

**ULCC | CHLC**

**UNIFORM LAW CONFERENCE OF CANADA**

**WORKING GROUP ON SECTION 672.26 AND RELATED SECTIONS OF  
THE *CRIMINAL CODE*  
(JURIES AND FITNESS HEARINGS)**

**STATUS REPORT**

**Presented by  
Julie Roy**

*Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.*

**Charlottetown  
Prince Edward Island  
August 2023**

**Presented to the Criminal Section**

This document is a publication of  
the Uniform Law Conference of Canada.  
For more information, please contact  
[info@ulcc-chlc.ca](mailto:info@ulcc-chlc.ca)

WORKING GROUP ON SECTION 672.26 AND RELATED SECTIONS OF THE *CRIMINAL CODE*  
(JURIES AND FITNESS HEARINGS)

[1] At the 2021 virtual meeting of the Uniform Law Conference of Canada (ULCC), the Criminal Section adopted a resolution at the request of Ontario (ON2021-03):

It is recommended that the Criminal Section of the ULCC strike a working group to review section 672.26 (and related sections) of the *Criminal Code* for possible legislative reform as to how the issue of fitness should be tried when an accused person has elected trial by judge and jury.

(Carried as amended 29-0-0)

[2] The resolution reflects the consensus that there appear to be two issues in the application of the *Criminal Code* fitness regime for a person who has elected (or is deemed to have elected) trial by judge and jury. The first issue relates to efficiency. It arises in situations where the provisions operate to require the accused to have one jury empaneled to decide fitness and then, if found fit, have a second and different jury empaneled for the trial. The second issue relates to potential prejudice. If fitness arises mid-jury trial, the empaneled jury must decide if the accused is fit to stand trial, which requires them to hear a wide range of evidence relating to their mental condition. If that accused is eventually found fit to stand trial, the trial continues *with the same jury*, and the trial judge must then deliver limiting instructions to the jury. This has raised concerns that this process could prejudice the accused, by exposing the jury to evidence they might not otherwise have been privy to.

[3] The working group is co-chaired by Joanna Wells (Justice Canada) and Rebecca Law (Ontario). Members include Lee Kirkpatrick and Noel Sinclair (both Yukon), Mandy MacLeod (Alberta), Alexander Godlewski and Stéphanie Moore (Justice Canada), Julie Roy (Quebec), Magalie Provost (Quebec DPCP), Lucie Joncas (Canadian Council of Criminal Defence Lawyers), and Rachel Anstey (New Brunswick).

[4] The working group has met virtually 6 times since September 2023 and intends to meet monthly commencing again in the fall.

## **1. Work to date**

[5] The group continues to explore its research question: “What are the implications of removing the issue of fitness to stand trial from the exclusive purview of the jury and placing it in the decision-making power of the judge?” Some areas that fall under this broad research question include the historical development of the provisions, the possible Charter implications (sections 7, 11(b), 11(d), 11(f)), and comparisons to legal systems in other countries.

[6] The work of the group involves a detailed procedural analysis of how Part XX.1 operates in the jury context. In particular, ss. 672.22 to 672.33(6).

[7] The group continues to work on the question of whether the Charter requires that a jury determine the question of fitness in a jury trial. They also agreed that its analysis

must include a study of whether more narrow changes to the *Criminal Code* would adequately address the problems identified.

[8] At least two more narrow changes have been considered by the group so far and there is general consensus that they are impractical or inappropriate. For example, the group agrees that there is possible prejudice to the accused when the issue of fitness arises mid-trial before a jury. If the accused person is found fit, the same jury hearing will go on to hear the remainder of the trial and arrive at a verdict with full knowledge of the evidence at the hearing. While it is possible to remedy this by amending the *Criminal Code* to provide for the accused to choose a separate jury to hear the fitness question only, this creates highly inefficient consequences, in terms of trial length, court resources, and juror selection and scheduling.

[10] Other jurisdictions permit the accused to decide whether the fitness hearing should be heard by a jury or a judge alone. For example, some states in Australia allow the accused person to decide who will hear the motion and further provide that where the accused is unable to instruct counsel, defence counsel can use their independent discretion to act in what they believe to be the defendant's best interests, including electing to have a judge alone hear the question of fitness. The working group has determined that this model would likely not be a good fit with Canadian legal principles.

### **1.1 Work of the group this coming year**

[10] When we reconvene in September 2023, it is proposed that the working group focus on the following issues this coming year:

- 1) The potential Charter implications of removing the decision of fitness to stand trial from the consideration of the jury;
- 2) Whether the possible prejudicial effect of mid-trial fitness hearings could be eliminated by an amendment mandating that any such motion must be heard by the trial judge alone;
- 3) The actual practical impact of the framework that requires potentially two juries when issues relating to fitness to stand trial arise raised before trial. This will involve trying to obtain information from jurisdictions that could shed light on whether these fitness hearings in jury trial cases continue to cause inefficiencies in Superior Courts of Justice jury selection and trial scheduling processes.

[11] It is recommended that the working group continue its study of this issue, in consultation with other committees as needed, and report back to the Criminal Section at the annual meeting in 2024.