[FITNESS TEST]

S.C. 5.2

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 LARRY WONG

ORIGINAL

BRITISH COLUMBIA REVIEW BOARD

REASONS FOR DISPOSITION

On December 3, 1991, the Provincial Court of British Columbia in Vancouver found Larry Wong ("the accused") to be unfit to stand trial on charges of Attempted Murder and Aggravated Assault, contrary to sections 239 and 268(2) respectively of the Criminal Code, and ordered that he be held in custody at the Forensic Psychiatric Institute at Port Coquitlam ("FPI") until the pleasure of the Lieutenant Governor was known.

In accordance with section 672.81(1) of the Criminal Code, the British Columbia Review Board ("the Review Board") held a hearing on March 27, 1997 in the presence of the accused, A. Pollak (counsel for the accused), C. Fulton (counsel for the Attorney General of British Columbia) and Mr. V. Bhauruth (a representative of the Director, Adult Forensic Psychiatric Services ("the Director")). The majority of the Review Board panel hearing the case, E. Tollefson (Alternate Chairperson) and. S. Irwin (Social Worker), was of the opinion that at the time of the hearing the accused was fit to stand trial and should be returned to the Court for a determination of that issue. The other member of the Panel, Dr. A. Marcus (Psychiatrist) was of the opinion that the accused was still unfit to stand trial. All members of the Panel agreed that pursuant to section 672.49(1) the accused should be detained in custody, subject to conditions, in a hospital, namely, the Forensic Psychiatric Institute ("FPI") pending his return to the Court.

Background

(a) Criminal

While the disposition material does not contain any formal record of criminal offences prior to the index offences, a letter of July 12, 1993, from Mr. V. Bhauruth, Case Management Coordinator, to Dr. J.M. Levy, treating psychiatrist, refers to Mr. Wong being convicted of Assault Causing Bodily Harm and Possession of a Weapon in 1969.

The alleged index offences occurred on or about November 7, 1991. According to the evidence of the complainants, the accused at that time was one of their tenants. He was living alone, and his room was very dirty and infested with cockroaches. They had gone to his room and offered to help him clean it up. The accused had invited them in and shortly thereafter, without warning, had attacked them with a cleaver. Both of them were wounded, one of them sustaining life threatening wounds. The account given by the accused is that his landlord and landlady were bad people who had come into his room to rob him and perhaps kill him; they were the ones who should be sent to jail -- he was merely trying to defend himself (exhibits 3, 4, 5 and 8). The accused was found unfit to

the accused himself has rejected other possible supervised community placements, insisting that he be allowed to return to the Chinatown area to live with his father, or to live by himself (exhibits 19, 26. 27, 35 and 36). It seems that he has refused to accept that his father passed away a few years ago and that his stepmother and step-siblings do not want him back. A new supervised boarding home in Chinatown is under construction, and the treatment team has applied to it on Mr. Wong's behalf (exhibit 35).

In a letter of February 4, 1997 to Dr. E. Murphy (exhibit 37), Dr. J.M. Levy wrote that there had not been much change in the accused's condition over the last year, and the treatment team was satisfied that, because of the accused's reluctance to take medication, he should stay in a hospital setting until a suitable supervised boarding home can be found for him.

On the issue of fitness to stand trial, there has been no change in the psychiatric assessment since his arrival in FPI. Throughout that period the treating psychiatrist has been Dr. J.M. Levy. In a letter dated January 19, 1993 to Dr. D. Eaves (exhibit 11) Dr. Levy wrote that the accused continued to fail to appreciate the nature of the charges and therefore was unfit to stand trial. Moreover, his prognosis for change was poor. In a letter dated August 20, 1993 to Dr. Eaves (exhibit 16), Dr. Levy expressed doubts whether the accused would ever be fit to stand trial. In subsequent letters, dated July 13, 1994, June 6, 1995, February 1, 1996 and February 4, 1997 (exhibits 22, 27, 32 and 37) he said that there had been few if any significant changes in the mental condition of the accused.

Evidence given at the hearing

As the hearing did not get under way until nearly 3:00 p.m., and it had to be completed that afternoon to be within the one-year term of the existing order, it was agreed by all parties to receive the evidence on both issues (fitness and the appropriate disposition) at the same stage of the hearing rather than in separate stages as is customary. A further reason for doing this was that Mr. Bhauruth had to leave by 4:00 p.m.

In opening for the Director, Mr. Bhauruth, (who is Case Management Coordinator for the accused), said that there had been no major change in the condition of the accused since the last annual hearing of the Review Board. The accused has no insight into his illness or his need for medication. He remains unfit to stand trial because he has no appreciation of the charges against him. The treatment team is looking for a supervised boarding home for him, but until the accused agrees to such a placement, the Director was asking for a disposition order that the accused be detained in hospital, but with delegation to the Director regarding access to the community and visiting leaves.

Ms. Fulton said that the Attorney General of British Columbia supported the position of the Hospital, both with respect to fitness to stand trial and the appropriate disposition.

Ms. Pollak (who had been assigned to act for the accused pursuant to section 672.50(8)(a) when the accused had originally declined to be represented by a lawyer) said that she had

not got instructions from her client on the issue of fitness, but on the issue of the appropriate disposition her client had told her that he wanted to go home.

In response to questions from Ms. Irwin of the Review Board, Mr. Bhauruth said that following a recommendation made by Mr. L. Hillaby, counsel for the Attorney General at the hearing of the Review Board on March 29, 1996, an effort had been made by the treatment team to instruct the accused about court procedures, but he does not listen -- he interrupts, repeating what he had said many times before (i.e. that his landlord and landlady had come to his apartment to steal his money and kill him, so his action was taken in self-defence). Medication so far has not assisted him much. He suffers from side-effects, and when they have attempted to explain the benefits of trying Clozapine he has refused to listen to them.

In reply to questions from the Alternate Chairperson, Mr. Bhauruth answered that the accused knew the rules he had to follow at FPI, he knew what his privileges were, and as these rules and privileges were not self-evident Mr. Bhauruth agreed that the accused must have learned them. The accused also knows what a doctor does and even knows in a superficial way what a Case Management Coordinator does, namely, that the latter is part of the treatment team. Concerning his story of the events of the Index Offences, the accused has told the same story consistently ever since he arrived at FPI. His communication skills are "pretty good", for he seems to be able to take basic instructions and to communicate his needs. To the question whether the Hospital had made any attempt to have the accused assessed by a Chinese-speaking psychiatrist, Mr. Bhauruth answered in the negative.

Ms. Fulton asked whether the accused understands the nature of the charge against him, and Mr. Bhauruth replied that in his replies to fitness questions the accused always focuses on the same thing. She asked whether the accused represents a serious risk, and Mr. Bhauruth replied that he would be if he quit taking his medication. When he was off medication he became very sick, began hearing noises under the floor of his room and felt that people were trying to kill him. This does not happen when he is on medication.

Ms. Pollak had no questions for Mr. Bhauruth.

Before Mr. Wong gave his evidence it was agreed that questions to him would be translated by the interpreter into Cantonese, but if Mr. Wong replied in English his reply would not be interpreted unless members of the Review Board, or any of the parties did not understand his English and asked that he repeat his answer in Cantonese.

In reply to questions directed to him by Ms. Pollak, members of the Review Board and finally Ms. Fulton, the accused gave evidence. His answers were on topic, though sometimes not directly responsive to the question asked. On several occasions he repeated his story that his landlord and landlady had come to his room to steal his money and other valuables and he had simply defended himself, as he had a right to do. He went on to say that he had told the court to arrest his landlord and landlady and put them in jail, and the

court had told him that he could go free. While a verbatim transcript is not yet available some of the questions and his answers were along the following lines:

Q. What might happen to you if you lost in court? A. I do not have to go back to court. The court said I didn't.

Q. But the court isn't finished. A. It should be. I am not guilty.

Q. What would happen if the court does not believe you? A. They came to my room to steal my money and my pass. I just defended myself. I have the right to do that. I told the judge to put them in jail for what they did.

Q. What is the job of the judge in court? A. Judge them right or wrong.
Q. Suppose that a person is charged with stealing a radio. Is there anything other than jail that the judge can order? A. Up to the judge. Stealing radio not serious -- one or two days.

Q. What is the role of the defence counsel? A. Help to do the right thing.

Q. What is an "oath"? A. Tell the truth.

Q. Do you want to get out of the Hospital and not have to come back to the Review Board ever again? A. I want to be free.

Q. To do that you have to first go back to court for another hearing. A. They came to my room to steal my money and my pass. I just defended myself. I told the judge to arrest them.

Q. What does "trial" mean? A. You tell me.

Submissions

Mr. Bhauruth left before the hearing reached this stage, but he told the Board before leaving that his final submission would be the same as his opening position, namely, the Review Board should make a finding of unfit to stand trial and order that the accused be detained in custody in the Hospital, with delegation to the Director to permit access to the community, including visiting leaves to supervised boarding homes for the purpose of finding an appropriate placement for him.

Ms. Fulton submitted that on the issue of fitness to stand trial the accused did not meet the test in R. v. Taylor (1992), 11 O.R. 323, for while he does appear to have a limited understanding of what goes on in court, she questioned whether he actually understands what could happen to him as distinct from what could happen to other persons found guilty.

Ms. Pollak said that she had no instructions from her client on this issue, so she would limit herself to reviewing the relevant evidence in the context of the definition of "unfitness to stand trial" found in section 2 of the Criminal Code. He appears to be able to respond to the charge and give an outline of a defence. He is able to communicate with counsel and the court, albeit with some difficulty. The main question is therefore whether he understands the possible consequences of the proceedings. On that issue she submitted that he appeared to have an abstract understanding, although it was not clear whether he

understands that he personally could be in peril as a consequence of the proceedings at his criminal trial.

Turning to the issue of an appropriate disposition, both counsel agreed that in the event the Review Board was of the opinion that the accused was fit to stand trial and should be returned to court for trial of that issue, an order should be made to keep him in hospital until he court determines his fitness. In the event that the Review Board was of the opinion that the accused was still unfit to stand trial, Ms. Fulton submitted that the Review Board should follow the recommendations of the Director, while Ms. Pollak said that her client wished to be released into the community on a conditional discharge.

Considerations and Conclusions

Subsections (1) and (2) of section 672.48 set out the obligations of the Review Board in cases where the court has found the accused unfit to stand trial on account of mental disorder:

> (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.
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> (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 section 2 of the Criminal Code as meaning,

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

This definition of unfitness to stand trial came into effect along with the introduction of the new Part XX.1 (Mental Disorder) Amendments to the Criminal Code in February, 1992, and the only reported decision which considers the criteria set out therein is R. v. Taylor (1992), 11 O.R. 323, a decision of the Ontario Court of Appeal.

Taylor, a lawyer who had been suspended from practice because of his mental disorder, in January, 1987, was charged with one count of aggravated assault and a second count of possession of a weapon, to wit: a knife, for a purpose dangerous to the public. The victim was the lawyer for the Law Society in the suspension proceedings. Taylor suffered from Chronic Paranoid Schizophrenia, but he denied that he was mentally ill, claiming that people (particularly lawyers) were conspiring against him. At his first trial in 1988, he was found not guilty on account of insanity (the Crown having raised the issue against Taylor's wishes), and he was ordered detained in strict custody until the pleasure of the Lieutenant Governor was known. In August, 1991, the Ontario Court of Appeal set aside the verdict of insanity and ordered a new trial on the basis of the decision of the Supreme Court of

Canada in R. v. Swain (1991), 63 C.C.C. (3d) 481. At Taylor's second trial, the issue of fitness to stand trial was raised by the Crown, and Wren J. appointed counsel to act on the accused's behalf. Taylor refused to accept the counsel appointed for him, alleging he was an incompetent fraud. There was psychiatric evidence that while the accused was articulate, and cognizant of the nature and possible consequences of the proceedings, he was unfit to stand trial because he was suffering from chronic paranoid schizophrenia which made it impossible for him to trust counsel, or to instruct them in his best interests. Dr. McDonald, one of the psychiatrists, is reported (at p. 329) as putting it this way:

> He is sufficiently distrustful of other people that he has not been able to obtain legal representation at any time that has been satisfactory to him. He believes that everyone has been conspiring against him and every lawyer he has been involved with has tried to make things worse for him rather than better. Unfortunately his paranoid condition has not been treated and not improved and he is not likely in the foreseeable future to be able to deal with a lawyer in a reasonable way.

Wren J. found the accused unfit to stand trial because the mental disorder made him incapable of "rationally" instructing or communicating with counsel or conducting a case.

Taylor appealed, and in the Court of Appeal the *amicus curiae* appointed by the Court to assist Taylor, argued that despite his delusions arising from his mental disorder Taylor was capable of conducting his defence because he had the capacity "to understand that he will be tried in a court of law, that he may be subject to punishment and will understand the gist of the testimony adduced at his trial." The Court of Appeal agreed with the "limited cognitive capacity" test, which it summarized in the following terms (at p. 336):

> Under the "limited cognitive capacity" test propounded by the *amicus curiae*, the presence of delusions do 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 and instruct counsel is limited to an inquiry into whether an accused can recount to his/~~her~~ counsel the necessary facts relating to the offence in such a way that counsel can then ~~properly~~ present a defence. It is not relevant to the fitness determination to ~~consider~~ whether the accused and counsel have an amicable and trusting relationship, whether the accused has been cooperating with counsel, or whether the accused ultimately makes decisions that are not in his/her best interests.

Is Mr. Wong "unfit to stand trial" within the meaning of section 2 of the Criminal Code, as that section has been interpreted by the Ontario Court of Appeal in Taylor? There seemed to be little doubt that the accused would not be classed as being "unable on account of mental disorder . . . to understand the nature or object of the proceedings" (section 2(a)). Although the accused could not answer some of the usual "civics" questions, particularly in relation to the role of the prosecutor and defence counsel, he has a basic knowledge of the role of the judge and the purpose of the procedure, and if his counsel felt that it was important for him to know more about the personnel or procedures of the criminal court, the accused would seem to have the ability to learn as evidenced by his learning of the rules and procedures at FPI. Perhaps most importantly, he knows that he is charged, and he knows what his defence is (self-defence). He has repeated the details of his story consistently for the last five years; therefore it is apparent that the accused "can recount to [his] counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence", and that he has at least a "rudimentary understanding of the

judicial process" as required by the Court of Appeal in Taylor. Both counsel in their submissions agreed with this conclusion.

Nor did the Review Board find that the accused was "unable on account of mental disorder . . . to communicate with counsel", thereby falling within the criterion of unfitness set out in section 2(c). Ms. Pollak, specifically mentioned that she found his ability to communicate with her to be adequate, although it was not without its problems. The members of the Review Board also were able to understand what he said, despite his somewhat limited vocabulary, his accent and his difficulty pronouncing certain words due to missing teeth. Only rarely was it necessary to seek the aid of the Cantonese interpreter. The main communication problem is keeping his attention directed to the question asked, for at every opportunity he wants to tell his questioner that it is his landlord and landlady who should be prosecuted, and that he was only defending himself. The defence counsel should have no difficulty in obtaining an account of his client's side of the story.

However, it was suggested by Ms. Fulton that the accused is caught by section 2(b) – "unable on account of mental disorder . . . to understand the possible consequences of the proceedings". Ms. Fulton said that while he did seem to have some understanding in the abstract of the possible consequences of a criminal conviction, she was not satisfied that he was able to understand that he too was subject to punishment if found guilty. Therefore, she did not think that he satisfied the Taylor test. Ms. Pollak made no submission on this point.

The majority of the Review Board acknowledges that Ms. Fulton has raised a good question, but it is nevertheless satisfied that Mr. Wong should not be found unfit to stand trial on the basis of the criterion in section 2(b). First, the literal interpretation of that provision does not require proof that the accused is able to understand that the consequences of a conviction apply to him in the same way as they do to others. Second, adding the condition suggested by Ms. Fulton seems to run counter to the judgment of the Ontario Court of Appeal in Taylor. In that case counsel for the respondent (Crown), while conceding that the "limited cognitive capacity" test was the appropriate test in Canadian criminal law, submitted (at p. 338) that the law should make allowances for cases where the accused's mental disorder is "so potent and extensive that it cannot be said that the person is capable of following the evidence, communicating rationally with counsel, or giving evidence which is responsive to the case for the Crown." In dealing with the respondent's submission, the Court of Appeal said (at p. 338):

> 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.

Neither the public nor the accused has anything to gain by delaying the holding of a trial in Mr. Wong's case. Key witnesses for the Crown may die or disappear. Memories of the event tend to fade with the passage of time. Psychiatric evidence indicates that there has been little change in the mental condition of the accused over the last five years and that the prospects of any significant improvement in the future are not good. The accused could be trapped for the rest of his life in the judicial limbo of unfitness to stand trial.

Third, even if the proper interpretation of section 2(b) is that suggested by Ms. Fulton, the Review Board still would find that accused does not fall within the criterion of that section. On the evidence it appears that he knows that committing a breach of the criminal law is a punishable offence (he said that he told the trial judge "to put his landlord and landlady in jail" for having tried to steal his money), and that the degree of punishment depends on the seriousness of the particular offence committed (he said that theft of a radio was not very serious and would result in perhaps one or two days in jail). He also seems to recognize that his assaults on his landlord and landlady were criminal offences that normally would be punished, but he is convinced that he should not be punished because he was acting in self-defence. Nowhere did he say that, unlike others, he was immune or exempt from punishment. Nor is there any expert opinion evidence that he thinks this is the case. The only support for the assumption that he is incapable of associating penal consequences with his alleged criminal acts is that he avoided answering questions about what could happen to him if he were convicted, choosing instead to repeat that he was only defending himself or that he did not have to return to court. The majority finds this assumption to be speculative. It would be just as reasonable to speculate that the accused believed that, if he were to say what punishment could be meted out to him upon conviction for the index offences, his answer could be taken out of context and used as an admission of guilt. It is not uncommon for people (particularly politicians) to refuse to answer a "hypothetical question", or alternatively to give an answer that is only peripherally related to the question.

After assessing the evidence and the submissions, the majority of the Review Board was of the opinion that the accused is fit to stand trial. It therefore ordered that he be returned to the Provincial Court for trial of the issue of his fitness to stand trial. All members of the Review Board, agreed that there were reasonable grounds to believe that the accused would deteriorate and become unfit to stand trial if released from hospital prior to being returned to the Court. Accordingly, the Review Board ordered that pending his return to the Court he be detained in custody in FPI subject to conditions set out in the disposition. It was also agreed that the conditions in the existing disposition were appropriate in the interests of the accused and the public, and should be retained in the new disposition, save for minor amendments.

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My dissenting opinion is as follows.

Mr. Wong though able to respond to some of the direct questions regarding the roles of the individuals in the Court situation and though he displayed some knowledge of the outcome of a Court proceedings did however continually persist with his account that his landlord and landlady had come to his apartment to steal his money and kill him. He interjected this phrase on many occasions during his viva voce evidence. He could relay this phrase as a defence to his counsel but in my opinion it is a fixedly held belief and any matters beyond this requiring more flexible instruction to his counsel are not available to him. It is my opinion on hearing the evidence that Mr. Wong is unable to instruct counsel even to the minimal degree discussed in the Taylor case and therefore remains unfit to stand trial.

Anthony M. Marcus