SCHIZOPHRENIA SOCIETY OF ONTARIO
A REASON TO HOPE

Fitness to Stand Trial

A person charged with a crime may be unable to go to trial if they are mentally unwell. This is called being "unfit to stand trial." The *Criminal Code of Canada* states that a person is unfit to stand trial if, because of mental illness, they are unable to do one or more of the following:

- **Understand the nature or object of the proceedings** – they are unable to understand that they are in a courtroom, who the people in the courtroom are (i.e., the judge, the Crown, their lawyer) and why they are there.
- **Understand the possible consequences of the proceedings** – they are unable to understand what they are charged with, what kinds of pleas they can enter (i.e., guilty or not guilty), what can happen to them if they plead guilty, or what can happen if they don't tell the truth in court.
- **Communicate with their lawyer** – they are unable to take part in their own defence and tell their lawyer, even in basic terms, what they want to do with their case.

Is there a difference between fitness to stand trial and criminal responsibility?

Fitness to stand trial and criminal responsibility are two different concepts. One does not affect the other. This means that even if the person is found mentally fit to stand trial, a later assessment may still show that — when the crime was committed — they were not well enough to understand the nature and consequences of their act and should be found not criminally responsible (NCR). Conversely, the person could be found unfit to stand trial in the present, but a psychiatric assessment might show that they knew what they were doing at the time of the act and therefore, must be held criminally responsible for it.

How does the court decide if the person is unfit to stand trial?

The law assumes that every accused person is "fit," unless it is determined by a judge, after a fitness hearing, that they are "unfit to stand trial." This is called "presumption of fitness."

The issue of mental fitness can be raised at any time between arrest and sentencing. Most fitness assessments are usually ordered shortly after the person makes an appearance in bail court. The Crown and/or the individual's lawyer (or duty counsel) can ask the judge to order a fitness assessment. Less often, the judge may question the person to determine whether they are fit to stand trial without request from the Crown or the defense counsel. If the person's

fitness to stand trial remains uncertain, the judge will order a forensic assessment (called Form 48).
After the fitness assessment is complete, a “fitness hearing” occurs in court. It is like a brief trial, with witnesses and evidence called. At the end of the fitness hearing, the judge will decide whether the person is fit to stand trial.

What happens during the fitness assessment?

Once the judge makes an order for a fitness assessment, they will usually send the person to a secure psychiatric hospital (usually with a forensic program) for the assessment. This assessment is typically performed by a psychiatrist or psychologist. In some courthouses, there is a psychiatrist available to assess the accused right in the courthouse, so the assessment can occur that same day.

During the assessment, the assessor will look at the person’s functional abilities and behaviour. They will also examine their beliefs, capacity to weigh variables, and mental state. Some questions that the assessors can ask include:

- Do you know where you are?
- What is the role of the justice of the peace or the judge?
- Do you know the charges against you?
- What pleas are available to you?
- Do you know the possible consequences of being found guilty? Not guilty?
- Do you understand what it means to take an oath?

The length of a fitness assessment mostly depends on whether or not the person agrees with the fitness assessment order. If the person agrees, then the order can be for up to 30 days. If the person does not agree, the assessment can last only 5 days. For both of these cases, a judge can also extend a fitness assessment order for up to 30 more days in order to finish an assessment.

What is the "Taylor Test"?

The "Taylor Test" refers to the case of R. v. Taylor, which set the test for fitness at "limited cognitive capacity." Prior to this case, a person was required to have a higher "analytical capacity" in order to be found mentally fit enough to stand trial. The current test for fitness to

stand trial only requires that the person has a basic understanding of their legal problem. The test is not whether they actually know their legal situation, but whether they are able to understand the concepts involved and to communicate the basic facts about their case. Capacity is the central concern, which means that the bar for determining fitness is actually set quite low.

In order to be considered fit to stand trial, it is also not necessary that the person be able to act rationally and/or in their own best interest. For example, symptoms of paranoia may cause the person to do something that would negatively affect their trial, such as fire their lawyer. However, if this paranoia does not reduce their capacity to understand the court process or communicate with a different lawyer, they will still be considered fit to stand trial.

If you are concerned about the findings of the assessment, you can ask for a second opinion. However, a court will not pay for a second assessment.

What happens if the person is found unfit to stand trial?

If the court determines that the person is unfit to stand trial, the court can order a Treatment Order (also called a "make fit" order). If this order is granted, the person will be sent to a psychiatric hospital (usually with a forensic program) for treatment to help make them mentally fit to stand trial. Efforts will be made to find a hospital in the region where the crime was committed; however, the person may be sent to any psychiatric hospital in Ontario that has an available bed. A “make fit order” can last up to 60 days, but the person will typically return to court after 30 days to see how they are doing.

A Treatment Order is the only circumstance under Canadian law which allows treatment of an accused person without consent. It can only be ordered under these strict criteria:

- The person is unlikely to become fit without treatment; and
- A psychiatrist thinks that the person can be made fit within 60 days if they receive treatment; and
- Only the least intrusive methods are used; and
- The benefits of making the person fit outweigh any possible negative effects of treatment.

What happens after the treatment or "Make Fit" order is complete?

If after the order expires the court determines that the person has the mental capacity to stand trial, they will return to court and the trial will go on as usual.

If the person is still not considered well enough after the order expires, they will not stand trial. Instead, they will come under the authority of the Ontario Review Board (ORB), an independent tribunal that handles cases of people who are unfit to stand trial or found NCR. Decisions about people who are unfit or NCR are called “dispositions.” In some cases, the first disposition hearing can be held at the court immediately after the verdict of unfit to stand trial is made. In other cases, the person’s first disposition hearing will be made by the ORB, within 45 days of being found unfit. Further disposition hearings are held by the ORB at least once a year. At each hearing, the person's case will have one of the following three outcomes, or "dispositions:"

- **Fit to stand trial** – the person is found to be mentally well to go through the trial process, and is sent back to court. If the court determines that the person is indeed fit, they will no longer be under the authority of the ORB. Their trial will proceed as normal.

- **Unfit to stand trial with a conditional discharge** – the person is still not well enough to go back to court, but is no longer required to remain in custody at the hospital. The ORB will release them into community with certain conditions. If the person breaks the conditions, they may be arrested again or sent back to the hospital. At any time during the year if their doctor believes that the person is now fit, they can contact the ORB for a hearing. If the ORB finds them fit, they will return to court.

- **Unfit to stand trial with a detention order** – the person remains unfit and is considered a danger to the public and the ORB decides that they require ongoing detention. This means that the person will not yet go back to court, and must remain in custody at the hospital. If the person's doctor decides that they have become fit to stand trial before the year is up, they can request an earlier hearing. If the ORB finds them fit, they will return to court.

If the person remains unfit to stand trial after the “make fit order” is complete, they will remain under the supervision of the ORB as long as the Crown maintains criminal charge against them. If the Crown can no longer prove its case, or decides not to continue with the case, then the person will no longer be under the supervision of the ORB.

What if the person never becomes fit enough to stand trial?

Rather than making the person stay under the authority of the ORB indefinitely, the court can issue a "stay of proceedings," which means that the charges are dropped and the person is allowed to live in the community without restrictions. This can only happen if all the following criteria are met:

- The person is not likely to ever become fit to stand trial.
- The person is not a significant threat to the public.
- A stay is in the interests of the proper administration of justice.

In order to determine whether a stay of proceedings should be ordered, the court will hold an *inquiry* and order a psychiatric assessment. This option is technically available to anyone; however, it is most often used with persons who have an intellectual disability or permanent brain injury.