

The Right to be Present

by Robin McKechney
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A highly unusual trial is unfolding in a Toronto courtroom in which a self-represented defendant, Xiu Jin Teng, has been ordered to watch her own trial remotely from a separate courtroom. Ms. Teng is charged with the first degree murder of her husband. The presiding judge was forced to make the extraordinary move after frequent disruptive outbursts by Ms. Teng that significantly impeded the progress of the trial.

A decision to remove a defendant from the courtroom is an order of last resort. It is a fundamental principle of fairness that testimony be given in the presence of the defendant. The defendant has a right to observe witnesses as they testify and the presence of the accused is thought to impress upon witnesses the importance of telling the truth. Balanced against the fairness to the defendant is the right of the Crown to be able to call its case and to the trier of fact, in this case the jury, to be able to listen to the evidence without repeated distractions.

The use of video link technology in the Teng case at least partially fulfills the objectives meant to be accomplished by the presence of the defendant. Other concerns, such as the ability of the accused to object to potentially inadmissible evidence, were also alleviated to some degree by the appointment of an *amicus curiae*, a friend of the court, who has the ability to question witnesses and object to evidence.

The judge in the Teng case clearly decided that the only way to preserve the fairness of the trial was to

remove the defendant, whose outbursts not only disrupted the Crown case but were in all likelihood harmful to her own case (as evidenced by the fact that the outbursts were routinely followed by a warning to the jury that the defendant's comments should play no role in their evaluation of the evidence).

This procedure may have application in the regulatory context when a member is sufficiently disruptive to the proceedings that the fairness of the hearing is jeopardized. It may be possible in such a circumstance to remove the member from the hearing room. Provisions must be made, however, for the member to be able to observe the proceedings and consideration should be given to the appointment of counsel in a role similar to the *amicus curiae* in the Teng case.

Discipline Committees should be mindful, if considering this type of extraordinary order, of the importance of the appearance of fairness. Famous criminal trials in both Canada (the "Just Desserts" trial) and the United States (the "Chicago Eight" trial) provide acute examples of where the appearance of unfairness to the defendant can jeopardize the perceived legitimacy of the proceedings.

In the Just Desserts trial, a trial that arose out of a shooting at a popular café in the Yorkville area of Toronto, the defendants (all of whom were black) were ordered to be placed in leg irons, belly chains and handcuffs while in the courtroom. Allegations of racism were made by lawyers and the public, and a judge would later find that the use of such restraints displayed "cultural insensitivity" toward the defendants. In the Chicago Eight trial, Bobby Seale, a leader of the Black Panthers, was ordered bound and gagged after making frequent protests about the political nature of the trial, which arose from the riots

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after the 1968 Democratic National Convention in Chicago. Commentators at the time wondered whether it was possible for Seale to receive a fair trial as a result. Needless to say, the images in the media of Bobby Seale sitting completely restrained in a chair with tape over his mouth had a significant impact on the public perception of the judicial system at the time.

Fortunately regulators rarely have to deal with disruptive hearing participants. However, having contingency plans in place for that possibility, including ensuring that options are available to ensure a fair trial (locating a facility where there are two rooms with videoconferencing equipment available; identifying possible sources for retaining an *amicus curiae* on short notice) may help prevent an over-reaction in a stressful situation. On the other hand, regulators would also want to make sure that having such contingency plans in place do not encourage their inappropriate use.