



## **BRITISH COLUMBIA REVIEW BOARD**

**IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE  
R.S.C. 1985 c. C-46, as amended S.C. 2005 c. 22**

**IN THE MATTER OF THE FITNESS TO STAND TRIAL  
AND DISPOSITION HEARING  
VIA CLOSED-CIRCUIT TELEVISION OF**

**QUINN JASON MASSETTOE**

**HELD AT: Forensic Psychiatric Hospital  
Port Coquitlam, British Columbia  
November 6, 2014**

**BEFORE: CHAIRPERSON: F. Hansford, Q.C.  
MEMBERS: Dr. R. Stevenson, psychiatrist  
P. Cayley**

**APPEARANCES: ACCUSED/PATIENT: Quinn Jason Massettoe  
DEFENCE COUNSEL: G. Leven  
DIRECTOR AFPS: Dr. D. Morgan, F. Fuller  
DIRECTOR'S COUNSEL:  
ATTORNEY GENERAL: A. Baines**

**\*Pursuant to s.672.501(1) of the Criminal Code, the British Columbia Review Board hereby prohibits the publication, broadcasting or other transmission of any information that could identify a victim or a witness under 18 years of age in this matter. Failure to comply with this order is an offence.**

## INTRODUCTION AND BACKGROUND

[ 1 ] ALTERNATE CHAIRPERSON: On November 6, 2014, the British Columbia Review Board (the Board) convened a hearing by video and telephone conference pursuant to sections 672.48 and 672.81(1) of the *Criminal Code* in the matter of Quinn Jason Massetoe, a 20 year old single man. Crown counsel attended by telephone conference. Dr. Morgan and Ms. Fuller appeared from Prince George by closed-circuit television. Mr. Massetoe, Mr. Levin, and Mr. and Mrs. Allen also appeared by closed-circuit television from Mackenzie, British Columbia. The panel attended by closed-circuit television from the Forensic Psychiatric Hospital (FPH) in Port Coquitlam, British Columbia.

[ 2 ] Mr. Massetoe faces charges of sexual assault and touching for a sexual purpose, contrary to s. 151 and s. 271 of the *Criminal Code*. The alleged offences took place on December 20, 2012 in the accused's foster home. The victim was a four year old girl. The police attended. Mr. Massetoe was able to discuss the facts of the case with them and with Ms. Chris Allen, his foster mother. He confirmed the events that were alleged to have occurred.

[ 3 ] On July 18, 2013, Mr. Massetoe was found unfit to stand trial and was released on a Recognizance of Bail. His initial Review Board hearing occurred on October 1, 2013. The delay was occasioned by, among other things, the absence in the Recognizance of a provision requiring Mr. Massetoe to report to Forensic Psychiatric Services. This necessitated that the Board adjourn the matter of its own motion in order that a fitness assessment could be prepared. On October 1, 2013, at the urging of all parties, and as a result of difficulties in convening a hearing in Mackenzie, BC at which all parties could attend, the Board found Mr. Massetoe to be unfit to stand trial and conditionally discharged him to reside with his foster parents. That disposition was made reviewable within two months.

[ 4 ] A further hearing was duly convened on November 18, 2013. At that hearing, the Board found that Mr. Massetoe was unfit to stand trial at that date and continued his conditional discharge. That disposition was made reviewable within one year. The Board accepted Dr. Morgan's opinion that Mr. Massetoe was far from fit to stand trial. In particular, the board relied upon Dr. Morgan's summary of the accused's fitness set out in paragraph 15 of his report of September 9, 2013 (Exhibit 7) to the following effect:

“... With regard to his fitness to stand trial, Mr. Massettoe appears to understand that he has been charged with sexual offences. He does not appear to have any great deal of understanding of the pleas available to him or the ramifications of his entering the various available pleas. He does not appear to understand the role of the defense lawyer, crown counsel or judge. He did not appear to understand how the issue of innocence or guilt of an accused person was determined by the trial judge, nor did he appear to understand the importance of taking an oath or the gravity of the offense of perjury. Mr. Massettoe's ability to communicate with counsel also remains impaired.”

[ 5 ] Dr. Morgan attributed Mr. Massettoe’s unfitness to a combination of his cognitive difficulties and autistic spectrum disorder, which rendered his ability to communicate impaired. When questioned by the Board at his last hearing, he became frustrated very quickly and did not wish to answer questions.

[ 6 ] All parties agreed that a conditional discharge was the least onerous and restrictive disposition that the Board could make in the circumstances. The only contentious issue was whether the firearms prohibition condition in force should be relaxed to permit the accused to use a rifle when he went hunting with his foster father. The Board was not persuaded that at that stage, the accused needed to possess or discharge a rifle in order to participate in these outings and declined to relax this condition.

[ 7 ] Additional reports reviewed and considered in preparation for this hearing include the Disposition and Reasons for Disposition of November 18, 2013 (Exhibit 10), Ms. Fuller's report dated October 15, 2014 (Exhibit 11) and Dr. Morgan's report of October 30, 2014 (Exhibit 12). Dr. Morgan, treating psychiatrist, Ms. Fuller, forensic case manager, Mr. Massettoe, and Mr. and Mrs. Allen, his foster parents, all testified orally.

[ 8 ] Our first task at this hearing is to determine whether Mr. Massettoe is fit or unfit to stand trial. If he is fit to stand trial, we are required to order that he be returned to court. We have no jurisdiction to make any other order or disposition. (*Criminal Code*, s. 672.48, *Evers v. B.C.*, 2009 BCCA 560). We are required to make that determination as at the date of this hearing.

[ 9 ] If Mr. Massettoe is unfit to stand trial, then our second task is to make a disposition as required by s. 672.54 of the *Criminal Code*, applying the criteria set out in that section. The only dispositions we can make are a conditional discharge or a custodial disposition. (S. 672.54 [b] and [c]).

[ 10 ] The Director submitted that Mr. Massetoe is fit to stand trial. His ability to withstand the trial process will be enhanced if the trial court takes into account that he functions best in a calm and quiet environment, and if simple language is used to the greatest extent possible. He will also benefit from frequent breaks so that he can maintain his focus. The Director submitted that Mr. Massetoe presents significantly better today and during his pre-hearing interview than he did at the time of his last disposition review.

[ 11 ] Mr. Massetoe's counsel, supported by Crown counsel, suggested that Mr. Massetoe was unfit to stand trial. Mr. Levin advised that he did not feel that he was able to obtain much in the way of coherent instructions from Mr. Massetoe, who was unwilling to discuss the case with him.

[ 12 ] All parties agreed that in the event Mr. Massetoe was found to be unfit to stand trial, a continuation of his present conditional discharge, reviewable within 12 months, was the necessary and appropriate disposition to be made in this case. The only contentious matter that remained was whether he should be permitted to possess firearms in order to go hunting with his foster father.

### **EVIDENCE AT THE HEARING**

[ 13 ] Mr. Massetoe's background and psychiatric history was reviewed in detail in our Reasons for Disposition of November 18, 2013 (Exhibit 10) and need not be further canvassed in detail in these Reasons. We are content to adopt the exposition of facts set out in those Reasons.

[ 14 ] In summary, Mr. Massetoe is a member of the Kwadacha First Nation. Both he and his twin brother were born with significant developmental disabilities associated with fetal alcohol syndrome. Mr. Massetoe and his brother were placed in foster care with the Allen family as infants and have resided with them since then. Despite attending high school through grade 12, Mr. Massetoe's actual academic level is between kindergarten and grade 1. He has also been diagnosed as having an autistic disorder and is prone to frustration. When angry, he has engaged in acts of minor violence.

[ 15 ] Mr. Massetoe has continued to reside with his foster parents as required by the terms of his conditional discharge and has been compliant with the terms of his discharge. They have taken additional steps to prevent a repetition of the offences. He is not permitted to be alone with children. There have been no further incidents and no episodes

of violence or other aggressive behavior. He enjoys their unconditional support, and that of his extended family.

[ 16 ] Mr. Massetoe is currently prescribed Risperidone .5 mg by mouth in the morning and 1 mg in the evening. Dr. Card, his general practitioner in Mackenzie, monitors these prescriptions. Risperidone is helpful in mood stabilization.

[ 17 ] Dr. Morgan again offers DSM IV TR diagnoses on Axis I of attention deficit hyperactivity disorder, and on Axis II, of autistic disorder and mild mental retardation.

[ 18 ] Ms. Fuller reports that as Mr. Massetoe comes to know staff better, he engages more easily with them. His behavior during appointments is described as childlike. He requires reminders to remain focused. He expresses frustration by using childlike phrases such as "I hate you" or "I hate my mother". This is likely due to his inability to express his emotions in an appropriate manner.

[ 19 ] Mr. Massetoe is doing very well in the community. He spends time with his older brother. He enjoys partaking in outdoor activities and particularly, hunting trips with his foster father. He is in regular contact with his foster parents' biological daughter. The family attends church in Mackenzie. The pastor describes Mr. Massetoe as a "social butterfly" who gets along well with other church members. This pastor has not seen any behavioral outbursts at church. He takes part in social and recreational facilities through a program called "AiMHi", and particularly enjoys bowling, board games and video games. The AiMHi life-skills worker describes him as a very "social" person who likes to meet new people. There are plans to engage him in a Community Living British Columbia (CLBC) program called the "Special Olympics", which involves participation in sporting activities.

[ 20 ] There is no drug or alcohol use in the family home and no evidence that Mr. Massetoe engages in the use of illicit drugs or alcohol. He is reported as being able to complete activities of daily living without the assistance of family. He receives life-skills support four days a week, for one to four hours at a time, funded by CLBC. He is reported to do best at his activities when people around him are calm and soft-spoken. He is most comfortable with people with whom he is familiar.

[ 21 ] Dr. Morgan reported that Mr. Massetoe posed no management problems during the last year. He remains compliant with medication and there have been no further incidents of concern.

[ 22 ] Mr. Massetoe has scheduled appointments in person or by videoconference with Dr. Morgan every three months. His most recent interview was on October 9, 2014. Dr. Morgan testified that it was only at this last appointment that Mr. Massetoe accepted him. Up to then, Mr. Massetoe expressed his anger and frustration to Dr. Morgan by making threats described by Dr. Morgan as “extravagant”. Ms. Fuller confirms that Mr. Massetoe was calm, pleasant, non-distressed and easy to engage in conversation during their last interview. He showed no signs of agitation or irritation and overall, his behavior and presentation during the interview was significantly improved over that displayed during previous interviews. Ms. Allen reported that this might be due to a recent increase of his dose of Risperidone that effected a significant improvement in his presentation. He became more settled, less agitated and less moody.

[ 23 ] Dr. Morgan reported that during this interview, Mr. Massetoe appeared far more composed. There was no evidence of distress, agitation or verbal hostility. He smiled at and interacted appropriately with Dr. Morgan. A good rapport was established and maintained. Mr. Massetoe’s speech appeared to be spontaneous and coherent and of normal rate and volume. Dr. Morgan did not detect any formal thought disorder. In Dr. Morgan's opinion, Mr. Massetoe did not then meet the criteria established for certification under the *Mental Health Act*.

[ 24 ] During this interview, Dr. Morgan reviewed Mr. Massetoe’s fitness to stand trial. He was aware of the nature of the charges against him but characteristically, did not wish to speak about them in detail because of his shame and embarrassment. Mr. Massetoe reported that he was aware that he had a defence lawyer who was there in court to help him and that Crown counsel would be present to prosecute the charges against him. He understood the pleas available to him and what the terms guilty or not guilty meant. He understood the role of the judge and that the decision would be made based on evidence. He understood the possible consequences of conviction including jail or probation. He reported that he understood the importance of telling the truth and the gravity and consequences of lying under oath.

[ 25 ] At all times, Mr. Massetoe appeared able to communicate, at least on a level adequate to enable him to stand trial. Dr. Morgan stated that he specifically considered the criteria set out in the *Taylor* case in making this determination.

[ 26 ] In Dr. Morgan's opinion, based on that interview and on the balance of probabilities, Mr. Massettoe was then fit to stand trial.

[ 27 ] In his oral evidence, Dr. Morgan agreed that organic brain damage was a factor in Mr. Massettoe's presentation. However, there had been very significant improvement in his presentation over time and with recent changes in his medication. Dr. Morgan agreed that Mr. Massettoe's presentation could vary from day to day. However, Dr. Morgan asserted that fitness had to be determined at a specific point in time, although his assessment did have some predictive value. He agreed it is possible that Mr. Massettoe might be unfit on the day actually set for trial, although he felt that this could be avoided if he was provided with a helper in court, if all parties were calm and used simple language, and if frequent breaks were taken so Mr. Massettoe could maintain his focus during the proceeding.

[ 28 ] Dr. Morgan indicated that he had considered in particular Mr. Massettoe's ability to communicate and felt that his level of understanding and use of language conformed to the standard set out in the *Taylor* case.

[ 29 ] In her oral testimony, Ms. Fuller confirmed that Mr. Massettoe could become agitated when asked to describe the index offences. He is clearly uncomfortable discussing the events leading to the charges. If he is not approached correctly, he may become agitated and as a result of his autistic disorder, freeze and become unable to communicate. In her opinion, his anxiety would not render him incapable of discussing the index offenses or reviewing them to counsel provided that consideration is given to his environment and to the language used.

[ 30 ] Ms. Allen testified that Mr. Massettoe responds differently each day. He acts out in the same manner as a preschooler or a pre-adolescent child. Since his recent medicine change, he has become less angry and hostile although he continues to exhibit symptoms of his autism. She last discussed the index offences with him in February, 2013. After the event, he readily admitted and discussed what had happened and was able to recount the sequence of events. However, should he become distressed and upset when talking about the offences, he could very well become rigid and find it difficult to communicate. Recent improvements in his moods and affect since his medication change have not affected the variability in his presentation.

[ 31 ] Mr. Levin indicated that he had difficulty obtaining instructions from Mr. Massettoe. The Board advised that although this statement could be taken into account (*R. v Steele*, [1991] 63 C.C.C. (3d) 149), the Board would be inclined to give greater weight to it if the facts underlying that conclusion were disclosed. Mr. Levin then advised that when he attempted to discuss the index offences, Mr. Massettoe became not so much anxious as disinterested. Mr. Levin pointed out his behavior during this hearing of playing with an object on the conference table during the evidence given by other parties. He appeared to lose focus and Mr. Levin did not get very far. He did not appear to be alert or oriented at all times during the discussion. It appeared to Mr. Levin that Mr. Massettoe “shut down” during the discussion.

[ 32 ] Mrs. Allen advised that she believed that Mr. Massettoe was having a typical day. He is quite familiar with the videoconferencing process as a result of his conferences with his caregivers, and this setting would probably be somewhat more familiar to him than an appearance in court. She feels that his recent favorable reaction to Dr. Morgan may be in part due to increased familiarity and in part due to the fact that their meeting took place in a large room where he would not feel confined.

[ 33 ] Neither Crown counsel nor defence counsel was prepared to address any questions to Mr. Massettoe respecting matters of fitness or disposition. Members of the panel and Dr. Morgan accordingly questioned Mr. Massettoe about the preceding and his understanding of it.

[ 34 ] Mr. Massettoe recalled discussing the trial process and the offence with Dr. Morgan. He stated that he knew Mr. Levin.

[ 35 ] Mr. Massettoe remembered that events had occurred and that as a result, he was facing charges of sexual assault. He indicated that he discussed what had happened with the police but had not talked much about the event since then. He was able to identify the court as being composed of a judge who made the decision, asked questions and got answers, defence counsel (and specifically Mr. Levin) who was there to help him, and Crown counsel who was not his friend. With prompting, he volunteered that if he was “unguilty”, he would be able to go home and that if he was guilty, he could go to jail. Although he professed to be unaware of the nature of evidence, he did understand the concept in so far as he agreed, for example, that fingerprints on a stolen item could prove



that a certain person stole it. He understood that witnesses were people who had seen something. They had to tell the truth and if they didn't, they could go to jail.

[ 36 ] When giving evidence, Mr. Massetoe stated a number of times that he “didn't know” about something, but when pressed gently, and having heard the question reframed in different language, he was able to answer the question. At no time when testifying did he appear anxious. He was disclosive and did not shut down or refuse to communicate, even when answering panel questions. Panel members and Dr. Morgan were careful to present their questions in the calm, soft spoken manner recommended by Dr. Morgan, using simple words where possible.

### **ANALYSIS - FITNESS TO STAND TRIAL**

[ 37 ] We shall first address this issue, since if we find Mr. Massetoe fit to stand trial, we need not address questions related to the necessary and appropriate discharge. His present discharge will remain in force until the court determines otherwise.

[ 38 ] Since Mr. Massetoe has already been found unfit, the burden of demonstrating fitness lies on the person asserting it. (*Criminal Code*, s. 672.22). The question therefore is whether the evidence we have heard today displaces the presumption that Mr. Massetoe remains unfit.

[ 39 ] We are required to assess fitness to stand trial as at the day of the hearing. We are not required to find that an accused possesses any degree of sophistication in his understanding of legal and criminal procedure. Section 2 of the *Criminal Code* defines “unfit to stand trial” as being unable “on account of mental disorder” to conduct a defence because of an inability “to understand the nature or object of the proceedings, understand the possible consequences of the proceedings, or communicate with counsel”. In considering this issue, the relevant test is whether an accused has a “limited cognitive capacity” to understand the process and to communicate with counsel. *R. v. Taylor*, (1992), 77 C.C.C. (3d) 551 (Ont. C.A) *R. v. Whittle*. [1994] 2 S.C.R. 914.

[ 40 ] Recent case authority from Ontario has further refined this test. In *R. v Triano*, March 12, 2014, Colvin J. suggested that the overarching goal of the test was to ensure that an accused is more than a confused spectator at his own case. He must be able to participate in the case in a meaningful manner.

[ 41 ] In Dr. Morgan's opinion, Mr. Massettoe is fit to stand trial. In arriving at this opinion, Dr. Morgan considered both the results of his prehearing interview and his evidence at this hearing. He took into account significant improvements in Massettoe's presentation, mood and concentration since his medication was recently adjusted. He stressed that while his presentation was variable, he was most likely to be able to meaningfully participate in his own trial if the court gave due consideration to his need to have matters presented simply, calmly, and with frequent breaks so that he did not lose concentration and become unfocused. Dr. Morgan was of the opinion that if this care was taken at trial, then Mr. Massettoe's increased ability to understand and explain the trial process and his ability to communicate with counsel could be preserved.

[ 42 ] We have carefully considered Mr. Levin's difficulties with obtaining instructions. Mr. Massettoe did not shut down during his examination at this hearing and was more forthcoming than he appears to have been with Mr. Levin. Difficulties in obtaining instructions could very well reflect Mr. Massettoe's relative unfamiliarity with Mr. Levin as counsel. Mr. Massettoe has been able to discuss the events leading to these charges with the police and with his foster parents. We must carefully distinguish between an unwillingness to discuss those events due to embarrassment or shame and an inability to discuss them. Mr. Levin's advice seems to reflect Mr. Massettoe's unwillingness to discuss the index offences rather than an inability to do so.

[ 43 ] In our view, any unwillingness to discuss the events leading to the charges more likely reflects Mr. Massettoe's shame and embarrassment rather than an inability to remember them or an inability to communicate. His failure to recount these events to Mr. Levin is inconsistent with his ability to do so when questioned by the police and his mother but is consistent with his continuing embarrassment and shame and his complaints about the young girl being introduced into his residence. Mr. Massettoe gave no evidence of shutting down when discussing his upcoming trial, even when questioned by panel members with whom he was completely unfamiliar and asked to advise what charges he was facing.

[ 44 ] Dr. Morgan had the advantage of evaluating Mr. Massettoe's responses on two occasions over the last 4 weeks. Although there were some gaps in his understanding of the trial process during the evidence given at this hearing respecting the role of Crown counsel, Mr. Massettoe was able to explain that role in his interview of October 9, 2014.

[ 45 ] On balance, we agree with Dr. Morgan that Mr. Massetoe possesses a rudimentary understanding of the nature or object of the proceedings in which he is engaged, the possible consequences, and the ability to communicate with counsel sufficient, if barely so, to displace the presumption that he is unfit to stand trial.

**DECISION**

[ 46 ] We find that Mr. Massetoe is fit to stand trial. We need not, therefore, consider a conditional or custodial discharge, or make any disposition.

[ 47 ] We endorse Dr. Morgan’s opinion that Mr. Massetoe will best be served by careful attention to communicating with him in a calm, structured environment, as free as possible from noise and distraction. We also note that he will be able to focus and concentrate best if proceedings are managed so as not to unduly tax his ability to focus and concentrate.

[ 48 ] Accordingly, we direct that Mr. Massetoe be returned to court.

Reasons written by F. Hansford, Q.C., in concurrence with Dr. R. Stevenson & P. Cayley

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