REASONS FOR DISPOSITION

ARISTIDES MONTEIRO

1. Aristides Monteiro ("the Accused") appeared in person before a panel of the British Columbia Review Board (the "Board") on September 16, 1997 and by telephone on September 22, 1997 having previously been charged with sexual touching and having been found unfit to stand trial and discharged conditionally. The hearing was convened to review the finding of unfitness and the disposition order.

2. The panel included Gail M. Dickson, alternate chairperson, Dr. Anthony Marcus, and Frank Falzon. The Accused was present at the hearing on September 16, 1997 with a family member, but without counsel. The family member present, Maria Suuronen, was the Accused's legal committee. Also present were Mr. Brad Tomlin, counsel for the Attorney General of British Columbia, and Ms. Fatima Reynolds, a mental health nurse in the Kitimat Mental Health Centre. Mr. Catalan, of the Outpatient Forensic Psychiatric Service joined the hearing by telephone. During the second portion of the hearing, which was conducted by telephone on September 22, 1997, the Accused was represented by counsel, Mr. Grant Lindsey.

3. The hearing proceeded in an unusual fashion. The Board began the hearing on September 16 by advising Ms. Suuronen and the Accused that counsel could be appointed to represent him without cost and the hearing could be adjourned for this purpose. Both the Accused and Ms. Suuronen expressed a desire that counsel should not be appointed and that the hearing should proceed. The Crown took the position that it was open to the Accused to choose not to have counsel present, but made it clear that no objection would be taken to an adjournment for the purpose of appointing counsel. For a time the hearing did proceed in the absence of counsel, evidence was heard, and a

preliminary view was reached on the issue of fitness; however, it was decided that the matter should be adjourned for the Accused to retain counsel and for the issues of fitness to stand trial and disposition to be revisited following that retainer. This took place, and the hearing concluded by telephone on September 22, 1997.

4. The disposition information was marked as exhibits without objection. In summary, the disposition information revealed that the Accused suffered an intra-cranial hemorrhage in 1990 and, as a result, suffers cognitive deficits affecting short term memory, concentration, attention, and judgment. He receives medication in connection with these problems and is compliant. His medications are monitored by family members. The Accused lives with his elderly parents in Kitimat, B.C., has significant family support and the assistance of a home support worker, attends regular socialization groups, and has not had trouble over the past year with any acting-out behaviour. He is described by his treatment team as cooperative, pleasant, compliant, and generally happy.

5. The medical evidence before the Board on the question of fitness to stand trial was relatively brief. In a letter dated August 27, 1997 the Accused's physician, Dr. Cooper, expressed the following opinion on the issue:

> "Mr. Monteiro's medical condition has not changed from previous statements from myself and other physicians, in that he remains with significant and sever cognitive deficit, which has a major impact on his short term memory. This is in relationship to a severe brain injury secondary to an intracranial hemorrhage, which he sustained in 1989.
>
> Thus, in my opinion, Mr. Monteiro remains unfit to stand trial due to these persistent and chronic cognitive deficits."

6. The Accused answered a number of questions put to him by members of the Board and counsel for the Crown. In the course of this questioning the Accused demonstrated a basic understanding of the roles of trial participants and a general sense of

the possible outcomes of a trial. He appeared to have some memory of the events at issue in connection with the charge outstanding against him and indicated, in a very simple way, that he hoped he would be able to tell his lawyer his version of those events. At the conclusion of this questioning the Crown expressed the view that the Accused "sounds fit to me"; Mr. Catalan, on behalf of the treatment team, took the position that the Accused was unfit to stand trial as he was unable to "internalize" court procedures, understand what goes on in court, and direct counsel.

7. As noted above, it was decided that the matter should be adjourned so that counsel for the Accused could be appointed. Mr. Lindsey, the Accused's counsel, attended the September 16 hearing briefly and was specifically asked by the Board to assess whether he could take instructions and lead a proper defence based on his discussions with the Accused.

8. The hearing resumed by telephone on September 22, 1997. At that time, Mr. Lindsey advised the Board that, in his opinion as counsel, he could not properly take instructions from the Accused for the purpose of defending him. He focused on the evidence regarding the Accused's impaired cognitive capacities and asked the Board to find the Accused unfit to stand trial.

9. Pursuant to section 2 of the **Criminal Code of Canada** an Accused is unfit to stand trial if, on account of mental disorder, he is unable to conduct a defence or to instruct counsel to do so. After careful consideration, and taking into account all of the evidence and submissions of counsel, a majority of the Board concluded that the Accused remained unfit to stand trial. In coming to this conclusion the Board took into account the limited cognitive capacity test outlined in the decision of *R. v. Taylor* (1992), 77 C.C.C. (3d) 551. In addition, and significantly, the Board considered the fact that a

statement by counsel as to the fitness of the Accused is entitled to very serious consideration (see *R. v. Steele* (1991), 63 C.C.C. (3d) 149).

10. In the Board's opinion although the Accused demonstrated a sufficient level of understanding of the nature and object of the proceedings and their possible consequences, as a result of his mental disorder he remains unable to recount to counsel the necessary facts relating to the offence in such a way that counsel could properly present a defence. The Board's opinion in this regard was based on the combined effect of all of the evidence including the testimony of the Accused, the medical opinion of Dr. Cooper, and, importantly, the statement of his counsel, Mr. Lindsey.

11. The issue of disposition was not controversial. The Accused had been living in the community safely, with appropriate supports and medications. Pursuant to Section 672.54 of the Criminal Code of Canada, the Board is required to make the least onerous and least restrictive disposition available to the Accused, bearing in mind the need to protect the public from dangerous persons, the mental condition of the Accused, the reintegration of the Accused into society, and the other needs of the Accused. These factors were all taken into account by the Board in the course of its deliberations on disposition. As this was a fitness hearing the only disposition options available to the Board were a custody order or a conditional discharge. Taking into account all of the evidence, the Board concluded that the existing conditional discharge order should be continued.

DISSENTING REASONS

ARISTIDES PACHACO MONTEIRO

I. Introduction

These reasons outline the basis for my respectful dissent from the decision of my colleagues concluding that the accused, Aristides Monteiro, was unfit to stand trial on charges of sexual touching of his 12 year old niece, which charge was laid in February, 1995.

At the outset, I wish to candidly acknowledge the lengthy delay in my provision of these dissenting reasons. Regrettably, the majority reasons only came to my attention in late December, 1998, after what I understand to be a subsequent fitness review by the Board in this case. I have not seen that later Panel's reasons. I have however, a clear record of the hearing and careful notes of the reasons for my dissent, which I will attempt to set out below.

The background to the September, 1997 decision is ably set out in the majority's reasons, which I need not repeat here.

II. The law

The Board's legal mandate in this matter is prescribed in s. 672.48(1) of the *Criminal Code*:

> 672.48(1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.
>
> (2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.

"Unfit to stand trial" is defined in s. 2 of the *Criminal Code*:

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

In the jurisprudence on this subject, the case of *R. v. Taylor* (1992), 11 O.R. (3d) 323 (C.A.) is oft-cited as the leading authority, and rightly so. The fundamental strength of that case lies in the court's appreciation that the language chosen by Parliament to express the fitness test can only properly be understood in light of the fundamental purpose of the test in the criminal law. At its root, the fitness test is a form of capacity test. While there are capacity tests in many areas of law - each reflecting their own standards evolved to meet the contexts in which they have arisen (see *Wirtanen v. British Columbia*, [1994] B.C.J. No. 2439 (S.C.) at para. 20) - the fitness test in the criminal law is part of a larger, more fundamental notion that it is unjust to subject a person to the criminal process where that person, on account of mental disorder, is incapable of any baseline understanding what regarding the proceedings are about, how the proceedings might affect them and is incapable of communicating with their counsel about their defence: see generally *R. v. Whittle*, [1994] 2 S.C.R. 914.

Where such baseline capability does exist, however, other interests prevail. One such interest is the accused's own right to have a timely, and final, disposition of the charges against him (whether that disposition be "guilty", "not guilty" or "NCRMD"). The spectre of being subject to mandatory *Criminal Code* orders for lengthy periods while criminal charges remain untried is highly undesirable: *R. v Taylor, supra*. As noted by this Board in *Re C.C.L.* (reasons in support of May 6, 1988 Disposition) at p. 12:

> "'[B]arring 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.

The other significant interest is that of society in general, and victims in particular, in the detection and prosecution of crime. This interest, an essential element of a reputable justice system, can be seriously compromised whenever the justice system is precluded from bringing persons accused of crime to trial, for a verdict to be issued on the evidence and according to law.

It is also important to recognize that "the test for fitness to stand trial is quite different from the definition of mental disorder in s. 16": *R. Whittle*, *supra*, para. 32. The latter test focuses on determining whether mental illness vitiates criminal responsibility for acts otherwise proved or admitted. The justice considerations inherent in that question are qualitatively different from those arising in a fitness proceeding where the test is whether the trial can even proceed.

In recognition of all these interests, Parliament has fashioned a test in which the accused is excused from the criminal trial process to the extent, and only to the extent, that he is "unable on account of mental disorder to conduct a defence at any stage of the proceedings before the verdict is rendered or to instruct counsel to do so..." - these being the important prefatory words from which the particulars in subsection (a) to (c) flow. A number of subsidiary propositions flow from the language of this definition when considered in light of the policy considerations discussed above.

First, the words chosen by Parliament to express the test require that a person must be unable on account of mental disorder to conduct a defence or instruct counsel. The term "unable" must be read as "unable, even with proper assistance and supports". A finding of unfitness should not be made on the basis of one's distant assessment of an accused, set adrift, in the criminal process. The question is whether the accused is capable of meeting the test with the supports he is prepared to accept and that are available to him, including reasonable and appropriate accommodations by the court in the conduct of the proceedings. If an accused needs further assistance understanding the trial process and his options within it, the question is whether he is capable of learning them. If, as has been suggested here, an accused's concentration is such that he cannot follow along for lengthy periods of time, the trial might well be broken down into "bite sized" pieces with plenty of opportunity for the accused to consult with receive advice from counsel and other support persons: see e.g., *R. v. S.D.*. [1998] N.S.J. No. 325 (N.S.Y.C.).

Second, the term "unable" is properly understood as a relative, not an absolute concept. We all have the capacity to do some things and not other things. So too in this area, where the infinite variations in mentally disordered persons will mean that, for many, capacity will exist to address some types of charges but not others. Context is extremely important here, and we wish to emphasize that "less serious" offences are not necessarily less complex to defend. However, when regard is had to the nature of the offence, the circumstances alleged and the mental disorder of the accused, informed judgments can be made regarding fitness to stand trial for some offences but not necessarily others.

Third, Parliament has stated that a person is unfit where, inter alia, he is "unable to communicate with counsel". The question is not whether a person trusts his counsel, can put forward the best defence, an ideal defence, a defence equivalent to one advanced by a person with greater intellect or means, or even a defence in their best interests: *R. v Taylor*, *supra*. The governing test is the "limited cognitive capacity" test. The question is whether the accused can communicate with counsel in a fashion that reflects a basic awareness of the charges, his position regarding those charges and what is going on around him in the courtroom. The fact that an accused, on account of mental disorder, lacks abstract analytical skills, suffers from delusions or is unable to reason on higher

cognitive levels does not render him unfit. As noted by the Supreme Court of Canada in *R. v. Whittle*, *supra*, at para. 32:

> ...provided the accused possesses this limited capacity, it is not a prerequisite that he or she be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves her interests.

III. Application of the fitness test to the present facts

In 1989, Mr. Monteiro suffered a brain hemorrhage. The event left him with brain damage. The nature of his reported condition is described in Dr. Postnikoff's September 22, 1997 report. That report notes that the brain damage left Mr. Monteiro mentally disordered - he has, since the event, displayed flattened affect, difficulties organizing his thoughts and loss of memory. Dr. Postnikoff refers to a neuropsychological assessment performed at the Forensic Psychiatric Institute in 1995 which concluded that Mr. Monteiro's ability to learn is impaired and has little abstract reasoning ability.

Dr. Postnikoff notes that as a result of his own examination, Mr. Monteiro recalled a previous charge and conviction for impaired driving for which he was convicted and sentenced. His report states as follows (p. 3):

> He initially denied any other charges. When a variety of hypothetical charges were suggested to him, he replied negatively that he had committed such things as bank robbery, auto theft or murder, did respond positively to sexually touching someone. He was able to provide a rudimentary description of his version of the events surrounding this offence. When the undersigned suggested a number of possible false accusations the victim might make against him, Mr. Monteiro was able to identify these as being "lies". However, when the undersigned repeated to him the possible statements the victim might say which Mr. Monteiro had previously mentioned, he was able to acknowledge these as being truthful. Thus, it seems he would have a basic capacity to comprehend testimony introduced to trial and be aware as to whether or not it was truthful. Thus, although Mr. Monteiro does not appear to retain a conscious awareness of the charge against him, when it is suggested to him, he does have a basic recollection of the facts and an awareness of his version of events. There is no evidence that he is attempting to minimize this involvement or displace responsibility. It does not appear that Mr. Monteiro is so suggestible that he would simply admit to testimony which might be introduced whether it was true or not.

This assessment coincides with my assessment of Mr. Monteiro's presentation at the September 16, 1997 hearing. Based on the information provided by Mr.

Monteiro at that hearing, I formed the opinion that he is well aware of the charge and has a solid recollection of his version of events. Whether he wishes to speak about them, or even think about them, is of course another matter. While he clearly has cognitive impairments, those impairments do not in my view render him unfit to stand trial on this charge. He is clearly capable of "recounting to his counsel the necessary facts so that counsel can present a defence": *R. v. Taylor* (1992), 11 O.R. (3d) 323 (C.A.). In this connection, the following excerpt from the September 16 transcript is for me definitive on this question:

Q. Do you visit with your other nieces and nephews?
A. Yeah.
Q. But why not Kayla? Do you know - do you know why?
A. Yeah.
Q. Yeah, and why, why is it?
A. Because I did something wrong?
Q. And - and what did you do?
A. I play with - with her bum - and with her tits.
Q. Mmm-hmm. And you remember doing that?
A. Yeah.

This evidence is of course not admissible for the purposes of Mr. Monteiro's trial in order to incriminate him: *Canadian Charter of Rights and Freedoms*, s. 13; see also *R. v. Dubois* (1985), 22 C.C.C. (3d) 513 (S.C.C.). The evidence is however highly relevant to the question whether he is fit to stand trial, and in particular whether he is able to communicate to his counsel "the necessary facts" in order that counsel may properly conduct a defence on his behalf.

Had I formed the opinion that Mr. Monteiro, on account of mental disorder, was incapable of remembering the events of the alleged crime, more difficult issues in connection with fitness would have arisen, for while amnesia is not generally a basis for findings of unfitness (*R. v. Boylen* (1972), 18 C.R.N.S. 273 (N.S. Magistrate's Court; and *R. v. Majid*, [1997] S.J. No. 507 (Q.B.)), such incapacity could render an accused unfit in a case where the sole issue is credibility and where the "lost evidence" fundamentally affects the fairness of the trial. That, however, is not this case.

Having concluded that Mr. Monteiro is able to communicate with counsel, the other elements of the fitness test require the Review Board to determine whether Mr. Monteiro is able to (a) understand the nature and object of the proceedings; and (b) understand the possible consequences of the proceedings

I have no hesitation in finding that Mr. Monteiro satisfies both these requirements. Mr. Monteiro knows that he is facing a criminal charge. He knows what it is about. He has been to court before, and he remembers the

experience. He understands the role of the participants in the trial. At our hearing, he was weakest about the role of the Crown, but I am confident that, upon a proper briefing, he will quickly understand what the Crown is about. He knows what could happen if he is convicted, and clearly understands the consequences of findings of "guilty" versus "not guilty".

The basis for Dr. Postnikoff's view that Mr. Monteiro was unfit to stand trial was the view that while Mr. Monteiro is able to understand the gist of testimony led at trial, "it is very unlikely that he has the capacity to take the witness stand if so required. When asked to elaborate upon his simple responses, he appears to embark in confabulation.... [A]lthough he may be able to provide his lawyer with a basic factual description of his version of the events, he is too impaired to provide direction to counsel or to assist in the preparation and presentation of his own evidence."

I find myself in respectful disagreement. As to the factor of "confabulation", it must be recognized that the nature of memory is such that many witnesses, without any bad faith, confabulate to fill in the details of events gone by and which are now under careful scrutiny. We should not expect more of Mr. Monteiro than we do of other witnesses. While Mr. Monteiro may confabulate from time to time in other areas, I am confident that his memory of the events in question are sufficiently clear that, if necessary, he could take the stand and adequately recount his version of events for purposes of a fair and just disposition of the charges. In my view, his mental disorder is not so severe in this regard as to threaten his right to a fair trial. If a trial were to proceed, it must be remembered that there would be cross-examination on both sides, as well as evidence from other witnesses regarding the aftermath of the alleged offence. Moreover, as Dr. Postnikoff's report makes clear, Mr. Monteiro is not inclined to agree with suggestions which do not coincide with his version of events: "*It does not appear that Mr. Monteiro is so suggestible that he would simply admit to testimony which might be introduced whether it was true or not.*" Based on his presentation before us, I concur in this assessment.

Concerns regarding Mr. Monteiro's ability to concentrate during the proceedings can be readily accommodated by the Court, and may well be necessary in any event given the age of the complainant. Moreover, based on the nature of the charge, and the number of witnesses, it is evident that the trial would not be a lengthy one. Finally, the test for fitness does not require Mr. Monteiro to provide assistance in evidence preparation, beyond providing counsel with the necessary facts to perform his role.

I do not lightly disregard the opinion of Dr. Postnikoff, nor that of Mr. Monteiro's counsel who advised the Board that, based on his interaction with the accused, he could not lead a proper defence. Both opinions are entitled to great weight. In the end, however, the question is a legal one, the responsibility for which rests

with the Board. On the facts of this case, it is my view that the opinions to the contrary seem to reflect a higher standard for the determination of fitness than that which the law requires. Those views seem premised on a form of "analytic capacity" test which does not reflect the state of the law in Canada.

The fitness test, as enunciated by Parliament and interpreted by the courts, is ultimately a test about whether and in what circumstances it is just and fair even to subject the accused to trial in light of his mental disorder. In my opinion, on all the facts, it is just and fair that Aristides Monteiro stand trial. He is, with support, capable of doing so. As such, both he and the larger society are entitled to have this charge finally disposed of according to law.

Frank A.V. Falzon

****