



BRITISH COLUMBIA REVIEW BOARD

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

**IN THE MATTER OF THE FITNESS TO STAND TRIAL
AND
DISPOSITION HEARING OF**

**CASD
A Young Person**

**HELD AT: Maples Adolescent Treatment Centre
Burnaby, BC
November 17, 2016**

**BEFORE: CHAIRPERSON: B. Walter
MEMBERS: Dr. W. Pankratz, psychiatrist
B. Long**

**APPEARANCES: ACCUSED/PATIENT: CASD
ACCUSED/PATIENT COUNSEL: A. Timothy
DIRECTOR MATC: Dr. J. Quan
DIRECTOR'S COUNSEL: K. LeReverend
ATTORNEY GENERAL: L. Hillaby
DIRECTOR MCFD: S. Leach (Added Party)**

INTRODUCTION AND BACKGROUND

[1] On November 17, 2016, the British Columbia Review Board convened at the Maples Adolescent Treatment Centre (MATC) to conduct an annual hearing in the matter of CASD, a young person under the *Youth Criminal Justice Act of Canada*, who is now 17 years of age.

[2] The issue before the Board on this date was to consider whether or not CASD remains unfit to stand trial on charges arising in September of 2014, consisting of assault and uttering threats, in the context of an assault on a caregiver. In respect of those offences he was, on October 31, 2014, given a verdict of unfit to stand trial and detained at MATC. The current hearing is also in respect of charges said to have occurred on January 7, 2015, including assault with weapon, assault causing bodily harm and uttering threats, arising out of the accused's alleged attack on staff at MATC using a pen. Those charges resulted in CASD's second verdict of unfit to stand trial dated May 25, 2015. For the record, both verdicts are under consideration in the current hearing.

[3] CASD was previously before the Board on an unfit to stand trial verdict dated August 24, 2012 in respect of similar charges. Those charges were stayed on July 30, 2014.

[4] The evidence gathered in the course of the Review Board's dealing with the first verdict, insofar as it discloses the accused's background, remains relevant. The accused had as many as 37 police contacts between 2007 and 2012, due to violent and out-of-control behaviour, frequently directed at persons and property. In April 2011 he stabbed a care-giving staff member, after which he was tasered. That event was rightly the subject of considerable publicity and controversy.

[5] CASD's childhood development was delayed. He is also assessed with both hearing loss and speech or communication delays. He has been in out-of-home care settings since the very young age of two. As of 2007 CASD was diagnosed with ADHD and mild to moderate mental retardation. CASD is considered as very low functioning and indeed "profoundly handicapped". In addition to his pre-disposition to aggression and violence, he has also consistently engaged in sexually inappropriate behaviour.

[6] When he was interviewed in respect of the 2012 verdict, he was unable to understand or to explain why his behaviour might have been wrong, and he demonstrated no understanding of the roles of participants in the court process.

[7] Throughout his stay at MATC, CASD's behaviour has been challenging, in particular because of his propensity to act out violently and his frequent inappropriate sexual touching. He was initially diagnosed with acute chronic anxiety, anger issues, aggression, sudden rages, restlessness and impulsivity. His behaviour was blaming and he was described as "distractible". He could not read, tell time or do math. His ability to focus was measured in mere minutes, and, until the first set of charges was stayed, he was consistently found unfit to stand trial.

[8] After his detention following his second verdict, CASD began to utilize visit leaves to a group home. However, he did not attend school. In early 2015 he eloped on several occasions.

[9] Following his May 2015 third verdict, the accused was permitted to continue to reside at his group home on a visit-leave basis under close staff supervision. At that point he appeared to better tolerate frustration and to comply with directions, but he still demonstrated a capacity to quick and escalating reactivity. It should be noted for the record that CASD has never presented with a psychotic illness or demonstrated any mood disorder.

[10] At CASD's last hearing on November 23, 2015 the Review Board again opined that he remained unfit to stand trial and detained him at MATC with the ability to afford him ongoing visit leaves with frequent monitoring and close supervision.

NEW EVIDENCE: FITNESS TO STAND TRIAL

[11] Although we have considered all the evidence on record, for the purpose of these Reasons we only recite that which is necessary to our decision.

[12] Dr. Quan has treated the accused since August of 2012. He filed a report which cites a tumultuous year, punctuated by recurrent, unstable as well as threatening and assaultive episodes. Dr. Quan says that CASD reacts with anger and aggression when faced with restrictions or when his wishes are frustrated. He has eloped at least two or three times in each and every month since his last hearing. He has also demonstrated sexual ideation and has endorsed homicidal thoughts toward staff and even his mother.

He has punched staff, he has refused medications, he has been threatening, he has been self-harming, he has been involved in sex with strangers, used marijuana and alcohol, and endorsed suicidal thoughts. He remains non-psychotic, and at least in Dr. Quan's initial opinion, unfit to stand trial.

[13] Dr. Quan has attended numerous fitness interviews but CASD's concrete thinking, his inability to deal with abstract concepts, as well as his intellectual and hearing deficits and his language or expressive problems, all impede his level of understanding of the judicial process. Dr. Quan also confirmed that on psychological testing, CASD was considered to function at the moderate mental retardation level with an IQ score of between 40 and 60 and functioning at an age level of five years. When CASD is emotionally upset, he more likely functions at the level of a two-year-old.

[14] At the most recent interview on the issue of fitness to stand trial, CASD was unable to answer the most basic questions having to do with court. Dr. Quan felt that CASD would be equally unable to pay attention or follow judicial proceedings because of his poor attention and focus abilities. He remembers some of his charges quite clearly, even the subject charges of his first unfit to stand trial verdict. However, despite ongoing efforts and attempts, Dr. Quan is of the opinion that he will likely be permanently unfit to stand trial. That said, we were told that CASD was able to navigate the public transit system on several of his elopements, that he has become a skilled Monopoly player, but is unlikely to ever understand the process he confronts.

[15] CASD has been assigned a complex combination of diagnoses which includes Post Traumatic Stress Disorder, Reactive Attachment Disorder, Attention Deficit Hyperactivity Disorder (ADHD), an intellectual disability, a bilateral hearing loss, alcohol related neurodevelopmental disorder (or FASD), a mixed expressive and receptive language disorder, as well as some physical issues. These diagnoses together, or at least some of them, affect CASD's emotional stability and capacity to restrain himself. They impair his learning and focus. They render him impulsive. In combination, they negatively impact his fitness to stand trial. Dr. Quan testified that, while some of CASD's afflictions such as ADHD, can be ameliorated by the administration of medication, the main barrier to fitness to stand trial is his intellectual disability.

[16] CASD experiences a considerable amount of stress about appearing before the Review Board, and in particular, by the prospect of a potential future transfer to FPH when he attains the age of 18, where he fears a loss of liberties and privileges.

[17] On the matter of fitness to stand trial, we had the opportunity to hear the testimony of CASD, the accused youth. He was able to name or identify his charges. He said that they were serious. He was at first reluctant to answer any questions with respect to the court process. He indicated that he knew the answers but was unwilling to discuss them. His ability to express himself orally is compromised. It was at times very difficult to understand what he was saying. However, he demonstrated some sophistication in terms of his understanding of the transit system, of knowing which trains to take to get to a particular destination, and he described how he obtains cigarettes to satisfy his interest in smoking.

[18] Using a less sophisticated and more simple narrative, apparent in response to questions from Mr. Hillaby, CASD demonstrated that he understood the concept of an offence; he was able to explain that if someone stole a piece of equipment, evidence of such a theft might be fingerprints. He was able to explain what witnesses do. He said it was important to tell the truth in court: that failure to do so could land him in jail. He was able to explain the role of the judge and of his lawyer. He was able, at least in a rudimentary manner, to articulate the consequences of a finding of guilt and even the meaning of the concept of probation. He persuaded us that he was relaxed and that he was able to focus by reference to movies and games that he plays.

[19] CASD's performance was indeed surprising. Dr. Quan was recalled. He indicated that the administration of a new medication in the past two weeks may have served to reduce CASD's anxiety and yielded a positive impact on his focus and performance. Dr. Quan witnessed what he said was CASD's best performance since he has known him.

[20] In summary, Dr. Quan agreed that based on his observed performance, CASD satisfies the minimal requirements of the test of fitness to stand trial found in s. 2 of the *Criminal Code* as illuminated in the Ontario Court of Appeal decision in **Taylor**.

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 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 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*; (*Taylor*, pg. 14).

[21] In discussing the test the Court said:

[] 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]

[22] In ***Szajkovic*** (BCRB, January 5, 2015), the Board said:

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. (pg. 10)

[23] At the conclusion of the hearing, all parties agreed that CASD's performance in answer to questions was sufficiently robust and sophisticated that he ought to be considered, at least on this day, as fit to stand trial and he should be given the opportunity to return to court for trial of that issue.

[24] Having determined that, as of the hearing, the accused is fit to stand trial, s.672.83(1) of the *Code* provides:

At a hearing held pursuant to section 672.81 or 672.82, the Review Board shall, except where a determination is made under subsection 672.48(1) that the accused is fit to stand trial, review the disposition made in respect of the accused and make any other disposition that the Review Board considers to be appropriate in the circumstances.

