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

REASONS FOR DISPOSITION
IN THE MATTER OF

TIBOR SZAJKOVICS

HELD AT: Harbour Towers Hotel & Suites
Victoria, BC
January 5, 2015

BEFORE:
CHAIRPERSON: B. Walter
MEMBERS: Dr. G. Laws, psychiatrist
A. Markwart

APPEARANCES:
ACCUSED/PATIENT: Tibor Szajkovics
ACCUSED/PATIENT COUNSEL: S. Suntok
DIRECTOR AFPS: Dr. D. Breitman, C. Ballard
DIRECTOR'S COUNSEL:
ATTORNEY GENERAL: K. Henders Miller

***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] On January 5, 2015, the British Columbia Review Board (the Board) convened an early hearing in the matter of Tibor Szajkovics, the accused in this matter, who is now 53 years of age.

[2] Mr. Szajkovics was charged in August and September 2012, with two counts of Indecent Act (Exposure), contrary to s. 173(1)(a) of the *Criminal Code*. He was first reported to have exposed himself in proximity to a group of young children of 10 to 12 years of age. In September 2012, he was reported to have been lying on a towel and touching himself, again near a group of children. On this latter occasion, he was, due to the earlier incident, subject to an undertaking to stay away from public places and from children.

[3] On November 3, 2013, after he was allegedly located naked on school property, Mr. Szajkovics was further charged with breach of a recognizance confining him to his residence, for all but two hours per day, unless otherwise approved by his bail supervisor.

[4] On assessment and testing, Mr. Szajkovics scored extremely low in all spheres of functioning, including the areas of verbal, reasoning, memory and information processing, although he performed much better on testing of academic achievement. His compromised functioning was attributed to a rare chromosomal anomaly. His IQ or level of cognitive functioning was assessed at 40, or moderate mental retardation.

[5] It appears that Mr. Szajkovics has resided for his whole life with his family, currently comprised of his elderly father, a sister and a brother. His family has been the extent of his social ambit and provides all of his significant and necessary supports. The family appears to have intentionally socially isolated Mr. Szajkovics, partly as a protective measure. His public education was truncated at grade four. There is also countervailing evidence that Mr. Szajkovics, despite his needs for support and supervision, functions relatively well in terms of his self-care. He also speaks and writes Hungarian.

[6] Mr. Szajkovics presents with no record of convictions or history of violence, aggression or of alcohol or substance use issues. Nevertheless, Mr. Szajkovics has been the subject of a large number of contacts with the police when he has wandered away from home, and these have involved incidents of sexualized behaviour.

[7] Both Dr. Miller (Exhibit 6), and Dr. Breitman (Exhibit 7), opined that Mr. Szajkovics should be considered unfit to stand trial. As early as February 2013, Dr. Breitman added her opinion that he was unlikely to ever be able to communicate effectively with counsel. It is unclear whether this opinion was founded on a legal or medical conceptualization of the construct of unfit to stand trial under s. 2 of the *Criminal Code*.

[8] Over the course of a number of appearances, counsel was able to persuade the trial court to embark on an inquiry to determine whether a stay of proceedings should be ordered under s. 672.851(4) of the *Criminal Code,* on the basis that the accused is not likely to ever become fit to stand trial and does not pose a significant threat to the safety of the public. The court was not persuaded of the latter factor. On May 10, 2013, Mr. Szajkovics was found unfit to stand trial and discharged under a disposition of the Court, subject to relatively restrictive conditions: Exhibits 9, 10.

[9] Mr. Szajkovics was cared for, and closely supervised by, his family. He and his family also received up to 17.5 hours of service per week from Community Living British Columbia (CLBC), which they appeared to accept somewhat reluctantly.

[10] At Mr. Szajkovics' first appearance before the Board, the Board reviewed his history and noted:

> "Mr. Szajkovics expresses shame and what sounds to be self-conscious remorse about his actions at the parks, in that he expresses that he knew what he was doing, including being naked as disgusting and that masturbation is a "nasty thing". He knows that he should not go to parks and recreation centres." (Exhibit 14, para. 15) (sic)

[11] Although it inexplicably did not, in furtherance of its inquisitorial mandate, examine or interact with the accused, the Board nevertheless accepted what it characterized as "undisputed evidence that Mr. Szajkovics is unfit to stand trial now of the index offences and will remain permanently UNFIT." (Exhibit 14, para. 29)

[12] The Board concluded that, given his lack of historic violence and the degree of supervision and support being provided, Mr. Szajkovics' risk was assumable and manageable in the community under conditions. The disposition did not include the usual provision for admission to the Forensic Psychiatric Hospital (FPH) in certain circumstances. The Board also alluded to a future referral to the court under s. 672.851.

[13] Mr. Szajkovics next appeared before the Board on December 11, 2013, just four and a half months after his first hearing. The Board found no evidence of any recurrence of untoward or concerning public sexual behaviours since the index offence.

[14] Again Dr. Breitman opined, and the Board accepted, that Mr. Szajkovics was permanently unfit to stand trial. The Board noted that Mr. Szajkovics had not received any organized education regarding the issues relevant to fitness, but it appears not to have inquired further, or directed the provision of such programming, despite the fact that Mr. Szajkovics was being provided with education and instruction in relation to arguably more complex sexual issues, to which he apparently responded well. Once again, the Board had no interaction with Mr. Szajkovics.

[15] On the basis of the extensive support being provided to Mr. Szajkovics and his family, and despite continuing to consider him a significant threat as defined in *Winko v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 S.C.R. 625 (*Winko)*, the Board again discharged Mr. Szajkovics subject to conditions.

EVIDENCE AT HEARING OF JANUARY 5, 2015

[16] The Director, Adult Forensic Psychiatric Services (AFPS), tendered new evidence in the form of reports from Mr. Szajkovics' case manager, Mr. Ballard (Exhibit 19), and Dr. Breitman (Exhibit 20).

[17] Mr. Ballard's written and oral evidence indicates that Mr. Szajkovics only ventures outside of his home with escort. Mr. Szajkovics continues to receive considerable, daily, in-home structured support from CLBC, including attending American Sign Language (ASL) classes. He has expressed that what he did was wrong and would not re-engage in such behaviour. Mr. Ballard reports that Mr. Szajkovics is able to summarize his daily activities as follows:

> "Helping everybody around the house"," Making Coffee", "Buying Groceries", "Dominos"," Cleaning Self", "Going for Walks" (Supervised), "Patricia spend time with Tibor at Home", "Takes Garbage to can beside carport", "Playing Keyboard", "Sign Language at Home", "Exercising with Patricia", "Watches movies about Animals, Africa, European Cities and Towns", "Clean up Yard", "Watching TV", "Listening to Music", "Feeding Animals", "Helping with Shopping", "Go with Dad to Doctor at Royal Oak Shopping Centre", "Puzzles", "Reading"," Working in the Garden with Dad or Tom", "Help Tom clean the roof", "Vacuuming", and "Watering the Garden". (Exhibit 19, para. 30)

[18] Mr. Ballard comments on the reluctance of Mr. Szajkovics' family to involve outsiders.

[19] Mr. Ballard testified that Mr. Szajkovics' sister, who is his guardian and primary caregiver, is now at home full time which enhances the level of support for Mr. Szajkovics in the home.

[20] Mr. Ballard testified Mr. Szajkovics' social activation has also increased, and he is learning new skills including ASL.

[21] Mr. Ballard confirmed that Mr. Szajkovics speaks two languages and characterized him as a "bright man" and, much to his family's surprise, he is good at acquiring new skills. His ability to learn has exceeded expectations and is termed "impressive".

[22] Mr. Ballard reports that Mr. Szajkovics' family is now more open and more engaged with service providers and now recognizes the benefits and importance of these supportive relationships. The fear of an undesirable outcome regarding Mr. Szajkovics' charges may be serving as an incentive to supervising him more closely.

[23] There have been no reports of further interaction with authorities.

[24] Mr. Ballard has not been involved in any efforts to bring Mr. Szajkovics to fitness to stand trial.

[25] Dr. Breitman confirmed Mr. Ballard's evidence. She says the accused remains co-operative and non-aggressive. There have been no reported unattended absences or elopements from the home. She also confirmed Mr. Szajkovics' ready, impressive ability to learn new skills and information, as reported by CLBC staff.

[26] Dr. Breitman confirmed Mr. Szajkovics' father's continued resistance to, and distrust of, intervention, his denial and minimizing of his son's alleged offending behaviours, and his re-characterization of the alleged events.

[27] Dr. Breitman provided no documentation of any structured interviews with the accused on the issue of fitness to stand trial. Nevertheless she says:

> "Although Mr. Szajkovics is aware of some of his charges, he continues to lack an understanding of the meaning of his charges or the purpose of the courtroom process. He lacks an understanding of possible pleas and outcomes. Given his mental state, which is consistent during his presentation in interviews, it is not likely that he will be able to communicate

> with his lawyer in order to participate in his defence in any meaningful way." (Exhibit 20, para. 11)
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> and
>
> "Based on Mr. Szajkovics' enduring intellectual disability and current presentation he lacks the basic understanding of the nature and purpose of the courtroom process, is not likely aware of possible outcomes, and is unlikely to be able to communicate with counsel effectively in order to participate in his own defence. It is therefore my psychiatric recommendation that Mr. Szajkovics remains Unfit to Stand Trial and is likely to be permanently Unfit to Stand Trial based on the enduring nature of his illness." (Exhibit 20, para. 28)

[28] Even without more in the way of analysis, this would appear to contradict even Dr. Breitman's own evidence in relation to Mr. Szajkovics' robust or "impressive" learning capabilities. Dr. Breitman testified that the team attempts, but Mr. Szajkovics is unwilling to discuss the offending behaviours. She says Mr. Szajkovics has little awareness of the process or rationale of the Board. She says his good language abilities do not mean he could be fit to stand trial.

[29] Under cross-examination, Dr. Breitman testified that the skills Mr. Szajkovics is demonstrating in the community are different, unrelated to, and do not match those required to demonstrate his fitness to stand trial. She said this in spite of Mr. Szajkovics' cognition having been assessed at a grade 9 level and despite the fact that he is literate. She did not elaborate on this theory.

[30] Dr. Breitman confirmed that there have been no efforts to provide Mr. Szajkovics with education in the area of fitness to stand trial and she disagrees that this could be achieved. Dr. Breitman concludes:

> "Mr. Szajkovics has some history of problems with non-contact sexual violence, problems with a major mental disorder including difficulty with adaptive behaviour, social interactions, and intellectual functioning, and a history of problems with supervision response, increasing his risk. Given his limited cognitive ability, he lacks insight into his alleged offending behaviour. Although his intellectual impairment is enduring, there have been no recent problems with instability, and no recent problems with treatment or supervision response. Based on his score on the Static-99R, his risk of sexually reoffending is in a low-moderate range. Without sufficient supervision in the community, Mr. Szajkovics is at risk for ongoing behaviour similar to the alleged index offences, namely exposing himself in public places. Since his most recent charges, there have been no instances of Mr. Szajkovics being unsupervised in the community or engaging in any inappropriate or unlawful behaviour. His family have been more diligent,

> monitoring him in the home and community and accepting the assistance of CLBC. Mr. Szajkovics has developed a relationship with Patricia Saavedra, his CLV worker, and his family has increasingly accepted and appreciated the services offered. They have recognized benefits to these services and their commitment to continuing with these services has been increasingly secured over the past reporting period. It is more likely that even without the requirement to do so, that they would continue to follow up with CLBC and CLV, a professional service which targets some of Mr. Szajkovics' risk factors and needs. Ms. Saavedra has worked with Mr. Szajkovics in developing, among other things, social skills and has assisted in reinforcing sex offender treatment initiated by Dr. Scott. I respectfully recommend that Mr. Szajkovics continues to be Unfit to Stand Trial and that he can continue to be managed in the community with no changes to the current conditions." (Exhibit 20, para. 30)

[31] Despite having previously opined that Mr. Szajkovics could be considered a significant risk to reoffend without extensive supervision, Dr. Breitman's current belief is that the level of supervision now in place is adequate to manage the accused's residual risk and, under the circumstances, she would not characterize him as a "significant threat". Her assessment of Mr. Szajkovics' risk is clearly premised on, or tied to, his level of supervision and the co-operation and acceptance of this by his family. She says the family is also motivated in this regard by its fear of false accusations and its desire to protect Mr. Szajkovics from exploitations. Thus, the family has constantly and consistently supervised Mr. Szajkovics and prevented his unescorted access to the community.

[32] For the first time, the Board undertook to interact with, and examine, the accused.

[33] Despite a halting, stammering and hesitant verbal style, Mr. Szajkovics appeared to willingly engage and he tried to answer questions from the Board, including about such topics as dropping of his charges; the role of his lawyer and the Crown; the meaning of guilty and not guilty; a trial in court, and its purpose; the role of a judge; possible trial outcomes; and television shows about lawyers and courts he watches.

[34] Mr. Szajkovics presented on the issues of fitness, in a far more robust and optimistic manner than the evidence to date would suggest.

ANALYSIS AND DECISION

[35] In this case, the Board is tasked with bifurcated or dual functions. First, we must form an opinion with respect to Mr. Szajkovics' fitness to stand trial. If, in our opinion, he remains unfit to stand trial, we must make a new disposition under s. 672.83.

FITNESS TO STAND TRIAL

[36] Section 2 of the *Criminal Code* provides:

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

[37] Unfit to stand trial is a legal, not a psychiatric or medical, construct.

[38] In *R.L.O.* [1998] B.C.R.B.D No. 7, the Board discussed the policy underpinnings or the objectives of the concept:

> "There must, to the greatest extent possible, be a consistent understanding of the nature and purpose of the fitness test in Canadian criminal law. … 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.
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> 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.
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> 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. …

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. …

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.). (emphasis added)

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. (emphasis added)

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.

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. …:

> 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 ...."

(*R.L.O.*, paras. 64-73) (emphasis added)

THE TEST

[39] In *Taylor*, the accused was characterized as articulate and aware of the trappings of a judicial proceeding. Nevertheless, his physicians considered his thinking at times irrational, distrustful, resistant, and believed that others were not acting in his interest. The Court opined that, despite his "technical" fitness, he was lacking certain abstractions and was unable to reason on higher cognitive levels and said he should be considered unfit to stand trial, because he would inevitably act in a way counterproductive to his best interests.

[40] The Ontario Court of Appeal, in *Taylor*, outlined the elements of what has become known as the limited cognitive capacity test:

> "Under the "limited cognitive capacity" test propounded by the *amicus curiae*, the presence of delusions does not vitiate the accused's fitness to stand trial unless the delusion distorts the accused's rudimentary understanding of the judicial process. It is submitted that under this test, a court's assessment of an accused's ability to conduct a defence and to communicate with and instruct counsel is limited to an inquiry to whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not relevant to the fitness determination to consider whether the accused and counsel have an amicable and trusting relationship, whether the accused has been co-operating with counsel, or whether the accused ultimately makes decisions that are in his/her best interests. The *amicus curiae* relies on this court's

decision in *Reference re Regina v. Gorecki (No. 1)* (1976), 32 C.C.C. (2d) 129, 14 O.R. (2d) 212, and *R. v. Trecroce, supra*.

In his factum and oral presentation, counsel for the respondent concurs with the *amicus curiae*, in the following respects:

> (a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject-matter of the trial.
>
> (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.
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> (c) The fact that an accused person's mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.
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> (d) The fact that a person's mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial." (*Taylor,* pg. 14-15)

[41] In discussing the test the Court said:

> "To determine whether the test should be modified as suggested by the respondent, one must remain cognizant of the rationale for the fitness rules in the first place. In order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way. At the same time, one must consider that principles of fundamental justice require that a trial come to a final determination without undue delay. The adoption of too high a threshold for fitness will result in an increased number of cases in which the accused will be found unfit to stand trial even though the accused is capable of understanding the process and anxious for it to come to completion." (*Taylor,* pg. 16) (emphasis added*)*

[42] The Court concluded:

> "The "limited cognitive capacity" test strikes an effective balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable time."

[43] Thus the issue is not one of analytical or abstract reasoning capacity, or even an accused's present knowledge. The question is whether the accused is possessed of the limited cognitive capacity to learn or gain even a "rudimentary understanding" of the judicial process. In *Lafortune* [1998] BCRB No. 1, the Board said:

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

[44] Some considerations, though not necessarily dispositive or exhaustive, may include:

> Understanding of Charge(s); Circumstances of arrest; Previous charges/arrests/court appearances; Accused view of relative seriousness of charge(s); Does accused have a lawyer; Has accused discussed his plea with counsel; Has lawyer advised accused how to plead; Role of defence lawyer; Role of crown/prosecutor; Role of judge; Other participants in the Court process; Meaning of oath; Consequences of not telling the truth; Definition of evidence and examples; Available pleas; Available verdicts; Consequences if found guilty/potential sentences; Consequences of "not guilty" verdict; Accused's assessment of likely outcome; Memory of events in question?; Has accused instructed his lawyer?'; Ability to listen to proceedings and respond to evidence; Ability to assess and respond to false/erroneous testimony; Courtroom demeanor/ability to refrain from interrupting; Does accused wish to stand trial/confront charges?

OPINION RE FITNESS TO STAND TRIAL

[45] Once an accused has been found unfit to stand trial, unfitness is presumed unless that presumption is rebutted in subsequent proceedings, as provided in s. 672.32(2):

> "The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities."

[46] We understand Mr. Szajkovics' family's, his legal counsel's, and it would appear, at least his treatment team's, strong impulse to bring his prosecution to closure. The Board has no antipathy towards that goal, but it is our job to make decisions on the basis of our understanding of the evidence and the law.

[47] In this case, we have testimony regarding the accused's "remorse", or at least his intention not to find himself in similar circumstances in the future. Real remorse is admittedly a relatively sophisticated concept.

[48] We also have evidence that Mr. Szajkovics functions at a relatively high level in terms of his self-care and daily living skills.

[49] Dr. Breitman testified Mr. Szajkovics is reluctant or unwilling to discuss the alleged offending behavior. With respect, that is not the same as being unable to discuss it. That statement is also reflective of our interaction with the accused who, in his own fashion, appears to be able to describe, in a rudimentary manner, his "bad" behavior.

[50] The witnesses testified to Mr. Szajkovics' "impressive" learning abilities, including the addition of ASL to his existing bilingual oral and written skills and the positive progress of his learning about sexuality. In our experience, these areas are far and away more complicated than the rudimentary understanding and limited capacity required to be found fit to stand trial required under the test in *Taylor*. On that very issue, Mr. Szajkovics demonstrated he could, in fact, converse about the court process to a limited degree.

[51] While in the main, we agree we have not yet been provided with sufficient evidence to rebut the presumption of unfitness, on a balance of probabilities, under s. 672.32(2), our interaction with Mr. Szajkovics left us optimistic that, with some effort, he could indeed be brought to a level of fitness to satisfy *Taylor*. We are persuaded he has the cognitive capacity to achieve this.

[52] We therefore, reluctantly conclude that, as of the current hearing, Mr. Szajkovics remains unfit to stand trial. However, we are not resigned on the issue. Therefore, his disposition will require the Director to extend some assertive efforts in this regard, to wit:

> "THAT, before the accused's next hearing, the Director undertake assertive efforts to render the accused fit to stand trial, and to provide a report describing such efforts and strategies and their effectiveness"

[53] The Board commends to the parties its decision in *Lai* (Nov. 7, 2000), a case in which a far more pervasively disabled young man was brought to fitness through the heroic efforts of his forensic care manager.

[54] As outlined above, we have no desire to thwart the parties' interests in resolving this prosecution, through the alternative measures contemplated in s. 672.851 of the *Criminal Code*. We have, therefore, determined that our disposition will also advance that process by the addition of the following condition:

> "THAT, as it has reasonable grounds to believe such evidence is necessary to make a recommendation to the Court to determine whether a stay of

proceedings should be ordered under s. 672.851, the Review Board, pursuant to s. 672.121(a), hereby orders that, on or before the accused's next hearing, the Director produce and submit an independent assessment report of the mental condition of the accused, in particular:

i. an opinion whether the accused remains unfit to stand trial and whether or not he is likely to ever become fit to stand trial; and

ii. the nature and significance of the accused's threat to the safety of the public"

DISPOSITION

[55] The evidence relevant to disposition is that since coming under forensic and Review Board auspices, Mr. Szajkovics' care and supervision has been effective in preventing any recurrence of allegations or reports of untoward conduct. The expert evidence suggests Mr. Szajkovics' residual risk is quite manageable under the current regime which is expected to remain intact and which has indeed, been enhanced by the more consistent presence of his sister.

[56] We also understand, though we have no direct evidence from members, that the family is somewhat less resistant to accept and engage with external sources of support.

[57] We have no evidence to suggest that a more restrictive disposition than the current discharge, subject to conditions, is either necessary or appropriate: s. 672.54(b).

[58] In light of the very specific requirement imposed in our order relating to the fitness issue, we have determined that a further hearing will be convened on or before June 5, 2015.

Reasons written by B. Walter, in concurrence with Dr. G. Laws & A. Markwart

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