

[1] ALTERNATE CHAIRPERSON: On July 8, 2005, the British Columbia Review Board conducted a hearing in the matter of Wesley Rodney Larocque, a young person within the meaning of the *Young Offenders Act*. The hearing was a review pursuant to s.672.81 of the *Criminal Code* of an order for Mr. Larocque's discharge on conditions, which was made on May 18, 2005.

[2] The unanimous conclusion of the Board on July 8, 2005 was that Mr. Larocque remains unfit to stand trial and is not likely to ever become fit to stand trial, and he does not pose a significant threat to the safety of the public. The Board made a recommendation to the court to hold an inquiry to determine whether a stay of proceedings should be ordered in this matter, pursuant to s.672.851 of the Code. These are the reasons for the order and the recommendation.

Facts

[3] Mr. Larocque, a young person at the time of the allegations, is now a 31-year-old man who was found unfit to stand trial on December 11, 2003 by the Provincial Court of British Columbia at Dawson Creek.

[4] The allegations which brought Mr. Larocque to court resulted in a charge of sexual assault of Justin Dick over a two-year period between June 14, 1989 and June 14, 1991, at or near Chetwynd, BC. The allegations were made in 2001 when the complainant was being investigated with regard to an assault of Mr. Larocque. The allegation is that on four occasions Mr. Larocque sexually assaulted the complainant who was a family friend, sleeping at Mr. Larocque's home on the four occasions related to the allegations. At the time of the allegations, Mr. Larocque was 15 to 16 years old and the complainant was 9 to 10 years old. The allegations are, of course, unproven.

[5] Mr. Larocque has no criminal history.

[6] He has been assessed as mildly mentally handicapped. He lives independently, in his own apartment, with the support of Community Living Services, until recently a program of the Ministry of Children and Family Development until it was transferred on July 1, 2005 to the new provincial Crown agency now known as Community Living British Columbia. He also receives significant support from his mother and brother. He requires assistance with some

of the activities of daily living, and sometimes needs prompting with regard to grooming and hygiene, but he can shop for himself and handle some of his own finances.

[7] One of the advantages Mr. Larocque enjoys living in a small town is that he is known and accepted in his community. People in Chetwynd know to contact his mother if his behaviour presents a problem. There are no reports from the community that Mr. Larocque is causing anyone any harm. There are no concerns about his daily interactions in the community.

[8] He attends a clubhouse called The Friendship Centre daily. When the challenges of community living overwhelm him, as they often do, he retires to the solitude of his own apartment. That is consistent with the evidence from his treatment team that he exhibits low frustration tolerance. Because of that he has missed more appointments than he has attended over the past year, and he is unable to understand why he must attend scheduled appointments with his treatment team. Also because of his low frustration tolerance, he has been unable to complete psychological testing.

[9] There are reports in the disposition information that the complainant and his girlfriend have taunted and harassed Mr. Larocque in the community. Dr. Jones notes in her report that the complainant's girlfriend has been charged with an assault of Mr. Larocque (Exhibit 17, page 3). The allegations which form the substance of the index offence were made during the course of a police investigation of the complainant as the suspect in an assault against Mr. Larocque (Exhibit 1, Report to Crown Counsel respecting police case no. 2001-1381). In spite of Mr. Larocque's reported low frustration tolerance, there are no complaints that he has responded aggressively in the face of such provocation.

Fitness to stand trial

[10] Mr. Larocque's cognitive and intellectual impairments interfere with his understanding of legal proceedings both before this board and in court. In interviews with members of his treatment team, he was at times only able to participate with a family member present to restate questions and interpret answers (Exhibit 8, page 4, and oral testimony of Dr. Jones). It should be noted that Mr. Larocque's first language is English. On a simple application of what is sometimes called "the civics test", Mr. Larocque can provide responses which might satisfy the examiner that he has minimal cognitive capacity to

understand the nature and object as well as the possible consequences of court proceedings. This, we were told, was the product of extensive coaching and training on the fitness questions. However, the evidence of Dr. Jones was that Mr. Larocque would be unable to communicate with counsel in order to conduct a defence.

[11] Neither Mr. Larocque's treating psychiatrist nor his own counsel were willing to subject him to a fitness examination during the hearing. Both cited concerns that under such questioning in a stressful situation he is likely to rapidly decompensate, become extremely anxious and either become hyper-focused on his innocence or perhaps try to leave the room. Mr. Seyl advised us that in his experience once Mr. Larocque becomes anxious in the course of an interview, one can expect him to take about two hours to regain the capacity to participate again meaningfully.

[12] Our Board Member, Dr. Holland, a Forensic Psychiatrist with many years of experience assessing young people, was able to carefully manage a fitness examination of Mr. Larocque, respecting his fragility. Mr. Larocque told us that he would like to return to court to have the outstanding criminal charge dealt with. He said that he would not mind if people asked him questions in court, and that he could listen to other people talking in court without getting too upset.

[13] We had to weigh those responses against the observations of Ms Budden and Dr. Holland that Mr. Larocque appeared flushed throughout his hearing, and often on the verge of tears. He clearly found the process of the hearing to be stressful.

[14] Dr. Jones, in her closing submission on behalf of the Director, noted that Mr. Larocque could be found on a "basic level" fit to stand trial, but he would rapidly decompensate during court proceedings to unfitness.

[15] Mr. Seyl urged us to consider that his client would never be fit to stand trial because of his mental handicap. He noted that his client is age "32 going on 8". He argued that the courts have no jurisdiction to try a child younger than 12 years of age for a criminal offence, and it would be offensive to try a man functioning at that level.

[16] Mr. Rivard, on behalf of the Attorney-General, asked to follow Mr. Seyl in his closing submission, and there was no objection. After hearing from Mr. Seyl, he voiced his agreement, noting that Mr. Larocque is permanently unfit to stand trial.

[17] We concluded that while Mr. Larocque might appear marginally fit during an inquiry tailored to his own fragility, during the more extended proceedings in court, and in particular during cross-examination should he give evidence, he would not be able to tolerate the resulting anxiety and would quickly decompensate to the point he would not be fit to stand trial. In Mr. Larocque's particular circumstances, we concluded his fragility so outweighed his veneer of marginal fitness that we could not find him presently fit to stand trial.

Not likely ever to become fit

[18] The disposition information includes a 1987 assessment by Dr. Dorgelo which concludes that Mr. Larocque has "uneven intellectual potential, consisting of deficient verbal IQ ... and mildly handicapped performance IQ and perceptual motor difficulties" (Exhibit 2). It also includes Dr. Kane's November 2003 assessment which notes that he "appears to have a long-standing mental retardation" and that he would be unable to assist with his defence or instruct counsel (Exhibit 3, page 3). On the basis of that information, the court found on December 11, 2003 that Mr. Larocque was unfit to stand trial (Exhibit 4, pages 4-5).

[19] In 2004, Dr. Jenny Tang noted, "it is unlikely that [Mr. Larocque] would be able to complete a full cognitive assessment due to his level of impairment" (Exhibit 8, page 2).

[20] Dr. Tomita, in his report from May 2004 describes a level of fitness much as Mr. Larocque demonstrated during this hearing. He noted that Mr. Larocque was able to generally outline the roles of people in a courtroom, understood the nature of the charge against him, the object of the court proceedings, the meaning of an oath, and the pleas available to him. However, Mr. Larocque "became highly anxious when discussing questions and in essence shut down after a short period of time." Dr. Tomita concluded that Mr. Larocque would rapidly decompensate during a trial and be unable to participate in any meaningful fashion. He added that Mr. Larocque's "unfitness is based on deficits that are likely unchangeable... even with specific remediation around fitness issues" (Exhibit 8, pages 4-5).

[21] When this matter was last before another panel of this Board, that panel found, "The evidence has consistently been that ... [Mr. Larocque's] deficits are likely permanent" (Exhibit 15, page 1). That panel later noted that "his mental state remains unchanged" (Ibid., page 2).

[22] Dr. Jones in her recent report stated, "[Mr. Larocque's] cognitive deficits are unchanging and I would think it is highly unlikely that his fitness would change over time" (Exhibit 17, page 6). Mr. Seyl, on behalf of his client, argued that Mr. Larocque will remain permanently unfit. Mr. Rivard, in his submission on behalf of the Attorney-General, agreed with that position.

[23] On the basis of that evidence and the submissions of counsel, we agreed that Mr. Larocque is not likely ever to become fit to stand trial.

Not a significant threat to the safety of the public

[24] Dr. Tomita in his May 2004 report outlined the standard risk assessment known as the HCR-20. He was of the opinion that Mr. Larocque's risk of re-offending sexually, or more generally violently, was low (Exhibit 8, page 7).

[25] Dr. Jones in her recent report also conducts an assessment according to the HCR-20, and concludes that Mr. Larocque presents a low risk to re-offend sexually (Exhibit 17, page 9). She also notes that he has no history of violence (Ibid., page 7).

[26] In response to questioning during the hearing, Dr. Jones re-affirmed her opinion that Mr. Larocque presents a low risk to re-offend sexually or in a more general sense violently.

[27] Mr. Rivard in his submission took no position on the question of significant threat.

[28] Mr. Seyl did not argue that his client presented a significant threat to the safety of the public, but rather suggested that his client was entitled to remain within the jurisdiction of this Board indefinitely because he would have access to more community resources as a forensic patient than as a consumer of services from Community Living Services alone.

[29] We agreed that Mr. Larocque does not present a significant threat to public safety. We noted that he is almost 32 years old, and his only criminal history is the index offence: an unproven allegation of a historical assault dating from 15 years ago, when he was a teenager. In spite of reports that the complainant and his girlfriend have taunted, harassed, and perhaps even assaulted Mr. Larocque in recent years, Mr. Larocque has not responded aggressively to that provocation. He has been living independently with the support of his

community, for a number of years without incident. His treating psychiatrist has assessed him at low risk to re-offend violently.

[30] We raised the possibility of a stay of proceedings with the parties. We could not agree with counsel's submission that it was an appropriate use of the criminal law to manage the community care of a permanently unfit accused who does not present a significant threat to public safety. Mr. Larocque does not have an Axis I psychiatric diagnosis. He is not treated for any major mental illness. He has seen Dr. Jones three times in the past year and has missed more appointments with Mr. Gallinger, his Forensic Liaison Worker, than he has attended. Mr. Gallinger stated in evidence he intended to have more contact with Mr. Larocque in the coming year in order to improve rapport, but he could not offer any further benefit to Mr. Larocque in the continued involvement of Forensic Psychiatric Services other than improved rapport. It was Dr. Jones' evidence that in the absence any supervision pursuant to an order of this Board, Mr. Larocque would not need any psychiatric follow up in the community.

No requirement for an assessment pursuant to s.672.121(a)

[31] We turned our minds to the provisions of s.672.121(a), which permit the Board to order an assessment as follows:

672.121 The Review Board that has jurisdiction over an accused found not criminally responsible on account of mental disorder or unfit to stand trial may order an assessment of the mental condition of the accused of its own motion or on application of the prosecutor or the accused, if it has reasonable grounds to believe that such evidence is necessary to

(a) make a recommendation to the court under subsection 672.851(1)

[emphasis added]

[32] We did not order an assessment. We note that the wording "may" is permissive, not mandatory. This conclusion is supported by the conditional wording "if it has reasonable grounds to believe that such evidence is necessary".

[33] We concluded that the record before us was sufficient upon which to ground a recommendation to the Court, pursuant to s.672.851.(1). We found the following evidence in the record:

- The disposition information contains evidence, as noted above, of Mr. Larocque's long-standing cognitive deficit (Exhibits 2 and 3).
- Dr. Tomita in 2004 was of the opinion that Mr. Larocque, if carefully managed, could provide barely adequate responses to the questions posed in a fitness inquiry, but would decompensate in a courtroom setting to the point he would not be capable of continuing with a trial (Exhibit 8, pages 4 to 5).
- Dr. Jones also put forward that opinion in her current assessment (Exhibit 17, page 6, and oral testimony).
- Dr. Tomita was of the opinion that Mr. Larocque's fitness deficits were likely unchangeable, even with specific remediation (Exhibit 8, page 5).
- A previous panel of this board similarly found that Mr. Larocque's cognitive deficits are likely permanent (Exhibit 15, page 1).
- Dr. Jones has recently repeated the conclusion Mr. Larocque's deficits are likely permanent (Exhibit 17, page 6, and oral testimony).
- Mr. Seyl, on behalf of his client agreed that he was likely permanently unfit (oral submission).
- Mr. Rivard, on behalf of the Attorney-General agreed that Mr. Larocque is likely permanently unfit (oral submission).

[34] After reviewing that evidence, the submissions of counsel, and Mr. Larocque's presentation at the hearing, we concluded that it was not necessary to have the further evidence of an order pursuant to s.672.121(a) in order to make a recommendation that the Court conduct an inquiry pursuant to s.672.851(1).

[35] We also turned our minds to the particular wording of s.672.851(1) as follows:

672.851(1) The Review Board may, of its own motion, make a recommendation to the court that has jurisdiction in respect of the offence charged against an accused found unfit to stand trial to hold an inquiry to determine whether a stay of proceedings should be ordered if

(a) the Review Board has held a hearing under section 672.81 or 672.82 in respect of the accused; and

(b) on the basis of any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(a), the Review Board is of the opinion that

(i) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and

(ii) the accused does not pose a significant threat to the safety of the public.

[*emphasis added*]

[36] On a plain reading of s.672.851(1)(b), the words "any relevant information" are followed by an inclusive, not requisite list: "including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(a)...." Those latter words modify the words "any relevant information".

[37] In anticipation of an argument that "an assessment report" is necessary in addition to "any relevant information," we offer that a comma before the word "and" might support such a reading, but there is no such comma. We also note that a reading which treats the assessment report as something separate from "relevant information" offends the purpose of the report.

[38] Lastly we note that it would offend judicial or administrative economy to require a subsequent hearing to be convened, solely for the purpose of fulfilling any supposed technical requirement for such an assessment even though we have abundant evidence that Mr. Larocque is both permanently unfit and not a significant threat to public safety. We note also that it was clear both on the expert evidence and on Mr. Larocque's presentation before us that he finds such hearings stressful. Neither Dr. Jones nor Mr. Seyl were willing to subject Mr. Larocque to a fitness examination at the hearing because of their concern he would suffer a decompensation in his mental state.

[39] Accordingly, on a grammatical, semantic, and practical analysis of sections 672.121(1) and 672.851(1)(b), we have concluded that we are not required to order a further assessment report, and we make the recommendation that the Court conduct an inquiry pursuant to s.672.851(1). Further assessment would only delay Mr. Larocque's return to court and subject him to yet another hearing before the Review Board, compounding the "anxiety, concern and stigma" which the unfit accused experiences in the criminal process (R. v. Demers, [2004] 2 S.C.R. 489; [2004] S.C.J. No. 43; 2004 SCC 46. at para.53).

