



UNIFORM LAW CONFERENCE OF CANADA

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

STATUS REPORT

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Presented to the Criminal Section

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[1] At the 2021 virtual meeting of the Uniform Law Conference of Canada (ULCCA), the Criminal Section passed 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 Working Group (WG) has met virtually since its establishment in late 2021. In the 2023-2024 year, group meetings lapsed owing to unexpected absences and members changing employment. At the ULCC meeting in August 2024, the delegates extended the group's mandate and to assist with identifying interested counsel to join the group this fall. Several members joined and meetings resumed on a monthly basis in September 2024, led by the provincial co-chair and the new federal co-chair. The members have built upon the earlier work of the group and studied the ramifications of removing the jury from the determination of fitness and any lesser amendment that could remedy the problems identified such as how the legislative scheme may prejudice the defendant by requiring the jury to hear the evidence at a fitness hearing, as well as how the scheme creates or contributes to inefficiencies in the Superior Court of Justice. The group has arrived at consensus on several key questions related to the application of the *Criminal Code* fitness regime to a person who has elected (or is deemed to have elected) trial by judge and jury. The WG is currently drafting its final report.

[3] The WG had anticipated that this spring, the SCC would release its ruling in the case of *R. v. Bharwani* 2023 ONCA 203 (SCC case file 40781). This case was heard in the Ontario Court of Appeal in 2023. The SCC granted the defendant's application for leave to appeal and the case was heard on October 10, 2024. As of the time of this writing, the decision remains on reserve. The case will address critical aspects of mental disorder law, including the determination of legal fitness, which is the central focus of this group. The appellant has asked the Court to revisit the seminal case of *R. v. Taylor* (1992), 11 O.R. (3d) 323 and amend the fitness test from one requiring a limited cognitive capacity to one requiring analytic capacity, including the capacity to make rational decisions. Given the potential significance of this case, the WG members agree that it would not be prudent to conclude its analysis or recommendations until the release of the Supreme Court of Canada ruling in *R. v. Bharwani*.

[4] The WG now aims to table a final report in spring 2026. The members will continue to meet while it awaits the *Bharwani* decision and finalize its report once the decision released and discussed by the group.

[5] It is recommended that the working group continue its study of this issue and report back to the Criminal Section at the annual meeting in 2026.