2014 NSJ No 688 (hereinafter *Keats*).
[26] *Keats*, at para 70.
[27] See, for example: *R v Storrey*, [1990] 1 SCR 241, 53 CCC (3d) 316; *R v Nguyen*, 2011 BCCA 131; [2011] BCWLD 3020; *R v MacPherson*, [1995] NBJ No 277, 100 CCC (3d) 216.
[28] *Criminal Code*, s 516.

show why he/she should be released. The accused bears the onus when:

- he/she has been charged with an indictable offence, alleged to have been committed while at large after having been released on bail for another indictable offence;[29]

- he/she is not ordinarily resident in Canada and has been charged with an indictable offence;[30]

- he/she has been charged with failing to appear in court or with failing to fulfil bail conditions while waiting to be tried for another offence;[31]

- he/she has been charged with trafficking in or exporting or importing narcotics[32] or conspiring to commit these offences;[33] and

- he/she is charged with an offence under s 469 (e.g., murder, treason, piracy).[34]

There are three grounds considered in determining whether an accused should remain in detention. The primary ground considered is whether continued detention is necessary to ensure that the accused attends trial.[35] If the justice or judge determines that continued detention is not justified to ensure the accused's appearance at trial, then she/he considers the remaining two grounds. The second ground to consider is whether continued detention is necessary in the public interest or for the protection or safety of the public, "having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice."[36] The final ground to consider is whether the detention is necessary to maintain confidence in the administration of justice, “having regard to all the circumstances incluing, the apparent strength of the

[29] *Criminal Code,* s 515(6)(a).
[30] *Criminal Code,* s 515(6)(b).
[31] *g,* s 515(6)(c). See also *Criminal Code*, ss 145(2)-(5).
[32] See *Controlled Drugs and Substances Act,* SC 1996, c 19, ss 5(3)-(4), 6(3).
[33] *Criminal Code*, s 515(6)(d).
[34] *Criminal Code,* s 522(2) (only a judge presiding in a superior court for the province may order that the accused be released pending trial).
[35] *Criminal Code,* s 515(10)(a).
[36] *Criminal Code,* s 515(10)(b).

prosecuation's case, the gravity of the offence, the circumstances surrounding the commission of the offence, including whether a firearm was used, and the fact that the accused is liable, on conviction, for a potentially lengthy term of prison."[37]

In determining whether the accused will appear for trial, the court will look at whether the accused has a fixed address, her/his employment and family status, her/his criminal record and her/his attachment to the community.[38] A person with a mental disability may be at a considerable disadvantage because she/he may not have steady employment and may be estranged from her/his family and friends. Thus, the way that these provisions are interpreted may result in discrimination against her/him because of mental disability.

As for the second ground, a decision of the Supreme Court of Canada, *R v Morales*, struck down the "public interest" criterion from the phrase "that [the accused's] detention is necessary in the public interest or for the safety or interest of the public" in subsection 515(10) (b) as being contrary to subsection 11(e) of the *Charter*.[39] Subsection 11(e) provides that a person charged with an offence should not be detained without just cause. The Supreme Court of Canada held that subsection 515(10)(b) violates *Charter* subsection 11(e) because it authorizes detention in terms that are vague and imprecise and therefore authorizes a denial of bail without just cause. Thus, in situations where the accused must show cause why she should be released, the secondary grounds now require that continued detention is necessary for the safety of the public.[40]

In regards to the third ground, the Supreme Court of Canada has recently

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[37] *Criminal Code*, s 515(10)(c).
[38] Griffiths and Verdun-Jones, at 197.
[39] *Morales,* at para 69. See also *R v Hall,* 2002 SCC 64, [2002] 3 SCR 309 (in which *Morales* was distinguished); *R v Helewka,* 2009 ABQB 531, [2009] AWLD 4076 (which followed *Morales*); *R v Abdel-Rahman,* 2010 BCSC 189, [2010 BCWLD 2928 (which followed *Morales*).
[40] See also *R c Pearson*, [1992] 3 SCR 665 at para 76, [1992] SCJ No 99 (Supreme Court held that the "public safety" component of *Criminal Code,* s 515(10)(b) was constitutionally valid). See also *R v Branco,* [1994] BCJ No 2991 (hereinafter *Branco*); *R v Farinacci,* [1993] OJ No 2627, 109 DLR (4th) 97 (Ont CA) (along with *Branco,* upheld the constitutionality of *Criminal Code,* s 679(3)(c), which permits a court to refuse bail pending appeal "in the public interest); *R v D'Agostino,* 1998 ABCA 202, [1998] AJ No 686; *R v Mian,* 1996 NSCA 114, 148 NSR (2d) 155; *R v Huang,* [1996] OJ No 4052, 50 CR (4th) 292 (Ont CA); *Cadeddu v Canada,* [1997] OJ No 4378, 11 CR (5th) 61 (Ont Gen Div).

clarified that it is not a residual ground for detention that only applies if the first two grounds are not satisfied. Rather, section 515(10)(c) is a distinct ground that can provide the basis for pre-trial detention on its own and therefore it should not be interpreted narrowly.[41]

If a judge or justice decides to release the accused, he/she may choose from five different methods. The accused may be released:

> (1) upon giving an undertaking to appear, together with such conditions as the justice or judge directs;[42]
>
> (2) upon entering into a recognizance in such amount and with such conditions as the justice or judge may direct;[43]
>
> (3) upon entering into a recognizance in such amount and with such conditions as the justice or judge may direct, together with the requirement of sureties;[44]
>
> (4) upon entering into a recognizance in such amount and with such conditions as the justice or judge may direct, together with a deposit of cash or other valuable security, with the consent of the prosecutor;[45]
>
> (5) if the accused is not ordinarily resident in the province or within 200 kilometres of the place in which he is in custody, upon entering into a recognizance either with or without sureties in such amount and upon such conditions as the justice or judge may direct together with the requirement of a deposit of cash or some other valuable security.[46]

The conditions that may be imposed if the accused is released include regular reporting to a peace officer; remaining in a particular area; notifying the peace officer of

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[41] *R v St-Cloud* 2015 SCC 27 at para 87, [2015] 2 SCR 328.
[42] *Criminal Code*, s 515(2)(a).
[43] *Criminal Code,* s 515(2)(b).
[44] *Criminal Code,* s 515(2)(c) (sureties are friends or relatives who assume responsibility for ensuring that the accused appears for trial – if the accused fails to attend or follow bail conditions, the surety may forfeit his recognizance).
[45] *Criminal Code,* s 515(2)(d).
[46] *Criminal Code,* s 515(2)(e). See *R v Folkes,* 2007 ABQB 624 at para 39, 228 CCC (3d) 284 (held that the phrase "if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody" is to be read out of subparagraph (2)(e) as they violate subsection 11(e) of the *Charter*).

a change in address, employment or occupation; refraining from communicating with any witness or other person listed in the release order; depositing one's passport; or any other reasonable conditions that the justice considers desirable.[47]

A mentally disabled person may have some difficulty complying with release conditions, depending upon the nature of his/her disability. Further, if the mentally disabled person does not know anyone who is willing to act as surety, he/she may have to remain in custody. Fortunately, several jurisdictions, including Alberta, have bail supervision programs. These programs assist those accused persons who do not have a surety who will enter into a recognizance for them. The accused may be released on his/her or her own recognizance, but is required to report to, and be supervised by, the bail program.[48]

If an accused person violates the terms of their release and commits an indictable offence while on judicial interim release, they may be arrested by the police.[49]

An order for judicial interim release (bail) remains in effect until the accused's trial is completed. If the accused is convicted, the court has the discretion to extend the order pending sentencing.[50] The court may also grant or continue bail pending a conviction or sentence appeal.[51]

The accused or prosecutor may apply for a review of the judge or justice's bail decision to a Queen's Bench judge. The bail decision of a Queen's Bench justice may be appealed to the Court of Appeal.[52]

D. Bail and Mentally Disabled Accused

Mentally disabled persons may have more difficulty obtaining bail for several reasons. First, they may not have supporting individuals who are willing to act as sureties (although this difficulty is alleviated somewhat by the bail programs in place). Second, mentally disabled accused may not meet the requirements for several of the criteria listed under primary ground for detention. They may not have steady

[47] *Criminal Code*, s 515(4).
[48] *Criminal Code,* s 522(3).
[49] *Criminal Code,* s 524(1).
[50] *Criminal Code,* s 523(1).
[51] *Criminal Code,* ss 679(1), 816, 831.
[52] *Criminal Code,* ss 520, 680.

employment or residences. They may not have very close ties with the community. They may have become estranged from their families or spouses. Many of these factors are directly related to their mental condition. Consequently, lawyers may have to advocate for alternative placement in the community or other options that would satisfy the primary ground.

They may have difficulty with the second ground as mentally disabled accused may pose a public safety risk in the eyes of the court. If the lawyer has statistics about the minimal risks associated with the person's condition, or a comprehensive history of the person indicating no public safety factors, he may have success in defeating this argument.

Mental disabilities can impair a person's ability to appear at the proper time and place for appointments (such as court dates). As a result, mentally disabled people are sometimes convicted for failure to appear for an arraignment or for other proceedings. Not only is this a criminal offence in itself,[53] but it also means that in future the person is likely to be denied bail and to be remanded in custody until trial, perhaps for such minor offences, as mischief, trespassing, causing a disturbance and the like.[54]

Finally, mentally disabled persons may have a determination of bail postponed in order that they might be assessed under s. 672.11.[55] This is discussed below under Assessments and Bail.

III. Remands for Psychiatric Observation

A. Assessment Orders

1. Introduction

At various stages in criminal justice proceedings, it may become apparent that an accused needs to be assessed by a psychiatrist or other mental health expert in order to determine, among other factors, if she is able to stand trial and understand the criminal process. The *Criminal Code* provides for examinations of the accused in Part XX.1.

The *Criminal Code* was amended on February 4, 1992, resulting in sweeping

[53] *Criminal Code*, s 145(2) (the penalty is a term of imprisonment for up to two years).
[54] R.J. Freeman and R. Roesch, Mental Disorder and Criminal Justice, (1989) 12 *International Journal of Law and Psychiatry* 105 at 110.
[55] *Criminal Code*, s 672.17.

changes to the provisions that dealt with accused persons who have mental disorders. These changes were the result of recommendations made by the Supreme Court of Canada in the decision *R v Swain*, the Law Reform Commission and others. [56]

In *Swain*, the Supreme Court of Canada held that subsection 542(2) [614(2)] of the *Criminal Code* violated the *Charter*. This section dealt with the custody of the accused after being found not guilty by reason of insanity or being found insane at the time of trial and therefore unfit to stand trial. The Supreme Court of Canada decision also highlighted difficulties in the existing Lieutenant Governor's warrant system. The federal government was given six months to enact new legislation that would address these concerns, which resulted in the amendments to the *Criminal Code*. [57]

One major change was in the procedure utilized to assess the mental condition of the accused. The criteria for the granting of assessment orders are given in section 672.11:

> 672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
>
> > (a) whether the accused is unfit to stand trial;
> >
> > (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);
> >
> > (c) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
> >
> > (d) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused;

[56] *Swain*. See also *Demers*.
[57] *Swain,* at para 170.

> (d.1) whether a finding that the accused is a high-risk accused should be revoked under subsection 672.84(3); or
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> (e) whether an order should be made under subsection 672.851 for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused.[58]

This section replaces and expands several provisions in the *Criminal Code*. The process of sending an accused for an assessment was referred to and likely will continue to be referred to as a "remand for observation". However, the accused is not merely to be "observed" during an assessment. Rather, he/she is to be assessed in order to assist the court when making determinations about his mental condition.

(a) Who May Order an Assessment and When May an Assessment Order Be Made?

The aforementioned *Criminal Code* provisions clarify when an assessment order may be made. Any court that has jurisdiction over the accused has the authority to order an assessment of the accused's mental condition.[59] "Court" is defined as including a summary conviction court, a judge, a justice and a judge of the court of appeal.[60] "Accused" is defined as including a summary conviction defendant and an accused in respect of whom a verdict of not criminally responsible on account of mental disorder has been rendered.[61] An assessment order may be made by the court at any stage of the proceedings against the accused.[62] Clearly, a judge or justice having jurisdiction over an accused may order an assessment if he/she has reasonable grounds (for the purposes

[58] For an overview of the new procedures, see, for example: B. Der, "Remands for Psychiatric Observation" in National Criminal Law Program, Criminal Procedure and Charter Issues (Saskatoon, Sask: July, 1992) at Section 9; T. Glancy, "The New Insanity Provisions", *Criminal Trial Lawyers Association, Three Short Snappers and the Post-Sentence Process*, November 21, 1992, Edmonton, Alberta and Dr. Cdasky, in Alberta Trial Lawyers Association Seminar, May 23, 1998, Edmonton, Alberta. In *R v Roussel* (1996), 112 CCC (3d) 538, the New Brunswick Court of Appeal held that the results of a psychiatric report that is prepared under s. 672.11 may be admitted at a sentencing hearing as long as the accused is given an opportunity to challenge the findings.

[59] *Criminal Code,* s 672.11.

[60] *Criminal Code,* s 672.1.

[61] *Criminal Code*, s 672.1.

[62] *Criminal Code,* s 672.12.

listed in section 671.11) at any time from the accused's first appearance on a matter through to his/her appeal after verdict. Section 672.12 reads:

> 672.12 (1) The court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.
>
> (2) Where the prosecutor applies for an assessment in order to determine whether the accused is unfit to stand trial for an offence that is prosecuted by way of summary conviction, the court may only order the assessment if
>
> > (a) the accused raised the issue of fitness; or
> >
> > (b) the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.
>
> (3) Where the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt for criminal responsibility, the court may only order the assessment if
>
> > (a) the accused puts his or her mental capacity for criminal intent into issue; or
> >
> > (b) the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.

The court may make an assessment order against the accused of its own motion, on application of the accused, or on application of the prosecutor.[63] There are some

[63] *Criminal Code,* s 672.12. See *R v Walker,* 2002 BCCA 89, 163 CCC (3d) 29 (held that the prosecutor may apply for an assessment order during the accused's examination in chief during trial if the defence counsel's opening address indicated the defence of NCR – the trial judge must then decide whether they can properly determine the criminal responsibility of the accused without an assessment of the accused's mental condition by an expert other than the one the accused has detained).

limits on the prosecutor's ability to apply for an assessment order. First, when the offence is prosecuted by way of summary conviction, the court may grant the prosecutor's application for an assessment order only if one of two conditions is met: either the accused has raised the fitness issue, or the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.[64] One assumes that the limits on the prosecution in summary conviction matters exist because the effect of a remand for observation (usually detention for a number of days, although the new legislation presumes against detention) may be more onerous that the possible penalty.

Second, if the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal responsibility (section 16), the court may only order an assessment if the accused puts her/his mental capacity for criminal intent into issue or the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence on account of mental disorder.[65] The competing factors to be considered by the prosecutor are the stigma of a criminal conviction which may impact upon employment and travel versus the stigma of the not criminally responsible defense which may formally document a mental disorder which may impact upon life and disability insurance as well as employment.[66]

These provisions all require that an assessment of an accused take place after a judge's order. The parties are not required to give notice that such an order will be sought. Indeed, the court may make such an order of its own motion.

Further, it has also happened (especially before the amendments) that an accused has been examined without a court order and the courts have had to rule on the admissibility of these "informal" examinations. The *Criminal Code* is silent as to the

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[64] *Criminal Code,* s 672.12(2)(a) – (b).

[65] *Criminal Code,* s 672.12(3) (provisions employ some of the recommendations in *Swain,* but go beyond *Swain* because the prosecutor can still raise the issue of mental disorder. Discussed futher in Chapter Six: The Exemption for Mental Disorder).

[66] See R.D. Schneider, "Mental Disorder in the Courts: Not Criminally Responsible – Whether or not the accused should avail himself of the defence" Ontario Criminal Lawyer's Association Newsletter, Vol. 15, No 3 at 26, October 1994.

admissibility of psychiatric examinations pursued by the Crown that are not the subject of a court order.[67]

The Supreme Court of Canada considered the admissibility of such an examination in *R v Vaillancourt*.[68] The accused was examined by psychiatrists at the request of the Crown. Although the accused had been interviewed by duty counsel at the time of his arrest, he was not represented by a lawyer at the time of the Crown's psychiatric examinations.

The Supreme Court of Canada held that although it would have been preferable for the Crown to proceed to seek a court order for the psychiatric examination and to advise defence counsel of that application, the failure to do so was not by itself a basis for excluding the evidence from the examination.[69]

The Court lamented the lack of provision for obtaining a court order immediately following the arrest of the accused. If such a procedure existed, and if notice were given to the accused, he could seek counsel on the matter.[70] The court implicitly recognized the desirability of obtaining legal counsel before a psychiatric examination. However, the Supreme Court did not go so far as to exclude the psychiatric examination as inadmissible.

It is not clear whether this case will still be followed in light of the 1992 amendments to the *Criminal Code* that permit any court that has jurisdiction over an accused to order an assessment when it has reasonable grounds to do so. At the time that *Vaillancourt* was decided, the Crown did not have a mechanism for obtaining an assessment order ("remand for observation") until the preliminary inquiry.[71] Currently, the Crown can now proceed to obtain an assessment order at any stage of the proceedings. It is difficult to see how the court would consider a psychiatric exam of an unrepresented accused, obtained by the Crown without a court order, now that the

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[67] See e.g., *R v Brunczlik,* [1995] OJ No 3972, 103 CCC (3d) 131 (Ont Gen Div) (Crown sought to use evidence obtained from the Crown psychiatrist for purposes other than originally intended – to establish the identity of the accused – the Court held that the Crown may not lead evidence to establish the identity of the accused on the basis of securing of a fair trial). See also *R v Lawrie*, [1996] OJ No 3750, 17 OTC 384.
[68] *R v Vaillancourt,* [1976] 1 SCR 13, 21 CCC (2d) 65 (hereinafter *Vaillancourt*).
[69] *Vaillancourt,* at 16.
[70] *Vaillancourt*, at 19.
[71] *Vaillancourt.*

Crown can proceed to obtain a court order. Under ubsection 672.23(1), a fitness issue may be addressed by the court at any stage of the proceedings provided the court has "reasonable grounds to believe" that the accused is unfit to stand trial. However, the section is silent as to what constitutes "reasonable grounds to believe", as well as the nature of the evidence that would support such a finding.

The issue of admissibility of statements made by an accused to psychiatrists under these circumstances is discussed in Chapter Four, Confessions and Statements.

(b) How Many Assessment Orders May be Made?

There is no specified limit in the *Criminal Code* as to the number of assessment orders that may be made. It may be necessary to send an accused for more than one assessment. First, more than one assessment may be required to determine the same issue. For example, a person may be fit to stand trial at one stage of the proceedings and yet become unfit to stand trial later in the same proceedings. Further, a person may remain fit to stand trial until the verdict, but may later become unfit before a disposition is made. A person's mental condition may be subject to several changes throughout the course of a trial. For example, he/she may have a condition that is sometimes controlled by drugs, but that requires changes in the amount of medication from time to time. Alternatively, he/she may have a condition where at times he/she is quite lucid and at other times, she is delusional or incommunicative.

Second, more than one assessment order may be required in order to determine different issues. For example, one set of criteria may be employed to determine whether a person is unfit to stand trial, as distinct from those required to determine whether he/she was suffering from a mental disorder at the time of the offence.

Unfortunately, section 672.11 is silent as to what would be the limit on numbers of assessments. Cases dealing with subsection 537(1) of the *Criminal Code* disagree as to whether more than one remand for observation could be made respecting the same offence and the same accused. For example, in *R v Mitchell*, the Ontario High Court held that successive remands for observation were not permitted.[72] However, in *R v*

[72] *R v Mitchell* (1980), 51 CCC (2d) 572 at para 7 (Ont HC) (hereinafter *Mitchell*).

Greenland[73] the same court (a different judge) held that subsection 537(1) did allow for more than one remand for observation unless the issue was *res judicata*.[74] The court determined that since the section was not restrictive, the court had discretion to order more than one remand for observation. In *Mitchell*, the court determined that section 537 only contemplated a remand to determine fitness to stand trial, and not to determine other issues regarding mental condition.[75] On the other hand, the court in Greenland interpreted the same section as applying to "mental illness" generally, and therefore held that issues beyond fitness could be examined during various remands for observation.[76]

In *R v Lenart*, the Crown successfully applied for a psychiatric assessment of Lenart, the accused, pursuant to section 22 of the *Mental Health Act*.[77] The trial judge ordered that Lenart undergo a 30-day inpatient assessment without his consent, for the purpose of obtaining a report to aid in sentencing. Lenart was then sentenced to 18 months imprisonment on the arson count and six consecutive months on the dangerous driving count. The accused argued that sections 21 and 22 of the Act were *ultra vires* the province because they infringed on federal jurisdiction to legislate criminal procedure.[78] However, the appeal was dismissed by the Ontario Court of Appeal, which held that the trial judge properly assessed the evidence and placed the proper evidentiary value on Lenart's failure to testify. The court concluded that the sentences were fit.

The court deemed the sections of the *Mental Health Act* in question to be *intra vires* the provincial legislature.[79] The provisions were in pith and substance provincial legislation. There was no conflicting federal legislation. It was not appropriate to apply the reading down doctrine in the absence of legislative conflict. The provincial legislation did not prohibit any action but was expansive of federal law-making authority

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[73] *R v Greenland* (1986), 53 CR (3d) 381 at para 11, 29 CCC (3d) 413 (Ont HC) (hereinafter *Greenland*).
[74] "Res judicata" refers to a matter which has been finally adjudged by the court.
[75] *Mitchell*, at para 8.
[76] *Greenland*, at para 8.
[77] *R v Lenart,* [1998] OJ No 1105, 123 CCC (3d) 353 (hereinafter *Lenart*). See *Mental Health Act*, RSO 1990, c M 7.
[78] *Lenart,* at para 22. "Ultra Vires" means beyond the powers or jurisdiction of.
[79] *Lenart*, at para 52. "Intra Vires" means within the powers or jurisdiction of.

by permitting the court to be furnished with additional information to assist in the determination of sentence.[80]

In light of the Lenart decision and the wording of section 672.11 of the *Criminal Code*, it is likely that more than one assessment order is permitted because five different situations requiring assessments are contemplated. It is not clear, however, whether more than one assessment order may be made for the same circumstance. In *Demers*, the Supreme Court held that courts and Review Boards can order psychiatric evaluations if no current evaluations are available to them, but did not elaborate as to how many assessments are allowed.[81] There have been instances where more than one assessment order has been made. For example, in *R v G. (M.),* the court ordered an assessment upon a motion brought by the accused's counsel. Based on the assessment report, the accused was found FST and a trial date was set. On the trial date, though, counsel for the accused told the court that she had been unable to communicate with her client and presented a letter from a therapist that questioned whether the accused could understand the judicial process and communicate with his counsel.[82] Another assessment order was granted based on the notion that the issue of fitness is fundamental to a fair trial and that it had to be addressed regardless of when it arose.[83] In light of the changing nature of some mental conditions, a good argument may be made for successive assessment orders to determine the same aspect of the accused's mental condition.

(c) Grounds for Making an Assessment Order

An assessment order may be made if there are reasonable grounds to believe that evidence of the accused's mental condition is necessary to determine:

> (a) whether the accused is unfit to stand trial:
>
> (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection

[80] *Lenart,* at para 50.
[81] *Demers*, at para 60.
[82] *R v G.(M.)*, [1994] NSJ No 682 at para 16, 135 NSR (2d) 209 (hereinafter *G. (M.)*.
[83] *G.(M.)*, at para 29.

> 16(1);
>
> (c) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
>
> (d) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused;
>
> (d.1) whether a finding that the accused is a high-risk accused should be revoked under subsection 672.84(3); or
>
> (e) whether an order should be made under subsection s. 672.851 for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused. [84]

Purpose

The purpose of ordering an assessment is spelled out in the *Criminal Code*: evidence (obtained through the assessment procedure) must be necessary in order to determine those issues listed in subsections 672.11 (a) to (e). The Crown or an accused may have difficulty obtaining an assessment order to determine an issue not enumerated in section 672.11, although it is not impossible. In *R v Snow*, the accused pleaded guilty to charges of aggravated assault and unlawful confinement, and asked the trial judge to order a pre-sentence psychiatric assessment. The trial judge held that she had no jurisdiction under section 672.11 to make such an order. [85]

The accused applied to the General Division for an order of mandamus, directing the trial judge to exercise her jurisdiction to order a psychiatric assessment. Alternatively, he asked the court to direct a psychiatric assessment under subsection 24(1) of the *Charter* on the grounds that the failure of the trial judge to order a psychiatric assessment deprived the accused of the right to make a full answer and defence (a right guaranteed by *Charter* sections 7 and subsection 11(d)).

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[84] *Criminal Code*, s 672.11.
[85] *R v Snow,* [1992] OJ No 1792 at para 4, 10 OR (3d) 109 (Ont Gen Div) (hereinafter *Snow*).

The General Division dismissed the application. The court held that the limited purposes for which assessment orders may be made under section 672.11 are exhaustively set out in the section, and that subsection 672.11(e) does not authorize a trial judge to make an assessment order to assist in the general sentencing process.[86] Further, the *Charter* application should have been made before the trial judge and should have been based on a finding that a psychiatric assessment was essential for full answer and defence so as to achieve a fair trial for the accused.[87] This is important because an accused found UST has no prospect of being treated in order to be released from the criminal justice system. Persons who have been judged UST for reasons other than mental disorder have had charges stayed.[88] The court noted that the accused could have retained the services of a psychiatric expert and used her evidence on the issue of sentencing. Further, the accused could have applied for an order for a psychiatric assessment for sentencing purposes under section 22 of the Ontario *Mental Health Act*.[89]

This decision was re-evaluated in the case of *R v Gray*.[90] This case involved an application by the accused, Nathan Gray, for a remedy for a breach of a *Charter* right. Gray pleaded guilty to breach of probation, failure to appear in court and trafficking cocaine. He had failed to attend numerous appointments with his probation officer and had also failed to appear before a Justice of the Peace to set a date for his appearance. Further, Gray was charged with selling crack cocaine to an undercover police officer.

At the sentencing hearing, the judge expressed his concern that Gray may be suffering from Fetal Alcohol Syndrome (FAS) or alcohol related neuro-developmental disorders (ARND) and, as a result, adjourned sentencing to allow Gray to provide evidence that would substantiate these claims, which would aid him in his defence.[91] The defence was unable to obtain a government-funded assessment for Gray, which led

[86] *Snow*,at para 24.
[87] *Snow*, at para 32.
[88] See e.g. *R v Roy*, [1994] NSJ No 82, 31 CR (4th) 388 (NS PC) (hereinafter *Roy*); *Demers*.
[89] *Snow,* at para 24. See generally *Mental Health Act,* RSO 1990, c M.7 (note that the Alberta *Mental Health Act*, RSA 2000, c M-13 does not have a similar section).
[90] *R v Gray,* 2002 BCPC 58, [2002] BCWLD 482 (hereinafter *Gray PC*).
[91] *Gray PC*, at para 219.

Gray's counsel to put forth an argument under section 15 of the *Charter* that the provincial government failed to accommodate his disability by providing funding to cover the costs of a psychiatric assessment.[92]

The British Columbia Provincial Court allowed Gray's application and made assessment order.[93] The case went to the British Columbia Supreme Court, where the court held that a judge has jurisdiction under section 672.13(1) of the *Criminal Code* to order an assessment for a developmental disorder, such as Fetal Alcohol Syndrome, but that the court does not have jurisdiction to direct that the assessment be undertaken at a specific facility, nor to order that the examination be paid for by the Crown.[94] This case suggests that assessments may be ordered by the courts to determine an issue that is not enumerated in section 672.11 if the court has reason to believe that the rights of the accused may be infringed if an assessment is not ordered.

"Reasonable Grounds to Believe"

Section 672.11 does not specify what is necessary to establish a reasonably grounded belief. The previous legislation required that the judge receive evidence from a medical practitioner suggesting the accused was mentally ill or mentally handicapped before an order for observation could be made. However, the amended legislation does not specifically require any particular form of evidence or testimony in order to ground a reasonable belief under section 672.11. Presumably, the evidence of a qualified medical practitioner would continue to be valuable in supporting the court's reasonable belief that assessment evidence is necessary.[95] The opinion of a medical practitioner may be used under paragraph 672.16(1)(a) to help the court decide whether or not custody is desirable to assess the accused and to determine whether the accused has consented to custody.[96]

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[92] *Gray PC*, at para 17.
[93] *Gray PC*, at para 221, 223.
[94] *R v Gray*, 2002 BCSC 1192 (hereinafter *Gray SC)*, at paras 49, 64.
[95] See *R v Sweeney* (1975), 28 CCC (2d) 70 at para 13 (Ont Prov Ct) (held the type of support required from a medical practitioner under the old provisions was support which would "back up, bear out, and substantiate" the opinion of the judge).
[96] *Criminal Code,* s 672.16(1)(a).

(d) Duration of Assessment Order

As a general rule, subsection 672.14(1) of the *Criminal Code* states that the duration of assessment orders is not to exceed 30 days. When an assessment order is made to determine whether the accused is unfit to stand trial, the order must not exceed five days (excluding travel time and holidays). However, subsection 672.14(2) states that if the accused and the prosecutor agree, the order may be extended for up to 30 days.[97]

Where compelling circumstances exist that warrant it, a court may make an assessment order that remains in force for sixty days (subsection 672.14(3)). The section is silent as to what might constitute "compelling circumstances." However, in *Gray* the court considered that compelling circumstances existed when there were no readily available medical specialists qualified to conduct an assessment for a developmental disorder such as FAS or ARND on an adult pursuant to a court order.[98] Unfortunately, the wording of the section does not make it clear whether the court may make an order for less than sixty days. Unlike subsection 672.14(2), which uses the words "not exceeding thirty days", subsection 672.14(3) merely uses the words "remains in force for sixty days".

In *R v Gow*, the Alberta Court of Queen's Bench considered whether they had discretion to grant an extension beyond the 60-day period under section 752.1.[99] It was held that in section 752.1(1) the word "shall" is mandatory, rather than directory, and that "the effect of non-compliance with the assessment period results in a nullity of the proceedings regarding the prosecutor's request for long-term offender designation". [100]

Section 672.15 provides for extensions necessary to complete assessment orders. The court may order an extension during the period that the order is in force or after the period of the order (subsection 672.15(1)). An extension may cover any further period needed to complete the assessment, provided that the extension does not exceed thirty days and the combined period of initial order plus all extensions granted

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[97] See also *R v Bondar,* 2010 ABQB 305, [2010 AJ No 1592.
[98] *Gray PC,* at para 221.
[99] *R v Gow,* 2010 ABQB 564, [2011] AWLD 39 (hereinafter *Gow*).
[100] *Gow,* at para 89.

does not exceed 60 days (subsection 672.15(2)).

(e) Content of Assessment Orders

Section 672.13(1) states what an assessment order must specify. The order must specify (a) the hospital, person or service that is to perform the assessment; (b) whether the accused is to be detained in custody while the order is in force; and (c) the period that the order is to remain in force (including the time for the assessment and the time for travel).

The assessment order may be in Form 48.[101]

An assessment order may require that the person who makes the assessment submit to the court a written assessment report on the mental condition of the accused.[102] The assessment order cannot direct that psychiatric or other treatment be carried out on the accused, nor can it direct the accused to submit to this treatment.[103]

(f) Assessment Reports

Section 672.2 deals with what is to be done with a written assessment report that has been ordered by the court. If an assessment order includes a term that requires the person who makes the assessment to make a written report, the report must be filed with the ordering court within a time period fixed by the court.[104] The Review Board must be sent a copy of the report without delay so as to assist in their determination of a proper disposition for the accused.[105]

Under subsection 672.2(4), the prosecutor, the accused and his/her counsel are entitled to copies of the assessment report. However, some of the information may be withheld from the accused under certain circumstances. Subsection 672.51(3) authorizes the court to withhold disclosure to the accused of any information likely to endanger the life or safety of another person, or that would seriously impair the accused's treatment or recovery.

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[101] See the Appendix to this chapter.
[102] *Criminal Code,* s 672.2(1).
[103] *Crimiinal Code,* s 672.19 (note that a Review Board may make a treatment disposition once the accused has been found unfit, subject to the limitations imposed by ss. 672.61 and 672.62).
[104] *Criminal Code,* s 672.2(2).
[105] *Criminal Code,* s 672.2(3).

(g) Assessment Orders and Bail

An assessment order takes precedence over a bail hearing. During the period that an assessment order is in force, no order for interim release or detention of the accused may be made under Part XVI of the *Criminal Code* or under s 679 (release pending appeal in respect of an indictable offence).[106] Section 672.17 does not address the priority in cases of release pending summary conviction appeal.

2. Presumption against Custody

Although most courts continue to follow the former practice of remanding accused into custody for observation, the *Criminal Code* contains section 672.16, which presumes that most accused must not be detained in custody for their assessments.[107] However, the presumption against custody is rebuttable:

> (1) if the court is satisfied that custody is necessary for the accused's assessment;
>
> (2) where the court is satisfied on the evidence of a medical practitioner, in a consensual written report, that custody is desirable for assessment and the accused consents to custody; [108]
>
> (3) where custody of the accused is required in respect of any other matter or otherwise under the Criminal Code;
>
> (4) where the Crown shows that detention is justified under Criminal Code subsection 515(10). Subsection 515(10) contains the primary and secondary grounds for justifying why an accused should not be granted a judicial interim release (bail). An example of such a ground would be to ensure the accused's attendance in court; or
>
> (5) if the accused is charged with an offence described in any of paragraphs 515(6)(a) - (d) or subsection 522(2), unless he shows that custody is not justified. The offences listed in ss. 515(6) include indictable offences (other than section 469) committed while at large, indictable offences (other than section 469) committed by a person not ordinarily resident in Canada, being unlawfully at large

[106] *Criminal Code*, s 672.17.
[107] Dr. Tweddle, Alberta Hospital Edmonton, Criminal Trial Lawyers Association, Three Short Snappers and the Post-Sentence Process, November 21, 1992, Edmonton, Alberta. See also: *R v Maher* (March 3, 1992) Toronto [Quicklaw OJ 782] (Ont Prov Div).
[108] See also *Criminal Code*, s 672.16(2) (where the prosecution and the accused agree, the evidence of the doctor may be provided through a written report).

> without excuse and so on. Thus, in circumstances where the Criminal Code places an onus on the accused to show why they should be released, that onus continues in relation to assessment orders.

B. Protected Statements[109]

An accused who is undergoing a psychiatric assessment will often make statements or provide information to the examining medical expert. There may be major risks to the accused in providing information to the psychiatrist under these circumstances. Under the former *Criminal Code* regime, the danger was that the information could later be used in evidence against the accused. Statements made to a psychiatrist during a court ordered assessment were not previously considered to be protected by privilege and were only protected if they could be brought under the umbrella of solicitor-client privilege.[110] Other arguments that have been raised to prevent these statements from being introduced in evidence include that they were made to persons in authority and therefore were subject to the common law rules on voluntariness, or that they were not the product of an operating mind.[111] With respect to statements made during court ordered assessments or during treatment directed by a disposition are concerned, these arguments are of historical interest only.

A protected statement is defined in subsection 672.21(1) as a statement made by the accused during the course and for the purpose of treatment as ordered.[112] The statement must be made to the person specified in the assessment order or disposition or another person acting under that person's direction. Statements made otherwise are not protected and are subject to the common law rules on admissibility.[113]

The general rule provided in subsection 672.21(2) states that the protected

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[109] See discussions by Hersh Wolch, Dr. Cdasky and Brian Beresh in Alberta Trial Lawyers Association Seminar, (May 23, 1998), Edmonton, Alberta.

[110] This may still be the case for statements made during psychiatric examinations that are not ordered by the court (but requested by the Crown) or those statements made to a psychiatrist prior to being retained by the defence. See the discussion under Chapter Four: Confessions and Statements.

[111] See Chapter Four: Confessions and Statements.

[112] *Criminal Code*, s 672.21(1). See also *R c G.(B.)*, [1999] 2 SCR 475, 135 CCC (3d) 303; *R v Genereux* (2000), 154 CCC (3d) 362, 140 OAC 165 (Ont CA) (protected statements are admissible in court for sole purpose of assessing fitness and/or criminal responsibility, unless they fall under exception listed in s 672.21(3), or unless accused consents).

[113] See Chapter Four: Confessions and Statements.

statement or references to it are inadmissible without the accused's consent in any proceeding where the production of evidence may be compelled. This rule does not appear to bar derivative evidence (evidence obtained indirectly through illegally obtained or otherwise inadmissible evidence).[114] The Crown may be able to derive other evidence after reading the assessment report that it has received.

While the general rule provides that the protected statement of an accused cannot be considered for its truth, it appears that in the context of a bail hearing it does not prevent the assessing doctor from giving his/her opinion on the accused's mental state. Further, the accused's statements may be introduced during a bail hearing to establish the basis of the assessing doctor's opinion of whether or not the accused should be granted judicial interim release.[115]

There are several situations that will be considered exceptions to the general rule. Evidence of a protected statement is admissible when:

> (a) determining whether the accused is unfit to stand trial;
>
> (b) making a disposition or placement decision respecting the accused;
>
> (c) determining, under section 672.84, whether to refer to the court for review a finding that an accused is a high-risk accused or whether to revoke such a finding;
>
> (d) determining whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out the death of her newly-born child;
>
> (e) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;

[114] D. Watt and M.K. Feurst, eds, Tremeear's Criminal Code (Toronto: Carswell, 1999) at 936 (hereinafter Watt and Feurst).
[115] *R v Ducharme*, 2008 NSPC 75 at 13, 277 NSR (2d) 387.

> (f) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
>
> (g) establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding.[116]

Consequently, there are several circumstances where evidence obtained during a court ordered assessment will be considered admissible. In *R v B(G)*, the Quebec Court of Appeal ruled that an admission to a psychiatrist may be used to cross-examine the accused on the issue of credibility, provided that the statement would be otherwise admissible.[117] The Crown appealed the decision. The Supreme Court of Canada upheld the Court of Appeal decision and ruled that a confession found to be inadmissible could not be introduced indirectly.[118] B.G.'s admission to the psychiatrist resulted directly from the confrontation of the accused with his inadmissible statement to the police. A purposive approach to the section required that it be interpreted to not permit admissibility of tainted statements.

There are several issues that may arise in the context of providing statements during court ordered and other assessments and the use that may be made of these statements at trial. They are discussed at length in Chapter Four, Confessions and Statements.

IV. Fitness to Stand Trial

Unfitness to stand trial is not a defence, but rather a plea related to the accused's condition and how it affects his or her ability to engage in criminal trial proceedings. The reasons for why an accused must be fit to stand trial are numerous. First, the requirement of fitness recognizes the basic rights of an accused to be present during his or her trial and to have the benefit of a full defence. These rights are set out in the *Criminal Code* as follows:

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[116] *Criminal Code*, s 672.21(3).
[117] *R c G. (B.)* (1997), 10 CR (5th) 235 (Que CA).
[118] *R c G. (B.)*,[1999] 2 SCR 475.

650. (1) Subject to subsection (1.1) to (2) and section 650.01, an accused other than an organization shall be present in court during the whole of his or her trial.

(1.1) Where the court so orders, and where the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken.

(1.2) Where the court so orders, an accused who is confined in prison may appear by closed-circuit in prison television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken, if the accused is given the opportunity to communicate privately with counsel, in a case in which the accused is represented by counsel.

(2) The court may

(a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;

(b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or

(c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.

(3) As accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

The general right of an accused to be present during his trial requires more than

his physical presence with the support of his lawyer. As stated in *R v Roberts*:

> It is a prerequisite that the accused be capable of conducting his defence. Subject only to disruptive conduct on his part, he must be physically, intellectually, linguistically and communicatively present and able to partake to the best of his natural ability in his full answer and defence to the charge against him.[119]

Therefore, to proceed to trial with an accused who is unfit to stand trial would be tantamount to trying a person who is not present. If the accused is not aware of the circumstances during trial, he/she cannot understand their significance, tender evidence or instruct counsel.[120]

Clearly, in Canada, an accused must be mentally fit to be tried.[121] This right is rooted in both the right to be present at one's trial and the right of an accused to make full answer and defence.[122] Other reasons for the fitness requirements include:

- the desire to preserve the integrity of our judicial system by having the appearance that justice has been done;

- ensuring that:
  - the accused understands why she/he is being punished;
  - there is accuracy in the determination of guilt;[123]
  - the accused can participate in the proceedings or assist counsel in his/her defence; and
  - the accused can participate in the proceedings in a meaningful way.[124]

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[119] *R v Roberts,* [1975] 3 WWR 742 at para 12, 24 CCC (2d) 539 (BC CA) (hereinafter *Roberts*). See also *R v Lee Kun*, [1916] 1 KB 337 (Crim App); *R v Woltucky* (1952), 15 CR 24, 103 CCC 43 (Sask CA) (hereinafter *Woltucky*); *R v Wolfson*, [1965] 3 CCC 304, 46 CR 8 (Alta CA) (hereinafter *Wolfson*); *R v Budic* (1977), 35 CCC (2d) 272, 3 AR 141 (ABCA) (hereinafter *Budic*); *R v McIlvride* (1986), 29 CCC (3d) 348 (BC CA) (hereinafter *McIlvride*); R *v W.(D.)*, [1991] SCJ No 26, [1991] 1 SCR 742.
[120] S. Yake, "Fitness to Stand Trial", unpublished paper, December 1, 1980 at 2 (hereafter *Yake*).
[121] *R v Steele,* [1991] JQ No 240, 4 CR (4th) 53, at para 61 (CA Que) (hereinafter *Steele*).
[122] *Steele.*
[123] *Yake,* at 3. See also: Law Reform Commission of Canada, The Criminal Process and Mental Disorder (Working Paper 14) (Ottawa: Law Reform Commission of Canada, 1975), at 32 - 33. For a discussion of the history of fitness to stand trial, from pre-Norman times to the present, see: A. Manson, "Fit to Be Tried: Unravelling the Knots" (1982) 7 *Queen's Law J* 305 at 307 - 321.
[124] *Taylor,* at para 50. See also *R v MacPherson,* [1998] NSJ No 241, 168 NSR (2d) 323 [*MacPherson*].

A. Presumption of Fitness

Section 672.22 states:

> An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

Thus, persons who appear before court on criminal charges are presumed to be fit to stand trial. This presumption may be rebutted by evidence that satisfies the court on a balance of probabilities that the accused is unfit to stand trial. This would seem to be consistent with the existing case law on the issue.[125]

B. "Unfit To Stand Trial"

1. General

What does it mean to be "unfit to stand trial"? Section 2 of the *Criminal Code* defines this term:

> 2. 'unfit to stand trial' means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings,
>
> (b) understand the possible consequences of the proceedings, or
>
> (c) communicate with counsel.

The definition of "unfit to stand trial" was absent from the Criminal Code until it was amended in 1993.[126] Consequently, there has been a fair amount of case law that

[125] See e.g , *R v Gibbons,* [1946] OR 464, 86 CCC 20 (Ont CA) (hereinafter *Gibbons*).

[126] For discussions of the previous regime regarding unfitness see: Simon Verdun-Jones, "The Doctrine of Fitness to Stand Trial in Canada" (1981) *4 International J of Law and Psychiatry* 363; P. S. Lindsay, "Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada" (1977) *19 Crim Law Q 303*; R. Roesch, "A Critical Note" (1978) *20 Can J Criminology 450*; A. Manson, "Fit to be Tried: Unravelling the Knots" (1982) *7 Queen's L J 305*; E.F. Ryan, "Insanity at the Time of Trial Under the Criminal Code of Canada" (1967) *3 UBC Law Rev 36*; Dr. A. McDonald, "Fitness to Stand Trial: A Legal and Ethical Dilemma" (1988*) 8 Health Law in Canada 71*; G. Lang, "The Folly of Fitness" (1990) *48 The Advocate 221*; Richard V. Ericson, "Working Paper 14: The Criminal Process and Mental Disorder" (1976) *8 Ottawa Law Rev 365*; G. Robertson, Mental Disability

discusses the elements necessary to find an accused unfit to stand trial.

In order to be found unfit to stand trial, the accused must have a mental disorder that renders him or her unable to conduct a defence or to instruct counsel to do so. The definition also lists particular ways in which, on account of mental disorder, a person may be unable to conduct a defence. These include: being unable to understand the nature or object of the proceedings; being unable to understand the possible consequences of the proceedings; or being unable to communicate with counsel.

The various elements of the *Criminal Code* definition of unfit to stand trial are discussed below.

2. "On Account of Mental Disorder"

In order to be found "unfit to stand trial", a person must be unable to perform various functions on account of mental disorder. "Mental disorder" is defined in section 2 as:

> 'Mental disorder' means a disease of the mind.

Chapter Six, The Exemption for Mental Disorder, discusses the meaning of "disease of the mind". Although it is likely that this phrase applies to mental illness, it is not clear from the *Criminal Code* whether it applies to other forms of mental disability such as mental handicap or brain injury. These disabilities could render a person unable to communicate with counsel, unable to understand the nature or object of the proceedings or the possible consequences of the proceedings. This issue is discussed further below.

3. "Unable to Conduct a Defence on Account of Mental Disorder"

In a case decided before the 1993 amendments took effect, the Quebec Court of Appeal enumerated five circumstances where an accused would be incapable of conducting a defence. These circumstances include if he or she:

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and the Law in Canada (Calgary: Carswell, 1987); M. E. Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978); H. Savage and C. McKague, *Mental Health Law in Canada* (Toronto: Butterworths, 1987).

> (a) cannot distinguish between available pleas;
>
> (b) does not understand the nature or purpose of the proceedings, including the respective roles of the judge, jury and counsel;
>
> (c) does not understand the personal import of the proceedings;
>
> (d) is unable to communicate with counsel, converse with counsel rationally or make critical decisions on counsel's advice; or
>
> (e) is unable to take the stand if necessary. [127]

In *R v Gorecki,* the Ontario Court of Appeal listed some of the factors that they considered when deciding that the accused was capable of conducting his own defence. [128] These factors included he:

(1) understood the nature of the charge against him;

(2) understood that he had been arrested;

(3) was able to give an account of the events to counsel;

(4) understood the purpose of the preliminary inquiry;

(5) understood the consequences of his choice of plea;

(6) could communicate with counsel, converse with them rationally and make decisions on their advice;

(7) was aware of the purpose of the trial and the proceedings and could distinguish the pleas open to him;

(8) was aware of the respective roles of the Judge, jury and counsel;

(9) could comprehend the details of the evidence;

(10) took a lively interest in the proceedings and

(11) was able to give evidence in a coherent fashion.[129]

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[127] *Steele*, at para 5. See also *R v Scardino* (1991), 6 CR (4th) 146, 13 WCB (2d) 334 (Ont CA).
[128] *R v Gorecki,* [1976] OJ No 2307, 32 CCC (2d) 129 (Ont CA) (hereinafter *Gorecki*). See also *Taylor,*
[129] *Gorecki,* at paras 23-24. See also *R v Trecroce*, [1980] OJ No 1352, 55 CCC (2d) 202 (Ont CA) (hereinafter *Trecroce*); *R v Mailloux*, [1988] 2 SCR 1029, 45 CCC (3d) 193.

Thus, it appears that the court looks at a variety of factors when determining whether an accused is unable to conduct a defence on account of mental disorder. The definitions of "unfit to stand trial" and "not criminally responsible" in ss 16 and 2 refer to "mental disorder". "Mental disorder" is defined in s 2 of the *Criminal Code* as meaning a "disease of the mind" Although both concepts refer to the disorder in the same way, they differ in the time of reference. Section 16 relates to the effect that the mental disorder had on the accused's mind at the time the offence was committed, while the s 2 definition of unfit to stand trial relates to the effect of the disorder on the ability of the accused to conduct a defense to the charges.

4. Unable on Account of Mental Disorder to "Understand the Nature or Object of the Proceedings"

When assessing whether an accused is unable to understand the nature or object of the proceedings, the court may look at several factors. Does the accused understand that she/he is facing a criminal trial? Does she/he understand the purposes of a trial? Can she/he distinguish the pleas that are open to her/him? Does he/she understand the nature of the offence charged? Does he/she understand that he/she is the person who has been charged? Does he/she understand the general court procedures and the evidence presented?[130]

The level of understanding required of the nature or object of the proceedings is that of an ordinary person. The accused need not have a sophisticated level of understanding of the proceedings.[131]

In *Woltucky*, the accused was charged with murder.[132] On first appearance, he was found unfit to stand trial and was committed to a mental hospital (under the former fitness provisions). The accused suffered from the delusion that he was being persecuted by the police and that they had a machine that could read his thoughts. A

[130] *R v Kieling* (1982), 8 WCB 76 (Ont CA) (upheld the listed factors as being relevant).
[131] *R v Walsh*, [1990] NSJ No 36, 95 NSR (2d) 126 (NS CC) (hereinafter *Walsh*) (citing with approval J. Atrens, P. Burns, & J. Taylor, eds., *Criminal Procedure, Canadian Law and Practice* (Toronto: Butterworth,1981) at 12-14).
[132] *Woltucky*.

year later, the accused appeared again at trial to face the murder charges. He was examined before the second trial by a doctor who concluded that while the accused continued to have delusions that the R.C.M.P. had a machine that could read his thoughts, he was able to understand the proceedings and to instruct counsel. This doctor testified for the Crown, but the defence did not lead evidence on the fitness issue. The accused was found fit to stand trial.

The Saskatchewan Court of Appeal ordered a new trial, holding that it is of vital importance that an accused be fit to stand trial and if there are grounds for doubting his sanity, the matter must be settled by a thorough inquiry. Since there had not been such an inquiry, there was a possibility that the accused was unfit for trial and therefore would not have had a fair trial.[133]

5. Unable on Account of Mental Disorder to "Understand the Possible Consequences of the Proceedings"

When assessing whether the accused understands the possible consequences of the proceedings, the court will examine such factors as whether the accused knows what the consequences of conviction might be, and whether the accused understands that the consequences might involve imprisonment.[134]

6. Unable on Account of Mental Disorder to "Communicate with Counsel"

There are a number of decisions where the court discusses which factors are necessary in order to be able to effectively communicate with counsel. The issue with which most cases struggle is whether a person may be considered unfit to stand trial because she/he disagrees with counsel as to the course of action to take in her/his defence. Generally, a person will not be considered unfit to stand trial merely because she/he disagrees with counsel as to defence strategies.

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[133] *Woltucky,* at para 14. See also *Gibbons*; *Walsh*.

[134] J. Atrens, P. Burns, J. Taylor, eds., *Criminal Procedure, Canadian Law and Practice* (Vancouver: Butterworth, 1981) ch 15, at 12-14. See also *R v Whittle*, [1994] 2 SCR 914, [1994] SCJ No 69 (SCC) (hereinafter *Whittle*) (the "operating mind" test requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence (regarding their statements) may be used in proceedings against the accused – note also, in exercising one's right to counsel or waiving the right, the accused must have the limited cognitive capacity required for fitness to stand trial).

One leading case in this area is *Trecroce*.[135] The accused was charged with murder after the death of his wife. The accused was convicted of murder at trial and appealed. The issue of the accused's unfitness was raised on the appeal and the Court of Appeal ordered that the accused be remanded for observation. The accused had been remanded for observation at his original trial and the psychiatrist was of the opinion that he was fit to stand trial but that he had a possible insanity defence. Counsel for the accused brought this and other psychiatric reports to the attention of the Court of Appeal. The Court of Appeal determined that it would like to hear oral testimony of the experts.

When the court reconvened, the accused's lawyer informed the Court of Appeal that he had been discharged, but would be prepared to remain to assist the court. Then, a question arose as to whether the accused was competent to discharge counsel and to appoint other counsel. The two psychiatrists who were present in court to testify on the "insanity" defence were asked to make an assessment on the accused's fitness to instruct counsel. They concluded that the accused understood the nature of the proceedings and the functions of the persons involved in them. Further, he knew what the issues were and the possible outcome of the proceedings. He was able to follow the evidence generally, although he might misinterpret it. They concluded that the appellant was capable of instructing counsel although he might disagree with counsel as to the conduct of the case and might not act with good judgment. The accused did not want to be seen as mentally ill and opposed the idea of raising the insanity defence.[136]

The Ontario Court of Appeal permitted the accused to retain another lawyer, but the accused also discharged the second lawyer. This second lawyer was prepared to resist a finding that the accused was mentally ill, but he was not able to follow the appellant's instructions on other issues. The accused ended up representing himself on the appeal.

In *Gorecki (No 1)*, the accused was convicted of the murder of his wife, and his

[135] *Trecroce*.
[136] *Trecoce,* at para 41. See also *Walsh*.

appeal to the Court of Appeal of Ontario was dismissed.[137] An application for leave to appeal to the Supreme Court of Canada was also dismissed. However, the Minister of Justice directed a Reference to the Court of Appeal on the issue of the accused's fitness to stand trial.[138] The accused had been examined before trial by psychiatrists who determined that while he was fit to stand trial, he might have an insanity defence. The accused refused to raise the insanity defence. The psychiatrists who examined the accused before trial and before the Reference concluded that the accused was intelligent and able to understand the nature of a trial, but either through lack of insight into his personality or arrogance would not accept a defence based on mental disorder. The Ontario Court of Appeal concluded that the accused was not incapable of conducting his defence nor was he unfit to stand trial.

The Court discussed the proper test to determine whether an accused is unfit to stand trial. The Court adopted the view in *Roberts* that the test of whether an accused is fit to stand trial is not whether he is able to act in his own best interests. Several factors were considered by the Court when reaching its conclusion that Mr. Gorecki was not unfit. The accused understood the nature of the charge against him, was able to follow the proceedings, assist his counsel in choosing a jury and witnesses and able to comprehend and recall the evidence. The accused was aware of the defences open to him but refused to allow counsel to advance the insanity defence because he understood the consequences of a finding of insanity.

In *Taylor*, the Ontario Court of Appeal dealt with the issue of what "unable to communicate with counsel" encompasses.[139] After a series of events, the accused was awarded a new trial on assault and other charges. At the second trial, Crown raised the issue of unfitness to stand trial and the court appointed counsel for the fitness hearing. The court ordered a 30-day psychiatric assessment of the accused's mental condition. At the resumption of the fitness hearing, the accused repudiated counsel and was arraigned without pleading. The hearing proceeded after the accused was given a copy

[137] *Gorecki*.
[138] This procedure is called a Reference, and is not undertaken often. Please refer to the discussion in Chapter Ten: Jury Trials and Appeals.
[139] *Taylor*.

of the psychiatric report generated by the assessment.

Two psychiatrists testified on the fitness issue. The first opined that the accused would be unable to properly instruct counsel because he suffered from delusions that included that the court and the witnesses had routinely conspired against him. The psychiatrist was concerned that the accused would misconstrue the evidence given by witnesses at the trial and that he would not be able to instruct counsel in a manner that would be in his best interests. The second psychiatrist agreed. He opined that the accused believed that he was the victim of a conspiracy and would be uncooperative with a lawyer assigned to represent him. In cross-examination, both psychiatrists conceded that the accused was "technically fit". That is, he was "cognizantly aware of the charges against him, the officers of the court, the possible pleas available to him, all the technicalities of the court".[140]

The court concluded that Taylor was unfit to stand trial. The court noted the accused's background as a lawyer, his high level of intelligence, and his capability of understanding the proceedings and the functions of the various parties involved in them. However, although the accused could communicate with counsel, the court distinguished *Trecroce* and concluded that Taylor's delusions were so pervasive and irrational that he would be "unable to perceive his own best interests and how those interests should be addressed in the conduct of a trial".[141]

The Ontario *Criminal Code* Review Board held a disposition hearing and heard the evidence of the same psychiatrists. The Review Board also concluded that the accused was unfit to stand trial because the accused "lack[ed] certain abstractions" and was "unable to reason on higher cognitive levels" Because of this problem, the accused would not act in a way that was in his best interests.

The accused appealed these findings. The Ontario Court of Appeal appointed an amicus curiae (friend of the court) to make submissions on behalf of the accused, who was having difficulty. The Ontario Court of Appeal considered the correct test for determining unfitness to stand trial. At issue was whether the accused had the ability to

[140] *Taylor,* at para 18.
[141] *Tayor,* at para 26.

communicate with counsel.

The court adopted a "limited cognitive capacity" test to determine the fitness issue. This test provides that a court's assessment of an accused's ability to conduct a defence and communicate with and instruct counsel is limited to whether the accused can recount to his counsel the necessary facts relating to the offence in such a way that counsel can properly present a defence. Second, the fitness determination is not affected by whether the accused and counsel have an amicable and trusting relationship, whether the accused has been cooperating with counsel, or whether the accused ultimately makes decisions that are in her best interest.[142]

The Ontario Court of Appeal held that the limited cognitive capacity test struck an effective balance between the objectives of the fitness rules and the accused's right to choose his own defence and to have a trial within a reasonable time. The requirement that the accused act in his or her own best interest would require the accused to have a higher "analytic ability" threshold, as well as the ability to make rational decisions that would benefit him or her. The Ontario Court of Appeal held that this establishes too high a threshold for finding the accused fit to stand trial.

The Ontario Court of Appeal held that the lower court had applied the wrong test and ordered a new trial. Following *Taylor*, a determination of fitness is too often limited to three basic questions:

1. Do you know what you are charged with?
2. Do you know what a judge does?
3. Do you understand what the job of the Crown is and what your lawyer is supposed to do?

These questions go to a minimal threshold level of understanding that is at odds with a fair understanding of what it takes to defend oneself adequately in a trial, which may result in the loss of freedom.[143]

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[142] *Taylor,* at para 44. See also *Whittle*; *R v Peepeetch*, 2003 SKCA 76, [2003] SJ No 542 (hereinafter *Peepeetch*); *R v Jobb,* 2008 SKCA 156, [2008] SJ No 764 [*Jobb*]; *R v Eisnor,* 2015 NSCA 64, [2015] NSJ No 257; *R v Michael,* 2015 ONSC 148, [2015] OJ No 130.

[143] See "Submission on Mental Disorder Provisions of the Criminal Code" (National Criminal Justice Section, Canadian Bar Association, April 2002) Online: http://www.cba.org (date accessed: June 2002).

The Canadian Bar Association notes that the, "subjective interpretation of the criteria in the definition also results in an inconsistent application. In *R v MacPherson*,[144] the court found the accused unfit even though he was reasonably aware of the judge, jury and purpose of the preliminary inquiry. However, as the accused was obsessed with the events surrounding the offence and could not discuss them in a relevant manner, the court found that his ability to instruct counsel was inadequate".[145]

Thus, in the view of the Ontario Court of Appeal, the fact that the accused fails to act in what counsel considers is in her/his best interest does not necessarily mean that the client's ability is so impaired that he or she is unfit to stand trial.

What is not entirely clear is if the court should consider whether an accused will be self-representing should they be found fit and proceed to trial. As was previously mentioned above, the court in *Taylor* held that an assessment of an accused's ability to conduct a defence should be limited to whether they could sufficiently communicate the facts relating to the offence to his/her counsel, so that their counsel could then properly present a defence.[146] Where the accused is self-representing, though, the ability to communicate the facts relating to the offence will not necessarily mean that he/she will be able to properly present a defence. In *Peepeetch,* the Saskatchewan Court of Appeal held that an accused is not entitled to a higher standard of fitness when choosing to self-represent. Also, as long as the trial judge determines that the accused knowingly exercised the right to self-represent then he/she is entitled to.[147] By contrast, the Yukon Territorial Court seems to have taken the opposite position by considering the accused's representation when deciding upon fitness. In *R v Hureau,* the court found the accused FST if represented by counsel, but UST if he was not.[148]

Further, in *R v Budic* the Alberta Court of Appeal has concluded that the

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144 *MacPherson*.
145 See "Submissions on Mental Disorder Provisions of the Criminal Code" at 7.
146 *Taylor*.
147 *Peepeetch*, at para 47.
148 *R v Hureau*, 2014 YKTC 36 at para 43, [2014] YJ No 48. See also *R v Adam*, 2013 ONSC 373, [2013] OJ No 222 (accused's self-representation - with the assistance of two *amicus curiae* who were advising him of his rights but were not receiving intsructions - was both ineffective and potentially detrimental to him - was found UST).

existence of delusions on the part of the accused at the time of trial may not necessarily affect her ability to communicate with counsel or to understand the technicalities of the court.[149] The accused was charged with murder, before the trial, the issue of unfitness was raised and the accused was found fit to stand trial. At trial, the insanity defence was raised and psychiatric evidence indicated that the accused was suffering from delusions that the deceased had been conspiring to kill him. The accused testified, providing an intelligible account of the killing. However, this account also indicated the nature and extent of the accused's delusions. The trial judge then invited the accused's lawyer to consider the accused's fitness to stand trial, and concluded that the accused was unfit to stand trial because his delusions were "right at the very heart of the crime." On appeal, the finding of unfitness was quashed and the matter remitted to the trial judge to continue with the trial.

The Alberta Court of Appeal held that the persistence of a delusion at the time of trial is not unusual. Further, the delusion's relationship to the insanity defence does not have a necessary relationship to the fitness of the accused to stand trial. Counsel for the defence felt that he was adequately instructed. The psychiatric evidence clearly distinguished between fitness to stand trial and insanity and the accused's testimony did not suggest that he was unfit to stand trial.

7. Accused Unfit for Reasons other than a "Disease of the Mind"

(a) General

As already noted, the *Criminal Code* definition of "unfit to stand trial" requires that a person is unable to perform various functions on account of mental disorder. "Mental disorder" is defined in section 2 as a "disease of the mind". It is not clear whether this term applies to mental disabilities such as mental handicap or brain injury. Mental disabilities may affect a person's ability to communicate with counsel, or to understand the nature or object of the proceedings or the possible consequences of the proceedings. Mental handicap may affect a person so that he or she is unable to stand trial. As Ellis and Luckasson have observed,

[149] *Budic*. See also *R v Iyoho,* 2009 ABPC 262, [2009] AWLD 3995.

> [a] defendant's receptive and expressive language skills, vocabulary, conceptual ability, and low level of general knowledge may all impair his ability to participate in his defence.[150]

The *Criminal Code* does not make it clear whether individuals with mental disabilities other than mental illness may rely on the provisions regarding fitness to stand trial.[151] However, recent case law suggests that persons with mental disabilities that are the result of diseases, such as FASD, that hinder their intellectual ability will generally be characterised as unfit to stand trial.[152] In some cases, courts have also found accused persons who have a mental handicap resulting in below average intelligence, which impairs their ability to function intellectually and socially, to be unfit to stand trial.[153]

In *R v Whitehead*, the Ontario Provincial Court addressed the issue of whether mental handicap falls within the *Criminal Code* definition of "mental disorder".[154] Whitehead was accused of assault and assault with a weapon and was arrested. Because of his behaviour, he was sent for a psychiatric assessment. The examining physicians indicated that Whitehead was mentally handicapped and unfit to stand trial because he was unable to instruct counsel in any meaningful way. The Ontario Provincial Court relied upon the definition of "disease of the mind" provided in *Cooper v R* and found that mental handicap was indeed a disease of the mind for the purposes of the fitness provisions of the *Criminal Code*.[155] Thus, Whitehead was found unfit to stand trial.

The Ontario Provincial Court expressed concern that since mental handicap is not a reversible condition, Whitehead risked remaining in a mental institution for the

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[150] J. Ellis and R. Luckasson, "Mentally Retarded Criminal Defendants" (1985) *53(3-4) George Washington Law Rev 414*, at 455 - 456 (hereinafter Ellis and Luckasson).
[151] For a general discussion on this issue, see: H. Savage, "The Relevance of the Fitness to Stand Trial Provisions to Persons with Mental Handicap" (1981) *59 Can Bar Review 319*.
[152] See *J. (T.)*.
[153] See *R v R. (M.S.*) (1996), 112 CCC (3d) 406; *R v P.(J.A.)*, [2000] SJ No 260, 192 Sask R 80, (SK PC).
[154] *R v Whitehead,* [1993] OJ No 2348, 20 WCB (2d) 562 (Ont Prov Ct) (hereinafter *Whitehead*).
[155] *R v Cooper,* [1979] SCJ No 139, 110 DLR (3d) 46 (SCC) *(*hereinafter *Cooper*) ("disease of the mind" defined as "any illness, disorder or abnormal condition which impairs the human mind and its functioning").

rest of his life.[156] Further, there were no provincial facilities that addressed his needs. Due to these concerns, the judge invited counsel to appeal his decision.

In the United States, where mentally handicapped persons are able to rely upon the unfitness provisions, some observers have noted that there is a relatively low rate of referral for pre-trial evaluation of defendants with a mental handicap.[157] Bonnie attributes this to a common failure to recognize the existence or seriousness of the disability.[158] Thus, the fairness of the trial will depend upon the ability and the inclination of the lawyer to recognize and compensate for the client's limitations.[159] This is complicated by the tendency of persons with a mental handicap to attempt to hide their disability. Further, Bonnie asserts that the risks of inadequate representation are magnified when the client is mentally handicapped because the client is in no position to monitor the lawyer's performance and because the lawyer (often a court-appointed attorney) will be inclined to spend less time with the client.[160]

One way to alleviate these difficulties is to ensure that any client with obvious mental deficiencies in intellectual capacity is properly evaluated by experts who are specially trained in dealing with mentally handicapped persons.[161]

The former *Criminal Code* procedures dealing with persons found unfit to stand trial (indefinite incarceration in a mental health facility under a Lieutenant Governor's warrant) were usually inappropriate for persons who were mentally handicapped. Under the former regime, a mentally handicapped person found unfit to stand trial could be held indefinitely for a relatively minor offence without having an opportunity to have his case decided on the merits. The purpose of the indefinite custody was to retain the person until he was fit to stand trial. However, unlike a person with a mental

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[156] Originally the new provisions of the *Criminal Code* included capping provisions where there were maximum dispositions. These provisions were never proclaimed in force and were later removed as they were thought to be unnecessary. See Chapter 12: Sentencing.
[157] R. J. Bonnie, "The Competency of Defendants with Mental Retardation to Assist in Their Own Defense" in R. W. Conley, R. Luckasson and G. Bouthilet, eds, The Criminal Justice System and Mental Retardation (Toronto: Paul H Brookes Pub Co, 1992) at 99 (hereinafter Bonnie).
[158] Bonnie.
[159] Bonnie
[160] Bonnie, at 99 - 100.
[161] Bonnie, at 100.

illness that may be controlled or cured through treatment, a person with a mental handicap might never be fit to stand trial.[162] Consequently, the unfitness test and procedures failed to address the situation of a mentally disabled person's inability to stand trial for reasons other than mental illness.

However, if a person is not able to conduct a defence for reasons beyond her/his control, they should have some recourse.

(b) A Stay of Proceedings

People may encounter difficulties that are not the result of a mental disorder when conducting a defence. For example, a communication difficulty that is the result of a brain injury may impede the accused's ability to stand trial. In *R v Hughes*, the accused had suffered a brain injury, was unable to write and could only speak a few words.[163] He was not mentally handicapped and could understand the proceedings. His difficulty was in communicating. The usual method of communicating with the accused was a trial and error method whereby several possible alternatives were presented to him and he indicated his agreement or disagreement with the facts presented through gestures.

The Alberta Supreme Court Trial Division held that although the accused could sufficiently instruct counsel, the accused would be unable to properly testify on his own behalf at trial. By using the trial and error method of questioning, the examiner would be breaching the rule against leading questions. Consequently, the accused may have been unfit to stand trial.

The court, however, did not end its analysis there. The court went on to consider whether a speech and hearing affliction that prevents or restricts communication could be equated with insanity. The provisions of the *Criminal Code* [then section 543] required that the unfitness was “on account of insanity”. The court held that since the accused's unfitness did not arise from insanity but from an inability to communicate, the unfitness provision [section 543] did not apply.

The Court held that at the close of the Crown's case, the court would have to

[162] Ellis and Luckasson assert that some mentally disabled defendants could be habilitated by carefully designed and individualized programs which may make it possible for them to stand trial (see Ellis and Luckasson, at 459).
[163] *R v Hughes* (1978), 43 CCC (2d) 97 (Alta TD) (hereinafter *Hughes*).

consider section 577(3) [now subsection 650(3)], which entitled the accused to make a full answer and defence at that time. If the accused could not testify because of reasons beyond his control, then he could be considered incapable of conducting his defence. The court would have to determine whether the accused could be given a fair trial under the Canadian Bill of Rights.[164] The court indicated that this case may be an appropriate case for the entering of a stay of proceedings.

The inability of the accused to testify will not necessarily result in a finding that they are UST, however. In *R v Morrisey,* the Ontario Court of Appeal stated that testimonial competence was not a part of the definition of fitness to stand trial since the ability to communicate with counsel does not require that an accused could competently testify about the offence.[165] The accused in this case lacked the specific memory of the offence because of a serious brain injury resulting from a bullet wound to the head. He could understand what was being said to him and express himself verbally, though, and as a result the court found that he could have been capable to testify if necessary and that he was FST. In light of this decision, it appears that testimonial incompetence can only work to refute the presumption of fitness if the accused's inability to testify is absolute, meaning that they are physically unable to communicate. If the accused is physically able to testify, even if it is only a nominal ability since they are unable to recall the offence itself, then they are considered capable of conducting their defence.

Faced with an accused who apparently cannot understand the trial proceedings and cannot instruct counsel, but who does not have a mental disorder (as defined in the *Criminal Code*), a court may consider entering a stay of proceedings. The court has the jurisdiction to enter a stay of proceedings under subsection 24(1) of the Charter of Rights. Further, the Supreme Court of Canada has confirmed a trial court's power to stay proceedings to prevent an abuse of process.[166] However, the Supreme Court has held

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[164] *Hughes,* at 119.

[165] *R v Morrisey*, (2007), 227 CCC (3d) 1, 54 CR (6th) (Ont CA), leave to appeal to SCC refused 231 CCC (3d) vi.

[166] See e.g. *R v Jewitt,* [1985] 2 SCR 128, 47 CR (3d) 193 (SCC); *R v Keyowski*, [1988] 1 SCR 657, 40 CCC (3d) 481(SCC) (hereinafter *Keyowski*); *R v Jans* (1990), 59 CCC (3d) 398 (Alta CA); *R v Power*,

that the remedy of a stay should only be applied in the clearest of cases where fundamental principles of justice are involved.[167]

In *R v Shupe*, the remedy of a stay of proceedings was considered.[168] Following a preliminary inquiry, the accused was committed for trial on charges of sexual assault. The accused had severe communication difficulties: he was deaf as well as mute, had poor sign language skills and had a mental age of ten years. The accused's lawyer made an application before trial, asking the chambers judge to stay the proceedings on the basis that the accused had no comprehension of the offence, was incapable of communicating with counsel and would not be able to respond to evidence given at trial. The chambers judge granted the stay of proceedings on the basis that it was contrary to the principles of fundamental justice to try the accused. Cooke J. was of the view that s 7 of the *Charter* (among others) would be infringed if the trial continued, which provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Cooke J. relied upon the decision *R v Reale*, and held that it was illogical to apply the same procedures to deaf and mute individuals against persons with mental handicaps unable to conduct a defence.[169] The court held that it was not striking down any statutory provision. Rather, the court was invalidating the procedure at common law that directs that the procedure for deaf and mute individuals is the same as for mentally handicapped persons. Further, the common law infringement of the section 7 right was not saved by section 1 of the *Charter*. The chambers judge then granted a stay of proceedings.

The decision to stay the proceedings was appealed to the Alberta Court of Appeal. In removing the stay of proceedings, the Court of Appeal stated that the judicial

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[1994] SCJ No 29, 29 CR (4th) 1 (SCC); *R v O'Connor,* [1995] SCJ No 98, 44 CR (4th) 1 (SCC); *R v La*, [1997] 2 SCR 680, [1997] SCJ No 30. See also *Criminal Code,* s 8(3).

[167] See e.g., *Keyowski*.

[168] *R v Schupe,* [1987] AJ No 638, [1987] 5 WWR 656 (AB QB) (hereinafter *Shupe*).

[169] *R v Reale,* [1973] OJ No 2111, 13 CCC (2d) 345 (Ont CA), affirmed [1975] 2 SCR 624.

stay in this case was unwarranted and premature, as the record of the preliminary inquiry, as well as the accused's previous three trials on unrelated matters suggested that the accused was capable of communicating with counsel. Thus, this was not seen as the "clearest of cases" where a judicial stay of proceedings was warranted. In addition, the Court of Appeal held that *Charter* subsection 24(1), which provides a remedy for persons whose Charter rights had been infringed, operated prospectively and the accused could not rely on it as he had not yet suffered any infringement of rights.[170]

The Alberta Court of Appeal did not rule on the applicability of the *Criminal Code* sections on unfitness to stand trial on account of mental disorder to persons who were not mentally disordered because the issue was not raised at trial and was raised only by the Crown on appeal. Thus, the case offers no guidance on the question of whether the unfitness provisions apply to persons who are not mentally ill. However, the Court of Appeal suggested that in appropriate situations, where there is clear evidence of inability to understand proceedings and instruct counsel, a stay of proceedings might be an appropriate remedy in some circumstances. The Court of Appeal noted that after the close of the case for the prosecution, the trial court might be obliged to address the issue of the accused's capacity to make a full answer and defence under subsection 577(3) [now subsection 650(3)]. If the trial judge then concludes that a fair and full defence is not possible under the circumstances, then all bars to conviction would become germane. Thus, the remedy of a stay of proceedings might be available to persons who are unable to stand trial but who do not fit the definition of "mental disorder" for the purposes of the unfitness provisions of the *Criminal Code*.

(c) Principles of Fundamental Justice

It is also possible to argue that the capacity to conduct a defence is a principle of fundamental justice. Consequently, a person who has a mental disability that affects his/her ability to conduct a defence, but who cannot rely upon the unfitness provisions

[170] However, the Supreme Court of Canada has noted that a s. 24(1) remedy is not precluded simply because the anticipated infringement has not yet occurred. See e.g., *Quebec Association of Protestant School Boards et al v Attorney General of Quebec et al (No 2)* (1982), 140 DLR (3d) 33 (Que SC), affirmed 1 DLR (4th) 573 (Que CA), affirmed [1984] 2 SCR 66; *R v Vermette*, [1988] SCJ No 47, 41 CCC (3d) 523 (SCC).

of the *Criminal Code,* may be able to rely upon the right granted in section 7 of the *Charter*.

The Supreme Court of Canada has analyzed what is meant by "fundamental justice" in section 7. In Reference case *Re subsection 94(2) of the Motor Vehicle Act (British Columbia)*, the Supreme Court of Canada held that the "principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as the guardian of the justice system."[171]

In *Ref Re s. 94(2)*, the Supreme Court of Canada held that a mandatory jail term for the absolute liability offence of driving while suspended violated a principle of fundamental justice because the penalty was disproportionate in some cases, especially where the accused had no knowledge that her licence was suspended. McIntrye J. stated that the principles of fundamental justice were offended when imprisonment was made mandatory in an offence for which an accused was not allowed to make a defence.[172] The only difference between the accused in the *Ref Re s. 94(2)* decision and an accused who has a mental disability that affects his or her capacity to conduct a defence is that in the one case, the source of the incapacity would be legal and in the other it would be physical.

The court applied this principle in *R v Roy*, and held that the justice system could not provide the accused with a fair trial in accordance with the principles of fundamental justice due to his disabilities.[173] The accused was charged with multiple counts of sexual touching contrary to section 151 of the *Criminal Code*. He was deaf and, more significantly, had never been taught to communicate, read or write. Both the provincial Board of Review and the medical specialists who had examined him found that he was not unfit for trial in that he was not afflicted by any mental disorder. Roy's defence counsel applied for a stay of proceedings, claiming that the accused could not communicate with his lawyer and, therefore, could not participate in his trial. As a

[171] *Re subsection 94(2) of the Motor Vehicle Act (British Columbia),* [1985] SCJ No 73; 48 CR (3d) 289 (SCC) (hereinafter *Ref Re s 94(2)*).
[172] *Ref Re s 94(2)*.
[173] *Roy*.

result, he could not make full answer and defence to the charges brought against him, which would violate his rights to a fair trial under section 7 of the *Charter*. The Nova Scotia Provincial Court allowed the application, stating that, as a result of Roy's disabilities, his ability to make full answer and defence was prevented.

In *Morgantaler*, *Smoling* and *Scott v The Queen*, the Supreme Court of Canada held that the right to fundamental justice may be infringed when an administrative structure put in place by legislation is "manifestly unfair".[174] Thus, accused persons who are unfit for trial, but who do not meet the *Criminal Code* requirement that the unfitness be rendered by a "mental disorder", could argue that the legislation is "manifestly unfair" because it requires them to go to trial when an equally unfit accused could avoid a trial if he or she is deemed "mentally disordered".

(d) Right to be Presumed Innocent until Found Guilty in a "Fair Hearing"

Wilson J., in *Morgenthaler*, suggested that whenever *Charter* rights are denied, the principles of fundamental justice are infringed. One *Charter* guarantee is the right not to be found guilty except by a fair hearing. Section 11(d) reads:

> 11. Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

At a minimum, the right to a fair hearing in *Charter* subsection 11(d) would appear to include the right of the accused to be heard, which is not available to those unable to communicate, for any reason beyond their control. This right to be heard and understood by a court has been endorsed as a fundamental right (in a language situation) by the Supreme Court of Canada.[175]

(e) The United States Position on Mentally Handicapped Accused who are Unfit to Stand Trial

In many American jurisdictions, the criteria considered by the courts to

[174] *Morgentaler, Smoling and Scott v The Queen,* [1988] SCJ No 1, 82 NR 1, 31 CRR (SCC) (hereinafter *Morgentaler*).
[175] *Société des Acadiens du Noveau Brunswick Inc v New Brunswick (Minority Language School Board No 50)* (1986), 23 CRR 119 (SCC).

determine whether an accused is unfit to stand trial include: whether he or she understands the nature and object of the proceedings against him; whether he or she can consult with counsel; and whether he or she can aid in their own defence.[176] A mentally handicapped defendant who is found to be incompetent to stand trial may not be convicted.[177] The United States cases do not distinguish those who have mental illness from those who have other mental disabilities for the purposes of finding a person unfit to stand trial.[178]

The American Bar Association's *Criminal Justice Standards on Mental Health* recognize that mental disability may render a person unable to stand trial.[179] Standard 7-4.1(b) provides that the test for mental competence to stand trial is "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings".[180] Standard 7-1.1 also recognizes that "mental disorder" can include "developmental disabilities that affect intellectual and adaptive functioning; and substance use disorders that develop from repeated and extensive abuse of drugs or alcohol or some combination thereof."[181]

V. The Fitness Hearing

A. General

At any stage of criminal proceedings before a verdict is rendered, a judge who has doubts about an accused's fitness to stand trial (on account of mental disorder) may order a fitness hearing. The sole purpose of this special proceeding is to determine whether the accused is unfit to stand trial. The fitness determination has been described

[176] *Drope v Missouri*, 420 US 162, at 171 (1975). See also E. Wertlieb, "Individuals with Disabilities in the Criminal Justice System" (1991), 18(3) Criminal Justice and Behavior 332 at 335.
[177] *Pate v Robinson*, 385 US 375 (1966).
[178] For a discussion of the United States situation, see Bonnie at 97 and Ellis and Luckasson, at 452 - 460.
[179] (Washington, DC: American Bar Association, 2016) (hereinafter ABA Criminal Justice Standards on Mental Health).
[180] ABA Criminal Justice Standards on Mental Health, s 7-4.1(b). See also *Dusky v United States,* 8- S Ct 788 (1960).
[181] ABA Criminal Justice Standards on Mental Health, s 7-1.1.

as a two-stage process.[182] First, the judge must have reasonable grounds to believe that the accused is unfit to stand trial. Second, the judge may direct on his/her own motion, or on the application of the accused or the prosecutor, that the issue of fitness of the accused may be tried.[183]

The cases are divided on whether a trial judge has discretion to decide whether to direct a trial on the issue of fitness, or whether they must direct a retrial on the issue once there is some evidence that fitness may be an issue.[184] However, the weight of recent authority indicates that once there is some evidence on the issue of unfitness, the trial judge must direct a trial on that issue. In some cases, courts of appeal have overruled judges who failed to hold a fitness hearing when it would have been appropriate.[185] For example, in *R v Smith*, the Saskatchewan Court of Appeal overturned a decision not to hold a hearing regarding fitness to stand trial. [186] In that case, the accused had a congenital mental impairment and had a mental age of eight and one-half years.

In *Steele*, the Quebec Court of Appeal held that the inclusion of the word "may" in subsection 615(1) [now 672.23(1)] was intended to confer authority, rather than to vest in trial judges a discretion not to exercise it.[187] Subsection 672.23(1) read:

> 672.23(1) Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.

The Quebec Court of Appeal interpreted the use of the word "may" in what was then s. 615(1) to mean that a "court is not bound to try the [fitness] issue where there is no real basis for the request".[188] However, if there is reason to doubt the accused's

[182] *R v McLeod, Pinnock and Farquharson* (1983), 6 CCC (3d) 29 (Ont CA), appeal dismissed (1986), 27 CCC (3d) 383 (SCC) (hereinafter *McLeod*); *McIlvride*.
[183] *Criminal Code*, s 672.23.
[184] *McLeod*, at 29; *Wolfson*.
[185] See e.g., *R v Leys* (1910), 17 CCC 198 (Ont CA).
[186] *R v Smith,* [1936] 1 DLR 717 (Sask CA).
[187] *Steele*, at para 68.
[188] *Steele,* at para 74.

fitness, the fitness issue must be tried. In *Steele*, the accused was charged and convicted of first-degree murder. At the opening of the trial, the trial judge allowed counsel to withdraw from the case but ordered them to act as legal advisors. At mid-trial, the trial judge would not address the fitness issue. Counsel for the defence had suggested that there was strong doubt as to the accused's fitness. This doubt was supported by expert psychiatric opinions. Following the trial judge's refusal to address the issue, counsel obtained permission to withdraw as legal advisors.

On appeal, the accused's conviction was quashed and a new trial was ordered. The Quebec Court of Appeal held that based on the circumstances of the case, the accused's conduct during and after the offence, the unfolding of the proceedings, the evidence adduced and counsel's comments about his client's mental fitness, the court was clearly bound to direct that a special issue be tried. In this case, the judge was not entitled to rely upon his own instincts.[189]

In *R v Fairholm*, the accused represented himself at trial.[190] The Crown introduced psychiatric evidence that indicated that the accused was suffering from a serious mental illness. However, a psychiatric report before the trial judge indicated that the accused was fit to stand trial. The accused was found not guilty by reason of insanity and appealed.

The British Columbia Court of Appeal held that, although there was a report indicating that the accused was fit to stand trial, the accused was not a person of ordinary understanding. The court must be very careful to ensure that mentally ill accused are not prejudiced in their defence. Since the psychiatric testimony indicated that the accused might have had difficulty conducting his defence, the trial judge ought to have conducted an inquiry to determine if the accused was unfit to stand trial.[191]

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[189] *Steele,* at para 77.
[190] *R v Fairholm* (1990), 60 CCC (3d) 289 (BCCA) (hereinafter Fairholm). See also *R v Savard* (1996), 106 CCC (3d) 130 (YTCA) (application for leave to appeal was dismissed without reasons - January 19, 1997).
[191] See also *R v Kolbe* (1974), 27 CRNS 1 (Alta CA); *R v Lefebvre* (1989), 71 CR (3d) 213 (Que CA), leave to appeal to SCC refused (1989), 105 NR 159n.

B. Procedure After a Fitness Hearing has Been Ordered

1. Introduction

The *Criminal Code* provides some direction as to how a fitness hearing is to be conducted. These are discussed in more detail below, but may be summarized as follows:

- The judge must assign counsel for unrepresented accused;
- The fitness issue may be tried at any time up until a verdict is rendered;[192]
- The trial of the fitness issue may be postponed under certain circumstances, such as in hybrid offences, until the prosecutor elects whether to proceed by way of summary conviction or indictment;
- If the trial is by judge and jury, under certain circumstances the trial jury must also try the issue of fitness;
- The prosecutor, the accused or the court may raise the fitness issue; and
- Under some circumstances, the issue of fitness may be raised on appeal.

To a degree, the case law has supplemented the *Criminal Code*'s procedural requirements and may continue to do so.

2. Jury Trials

Once the judge has directed a fitness hearing, the issue may be heard by a judge alone or by a judge and jury, depending upon the circumstances. In proceedings other than trial by judge and jury (e.g., at the preliminary inquiry), the judge will try and determine the fitness issue.[193] The court must order that any unrepresented accused who is the subject of a fitness hearing be represented by counsel.[194]

If the accused is tried, or is to be tried, by a judge and jury, the fitness issue will be tried by a jury.[195] Section 672.26 sets out the procedure for judge and jury trials:

> 672.26 Where an accused is tried or is to be tried before a court composed of a judge and jury,

[192] See: *R v Balliram* (2003), 173 C.C.C. (3d) 547 (Ont. S.C.J.) (hereinafter *Balliram*), where the court held that the issue of fitness can also be raised in the period between the verdict and sentencing. This is discussed in more detail below.
[193] *Criminal Code*, s 672.27.
[194] *Criminal Code,* s 672.24.
[195] *Criminal Code,* s 672.26.

> (a) if the judge directs that the issue of fitness of the accused be tried before the accused is given in charge to a jury for trial on the indictment, a jury composed of the number of jurors required in respect of the indictment in the province where the trial is to be held shall be sworn to try that issue and, with the consent of the accused, the issues to be tried on the indictment; and
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> (b) if the judge directs that the issue of fitness of the accused be tried after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issues in respect of which it is already sworn.

Thus, if the fitness issue is directed before the accused is given in charge of the jury for trial, subsection 672.26(a) requires that a different jury, equivalent in size to the trial jury, be empanelled to determine the fitness issue. Although at this stage of the inquiry the jury has not been empanelled to decide on the indictment, they will hear the charges against the accused (or perhaps a slightly redacted version) in order to assist them in deciding on fitness.[196] In the event that the jury finds the accused fit to stand trial, the fitness jury may also sit at the accused's trial on the indictment, as long as the accused consents.[197] Where the trial of the issue of fitness is directed after the accused has been given in charge of the jury for a trial, the trial jury must be sworn to try the fitness issues, along with the trial issues.[198]

A problem may arise if the accused has provided a "protected statement" (a statement made during the course of an assessment to the person specified in the assessment order).[199] Although the *Criminal Code* stipulates that the accused must consent to the admission in evidence of a "protected statement" made during an assessment, an exception is made for a protected statement made during an

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[196] *R v Brideau*, (2015), NBBR 54, [2015] NBJ No 59.
[197] *Criminal Code*, s 672.26(a) (this is in accordance with the existing common law). See e.g., *R v Curran* (1974), 21 CCC (2d) 23 (NBCA).
[198] *Criminal Code*, s 672.26(b).
[199] *Criminal Code*, s 672.21(1). See e.g., M. Bryant and C. Evans, "'Fitness to Stand Trial' or the 'Politically Correct Criminal Code'", in National Criminal Law Program, Criminal Procedure and Charter Issues, July, 1992, Saskatoon, Saskatchewan (hereinafter Bryant and Evans).

assessment if it is used to determine whether the accused is fit to stand trial.[200] Consequently, the trier of fact (judge or jury) could hear evidence of statements made by the accused during a fitness assessment.

The Law Reform Commission of Canada, in *Report to Parliament on Mental Disorder in the Criminal Process*, recommended that the jury be excluded during the fitness hearing. [201] However, Parliament did not fully follow this recommendation.

If the fitness issue arises before an accused's jury is charged, the accused must consent to that jury hearing the other issues on the indictment. However, if the jury has already been charged, the information from the assessment will be before the trial jury because the *Criminal Code* requires that the trial jury try the fitness issues, as well as the other issues on the indictment.

Thus, if the fitness issue is dealt with first, the "protected statement" will be before the jury. This statement would not ordinarily be before the jury until ruled admissible. If the jury finds the accused fit to stand trial, they will be expected to "cast it from their minds" when deciding upon the accused's guilt.[202]

Counsel and the accused may question whether jurors who have heard a protected statement during the fitness stage of the trial can truly cast it from their minds at a later stage in the proceedings. To avoid this situation, the accused may elect to have the matter heard before a judge alone, or may choose to raise the issue of fitness before the accused is given in charge to the jury, so that a separate jury will decide the fitness issue.

If the jury is asked to determine whether an accused is fit to stand trial, then jurors have the obligation to make an earnest assessment. In *R v Levionnois*, the jury took only nine minutes to decide that the accused, charged with murder, was fit to stand trial. [203] The same jury required four hours to determine whether the accused was mentally ill at the time of the offence. The Ontario Court of Appeal held that the issue of fitness to stand trial was neither adequately presented to, nor considered by, the jury,

[200] *Criminal Code*, s 672.21(3)(a).
[201] (Ottawa: 1976), at 44 - 45.
[202] Bryant and Evans, at 4.
[203] *Gibbons*. See also *R v Hubach* (1966), 55 WWR 536 (AB CA).

and that the accused may have been convicted "while insane". Consequently, a new trial was ordered.

In *R v Gibbons*, the jury took only five minutes to determine the fitness issue, yet took five hours to determine whether the accused was mentally ill at the time of the offence. The Ontario Court of Appeal set aside the conviction for murder and ordered a new trial based on the "vital importance in the administration of justice that the accused, particularly in a capital case, should be fit to stand trial."[204] Because there was doubt about this here, it had to be re-tried.

If, at the end of the fitness hearing the accused is found to be fit to stand trial, the arraignment, preliminary inquiry, trial or other stage of the proceeding continues as if the issue of fitness had never arisen.[205] However, if the accused is found unfit to stand trial, any plea that he has made will be set aside and the jury will be discharged.[206]

3. Nature of the Proceedings

The fitness trial has been described in earlier cases as a non-adversarial proceeding: an inquiry into the status of the accused.[207] This inquiry must be thorough and places a responsibility on all concerned to contribute to the hearing.[208] However, the fitness provisions place the burden of proving that the accused is unfit to stand trial on whoever applies under s 672.23(1) for a trial on the issue of fitness, whether that is the accused or the prosecutor.[209] Whether this provision will change the nature of future fitness proceeding is unclear.

4. When May the Issue of Fitness Be Raised?

Pursuant to section 672.23(1) of the *Criminal Code,* the issue of fitness may be raised at any stage of the proceedings before a verdict is rendered, provided the court has reasonable grounds to believe that the accused is unfit to stand trial.[210] Furthermore, in *Balliram* the court held that it can also be raised between the issuing of

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[204] *Gibbons*, at para 9.
[205] *Criminal Code*, s 672.28.
[206] *Criminal Code*, s 672.31.
[207] See e.g., *Steele*, at para 97; *Roberts*, at para 13.
[208] *Budic*, at 278.
[209] *Criminal Code*, s 672.23(2).
[210] *Criminal Code*, s 672.23(1).

the verdict and the sentencing if necessary.[211] Because of the variable nature of mental illness, this is a genuine possibility. The court ruled that the failure of section 672.23 to provide for a fitness hearing after the verdict had been rendered violated section 7 of the *Charter,* and that the appropriate remedy was to read in words that would allow a fitness hearing before the sentence is imposed. There are some circumstances where a court must postpone the trial of the fitness issue, and some circumstances where a court may postpone the trial of the fitness issue. For example, the court must postpone the trial of the fitness issue in hybrid offences (offences where the accused may be prosecuted by indictment or by summary conviction) until the prosecutor has elected to proceed by way of indictment or summary conviction.[212]

The court may postpone the trial of the fitness issue in two other circumstances. First, if the issue arises before the close of the case for the prosecution at a preliminary hearing, the trial of the fitness issue may be postponed to a time that is not later than the time the accused is called upon to answer to the charge.[213] Second, if the issue arises before the close of the case for prosecution at trial, the fitness issue may be postponed until not later than the opening of the accused's case or, on a motion by the defence, at any later time the court may direct.[214]

These provisions permit the accused to be discharged at the conclusion of the Crown's case, without the necessity of a fitness hearing in the absence of sufficient evidence to put the accused on trial or in the absence of sufficient evidence to require the accused to defend.

Some courts have held that the Crown must establish a *prima facie* case against the accused before a fitness inquiry is held. In *R v Butt*, the British Columbia Provincial Court held that s 7 of the *Charter of Rights* was infringed if a court embarked upon a determination of the accused's fitness in the absence of any evidence of the accused's possible guilt.[215]

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[211] *Balliram*.
[212] *Criminal Code*, s 672.25(1).
[213] *Criminal Code,* s 672.25(2)(a).
[214] *Criminal Code,* s 672.25(2)(b).
[215] *R v Butt,* (1990), 9 WCB (2d) 654 (BC Prov Ct); *Charter* (Everyone has the right to life, liberty and

Criminal Code paragraphs 615(5)(a) [now 672.25(2)(b)] provided that the direction to hold a trial of the fitness issue may be postponed until any time up to the opening of the case for the defence. The court held that one of the reasons for postponing the inquiry is the lack of evidence implicating the accused at the time of the application to have a fitness inquiry. The mental capacity to conduct a defence presupposes the existence of a case to be defended. Thus, the Crown must present a *prima facie* case of guilt against the accused before the court directs a fitness trial. If the criminal act cannot be attributed to the accused then the accused is entitled to be acquitted regardless of whether or not he or she has a mental disability that affects their fitness to stand trial.

In *Taylor*, the trial judge had conducted the inquiry into the fitness issue immediately after the accused had been arraigned.[216] He did not require the Crown to lead any evidence to demonstrate that the accused had committed the acts alleged against him. (This may have been because it was a second trial for the same offence.) The Ontario Court of Appeal held that it did not have to decide whether section 7 of the *Charter* required that paragraph 672.25(2)(b) of the *Criminal Code* be interpreted to require the Crown to establish a *prima facie* case before the fitness inquiry is held. However, the court held that:

> [I]n exercising his or her discretion under s. 672.25(2)(b) of the Code, a trial judge must consider whether there is any dispute as to the Crown's ability to demonstrate that the accused committed the act or acts alleged in the indictment. If there is a dispute, the trial judge should not decide the question of fitness without being satisfied that the Crown is in a position to establish that the accused committed the act or acts alleged. The trial judge may proceed with the trial proper and postpone the fitness inquiry, or he or she may require the Crown to demonstrate at the outset of the fitness hearing that it is in a position to establish that the accused committed the act or acts alleged in the indictment. In either case, a finding that an accused is not to stand trial should not be made in the absence

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security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice).

[216] *Taylor*.

of any basis to put that accused on trial. [217]

Because the accused had not conceded that he had assaulted the complainant and alleged that the complainant had recanted, the trial should have either delayed the holding of the fitness inquiry until the Crown had demonstrated that it could still prove the allegation, or the trial judge should have required the Crown to show that it was in a position to prove the allegation made against the accused as part of the fitness hearing. The Ontario Court of Appeal ordered a new trial.

In *R v Brown*, the Ontario Provincial Court held that if a fitness hearing is to be conducted, the Crown must first satisfy the court (or jury) that there is sufficient evidence upon which a properly instructed jury could convict the accused. [218] After the court has been satisfied that there is sufficient evidence in this regard, the actual fitness hearing should be conducted.

If the court has postponed directing a trial on the issue of fitness under subsection 672.25(2) of the *Criminal Code*, and the accused is discharged or acquitted before the fitness issue is tried, then the issue must not be tried.[219] This section applies to both the preliminary inquiry and the trial.

5. Who May Raise the Issue of Fitness?

The accused, the prosecutor, or the court of its own motion may raise the issue of fitness to stand trial.[220] The burden of proof to show the accused is unfit to stand trial rests on the party who raises the issue.[221]

Justice Trueman of the Provincial Court of British Columbia affirmed that a court has a duty to inquire into, "the systemic or background factors that contributed to the particular offender coming before the courts for a particular offence. . .". [222] In the case of *Harris,* Trueman J. considered the extent of the duty to rise to at least the standard of

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[217] *Taylor,* at para 37.
[218] *R v Brown* (1993), 13 CRR (2d) 341 (Ont Prov Ct).
[219] *Criminal Code*, s 672.3.
[220] *Criminal Code,* s 672.23(1) (although the prosecutor may raise the issue of fitness at any time, he may be limited in asking for an assessment order under s 672.12(2) if the matter has proceeded by way of summary conviction).
[221] *Criminal Code*, s 672.12(2).
[222] *Gray PC.*

an employer to an employee where a sentencing judge is dealing with liberty interests.[223] There is a duty on an employer to make inquiries when something begins to look seriously wrong. Relying on human rights doctrine in the area of employment law and the Supreme Court's decision in *R v Gladue*, Trueman J. determined that "judges cannot remain silent" where there are undetermined factors that may impact his or her final decision.[224]

On the other hand, in *Gray PC,* Trueman J. ordered an assessment of an adult offender for Fetal Alcohol Syndrome (FAS) or Alcohol Related Neurodevelopmental Disorders (ARND) to be performed by a medical doctor experienced in making such assessments to determine if Nathan Gray was unfit to stand trial or, alternatively, whether he was suffering from a mental disorder and not criminally responsible for the offences with which he was charged.[225] Section 672.11 of the *Criminal Code* gives a judge the jurisdiction to make an assessment order, and subsection 672.12(1) gives a judge the authority to make such an order. Furthermore, Trueman J. stated that to not make such an order when there are indications that such evidence is necessary for the court before it can render an appropriate sentence, would infringe the rights of the accused under sections 7 and 15 of the *Charter*.[226] The "duty to diagnose . . . is a fundamental component of section 15 in sentencing proceedings", as well as "a fundamental component of s. 718 of the *Criminal Code*, which refers to a 'peaceful, just and safe society'".[227]

Thus far, only *Gray* has been appealed and the British Columbia Supreme Court granted *certiorari* quashing the assessment order.[228] The lower-court decision was overturned because when Trueman J. directed that the assessment be completed at a particular private facility and that the Crown pay for the assessment as Gray could not

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[223] *R v Harris,* 2002 BCPC 33 at para 83 (hereinafter *Harris*).
[224] *R v Gladue,* [1999] 1 SCR 688 at para 80, Online: QL(CJ) (SCC) ; *Harris,* at para. 84.
[225] *Gray PC,* (she did not, however, order that the Crown pay for the assessment when the accused indicated he could not afford it).
[226] *Gray PC,* at paras 216, 219.
[227] *R v Creighton*, 2002 BCPC 182 at para 107, [2002] BCJ No 1151 (hereinafter *Creighton*) (reversed in *R v Creighton,* 2002 BCSC 1190, but only based on the missing content from the assessment order, not on the ability of the judge to grant it).
[228] *Gray SC*.

afford to she did not have jurisdiction to do so.[229] Despite this, however, the court did also state that "a judge has jurisdiction under s. 672.12(31) of the *Criminal Code* to order assessment for a developmental disorder, such as Fetal Alcohol Syndrome."[230]

Nevertheless, in *R v Reid*, the British Columbia Court of Appeal also held that a sentencing judge has a duty to make inquiries that are separate from, and independent of, the duty of counsel to present material to the court.[231]

There is a question as to whether the Court of Appeal may raise the issue of fitness of its own motion on an appeal. Section 686(1)(d) of the *Criminal Code* provides that the Court of Appeal may set aside a conviction and find an appellant unfit to stand trial. There are numerous decisions where the Court of Appeal has, on its own motion, raised the issue of mental illness for the first time on appeal based on its jurisdiction under paragraph 686(1)(d).[232] Presumably, the Court of Appeal could also raise the issue of fitness to stand trial on its own motion, based on its jurisdiction under paragraph 686(1)(d).

It is not as clear whether the Court of Appeal could raise the fitness issue when the appeal is from an acquittal. Section 686(4) of the *Criminal Code* states that, when the appeal is from an acquittal, the Court of Appeal has jurisdiction to order a new trial, dismiss the appeal or enter a verdict of guilty under certain circumstances.[233] Additionally, a justice at the Court of Appeal has the jurisdiction to order an assessment of the accused if he or she has reasonable grounds to believe that such evidence is necessary to determine whether the accused is unfit to stand trial.[234] Presumably, if the Court of Appeal were faced with a Crown appeal of an acquittal where the accused's fitness to stand trial has become an issue, they would be inclined to order a new trial on the issue of fitness or to dismiss the appeal. Alternatively, although there appear to be no cases where this has occurred, perhaps the Court of Appeal, on its own motion, could raise the issue of fitness for the first time on an appeal from an acquittal.

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[229] *Gray SC* at para. 26.
[230] *Gray SC* at para 17.
[231] *R v Reid,* [2002] BCJ No 845 (BCPC*); Creighton,* at para 64.
[232] See e.g., *R v Irwin* (1977), 36 CCC (2d) 1 (Ont CA).
[233] *Criminal Code*, s 686(4)(b).
[234] *Criminal Code,* s 672.11(a).

6. Counsel for Unrepresented Accused

Where the court has reasonable grounds to believe that an accused is unfit to stand trial, and the accused is not represented by counsel, the court must order that the accused be represented by counsel.[235] This duty can exist even where the accused is without counsel by choice, as was the case in *R v Verma.* In that case, the British Columbia Court of Appeal held that the failure of the court to order that the accused be represented constituted a breach of the accused's constitutional right to counsel, even though he had dismissed multiple lawyers during the course of the proceedings to that point. [236] If the court has ordered that the accused be represented by counsel, but the accused is denied legal aid by the provincial legal aid program, the Attorney General must pay their legal fees to the extent that the accused is unable to do so.[237]

VI. Accused Found Fit to Stand Trial

If the accused is found fit to stand trial, the proceedings are to continue as if the issue of fitness had never arisen.[238] However, the issue of fitness to stand trial may arise more than once throughout the proceedings, especially if the preliminary inquiry occurs several months before the criminal trial. Therefore, the court may be asked to direct that the fitness issue be tried more than once. The *Criminal Code* does not specify whether there is a limit on the number of trials that may be held on the issue of fitness. An argument may be made that there should not be a limit because of the nature of many mental conditions. An accused's ability to stand trial may wax and wane throughout the course of the proceedings. Consequently, the court should have the jurisdiction to order a trial on the issue of fitness whenever it appears necessary. This view is supported by the wording of subsection 672.23(1) of the *Criminal Code*, which states that a court may direct the issue of fitness be tried: "[w]here the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to

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[235] *Criminal Code,* s 672.24.
[236] See *R v Verma*, 2011 BCCA 52. See also *R v Waranuk* (2010), 89 WCB (2d) 235, [2010] Y.J. No. 81 (C.A.); *Fairholm*.
[237] *Criminal Code*, s 672.24(2).
[238] *Criminal Code,* s 672.28.

believe the accused is unfit to stand trial [emphasis added].” It could be argued that this indicates that more than one fitness determination may be necessary and are permissible.[239]

If an accused has been found fit to stand trial, he or she may be detained in a hospital pending the outcome of the trial in certain circumstances.[240] Section 672.29 of the *Criminal Code* states:

> 672.29 Where an accused is detained in custody on delivery of a verdict that the accused is fit to stand trial, the court may order the accused to be detained in a hospital until the completion of the trial, if the court has reasonable grounds to believe that the accused would become unfit to stand trial if released.

The accused may be detained in a hospital in accordance with s. 672.29 only if two conditions are met. First, the accused must have been detained in custody after the fitness verdict has been rendered. Second, the court must have reasonable grounds to believe that the accused will become unfit to stand trial if released. Watt and Feurst argue that “if released” should have read “if returned to custody”, because the provision was likely intended to prevent the deterioration of the accused while in custody, which could give rise to constant “re-visitation of fitness issues”.[241] However, an accused's fitness could also deteriorate while he or she is released from custody.

VI. Accused Found Unfit to Stand Trial

A. General

Once an accused has been found unfit to stand trial, the court may take one of four steps. First, the court may make an assessment order for a period of no longer than 30 days for the purposes of assisting it to make a disposition (subsection 672.11(d)). Second, the court may make a treatment disposition for a period of no longer than 60 days (sections 672.58 to 672.63). The purpose of sections 672.58 to 672.63 is to ensure

[239] Arguably, s 672.23 of the *Criminal Code* clarifies any question that existed under the previous common law. See the discussion under Assessments: How many may be ordered?
[240] *Criminal Code*, s 672.29.
[241] Watt and Feurst, at 940.

that the accused is fit to stand trial. Certain criteria and evidence is required by the court before it permits treatment to be carried out. Subsections 672.6(1) and (2) of the *Criminal Code* entitle the accused to notice of a disposition under section 672.58, and allow the accused, on receiving notice, to challenge the application. Third, the court may make a disposition under section 672.54 (absolute discharge, conditional discharge or hospital detention) that, pursuant to subsection 672.47(3) must be reviewed by the Review Board within ninety days. Finally, the court may do none of the above. In that case, the Review Board must make a disposition under section 672.54 within 45 days.[242] Section 672.54 lists the factors to be considered by the court or Review Board when determining which of the three dispositions should be made. The factors are:

- the need to protect the public from dangerous persons;
- the accused's mental condition;
- the accused's re-integration into society; and,
- the accused's other needs.[243]

1. The Plea

When a verdict of unfit to stand trial is rendered, any plea that has been made must be set aside and the jury must be discharged.[244] However, a verdict that the accused is unfit to stand trial does not prevent the accused from being tried for the same offence where the accused becomes fit to stand trial.[245] The onus of proving that the accused has subsequently become fit to stand trial is on the party who asserts fitness. Further, the standard of proof required is a balance of probabilities.[246]

2. Review of Evidence

Subsection 672.33(1) of the *Criminal Code* provides that the court that has jurisdiction over an accused that is found unfit to stand trial must hold an inquiry not later than two years after the unfitness verdict is rendered, and every two years

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[242] For a discussion of the new fitness procedures, see: J. McIntyre, "Amendments to the Criminal Code (Mental Disorder): Bill C-30 and Review Boards" (1992) *50(4) The Advocate 575*.
[243] Watt and Feurst, at 956.
[244] *Criminal Code*, s 672.31.
[245] *Criminal Code*, s 672.32(1).
[246] *Criminal Code*, s 672.32(2).

thereafter until the accused is acquitted.[247] The purpose of the inquiry is to determine whether sufficient evidence can be adduced to put the accused on trial.[248] The court may extend the period for holding an inquiry if it is satisfied, on the basis of an application made by the prosecutor or the accused, that the extension is necessary for the proper administration of justice.[249] The court may also, on application by the accused, order an inquiry be held at any time if they are satisfied that there is reason to doubt that there is a *prima facie* case against the accused.[250] The court will make their decision on the basis of the application and any written materials submitted by the accused.[251] The prosecutor has the burden of proving that sufficient evidence can be adduced to put the accused on trial.[252] During an inquiry under section 672.33, the court must admit as evidence any affidavit containing evidence if given viva voce, as well as any certified copy of oral testimony that were previously given in a proceedings or inquiry in respect of the offence with which the accused is charged.[253] If, after the inquiry, the court determines that sufficient evidence cannot be adduced to put the accused on trial, the court must acquit the accused.[254]

3. Disposition

Under the earlier regime, a person who was found unfit to stand trial faced the possibility of lengthy detention ("at the Lieutenant Governor's pleasure"). The current regime permits the decision-maker (the court or Review Board[255]) to order the accused to be held in custody in a hospital, to be conditionally discharged, or to be granted an absolute discharge.[256] A court-ordered hospital detention order cannot continue in force for more than 90 days after it is made.[257] Before the court-ordered hospital detention has expired, the Review Board must hold a hearing and must make a disposition

[247] *Criminal Code*, s 672.33(1).
[248] *Criminal Code*, s 672.33(1).
[249] *Criminal Code,* s 672.33(1.1). See: *R v Kariman-Kakolai,* 2016 ONCJ 336, (ON PC).
[250] *Criminal Code*, s 672.33(2).
[251] *Criminal Code*, s 672.33(2).
[252] *Criminal Code,* s 672.33(3).
[253] *Criminal Code*, s 672.33(4).
[254] *Criminal Code*, s 672.33(6) (subsections (3) to (5) govern the procedures to be followed in the inquiry).
[255] *Criminal Code*, s 672.47(1).
[256] *Criminal Code*, s 672.54. See *Demers*.
[257] *Criminal Code,* s 672.55.

regarding the accused.[258] The decision-maker is required to take the following factors into account in deciding the appropriate disposition: the need to protect the public from dangerous persons; the mental condition of the accused; the reintegration of the accused into to society; and the other needs of the accused.[259] The decision-maker must make a disposition that is the least onerous and least restrictive to the accused.

The court may hold a disposition hearing after the verdict of unfit to stand trial has been rendered, and must hold such a hearing if asked to do so by the prosecutor or the accused.[260] At the disposition hearing, the court must make a disposition if it is satisfied that it can readily do so and that a disposition must be made without delay.[261]

Where the court does not make a disposition, the Review Board must make one. The Review Board is composed of five members who are appointed by the Lieutenant Governor of the Province.[262] One member of the Review Board must be a psychiatrist and at least one other member must have training and experience in the mental health field and be entitled under the laws of a province to practice medicine or psychology.[263] The chairperson of the Review Board must be a judge or a person qualified to be one.[264]

If there is no court-ordered disposition, any order for the interim release or detention of the accused in force at the time of the verdict of unfit to stand trial or not criminally responsible on account of mental disorder continues in force until the Review Board makes a disposition.[265] However, when cause is shown, the court may vacate any existing form of release and make any other order for the accused's interim release that the court considers appropriate in the circumstances, including an order directing that the accused be detained in hospital pending the Review Board hearing.[266]

4. Treatment Orders and Accused Found Unfit to Stand Trial

Neither the court nor the Review Board is permitted to order the accused to

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[258] *Criminal Code*, s 672.47(3).
[259] *Criminal Code*, s 672.54.
[260] *Criminal Code,* s 672.45(1) (the disposition aspects are fully discussed in Chapter Twelve: Sentencing).
[261] *Criminal Code,* s 672.45(2).
[262] *Criminal Code*, s 672.38(1).
[263] *Criminal Code*, s 672.39.
[264] *Criminal Code*, s 672.4.
[265] *Criminal Code*, s 672.46(1).
[266] *Criminal Code*, s 672.46(2).

submit to medical or psychiatric treatment when a disposition order is made, except in circumstance where the disposition includes a condition regarding psychiatric or other treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused.[267] The court is authorized to make a treatment order if a disposition order has not been made. On application of the prosecutor, the court may order an accused that has been found unfit to stand trial to submit to treatment by a specified person or a specified hospital for a period of up to 60 days.[268]

Although the accused must be notified that the prosecutor intends to apply for a treatment order, and may challenge the application, the accused's consent to the order is not required.[269] This provision of the *Criminal Code* may be open to challenge, and is discussed in more detail in Chapter 12, Sentencing and Chapter 13, Mentally Disabled Persons in Prisons and Jails.

There are limits on the treatment order. The court cannot require that the accused undergo mandatory treatment unless the court is satisfied, on the basis of the testimony of a medical practitioner that a specific treatment should be administered to the accused for the purpose of making the accused fit to stand trial.[270] Further, the court cannot require the performance of psychosurgery or electro-convulsive therapy or other prohibited treatment.[271] A third limit on the court is that the hospital or individual designated to treat the accused must consent to the treatment disposition.[272] The Supreme Court of Canada recently clarified what this consent entailed in *Centre for Addiction and Mental Health v R.* The Court held that under s 672.62(1) consent is required for the disposition in its entirety, not just the specific treatment aspects of it. Therefore, a court can only make a treatment order that requires the treatment begin

[267] *Criminal Code*, s 672.55(1).
[268] *Criminal Code,* s 672.58. See *Evers v British Columbia (Director of Adult Forensic Services)* (2009), 249 CCC (3d) 178 (BC CA) (held that s 672.58 permits only a court, not a Review Board, to make an order directing treatment of the detainee in cases where the court has not made a disposition in respect to an accused found unfit to stand trial).
[269] *Criminal Code*, s 672.6. See also *Notice of Application for Treatment Regulations*, SOR/92-665.
[270] *Criminal Code*, s 672.59(1).
[271] *Criminal Code,* s 672.61.
[272] *Criminal Code*, s 672.62(1).

immediately in two situations; either the hospital or facility in question consents to the disposition, or the court finds that to delay the order or treatment start date would breach the accused's rights under the *Charter*.[273]

Glancy suggests that it may be tactically advisable to consent to treatment during the original fitness assessment, especially where the accused has been charged with a relatively minor offence.[274] If the accused has undergone treatment during the fitness assessment, this may assist counsel to make representations against the advisability of further treatment during the disposition stage at the end of trial. If the charges are relatively minor, further detention for the ultimate purpose of determining the disposition might not be necessary.[275]

B. Review Board Assessment of Fitness

The *Criminal Code* grants several powers to Review Boards.[276] These boards must be established or designated in each province and are obliged to make or review dispositions concerning any accused who has been found not criminally responsible on account of mental disorder or unfit to stand trial.

Where the court has made a disposition under section 672.54 (other than an absolute discharge),[277] the Review Board must hold a review hearing within 90 days of the court disposition and must make a disposition.[278] For example, in *Taylor,* at one stage in the proceedings, the accused was found unfit to stand trial by the provincial court and ordered detained in a mental health centre (Penetanguishene). Subsequently, the Ontario *Criminal Code* Review Board held a disposition hearing under subsection 672.47(1) and heard evidence from the psychiatrists who testified at trial. The Review Board concluded that the accused was still unfit to stand trial and ordered that he be

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[273] *Centre for Addiction and Mental Health v R* (2014), 316 SCC (3d) 182.
[274] T. Glancy, "The New Insanity Provisions", in Criminal Trial Lawyers Association, Three Short Snappers and the Post-Sentence Process, November 21, 1992, Edmonton, Alberta at 6 (hereinafter Glancy).
[275] Glancy, at 6.
[276] The specific procedural rules regarding the Review Board are discussed in Chapter Twelve: Sentencing.
[277] Where an accused is found unfit to stand trial, the court may not order that the accused be absolutely discharged. The court may order an absolute discharge in respect of an accused found not criminally responsible on account of mental disorder.
[278] *Criminal Code*, s 672.47(3).

returned to the Mental Health Centre.

If the Review Board has reasonable grounds to believe that the accused will become unfit to stand trial if released from the hospital, it may order that the accused continue to be detained in a hospital until the court determines whether they are fit to stand trial.[279] The Review Board or chairperson must send a copy of a disposition made under section 672.47 to the court and to the Attorney General of the province.

Where the Review Board holds a hearing to make a disposition or to review one made by the court, it must determine whether the accused is fit to stand trial.[280] If the Review Board determines that the accused is fit to stand trial, it must order that the accused be sent back to court, and the court must try the fitness issue and render a verdict.[281] The *Criminal Code* does not provide for any right of appeal against a Review Board's opinion that an accused is fit to stand trial under section 672.48. Under this section, the Board determines that the question of an accused's fitness to stand trial should be the subject of an inquiry.[282]

In exceptional circumstances, the chairperson of the Review Board may return an apparently fit accused to court for a trial on the fitness issue, even though the Review Board has not so ordered. The chairperson may exercise this authority if the accused and the person in charge of the hospital where the accused is being detained consent to this action. Further, the chairperson of the Review Board must be of the opinion that the accused is fit to stand trial, and that the Board will not hold a hearing to review a disposition in respect of the accused within a reasonable period.[283]

Review Boards have the same disposition options, and are subject to the same limitations, as courts.[284] Further, Review Boards have authority to impose conditions on

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[279] *Criminal Code*, s 672.49(1) (as of April 2006, there are no hospitals in Calgary in which an accused can be detained. If an accused must be detained, the only available facility is the Calgary Remand Centre. This information was provided by Constable Martin Cull, Persons With Disabilities Coordinator with the Calgary Police Service).
[280] *Criminal Code*, s 672.48(1). See *R v CLD*, [1995] BCJ No 2683 (Prov Ct); *R v. Proctor*, [1993] MJ No 525 (QB).
[281] *Criminal Code*, s 672.48(2).
[282] See *R v Myles*, [1995] BCJ No 2395 (CA). See also *R v Paré*, [2001] OJ No 4186 (ON CA) (hereinafter *Paré*).
[283] *Criminal Code*, s 672.48(3).
[284] *Criminal Code*, s 672.54 (see discussion under 1(c) Dispositions).

third parties other than accused persons found not criminally responsible on account of mental disorder ("NCR"). In *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, the Supreme Court of Canada heard an appeal from a decision of the British Columbia Review Board, in which the appellant argued that the Review Board did not have jurisdiction to make an order obligating the Director of Adult Forensic Psychiatric Services (the "Director") to take particular actions and meet certain conditions in the care and treatment of M.M, an aboriginal offender.[285]

M.M. was found not guilty in 1986 of several criminal offences after being diagnosed with chronic paranoid schizophrenia, serious antisocial behaviour and organic brain damage. In 1992, he was classified as "not criminally responsible" and placed under the jurisdiction of the board. M.M was granted numerous conditional discharges, each of which failed. He was then placed at the Forensic Psychiatric Hospital and, in 2002, concerned with the lack of progress in M.M.'s treatment, the Review Board ordered the Director to provide independent evaluations of M.M.'s progress and the risk he posed to the public safety under a different treatment plan. The Director was also ordered to make efforts to enrol M.M. in a First Nations drug and alcohol treatment program.

The Director appealed the Review Board's decision, and the Court of Appeal held that the Review Board could not impose conditions on anyone but an NCR accused. M.M. appealed to the Supreme Court of Canada. The Supreme Court held that the legislative mandate of Review Boards requires that they have the power and authority to impose conditions on parties other than an NCR accused in order to ensure those parties may properly oversee and implement effective treatment regimes. According to the Supreme Court, the role of a Review Board is to ensure opportunities for medical treatment are provided. Furthermore, although Review Boards are not permitted to prescribe actual treatment, they possess a supervisory role and can impose conditions on third parties, such as the Forensic Psychiatric Hospital, to ensure that such opportunities for medical treatment are available.

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[285] *Mazzei v British Columbia (Director of Adult Forensic Psychitaric Services)* [2006], SCJ No 7 (SCC) (hereinafter *Mazzei*).

C. Appeals From a Disposition or Placement Decision

A verdict of unfit to stand trial is followed by a disposition made by a court or Review Board.[286] Although these two decisions are made in close succession, the appeal mechanisms are quite different. Hence, it is important to differentiate between a verdict (such as "unfit to stand trial") and a disposition (an order made by a court or Review Board under section 672.54, or by a court under section 672.58).

The verdict of unfit to stand trial is appealed under Parts XXI and XXVII of the *Criminal Code.*[287] After a verdict of unfit to stand trial has been rendered, the disposition made by a court or Review Board may be appealed under Part XX.I of the Criminal Code. The grounds of appeal are wide, and include any ground of appeal that raises a question of law or fact alone or of mixed law and fact.[288]

The time limit for filing notice of appeal is quite short. Notice of an appeal against a disposition or placement decision must be made within 15 days after the day on which the parties are provided with a copy of the placement decision or disposition.[289] Further, appeals of disposition or placement decisions must be heard as soon as practicable after notice of appeal is given, within any time period, in or out of the court's regular sittings, that may be determined by the court, a judge of appeal, or the rules of the court.[290]

Section 672.72 governs the form of appeals. Under this section, appeals are to be based on the transcript of the court or Review Board proceedings. The court of appeal may also hear any other evidence that the court considers necessary in the interests of justice.[291]

D. Mandatory and Discretionary Reviews of Dispositions

The Review Board is required to review, on an annual basis, the disposition of an accused person who has been found unfit to stand trial. Section 672.81 of the *Criminal*

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[286] Appeals from dispositions are discussed in greater detail in Chapter 12: Sentencing.
[287] *Paré*, (held there is not a right of appeal from a Review Board decision that the accused is fit to stand trial).
[288] Any party may appeal against a disposition on any question of law or mixed law and fact. See *Mazzei*..
[289] *Criminal Code*, s 672.72(2).
[290] *Criminal Code*, s 672.72(3).
[291] *Criminal Code*, s 672.73(1).

Code provides that these reviews are mandatory unless subsection 672.81 (1.1) applies. Under subsection 672.81(1.1), if the Review Board wishes to extend the time for holding a hearing to a maximum of twenty-four months after the making or reviewing a disposition, the accused must be represented by counsel and both the Attorney General and the accused must consent to the extension.[292] Otherwise, the Review Board must hold the first review hearing not later than twelve months after making a disposition, and every twelve months thereafter, so long as the disposition remains in force. The mandatory review provisions do not apply to an absolute discharge made under subsection 672.54(a).

Similarly, subsection 672.81(1.2) allows for a similar extension if, at the conclusion of a Review Board hearing, the accused has been found not criminally responsible for a serious personal injury offence, is subject to a custodial disposition under subsection 672.54(c), or the Review Board is satisfied that the condition of the accused is unlikely to improve and detention remains necessary for the period of extension.[293] Section 672.81(1.2) permits that the time for holding a subsequent hearing be extended to a maximum of twenty-four months.[294]

A review is also triggered if there are increased restrictions placed on the liberty of the accused. When the person in charge of the facility where the accused is detained notifies the Review Board that increased restrictions have been placed on the accused for a period of more than seven days, the Review Board must hold a hearing as soon as is practicable.[295] Such a hearing must also be held if the person in charge requests a review of the disposition.[296] Under section 672.82, the Review Board also has discretion to review any of its dispositions at the request of the accused or any other party.[297]

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[292] *Criminal Code*, s 672.81(1.1)

[293] *Criminal Code,* s 672.81(1.2) (for the purposes of subsection 1.2, s. 672.81(1.3) defines "serious personal injury offence" as an indictable offence involving: (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person; or an indictable offence referred to in ss. 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 271, 272, or 273, or an attempt to commit such an offence).

[294] *Criminal Code,* s 672.81(1.2).

[295] *Criminal Code*, s 682.81(2.1).

[296] *Criminal Code*, s 682.81(2).

[297] *Criminal Code*, s 672.82(1).

E. Appeals and Fitness

Either the Crown or the accused may appeal from the verdict of unfit to stand trial. The accused may also appeal from a conviction. When the accused was convicted of the offence, she may also have been found fit to stand trial. As a result, the finding of fitness may also be appealed.

1. Crown

Section 676(3) of the *Criminal Code* provides that, in an indictable matter, the Attorney General, or counsel instructed by the Attorney General for the purpose, may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.[298]

If the matter has proceeded by way of summary conviction, the Attorney General (Crown) may appeal a verdict of unfit to stand trial to the court of appeal under s. 813 (a)(iii) of the *Criminal Code*. [299] No restriction is placed on the nature of the grounds of appeal that may be raised. A further appeal of the summary conviction matter is available to the provincial court of appeal on a question of law alone.[300]

Section 830(1) of the *Criminal Code* provides that, in a summary conviction matter, the Attorney General may appeal against a verdict of unfit to stand trial on the following grounds:

> (a) it is erroneous in point of law;
>
> (b) it is in excess of jurisdiction; or
>
> (c) it constitutes a refusal or failure to exercise jurisdiction.

An appeal under section 830 must be based on the transcript of the proceedings that are being appealed from, unless, within fifteen days of the filing of the notice of appeal, the appellant files with the appeal court a statement of facts

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[298] *Criminal Code,* s 676(3) (for an example of where the Crown appealed a trial judge's verdict that the accused was unfit to stand trial, see *Jobb, supra* note 141, where the Saskatchewan Court of Appeal determined that the trial judge had applied too stringent a test in concluding the accused was unfit to stand trial).

[299] In Alberta, the Court of Queen's Bench.

[300] *Criminal Code*, s 839.

agreed to in writing by the respondent.[301]

2. Accused

Section 675(3) of the *Criminal Code* provides that if, in proceedings regarding an indictable offence, a verdict of unfit to stand trial is rendered in respect of the accused, the accused may appeal to the court of appeal on the following grounds:

> (a) on any ground of appeal that involves a question of law alone;
>
> (b) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof, or on the certificate of the trial judge that the case is a proper case for appeal; or
>
> (c) with leave of the court of appeal, on any other ground that appears to the court of appeal to be a sufficient ground of appeal.[302]

If the matter has proceeded by way of summary conviction, the accused may appeal a verdict of unfit to stand trial to the Court of Queen's Bench under paragraph 813 (a)(iii).[303] There is no restriction on the nature of the grounds of appeal that may be raised. If the accused is found guilty of a summary conviction offence after being found fit to stand trial, he or she could appeal the conviction under the same section. A further appeal to the provincial court of appeal is available under section 839, but it must be made on a question of law alone.[304]

Section 830 of the *Criminal Code* provides that an accused may appeal a verdict of unfit to stand trial, or other final order or determination of a summary conviction court, directly to the provincial court of appeal on a transcript or agreed statement of facts. The grounds for launching such an appeal are:

> (a) it is erroneous in point of law;
>
> (b) it is in excess of jurisdiction; or

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[301] *Criminal Code*, s 830(2).
[302] *Criminal Code*, s 675(3). See also *Criminal Code,* s. 675(1).
[303] *Criminal Code*, s 813(a)(iii).
[304] *Criminal Code*, s 839.

(c) it constitutes a refusal or failure to exercise jurisdiction.[305]

3. Court

Whether the Crown proceeds by way of indictment or summary conviction, the powers of the court of appeal (either the provincial court of appeal, in indictable matters, or the Court of Queen's Bench, in summary conviction matters) are listed in s. 686. They are incorporated into summary conviction appeals by way of section 822.[306] Section 686 reads (in part):

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable and cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

[305] *Criminal Code*, s 830(1).
[306] When the appeal is undertaken under s. 830, the powers of the appeal court are listed under s. 834.

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or

(d) may set aside a conviction and find the appellant unfit to stand trial
or not criminally responsible on account of mental disorder and may
exercise any of the powers of the trial court conferred by or referred
to in section 672.45 in any manner deemed appropriate to the court
of appeal in the circumstances.

(2) Where a court a appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial.

(3) Where the court of appeal dismisses an appeal under
subparagraph (1)(b)(i), it may substitute the verdict that in its opinion
should have been found and

(a) affirm the sentence passed by the trial court; or

> (b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
>
> (4) Where an appeal is from an acquittal, the court of appeal may
>
> (a) dismiss the appeal; or
>
> (b) allow the appeal, set aside the verdict and
>
> (i) order a new trial, or
>
> > (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
>
> ...
>
> (6) Where a court of appeal allows an appeal against a verdict that the accused is unfit to stand trial, it shall, subject to subsection (7), order a new trial.
>
> (7) Where the verdict that the accused is unfit to stand trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of the opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

Thus, if an accused is appealing a conviction after having been found fit to stand trial, the court of appeal has jurisdiction to acquit the accused or order a new trial and direct that the fitness issue be revisited.

If the accused or the Crown is appealing from a verdict of unfit to stand trial, the court of appeal has jurisdiction to allow the appeal and order a new trial. If the unfit to stand trial verdict was arrived at following the close of the prosecution's case, and the court of appeal is of the opinion that the accused should have been acquitted, the court of appeal may acquit the accused.

4. Appeals to the Supreme Court of Canada

Section 692 of the *Criminal Code* sets out the rights of appeal to the Supreme Court of Canada for accused persons who have been found unfit to stand trial or not criminally responsible on account of a mental disorder. This section applies only in cases where an accused has been found unfit to stand trial and that finding has been affirmed by the court of appeal.[307] If so, the accused may appeal, as a right, to the Supreme Court: (a) on any question of law, if the Supreme Court has granted leave to appeal, or (b) on any question of law on which a judge of the court of appeal dissents.[308] There is no right of appeal under s. 692 in cases where the court of appeal set aside the verdict of unfit to stand trial and ordered a new trial.

Where a court of appeal sets aside a conviction pursuant to an appeal under s. 675, or dismisses an appeal under subsection 676(1) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada on any question of law on which a judge of the court of appeal dissents or, if the Supreme Court grants leave to appeal, on any question of law.[309]

VII. Ethical Issues

The ethical issues that arise when counsel is concerned their client is unfit to stand trial are similar to those that arise when counsel deals with a client's incompetence before trial. Capacity issues have been discussed at length in Chapter Three, Solicitor and Client Issues. However, there are some specific concerns that arise in the context of fitness to stand trial.

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[307] *Criminal Code*, s 692(2). See *R v Puskas*; *R v Chatwell*, [1998] 1 SCR 1207 (SCC) (regarding an accused's rights to appeal).
[308] *Criminal Code*, s 692(3).
[309] *Criminal Code*, s 694.

For example, an ethical dilemma arises when a lawyer must decide whether to raise the issue of fitness in cases where their client has denied having a mental disability and instructed them not to do so. However, the very nature of a fitness inquiry would seem to preclude the concern that the lawyer must follow their client's instructions.[310] Indeed, by not raising the fitness issue when it appears relevant, the lawyer may be found to be incompetent or unprofessional.

In *R v Brigham*, the Quebec Court of Appeal quashed a jury conviction and ordered a new trial for a person accused of murder on the grounds that he had been deprived of his right to effective counsel. [311] The court provided two reasons for finding that Brigham had been deprived of this right: his counsel had either failed to protect his client's right to be present, in fact and in law, or his right to be called as a witness.[312]

The lawyer who had represented Brigham at trial, Kastner, deposed that Brigham had not testified in his defence for several reasons. First, his counsel from a previous trial had advised that Brigham should not testify. Second, forensic psychiatrists who examined Brigham before trial found him to be suffering from delusional psychosis and, although he was fit to stand trial, his condition was fragile. Third, Kastner deposed that Brigham's mental condition deteriorated during the trial to the point that he could not distinguish between fact and fantasy. Fourth, a psychiatrist advised that Brigham should not testify. Fifth, Brigham made a statement to Kastner that may have indicated guilt and that contradicted previous statements. Sixth, Brigham had addressed the jury and the court at the end of the Crown's case. Finally, Kastner felt that there was a good chance that Brigham would be acquitted and thought it was not in the accused's best interest to testify.

In quashing Brigham's conviction and ordering a new trial, the Quebec Court of Appeal held that counsel had either failed to protect Brigham's right to be present in fact or in law or to be called as a witness. If Brigham was convicted while unfit to stand

[310] A. Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality" (1982) 27 McGill Law Journal 196 at 232 (hereinafter Manson).
[311] *R v Brigham* (1992), 79 CCC (3d) 365 (Que CA)(hereinafter Brigham) (this was an appeal from the second trial on the matter as the first conviction had been quashed for irregularities in jury selection and for misdirection as to the elements of first degree murder). See also *R v Smith* (1997), 37 OR (3d) 39 (Ont CA).
[312] The issue of Brigham's right to testify is discussed in Chapter Three: Solicitor and Client issues.

trial, he was in effect not present at his trial. If he was fit but not called, he was deprived of his right to testify. This was not, however, an appropriate case for the court to find that the accused was unfit and set aside the conviction on that basis. A full hearing was required in order to determine the fitness issue.

The Quebec Court of Appeal also discussed the issue of effective representation. The court cited *R v Garofoli*[313] and *R v Silvini*[314] for the proposition that, in Canada, there is a right to the assistance of effective counsel. Further, the court noted that in *R v Kelly* the Ontario Court of Appeal held that the incompetence of trial counsel can afford a ground of appeal. [315] In order to successfully show incompetence, the accused must demonstrate: (1) that counsel's performance was so deficient as to be properly characterized as incompetent, and (2) a reasonable probability that, but for the unprofessional errors of counsel, the result at trial may have been different.[316] Further, the Quebec Court of Appeal held that it was not necessary in this case to choose between standards set in previous cases (e.g., "flagrantly incompetent" and "unprofessional") in order to characterize counsel's overall performance. Rather, it was sufficient that the accused succeeded in raising serious concerns regarding the inexperience and inability of his counsel. Although the court looked at the broad issue of effective representation, the court concluded that the appeal should succeed on the narrower grounds of failure to call the accused to testify and failure to disclose that the accused had become delusional.

Despite this mandate to disclose to the court that the accused is not fit to stand trial, lawyers have an obligation to their clients to take great care in deciding whether or not to raise the fitness issue. Laywers may be uncomfortable relying upon their own conclusion that their clients are not fit to stand trial. Even if a lawyer solicits the assistance of a psychiatrist to help determine if their judgment is accurate, the lawyer may still be unsure whether to raise the fitness issue. Manson suggests that defence

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[313] *R v Garofoli* (1988), 41 CCC (3d) 97 (Ont CA), appeal allowed, new trial ordered (1990), 80 CR (3d) 317 (SCC).
[314] *R v Silvini* (1991), 68 CCC (3d) 251 (Ont CA).
[315] *R v Kelly* (1992), 52 OAC 241 (Ont CA).
[316] *R v Collier* (1992), 77 CCC (3d) 570 (Ont CA).

counsel must balance the psychiatric opinion with their own perception of the client's ability to understand the nature of the allegations and the criminal process, to appreciate the potential consequences, to communicate with counsel and to assist generally in the conduct of the defence.[317] If, after making these considerations, counsel has serious doubts about the client's fitness to stand trial, Manson asserts that counsel must raise the issue, subject to some qualifications.[318]

One qualification stated by Manson is largely of historical interest. Manson was concerned that for minor charges the accused would serve less time incarcerated in prison or jail if found guilty than he would if confined in a mental facility once found unfit to stand trial. In the past, some lawyers may have chosen to avoid raising the issue of fitness because they believed that this was in the client's best interest. Under the previous legislative regime, a lawyer might not have wanted his client to be found unfit to stand trial, because of possible long term confinement in a mental institution or treatment facility. Since then, the Supreme Court of Canada has struck down provisions of the *Criminal Code* relating to permanently unfit accused's and has given Canada's new minority Parliament one year to rewrite the law. After the decision in *Demers*, recent amendments to the *Criminal Code* allow courts, under section 672.54, to absolutely discharge a permanently unfit accused, and should also allow courts or Review Boards to order psychiatric evaluations if no current evaluations are available to them. Now that courts have the power to do this, fewer situations are likely to arise in which counsel elects not to raise the issue of fitness and therefore be faced with the ethical dilemma of proceeding to trial with a client who is not able to instruct him properly. Manson also suggests that where lesser offences are involved, counsel may be well advised to approach the police or the Crown to address the possibility of diversion. The lawyer has a reasonable chance of negotiating diversion only if the accused is willing to attend treatment facilities in the community.[319]

There are other factors that might influence counsel to raise the issue of fitness

[317] Manson, at 232.
[318] Manson, at 232.
[319] Manson, at 234.

and thereby request an assessment order even though he might not otherwise do so. If the client's mental capacity is a viable issue and the client is not eligible for judicial interim release (bail), asking for an assessment order to be performed in a mental facility may offer an attractive alternative to jail.[320] Second, the client's family may request that the accused be treated in a hospital. An assessment may be a useful vehicle for the basis for eventual civil commitment.[321] Further, asking for an assessment may force the Crown to be more amenable to a plea bargain if it sees that the accused may have a mental illness, leading to a possible lengthy mental disorder (section 16) trial.[322]

On the other hand, counsel may avoid raising the issue of unfitness for several reasons not related to the client's mental condition. For example, counsel may not want to alert the Crown about a history of mental illness and thereby run the risk that the Crown will raise the issue of mental disorder at trial (at the appropriate time).[323] Further, the lawyer may feel that the Crown's case is so weak that she can win the case without the participation of the client.[324] This latter concern is addressed by the *Criminal Code* fitness provisions that permit postponement of the fitness trial until after the close of the prosecutor's case. Presumably, defence counsel who determines that the Crown has not proved its case could argue at the close of the Crown's case that the Crown has not proved the client's guilt; therefore the accused would be discharged without his counsel entering into the fitness discussion. In *Gray*, Trueman J. noted that an accused whose liberty interests are at stake has a right to have a developmental disability or mental illness and the extent of it placed before the court for consideration.[325] In *R v Creighton*, Trueman J. asserted that information regarding these issues should be presented to the court by the accused's defence lawyer. [326]

Despite tactical considerations, if a lawyer sincerely doubts that her client is fit to stand trial, she may be obligated to the court and to her client to raise the issue. If

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[320] P. A. Chernoff and W. G. Schaffer, "Defending the Mentally Ill: Ethical Quicksand" (1972) *10 Amer Crim Law Rev 505* at 518 (hereinafter Chernoff and Schaffer).
[321] Chernoff and Schaffer, at 518.
[322] Chernoff and Schaffer, at 518.
[323] Chernoff and Schaffer, at 518.
[324] Chernoff and Schaffer, at 518.
[325] *Gray PC*.
[326] *Creighton*.

the lawyer has a reason to believe that the client is not mentally fit, proceeding to trial without canvassing the fitness issue may be dangerously close to behaving unethically. In this situation, if counsel is silent when a plea of not guilty is entered, if she requests a jury trial (where an election is available) or if she states that her client does not wish to testify, the lawyer was implicitly representing to the court that the client wished to proceed in this manner.[327] An incompetent client could not knowingly or voluntarily make these decisions.

The fitness provisions in the *Criminal Code* assist the lawyer greatly in several ethical dilemmas. Because there are limits on the length of time that a person may be subject to an assessment order and because there is a presumption against custody during assessments, some of the more severe implications of raising the fitness issue are now eradicated. Counsel may now raise the issue of fitness more comfortably, knowing that the accused will not be indefinitely confined without ever having a trial on the merits of his case. Further, the accused may be assessed in a relatively short length of time, thereby removing the concern that a fitness assessment and the resultant indefinite confinement may last longer than the sentence that the accused would have received had he been found guilty.

VIII. Conclusion

The issue of fitness to stand trial is important to mentally disabled persons. The inability to communicate with counsel, or to conduct a defence, can have serious consequences. Lawyers and clients are faced with several difficult and crucial decisions when it appears that fitness may be a concern. They must weigh the consequences of being found unfit to stand trial, possibly resulting in custody in a mental health facility, with the consequences of facing a criminal trial. Further, persons who are found unfit to stand trial may face unwanted treatment in order to render them fit to stand trial.

Lawyers with clients who may be unfit to stand trial also face ethical and legal

[327] Chernoff and Schaffer, at 521.

obligations that may not compliment what they feel is in their client's best interest. The lawyer may consider it tactically inadvisable to raise the issue of fitness. Yet, if the client appears to be unfit to stand trial, the lawyer may be obligated to raise the issue. Unfortunately, mental disorders are not static, and clients may become unfit during a lengthy trial. This places lawyers in a difficult position. Sometimes it is challenging for a lawyer to determine whether the client has indeed become unfit, particularly in cases where psychiatric experts have previously determined the client is fit to stand trial. Although these difficulties are not easily resolved, the *Criminal Code* provisions dealing with the issue of fitness should be of assistance, as counsel may now raise the issue of fitness knowing that an accused will not be indefinitely confined without the chance to a trial on the merits of their case.

Appendix

Forms

The following forms pertaining to fitness and assessments are contained in the *Criminal Code.*

FORM 48

Assessment Order

(Section 672.13)

Canada,
Province Of
(Territorial division)

Whereas, I have reasonable grounds to believe that evidence of the mental condition of (name of accused), who has been charged with .....may be necessary to determine*

[] whether the accused is unfit to stand trial

[] whether the accused suffered from a mental disorder so as to exempt the accused from criminal responsibility by virtue of subsection 16(1) of the *Criminal Code* at the time of the act or omission charged against the accused

[] whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, if the accused is a female person charged with an offence arising out of the death of her newly-born child

[] if a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, the appropriate disposition to be made in respect of the accused pursuant to section 672.54, 672.58 or 672.64 of the *Criminal Code* or whether the court should, under subsection 672.84(3) of that Act, revoke a finding that the accused is a high-risk accused

[] if a verdict of unfit to stand trial has been rendered in respect of the accused, whether the court should order a stay of proceedings under section 672.851 of the *Criminal* Code

I hereby order an assessment of the mental condition of (*name of accused*) to be conducted by/at (*name of person or service by whom or place where assessment is to be made*) for a period of _____days

This order is to be in force for a total of _____ days, including travelling time, during which time the accused is to remain*

[] in custody at (place where accused is to be detained)

[] out of custody, on the following conditions:

(*set out conditions, if applicable*)

Dated this ..... day of .....A.D.

....., at .....

.....

(*Signature of justice or judge or clerk of the court, as the case may be*)

* Check applicable option.

FORM 48.1

Assessment Order of the Review Board
(Section 672.13)

Canada,
Province Of
(Territorial division)

Whereas, I have reasonable grounds to believe that evidence of the mental condition of (name of accused), who has been charged with .....may be necessary to *

[] if a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, make a disposition under section 672.54 of the *Criminal Code* or determine whether the Review Board should, under subsection 672.84 (1) of that Act, refer to the superior court of criminal jurisdiction for a review of the finding that the accused is a high-risk accused
[] if a verdict of unfit to stand trial has been rendered in respect of the accused, determine whether the Review Board should make a recommendation to the court that has jurisdiction in respect of the offence charged against the accused to hold an inquiry to determine whether a stay of proceedings should be ordered in accordance with section 672.851 of the *Criminal Code*

I hereby order an assessment of the mental condition of (*name of accused*) to be conducted by/at (*name of person or service by whom or place where assessment is to be made*) for a period of _____days

This order is to be in force for a total of _____ days, including travelling time, during which time the accused is to remain*

[] in custody at (*place where accused is to be detained*)
[] out of custody, on the following conditions:
(*set out conditions, if applicable*)

Dated this ..... day of .....A.D.
....., at .....

.....
(*Signature of Chairperson of the Review Board*)

*check applicable opinion

FORM 49

WARRANT OF COMMITTAL
DISPOSITION OF DETENTION
(Section 672.57)

Canada,
Province Of
(*Territorial division*)

To the peace officers, in the said (*territorial division*) and to the keeper (administrator, warden) of the (prison, hospital or other appropriate place where the accused is detained).

This warrant is issued for the committal of A.B., of .....(*occupation*), hereinafter called the accused.

Whereas the accused has been charged that (*set out briefly the offence in respect of which the accused was charged*);

And whereas the accused was found*

[] unfit to stand trial

[] not criminally responsible on account of mental disorder

This is, therefore, to command you, in Her Majesty's name, to take the accused in custody and convey the accused safely to the (*prison, hospital or other appropriate place*) at ..... and there deliver the accused to the keeper (*administrator, warden*) with the following precept:

I therefore command you the said keeper (*administrator, warden*) to receive the accused in your custody in the said (*prison, hospital or other appropriate place*) and to keep the accused safely there until the accused is delivered by due course of law.

The following are the conditions to which the accused shall be subject while in your (*prison, hospital or other appropriate place*):

The following are the powers regarding the restrictions *(and the limits and conditions on these restrictions)* on the liberty of the accused that are hereby delegated to you the said keeper (*administrator, warden*) of the said (*prison, hospital or other appropriate place*):

Dated this ..... day of .....A.D. ....., at .....

.....
(Signature of judge, clerk of the court, provincial court judge or chairperson of the Review Board)

*Check applicable option.

FORM 50

WARRANT OF COMMITTAL
PLACEMENT DECISION
(Section 672.7(2))

Canada,
Province Of
(*territorial division*)

To the peace officers, in the said (*territorial division*) and to the keeper *(administrator, warden*) of the (*prison, hospital or other appropriate place where the accused is detained)*.

This warrant is issued for the committal of A.B., of .....(*occupation*), hereinafter called the accused.

Whereas the accused has been charged that (*set out briefly the offence in respect of which the accused was charged)*;

And whereas the accused was found*
[] unfit to stand trial
[] not criminally responsible on account of mental disorder

And whereas the Review Board has held a hearing and decided that the accused shall be detained in custody;

And whereas the accused is required to be detained in custody pursuant to a warrant of committal issued by (*set out name of the Judge, Clerk of the Court, Provincial Court Judge or Justice as well as the name of the court and territorial division*), dated the ..... day of .....in respect of the offence that (*set out briefly the offence in respect of which the accused was charged or convicted*);

This is, therefore to command you, in Her Majesty's name, to*

[] execute the warrant of committal issued by the court, according to its terms
[] execute the warrant of committal issued herewith by the Review Board

Dated this ..... day of .....A.D.
....., at .....

.....
(Signature of chairperson of the Review Board)

*Check the applicable option.

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