Indexed as:

R.L.O. (Re)

IN THE MATTER OF Part XX.1 (Mental Disorder) of the Criminal Code R.S.C. 1985 c. C-46, as amended 1991, c. 43
AND IN THE MATTER OF the Disposition Hearing of R.L.O. (a young person)

[1998] B.C.R.B.D. No. 7

British Columbia Review Board
E.A. Tollefson, Alternate Chairperson, J. Brink and F.A.V. Falzon, Members

November 27, 1998.
(84 paras.)

Appearances:

R.L.O., accused/patient.
S. Sheets, counsel for the accused/patient.
P. Insley, for the Attorney General.
Dr. R. Miller and C. Mills, for the Director, Adult Forensic Psychiatric Community Services.

REASONS FOR DISPOSITION

¶ 1 CHAIRPERSON:-- On November 27, 1998, the British Columbia Review Board ("the Review Board") held a hearing in respect of R.L.O. ("the accused"), pursuant to section 672.81(1) of the Criminal Code. The hearing was held in the presence of the accused, S. Sheets (counsel for the accused), P. Insley (counsel for the Attorney General of British Columbia) and Dr. R. Miller and C. Mills (representatives of the Director, Adult Forensic Psychiatric Community Services). Members of the Review Board panel hearing the case were E. Tollefson (Alternate Chairperson), Dr. J. Brink (Psychiatrist) and F. Falzon (Lawyer).

Background

¶ 2 Reference should be made to the extensive background history set out in the reasons given by the Review Board in connection with its disposition of April 30, 1997 (see exhibit 47).

Criminal history

¶ 3 The following summary is taken from the reasons for the April 30, 1997 disposition.

> There are a number of index offences. The first is a charge of second degree murder with respect to a homicide that occurred in April, 1988, while the accused was still a young person as defined by the Young Offenders Act. Apparently the killing (by stabbing) took place in the course of a fight at a house party. While awaiting trial at the Vancouver Pre-Trial Centre, the accused attempted suicide by hanging and sustained permanent brain damage. On June 19, 1990, the Youth Court of British Columbia at Surrey found that he was unfit to stand trial on account of mental disorder, and ordered that he be held in custody at the Forensic Psychiatric Institute until the pleasure of the Lieutenant Governor was known. In May, 1995 the accused, now an adult, eloped from the Cedar Lodge Skeleem Village Recovery Centre where he was residing under a conditional discharge order made pursuant to the 1988 index offence, and committed a series of offences -- theft of property of a value of over $5000, possession of series of offences -- theft of property of a value of over $5000, possession of stolen property; dangerous driving, and breach of probation, contrary to sections 334(a), 355(a), 249(1)(a) and 740(1) respectively of the Criminal Code, and failing to come to a safe stop contrary to section 92.1(1) of the Motor Vehicle Act of British Columbia. He was found to be unfit to stand trial on account of mental disorder by the Provincial Court of British Columbia in Nanaimo, January 17, 1996, and he was discharged subject to the conditions of the order.
>
> Prior to the 1988 index offence, the accused had acquired a juvenile record of 10 offences between 1984 and 1988, including unlawful use and possession of a weapon, theft, breaking and entering, causing a disturbance and taking a motor vehicle. Drinking and assaultive behaviour led to him being incarcerated at Willingdon Youth Detention Centre (exhibit 12). In 1994, he was convicted on two counts of assault and one count of assault causing bodily harm in the first quarter of that year. He was given a suspended sentence and released on conditions including the performance of 35 hours of Community Work Service at Skeleem Village (exhibit 13).
>
> Social and Psychiatric history

¶ 4 The evidence indicates that he had a reasonably happy childhood, but in his adolescent years he got in with a bad crowd, quit school at Grade X, began drinking and getting in trouble with the law. He spent time in a number of group homes, but he maintained close ties to his family. Over the years, his mother has been particularly supportive (exhibits 9, 12, 18, 27, 34 and 40); although her drinking is a matter of concern to Mr. R.L.O.'s caregiver (exhibit 55).

¶ 5 Mr. R.L.O. does not appear to have had any psychiatric problems prior to sustaining brain damage in the suicide attempt Psychiatric reports over the years indicate that the brain damage has adversely affected his memory, emotional control, behaviour and personality. In a letter of September 6, 1995 to the presiding judge, Dr. F.H.G. Mills expressed the opinion that the accused would require care

and control for the rest of his life because of the organic brain injury. Moreover, even assuming that his pre-morbid condition could be restored, it was characterized by anti-social, aggressive and irresponsible behaviour. In the period May 1, 1995 to January 31, 1996, authorities at Skeleem Village identified 28 instances of aggressive outbursts either verbal or physical, 9 of which required physical re-direction by the staff. Many of these arose out of incidents where Mr. R.L.O. had paranoid thoughts that somebody had stolen or tampered with his property, when in fact he had just forgotten where he had left it. There were also in that period six wanderings or elopements, including the one on May 7, 1995, which resulted in the second set of criminal charges forming part of the list of index offences (exhibit 27).

¶ 6 However, there have been signs of progress since the summer of 1996, with reports in the fall and winter of that year indicating a significant diminution in the number of incidents of aggression, confusion and paranoia. In addition, he was reported to be brighter, more communicative and more articulate than previously (exhibits 36 - 40). Indeed, the progress was such that the administration at Skeleem Village felt able to move Mr. R.L.O. into the home of R.Y., one of the workers at the Recovery Centre. This home is in the countryside, some distance (a 25 minute drive, though only 3 kms. "as the crow flies") from the Centre, and living there is quieter and less stimulating for Mr. R.L.O. than is living at the Centre.

¶ 7 A conditional discharge, was made by the Review Board April 30, 1997. It provided that Mr. R.L. O. "shall be supervised for 24 hours each day in a manner considered appropriate by the Director", but it was understood by the Board that this permitted him to live with the R.Y. family. Despite major administrative upheaval at Skeleem Village, he continued to make good progress in the ensuing year, working alongside R.Y., to the point that he regards himself as a member of the staff rather than a client of the institution (exhibit 52).

¶ 8 The April 6, 1998 disposition (exhibit 54) continued the provisions of the previous order, but it also required that a new neuropsychological assessment be submitted to the Board. Pursuant to this requirement, numerous tests were conducted on Mr. R.L.O. in August by Dr. David Hallman of Adult Forensic Services. Dr. Hallman's report (exhibit 56) states that the tests indicate a very high likelihood of significant, diffuse brain dysfunction. In tests of reasoning he fell in the range of a 9 to 10 year old, while in tests of short term memory he fell to the level of a child of 7 years 9 months. Dr. Hallman recommended that Mr. R.L.O. not be placed in a group home but in a placement with a mentor or big-brother figure that provides 24-hour per day supervision. Dr. Hallman thought that the present placement with the Y.'s was good.

¶ 9 In September, 1998, Ms. C. Mills, case management coordinator for Mr. R.L.O., wrote to Dr. R. Miller (exhibit 58) reporting that things generally were going well. R.Y. was no longer working at Skeleem Village, but rather as a community-living support worker for people served by Skeleem, so Mr. R.L.O. was attending the day program at Skeleem and doing many of the same activities there that he had done with R.Y. While he was not particularly happy with this, he had adjusted quite well. It was hoped that in October Mr. R.L.O. could once again be working with R.Y. in the community.

¶ 10 The October 6, 1998 hearing was abbreviated due to lack of time; however, it was agreed by all parties that another hearing should be held before the end of January, 1999 and that in the interim the accused should be subject to the same conditions as set out in the existing disposition, with the deletion of condition #12, which had already been satisfied by the submission of Dr. Hallman's neuropsychological report (exhibit 56). A new disposition was made accordingly (exhibit 60).

Evidence given at the hearing

¶ 11 The hearing concentrated on the issue of Mr. R.L.O.'s fitness to stand trial. On that issue it was decided that Mr. R.L.O. was now fit to stand trial for the 1995 offences, but still remained unfit with respect to the murder charge (The reasons with respect to the Review Board finding with respect to fitness have been prepared separately from the disposition reasons.)

¶ 12 In the disposition portion of the hearing, evidence was given by Ms. Mills that Mr. R.L.O. was being given more support at Cedar Lodge (Skeleem Village) than he had received previously, and he now had a support worker to go with him to do banking, kayaking etc. Much of the cost was being paid by the B.C. Head Injury Fund. On the question of supervision when R.Y. has other duties, the reply was that other people in the house (Mrs. Y., and the two tenants upstairs) could supervise. All the neighbours had been made aware of Mr. R.L.O.'s situation. There were no small children in the house. Her general assessment was that he was doing well. She did not know the details of a proposal that R.Y. was developing, but said that she would entertain it favourably because of the special relationship that has developed between R.Y. and Mr. R.L.O.

¶ 13 R.Y. gave evidence of a proposal he was developing whereby he would provide services to businesses, and Mr. R.L.O. would work as his sidekick. At Skeleem Village he had worked as a Maintenance Man and Mr. R.L.O. had worked along side him. The arrangement would be similar, except that he would be responsible for Mr. R.L.O. 24 hours a day. There would be provision for a access to a supervised gyre and for evening activities. He would accompany Mr. R.L.O. everywhere until he had trained additional workers to do so. He was not afraid of unauthorized absences -- he had not had any problems so far, and he thought that maybe Mr. R.L.O. had outgrown his penchant for stealing vehicles.

Submissions

¶ 14 All parties felt that the present arrangement was a good one. They suggested a continuation of the provisions of the present order.

Considerations and Conclusions

¶ 15 The evidence indicates that Mr. R.L.O.'s condition has largely stabilized over the last couple of years. He is capable of carrying out routine chores, and at Skeleem Village regards himself as part of the staff. He has an excellent relationship with his supervisor and principal care-giver, R.Y., and appears to

have become a fixture of the Y. household.

¶ 16 After taking into account the four considerations set out in the opening of section 672.54 of the Criminal Code, the Review Board had little difficulty in reaching the conclusion that the least onerous and least restrictive disposition that could be made at this time was a discharge subject to conditions as set out in the October, 1998 disposition order. It is providing Mr. R.L.O. with good quality of life but at the same time also providing good safeguards to protect the public. The new order therefore will vary from the previous one only in terms of the appropriate reference to the finding that the accused was now, in the Board's opinion, fit to stand trial on the 1995 charges.

FITNESS TO STAND TRIAL - REASONS FOR DECISION

I. Introduction

¶ 17 On November 27, 1998, a panel of the British Columbia Review Board consisting of Dr. E.A. Tollefson (Alternate Chair), Dr. J. Brink and Mr. F.A.V. Falzon convened in Victoria to consider Mr. R. L.O.'s fitness to stand trial for offences described below.

¶ 18 Our November 27, 1998 disposition followed a brief interim disposition made by the Panel on October 6, 1998. At the October 6, 1998 hearing, we advised the parties that despite a consensus between the accused and the Director that Mr. R.L.O. remained unfit to stand trial, the Review Board was legally responsible to exercise its own informed judgment on this difficult matter of fitness, a judgment which we could only arrive at in this case after proper inquiry and taking into account the submissions of the parties.

¶ 19 Present before the Review Board on November 27, 1998 were the accused and his counsel, Mr. S. Sheets. Also present were Mr. P. Insley, counsel for the Attorney General of British Columbia, and Dr. R. Miller and C. Mills, representatives of the Director, Adult Forensic and Community Services. The offences in respect of which the accused has been found unfit to stand trial are these:

1. An information sworn April 14, 1988, charging that on April 12, 1988, in the City of Surrey, Mr. R.L.O. committed second degree murder;
2. An information sworn May 16, 1995, charging that on that date, in the area between Shawnigan Lake and Ladysmith on Vancouver Island, Mr. R.L.O. committed theft, possession of stolen property and dangerous driving arising from the theft of a "B.C. Tel." truck.
3. A second information sworn May 16, 1995, charging that on that date, at or near Ladysmith, Mr. R.L.O. drove a motor vehicle contrary to a 1993 probation order, and failed come to a safe stop as required by the Motor Vehicle Act.

¶ 20 At the conclusion of the November 27, 1998 fitness hearing and after deliberation, the Panel unanimously concluded that Mr. R.L.O. was fit to stand trial for the 1995 charges, but was not fit to

stand trial on the murder charge. The Panel issued its disposition with reasons to follow. These are those reasons.

II. Background and Procedural History

¶ 21 Mr. R.L.O. has appeared before the Review Board several times. The history of this matter is complex. In view of the conclusions we have reached in this matter, a comprehensive historical outline is necessary.

A. The Murder charge-judicial findings-not fit to stand trial

¶ 22 R.L.O. was 17 years old when the stabbing incident took place which gave rise to the murder charge. While there is information before us about Mr. R.L.O.'s early alcohol abuse, possible cognitive difficulties and his lengthy juvenile record -- including a 5 day detention ordered by the court only 7 days before the stabbing -- there is no evidence before us that Mr. R.L.O. had ever suffered from any mental disorder. Following the murder charge in April, 1988, Mr. R.L.O. was detained in custody.

¶ 23 On May 4, 1988, while in custody, Mr. R.L.O. attempted suicide by hanging. He was resuscitated, but the resulting cerebral anoxia left him brain damaged. The effects of the brain injury were summarized as follows by Dr. Lohrasbe in 1994:

> R.L.O. suffers from an Organic Brain Disorder following a suicide attempt. There are many manifestations to his brain dysfunction and clinically the most apparent are cognitive impairments. He has a lowered intelligence, poor memory, limited language and an impaired ability to learn. There have been problems in his affective functioning but more recently this appears to have stabilized. As with many individuals with brain injury, his affect can sometimes be inappropriate. There are also significant conative consequences, his impulsivity and aggression being the ones of most concern. Having never examined Mr. R.L.O. prior to his injury, it is unclear as to what degree of dysfunction can be directly attributed to the brain injury. Overall, however, the picture he presents is so consistent with the findings typically associated with severe head injury that I am incline [sic] to attribute the bulk of his presentation to it.

¶ 24 Mr. R.L.O. was originally admitted to the Forensic Psychiatric Institute on February 19, 1990, on a 30 day remand for an assessment as to his fitness to stand trial. Only days earlier, he had been charged with assault with a weapon against a staff member at a Kamloops Rehabilitation Institution, where Mr. R.L.O. had been residing. The history, if any, of that assault charge, and its relationship to this first fitness assessment, is not part of the record before us.

¶ 25 On June 19, 1990, Her Honour Judge Stromberg-Stein (as she then was) found Mr. R.L.O. unfit to stand trial on the murder charge, and ordered that he be held in custody at the Forensic Psychiatric Institute until the pleasure of the Lieutenant Governor in Council was known.

¶ 26 On August 19, 1992, as a result of the Supreme Court of Canada's decision in R. v. Swain and subsequent Criminal Code amendments enacting Part XX.1 of the Criminal Code, this Board held a transitional hearing of his Order-in-Council status, at which time it determined that, Mr. R.L.O. remained unfit to stand trial. A term of the Board's disposition was continued residence at the Forensic Psychiatric Institute ("FPI").

¶ 27 In March, 1993, Mr. R.L.O. was placed in a Cobble Hill treatment facility known as "Skeleem Village", a facility for head injured persons operated by the Cedar Lodge Society. Mr. R.L.O.'s placement at Skeleem Village, while still under Review Board jurisdiction, was regarded as a secure community placement.

¶ 28 On June 30, 1993 -- shortly before the accused's next scheduled annual review by the Board -- the Crown entered a stay of proceedings on the murder charge. This action resulted the termination of the Review Board's jurisdiction over the accused. Despite the stay, Mr. R.L.O. remained at Skeleem Village. The reasons for the stay are not before the Board and are in any event not for this Board to inquire into.

¶ 29 On May 20, 1994, the Crown exercised its prerogative to reinvigorate the proceedings, and a new fitness hearing was ordered. The hearing proceeded on the basis that the onus lay on the Crown to demonstrate fitness on a balance of probabilities. The new fitness hearing, before Her Honour Judge Rae, occupied two days in March, 1995.

¶ 30 At the March, 1995 hearing, the Court heard expert evidence from Dr. Lohrasbe, a forensic psychiatrist, called by the Crown. Dr. Lohrasbe testified, inter alia, that while Mr. R.L.O. exhibits gross memory impairment, his level of functioning was sufficient to satisfy the narrow Criminal Code fitness test, which had in his view clarified the standard in the wake of previous, "idiosyncratic" approaches to the fitness issue. While Dr. Lohrasbe personally preferred a broader view of the fitness test, he was satisfied that Mr. R.L.O. satisfied the narrow approach mandated by law. The Court also heard evidence from a psychologist, Dr. Kathleen Montgomery, who had administered a series of I.Q. tests to Mr. R.L. O. Dr. Montgomery did not offer an opinion as to fitness. Instead, she reported the results of the tests which disclosed (a) Mr. R.L.O.'s IQ being at the lower end of the low average range, (b) difficulties in associating language with objects and (c) the need for reminders to perform daily tasks. Dr. Montgomery gave evidence that Mr. R.L.O.'s "long remote memory" is generally in tact, but that his memory ability since the brain injury reflects a chronic inability to learn and retain new information. The Court also heard from Peter Wittig, the program manager for Skeleem Village. Mr. Wittig testified that while Mr. R. L.O.'s short term memory had not improved in his time there, his behavior and anger management had improved and he had successfully quit smoking. Mr. Wittig also gave evidence that Mr. R.L.O. had previously achieved Grade 10 and that he could still read and write sufficiently to keep a journal as part of the Skeleem program.

¶ 31 Judge Rae rendered her decision on April 20, 1995. She concluded that the Crown had not discharged its onus to demonstrate on a balance of probabilities that the accused was fit to stand trial for

murder:

> I am satisfied on the basis of the opinion evidence tendered by both the Crown and Defence that although R.O. may have a very limited ability to answer correctly, with some difficulty, and in a very concrete fashion, a number of very simple questions as to the function of a judge, a court and can at a very basic level explain concepts such as guilt, innocence, evidence, oath etc., he does not have any ability to appreciate what is going on around him in the courtroom.
> He has no short term memory and no ability to process new information. He has severely impaired language skills, and he is very suggestible. Dr. Lohrasbe himself agreed that R.O. would not be able to participate in his trial in any meaningful way without the assistance of counsel. It is a fundamental principle of our law that an accused in the adversarial system has an absolute right to make fundamental decisions about the conduct of his trial and to assume the risks involved. It is also a fundamental principle of our law that counsel must take instructions from the accused. R.O. does not have the level of cognitive functioning that would allow him to instruct counsel in such a manner that counsel would be able to mount a full defence to this charge. He is unable to weigh options and make life choices and as such has no ability to appreciate the consequences of the proceedings in other than a very concrete way, and even if explained to him in any detail, he is unable to remember those consequences for any significant period of time. All of the cognitive skills set forth above are critical to an accused being able to mount a full defence. R.O. simply does not have the ability to conduct an adequate defence as a result of brain damage resulting from a failed attempt at hanging and there is little hope that there will be any significant improvement in his level of cognitive functioning. For these reasons, I am satisfied that the Crown has not shown on a balance of probabilities that R.O. is fit to stand trial.

Judge Rae's April, 1995 fitness ruling returned Mr. R.L.O. to the Review Board's jurisdiction.

B. Offences in 1993 and 1994 -- fit to stand trial -- convictions

¶ 32 Having canvassed the procedural history which, on April 20, 1995, returned Mr. R.L.O. to the Review Board's jurisdiction respecting the murder charge, it is relevant to examine events that took place in the two years preceding her judgment, which add to the complexity of this case.

¶ 33 Prior to Judge Rae's 1995 finding respecting the murder charge, Mr. R.L.O. had in fact been charged and convicted of offences he committed in 1993 and 1994 well after his brain injury and after his entry to Skeleem. While we do not suggest that this would have altered the outcome of her fitness determination on the murder charge, it does not appear from the record before us that evidence in relation to these proceedings was before Judge Rae at the fitness phase of the 1995 hearing before her. (We note, however, that at the disposition phase of the hearing before Judge Rae, defence counsel made comments critical of the 1993 and 1994 convictions: Ex. 8, p. 8).

(i) The 1993 offences

¶ 34 The 1993 offences -- committed after the Crown had stayed the murder charge involved 4 counts relating to the theft of a motor vehicle. Mr. R.L.O. was convicted of these offences by Judge Green of the Provincial Court. In respect of those charges, the accused was represented by his present counsel. A fitness hearing was held, and on October 1, 1993, despite an opinion by Dr. Mills to the contrary, Mr. R.L.O. was found fit to stand trial (we do not have a record of the transcript or reasons of that proceeding). A guilty plea was entered. We were not advised of any particular difficulty experienced by counsel in representing Mr. R.L.O. in respect of those charges. A probation officer's October, 1993 presentence report in respect of those charges is instructive, and demonstrates a reasonable awareness by Mr. R.L.O., at least at that point in time, of the charges and the events which gave rise to them:

> The subject's attitude regarding these charges was to show remorse for his actions and to tell me his plan to handle his urge to travel to Vancouver. This plan involves:
>
> - To go for a run instead
> - To talk to staff should he feel the need to go to Vancouver
> - To exercise more
> - To buy a bus ticket to go to Vancouver
>
> This Plan is supported by Peter Wittig the director Skeleem Village.

(ii) The 1994 offences

¶ 35 The 1994 offences involved 3 counts relating to assaults on a fellow Skeleem resident in January, February and March of that year. The accused's present counsel also represented him in respect of those offences, for which guilty pleas were entered. We are not aware of any fitness issue having being raised by counsel, the Crown or the court respecting these offences.

¶ 36 We hasten to acknowledge the probation officer's May, 1994 pre-sentence report concerning these offences, which recognized Mr. R.L.O.'s limited ability to "really understand" the court process and the pre-sentence process.

¶ 37 For completeness, we would note as well the evidence before us that Mr. R.L.O. was charged twice in 1994 for breaches of an undertaking (February and March, 1994) and 3 times that year for assault (January and March 12, 1994). Information regarding the disposition of all these charges is not before us.

C. The 1995 charges

¶ 38 As described above, Her Honour Judge Rae's April 20, 1995 finding returned Mr. R.L.O. to the

Review Board's jurisdiction on the murder charge.

¶ 39 In the brief period between Judge Rae's decision and the Review Board hearing in July of that year, R.L.O. was charged with the 1995 offences, concerning the alleged theft of the BC Tel van. This incident is summarized as follows in Dr. Mills' 1995 fitness assessment report (p. 4):

> The police report of 15 May has Mr. R.L.O. driving a high speed on the wrong side of the road, running away from police vehicles, driving at high speed through downtown Ladysmith, veering off the road onto the highway construction site where he both endangered walking personnel and eventually damaged his vehicle by crashing it into a piece of equipment, and finally trying to run away from police when apprehended.

D. Review Board's July, 1995 fitness decision on the murder charge

¶ 40 The 1995 charges -- which had only recently been laid -- were not the subject of this Board's July, 1995 fitness determination as no judicial finding of unfitness had yet been made. This Board's July, 1995 hearing was exclusively concerned with Mr. R.L.O.'s fitness for the murder charge, following Judge Rae's April 20, 1995 decision: Criminal Code, s. 672.47. In his report prior to Review Board's July, 1995 hearing, Dr. Mills concluded as follows (pp. 6-7):

> The fact of his very clear recall of events prior to 1988, that is, prior to his brain damage, was striking by contrast. I include within that his knowledge of Court process since it is obvious from his history that Mr. R.L.O. had considerable exposure to Court processes from age 12 onward. Given the very limited degree of cognitive ability that he has retained, I think it unreasonable to presume that his ability to repeat material from memory that was obtained at a time of full competence has any bearing whatever on his current ability or inability to use this information in a way that could be read as knowledgeable or participatory. Therefore, regardless of his memory/recall, I think it highly unlikely that he could participate in any legal proceedings in a knowledgeable or contributory manner. Thus, I still find myself viewing Mr. R.L.O. as being unfit to stand trial. The grounds are still those of severely damaged cognitive processes whose combined effects have been to render him an undirected, impulsive, at times dangerous young man, with no judgment, foresight or conceptual ability. Although not everything Mr. R.L.O. reports about himself is not [sic] necessarily to be believed (I am of the opinion that he can, when he chooses, use his memory loss to his advantage), I do not see him as being capable of consistent conscious deception.

¶ 41 On July 20, 1995, the Board unanimously concluded that Mr. R.L.O. was not fit to stand trial on the murder charge. Its reasons are important:

> As was the Honourable Judge Rae, we are of the opinion based on all the evidence that while the accused's answers to questions on the above referenced matters appear to be appropriate, there is insufficient cognitive capacity in the accused to appreciate the nature and consequences of the charge he is facing. His ability to defend himself adequately in court remains in serious doubt.
> In the balancing of all the evidence, our opinion is that he is unfit to stand trial, despite his having been found fit in the intervening period between this hearing and the last Review Board hearing on August 19th, 1992. It is important to note that though criminal convictions appear to have been recorded as having been committed by the accused since our previous opinion on unfitness in 1992, there is reason to question whether such verdicts were entered without the fullest of inquiry into the mental condition of the accused at that time. It is important to reflect that the accused young person is facing a charge of murder.
> Such a trial would, under ordinary circumstances, take a large toll on an accused, requiring the fullest of participation with defence counsel in an effort to adequately defend himself. There is a lack of confidence in this panel that the accused's impaired capacities would allow for such participation by the accused at this time. [emphasis added]

¶ 42 For the reasons given below, we believe that this accused's capacity gives rise to a significant distinction in law between his fitness for the purposes of defending a murder charge and his fitness in respect of the 1995 offences. We agree with our previous colleagues that the accused is not fit to participate in a murder trial. However, the demands of a trial respecting the 1995 offences would in our view be qualitatively different. As discussed below, we are of the view that, with appropriate supports, the accused is fit to stand trial on those charges. In this connection, we are not as inclined as our colleagues to suggest that Judge Rae's April, 1995 decision respecting the murder charge necessarily calls into the question conclusions respecting fitness in respect of the 1993 and 1994 offences.

E. Review Board's jurisdiction over the 1995 charges

¶ 43 This Board's jurisdiction over the accused in respect of the 1995 charges arose from Judge Clark's January 16, 1996 decision that Mr. R.L.O. was unfit to stand trial on those charges. The Court's reasons are brief and reflect the joint positions of the Crown, counsel for the accused and Dr. Mills' opinion dated September 5, 1995, reiterating his July 13, 1995 opinion. The Court deferred disposition, triggering the Review Board's obligation to hold a hearing within 45 days: s. 672.47.

¶ 44 In March, 1996, the Board held further fitness hearing in relation to Mr. R.L.O. That was the first Review Board hearing addressing fitness in respect of the 1995 charges. The March, 1996 hearing also dealt with fitness relative to the murder charge. The Board unanimously concluded that Mr. R.L.O. was unfit, and did not distinguish between either set of charges in respect of fitness: (pp. 3-4)

> It is our opinion that he is unable to participate in the trial process in a meaningful way and as a result, would be unable to conduct his defence. His cognitive capacities to reason have become severely damaged as a result of his attempt at taking his own life. He lacks a reliable memory and in our opinion, applying the Taylor test, he is unfit. He would have trouble adequately sequencing events surrounding the index offence. He is not fully oriented as to time. He believes he would have to make a statement to police as a function of the trial process. He has heard of the expression "perjury" but admits he does not understand it. He could not give adequate examples of evidence, though he knew it important that he be truthful. When asked when he was last before the Review Board, he answered one month (the facts indicate that he was last before the Review Board in July of 1995). This is particularly concerning as the most serious of the alleged index offences are quite old.
>
> His inability to adequately grasp concepts of time would put him in jeopardy when he should not so be, recognizing the principles of presumed innocence before proven guilt being an essential feature of the criminal trial process.

F. Further conviction in 1996

¶ 45 In February, 1996, Mr. R.L.O. was charged with assaulting a fellow resident at Skeleem. From the material before us, it appears that this charge resulted in conviction and one day "nominal sentence", imposed June 24, 1996. From this conviction and sentence, we deduce that either no issue of fitness was raised respecting this offence, or that if it was raised it was rejected. Mr. R.L.O. was represented by his present counsel in relation to this charge.

¶ 46 The manner in which the 1996 charge was handled, and its recency, lends further support to our view that, given Mr. R.L.O.'s level of functioning, categorical assertions about his fitness to stand trial are inappropriate.

G. Review Board's 1997 decisions

¶ 47 Prior to issuing its 1997 decisions, the Board had the benefit of Dr. Miller's February 5, 1997 opinion. Dr. Miller had been assigned to the file on behalf of the Director in 1996. In preparing his report, Dr. Miller reviewed the voluminous file, and interviewed Mr. R.L.O.

¶ 48 Dr. Miller opined that the behavior control drug "Loxapine" -- administered to Mr. R.L.O. over a number of years -- has been contributory to Mr. R.L.O.'s history of confusion, sedation and sometimes aggressive behaviour. Dr. Miller suggested that the drug might well have affected his psychological test scores. This said, Dr. Miller concluded as follows:

> Currently he is described as significantly improved. It is clear, however, that he has continuing significant problems with comprehension and memory. He appears to have some memory of the events in 1988. There were also several things that were confabulated. He can describe in theoretical terms the workings of the Court. He would have little ability to retain, comprehend and re-act [sic] in a meaningful way to evidence presented at trial. It would be my opinion that this would inhibit Mr. R.L.O.'s ability to communicate things that he otherwise should with counsel. He would be unable to comprehend the direction of proceedings. As a result of these factors he would be unable to participate in his own defense. I would recommend that Mr. R.L.O. not be returned to court for trial on any of the charges which are outstanding.

¶ 49 On February 27, 1997, the Review Board issued a brief two month disposition on the same terms as previous dispositions. The Board's Order refers to a determination that in its opinion, "the accused is unfit to stand trial at the time of the hearing".

¶ 50 On April 30, 1997, the Review Board considered Mr. R.L.O.'s case again. On this occasion, the Board divided 2-1 on the issue of Mr. R.L.O.'s fitness to stand trial. The Panel Chair, who dissented from the views of the majority, expressed the differing views as follows:

> The conclusion of the majority of the Review Board is that at this stage Mr. R.L.O. still does not have the necessary level of cognitive capacity to permit him to be found fit to stand trial on either of the sets of index offences, and therefore, he should not be sent back to the court to have the court determine the issue on a formal basis.
> The majority is of the opinion that the Court did address this matter in April, 1995, and came to the conclusion that Mr. R.L.O. is not fit to stand trial. The medical evidence is that there has been no significant improvement in his cognitive capacity. The majority of the Board concludes that he is unfit with respect to both sets of offences, the murder and the Nanaimo offences.
> My own personal view is that the limited cognitive capacity is, indeed, a very low threshold, and that in relation to the Nanaimo offences, given the less serious nature of these offences, he does have the necessary mental capacity to instruct his counsel sufficiently to carry on a proper defence. They are closer to the present, and on the basis of the answers he gave in evidence today, it appears that his memory of these offences and the surrounding circumstances has not been affected quite as profoundly by the brain damage as the
> evidence of the alleged murder....

> In relation, however, to the more serious charge of murder, my view is that he is still unfit to stand trial. With respect to many of the facts that his counsel will want to have thoroughly examined in order to provide an adequate defence to his client, on the basis of all the evidence before us, I conclude that Mr. R.L.O. could not give any real assistance.... Given the seriousness of the charge and the possibility (remote though it may be) of some therapeutic breakthrough that might improve his memory or other cognitive processes, the societal value in having a trial within a reasonable time should yield to the societal value of allowing the accused to make full answer and defence.

H. Review Board's April, 1998 decision

¶ 51 On April 6, 1998, the Review Board arrived at its unanimous conclusion that "we have marginally found for unfitness to stand trial". It issued its order in light of an agreement by all parties that an updated neuropsychological assessment "would greatly assist in the determination of Mr. R.L. O.'s fitness".

¶ 52 The April 6, 1998 Panel had the benefit of Dr. Miller's March 23, 1998 report. That report noted an improvement in Mr. R.L.O.'s cognitive functioning arising from a medication change. It also noted that "his [cognitive] functioning at a gross level was really quite good". Dr. Miller continued to be of the view that Mr. R.L.O. was not fit to stand trial on the murder charge and concluded that similar logic would apply to the 1995 charges, with the additional complication that Mr. R.L.O. "does not appear to have memory that he's been charged with the theft of the BC Tel van".

¶ 53 In connection with this report, we pause to note parenthetically that Dr. Miller's opinion regarding Mr. R.L.O.'s memory of the BC Tel van incident was informed by Mr. R.L.O.'s statement that, while being pursued by police, "he crashed the truck while attempting to get to the Cobble Hill Ferry". While Dr. Miller suggests that "much of this information appears to be confabulated", we note a remarkable similarity between Mr. R.L.O.'s information and the police report. Based on our review of the record, an erroneous reference to the "Cobble Hill Ferry" rather than the "Mill Bay Ferry" (which is located in the vicinity of the road where the chase occurred) does not necessarily suggest confabulation, particularly when read in light of Mr. R.L.O.'s reference to the police chase and the truck crash, both of which are elements of the police report.

I. The 1998 Neuropsychological Assessment

¶ 54 Dr. Hallman, a psychologist employed by Adult Forensic Services, completed his assessment report on August 28, 1998. The main points arising from his report may be summarized as follows:

- Mr. R.L.O. scored 59 on the Stanford-Binet Intelligence Scale -- this score is compatible with what is described as "the ICD-9's MILD category of mental handicap"
- Mr. R.L.O. scored 63 on the Luria-Nebraska Neuropsychological Battery. Dr. Hallman summarized the meaning of its score and its components, as follows:

> Mr. R.L.O.'s profile indicated that all five of the general indicators of brain dysfunction fell within the abnormal range suggesting a very high likelihood of significant diffuse brain dysfunction. The indication that his intermediate memory was much more impaired than his short-term memory also point to subcortical involvement. The overall elevations, however, did point to a significantly impaired short-term memory. Short-term memory impairment increased concomitantly with increases in the complexity of the items and when interference was introduced.

- Mr. R.L.O. scored 65 on the Global memory scale, which placed him in the impaired range of overall memory functioning in comparison to others of his age and education level. Mr. R.L.O.'s memory scores were higher when information was presented verbally rather than visually. These scores reflect "severe problems in focusing on instruction and [a tendency] to be easily distracted".
- Dr. Hallman's other observations included (a) "significant problems in acquiring new knowledge unless training is closely supervised, broken in to small components of the overall task and goal oriented in a very specific manner" (p. 8); and (b) "...Mr. R.L.O. is likely to have considerable difficulty in describing significant people and places with whom he has interactions in the present and past": p. 9.
- On general language based academic competence (reading, writing and speaking), Mr. R.L.O. was assessed at a Grade 5 or 6 level. It was noted that, without help, he could not understand legal documents. He displayed Grade 4 math skills.

¶ 55 As part of his assessment, Dr. Hallman performed a "Competence Assessment for Standing Trial for Defendants with Mental Retardation":

- On the dimension referred to as "Basic Legal Concepts", Mr. R.L.O. scored 82% as was regarded as "competent".
- With reference to "Skills to assist Defence", he scored 73% and was also regarded as "competent".
- With respect to "Understanding Case Events", he scored 35% and was deemed "incompetent". With respect to this part of the testing, however, two points are significant:

> (a) Dr. Hallman's testing and discussion focused only on the murder charge. No reference was made to the 1995 charges; and

(b) Dr. Hallman's testing on this indicium is predicated on the assumption that memory is a sine qua non of fitness, a proposition which, as noted below, is open to question as a matter of law.

J. The November 27, 1998 hearing

¶ 56 In addition to Dr. Hallman's assessment report described in the previous section, we had the benefit of letters from Dr. Miller and Cynthia Mills. Dr. Miller's September 1, 1998 report reads, in part, as follows:

> In contrast to my earlier interview with Mr. R.L.O. on this occasion he appeared to have little if any memory of the events around the murder. He appeared to have marked impairment of short term memory. I did not think he would be unable [sic] to instruct counsel in a meaningful way or that he would be able to follow the proceedings at trial. In view of this and also having read Dr. Hallman's report, it is my recommendation that Mr. R.L.O. remain unfit for trial.

¶ 57 Dr. Miller confirmed his opinion at the hearing. Dr. Miller was of the view that one ought not to distinguish between the two sets of charges. His opinion was primarily that Mr. R.L.O., because of short term memory deficits, would be unable to follow the events at trial and to integrate them in that context so as to give his counsel sensible instructions. Dr. Miller was also concerned about what he sees as Mr. R.L.O.'s tendency to confabulate, which impairs his ability to instruct counsel. Dr. Miller's evidence on this point thus differs from Dr. Hallman's assessment that Mr. R.L.O. had "sufficient skills to assist the defence".

¶ 58 Mr. R.L.O. gave evidence in response to questions from the Board. In our view, consistent with Dr. Hallman's findings, Mr. R.L.O. demonstrated a more than adequate understanding of the court system. When asked "why we he was here today", he answered "We are here to see if I am fit or unfit for trial". He accurately answered what would happen if he was found both fit ("I will go to court") and unfit ("Home"). He knew that he had recently been before the same panel, but could not remember exactly when. Mr. R.L.O. was well-oriented regarding where he lives, and the names of the people, and dogs, that he lives with. He accurately recalled a hike on the West Coast Trial, including when it occurred (he recalled this more accurately than his caregiver), but was inaccurate regarding the amount of time it took to complete the trip. He also inaccurately answered questions about the frequency with which he had seen his counsel, which inaccuracy reflected that, when it is hard to remember, or instead of saying he cannot remember, Mr. R.L.O. will confabulate an answer. We did not, however, regard confabulation in any way dominant throughout his evidence before us.

¶ 59 When asked about court, Mr. R.L.O. stated that he had been to court before, and he correctly answered questions about the role of the judge ("to decide whether you are guilty or not guilty"), his lawyer ("to defend me"), the Crown ("they say to the judge if you are guilty or not guilty") and an oath ("oath is to tell the truth, isn't it?). He was not clear about his right not to be compelled to give evidence,

but stated that he would tell the truth if he did testify. In answering questions about being innocent until proved guilty, Mr. R.L.O. answered as follows in response to a question about "how do you get proven guilty":

> The guys in court give evidence, saying that, and then I am guilty. The judge decides whether I am guilty or not guilty because of evidence in court, and judge decides whether I am guilty or not guilty.

¶ 60 Mr. R.L.O. knew that a finding of guilt could give rise to a number of possible outcomes depending on the nature of the offence, and gave evidence showing an understanding of the different "degrees" of murder. In answer to questions from Crown Counsel, Mr. R.L.O. displayed a good memory of his experiences in court as a juvenile.

¶ 61 When asked about the murder charge, Mr. R.L.O. thought he had been charged with first degree murder. When asked about the 1995 charges, Mr. R.L.O. answered "Truck theft. That's over, isn't it? I thought we dealt with that one .... Went to court and we were found guilty, and then some time in jail for it." On this aspect of his evidence, Mr. R.L.O. later acknowledged that might be confusing the very similar 1993 offences -- which were in fact over with -- and the 1995 charges which are still outstanding.

¶ 62 Mr. R.L.O.'s caregiver, R.Y., who was a fair and balanced witness, also gave evidence. Mr. R.Y. has worked closely with Mr. R.L.O. for 5 years, firstly through Skeleem and in the past year that Mr. R.L.O. has been resident in Mr. R.Y.'s home. In answer to questions about Mr. R.L.O.'s ability to participate in a trial, Mr. R.Y. felt that, with appropriate supports, Mr. R.L.O. could better understand the court process:

> Q. Memory is a bit of a problem, but his understanding of questions, and so forth, if he knows that he is being questioned in the general area of questioning, does that help him?
>
> A. To brief him before?
>
> Q. Yes.
>
> A. I don't know if it would help him in the memory end of it. It would help him to be in the general area of what the thing is going to be about.

III. Analysis

A. The Law

¶ 63 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.

¶ 64 There must, to the greatest extent possible, be a consistent understanding of the nature and purpose of the fitness test in Canadian criminal law. Without a clearly expressed and consistent approach to fitness, Dr. Lohrasbe's 1994 reference to the "idiosyncracies" of pre-codification approaches to the question will continue to present difficulties. It is, at a minimum, essential that those of us who are legally obliged to express judgments and opinions on the subject -- whether as courts, review boards or forensic specialists -- have the same notions in mind when we speak of someone who is "unfit to stand trial". The present case represents an excellent illustration of a circumstance in which the complexity of the accused's case has been compounded by what may well be differing understandings of what the fitness test is, or should be about, in Canadian criminal law.

¶ 65 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 words comprising 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 regarding what 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, which specifically approved R. v. Taylor, supra.

¶ 66 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 the Board in Re C.C.L. (reasons in support of May 6, 1998 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.

¶ 67 The other is the pressing interest 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: R. v. Taylor, supra.

¶ 68 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. 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.

¶ 69 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.

¶ 70 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 in the present case, an accused's concentration is such that he cannot follow along for a lengthy period 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.).

¶ 71 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 for some offences and not others. That principle is nicely illustrated by the present case. There is a clear, substantial and qualitative difference between defending the murder charge and defending the 1995 offences on the facts charged here, particularly with appropriate supports. There are other sources of information available to defence counsel. The facts of these charges are relatively simple and in respect of each count there were independent witnesses.

¶ 72 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 and/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.

¶ 73 Finally, within the context of this test, mental disorder that results in lack of memory does not automatically render a person unfit to stand trial. As this Board has previously recognized, many people go to trial where they cannot remember what happened, but this lack of memory does not ipso facto preclude the holding of a trial or render the trial unfair. In this regard, the Board's reasons in C.C.L., supra, are instructive (pp. 11-12):

> In R. v. Boylen (1972), 18 C.R.N.S. 273 (N.S. Magistrate's 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 trial hearing guaranteed under s. 2(c) of the Canadian Bill of Rights ....

> Even though R. v. Boylan 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 an 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 ....
> ...although a lack of memory relevant to the alleged crime may be considered in determining whether the accused is unable on account of mental disorder to instruct counsel, it is not conclusive of the issue.

¶ 74 Cases decided in a Charter context reinforce this view. In R. v. Majid, [1997] S.J. No. 507 (Sask. Q.B.), the Court engaged in a comprehensive review of the relevant law relating to lost memory, and concluded that, even in credibility cases, a person's right to make full answer and defence is not necessarily prejudiced by memory loss (in Majid, irreparable memory damage caused by herpes simplex encephalitis). The following passage from the American decision, United States v. Stevens 461 F. 2d. 317 (1972), cited with approval in Majid, puts the issue in perspective:

> Moreover, we do not believe that due process requires that every defendant who claims loss of memory go free without trial. As has been cogently observed:
>
> > In his plight, the amnesiac differs very little from an accused who was home alone, asleep in bed, at the time of the crime, or from a defendant whose only witnesses die or disappear before trial. Furthermore, the courts, of necessity, must decide guilt or innocence on the basis of the available facts even where those facts are known to be incomplete, and the amnesiac's loss of memory differs only in degree from that experienced by every defendant, witness, attorney and venireman. How much worse off is a generally amnesiac defendant on trial for murder, for example, than one who remembers all but the dispositive fact: who struck the first blow?
>
> If a defendant is permanently amnesiac, furthermore, there will be no time in the future when the court can secure the benefit of his version of facts. The choice facing the court would therefore be proceeding to adjudicate the defendant's guilt or innocence on the basis of incomplete data or abandoning the adjudicatory process altogether.

¶ 75 In our judgment, memory loss caused by mental disorder will only render an accused unfit to stand trial where it is concluded that lost memory, on account of mental illness, prejudices him to such a profound extent that he cannot, given the nature of the charges and the other evidence available to the court, receive a fair trial. The authorities make clear that in cases such as the 1995 offences, which do not involve credibility and respecting which there are other independent sources of information relating

to the charges, fairness is not in jeopardy.

B. Application of the law to the facts

¶ 76 On the whole of the evidence before us, and taking into account the language and purpose of the law relating to fitness to stand trial, we have concluded that Mr. R.L.O. is fit to stand trial on the 1995 charges but remains unfit to stand trial in relation to the 1988 murder charge.

¶ 77 The evidence is clear that Mr. R.L.O.'s brain injury has left him with lowered intelligence, poor memory, limited language and an impaired ability to learn. He is easily distractable, and requires consistent repetition in order to perform many basic tasks. He has poor analytical skills. On the other hand, Mr. R.L.O. can perform many tasks quite successfully. With supervision, he works, exercises and interacts quite well. His math skills are at the Grade 4 level and his reading skills are at the Grade 5-6 level. His memory of events from childhood and adolescence is good. While his short and medium term memory is significantly impaired, he would not be regarded as "amnesic". He can pay attention for short periods of time. Although he can confabulate when he does not remember something, by far the balance of his responses before us were appropriately responsive.

¶ 78 Based on the evidence before us, we are satisfied that he is capable of understanding the nature and object of the 1995 offences, and that he understands the consequences of the proceedings. Mr. R.L.O. is perfectly able to understand that he has been charged with stealing a BC Tel Van. He knows where the offences are alleged to have taken place. He understands that these are criminal charges. He tells us that incidents like this have happened before, and that on one occasion, he went to trial and was convicted for a similar offence. Mr. R.L.O. understands the purpose of the court process. He understands the role of the players, the role of evidence and the nature of the oath. These are matters respecting which Mr. R.L.O. can readily access his long term memory in view of his experiences in the youth justice system, and in respect of which he has had at least 3 experiences, resulting in convictions, since 1993. Mr. R.L.O.'s understanding of these matters may be "concrete", but it is nonetheless clear. Mr. R.L.O. further understands the possible consequences of Court. In other words, he knows what is at stake if he is convicted, and that a range of consequences are possible. He may need to be reminded about some of these matters from time to time. But those supports are available, and he is "able" to utilize them.

¶ 79 As for his ability to communicate with counsel in respect of these offences, we observe that Mr. R.L.O. is in happy position of having had a long relationship with his counsel, whom he trusts. They have dealt with many sets of criminal charges together. At least three sets of those charges -- which are not qualitatively different from the 1995 offences -- have been addressed in the absence of any judicial finding of unfitness.

¶ 80 Mr. R.L.O.'s memory is clearly impaired, but we do not regard that reality, for the reasons expressed above, as rendering him unfit to stand trial, given the nature of the 1995 charges. Resolution of these charges will not turn on questions of credibility. The allegations are relatively straightforward. There are many independent witnesses to the events, and a documentary record which will assist the

accused and in his counsel in deciding how to answer the charges. If the accused suffered a memory block as a result of amnesia arising from a crash, a court would not declare the trial unfair. Nor should this factor, in this case, be a basis for finding the accused unfit to participate in such a trial.

¶ 81 Nor are we completely satisfied, as a factual matter, that Mr. R.L.O. has no memory of the 1995 charges. When Dr. Miller examined this question, he concluded that Mr. R.L.O. has no reliable memory and that Mr. R.L.O. had confabulated many of his responses. For the reasons given above (p. 11), we do not entirely share that opinion, particularly given the many similarities between his comments to Dr. Miller and the police report. As to the factor of "confabulation", it must recognized that the nature of memory is such many if not most witnesses, without any bad faith, confabulate certain details of events gone by. Mr. R.L.O.'s degree of confabulation is not profound; nor should we expect more of Mr. R.L.O. than we do of other witnesses. Be that as it may, the helpfulness of Mr. R.L.O.'s recollections is ultimately a matter for him and his counsel to consider should this matter proceed to trial. As noted, this factor is not a basis in law to find Mr. R.L.O. unfit to stand trial.

¶ 82 Finally, we are of the view that, if this matter proceeds to trial, the nature of the 1995 offences are such that Mr. R.L.O. would, with proper supports from those around him, and from the Court, be able to understand the proceedings and the evidence tendered against him. He is in our view capable of discussing with his counsel the options about what verdict to enter, and is capable, with help, of discussing the evidence and making choices about how to proceed as trial unfolds. Such choices might or might not reflect deep analysis or even his best interests, but as Taylor makes clear, that is not the test. In our opinion, based on Mr. R.L.O.'s cognitive capacity to participate in a trial, it is just that the 1995 charges should be tried.

¶ 83 On the murder charge, however, we take a different view. We take notice of the fact that murder trials are almost inevitably lengthy and complex matters. Because of what is at stake upon conviction for persons accused of murder, such trials impose much greater demands on accused persons in the sense of actively following the proceedings. While we would not foreclose a finding of fitness in the future based on possible improvements in Mr. R.L.O.'s condition, we are not presently satisfied that, even with appropriate supports, Mr. R.L.O. has the ability to meaningfully follow along with the flow of events for the entire duration of a murder trial. He would likely be able to "keep it together" for parts of the evidence, but this would inevitably break down in a trial that could take place over weeks rather than days.

IV. Conclusion

¶ 84 Having found the accused, R.L.O., to be fit to stand trial on the 1995 charges, the Review Board orders, pursuant to s. 672.48(2), that he be returned to Court on these charges.

QL Update: 20000911
qp/qi/s/qldrk