Indexed as:

LaFortune [LaFortunate] (Re)

IN THE MATTER OF part XX.1 of the Criminal Code
R.S.C. 1985, c.C.-46, as amended 1991, c.43
AND IN THE MATTER of Corinne Cheryl Lafortune
[Corinna Cheryl LaFortunate]

[1998] B.C.R.B.D. No. 1

British Columbia Review Board
E.A. Tollefson, Alternate Chairperson, G. Laws and
M. Anderson, Members

May 6, 1998.
(56 paras.)

Appearances:

Corine Cheryl Lafortune, accused/patient.
L. Rupert-Bailey, counsel for the accused/patient.
J. Ratel, for the Attorney General.
C. Mills, for the Director, Adult Forensic Psychiatric Community Services.

CHAIRPERSON:--

CASE NOTE

1. Facts

¶ 1 The Provincial Court of British Columbia found the accused unfit to stand trial on account of mental disorder and deferred to the B.C. Review Board the responsibility of holding a hearing. The accused suffered from a mild mental handicap which placed her as either mildly mentally retarded (I.Q. 61) or having "borderline" intelligence (I.Q 72). As well, she had a major behavioral syndrome marked by impulsivity, aggression and destructiveness. The accused was charged with committing assault contrary to s. 266 of the Criminal Code.

2. Issue

¶ 2 This case applies the "capacity" test for determining fitness to stand trial, and considers what degree of impairment arising from mental retardation would render an accused unfit.

3. Reasoning

¶ 3 After noting that the accused must fit within the statutory definition set out in the Criminal Code to be considered unfit to stand trial, the panel applied the "limited cognitive capacity" test. As stated by this panel, this is a twofold test: (1) is the excused able, after being furnished with an explanation, to understand the nature, object and possible consequences of the proceedings, and (2) is the accused able (although perhaps unwilling) to communicate with counsel. The panel noted that this test was set out in R. v. Taylor (1992), 1992 72 C.C.C. (3d) 551 (BCCA), and quoted with approval a statement of the court warning against setting too high a standard for determining fitness to stand trial.

¶ 4 In this case, the accused had a general idea of the nature and object of the proceedings, such as knowing she could go to jail or be placed on probation. As well, the accused was able to identify the participants in a trial (such as the judge and her lawyers), although she was less clear on their functions. This understanding was sufficient to meet the fitness standard.

¶ 5 Furthermore, even if the accused did not currently have the necessary knowledge, the panel believed that if properly coached, the accused would be able to understand the functions of the court. The panel came to this conclusion based on the accused's I.Q., and the ability of the accused to answer some of the questions of the panel. The panel noted that as the accused had never been to school, and did not read much, she may not have had the occasion to learn how the court functions.

¶ 6 Turning to the second part of the test, the panel noted that the accused was able to communicate with counsel. Although communicating with the accused could be frustrating, and the accused would sometimes refuse to talk to counsel, the panel noted that counsel does not have to be satisfied with the degree of communications for the accused to be found fit. The accused was able, after some initial difficulties, to recall some of the circumstances surrounding each of the offences. Given that this was a relatively straightforward case, with independent witnesses, the panel found that this degree of recollection enabled the accused to participate in the proceedings. As well, the inability of the accused to recall enough of the index offences to help her counsel in preparing the defence, although relevant, would not of itself render the accused unfit. Such a finding would mean that otherwise competent individuals would be found unfit, and would always be subject to the jurisdiction of the Review Board.

REASONS FOR DECISION ON FITNESS TO STAND TRIAL

Background

¶ 7 The three alleged offences with which Corinne Cheryl LaFortune ("the accused") is charged are all assaults contrary to s. 266 of the Criminal Code, which occurred April 18, 1997 at or near Saanich, and August 31 and September 2, 1997 at or near Victoria. The complainants in the first two cases were

her caregivers, and in the September incident the complainant was a security officer for the Royal Jubilee Hospital.

¶ 8 On March 26, 1998, the Honourable Judge Filmer of the Provincial Court of British Columbia at Victoria, found the accused to be unfit to stand trial on account of mental disorder and deferred to the British Columbia Review Board (the "Review Board") the responsibility to hold a hearing and make a disposition within 45 days.

¶ 9 On May 6, 1998, a panel of the Review Board, composed of E.A. Tollefson, Q.C. (Alternate Chairperson), Dr. G. Laws (Psychiatrist) and M. Anderson (Social Worker) held a hearing in the presence of the accused; L. Rupert-Bailey, counsel for the accused; J. Ratel, counsel for the Attorney General of British Columbia; and C. Mills, a representative of the Director, Adult Forensic Psychiatric Community Services. After hearing and considering all the evidence and submissions, the Review Board members were unanimously of the opinion that the accused was fit to stand trial and, pursuant to s. 672.48(2) of the Criminal Code, ordered that the accused be returned to court for trial of the issue of fitness, and that pending the return of the accused to the court she abide by the terms and conditions of any applicable court orders.

Evidence received and considered by the Review Board at the fitness hearing

¶ 10 No evidence of recent psychiatric assessments of the accused's fitness to stand trial was available to the Review Board, but given the static nature of her mental condition, the Board took into consideration reports of three psychiatric assessments conducted since August, 1996, and a report of psychological testing conducted in October, 1997. These reports provide invaluable background information about Ms. LaFortune's mental condition.

Dr. Lohrasbe's Assessment

¶ 11 In a letter of August 29, 1996 (exhibit 1) to the Presiding Judge of the Provincial Court of British Columbia in Victoria, Dr. S. Lohrasbe, Psychiatrist, Adult Forensic Psychiatric Community Services, Victoria, inter alia set out his assessment of Ms. LaFortune's fitness to stand trial. He said that as an infant she apparently was accidentally poisoned when she ate mushrooms, and this led to delays in her development, seizures and a mild mental handicap. There was also "a major behavioral syndrome marked by impulsivity, aggression and destructiveness." She has never lived alone, always being in the care of an institution or individual. Dr. Lohrasbe said that she "has never been viewed as psychotic and her ability to comprehend objective reality has never been viewed as impaired."

¶ 12 Reporting on his interview with her, Dr. Lohrasbe said:

> Ms. LaFortune did not recall me from our interview four years ago. She was initially nervous but quite pleasant. She was cooperative, and attempted to answer all questions placed to her. She was fully oriented as to time, place, person and situation. Her use of vocabulary and abstract concepts was limited and in keeping with her tested intelligence which has consistently been within the range of mild mental retardation. Similarly, her level of general knowledge is limited.
> Ms. LaFortune understood the basics of the legal process. She understood what she was charged with and she understood potential consequences for her. She recalled the incident that led to the charges against her and her account contained no unusual or bizarre features. Ms. LaFortune freely admits that she gets frustrated easily and then strikes out, usually at objects and sometimes at people.
> OPINION
>
> 1. Psychiatric Diagnosis: The only relevant psychiatric diagnosis is mild mental retardation. In addition, she carries the diagnosis of epilepsy.
> 2. Fitness for Trial: Although her level of comprehension is limited by her intelligence, she is in my opinion fit for trial.

¶ 13 Dr. Lohrasbe said that her prognosis would appear to be poor. Despite having been cared for by numerous sympathetic individuals and institutions, she had not shown any apparent improvement in her tendency to lash out when her demands were not met. He added:

> She can be irritable, impulsive and aggressive and has a very low frustration tolerance. Unfortunately, what this means is that recurrent bouts of destructive behaviour can be expected on an indefinite basis. There is no reasonable expectation that psychiatric treatment is going to significantly after the prognosis.

Dr. Miller's Assessments

¶ 14 Dr. R.E.W. Miller, Psychiatrist, Adult Forensic Psychiatric Community Services, Victoria, received two court orders for assessment of Ms. LaFortune's mental condition, including fitness to stand trial, the first with respect to the assaults that allegedly occurred August 31 and September 2, 1997 in Victoria, and the second with respect to the alleged Saanich assault of April 18, 1997.

¶ 15 In a letter dated September 19, 1997 (exhibit 11) to the Presiding Judge of the Provincial Court of British Columbia in Victoria, Dr. Miller dealt with the Victoria assaults. He reviewed previous reports and assessments of Ms. LaFortune's mental condition, noting that she had apparently scored 61 on an IQ test, which put her in the "Mild Mental Retardation" category. He quoted Dr. Nathan Ory, Psychologist, as commenting that Ms. LaFortune's strengths lie in "her ability to retain repetitively practiced routines" and "to copy from a direct visual model", with her relatively weakest area of functioning being "her poor ability to attend or to retain verbal information".

¶ 16 From direct examination of Ms. LaFortune Dr. Miller reported that she was, after some cuing,

able to tell him about the circumstances of the two Victoria charges. She could tell him who her lawyer was, that her lawyer already knew what happened (from the police reports), and that her lawyer's job is "to talk about everything". She was also able to recall the presence of the sheriff and the judge ("the man with a different suit'). In reply to a question of what would happen if she pled guilty, she replied "they would talk about me coming here (police cells) or to B.C.C.W."; and when asked what would happen if she pled not guilty, she simply replied, "they wouldn't believe it." Finally, in reply to a question of who would determine whether she was innocent or guilty, she replied, "the judge, the pigs and my lawyer".

¶ 17 Dr. Miller expressed the opinion that though Ms. LaFortune had no psychiatric disorder such as schizophrenia or major depression, she nevertheless had a "mental disorder" as that term is used in the Criminal Code, resulting from brain damage that likely arose from her ingestion of poisonous mushrooms at the age of eleven months. He described her mental disorder in the following way:

> She seems to have developed a seizure disorder that comprises epileptiform seizures and pseudo seizures. Both are associated with neurological impairment. Her personality functioning has been severely effected [sic]... The documentation states that Ms. Lafortune has an IQ of 61 and she is described by Dr. Ory, Psychologist who specializes in mental retardation for Island Mental Health Services as "Mildly Mentally Handicapped".

¶ 18 As to her fitness to stand trial, Dr. Miller wrote:

> Ms. Lafortune does not have a clear understanding of the way a Court room works. I feel confident, however that if a counsel listens patiently that Ms. Lafortune is able to communicate her side of the story. She recognizes that she could be sent to jail as a result of these charges and seems to expect that this will happen. She with minimal cuing was able to remember the two incidents that led to the charges and the details of the charges themselves. I do not think that Ms. Lafortune has the verbal ability to be able to follow proceedings. Ms. Lafortune does not apparently understand the process of a trial or who has the ultimate responsibility for decisions on guilt and sentenced [sic]. Despite these reservations and despite her mental disorder it will be my understanding that Ms. Lafortune would not be defined within the meaning of section 2 of the criminal code as unfit to stand trial.

¶ 19 In his letter of September 22, 1997 (exhibit 12), Dr. Miller considered Ms. LaFortune's fitness to stand trial with respect to the alleged Saanich assault of April 18, 1997. He wrote that he held another interview with her questioning her about her knowledge of the circumstances surrounding that alleged assault and her knowledge of court procedure and outcomes.

¶ 20 Dr. Miller reported that Ms. LaFortune at first said that she did not remember the alleged assault. However, she said that her caregiver [the complainant] had called the police, she had been taken to the police station, and she had complained about the handcuffs being on too tight. She thought the

episode likely took place in the living room, although she did not remember what time of day it was, or what caused it. She said that when she gets angry, she hits people, usually in the face and with her right hand. She told Dr. Miller that she was not sorry for what happened, for the caregiver deserved to be hit.

¶ 21 She knew that she would be returning to court on September 22. She said that she would see her lawyer there and, after some prompting, said she would also see the judge. Dr. Miller reported that in this interview she had more difficulty in giving an explanation of how the court would proceed, but she did say that if would be "bad" if she were found guilty, and if this happened "the people would talk about sending me back here (police cells)."

¶ 22 Dr. Miller noted that Ms. LaFortune had the ability to read and spell some quite large words, such as "Establishment" and "Recipient" and give correct answers to fairly difficult multiplication problems such as 17 x 17 = 289, and expressed the opinion that this was good for a person with an I.Q. of 61.

¶ 23 Dr. Miller concluded that Ms. LaFortune should be regarded as mentally disordered within the meaning of the Criminal Code. On the issue of fitness to stand trial he wrote:

> I have significant doubt that Ms. Lafortune is fit to stand trial on this account when one takes into account the vagueness of her memory and her limited ability to instruct counsel and follow the meaning of proceedings. There is very limited psychological assessment on this file and it may well be worthwhile remanding Ms. Lafortune for an assessment by a qualified neuropsychologist [sic].

Psychological Assessment

¶ 24 In a letter of November 4, 1997 (exhibit 15) to Léandre Rupert-Bailey, Dr. Robert Haymond, Registered Psychologist, wrote that in October, 1997 he had carried out two standard psychological tests on Ms. LaFortune. [It does not appear that this assessment is the one that Dr. Miller had suggested be done (see exhibit 12).]

¶ 25 On the Wechsler Adult Intelligence Scale - Revised (WAIS-R) she achieved a score of 72, placing her in the borderline range of intelligence and the 3rd percentile compared to other adults in her age group. However, Dr. Haymond noted that on two subtests which measure competency in, and understanding of, the social world, her scores were both quite low. He said that "In terms of comprehending how and why the social world functions as it does, her understanding is very concrete and her ability to generalize from one situation to another extremely limited."

¶ 26 On the Wechsler Memory Scale - Revised (WMS-R), she achieved a score of 64 in General Memory, placing her in the 1st percentile compared to the sample population in her age range. Verbal and visual memory scores were balanced. Dr. Haymond noted her memory was far better, relatively speaking, for simple tasks as opposed to complex ones, and that in the Logical Memory section of the

test she showed not only a poor memory but she also confabulated, adding obviously incorrect details.

¶ 27 Her IQ score of 72 (as compared with a previous assessment of 61) is perhaps in part attributable to the tests being conducted under what Dr. Haymond termed "ideal conditions". It would place her in the "borderline' range of intelligence rather than that of "Mild mental retardation". However, Dr. Haymond expressed the opinion that during episodes of irritable behaviour her focus could become very narrow and she would be "quite unable to deal with situations in a rational manner. In such situations her emotional state would tend to limit her memory and cognitive competence considerably." His conclusion on fitness was:

> With regard to fitness to stand trial, the results of memory testing suggest she would possess great difficulty when attempting to recall events which occurred months or even weeks ago, especially if these events were of a complex nature and Ms. LaFortune were required to differentiate between the dynamic circumstances of two or more offences. In short, given Ms. LaFortune's cognitive deficiencies, comprehension of legal matters is apt to be an overwhelming challenge.

¶ 28 It is to be noted that Dr. Haymond apparently did not take into consideration Ms. LaFortune's extraordinary mathematical ability.

Examination of Ms. LaFortune

¶ 29 Review Board member, Dr. G. Laws, Forensic Psychiatrist, conducted the principal examination of Ms. LaFortune by the Panel. The following is a summary of the examination as recorded by the Alternate Chairperson.

¶ 30 During the hearing, Ms. LaFortune had been writing in a very neat script, and Dr. Laws asked what she was writing. She replied that it was a note about the place that she was staying. When asked about her reading ability, she said that she could read regular things but needed large print. She demonstrated by reading the title on a newspaper that was on the table -- the Business Examiner, however, when asked what the word "Examiner" meant, she said that she did not know, and when asked if she knew what "Exam" meant, she said that she did not know what that meant either.

¶ 31 Dr. Laws then said that we had been told that she was good at mathematics, and wondered whether she could tell us what 16 times 16 equalled. Ms. LaFortune thought for three or four seconds and replied "256", which is the right answer. When asked whether she had learned how to solve mathematics problems in school, she said "no", adding that she had always been in special classes. She then described how the problem could be broken down into either 8s or 4s.

¶ 32 Dr. Laws then asked a series of questions to determine the accused's knowledge of the charges, the role of different persons in the court, and procedure before the court:

Q. Do you know why we are here this morning? A. No.

Q. Do you know that you have been charged? A. No. I haven't done anything wrong.
Q. Do you know that the court found you unfit to stand trial? A. I don't remember.
Q. Do you care what happens in court? A. Depends what it is. [She then went into a discourse that she did not want to go back to the Forensic Psychiatric Institute, where "dummy" Dr. MacDonald had not given her enough medication, and she had suffered seizures. She asserted that it was not possible for her to be sent back there, and even when Dr. Laws suggested to her that (even though unlikely) it could happen, she reiterated that it was not possible, for her lawyer had said so.]
Q. You have been in court before, do you remember? A. No, I can't remember. They talked about things that happened a long time ago.
Q. You have a good memory. They say you hit Cheryl. A. That was a long time ago. Last year. I haven't done anything since last Fall.
Q. Do you remember the things you did to people at the Eric Martin Pavilion? A. Those people who make people leave. [She further identified them by saying that they had "uniforms"].
Q. Do you remember being in a car with people? A. Julie wanted me to get out of the car, but I wouldn't.

Q. You hit the guy? A. Yes.

Q. Were you charged with assault? A. That was last year. I have never done anything like that since I last did it.

Q. That would be called "Assault". What might the court do if you were found guilty? What happened the last time?
A. Go to that place. [Someone beside her said that she was referring to jail.]

Q. Might they put you in jail? Do you know what a jail is for? A. They put people in jail when they have done something wrong.

Q. Have you heard of "Probation"? A. Yes.

Q. Have you ever been on probation? A. Yes.

Q. What did you have to do on probation? A. See the Probation Officer . . . to check up on things.

Q. Who makes the decision about whether you are guilty?
A. The dummies.

Q. Would you call him that in court? [in a stage whisper, Gail Mody, her current caregiver, said "Yes". In reply, Ms. LaFortune said to Gail, "You're always interrupting".]
Q. Would you be able to tell if people said something that was wrong? A. Yes.

Q. Who would you tell? A. The police.

Q. Would the judge believe you? A. Don't know, but Cheryl [her former caregiver] would tell them that I don't do that sort of thing.

¶ 33 In reply to questions about the persons in the courtroom, and what their roles are, she said that the judge runs the show and wears "a different suit". She had always had a male judge. Her lawyer talks about things that happen. She referred to another lady in the court, but she did not know whether this other lady was also a lawyer -- she only described her as being "on the other side", leaving it unclear whether this meant the other side of the case, or the other side of the courtroom. When asked if she knew what the Prosecutor, or Crown Counsel, did, she at first said that she did not know, but then added "Someone who says this is what the person did".

¶ 34 Mr. Ratel asked a series of questions:

Q. We have never met. Do you know what I do? A. No.

Q. Do you know what Léander does? A. Yes.

Q. I act for the Crown Prosecutor. Do you know the police are involved? A. Yes. I know what you do. You talk about things that happened.
Q. I tell the judge what the police say happened. A. It takes a long time to get through court. Forever.

Q. Do you know what the judge does at the end of the day?
A. No.

¶ 35 Ms. LaFortune was then questioned by Ms. Rupert-Bailey:

Q. Do you know what "Likely" or "Unlikely" means? A. I don't know.

Q. Have you ever had a trial? A. Don't know.

Q. What is a "Trial"? A. I don't know what it is.

Q. Do you remember what happened in court? A. They talk about things that happened.

Q. Who? A. You, someone else, the Judge. [She went on to say that she remembers being released.]
Q. What does "I represent you" or "I protect your interests" mean? A. I don't know.
Q. What do I do for you? A. Say I'm never going back to dummy Forensic. Write to dummy MacDonald about what they did to me at F.P.I.

Q. What do you mean by "going to check with Probation"?
A. Go to see Les every second week, then every month.

Q. What does "check up" mean? A. He checked up . . . talked to me and Cheryl. Asked how everything was going. Cheryl and I said everything was OK. [She added that they had gone to see him for a year.]
Q. What does an "Undertaking" mean? A. I don't know. [At this point the Alternate Chairperson intervened to ask whether Ms. LaFortune knew what a "Promise" was, and she replied that she did.]
Q. Have you ever been in front of any female judge? A. No, always male.

¶ 36 Ms. Rupert-Bailey then asked Cheryl Gilding, Ms. LaFortune's former caregiver, to comment on her capability. Ms. Gilding said that when Ms. LaFortune does not understand, she just agrees. She never reads a book -- she can read but does not understand. Her attention span is poor. She called the judge a "dummy". She won't talk to Ms. Rupert-Bailey sometimes. She is not able to remember details, but only the high points. She does not understand concepts like "Consequences".

¶ 37 During this part of the hearing, the Alternate Chairperson asked Ms. Rupert-Bailey whether she had given her client any instruction with regard to what the court proceedings were all about, given that people are not born with this knowledge. Ms. Rupert-Bailey replied that she did not "give instruction to", but rather "took instruction from" her client. She was further asked whether she had given Dr. Haymond any guidance with respect to the fitness test as set out by the Ontario Court of Appeal in R. v. Taylor (cited below), and she replied that she had not.

Submissions with respect to fitness to stand trial

¶ 38 Ms. Mills said that the Director of Adult Forensic Psychiatric Community Services took no position on this issue, but left it to the Review Board.

¶ 39 Mr. Ratel said that the Attorney General had concerns about whether she was fit. While she had a rudimentary understanding of the process, and a clear understanding of what she wants, she does not comprehend that consequences may be different.

¶ 40 Ms. Rupert-Bailey submitted that her client did not meet the Taylor test. Although she does understand "arrest", she does not understand that if you break a window you get punished. Her only concern is "Where do I want to be?" Jail as a punishment is not realistic to her. Nobody would call the judge a "dummy", yet she did. She has no idea about the expected decorum in a courtroom. She has a

rigid, compartmentalized way of viewing the world. She does not understand "the nature or object of the proceedings", or the consequences that flow from her actions. She has always pled guilty in the past and has never had a trial. She communicates well on things that interest her, but she has difficulty talking about issues that disturb her.

Considerations and Conclusions regarding the issue of fitness to stand trial

The Applicable Law

¶ 41 The question of whether the accused is fit or unfit to stand trial is to be determined on the basis of the factors set out in the definition of "unfitness to stand trial", which was introduced into s. 2 of the Criminal Code by the 1991 Mental Disorder Amendments. It provides as follows:

> "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.

¶ 42 By using the term "means", the definition limits the categories of situations in which the accused may be found "unfit to stand trial" to those listed therein. In all other cases the accused must be found fit to stand trial. Thus, for example, a person who understands the function of the court, the possible consequences of conviction and can communicate with counsel will not be found unfit to stand trial merely because he/she gives voice to paranoid beliefs impugning the integrity of the court, or displays rude behaviour toward the court. If it feels it to be necessary, the court can deal with such eventualities through exercising its contempt power.

¶ 43 The definition creates a "capacity" test. The accused is to be found fit to stand trial only if he/she, on account of mental disorder, is "unable" to conduct a defence or to instruct counsel to do so, and in particular is "unable" to understand the nature, object or possible consequences of the proceedings (paragraphs (a) and (b)), or to communicate with counsel (paragraph (c)). A finding of unfitness to stand trial cannot be made simply on the basis that the accused does not give good answers to the traditional Civics test regarding his/her knowledge of the personnel and procedure in criminal courts and the type of sentences that may be imposed: inadequate responses may only indicate that the accused has never had occasion to learn about the criminal courts. The inquiry that must be made by the court or review board is not whether the accused has present knowledge of these matters, but whether he/she is able or unable to understand them if furnished with an explanation of what they involve. In this regard, the Review Board believes that it is entirely appropriate for, if not incumbent upon, counsel to instruct his/her client about these matters before the proceedings. Precedent for such action may be found in the practice of instructing a witness with regard to the nature of an oath, under s. 16 of the Canada Evidence Act, where a witness is under the age of fourteen or is a person whose mental capacity is challenged: see

the decision of Dickson J.A., for the majority of the Manitoba Court of Appeal, in R. v. Bannerman (1966), 55 W.W.R. 257, affirmed by the Supreme Court of Canada for the reasons given by the majority of the Court of Appeal, 55 C.R. 76.

¶ 44 Similarly, it is only when the court or review board is satisfied that the accused, on account of mental disorder, is "unable" to communicate with defence counsel that a finding of unfitness to stand trial may be made under paragraph (c) of the definition. Putting this statement of law into a positive form, if the accused has sufficient mental capacity "to be able" to communicate about the case in a meaningful way with counsel, the accused is "fit to stand trial". On this point the leading decision is R. v. Taylor (1992), 72 C.C.C. (3d) 551. In that case, the accused was charged with aggravated assault and possession of a weapon dangerous to the public. He had been found unfit to practise law on account of chronic mental illness, namely paranoid schizophrenia, and had been suspended by the Law Society. There was psychiatric evidence that his paranoia caused him to believe that lawyers and judges were in a conspiracy against him. At the fitness hearing, he repudiated the lawyer appointed by the court, and refused to cooperate with him, saying that he was an incompetent fraud. Contrary to the advice of counsel, he testified at the fitness hearing and stated that he was concerned about the fairness of the upcoming trial. The trial judge found that although he knew the nature of the process and could communicate with counsel, he was unfit to stand trial because his mental disorder was so pervasive that he was "unable to perceive his own best interests and how those interests should be addressed in the conduct of the trial." The accused appealed but refused to accept counsel, so the court appointed an amicus curiae. In its decision the Court of Appeal accepted the argument of the amicus curiae that the trial judge had applied too high a standard of fitness, and that the appropriate test is whether the accused has "a limited cognitive capacity". At p. 564, the Court said that under this test as propounded by the amicus curiae, a court's assessment of an accused's ability to conduct a defence and to communicate with and instruct counsel

> is limited to an inquiry into whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not relevant to the fitness determination to consider 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 his/her best interests.

¶ 45 At pp. 566-67, the Court further elaborated on the limited cognitive capacity test, saying that one must remain cognizant of the rational for the fitness rules in the firs place:

> In order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way. At the same time, one must consider that principles of fundamental justice require that a trial come to a final determination without undue delay. The adoption of too high a threshold for fitness will result in an increased number of cases in which the accused will be found unfit to stand trial even though the accused is capable of understanding the process and anxious for it to come to completion.

¶ 46 The "limited cognitive capacity" test as set out in R. v. Taylor was specifically approved by the Supreme Court of Canada in R. v. Whittle (1994), 32 C.R. (4th) 1, at pp.15-16.

¶ 47 In light of the above, is Ms. LaFortune unable, on account of mental disorder, to understand the nature, object and potential consequences of a criminal trial? The Review Board found that she cold identify the principal actors at the court: the judge (the man in a different suit), her lawyer, and another woman (at the court fitness hearing, the Crown Counsel was a woman). She was not quite so clear as to their respective functions, but she did know that the judge "runs the show" and her lawyer talked about things. She also knew the principal risks a trial might have for her -- jail (which she at first referred to simply as "that place") or probation, and as far as the latter was concerned her replies to her own counsel's questions revealed a reasonable knowledge of what was involved in reporting to a probation officer. She also appeared to associate being sent to the Forensic Psychiatric Institute (which she referred to as "dummy Forensic") as a consequence of court proceedings, although she was adamant that she would not be sent there this time. While some of her answers to her counsel were of the "I don't know" variety, generally these answers related to questions asking for the meaning of legal terms, such as "trial", "I represent you" and "undertaking". Ms. Rupert-Bailey did not attempt to simplify the questions by using less technical terms, such as "promise", which her client did understand. It is perhaps not surprising that Ms. LaFortune does not know the meaning of these words inasmuch as she has not attended the regular school system, does not read much, and apparently has never been at an actual trial or had the nature of the trial process explained to her. The Review Board is satisfied that Ms. LaFortune meets the "limited cognitive capacity" test in that she has a general idea of the nature and object of the proceedings, and of the consequences of being found guilty. Moreover, in the light of her IQ of 72 and her responses to Dr. Laws' questions, the Review Board is of the opinion that, Ms. LaFortune has the capacity to increase her understanding of these matters if properly coached.

¶ 48 The second inquiry that must be made is about the capacity of accused to communicate with her counsel as required by paragraph (c) of the definition of "unfitness to stand trial". Ms. Rupert-Bailey told the hearing that she found questioning her client to be a very frustrating experience, and Ms. Gilding gave evidence that Ms. LaFortune sometimes would not speak to her lawyer. Once again, we must remind ourselves that the issue is not how satisfied counsel is with the degree of communication that has existed heretofore with her client, but whether her client is "unable on account of mental disorder to communicate with counsel."

¶ 49 The Review Board finds as a fact that although occasional frustrations may exist in the relationship between Ms. Rupert-Bailey and her client, their relationship is much more congenial than that in R. v. Taylor; yet the Court of Appeal found that Taylor was mentally capable of communicating with counsel.

¶ 50 Does Ms. LaFortune's memory render her "unable on account of mental disorder to communicate with counsel?" Dr. R. Miller thought that she was fit to stand trial with respect to the latter two offences (which had occurred only a few weeks before he wrote his letter of September 19, 1997 (exhibit 11)), but in his letter of September 22, 1997 he expressed doubt as to her fitness to stand trial with respect to the April offence because of "the vagueness of her memory and her limited ability to instruct counsel and follow the meaning of proceedings" (exhibit 12). Dr. Haymond, in his report of November 4, 1997 (exhibit 15), opined that she would find great difficulty in remembering events that happened many months ago, particularly if they were of a complex nature.

¶ 51 The Review Board is satisfied that on the day of the hearing Ms. LaFortune met the requirements of the Limited Cognitive Capacity test. Her first answers to Dr. Laws were that she did not know or could not remember, but as the conversation between them went on, with questions being asked in different ways, she revealed more and more about the circumstances surrounding the three alleged offences. Even though she did not appear to know the name of the offence she was charged with in each of the three cases (Assault), she knew it was for hitting people. She knew that one of the cases involved an attack a year ago on her caregiver, Cheryl; a second case involved her hitting somebody when "Julie" wanted her to get out of a car; and the third occasion involved people in uniform ("those people that make you leave") at Eric Martin Pavilion. The fact that she was able to provide this information with a little encouragement and prompting tends to indicate that the initial denial of any recollection had nothing to do with her cognitive capacity but rather her volition -- like many witnesses she prefers not to recount certain things that she has done in the past. However, willful failure to answer such questions is not within the definition of "unfitness to stand trial", for the failure is caused neither by an incapacity to communicate, nor by mental disorder. The Review Board, of course, does not know whether the responses given were either truthful or accurate, but they were coherent and rational, and seemed to be consistent with her responses to Dr. Miller in September, 1997 (exhibits 11 and 12) and were not inconsistent with information contained in the police occurrence reports to Crown Counsel.

¶ 52 Dr. Haymond expressed the opinion that she would have particular difficulty in remembering "complex" events that happened many months ago". Certainly, in determining whether the accused is able "to participate in the proceedings in a meaningful way" (to quote the words used by the Court in R. v. Taylor), the Review Board has to take into account the complexity of the case, and the other sources of information available to the defence counsel. In the three index offences, the facts appear to be relatively simple, and in each of the latter two cases there was an independent witness.

¶ 53 Even if it were concluded that Ms. LaFortune's memory is vague to the point of rendering her unhelpful to her counsel in the preparation of a defence, the law appears that this by itself would not be a

sufficient reason for finding her unfit to stand trial. As a result of some cause other than a mental disorder, many people have no memory of what transpired in a particular time frame, but this lack of memory does not preclude the holding of a trial. In R. v. Boylen (1972), 18 C.R.N.S. 273 (N.S. Magistrates Court), the accused claimed that a prosecution should not proceed because, due to a concussion he had lost his memory, and he therefore could not make full answer and defence, and as a result would be denied the right to a fair hearing guaranteed under s. 2(c) of the Canadian Bill of Rights. Magistrate Kimball rejected the claim, saying (at p. 278):

> The inability of an accused, who is otherwise normal, to recall events and to not be able to instruct counsel as is normally done, in my opinion, does not deny him the right to a fair hearing. It does not deny him the opportunity to exercise his right to examine and cross-examine witnesses or testify himself if he wishes to do so. If it were otherwise loss of memory could become a very easy refuge for those persons who were otherwise fully responsible for the consequences of their acts. The fact that a person does not remember certain events does not mean he was not fully responsible for those events when they occurred and, in the absence of the defence of insanity, in my opinion, he should not be excused from that responsibility.

¶ 54 Even though R. v. Boylen was not a mental disorder case, there are good reasons for following it in cases such as the present. If the rule were that "unfitness to stand trial" was established upon proof of the accused having no memory of the alleged crime or its surrounding circumstances on account of mental disorder, it would mean that mentally disordered accused persons would have to be found unfit to stand trial even though in every other respect they were capable and anxious to proceed. This is an example of what the Court of Appeal in R. v. Taylor meant when it warned about the danger of setting the threshold of fitness too high (see supra). Moreover, where, as in Ms. LaFortune's case, the professional evidence is that memory will only worsen with the passage of time, the finding of unfitness would almost certainly continue to apply; and, barring a stay of proceedings or a finding that the Crown no longer had a prima facie case, the accused would be subject to an order of the Review Board for the rest of his/her life, even if he/she was not a significant threat to the safety of the public and did not require psychiatric supervision. This would amount to imposing a life sentence of probation without the benefit of trial.

¶ 55 The conclusion reached by the Review Board is that although a lack of memory relevant to the alleged crime may be considered in determining whether an accused is unable on account of mental disorder to instruct counsel, it is not conclusive of the issue. The Board is satisfied that Ms. LaFortune is capable of communicating with her counsel and any lack of memory she displays will not prevent her counsel from presenting a defence.

¶ 56 Having found the accused, Corinne Cheryl LaFortune, to be fit to stand trial, the Review Board therefore orders, pursuant to s. 672.48(2), that she be returned to the court for trial of the issue of fitness.

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