



Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: Fitness to Stand Trial

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STATEMENT OF INTENT: CAPL Resource Guide for Reference and Training

This document is intended as a review of legal and psychiatric principles to offer practical guidance in the performance of forensic evaluations. This resource document was developed through the participation of forensic psychiatrists across Canada, who routinely conduct a variety of forensic assessments and who have expertise in conducting these evaluations in various practice settings. The development of the document incorporated a thorough review that integrated feedback and revisions into the final draft. This resource document was reviewed and approved by the Board of CAPL on August 30, 2021. It reflects a consensus among members and experts, regarding the principles and practices applicable to the conduct of forensic assessments. This document does not, however, necessarily represent the views of all members of CAPL. Further, this resource document should not be construed as dictating the standard for forensic evaluations. Although it is intended to inform practice, it does not present all currently acceptable ways of performing forensic psychiatry evaluations and following these guidelines does not lead to a guaranteed outcome. Differing facts, clinical factors, relevant statutes, administrative and case law, and the psychiatrist's clinical judgement determine how to proceed in any individual forensic assessment.

This resource document is for psychiatrists and other clinicians working in a forensic assessor role who conduct evaluations

and provide opinions on legal and regulatory matters for the courts, tribunals, and other third parties. Any clinician who agrees to perform forensic assessments in any particular domain is expected to have the necessary qualifications according to the professional standards in the relevant jurisdiction and for the evaluation at hand.

See the Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: General Principles, which will apply to all of the guidelines and will not be repeated below.

OVERVIEW OF FITNESS TO STAND TRIAL

The rationale for determining fitness to stand trial is to ensure fairness in the judicial system. Every person is presumed to be fit to stand trial. However, an accused person needs to be both physically and mentally present and able to understand and participate in the court proceedings. An accused person needs to be able to participate in their own defence and be free of a mental disorder that would interfere with their ability to do so. Mental capacity applies only to the circumscribed task (e.g., at the time of the trial). However, prospective elements have been taken into consideration in more complex trials. The issue of fitness can be raised at

different stages of the trial and, though much less common, it has been raised after a verdict and prior to sentencing, as well as at appeal. (1)

Legislation and Case Law

While present in common law (see *R v. Pritchard* [2]), being unfit to stand trial was first codified in the Criminal Code of Canada in 1992 with Bill C-30. Though not clear in appellate case law (e.g., *R v. Taylor* [3]), most legal and psychiatric professionals are of the view that a person should not be tried if they are unable to understand the meaning and purpose of the trial in a rational manner or conduct a defence on their own or with the assistance of counsel. (1)

There is a presumption of fitness to stand trial. However, according to the Criminal Code of Canada, (4) an accused person is unfit to stand trial if they are 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. In particular, they are unfit to stand trial if they are incapable of the following on account of mental disorder:

- understanding the nature and object of the proceedings
- understanding the possible consequences of the proceedings
- communicating with counsel

The Criminal Code defines mental disorder as a “disease of the mind.” Its legal definition, as described in *Cooper v. R*, is “any illness, disorder or abnormal condition which impairs the human mind and its functioning.” (5) From a psychiatric perspective, mental illnesses that could render a person unfit include (but are not limited to) psychotic disorders with active psychosis, major mood disorders with active psychosis, and cognitive impairment (such as moderate to severe intellectual disabilities, severe brain injuries, dementia, and drug- or delirium-related [temporary] impairment). A specific diagnosis does not in and of itself dictate whether someone is unfit to stand trial; however, based on case law and consensus, amnesia for the alleged crime, (6) selective mutism, language and hearing limitations, lack of cooperation, mild intellectual disabilities, anxiety, and personality disorders do not in and of themselves render a person unfit to stand trial. Similarly, lack of knowledge about how the justice system works does not render a person unfit.

A mental disorder is necessary but not sufficient to render an accused person unfit. A person can be delusional, for example, and still be fit to stand trial. However, delusions can impact fitness if they interfere with the accused person’s understanding of the legal process or ability to participate in the court process, if the accused person is unable to conduct a defence or instruct their lawyer on account of delusions, or if the delusions cause the accused person to be unable to testify relevantly and manage their courtroom behaviour due to their disorganized mental state. (1,7)

Prior to 1992, an accused person needed to be able to participate in court proceedings in a meaningful way and instruct counsel rationally. (1) *R v. Taylor* (3) narrowed the fitness-to-stand trial standard to a lower threshold for understanding and ability. The test of fitness changed from a more analytic test to a limited cognitive test of fitness. Under a limited cognitive capacity test, a person does not need to have a rational understanding of their legal circumstances, nor do they have to act in their own best interests. Although the limited cognitive capacity test has not been explicitly defined, questions have been narrowed to determine the accused person’s awareness of their charges, the pleas available and possible consequences of the proceedings, the various roles of the officers of the court, and the meaning of an oath and perjury. (1) These typical questions come from *The Criminal Process and Mental Disorder*. (8) The accused person must also be able to communicate with counsel. Although it has been argued that the otherwise unfit accused person may be able to conduct a defence with the assistance of counsel, (1) this might depend on the seriousness of the offence.

The limited cognitive capacity in *R v. Taylor* (3) was decided by the Ontario Court of Appeal and affirmed by the Supreme Court of Canada in *R v. Whittle*. (9) Subsequently, some courts have determined that an accused person must also be able to participate in the court proceedings, with a “rational understanding of their legal situation,” and “sufficient mental fitness to participate in the proceedings in a meaningful way.” (1,10) Such an approach comports better with the perspective of most clinicians.

Future Capacity and Sliding Scales of Fitness

While fitness assessments provide conclusions at the time of the interview, an understanding of prospective capacity is important, as many trials are not held at the time of evaluation and some hearings are lengthy and complex. Fluctuations in capacity are not uncommon and can impact an accused person’s fitness to stand trial day to day and over time. Based on the accused’s illness, state of treatment, and history, as well as the anticipated length and stressfulness of the trial, opinions could be provided regarding whether they are likely to remain fit over an extended period of time. Further, although not defined, the threshold of fitness is linked to the complexity of the allegations, the duration of the trial, the accused’s level of understanding and fluctuations in mental state, and the required involvement of the accused in the defence. (1)

Fitness Orders and Assessments

There is also a presumption of fitness at all stages of court proceedings. The issue of fitness to stand trial can be raised at any stage before a verdict is rendered or sentence imposed. Presentations in court suggestive of a fitness problem could include evident delusions, being seemingly unable to attend to the court proceedings, an extreme or inappropriate affect, and odd behaviour (e.g., ranting, being uncontrollable, talking

to oneself, being incomprehensible, being highly distractible, or appearing to respond to internal stimuli). Some are subtle and only discoverable with careful attention (e.g., significant inattention and distractibility). The prosecutor can raise the issue of fitness on reasonable grounds, as can the court. Although there could be a conflict of interest, defence counsel can also raise the issue, particularly if they are unable to receive adequate instruction from the accused. The burden of proof is on the party who raises the issue. The presumption of fitness will remain until displaced on a “balance of probabilities,” that is, more likely than not.

If there are reasonable grounds, an assessment of fitness to stand trial can be ordered by the judge under section 672.11 of the Criminal Code. (4) The duration of a fitness-to-stand-trial assessment order is from a few days to 60 days, under compelling circumstances. An assessment can be conducted by a medical practitioner or any other person who has been designated by the Attorney General as being qualified to assess the mental condition of the accused under an assessment order made under section 672.11 or 672.121 (section 672.1). Fitness-to-stand-trial issues can be determined without expert evidence; however, an expert is usually asked to assess the accused person. This is most commonly a physician with expertise in diagnosing and treating complex medical conditions that can contribute to someone being unfit. Forensic psychiatrists have specialized training in performing these assessments, and any expert who performs a fitness-to-stand-trial assessment should have similar training. In more remote parts of Canada, access to a psychiatrist may not be possible, and trained health care practitioners may be designated by the provincial or territorial Attorney General. There are also often administrative issues tied to the forensic hospital that need to be considered in such evaluations. The court must appoint counsel if there are reasonable grounds to believe the accused may be unfit and unrepresented.

Dispositions for an Accused Person Found Unfit to Stand Trial

If an accused person has been found to be unfit to stand trial, a court-ordered treatment order can be issued, or they can be placed under the jurisdiction of the provincial or territorial review board. The latter, however, could prolong the court proceedings.

Court-Ordered Treatment Orders

A court-ordered treatment order under section 672.58 of the Criminal Code may be issued for up to 60 days to render an accused person fit to stand trial with medication (see Table 1). Before such a hearing can take place, the Crown must notify the accused in writing and as soon as practicable of the application (section 672.6 [1]). At such a hearing, the accused may call evidence to rebut that adduced by the Crown. A treatment order also requires expert testimony from a medical practitioner (section 672.59). If the accused

Table 1. Court-Ordered Treatment Orders

<ul style="list-style-type: none"> • The accused person must be found unfit to stand trial. • They are court-ordered on application by the Crown with expert testimony. • They are for a specified period not exceeding 60 days (the accused may become fit earlier). • The accused can be in or out of custody and can be ordered for inpatient treatment. • The proposed treatment facility or practitioner must consent to receive the accused. • The treatment is for medication and necessary ancillary monitoring (12) and cannot include ECT* or psychosurgery. • The following testimony from a medical practitioner must be satisfied: <ul style="list-style-type: none"> – The proposed treatment will likely render the accused fit within 60 days. – Without treatment, the accused will likely remain unfit. – The risk of harm is not disproportionate to the anticipated benefits. – The treatment proposed is the least restrictive and least intrusive treatment option.

* ECT might be used in some circumstances with consent or substitute consent under the mental health legislation.

person remains unfit after 60 days under a treatment order, they are traversed to the provincial or territorial review board.

The use of court-ordered treatment orders varies across Canada. In British Columbia, treatment orders are not used because accused people admitted for a court-ordered fitness assessment can also be admitted as involuntary patients under the BC Mental Health Act and receive treatment that restores fitness capacity during the remand period, at least for those who are responsive to treatment. In Saskatchewan, they are rarely used, as those found unfit are treated either voluntarily or under the Mental Health Act, and capacity is assessed as a component of the certification criteria. Treatment orders are used in Manitoba and Nova Scotia, though not often.

Dispositions Under the Review Board

If an accused person has been found unfit to stand trial, the court may conduct a disposition hearing and issue a disposition or traverse the matter to the review board. However, where a party requests that the court hold a hearing, one must be held (section 672.45 [1]). A disposition will only be rendered by the court where it is satisfied that it can readily do so, and a disposition should be made

without delay (section 672.45 [2]). The accused will either be detained in the custody of a hospital (section 672.52[c]) or discharged from hospital subject to certain conditions (section 672.54[b]). The accused remains under the jurisdiction of the review board until they are fit to stand trial or until there is an acquittal or stay of proceedings. Within each two-year interval, if the Crown cannot demonstrate a *prima facie* case, then the court shall acquit the accused. If the accused person is found to be permanently unfit and does not represent a significant threat to the safety of the public, then a stay of proceedings may be issued by the court (section 672.851). (11) To be found permanently unfit requires evidence that the accused is unlikely to ever become fit (which is usually secondary to severe cognitive impairment or chronic refractory psychosis). If the accused is permanently unfit and continues to be a significant threat, then the accused remains under the review board.

“Keep Fit” Orders

If an accused person has become fit to stand trial with treatment in hospital but there are concerns that they may become unfit prior to the verdict, continued hospital admission with a “keep fit” order can be issued under section 672.29 of the Criminal Code.

Fitness to Proceed with Sentencing

Issues of fitness can also be raised at any stage of the proceedings, including post-verdict and pre-sentence, as well as on appeal. This could be particularly relevant in the event of deterioration in mental state during more lengthy court proceedings or if a more complex issue arises that requires more understanding (e.g., a dangerous offender proceeding). Although there are no statutory provisions regarding fitness to proceed with sentencing (in that there is now the Criminal Code of Canada legislation) and the case law is limited, the issue has arisen in court. (1,13,14)

If an accused person is found unfit to proceed with sentencing on account of a mental disorder, they could be subject to the jurisdiction of the review board until they are fit to proceed with sentencing. A treatment order requires a verdict of “unfit to stand trial” as a pre-condition. With Justice McWatt’s decision in *Balliram*, (13) the Criminal Code provisions dealing with fitness have been read up to include “through to the completion of sentencing.” Although most fitness issues arise prior to arraignment, in theory they can arise post-verdict. Where this occurs, a treatment order is possible, even though the verdict of unfit arises further down the prosecutorial timeline.

Considerations Specific to Issues of Fitness

The following are considerations that could arise for an accused in court or after being found unfit to stand trial:

- The issue of fitness not being raised when an accused’s mental state is hindering their ability to participate in

court proceedings in an ongoing fashion, to ensure fairness.

- Protracted court proceedings for relatively minor offences due to the accused being unfit to stand trial; for minor allegations when the resolution of the fitness question will likely be protracted, considerations should be made about the possibility for diversion. Prosecutorial discretion should determine whether there is a public interest in prosecution or whether a more equitable/efficient solution might be found.
- Expeditious treatment under a treatment order, or while under the review board, to render the accused fit as soon as possible and returning the accused to court as soon as they are fit to stand trial so as not to prolong the proceedings unnecessarily.

THE FITNESS ASSESSMENT

Settings for Assessments

Settings for assessments of fitness to stand trial can include court cells or offices in the courthouse (including mental health courts), detention centres, or forensic inpatient and outpatient assessment settings. In recent years, more videoconferencing options have become available.

Sources of Information

Sources of information may be limited, depending on the setting and time allotted to the assessment. At the very least, this section will include court documents and an (attempted) interview with the accused person. While it is the accused’s mental state that is at issue, for more extensive or complex assessments, hospital records, collateral interviews, and psychometric tests may be needed to understand the accused’s diagnosis or whether they are malingering.

The Interview

As in all forensic psychiatry assessments, an interpreter may be used when the accused person is not fluent in the assessment language. Facilitated communication may also include sign language interpretation or technology-facilitated communication, such as physical or electronic language boards or programs. The assessor also takes into account cultural and religious considerations, including the accused person’s knowledge of the Canadian court system, their values and views, and how these could impact their answers to the questions. However, lack of knowledge about the Canadian legal system due to place of origin or language is not a reason to be unfit; it is the person’s ability to know or be educated about this information.

It is important to recognize the seriousness of the charge(s) and the expected length of the trial. The length and depth of the interview could depend on these, as well as on the setting of the assessment and the accused person’s mental state.

An accused person is not required to consent to participate in an assessment of fitness to stand trial. However, the assessment process is addressed with the accused person.

A significant part of the fitness assessment involves addressing core fitness issues with the accused to assist in determining their ability to understand the nature and object of the proceedings. These include a general knowledge of the charge(s) (albeit the accused person does not have to agree with the charges or know the details), the pleas available, the possible consequences of being found guilty or not guilty, the roles of the various officers of the court, and the meaning of an oath and perjury. In some cases, it might also be helpful to ask about their understanding of their basic rights in court. The issue of concern is not whether the accused knows but whether they have the ability or capacity to understand the concepts and to communicate with counsel or conduct a defence. Coaching is used in many fitness assessments to elucidate the discrepancy between knowledge and the capacity to understand. Questions exploring the accused's ability to communicate are also fundamental to such an assessment, as are questions about their mental state, psychiatric history, and current and past treatment. Table 2 presents examples of basic fitness questions, which could be aided by diagrams and coaching. Ancillary issues include capacity for meaningful engagement in the court proceedings.

It is also important to elucidate the accused person's psychiatric symptoms, cognitive abilities, potential fluctuations in mental state, and ability to process information and communicate, in order to understand how these areas could impact fitness.

The extent of the background elicited is determined by the need to better understand the psychiatric history and presentation that could contribute to the accused's unfitness and their response to treatment in the past. This is particularly important for a treatment order if the person has been found unfit to stand trial. Background information will also be of assistance in determining the probability of the accused being rendered fit within a 60-day treatment order. More complex cases and lengthier trials may require more background to develop a better understanding of the person. History that elucidates cognitive capacity and functioning in other areas of an accused's background may be useful for cases where the subject is unwilling to participate in any assessment or in instances of malingering. Although asking the accused person about their charges is fundamental to the fitness assessment, the account of the circumstances leading to the alleged offence is not relevant to a fitness-to-stand-trial assessment and could be prejudicial if written in the report.

Use of Structured Fitness Tests and Diagrams

An assessment of fitness to stand trial can be assisted by *aide-memoires*, such as a structured fitness test or diagrams. The Fitness Interview Test-Revised (FIT-R) (15), for example,

Table 2. Examples of Fitness-to-Stand-Trial Questions

- Do you know why you are here (in court, having an assessment, etc.)?
- Do you know why you were arrested?
- What is/are the nature of your charge(s)?
- What do you think will happen when you go to court?
- What could you (or anyone else) plead if charged?
 - If the accused has difficulty identifying the pleas available, they might be asked: What could happen if you were found guilty of your charges? And if you were found not guilty?
- Do you have a lawyer? What is the role of your lawyer? Are you able to discuss your charges with your lawyer? Do you feel able to communicate with your lawyer? How will you help your lawyer defend you? Do you trust your lawyer? Do you understand that you have the right to cross-examine/ask questions either directly or through counsel during the trial?
 - Other questions if deemed appropriate could include: Do you know you are entitled to be represented by a lawyer? Do you understand that you have a right not to testify in court, though you can if you wish?
- What is the role of a Crown attorney or prosecutor in court? (The American equivalent of “district attorney” may be more familiar to some.)
 - Alternative: There are generally two lawyers in court — yours and one who represents the state. Do you know what they might do?
- What is the role of a judge and/or jury?
 - Alternative: Who makes the decisions in court?
- What is an oath?
 - Alternative: What do you swear to do in court (by affirming or putting your hand on a holy book)? What happens if you lie in court?
- Do you think the processes and procedures of the court are fair?
- What behaviour is expected of you in court during the proceedings?

is an in-depth fitness interview developed in Canada, for Canadian as well as American contexts. Structured assessment tools and diagrams can be used to coach and understand the accused's comprehension of the court and the proceedings. Diagrams can be particularly helpful for those with hearing impairments, language difficulties, limited knowledge of the Canadian court system, and cognitive limitations. They are also potentially useful for those with heightened anxiety or mutism.

Table 3. Example Template for a Fitness-to-Stand-Trial Report

<ul style="list-style-type: none">• Reason for assessment• Sources of information• Limits of confidentiality• Identifying data• Response to fitness questions• Background information (including psychiatric history and treatment)• Review of symptoms and mental status examination (and fluctuations)• Psychiatric opinions and recommendations:<ul style="list-style-type: none">– Diagnoses– Fitness assessment– Other psycholegal issues as applicable (duty to warn, child protection services, driving capacity, need for involuntary hospitalization, etc.)– Recommendations:<ul style="list-style-type: none">○ If fit, a keep fit order may or may not be recommended○ If unfit, recommendations could include:<ul style="list-style-type: none">– Reassessment– Treatment orders: criteria and procedure– Review board disposition until fit– Disposition if permanently unfit (if determined they remain a significant threat)– If unfit to proceed with sentencing, treatment order or review board disposition• Signature block
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Fitness Coaching and Retesting

A fitness assessment may include fitness coaching and retesting. While this is more common in lengthier assessments, during treatment orders, and when an accused person is under the review board, it can be used at any time. This is particularly important for those whose basic knowledge of the court is limited. It is also important that the accused person understands they are permitted to ask questions about the court process. The assessor will provide answers to their questions and potentially use diagrams or other aids. They will then retest the accused after a time. It is sometimes useful for another member of the team to retest the accused. The accused's answers may differ depending on the context.

Other Testing

Examinations, such as psychometric tests, can assist in determining intellectual functioning and potential malingering.

Urine drug screens and other medical investigations can assist in determining potential drug effects on a person's mental state, medical comorbidities, and other possible confounding issues.

Special Considerations

Some individuals can benefit from special accommodations by the court, such as regarding age, cultural and racial differences, limited education or understanding of the Canadian court system, medical issues, disabilities, mental disorders, or intellectual functioning. These accommodations could involve building rapport, the use of coaching and diagrams, and the presence of a support person, depending on need. If someone is mute or highly fearful, for example, these considerations may be of great assistance in understanding their fitness. While amnesia for the alleged offence may not itself impact fitness, (6) more extensive memory problems can. Standardized testing and the use of diagrams and coaching can assist. Psychometric tests can also be fundamental for cases of suspected malingering.

Another area that needs special consideration relates to the potential length and complexity of the trial and fluctuating presentations. Depending on the length of the hearing, the seriousness of the charge, and the potential outcome of the proceeding, the threshold for fitness could vary. It is expected, for example, that the mental state of a person with active psychosis would fluctuate over time, thus their fitness could be more impacted by a lengthy hearing. Further, the stress of a lengthy hearing could also negatively impact a person's mental state, thereby impacting their fitness over time.

An accused person who is self-represented requires a careful assessment of fitness to stand trial; however, they may not cooperate with such an assessment, which can impact an understanding of their fitness. The threshold may be different in a self-represented or uncooperative accused person.

Diagnostic Considerations

Diagnostic considerations are determined from history and presentation, with a focus on those involving psychosis, affective disorders, cognitive impairment, impact of maladaptive personality traits, medical conditions, malingering, and substance-induced states, including withdrawal.

THE FITNESS REPORT (INCLUDING A TEMPLATE)

The fitness-to-stand trial report is similar to other forensic psychiatry reports (see General Principles), though they tend to be much shorter. The length depends, of course, on the complexity of the matter (length of assessment, diagnostic dilemmas, additional testing, collateral information, etc.).

The fitness report generally includes sources of information, background (especially psychiatric history and treatment),

responses to the fitness questions, review of symptoms, and mental status examination (and if there are fluctuations). The psychiatric opinions and recommendations include the diagnosis and current state, prognosis over time, and response to treatment if known. An opinion regarding fitness to stand trial (or, in rarer circumstances, fitness to be sentenced) could be limited to the Criminal Code criteria, although many forensic psychiatrists comment on the ultimate issue “from a psychiatric perspective.” Fitness is determined by the trier of fact.

Other psycholegal issues may be addressed if they are a concern. These could include a duty to warn, the need for involuntary hospitalization, driving capacity concerns, or the need to contact child protection services. (16)

If the accused person is opined to be fit to stand trial, recommendations could include a keep fit order if the person is being treated and needs to be in hospital during the trial to remain fit. This may be considered if there is a likelihood of the accused discontinuing medication outside the hospital setting and if there is an expectation of a lengthy trial.

If the person presents as unfit to stand trial, recommendations could include reassessment if, for example, there is expected fluctuation in mental state, if the unfitness is related to substance use or a medical condition, or if there are concerns about malingering or selective mutism. A court-ordered treatment order could be recommended if the person has active psychosis or mania, if it is unlikely they would become fit without the treatment order (see Table 1), or if they are expected to become fit with antipsychotic or mood-stabilizing medication. If the accused person is unfit to proceed with sentencing or has completed a treatment order but remains unfit, they would then be traversed to the review board. See Table 3 for an example of a template for the fitness-to-stand trial report.

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