**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v. Eisnor*, 2015 NSCA 64

**Date:** 20150625
**Docket:** CAC 420821
**Registry:** Halifax

**Between:**

Wayne Paul Eisnor

Appellant

v.

Her Majesty the Queen

Respondent

| | |
|---|---|
| **Judges:** | Fichaud, Beveridge and Bourgeois, JJ.A. |
| **Appeal Heard:** | November 25, 2014, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Fichaud and Bourgeois, JJ.A. concurring |
| **Counsel:** | Malcolm Jeffcock, Q.C. and Roger Burrill, for the appellant<br>William Delaney, Q.C. for the respondent |

**Reasons for judgment:**

## INTRODUCTION

[1] June 30, 2010 was a quiet day, a normal day, for the customers and staff of the Freshmart in New Germany. That changed when Wayne Eisnor, the appellant, confronted his estranged wife, Tina, at her vehicle in the Freshmart parking lot. They spoke for some minutes.

[2] The appellant ran to his vehicle, retrieved an object and returned. As Mrs. Eisnor was starting to back up, the appellant shot her in the head, twice. One of those gunshot wounds caused her death. He immediately shot himself, also in the head.

[3] The appellant's self-inflicted wound caused significant brain damage. The principal damage was to that area of the brain that governs memory.

[4] The appellant was promptly arrested, and charged with the first degree murder of his wife.

[5] The experts were unanimous, the appellant has no memory for the six months preceding June 30, that day, and for some weeks following. Initially, he was found unfit to stand trial. His cognitive functioning improved. This led to findings by the Nova Scotia Review Board, and by the Honourable Judge Gregory E. Lenehan of the Nova Scotia Provincial Court that the appellant was fit to stand trial. A committal to stand trial in Supreme Court on the charge of first degree murder followed.

[6] Prior to trial, the appellant applied to the trial judge, the Honourable Justice Glen McDougall, to have his fitness to stand trial tried by the jury. The Crown convinced the trial judge that the application should be dismissed.

[7] The trial ended with the jury's verdict of guilty as charged. The trial judge, as required by law, imposed a sentence of life imprisonment without parole eligibility for 25 years.

[8] The appellant appeals as of right from conviction. He claims that the trial judge failed to properly interpret the *Criminal Code* provisions with respect to fitness to stand trial; if he had done so, the application to have the jury determine

the issue of fitness would have been successful. His other complaint is that the trial judge erred in permitting the jury to hear "extraneous inadmissible evidence".

[9] Despite the stalwart efforts by counsel for the appellant, I am not persuaded that the trial judge erred in how he interpreted the legal test for fitness to stand trial, and in refusing to direct the issue be tried by the jury. Nor did the trial judge err in admitting the impugned evidence. Accordingly, I would dismiss the appeal. The following reasons explain why.

[10] First, additional details of the pre-trial applications and of the trial proper are needed to provide context.

THE PRE-TRIAL MOTIONS

*The Fitness Issue*

[11] The appellant's trial was scheduled to commence September 3, 2013. On April 26, 2013, he filed a motion. The motion asked the trial judge to do one of two things: rely on the principles of fundamental justice found in the *Canadian Charter of Rights and Freedoms* to interpret the definition of "unfit to stand trial", found in s. 2 of Criminal Code, to include the requirement that an accused must be able to "meaningfully" communicate with counsel; or to find a violation of the *Charter* absent that requirement, and as a remedy, read into the definition the need to be able to "meaningfully communicate with counsel".

[12] Utilizing either path to achieve his desired interpretation, the way would be clear for the appellant's request that the trial judge direct the jury to try the issue of his fitness to stand trial based on his claimed inability to "meaningfully communicate" with counsel.

[13] Two days were set aside to hear this motion. The Crown requested that the aspect of the motion that challenged the constitutional validity of the *Criminal Code* provisions be summarily dismissed. The trial judge did so in oral reasons on July 5, 2013. The reasons were later released on July 25, 2013, and are reported as 2013 NSSC 241.

[14] The *Criminal Code* stipulates that an accused is presumed to be fit to stand trial unless the court is satisfied on a balance of probabilities otherwise (s. 672.22). A court need only have reasonable grounds to believe that an accused is unfit to direct the issue of fitness be tried (s. 672.23).

[15] What is meant by being unfit to stand trial is set out in s. 2 of the *Criminal Code* as follows:

> "unfit to stand trial" means 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, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings;
>
> (b) understand the possible consequences of the proceedings, or
>
> (c) communicate with counsel;

[16] The trial judge did not comment on the issue of mental disorder, other than refer to the definition in s. 2 of *Code*, that it means a "disease of the mind". No *viva voce* evidence was heard. Materials were filed without objection. Included were the opinions of medical professionals and the transcripts of previous proceedings.

[17] The Crown took the position that even if the appellant genuinely had no memory of the events of June 30 and the months leading up to that date, there was no basis to refer the issue of fitness to the jury, or to interpret the legal definition as requiring an accused to be able to communicate his or her recollections of the relevant events.

[18] After referring to these statutory provisions, the trial judge discussed many of the authorities that have considered what informs the statutory test for fitness to stand trial. These included: *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont.C.A.); *R. v. Morrissey*, 2007 ONCA 770, leave to appeal denied, [2008] S.C.C.A. No. 102; *R. v. Jobb*, 2008 SKCA 156; *R. v. Amey*, 2009 NSPC 29; *R. v. Adam*, 2013 ONSC 373. I will discuss some of these authorities later.

[19] For now, it is sufficient to say that the trial judge appeared to accept that to be fit to stand trial, the case law required that an accused be able to meaningfully participate in the trial, but this did not require a specific recollection of the events relating to the charge (2013 NSSC 241 at para. 41). Despite this conclusion, he declined to specifically address the statutory interpretation issue. Instead, he dismissed the *Charter* challenge, reasoning:

> [50] What the applicant -- the accused -- is seeking does not require a specific challenge under the *Charter*. It is, broadly speaking, a question of statutory interpretation.

> [51] Such statutory interpretation is always subject to the *Charter* and should the issue of fitness to stand trial eventually find its way to a jury it will be incumbent upon the Court to address the meaning of "unfit to stand trial" in a manner consistent with the rules pertaining to proper statutory interpretation and in a manner that reflects existing case law.
>
> [52] It does not in my opinion require a re-defining of the term nor does it rise to the level of a *Charter* challenge. Parliament, in its collective wisdom, has provided a legislated definition that works. It is one that is not so overly rigid that it cannot be applied to the case that now comes before this Court. It does not prevent the accused from making a full answer and defence to the charge he now faces.

[20] The application to advance a *Charter* challenge was dismissed.

[21] The balance of the appellant's application, requesting the trial judge direct the jury to try the issue of his fitness, was heard on July 29, 2013. The parties relied on the materials that had already been filed. In addition, by consent, the appellant tendered the detailed opinion of forensic psychologist Dr. Stephen Porter dated April 13, 2013.

[22] In summary, Dr. Porter opined that the appellant's amnesia is genuine. The Crown, for the purposes of the application, accepted Dr. Porter's opinion.

[23] The trial judge delivered oral reasons on August 16, 2013. These were shortly released in writing, and are reported as 2013 NSSC 263.

[24] The trial judge correctly directed himself that he need only have reasonable grounds to believe that the appellant was unfit to stand trial. The appellant argued that the trial judge in *Morrissey, supra*. had directed the issue be tried by the jury, which had found he was fit. Ergo, the same should happen here. The procedural history in *Morrissey* was different, but the facts were similar to the ones before Justice McDougall.

[25] In *Morrissey*, the accused shot his girlfriend, and then himself. He suffered a very severe brain injury. The trial judge accepted that: it was highly likely that Morrissey had retrograde amnesia for the period of at least several minutes to 30 or 45 minutes prior to his brain injury; there was a possibility that he has still had islands of memory for events during that period; and there was a risk of confabulation about events for which he had no memory.

[26] The instruction given to the jury in *Morrissey* about the claimed inability to communicate with counsel was:

> The third branch specifies: is he unable, on account of mental disorder, to communicate with counsel? The test for this third branch is one of "limited cognitive capacity". The question is whether he can recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. To that end he must be able to speak with counsel rationally, to understand questions and answer them in an intelligible fashion, and to make critical decisions on counsel's advice, concerning the offence with which he is charged. Amnesia for the events underlying the criminal charge will not, by itself, render an accused "unable to communicate with counsel". For example you can ask yourselves[:] Can Mr. Morrissey understand the evidence that is given by various witnesses so that he can confer with his counsel and give instructions? Does he have the mental capacity to instruct his counsel upon the evidence in order to make full answer and defence to the charge? Is he able to understand advice given by his counsel and to reach a decision as to whether he should or should not testify? Does his mental condition prevent his counsel for [sic] obtaining a factual and truthful account of the event from him? I remind you that amnesia for the events underlining the criminal charge will *not*, by itself, render an accused "unable to communicate with counsel", and you must consider the questions I have suggested in that context. [Emphasis in original]
>
> para. 56, 2007 ONCA 770

[27] This direction was upheld on appeal as being correct (2007 ONCA 770, para. 58). As noted earlier, leave to appeal to the Supreme Court of Canada was denied ([2008] S.C.C.A. No. 102).

[28] Justice McDougall's conclusion not to direct the issue of fitness to be tried is as follows:

> [26] In the case that is before me, the only real issue respecting Mr. Eisnor's level of fitness to stand trial that could be put to a jury is his inability to remember the events immediately surrounding the alleged events and for the six month period preceding it and also for a much shorter period in its aftermath. No one is challenging that the accused has retrograde amnesia which prevents him from communicating to his counsel his version of the events that has led to the charge that is now before the Court.
>
> [27] It is clear from my reading of *Morrissey* that this fact, **in and of itself** [emphasis added], is not sufficient to render the accused unfit to stand trial.
>
> [28] I am therefore not satisfied on the balance of probabilities that there are reasonable and probable grounds to believe that the accused is unfit to stand trial. Consequently the issue of fitness will not be put to the jury unless subsequent

> circumstances lead me to believe that Mr. Eisnor's condition has deteriorated or is compounded by other factors not now known.
>
> 2013 NSSC 263 [Emphasis in original]

*Ruling on Evidence*

[29] The Crown sought a decision from the trial judge on the admissibility of evidence it wanted to call at trial. A two day *voir dire* was held near the end of August 2013. Ten witnesses were examined.

[30] Many gave evidence about various statements made to them by the deceased in the weeks leading up to June 30, 2010, and on the day of. Some of the statements related to the deceased's fear of the appellant; others to complaints by the deceased about the behaviour of the appellant, from stalking to demeaning discreditable conduct, and death threats involving the appellant's use of a handgun he kept in the kitchen cupboard.

[31] Ashley and Devan are the adult children of the appellant and deceased. They also testified. Each described an incident when they were only 9 and 10 years old. The appellant became enraged. He took the handgun from the kitchen cupboard and either pointed it at the deceased's head or chest and threatened to kill her. Each also related different comments made to them by the appellant in the weeks prior to June 30, 2010, which they interpreted as threatening or ominous.

[32] Devan also described an incident at home, a month or two prior to separation, where he said the appellant had "gotten into one his moods again", threw food on the floor from the table and told the deceased to eat it like a dog.

[33] On September 5, 2013 the trial judge delivered oral reasons. He allowed admission of some, but not all of the hearsay statements said to have been made by the deceased. In making his ruling, the trial judge relied exclusively on the principled approach to the admission of hearsay—that to be admitted the proffered evidence must pass the threshold requirements of necessity and reliability.

[34] The trial judge also referred to the ultimate need to balance probative value and prejudicial effect. He took the following approach:

> Having said I believe that the principled approach to determine the admissibility of hearsay evidence which relies primarily, on necessity, while always balancing the overall probative value versus prejudicial effect on the accused warrants the introduction of this evidence in order to give to the members of the jury some

> context so that they can better appreciate the relationship that existed between the accused and his wife in the weeks and days prior to the shooting that left her dead and him seriously injured from a self-inflicted gun shot wound to the head.
>
> The admission of this evidence, along with mid-trial and final instructions to jurors as to the permissible and prohibited uses of this form of evidence, should accomplish this objection [sic] while, at the same time, address any Defence concerns regarding reasoning and moral prejudice to the accused.

[35] The trial judge also set out the text of his proposed mid-trial instructions to alert the jury to the inherent limitations of hearsay evidence. Included was a direction that they must not use the evidence to conclude that the appellant may be a bad person, and hence more likely to have committed the offence with which he was charged.

[36] After referring to the legal principles and his proposed jury instruction, the trial judge set out the gist of the available evidence from each witness. He ruled that nine of the witnesses could testify to some, but not all of the hearsay statements made by the deceased or conduct they had observed, or statements made, by the appellant.

[37] Earl Hirtle's proposed evidence was that in the weeks leading up to Tina Eisnor's death, she had told him of being sexually and physically assaulted by the appellant, and of an incident where the appellant caused her young boy to run out of the house because the appellant had a gun. No time frame was known by Hirtle for the latter incident. In addition, she had confided to Earl how she was scared to death of the appellant, he was abusive to her, and was "gonna kill her". The appellant would not stop calling the house.

[38] The trial judge ruled all of this evidence inadmissible. He considered that the circumstances surrounding the statements, and the uncertainty of when the events took place, made the potential evidence "suspect".

[39] The trial judge also ruled inadmissible Collette Veinot's proposed evidence of the deceased's statements to her about an incident in the matrimonial home when the appellant put her food on the floor. The trial Judge concluded that insufficient reliability had been established.

[40] Also excluded was potential evidence from Peter Hirtle about statements said to have been made to him by the deceased about assaultive conduct by the

appellant, including a complaint he had held a gun to her head some years ago. The judge prohibited the Crown from leading evidence that on the day of the homicide the appellant had called the deceased and berated her with an abusive and offensive comment. The judge called the alleged comment "absolutely disgusting"—it could inflame the jury against the appellant. In short, the prejudicial effect would greatly outweigh any probative value it might have.

[41] Although not hearsay, the trial judge excluded Ashley's evidence about the appellant's use of the handgun to threaten all three family members in order to control their visits to her grandparents. He concluded that the prejudicial effect of this evidence outweighed its probative value. For the same reason, Ashley would not be permitted to testify about the appellant's threat at Christmas 2009 to burn the house down with all them in it. Finally, the trial judge excluded the statement by the deceased to Ashley that the reason she could not leave the matrimonial home was out of fear the appellant would do something to them.

*The Trial*

[42] The Crown's case against the appellant was simple, but powerful. In broad daylight, in the parking lot of the Freshmart in New Germany, the appellant shot Tina Eisnor in the head, twice. Immediately, he shot himself, also in the head.

[43] There could be no doubt that the appellant unlawfully caused Tina Eisnor's death. Despite some evidence of alcohol consumption, there could also be no real doubt that he meant to cause her death, or bodily harm that he knew was likely to cause death, and was reckless whether death ensued. The only realistic issue was whether the murder was planned and deliberate. On this issue, the evidence was not so clear.

[44] There is no need to recite all of the evidence. The following is a *précis*, with detours into detail where required to appreciate the evidence that the appellant said the jury should not have heard.

[45] Tina Eisnor left the family home in May 2010. She returned, but soon left again. She and Peter Hirtle had a relationship for about four weeks leading up to her death. Peter Hirtle testified that Tina told him of going to the family home to get some belongings. She climbed up a ladder to the attic. She heard the appellant in the room below. When she came down, she described to Peter that the appellant stuck a gun right between her eyes. Someone knocked. The appellant grabbed

Tina and shoved her into the bathroom. She managed to get out due to the presence of the appellant's mother. Tina had bruises. Peter said he saw them.

[46] Mr. Hirtle testified to various unpleasant interactions with the appellant, involving threatening hand gestures, as if the appellant had a gun.

[47] Tina's sister, Julie Illingworth testified that Tina told her about what is clearly the same event at the family home. The appellant had the gun out. She was fearful he was going to shoot her. The appellant grabbed Tina by the arms and shoved her into the bathroom. Bruises were caused. The incident ended because of the presence of the appellant's mother. Ms. Illingworth described how Tina complained the day before the shooting of her being fearful for her life, and the stalking behaviours by the appellant.

[48] Terri MacDonald informed the jury of two incidents that Tina had told her about. Her conversations with Tina were after she had separated from the appellant. Just two weeks prior to June 30, Tina told Ms. MacDonald that she had gone to the house to gather some belongings. The appellant had a gun. There was physical contact. Tina ended up with bruises on her arms. Ms. MacDonald observed them.

[49] The other incident was said to have happened in May 2010. Tina had come home from Bridgewater with Chinese food for the appellant's supper. The food was cold. The appellant threw it on the floor and pushed Tina down towards the food, saying she was a dog, and so she could eat like one.

[50] Collette Veinot was Tina's co-worker. Two or three weeks before June 30, Tina told her about when she had gone to the family home to pick up things. If it was not for the appellant's mother showing up at the home, Tina said she would not have been able to get out. Ms. Veinot was present when she overheard Tina say to the appellant on the phone, why did he tell Devan that he would not have "no parents in a couple of weeks."

[51] Carla Eisnor testified that Tina had mentioned separation several times throughout the years, but more seriously a couple of months before June 2010. Ms. Carla Eisnor offered her help. Tina called and asked to stay with her. Tina did not end up staying, but did ask permission to leave her van in Carla's driveway in the stated hope of stopping the appellant from following her. Carla spoke of seeing the appellant drive by her home on multiple occasions.

[52] Ms. Eisnor also said that Tina told her about an incident where she and the appellant had a dispute over some takeout food she had brought home. There were scant details. Just that the food was cold, and the appellant had showed his disappointment by trying to shove Tina's face in it.

[53] Devan Eisnor was 23 years old at trial. In a general way, he testified about his relationship with his parents. He also recounted two incidents that he had witnessed. The first in time was when he was nine years old. It was summer. His parents were fighting. It escalated. The appellant retrieved his handgun out of the kitchen cupboard and aimed it his mother.

[54] Devan ran outside and plugged his ears, waiting for it to go off. It did not. He identified the gun in court. His best bet was it is the same handgun. He also identified two pairs of binoculars that had been found in the appellant's van on the day of the shooting. Devan testified that these were kept in different spots, but usually in the same cupboard as the handgun.

[55] The other incident was a month or two before his parents separated. The appellant "got into one of his moods", threw food on the floor and told Tina to eat it like a dog.

[56] Devan also referred to numerous times the appellant called him post separation and begged for his help in getting Tina to return. He also commented on the appellant's intention to try to get alimony from Tina. Devan thought it was nonsense. The appellant replied that he would not have to worry about anything soon. Devan interpreted this as a death threat. He conceded in cross-examination that he may have misinterpreted what the appellant had said.

[57] Ashley Eisnor testified that when she was around ten years old, the family were haying. They came home to get drinks. The appellant became upset and pulled the hand gun from the cupboard, put it to her mother's head, and threatened to kill her. Devan ran outside. A knock at the door ended the incident. The appellant apologized.

[58] Ashley described a chance meeting in early June 2010 with the appellant, his mother, and another woman. The appellant told Ashley that he needed her to come home and take care of things. He could not do it anymore. If she did not come home, something bad was going to happen. When Ashley told her mother of this encounter, Tina warned her not to go near the appellant.

[59] The only other witnesses to testify at the trial as to events before the shooting were defence witnesses. There were three, David and Brenton Holland, and Lisa Hirtle. Following a *voir dire*, the trial judge ruled that these witnesses could testify as to statements made to them by the appellant, principally on the day of the shooting.

[60] Lisa Hirtle was the estranged spouse of Peter Hirtle. She said she had kicked Peter out of their home on May 12, 2010 as he had been running around with Tina Eisnor. She and the appellant talked on the phone almost every day. On June 30 the appellant called her at 8:26 a.m. He seemed normal. He told her he was doing laundry—planning to hang it out to dry, then go to "the garage". He would talk to her later that afternoon.

[61] David and Brenton Holland are two of the appellant's cousins. They are part-owners of Holland Carriers. The appellant worked for Holland Carriers part-time, driving the Michelin run each weekend.

[62] Brenton Holland described seeing the appellant at coffee break at the company garage on Wednesday, June 30, 2010. After the break, the appellant stayed and chatted. They spoke about scheduling for the upcoming holiday weekend, and the planned festivities. According to Mr. Holland, the appellant told him that he was not going to the parade as he did not want to "see the two of them together" . Before leaving, he saw the appellant sweep off the step of his fruit and vegetable stand. In terms of demeanour, he thought the appellant was upset, as he was smoking, having previously quit.

[63] David Holland confirmed the appellant's part-time employment doing the Michelin runs starting at 3:00 a.m. on the weekends. He also confirmed that after coffee break, the appellant came to his office to confirm that the Michelin runs were still on for the upcoming holiday weekend. He was not surprised by the query. He noticed nothing unusual about the appellant's demeanour.

[64] There was, of course, no call by the appellant to Lisa Hirtle later that afternoon. Witnesses described Tina's shopping trip at the Freshmart shortly after noon. She chatted with friends, commenting that she was going to go home and would take the phone off the hook, as "he" was bothering her.

[65] When she finished her shopping, she returned to her car. The appellant was parked two spaces away from her van. She was overheard to say to the appellant, "I told you I would do that." No one heard any reply by the appellant. Others saw

Tina walk towards her van, and within minutes heard a "pop", a woman's scream, then another "pop".

[66] A witness from 3-400 feet away saw the appellant arrive in the parking lot. Sometime later, he saw Tina get into her van, and the appellant approach her. His hands were moving. The witness could not hear anything. The appellant was there for five minutes, then ran to his van, got something, and ran back to Tina's van. At that point, Tina's van was backing out. The witness saw the appellant's hand move. He described hearing one gunshot, and the appellant fell to the ground.

[67] When witnesses arrived on the scene, Tina was slumped down in her seat, the van running. She was breathing, but in the opinion of the Medical Examiner one of the gun shot wounds was inevitably fatal. He could not say which of the two shots occurred first.

[68] The appellant was seen trying to move. Police officers handcuffed him, and found the handgun under his body. He was mute, but responded with hand squeezes on being prompted.

[69] The handgun had a capacity of nine cartridges. Six were unfired. There were three expended cartridge cases.

[70] An empty 375 ml bottle of rum was found in his car, along with two pairs of binoculars and some handwritten notes.

[71] The police went to the family home. Physically, there was nothing out of the ordinary. Dishes in the dishpan, the vacuum out. Just as the appellant had described to Lisa Hirtle, a load of laundry drying on the line.

[72] But the police found further handwritten notes on the kitchen table, and in the master bedroom. The papers on the kitchen table alerted the reader that there were more papers to read in the bedroom under the mattress. There were ominous inferences that a jury could draw from these writings. They spoke of her being out enjoying herself, and he at home was "knot going to happen"; "she's knot going to lay with him. In love with him and Tell me that used her bad for 20 yrs."

[73] There is more. The jury could find that the appellant was dismayed at Tina leaving him, including his notation: "25 yrs with her. I just can't give it up this way. So both of us going to pay." And, "I had a good life to now. I love my children, tell them this please. But my nerves got the Best of me".

[74] Toxicology reports on blood drawn from the appellant showed, in the opinion of an RCMP expert, his blood alcohol level at the time of the shooting to be between 146 and 193 mg of alcohol per 100 ml of blood. No witness described the appellant as exhibiting any signs of impairment.

[75] The defence called three experts, Drs. Aileen Brunet, Jeanette McGlone and Stephen Porter. The Crown did not contest the overall thrust of the opinions of these experts: the appellant had suffered a severe brain injury that initially left him unfit to stand trial; over time, he regained cognitive function, but had dense amnesia for the events of June 30 and the months preceding. In fact the Crown was willing to, and did stipulate to that effect before the jury.

[76] The appellant also testified. He described his early life, including struggles with formal education, his employment history, and familial relationships.

[77] The appellant initially testified that he could not say what had happened on June 30. He identified the .22 calibre handgun as his, but could not explain why he had brought it to the Freshmart on June 30. He later denied taking the gun in the van with him. Although he said he had no memory of the events of June 30, he repeatedly denied that he had shot his wife. He could not recall making the writings found in his home, but allowed that it looked like his handwriting.

[78] Defence counsel argued to the jury that there was some form of interaction between Tina Eisnor and the appellant, for as long as five minutes. He urged that "Something happened between the participants. Something ugly and nasty that we will never know." It was after that interaction, the appellant ran to his van where he retrieved his handgun. The shooting followed. But there was no plan to murder anyone.

[79] The appellant had confirmed plans, just two hours before the shooting, to work that weekend. He had done the laundry, and hung it out to dry. These were contraindications to a plan to murder his wife and commit suicide. Furthermore, the alcohol he consumed would impair judgment and heighten impulsive conduct. The appellant's written musings demonstrated the extent of his anxiety over his situation.

[80] The Crown argued that the evidence, including the writings, showed the appellant's animus toward the deceased for having left him. He was fully aware of what he was doing, and was determined to complete the plan he had developed.

[81] The trial judge left four verdicts with the jury: guilty as charged; guilty of second degree murder; guilty of manslaughter; and not guilty. The only objection by the defence to the jury charge was with respect to a lack of distinction between the role alcohol consumption could have on the issue of intent to commit murder and how it might impact on their consideration of planning and deliberation.

[82] The trial judge agreed. He re-charged the jury to ensure that they understood that even if they were satisfied beyond a reasonable doubt that the appellant had the necessary intent to commit murder, a lesser degree of intoxication may suffice to raise a reasonable doubt about whether he planned and deliberated the murder of Tina Eisnor.

[83] Before examining the issues raised by the appellant, it is convenient to set them out, as phrased by the appellant. He complains:

> 1. The learned trial judge erred in failing to leave the issue of fitness to stand trial to be tried by the jury;
> 2. The learned trial judge erred in failing to interpret "unfit to stand trial" as found in s. 2 of the *Criminal Code* in a manner that was consistent with the Principles of Fundamental Justice as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*;
> 3. The learned trial judge erred in permitting the jury to hear extraneous inadmissible evidence.

FITNESS TO STAND TRIAL

[84] In order to properly interpret the current provisions of the *Criminal Code* with respect to fitness to stand trial, it is necessary to understand what the law was before the current provisions, and what Parliament intended by the legislation.

[85] The first *Criminal Code* did not provide much guidance concerning fitness to stand trial. The key section was:

> A court, judge or provincial court judge may, at any time before verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand trial.

[86] Professor Stuart in his text, *Canadian Criminal Law*, 6th ed (Scarborough, Ont: Carswell, 2011) referred to a number of scholarly examinations of the history

of the rule and the rationale for its existence. He summed up the principles as follows:

> Modern rationales are said to include the need to ensure the accuracy of the trial, the maintenance of the dignity of the judicial process (presumably against bizarre behaviour in court), the concern that the accused not be punished unless he is aware of what is going on and, finally, the fairness of the trial. The Law Reform Commission advances the rationale of promoting "fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings". A fitness procedure seems axiomatic if we consider any aim of punishment. What is the point of applying the criminal sanction to one who cannot understand the condemnatory process of trial and sentence?
>
> p. 407

[87] Fish J.A., as he then was, in *R. v. Steele* (1991), 63 C.C.C. (3d) 149, [1991] J.Q. No. 240, reviewed the leading Canadian authorities and commentary on the issue of fitness. He made clear that insanity for the purposes of fitness to stand trial is entirely different than insanity at the time of the commission of an offence.

[88] Fitness focuses on the accused's ability to understand the process, the consequences of what is at stake and to rationally communicate in order to participate, to the best of his natural abilities, in his defence. It has nothing to do with the accused's mental health at the time of the commission of the act or omission that has led to charges.

[89] Justice Fish referenced some of the commentary on the test for fitness to stand trial, including that of Professor Stuart:

> Prof. Stuart writes (on. cit., at pp. 325-6):
>
> > Judges using different language can only further confuse witnesses and jurors and there is much to commend the recommendation of the Law Reform Commission that uniform criteria be included in the Code:
> >
> > A person is unfit if, owing to mental disorder:
> >
> > (1) he does not understand the nature or object of the proceedings against him, or
> >
> > (2) he does not understand the personal import of the proceedings, or,
> >
> > (3) he is unable to communicate with counsel.
> >
> > Since this approach is merely a clarification of the common law, there is nothing to stop judges from resorting to such language at once. Perhaps

> the third criterion of inability to communicate with counsel is better generalized to an ability to assist in a defence. This formulation includes not only communication but also the ability of the accused to take the stand and also make important decisions that are his and his alone to make, such as the entry of a plea.
>
> Lindsay, despite his criticism of the Law Reform Commission's recommendation, agrees that "Basically, this formulation is a codification of the common law" (*supra*, at p. 320).

[90] Justice Fish, from his extensive review of the authorities, summarized the relevant principles. In relation to the actual test, he wrote:

> 5. An accused is incapable of conducting the defence, within the meaning of s. 615 of the *Criminal Code*, if he or she:
>
> (a) cannot distinguish between available pleas;
>
> (b) does not understand the nature or purpose of the proceeding including the respective roles of the judge, jury and counsel;
>
> (c) does not understand the personal import of the proceedings;
>
> (d) is unable to communicate with counsel, converse with counsel rationally or make critical decisions on counsel's advice; or
>
> (e) is unable to take the stand, if necessary [Note: These principles are mainly drawn from Gorecki (No. 1), pp. 134-5; McIlvride, pp. 356-7; Woltucky, pp. 46-7; Demontigny, pp. 3-5; Budic, p. 278; Wolfson, pp. 314-5; L.R.C. Report on Mental Disorder in the Criminal Process, p. 14; Don Stuart, op. cit., p. 326.].

[91] The language suggested by the Law Reform Commission of Canada, quoted above, formed the basis of the 1991 legislative package that created Part XX.1 of the *Criminal Code*. For the first time, fitness was statutorily defined. For ease of reference, I will repeat the provisions of s. 2 of the *Criminal Code*:

> "unfit to stand trial" means 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, and, in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings;
>
> (b) understand the possible consequences of the proceedings, or
>
> (c) communicate with counsel;

[92] Section 2 was also amended to define "mental disorder" as meaning "a disease of the mind". The phrase "disease of the mind" comes from the rules articulated in the infamous reference to the House of Lords in the *M'Naghten Case*[1]. To establish a defence of insanity, it needed to be proved that the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know, that he did not know it was wrong.

[93] The general thrust of the M'Naghten rules found their way into Canada's first *Criminal Code*[2]. With some minor changes in the wording, the main provision was numbered in the 1953-54 revision[3] to be:

> 16 (1) No person can be convicted of an offence while he was insane. A person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that rendered him incapable of appreciating the nature and quality of an act or of knowing that it was wrong.

[94] The 1991 legislative package that created Part XX.1 of the *Code* was entitled "Mental Disorder". It removed the term "insanity" from the legal lexicon. Section 16 was changed to provide that no person is criminally responsible for an act or omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

[95] The leading case on what constitutes a "disease of the mind" is *R. v. Cooper*, [1980] 1 S.C.R. 1149, in which Dickson J., as he then was, provided the following summary at 1159:

> In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.

---

[1] (1843), 8 E.R. 718
[2] 55-56 Vict., c. 29, s. 11
[3] S.C. 1953-54, c.51

[96] It is a question of law for the trial judge to decide (see *R. v. Chetwynd* (1986), 74 N.S.R. (2d) 75 (A.D.); *R. v. S.H.*, 2014 ONCA 303).

[97] The majority judgment of the Supreme Court of Canada in *R. v. Stone*, [1999] 2 S.C.R. 290 established that the legal inquiry as to whether a condition constitutes a disease of the mind requires a "holistic approach" informed by: the internal cause theory; the continuing danger theory; and policy concerns. Bastarache J. wrote about this latter factor:

> [218] There may be cases in which consideration of the internal cause and continuing danger factors alone does not permit a conclusive answer to the disease of the mind question. Such will be the case, for example, where the internal cause factor is not helpful because it is impossible to classify the alleged cause of the automatism as internal or external, and the continuing danger factor is inconclusive because there is no continuing danger of violence. Accordingly, a holistic approach to disease of the mind must also permit trial judges to consider other policy concerns which underlie this inquiry. As mentioned above, in *Rabey* and *Parks*, this Court outlined some of the policy concerns which surround automatism. I have already referred to those specific policy concerns earlier in these reasons. I repeat that I do not view those policy concerns as a closed category. In any given automatism case, a trial judge may identify a policy factor which this Court has not expressly recognized. Any such valid policy concern can be considered by the trial judge in order to determine whether the condition the accused claims to have suffered from is a disease of the mind. In determining this issue, policy concerns assist trial judges in answering the fundamental question of mixed law and fact which is at the centre of the disease of the mind inquiry: whether society requires protection from the accused and, consequently, whether the accused should be subject to evaluation under the regime contained in Part XX.1 of the *Code*.

[98] The role that policy concerns may play in considering if the brain damage caused by the appellant's self-inflicted gunshot wound constitutes a "disease of the mind" making him unfit to stand trial need not be resolved here. But there seems to be something discordant about the ultimate consequences that could flow from a conclusion that his self-inflicted loss of memory was a disease of the mind causing him to be unfit to stand trial. There is no evidence that his brain injury impacts how his mind functions in terms of being able to understand the proceedings, the consequences, and communicate with counsel. Only his memory for a specific period of time is lost. If his loss of memory of the events is permanent, and the medical evidence suggests that it is, and if he is not a significant threat to the public, this could potentially lead to a permanent stay of the murder charge under s. 672.851 of the *Code*.

[99] However, if his self-inflicted injury rendered him unable to understand the nature or object of the proceedings, or the possible consequences of them, or communicate with counsel, it would be difficult to see how one could focus on the cause and ignore the result.

[100] I need not dwell on this issue as Judge Lenehan, the parties, and the trial judge all assumed that the appellant's self-inflicted brain injury constituted a disease of the mind, and hence a mental disorder. I will, for the purposes of my analysis, do the same.

[101] The appellant does not contend that his mental disorder renders him unable to understand the nature or object of the proceedings, or the possible consequences of the proceedings. It is the third requirement of communication with counsel that is pivotal.

[102] The appellant does not suggest that he is unable to rationally communicate with counsel. Rather, it is because he has no memory of the events of June 30 that makes him unable to "meaningfully communicate" with counsel that spawns reasonable grounds to believe he is unfit. The argument is, to interpret "communicate with counsel" otherwise would make the appellant's trial unfair, as he is unable to assist in his defence by instructing counsel about what happened.

[103] With respect, the position of the appellant conflates fair trial concerns with fitness to stand trial criteria. It is easy to do, since as earlier described, trial fairness is one of the rationales for requiring courts to inquire into an accused's fitness.

[104] If an accused's mental or physical problems prevent him or her from having a fair trial, then a remedy may well be available under the *Canadian Charter of Rights and Freedoms*. Here, the appellant did not claim that his trial was unfair, or in any way fringed his right under s. 7 of the *Charter* not to be deprived of his liberty except in accordance with the fundamental principles of justice.

[105] One of the first cases that interpreted the statutory criteria for fitness was *R. v. Taylor*, (1992), 77 C.C.C. (3d) 551, [1992] O.J. No. 2394 (C.A). The issue was what degree of mental acuity is required to be able to "communicate with counsel".

[106] Pending a new trial, previously ordered by the Court of Appeal, Mr. Taylor applied for *habeas corpus* to challenge his committal to stand trial. That was dismissed, but Justice Wren found Mr. Taylor unfit to stand trial. The medical

evidence was that the appellant's mental disorder could cause him to misconstrue the evidence, and be unable to instruct counsel in a manner that would be in his best interests.

[107] Lacourcière J.A., wrote the unanimous reasons for judgment. Outcome hinged on a choice between moving from a "limited cognitive capacity" test to one of "analytic capacity". With respect to the former test, Justice Lacourcière referred to earlier decisions of the Court as representing the correct test in Canadian criminal law. He rejected the requested change, concluding that the limited cognitive capacity test struck an effective balance between the objectives of the fitness rules and the constitutional right of an accused to choose his own defence and have a trial within a reasonable time. He reasoned:

> [50] To determine whether the test should be modified as suggested by the respondent, one must remain cognizant of the rationale for the fitness rules in the first place. In order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way. At the same time, one must consider that principles of fundamental justice require that a trial come to a final determination without undue delay. The adoption of too high a threshold for fitness will result in an increased number of cases in which the accused will be found unfit to stand trial even though the accused is capable of understanding the process and anxious for it to come to completion.
>
> [51] In addition, adopting a high threshold of fitness, including a "best interests" component, derogates from the fundamental principle that an accused is entitled to choose his own defence and to present it as he chooses. In *R. v. Swain*, *supra*, at p. 970 S.C.R., p. 504 C.C.C., Lamer C.J.C., for the majority, stressed the importance of the accused's s. 7 right to liberty which allows him to control his own defence. An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved.

[108] The *Taylor* case had nothing to do with a lack of memory by an accused—only if the mental disorder that impaired the ability to make decisions and instruct counsel in the accused's best interests made him unfit to stand trial. The Court found it did not.

[109] The limited cognitive capacity test was referred to with approval in *obiter* by the Supreme Court of Canada in *R. v. Whittle*, [1994] 2 S.C.R. 914. The appellant confessed to a variety of crimes, including murder. He was arrested, cautioned, and given his rights to retain and instruct counsel. He declined. But after further inculpatory statements, the issue of counsel was revisited. The appellant consulted a lawyer who advised him to keep his mouth shut. The appellant did anything but, giving further inculpatory statements because he needed to talk to the police to stop the voices in his head.

[110] Psychiatrists were of the view that the appellant suffered from schizophrenia, but he would have been aware of the consequences of speaking to the police. Justice Sopinka declined to adopt the higher standard of cognitive capacity over the limited cognitive capacity test for fitness, in relation to the choices facing an accused inherent in the confessions rule, the right to silence, and the right to counsel. He summed up the law as follows:

> [51] In exercising the right to counsel or waiving the right, the accused must possess the limited cognitive capacity that is required for fitness to stand trial. The accused must be capable of communicating with counsel to instruct counsel, and understand the function of counsel and that he or she can dispense with counsel even if this is not in the accused's best interests. It is not necessary that the accused possess analytical ability. The level of cognitive ability is the same as that required with respect to the confession rule and the right to silence. The accused must have the mental capacity of an operating mind as outlined above.

[111] The point is this: the statutory provisions as to fitness in s. 2 of the *Code*, appear to be a codification of the common law criteria. The principles set out by Justice Fish in *R. v. Steele*, and other leading authorities on the common law test for fitness have held sway after the *Code* amendments (see: *R. v. Brigham*, [1992] J.Q. no 2283; 52 Q.A.C. 241; 79 C.C.C. (3d) 365; *R. v. Taylor, supra.*; *R. v. Morrissey, supra*.) The appellant does not cite any cases that suggest otherwise.

[112] I have earlier referred to *R. v. Morrissey*. It stood squarely in the path of the appellant before Judge Lenehan, and before the trial judge, Justice McDougall. It does so here as well.

[113] To avoid *Morrissey*, the appellant advances a number of stratagems. First, the appellant's case can be distinguished from *Morrissey*. Second, that *Morrissey* is wrongly decided. Third, if one interprets the statutory definition in s. 2 of the *Code* for fitness in accordance with *Charter* 'values' the appellant's fitness should have been tried by the jury.

[114] In my view, although there are some factual differences between *Morrissey* and the case at bar, they are not significant to the legal outcome. There are also some differences in the arguments advanced in *Morrissey*, but the legal analysis remains sound. In other words, the differences do not interfere with the applicability of what was decided in *Morrissey* to this case.

[115] Mr. Morrissey was charged with the first degree murder of his former girlfriend. He had already tried to commit suicide. On the day of the homicide, Morrissey picked the victim up. He had a handgun and ammunition he had taken from his father's gun cabinet. While being chased by the police for speeding, he shot his girlfriend in the head, and then shot himself in the middle of his forehead.

[116] Expert evidence was that Mr. Morrissey had suffered a very severe brain injury. Multiple bullet fragments were lodged in his left frontal lobe. The injury caused retrograde amnesia for the events of at least several minutes to 30 or 45 minutes before his brain injury. He may still have had islands of memory for the event, and there was a risk of confabulation about events for which he actually had no memory.

[117] A psychiatrist testified that it was his opinion that Mr. Morrissey was fit to stand trial, but was unable to give reliable information to his counsel about the critical events because of his lack of memory. The trial judge directed the jury to try the issue of fitness, but refused to instruct the jury that testimonial competence or lack of memory of the events, alone were condition precedents to a finding of fitness.

[118] Blair J.A. wrote the unanimous reasons for judgment. He compared the test for testimonial competence under s. 16 of the *Canada Evidence Act* with that of fitness under s. 2 of the *Code*. He observed that the two concepts are different. Ability to testify may be relevant to a fitness inquiry, but it is not a condition precedent to fitness. Justice Blair reasoned:

> [26] There is no dispute in this case that the appellant suffers from a mental disorder resulting from his brain injury. He is diagnosed as having both an "amnestic disorder" and "frontal lobe syndrome", each a mental disorder. Nor is it disputed that he meets the first two specific criteria of fitness to stand trial, namely, that he understands the nature and object of the proceedings and that he understands their possible consequences. The medical evidence amply supports those findings. At issue, fundamentally, is whether the criterion that the appellant be able to "communicate with counsel" necessarily encompasses the standard that he be competent to testify and, in particular, that he be competent to testify about

> the critical events of the homicide and to relate them to his lawyer. In my view, it does not.

[119] After referring to the limited cognitive capacity test re-affirmed in *R. v. Taylor*, Justice Blair turned to the argument that the test for fitness required a present memory of the events so that the accused can recount to counsel the necessary facts relating to the offence. This was rejected:

> [29] First, the concept that the accused must be able to recount "the necessary facts relating to the offence in such a way that counsel can then properly present a defence" must be interpreted in a purposive and functional manner, in my view. It is intended to refer more broadly to the accused person's ability to recount the facts generally relating to the offence or offences with which he or she has been charged. It is not intended to narrow the inquiry solely to the ability to relate the immediate facts pertaining to the particular incident giving rise to the crime (e.g., the immediate events surrounding the actual shooting in this case). This makes sense, since the thrust of the concept of unfitness to stand trial is that the accused is unable to conduct a defence or to instruct counsel to do so. **The ability to communicate with counsel in the context of a fitness inquiry speaks to the ability to seek and receive legal advice. An inability to recount the facts immediately connected with the event giving rise to the charges is not the same as an inability to communicate with counsel in a way that permits an accused to seek and receive effective legal advice.** Moreover, there are instances where an accused may wish to - or may be able to do nothing but - formulate a defence based on the contention that he or she is unable to remember the events in question.
>
> [Emphasis added]

[120] Essentially the same argument was advanced about the impact of amnesia of the events on the issue of fitness as here—that is, Mr. Morrissey was unfit because he is incapable of communicating to counsel, and to the Court what happened. This was rejected for two reasons:

> [38] There is no need, therefore, to collapse the notion of testimonial competence into the notion of fitness for trial in order to meet the objectives of either concept. Mr. Breen argues, nonetheless, that because the appellant is incapable of communicating the evidence with respect to the critical events surrounding the homicide, the appellant is incompetent to testify; accordingly he must be declared unfit for trial because he is similarly incapable of communicating that evidence to his counsel. In my view, however, there are two principal flaws in this argument.
>
> [39] First, as indicated above, the ability to communicate the evidence (for purposes of testimonial competence) and the ability to communicate with counsel (for purposes of fitness for trial), are not the same concepts. The former evokes

the capacity to perceive, recollect, and communicate matters relating to the issues before the court. The latter contemplates the ability to communicate with counsel for the purposes of conducting a defence, considering counsel's advice, and giving instructions with respect to the defence. As Carrothers J.A. put it in *R. v. Roberts*, supra, at p. 545 - in language that is still pertinent, albeit pre-*Charter*, and that was picked up by the trial judge in this case in her charge at the fitness hearing:

> It is a prerequisite to any criminal trial that the accused be capable of conducting his defence. Subject only to disruptive conduct on his part, he must be physically, intellectually, linguistically and communicatively present and able to partake to the best of his natural ability in his full answer and defence to the charge against him. [Citations omitted. Emphasis added]

[40] Secondly, while the inability of a person to recall or testify about the immediate events surrounding a crime may be a factor to be weighed in determining whether the Crown has met its onus of establishing guilt beyond a reasonable doubt, amnesia has never been considered, by itself, to be a basis for declaring the accused unfit for trial or for relief from prosecution or conviction. The jurisprudence in Canada, the United Kingdom, Australia and the United States is consistent in this regard: see *R. v. Lowe* (1974), 21 C.C.C. (2d) 193 (Ont. C.A.) at pp. 198-199; *R. v. L.J.H.* (1997), 120 C.C.C. (3d) 88 (Man. C.A.); *R. v. Podola* (1959), 43 Cr. App. R. 220 (Ct. Crim. App.) at pp. 240-242; *Bratty v. Attorney-General For Northern Ireland*, [1963] A.C. 386 at p. 409 (H.L.); *Russell v. H.M. Advocate*, [1946] S.C.(J.) 37 (H.C.J.); *Hughes v. H.M. Advocate*, [2002] S.C.(J.) 23 (H.C.J.); *R. v. Daniel Peter Richards*, 1994 SASC 4889 at paras. 16-27; *R. v. Mailes*, 2001 NSWCCA 155; *Conway v. The Queen*, [2000] 172 A.L.R. 185 (F.C.A.) at paras. 308-309; *R. v. Arnold* (2003), 40 M.V.R. 488 422 (S.A.S.C.) at paras. 56-69; *People of the State of Colorado v. Palmer*, 31 P.3d 863 (Col. Sup. Ct. 2001); and *United States v. Andrews*, 469 F.3d 1113 at 1116-1119 (7th Cir. 2006).

[41] In *R. v. L.J.H.*, *supra*, the Manitoba Court of Appeal observed, at p. 91:

> The issue before the Court arises from the amnesia the accused says he now suffers - the impairment of his ability to recall past experiences. Counsel's review, and the Court's own research, have been unable to find a single case in Anglo-Canadian jurisprudence in which the amnesia of the accused has resulted in his acquittal or in the discontinuance of the proceedings against him. In 'Amnesia: A Case Study in the Limits of Particular Justice' (1961-62), 71 Yale L.J. 109, the author notes (at p. 116) that 'there is no record of any court [in the United Kingdom and the United States] holding a defendant incompetent to stand trial solely on the basis of amnesia.'

[42] In *People of the State of Colorado v. Palmer*, *supra*, at pp. 867-868, Justice Rice wrote:

> We are persuaded by the reasoning of the majority of courts that have determined that a defendant's amnesia does not, in and of itself, require a finding of incompetency.
>
> ...
>
> ... amnesia is relevant to the issue of competency, but is only determinative if a defendant suffers a loss of memory so severe that it renders him unable to understand the proceedings against him or to assist in his own defence.

[121] I see no basis to depart from these sound reasons. With respect, I adopt them.

[122] Mr. Morrissey also sought a stay of proceedings at trial on the basis that because he was incompetent to testify about the events, continuing the trial would offend ss. 7 and 11(d) of the *Charter* as he could not make full answer and defence. The application was dismissed by the trial judge, Justice Fuerst. Mr. Morrissey also claimed he was incompetent to testify. He refused to testify on the incompetence application, causing Fuerst J. to dismiss it as well.

[123] On appeal, no error was found by Justice Fuerst's dismissal of the incompetency application, or in her conclusion that there was no violation of Mr. Morrissey's *Charter* right to make full answer and defence.

[124] In response, the appellant here suggests that his injuries were more severe than those suffered by Mr. Morrissey. Morrissey recalled going to the scene. The appellant suggests that in *Morrissey*, there was scepticism about the claim of amnesia.

[125] It may well be that the appellant's injuries were more severe than those of Mr. Morrissey's, but the consequences of both injuries were functionally the same. I see nothing in the factual matrix that make the principles set out in *Morrissey* inapplicable to this case.

[126] I recognize that in *Morrissey*, the jury was given an opportunity to decide the issue of fitness. But in doing so, the trial judge instructed the jury that amnesia for the events would not render him unfit by reason of making him unable to communicate with counsel. That was the sole issue suggested by the appellant here as to why there were grounds to believe that he was unfit to stand trial.

[127] Judge Lenehan decided on April 3, 2012 that the appellant was fit to stand trial. All of the materials before Judge Lenehan were, by consent, part of the

record before Justice McDougall. Dr. Aileen Brunet testified before Judge Lenehan that in her opinion, from a psychiatric point of view, the appellant was fit to stand trial.

[128] Judge Lenehan had no difficulty concluding that the appellant's amnesia was genuine, but that his inability to recall the events did not translate into an inability to communicate with counsel. At the time of the proceedings before Justice McDougall nothing had changed. There remained the sole issue: did the appellant's retrograde amnesia of the events provide reasonable grounds to believe him to be unable to communicate with counsel within the meaning of s. 2 of the *Code*?

[129] The appellant submits that *Morrissey* is wrongly decided. The only flaw specifically identified is Justice Blair's description of American case law, including his reference to *R. v. L.J.H.* (1997), 120 C.C.C. (3d) 88 (Man. C.A.), where Philp J.A. wrote about the state of the United States authorities:

> [9] The issue before the Court arises from the amnesia the accused says he now suffers - the impairment of his ability to recall past experiences. Counsel's review, and the Court's own research, have been unable to find a single case in Anglo-Canadian jurisprudence in which the amnesia of the accused has resulted in his acquittal or in the discontinuance of the proceedings against him. In *Amnesia: A Case Study in the Limits of Particular Justice* (1961-62), 71 Yale L.J. 109, the author notes (at p. 116) that "there is no record of any court [in the United Kingdom and the United States] holding a defendant incompetent to stand trial solely on the basis of amnesia."[4]

[130] But the appellant does not cite any cases that cause me to doubt the accuracy of what was stated in *Morrissey* and *L.J.H.* to be the law in the United States about the impact of amnesia on fitness to stand trial.

[131] The appellant relies on quotes taken from a number of cases in support of his claim that a fitness inquiry must involve a consideration of an accused's ability to tell counsel what happened in order to meaningfully communicate with counsel.

[132] From *R. v. Adam*, 2013 ONSC 373, he quotes Justice Trotter:

---

[4] *L.J.H.* that had nothing to do with fitness to stand trial. The appellant claimed his right to a fair trial was infringed by his lack of memory.

> [28] However, later in his reasons, Blair J.A. addressed the foundations of the fitness to stand trial rule. Speaking in broader terms, he stressed the basic notions of fairness that are inherent in the concept of fitness in s. 2 of the *Criminal Code*. These thoughtful comments from his judgment resonate in this case (at p. 17):
>
> > An accused must be mentally fit to stand trial in order to ensure that the trial meets **minimum standards of fairness and accords with principles of fundamental justice** such as the right to be present at one's own trial and the right to make full answer and defence: see R. v. Steele (1991), 63 C.C.C. (3d) 149 (Que. C.A.) at pp. 172-173 and 181; R. v. Roberts (1975), 24 C.C.C. (2d) 539 (B.C.C.A.**). Meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness.** [emphasis added]
> >
> > …
>
> [35] On a more fundamental level, trial judges must always be concerned with preventing miscarriages of justice. A miscarriage of justice does not always involve actual prejudice to an accused person. Public confidence in the administration of justice may also be shaken and undermined by the appearance of unfairness: see *R. v. Cameron* (1992), 64 C.C.C. (3d) 96 (Ont. C.A.), at p. 102 and *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at pp. 220-221, *R. v. F.E.E.* (2011), 282 C.C.C. (3d) 552 (Ont. C.A.), at p. 560 and *R. v. Kakegamic* (2010), 265 C.C.C. (3d) 420, at p. 429. The *voir dire* in this case provided a good opportunity to observe Mr. Adam in action. If the same type of conduct or behaviour is repeated at trial in front of a jury (with Mr. Adam pursuing his themes of sorcery, magic and hair fibres), the proceedings will quickly degenerate into a cruel spectacle. A reasonable observer viewing this first-degree murder trial firsthand would surely be troubled by the obvious fact that Mr. Adam is unable to defend himself, due to a debilitating mental illness. The appearance of justice would be irretrievably tarnished.

[133] From these statements, the appellant makes this submission:

> 92. It is respectfully submitted that to cause an individual who, as a result of a significant brain injury, clearly and unarguably has an inability to have any knowledge to share with counsel about an alleged offence (i.e. to "instruct counsel"), to stand trial is an injustice.

[134] The position of the appellant is a clear example of the conflation of the two concepts of fitness and trial fairness. If to put the appellant on trial were to cause an injustice, the remedy, if there were one, is a stay of proceedings, not an attempt to find the appellant unfit to stand trial because he cannot remember what he did before and on June 30.

[135] There was no suggestion at trial, nor on appeal, that the appellant's trial was in any way unfair. He effectively cross-examined witnesses, called witnesses, and in fact testified personally before the jury.

[136] The appellant also relies on quotes from *R. v. Amey*, 2009 NSPC 29, *R. v. Sharp*, [1958] 1 All E.R. 62 and the dissent in *Wilson v. United States*, 391 F.2d 460 (1968), as the basis to inject into the fitness test the requirement of memory of the act or omission said to constitute the offence. I am not persuaded that any of these extracts support such a proposition.

[137] In *R. v. Amey*, the trial judge was Ross Prov. Ct. J. Mr. Amey argued that he was fit to stand trial. Psychiatric opinion was that he was not. A psychologist opined he was. The appellant relies on the following comment by Judge Ross:

> [62] The first statement of "unfit" in the statutory definition is "unable on account of mental disorder to conduct a defence or to instruct counsel to do so." Communication with counsel must be informed, at least on a basic level, by an awareness of the proceedings as they unfold. Memory of the impugned conduct, as well as the ability to absorb and retain memory of things which unfold at trial are both important to giving instructions. The instructions need not display analytical thinking and do not have to be in the client's best interests. However, presence and participation suggest that the accused be more than a bystander.

[138] The appellant submits that these remarks were critical in Judge Ross's determination of fitness and should influence this case. With respect, they were not. These remarks cannot be taken as an endorsement of the need to have memory of the events in order to be fit to stand trial. All Judge Ross said was that memory of the impugned conduct, as well as the ability to absorb and retain memory of the things unfolding at trial, are important to giving instructions to counsel.

[139] Mr. Amey suffered from dementia. He understood the possible consequences of the proceedings, but had amnesia of the events, and of recent events. He may possess what was referred to as "in the moment understanding", but could not retain and process what would be going on in a trial. Judge Ross made it clear that it was not his mental disorder causing amnesia of the events that impacted the issue of fitness, it was Mr. Amey's ability to be aware of the trial events that impacted on fitness to stand trial:

> [67] Mr Amey is in a worse position than someone with amnesia of the events because of alcohol ingestion, subsequent injury, etc. This is not a case of

> forgetting due to drunkenness. The law does not exempt an accused from the criminal process because of self-induced intoxication and its resulting effect on memory. **Mr. Amey has dementia, a mental illness which not only compromises his memory of the underlying events but deprives him of the ability to process and remember things that would happen during his trial**. I take Mr. Amey's amnesia and propensity to confabulate as factors in my conclusion regarding fitness, but I recognize that these are not sufficient reasons in and of themselves to find him unfit. **My concern is not simply that he has little ability to recall the events surrounding the charges, but that he is unable to retain and process, even at a basic level, what he might be told of these events by other witnesses**.
>
> [Emphasis added]

[140] The issue of Mr. Amey's fitness was subsequently re-tried later in 2009, and he was found fit to stand trial by The Honourable Chief Judge Patrick H. Curran (2010 NSPC 100).

[141] Justice Salmon was the trial judge in *R. v. Sharp, supra*. On arraignment, the accused stood mute. A jury was empanelled to try the issue whether he was mute by malice or by visitation of God. The reporter's note of Justice Salmon's summing up to the jury was:

> SALMON, J., summing-up to the jury, said that, when a question arose whether a defendant was capable of pleading to the indictment and standing his trial, it was the duty of the court to make sure that he was capable of doing so before the trial was allowed to proceed, because **it was repugnant to one's sense of justice that a person should be on his trial if he was unable to plead and unable properly to stand his trial**. It was, therefore, the duty of the jury to decide whether they were satisfied that the defendant was fit to plead. If they came to the conclusion that the defendant could not communicate with his advisers, or with the jury if he were called to give evidence, he was not fit to stand his trial, and, therefore, the real question on which the jury must be satisfied was whether the defendant was fit to communicate with his advisers and with the court. The fact that the defendant was mute was not conclusive on this point, because, although he could not speak, he might be able to communicate sufficiently with his advisers by signs or writing, and with the court in writing. If the jury were satisfied that the defendant could communicate in writing, they must then also consider whether he could understand, because a defendant could not stand his trial unless he was able both to communicate and to understand. His Lordship then reviewed the evidence.
>
> [Emphasis added]

[142] It is the bolded words that the appellant relies on. I say without hesitation, that it would be indeed repugnant to everyone's sense of justice to put a person on

trial who was unable to plead and properly stand his trial. That is the reason we require courts to hold a trial into fitness if there are reasonable grounds to believe that an accused may not be fit to stand trial. But that animating concern does not transform the fitness inquiry beyond the statutory criteria found in s. 2 of the *Criminal Code*.

[143] Here, the appellant was able to plead and properly stand his trial. He understood the nature and object of the proceedings, and the possible consequences, and he could communicate rationally with counsel. The only claim to say he was not fit was his lack of memory of the events. That alone, is insufficient.

[144] The last reference is that of Senior Circuit Judge Fahey, who in a dissenting judgment in *Wilson v. United States, supra*. wrote:

> [34] Determination of guilt is not the test of the validity of a criminal conviction under our system of law. Though such a determination is essential, it must be reached at a trial which conforms with the requirements of the Bill of Rights. Ascertainment of guilt even to a scientific or mathematical certainty does not alone suffice. The plan of the majority to have a hearing at which the Government must prove its case beyond "all reasonable hypotheses of innocence" is no more than a different standard by which to judge the issue of guilt which has already been determined at trial. It does not cure the lack of the constitutional guarantees of due process of law and the right to the effective assistance of counsel.
>
> [Emphasis by counsel]

[145] Based on this quote, the appellant submits:

> 102. It is the position of the appellant that, in his situation, there is nothing which can be done to "cure the [violated] constitutional guarantees".

[146] Neither the dissent in *Wilson*, nor the majority assist the appellant. In *Wilson*, the defendant had suffered a severe brain injury which left him with complete retrograde amnesia for the events. He was ultimately found competent to stand trial, and was convicted. He appealed, claiming that his constitutional right to due process and effective assistance of counsel had been denied. Judge Levanthal saw no unfairness in the trial, but agreed with the outcome suggested by Judge Wright, a remand back to the trial judge for a further hearing on the specific issue if the retrograde amnesia deprived Wilson of his constitutional rights. Judge Wright expressed his conclusion as follows:

> [10] We agree with Judge McGuire's general approach to assessing the question of competency. However, we remand to the trial judge for more extensive posttrial findings on the question of whether the appellant's loss of memory did in fact deprive him of the fair trial and effective assistance of counsel to which the Fifth and Sixth Amendments entitle him.

[147] As already observed, the appellant here made no application to the trial judge that his rights under the *Charter* would be infringed or denied by the trial proceedings. The only reliance on the *Charter* at trial, and now in this Court, is to suggest that the provisions of s. 2, in particular, the third prong of the fitness criteria "communicate with counsel" must be interpreted in accordance with "*Charter* values" to include an ability to communicate about the circumstances of the offence. It is to that specific proposition that I now turn to.

[148] Both parties agree that matters of statutory interpretation are questions of law and, the standard of review is correctness (*R. v. Carvery*, 2012 NSCA 107 at para. 31).

[149] The appellant cites two cases in support of his argument on statutory interpretation, *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 and *R. v. Wust*, 2000 SCC 18. Neither assist the appellant.

[150] In *Winko*, a dissent in the British Columbia Court of Appeal concluded that s 672.54 offended s. 7 of the *Charter*. The Supreme Court of Canada unanimously, but in two concurring judgments, found that the provisions found in Part XX.I of the *Criminal Code*, properly interpreted, did not offend the *Charter*.

[151] In *Wust*, the Crown appealed from a decision of the Ontario Court of Appeal that had interpreted s. 719(3) of the *Code* to permit a trial judge to take into account time spent in custody to reduce a sentence below the mandatory minimum sentence set by Parliament. The appeal was dismissed. Arbour J., writing for the Court explained:

> [33] All of the above suggests that if indeed s. 719(3) had to be interpreted such as to prevent credit being given for time served in detention prior to sentencing under a mandatory minimum offence, the result would be offensive both to rationality and to justice. Fortunately, as was admirably explained by Rosenberg J.A. in *McDonald*, *supra*, this result is avoided through the application of sound principles of statutory interpretation.
>
> [34] In his judgment, Rosenberg J.A. employed several well-established rules of statutory interpretation to conclude as he did, at p. 69, that s. 719(3) provides

> sentencing judges with a "substantive power to count pre-sentence custody in fixing the length of the sentence". I agree with his analysis. In particular, I approve of his reference to the principle that provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 29, per Lamer C.J.); to the need to interpret legislation so as to avoid conflict between its internal provisions, to avoid absurd results by searching for internal coherence and consistency in the statute; and finally, where a provision is capable of more than one interpretation, to choose the interpretation which is consistent with the *Charter: Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, per Lamer J. (as he then was). Without repeating Rosenberg J.A.'s analysis here, I wish to make a few observations.

[152] The need to first interpret a statute, including a penal one, by resort to the ordinary principles of statutory interpretation, and only turn to *Charter* values as an interpretative aid in the eventuality of ambiguity was re-affirmed by the Supreme Court in *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 (para.28).

[153] Iacobucci J., for the Court described what is meant by "ambiguity":

> [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[154] The appellant made no submissions that any of the words or phrases set out in s. 2 of the Code were ambiguous. I see none.

[155] In my view, 'communicate with counsel' means just that—the ability to hear, understand, and respond. Of course, the ability to respond must be rational, one not beset with delusions about what is going on in the trial, but not necessarily the ability to act in his or her own best interests.

[156] Nothing in the evolution of the relevant statutory provisions, and the legislative history indicate that Parliament intended to import into the fitness

criteria the need for the accused to be able to recall the events in order to be able to communicate with counsel.

[157] As described in detail earlier, the common law has never considered memory of the relevant events as a stand alone prerequisite for fitness to stand trial. There is simply no basis to interpret the words of s. 2 as importing that as a requirement. I see no error in the trial judge's interpretation of the fitness criteria, and as a consequence, would dismiss this ground of appeal.

[158] The appellant conceded that if the trial judge did not err in his interpretation of the test for unfitness to stand trial, then he made no error in declining to direct the issue of fitness to be tried by the jury. Accordingly, I would also dismiss that ground of appeal.

EXTRANEOUS INADMISSIBLE EVIDENCE

[159] The law is clear—hearsay is presumptively inadmissible (see *R. v. Youvarajah*, 2013 SCC 41 at para. 18). There are many exceptions, long recognized by the common law. In addition, admission can be established if the statements pass the threshold requirements of necessity and reliability.

[160] Also clear, as a general proposition, the Crown is not permitted to lead evidence of discreditable conduct by an accused outside the offences charged, solely to show propensity. If relevant to an issue at trial, the Crown must establish on a balance of probabilities that the probative value of the evidence outweighs its prejudicial effect (see: *R. v. Handy*, 2002 SCC 56; *R. v. C.J.*, 2011 NSCA 77).

[161] Here, the trial judge admitted numerous hearsay statements, some of which tended to show the appellant had committed disreputable acts against his former spouse, and non-hearsay evidence to like effect.

[162] Admissibility of evidence is a question of law. Such questions are reviewable on the standard of review of correctness. A trial judge must be right in his or her identification and application of the rules on the admissibility of evidence (see *R. v. Underwood*, 2002 ABCA 310 at para. 61; *R. v. Smith; R. v. James*, 2007 NSCA 19 at para. 166, aff'd 2009 SCC 5). But considerable deference is afforded to trial judges with respect to issues such as determination of probative versus prejudicial effect (*R. v. Handy, supra.*; *R. v. Pasqualino*, 2008 ONCA 554; *R. v. Poulette*, 2008 NSCA 95).

[163] The appellant does not suggest the trial judge erred in his conclusion that the requirements of necessity and reliability were made out for any of the hearsay evidence admitted at trial. The complaint is that the evidence about the earlier gun pointing incident circa 1999, and what has been referred to as the takeout food incident, were of slight probative value but highly prejudicial. In addition, without identifying any flawed ruling by the trial judge, the appellant suggests that the evidence from Devan and Ashley Eisnor was fraught with "subtle nuances to prior discreditable nature of the appellant".

[164] With respect, I see no merit in these complaints. The appellant acknowledges in his factum that hearsay statements of the deceased may be particularly material in the context of domestic violence prosecutions. He quotes *R. v. Carroll*, 2014 ONCA 2, where Watt J.A. wrote:

> [104] A deceased's mental state may be relevant to an accused's motive to commit an offence: *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 60; *R. v. Moo*, 2009 ONCA 645, 247 C.C.C. (3d) 34, at para. 98. In a similar way, the state of the relationship between an accused and a deceased in a time leading up to the unlawful killing of the deceased may demonstrate animus and motive on the part of the accused, and thus be relevant to the identity of the deceased's killer and the state of mind that accompanied the killing: *Griffin*, at para. 61; *Moo*, at para. 98. Statements of the deceased may afford evidence of the deceased's state of mind and thus be relevant to prove a motive and animus: *Griffin*, at para. 61.

[165] As I understand the appellant's argument, the earlier gun incident was too dated to have much, if any probative value, and was prejudicial as tending to show the appellant to be a person capable of volatile and near lethal behaviour towards the deceased. There is no doubt that the evidence of Devan and Ashley Eisnor of that gun incident was not hearsay. They were present. They saw it.

[166] An accused is not put on trial for all of his or her past conduct. Ordinarily events from eleven years pre-offence might be excluded, but in these circumstances, I see no error by the trial judge's decision to admit this evidence.

[167] The earlier gun incident tended to confirm the ultimate reliability of the hearsay statements of the deceased testified to by Peter Hirtle, Julie Illingworth and Terri MacDonald. They described the deceased telling them about a handgun incident in the weeks just prior to the homicide where the appellant had used, what the jury could find, to be the same gun to threaten the deceased as he later used to kill her.

[168] The appellant's theory was that the deceased had said something to the appellant in the parking lot, "something ugly and nasty that we will never know." The historical dynamics of the spousal relationship were relevant to whether the deceased would be less likely to say something to the appellant which would antagonize him.

[169] Furthermore, although the gun incident was somewhat remote, it was relevant to the evidence about the level of fear experienced by the deceased in the period prior to the shooting. I see no reversible error by the trial judge in his determination that the probative value was not outweighed by its prejudicial effect.

[170] As to the so-called takeout food incident, it appears that in actuality there may have been two food on the floor incidents. One, that Devan Eisnor was a witness to, a month or two prior to separation. The other, revealed in hearsay statements by Carla Eisnor and Terri MacDonald in May 2010, where takeout food brought home by the deceased was cold; the appellant threw it on the floor, pushed her toward the food, saying she was a dog, and she should eat like one.

[171] In any event, for essentially the same reasons in relation to the gun incident, I see no error by the trial judge in admitting this evidence. The food on the floor incident witnessed by Devan Eisnor tended to substantiate the accuracy of the incident described by hearsay by Carla Eisnor and Terri MacDonald. In addition, prior assaultive behaviour by an accused in a domestic homicide is generally admissible.

[172] There are sound reasons for this. Such evidence can provide necessary context about the relationship, and the likely reaction by the accused to conduct by the deceased, such as leaving the marriage and starting a new relationship. Thus it can provide evidence to establish identity, motive and animus, which can go the issue of intent by the accused in committing the homicide. This is aptly explained in *R. v. Moo*, 2009 ONCA 645:

> [96] The second admissibility rule that the appellant invokes looks to the substance of the hearsay declarations, in particular their disclosure of the appellant's bad character. The character rule generally prohibits the use of character evidence as circumstantial proof of conduct: *R. v. Handy*, [2002] 2 S.C.R. 908, at para. 31. This exclusionary rule equally bars evidence of similar acts or extrinsic misconduct to support an inference that an accused has the propensity or disposition, in other words, character, to do the type of acts charged and, accordingly, is guilty of the offence: *Handy*, at para. 31. We establish guilt by proof of conduct, not by proof of character.

> [97] Despite this general rule excluding character evidence as circumstantial proof of guilt, we recognize that, sometimes, evidence of prior misconduct, which tends to show bad character, may be so highly relevant and cogent that its probative value in the search for the truth outweighs any potential for misuse: *Handy*, at para. 41. Thus, we permit admission of this evidence by exception where its probative value exceeds its prejudicial effect.
>
> [98] In prosecutions for domestic homicide, evidence is frequently admitted to elucidate the nature of the relationship between the accused and the deceased. This evidence, which often discloses misconduct other than that charged, not only demonstrates the nature of the relationship between the parties, but also may afford evidence of motive and animus relevant to establish the identity of the deceased's killer and the state of mind with which the killing was done: *R. v. Chapman* (2006), 204 C.C.C. (3d) 449 (Ont. C.A.), at para. 27; *R. v. Cudjoe* 2009 ONCA 543, at para. 64; *R. v. Van Osselaer* (2002), 167 C.C.C. (3d) 225 (B.C. C.A.), at para. 23, leave to appeal refused, [2002] S.C.C.A. No. 444, 313 N.R. 199n (S.C.C.).

[173] There is also some authority that when a jury hears evidence of prior discreditable conduct concerning assaultive behaviour by the accused toward a domestic homicide victim, a limiting instruction may not actually be required to caution against the risk of reasoning prejudice (see for example: *R. v. Merz*, 140 C.C.C. (3d) 259 (Ont.C.A.); *R. v. Pasqualino, supra*.; *R. v. Krugel* (2000), 143 C.C.C. (3d) 367; *R. v. Cudjoe*, 2009 ONCA 543 at paras. 64-69, but see *R. v. Assoun*, 2006 NSCA 47 at para. 134, leave ref'd [2006] S.C.C.A. No. 233).

[174] Although there could have been little doubt about the identity of the appellant as the killer, the jury needed to decide the issue of his intent, and if satisfied beyond a reasonable doubt that he had the intent to murder the deceased, was the murder planned and deliberate. The evidence of the relationship and the degree of animus toward the deceased were relevant to these issues.

[175] Here, the trial judge gave mid-trial and final instructions cautioning the jury against using such evidence to punish the appellant for past misconduct, or to conclude that he is a bad person, and hence more likely to have committed the offence with which he was charged. The appellant does not suggest error in the judge's instructions about the evidence. I see none, although the instructions could have been more complete about the use they could make of the evidence.

[176] The trial judge was required to balance the probative value against the potential it could taint the fairness of the trial, and hence work an unfair prejudice for the appellant. The trial judge excluded a considerable body of evidence, either

finding the threshold of reliability had not been made out, or the probative value was outweighed by its prejudicial effect. I see no reversible error by the trial judge in his decision to admit the impugned evidence. I would dismiss this ground of appeal.

[177] Accordingly, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.