Fitness to Stand Trial: A Guide for Families

A person who is charged with a crime may be too mentally ill to be able to go through the trial process. 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**
- **Understand the possible consequences of the proceedings**
- **Communicate with their lawyer**

When will the court decide if my family member is fit/unfit to stand trial?

The issue of mental fitness can be raised at any time between arrest and sentencing. The court will complete an order for a forensic assessment (called a Form 48). This assessment is typically performed by a psychiatrist or psychologist. The assessment order should last only 5 days, but it can be extended to 30 or 60 days under special circumstances if both the Crown and your family member agree.

In some courts, court staff (such as the judge or duty counsel) may conduct an initial informal fitness assessment to determine whether your family member is fit to stand trial. If, based on these more informal questions, the judge remains uncertain about your family member's fitness to stand trial, he or she will order a more thorough assessment by a psychiatrist via a Form 48.

What happens during the assessment?

During the assessment, the assessor will look at your family member's functional abilities and behaviour. They will also examine their beliefs, capacity to weigh variables, and mental state. The assessor will also try to find out whether your family member understands what he or she has been charged with.

An accused person is presumed to be fit to stand trial unless the contrary is proven on the *balance of probabilities.* This means that the evidence must show that your family member is more likely unfit than fit to stand trial. In order to be considered unfit, your family member must demonstrate at least one of the following three things:

1. They are unable to describe the roles of the people in the courtroom, such as the Crown counsel, defence counsel (their lawyer), and judge.
2. They do not have a general understanding of what happens in court, such as what the possible outcomes are and what an oath is.
3. They are unable to instruct their lawyer and take part in their own defence.

I believe my family member is very ill; yet the assessment showed that he was fit to stand trial. How is that possible?

The test for fitness to stand trial only requires that your family member have a **basic understanding** of their legal problem. The test is not whether he/she **actually knows** their legal situation, but whether they are **able** to understand the concepts involved and to communicate. **Capacity** is the central concern, which means that the bar for determining fitness is actually set quite low.

In Canadian law, it is also not necessary that your family member be able to act rationally and/or in their own best interest in order to be considered fit to stand trial. For example, symptoms of paranoia may cause your family member 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.

Fitness to stand trial and criminal responsibility are two different concepts. One does not affect the other. This means that even if your family member is found mentally fit enough to stand trial, a later assessment may still show that, at the time of the crime, they were not well enough to understand the nature and consequences of their act and should be found not criminally responsible (NCR). Conversely, your family member 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.

If you are concerned about the findings of the assessment, you can ask for a second opinion. Your family member has the right to order another assessment to challenge the Crown's evidence – however the court will not pay for this.

What happens if my family member is found unfit to stand trial?

If the court determines that your family member is unfit, the Crown may bring in an application for a Treatment Order (also called a "make fit" order). If this order is granted, your family member will be sent to a mental health facility for treatment to help make them mentally fit enough to stand trial. Efforts will be made to find a bed in the region where the act was committed; however, your family member may be sent to any mental health facility in Ontario that has an available bed. A make fit order can last up to 60 days, but your family member will typically be returned 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 after these strict criteria have been met:

- A psychiatrist thinks that your family member can be made fit within 60 days if they receive treatment.
- Only the least intrusive methods are used.
- The benefits of making your family member 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 your family member has the mental capacity to stand trial, he or she will be returned to the court and the trial will go on as usual.

If your family member 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 panel that handles cases of people who are unfit to stand trial or NCR. Decisions about people who are unfit or NCR are called “dispositions”. In some cases, the first disposition hearing might be held at the court immediately after the verdict of unfit to stand trial is made. In other cases, your family member’s first disposition might be made by the ORB, at a hearing held within 45 days of being found unfit. Further disposition hearings are held by the ORB at least once a year. At each hearing, your family member's case will have one of the following three outcomes, or "dispositions":

- **Fit to stand trial**: This means that the ORB has decided that your family member is now mentally well enough to be able to go through the trial process, and should be sent back to court. If the court determines that your family member is indeed fit, he or she will no longer be under the authority of the ORB. Their trial will proceed as normal.
- **Unfit to stand trial** with a **conditional discharge**. This means that your family member 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 your family member with certain conditions; for example, he or she must report to the hospital or provide urine samples periodically. If your family member breaks the conditions, they may be arrested again or sent back to the hospital.

- **Unfit to stand trial** with a **detention order**. If your family member remains unfit and is considered a danger to the public, the ORB may decide that they require ongoing detention. This means that your family member will not yet go back to court, and must remain in custody at the hospital.

If your family member's doctor decides that they have become fit to stand trial before the year is up, they can request an earlier hearing.

What if my family member never becomes fit enough to stand trial?

As of June 2005, there are new provisions in the *Criminal Code of Canada* for people who are permanently unfit. Rather than making the person stay under the authority of the ORB indefinitely, the court can now 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:

1. Your family member is not likely to ever become fit to stand trial.
2. Your family member is not a significant threat to the public.
3. 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 individuals who have an intellectual disability or permanent brain injury.

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. This involved the person being able to maintain a relationship with their lawyer, act rationally, and make decisions based on their own best interests. Now, the bar is set much lower. In order to demonstrate that they are able to "instruct their lawyer," your family member would only have to be able to communicate the basic facts about their case.