SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Eisnor, 2013 NSSC 241

Date: 20130705
Docket: CRBW 409597
Registry: Bridgewater

Between:

Her Majesty the Queen

Applicant

v.

Wayne Paul Eisnor

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: June 4, 2013, in Bridgewater, Nova Scotia

Written Decision: July 25, 2013

Counsel: Lloyd Tancock and Rick Hartlen, for the applicant
Roger Burrill, for the respondent

By the Court [Orally]:

[1] The accused, Wayne Paul Eisnor, through his counsel, Mr. Roger Burrill, has filed a notice asking the Court to make a preliminary determination on whether to put the issue of the accused's fitness to stand trial to the Jury pursuant to s. 672.26 of the **Criminal Code of Canada**, R.S.C. 1985, C-46 (as amended).

[2] The notice which was filed with the Court on April 26, 2013 included a notice of constitutional question pursuant to the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89 (as amended). Specifically the notice contained the following:

> TAKE NOTICE that the Applicant, Wayne Paul Eisnor, raises Constitutional questions relating to Section 2 of the *Criminal Code of Canada* R.S.C. 1985, C-46

> as amended, and in particular, the definition of "unfit to stand trial", subsection (c) [the "communicate with counsel" component];
>
> FURTHER TAKE NOTICE that the Applicant, Wayne Paul Eisnor, seeks an interpretation of s. 2 of the *Criminal Code of Canada*, AND in particular, the definition of "unfit to stand trial", subsection (c) [the "communicate with counsel" component] in accordance with Section 7 of the *Canadian Charter of Rights and Freedoms* - the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Specifically, the Applicant, who, as a result of a significant brain injury has suffered cognitive processing impairment including, but not limited to, retrograde amnesia the effect of which significantly impacts his ability to process, store and retrieve information, discuss this information with counsel and provide instruction or otherwise conduct a defence, seeks a determination that s. 2 of the *Criminal Code of Canada* must be interpreted in a manner that is consistent with the principles of fundamental justice *per* s. 7 of the *Charter of Rights and Freedoms,* **and** that the Applicant, shall have the issue of fitness to stand trial tried before a jury pursuant to s. 672.26 of the *Criminal Code of Canada*;
>
> AND FURTHER TAKE NOTICE that, in the alternative, the Applicant, Wayne Paul Eisnor, seeks a declaration that s. 2 of the *Criminal Code of Canada*, the definition of "unfit to stand trial", subsection (c) [the "communicate with counsel" component] violates s. 7 of the *Canadian Charter of Rights and Freedoms* – the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Following from a finding that the Applicant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* have been violated, the Applicant seeks the following remedy: "that the definition of "unfit to stand trial", subsection (c) [the "communicate with counsel" component] subsection (c) shall be read as "meaningfully communicate with counsel"; **[emphasis not mine]**

[3] Two days have been set aside for the hearing of the application beginning on Monday, July 29 and continuing as required on Tuesday, July 30, 2013.

[4] Upon receipt of the notice, Crown counsel requested the Court to summarily dismiss that aspect of the Defence application that invoked a *Charter* remedy based on a violation of the accused's s. 7 "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[5] Alternatively, the Crown seeks an Order compelling the applicant/accused to furnish further particulars regarding the *Charter* motion.

[6] In a reply filed with the Court on May 31, 2013 counsel for Mr. Eisnor addressed the Crown's alternative position by stating that the materials filed in support of the application clearly identifies the issue to be addressed – that being cl. (c) of the definition of 'unfit to stand trial' found in s. 2 of the **Criminal Code.**

[7] Furthermore, Mr. Burrill submits that "... the facts from witnesses to support the challenge are clearly identified in the report ... of Dr. Porter and the evidence within the filed Casebook."

[8] Finally, it is suggested that "...the applicant has identified case law regarding principles associated with the application to the effect that there is a request that Mr. Eisnor's right to meaningfully participate in his trial through the provision of adequate meaningful instructions is protected."

[9] Mr. Burrill, further in his reply brief, goes on to state:

> This is clearly a full answer and defence issue under Section 7. Finally, the remedy sought, with its *Charter* implications, has been clearly outlined in the materials filed with this Court. That it, the applicant seeks to have the issue of fitness put before the Jury in accordance with the procedure outlined in Section 672.26 of the *Criminal Code*.

[10] I will deal with the preliminary motion advanced by the Crown. In doing so I might delve into issues that will be the focus of more detailed and substantive argument when the merits of the application are argued before me on July 29 and 30, 2013. Any foray I might make into that untested territory should not be interpreted, in any way, as a pre-determination of those issues.

[11] Crown and Defence counsel have both provided written briefs supplemented by oral arguments that were heard by me on June 4. I thank counsel for their able submissions, both written and oral. They have assisted me greatly.

[12] I will provide the following by way of introduction and background.

[13] The accused is charged with first degree murder. On June 30, 2010 it is alleged, he shot his wife twice in the head, killing her, and then, turning the gun on himself, he shot himself once, in the head. The accused was left with a brain injury to the right temporal lobe causing (according to various expert opinions) "dense retrograde amnesia" and leaving him with no memory of the day of the events or of the previous six months.

[14] The question on this application is what test should be put to a Jury tasked with making a finding as to whether an accused, who has suffered a serious brain injury, is fit to stand trial. The accused claims to have no memory of the alleged offence on account of a gunshot-induced brain injury. His position, as I understand it, is that the nature of his amnesia creates a situation in which the existing test for fitness to stand trial would violate s. 7 of the *Charter*. He asks the Court, in effect, to read in additional language to the definition of "unfit to stand trial" in s. 2 of the **Criminal Code**.

BACKGROUND:

[15] After treatment and discharge to the forensic hospital in September 2010, the applicant was determined to be unfit to stand trial by a Provincial Court Judge in October. In July 2011 the Review Board found him fit to stand trial, leading to a finding of "fit to stand trial" by Provincial Court Judge Gregory E. Lenehan in April 2012.

[16] A preliminary inquiry was held in November 2012, and the applicant was ordered to stand trial on the charge.

[17] The applicant now brings another application in which he alleges that he is unfit to stand trial. This application is brought in advance of the accused being given in charge to the jury, and so will require determination by a Jury. Counsel for the applicant argues that the issue of fitness to stand trial should "be interpreted in a manner consistent with the principles of life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as *per* s. 7 of the *Canadian Charter of Rights and Freedoms*.

[18] According to the applicant, while there are witnesses to the events leading up to the shooting, including an "animated" conversation between the applicant and the

victim, there is no evidence of "the content, tenor, or exact wording of this conversation just prior to the shooting," and the applicant himself "has no means of recalling these important facts." The result of this absence of evidence, he says, is to deprive him of the ability to mount possible defences to the charge of first degree murder such as a possible provocation defence (reducing the charge to manslaughter) arising from "the interaction between participants in the pivotal moments prior to the incident." His inability to provide information in support of such a defence, he says, is "entirely due to his brain injury."

FITNESS TO STAND TRIAL:

[19] The **Criminal Code** presumes an accused is fit to stand trial, "unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial." (See s. 672.22) The party bringing the application has the burden of proving that the accused is unfit to stand trial. (See s. 672.23(2)) Where the accused is to be tried before a judge and jury, and the judge directs a trial of the issue of fitness to stand trial before the accused is given in charge to the jury, a jury will be sworn to try the issue. (See s. 672.26(a))

[20] The test for fitness to stand trial is set out at s. 2 of the **Criminal Code**, where the phrase "unfit to stand trial" is defined in the following terms:

> "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...

[21] Section 2 defines "mental disorder" to mean "a disease of the mind."

[22] The 'limited cognitive capacity' test for unfitness, originally formulated by the Ontario Court of Appeal in **R.** v. **Taylor** (1992), 77 C.C.C. (3d) 551, "requires only a relatively rudimentary understanding of the judicial process - sufficient, essentially, to enable the accused to conduct a defence and to instruct counsel in that regard. It

is in that sense that the accused must be able ‘to communicate with counsel’ and relate the facts concerning the offence.

[23] In this case, the applicant asserts that he cannot answer the charge against him.

R. v. Morrissey:

[24] The position of the Defence is that the framing of the fitness analysis set out in **R.** v. **Morrissey**, 2007 ONCA 770, would violate s. 7 of the *Charter of Rights and Freedoms* if it were put to the Jury in the circumstances of this case. Like the accused in this case, the appellant in **Morrissey** claimed that "his inability to remember the events surrounding the death of his ex-girlfriend" rendered him "unfit to stand trial for her homicide…" At the beginning of the trial, the Jury found the appellant fit to stand trial. The trial judge refused a defence request to instruct the Jury that testimonial competence was a prerequisite to fitness. The appellant then re-elected to be tried by judge alone. When the Crown closed its case, the appellant sought a finding, pursuant to ss. 7 and 11(d) of the *Charter* that his right to make full answer and defence was fatally impaired by his testimonial incompetence, "itself a consequence of his inability to remember the critical events." The appellant was unwilling to testify on a competency *voir dire* which the trial judge held to be necessary for such a finding. The application was dismissed. Based on the evidence of a neuropsychologist and a forensic psychiatrist, the trial judge had concluded that it was "highly likely" that the appellant had "retrograde amnesia for a period ranging from at least several, to 30 or 45 minutes, prior to his brain injury;” and that there was "a possibility that he [had] islands of memory for events during that period;" and that there was "a risk of confabulation concerning events for which he [had] no memory."

[25] The Ontario Court of Appeal rejected the appellant's argument that the trial judge "erred in failing to instruct the jury at the fitness hearing that testimonial competence is a condition precedent to a finding of fitness." The test for testimonial competence under s. 16 of the *Canada Evidence Act* was not identical to the test for fitness to stand trial under s. 2 of the **Criminal Code**. Blair, JA speaking for the court said:

> 25 "Testimonial competence" is not a component of that definition. Rather, the ability to "communicate with counsel" is. Although one of the elements of testimonial competence is the ability "to communicate *the evidence*", communicating *the evidence* and communicating *with counsel* are not necessarily the same things.

> Moreover, testimonial competence and fitness for trial are different, albeit related, concepts, and are founded upon different rationales. In my view, therefore, although factors relating to an accused person's ability to testify may be relevant to the fitness inquiry - as, indeed, the trial judge instructed the jury in this case - the testimonial competence of the accused, as contemplated at common law and pursuant to s. 16 of the *Canada Evidence Act*, is not a condition precedent to the accused being declared fit to stand trial... **[Emphasis by Blair, JA]**

[26] To be clear, there was no dispute that the appellant satisfied the first two components of fitness to stand trial. The dispute was entirely on the third element – the ability to communicate with counsel. As I understand the accused's position, that is also the case here. The fundamental issue was "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." The concern with the accused's competence to testify about the "critical events of the homicide and to relate them to his lawyer" is also at the heart of the present matter.

[27] With respect to the suggestion that **Taylor**, *supra,* required that the accused be capable of recounting to counsel "the necessary facts relating to the offence in such a way that counsel can then properly present a defence," Blair, JA said:

> 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.]**

[28] In any event, Blair, JA said, "even if the reference to the accused person's ability to recount the facts relating to the offence is to be interpreted narrowly in the sense of the ability to recount the events surrounding the criminal incident itself, then in my view **Taylor** is misconceived as standing for that proposition." The court in **Taylor** had merely been describing the position of the *amicus curiae* not endorsing it. The question of whether fitness required the accused to be able to "relate the immediate events surrounding the actual crime" had not been before the court in **Taylor**. It was, however, the question to be decided in **Morrissey**. On this point, Blair, JA, pointed out the differing requirements of testimonial competence versus fitness to stand trial:

> 36 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... Meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness.
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> 37 Minimum standards of reliability and trustworthiness, on the other hand, are the principal underpinnings of testimonial competency concerns. These are different goals than those underlying the requirement of fitness for trial. As McLachlin J. (as she then was) noted with respect to testimonial competency, in *Marquard*, supra, at p. 219, "[t]he goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable."
>
> 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…

[29] The appellant argued, however, 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." Blair, JA, rejected this position, for two reasons:

> 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 by Blair, JA]**

> 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… **[Emphasis added.]**

[30] Blair, JA, also cited the case of **Colorado v. Palmer**, 31 P 3d 863 (Col Sup Ct 2001), where the court said, "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." This was not the case with the appellant in **Morrissey**, who had sufficient communication skills and grasp of the proceeding to take the stand. Blair, JA, put it this way:

> 44 Therefore, Mr. Morrissey may well be capable of taking the stand, if necessary. He can absorb, understand, recount and respond to oral testimony. He can communicate with counsel. He can tell the court about his background; about his relationship with Ms. Pajkowski and its breakdown; and about the circumstances pre-dating, leading up to, and following the shooting. In short, *the appellant can understand the nature and object of the proceedings against him and their potential consequences, and he can communicate with his counsel and assist in his defence*. **[Emphasis added.]**

[31] The appellant's inability to remember the immediate circumstances of the incident leading to the charge did not render him incapable of taking the stand. Blair, JA, went on to say:

> 47 The only thing the appellant's mental disorder precludes him from doing is providing a reliable account of the events immediately preceding and surrounding the

> homicide. In this respect, however, he is in no different position than many accused who are unable to relate the circumstances of the crime to the court or to their lawyer because of such frailties as stroke, self-induced alcohol impairment, amnesia, memory loss resulting from physical disease or psychological trauma, blackout, or simple forgetfulness (a characteristic that afflicts many normal people). As noted above, people in these circumstances are not sheltered from criminal responsibility or exempted from trial as unfit.
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> 48 I accept for purposes of this appeal that, in a narrow sense, Mr. Morrissey may "lack testimonial competence" in relation to the critical events surrounding the homicide itself because of his inability to communicate the evidence in that regard. In *Farley, supra,* Justice Doherty reiterated the distinction, drawn in *Marquard*, between the *capacity* to perceive, recollect and communicate, on the one hand, and the *actual ability* to do so with respect to specific events, on the other hand. At p. 81, he added:
>
> > A person may have the capacity to perceive, recall and recount and yet be unable to perform one or more of those functions in a given situation. For example, a witness who genuinely has no recollection of the relevant events is not thereby rendered incompetent *unless that inability to recall is a reflection of the absence of the capacity to recall*. It must also be stressed that the cognitive and communicative components of s. 16(3) set a relatively low threshold for testimonial capacity. Once the capacity to perceive, remember and recount is established, any deficiencies in a particular witness's perception, recollection, or narration go to the weight of that evidence and not the witness's competence to testify: *R. v. Marquard*. **[Emphasis added by Blair, JA]**

[32] These comments, it must be emphasized, related to testimonial competence, not fitness. While the possibility existed that the appellant's inability to recall the events surrounding the shooting was a reflection of absence of capacity to recall, Blair, JA, concluded that:

> ... the appellant's incapacity to recall the critical events surrounding the homicide would not, by itself, render him incompetent to testify as a witness at his trial, given his ability to communicate with respect to other matters, as outlined above. From a policy perspective, such a tenet could be problematic: as mentioned above, the inability to recall the critical events surrounding a crime may well be an important feature of an accused person's defence, as an indicator of his or her state of mind.

[33] This was the case despite the lack of clarity as to the extent of the amnesia. Even "assuming that the appellant's inability to recall [was] incapacity-related, and that he lacks testimonial competence with respect to those events," Blair, JA, was "satisfied … that the lack of such competence [was] not sufficient, by itself, to require a finding of unfitness to stand trial." Once again, testimonial competence did not determine fitness.

[34] The Court of Appeal also rejected the claim that the appellant's right to make full answer and defence under s. 7 of the *Charter* had been violated and that a stay of proceedings was therefore justified. The appellant "was able to cross-examine Crown witnesses, to call defence witnesses, and even to adduce evidence to support the theory that the shooting was unintentional. The appellant could have taken the stand to testify on the Incompetency Application; he ultimately chose not to." While the brain injury and retrograde amnesia likely "had some impact on the manner in which he was able to conduct his defence, they [had] not so interfered with his ability to defend himself that it can be said that he was denied his constitutional right to make full answer and defence." Blair, JA, noted that there were policy reasons in support of this conclusion:

> 75 There are strong policy reasons for concluding that a claim of memory loss respecting the critical events in question, by itself, ought not to provide the foundation for a stay of proceedings - regardless of the cause of that disability. For one thing, such a loss of memory is a prevalent claim (30-40% of people charged with a violent crime, perhaps more, claim to be affected by amnesia in relation to the crime). For another, it is an easy claim to make and a difficult one to disprove: see *R. v. L.J.H., supra*, at p. 89. If a claim of amnesia is available to support an abuse of process application under the *Charter* in cases such as this, it could lead to many cases being stayed in a manner that is not in the public interest. I agree completely with, and adopt, the following statement by Justice Fuerst in her ruling on the broader stay application (177 C.C.C. (3d) 428, at para. 34):
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> > In fact, Dr. Bloom testified that amnesia is a feature of a very substantial percentage of cases of accused persons charged with violent crimes. He indicated that 30 to 40 per cent of people charged with crimes of violence claim amnesia. Similarly, in *R. v. Stone* ..., the Crown's expert witness testified at trial that up to 50 per cent of people charged with serious crimes report that they do not remember the incident. If Mr. Fleming's submission were correct, a large number of accused persons would be entitled to claim exemption from prosecution on constitutional grounds, because of lack of

> memory. I am unable to conclude that the Charter's fair trial rights are this far-ranging. As has been pointed out, the amnesiac's loss of memory differs only in degree from that experienced by other persons not suffering from amnesia…

[35] The lack of recollection was referenced again in **R. v Jobb**, 2008 SKCA 156, where the court held that the "limited cognitive capacity test" did not require that the accused be able to give on-going instructions throughout the trial. The court described the analysis in these terms:

> 39 … According to that test, the court's assessment of an accused's ability to conduct a defence and to communicate with and instruct counsel is limited to an inquiry into whether an accused can recount to his or her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence…
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> ...
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> 43 In her concluding paragraph the trial judge found that Mr. Jobb is unable to recount the facts of his offences "in such a way that counsel may prepare a defence". There was, with respect, no evidence to support this conclusion and the evidence was to the contrary-that Mr. Jobb was able to recount the facts of his offences… That Mr. Jobb be able to participate in his defence in "a meaningful way or assist his counsel during the course of a trial" is not, with respect, an accurate application of the limited cognitive capacity test, which requires only that he be able to recount the facts of the offences with which he is charged to his counsel…

[36] The Saskatchewan Court of Appeal did not cite **Morrissey** in **Jobb**. In his brief before the Provincial Court, Mr. Burrill, counsel for the accused, suggests that **Jobb** is significant in that it "recognizes, post-**Morrissey**, that there is a necessity to hear evidence regarding the ability/inability to recount the offence," of which there is "an abundance" in the present case. To the extent that **Jobb** can be read as differing from, or expanding upon, **Morrissey**, I am of the opinion that **Morrissey** provides a clearer and more persuasive analysis.

[37] In **R. v Amey**, 2009 NSPC 29, the accused had been diagnosed with a subdural hematoma and dementia. In applying **Taylor** and **Morrissey** on the fitness application, Ross, Prov Ct, J noted that in considering the accused's ability to instruct counsel, "[m]emory 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." He continued:

> 65 My reading of *Taylor* and *Morrissey* is that an accused, to be considered fit, must possess the ability to engage with the trial process in a meaningful way. A fit accused would not be impervious to incriminating evidence; rather, he would be able to grasp its possible significance, able to appreciate that it might be accepted by the trier of fact. The trial process itself should make some impression on the accused. While it is generally agreed that Mr. Amey understands that if convicted he could be subjected to a sentence, i.e. that he understands possible consequences of the proceedings, it is far from clear that events during the trial itself would have much impact on him. While he may possess an "in the moment" understanding, *the more basic question is whether he possesses the ability to relate trial testimony to past events and to assess, at least on a rudimentary level, the possibility veracity of such evidence. Even with amnesia of the subject events an accused should be able to conceive that a trier of fact might make adverse findings based on the evidence of others.* **[Emphasis added.]**

[38] Judge Ross went on to describe the implications of the form of memory loss the accused displayed:

> 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.

[39] Judge Ross concluded that the accused was unfit to stand trial.

[40] The question of "meaningful participation," as described in **Morrissey**, was recently considered in **R. v Adam**, 2013 ONSC 373 (a case not cited by the parties), where Trotter, J said:

> 29 Applying the law to the facts of this case is challenging. It is easy to become pre-occupied with the three "arms" of the fitness test in s. 2 of the *Criminal Code*, but then lose sight of the elemental questions raised by a fitness inquiry. Drawing on the passage from *R. v. Morrissey* directly above, the fitness inquiry demands an assurance that, despite suffering from a mental disorder, the accused person is able to receive a fair trial. In this context, meaningful participation is required. For an accused person in a criminal trial, meaningful participation can only mean the ability to defend oneself. This is reflected in the opening words of s. 2, which bear repeating: "'unfitness to stand trial' means unable on account of mental disorder to conduct a defence ... or to instruct counsel to do so." It cannot seriously be contended that rationality has no role to play in this determination. Moreover, the three arms of the fitness test (in s. 2(a) to (c)) are not free-standing fitness criteria to be mechanically applied; instead, they are tools to assist in determining whether a mentally ill accused person is able to defend him or herself.

[41] In my view, the caselaw does not stipulate that "meaningful participation" demands a specific recollection of the events relating to the charge. The question is, rather, whether the accused is capable of engaging in a rational way with the trial process.

DISCUSSION:

[42] The applicant submits that the definition of "unfit to stand trial" in s. 2 of the **Criminal Code** must be interpreted so as to ensure "meaningful" participation of the accused at trial. He says this encompasses "an opportunity to meaningfully communicate with counsel in a manner that can assist with the preparation, presentation, and conduct of a defence." He points to the comment in **Taylor** that "the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way."

[43] The Crown takes the position that **Morrissey** is on point and should be applied as persuasive authority. The applicant says **Morrissey** is distinguishable on the basis that he is not seeking a stay of the proceeding on the basis of an inability to make full answer and defence pursuant to ss. 7 and 24(1) of the *Charter*, with the attendant policy implications; rather, he "simply submits that the principles of fundamental justice dictate that where an individual is legitimately unable to recount events of the incident because of a serious brain injury, and the components of s. 2 are met within the context of *meaningfully* participating in his/her trial, then the detention scheme

envisioned by Part XX.1 [of the **Criminal Code**] kicks in with all of its attendant protections to society and the detainee."

[44] The court in **Morrissey** concluded that 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." This was said in the course of interpreting the scope of the "limited cognitive capacity" analysis, and particularly whether the accused could "recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence." The applicant, however, suggests that the "ultimate determination" in **Morrissey** arose from policy concerns that "a claim of memory loss respecting the critical events in question, by itself, ought not to provide the foundation for a stay of proceedings - regardless of the cause of that disability." I do not follow the applicant's reasoning on this point. As I read **Morrissey**, the policy comments are obiter on the specific issue of fitness to stand trial and the interpretation of **Taylor**. They were made in the context of a related request for a stay of proceedings on the basis of an inability to make full answer and defence. As the applicant has pointed out, no such remedy is sought here.

[45] The applicant also submits that **Morrissey** should be distinguished on the basis that the retrograde amnesia experienced by the appellant in that case was not identical in its effects to that experienced by the applicant in this case. Further, the applicant suggests that Blair, JA, misunderstood the scientific aspects of brain injury, and implies that the Ontario Court of Appeal was particularly concerned with potential faked amnesia. The applicant goes on to suggest without elaboration (other than a reference to counsel's submissions before the Review Board) that this court should reject the Ontario Court of Appeal's view that amnesia alone has never been accepted as a basis to find an accused unfit to stand trial. The applicant concludes:

> … The applicant cannot communicate with counsel in a manner that would provide any insight into the allegations, and as a result, as to how to properly defend the case. The applicant's case is substantively different than *Morrissey* - both on a factual basis and in the remedy sought.

[46] To the extent that I understand the applicant's argument, it is that the court should decline to follow **Morrissey** on the basis that the medical evidence respecting the brain injury in this case does not allow for the possibility of faking. But this was not the reasoning in **Morrissey**. The court in that case did affirm that amnesia alone

does not permit a finding of unfitness. But it did not do so out of policy concerns based on faking or malingering as the applicant seems to suggest.

CONCLUSION:

[47] The *Constitution Act*, 1982 in Part VII states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[48] Part I of the *Constitution Act* contains the "*Canadian Charter of Rights and Freedoms*" which includes s. 7's guarantee of "life, liberty and security of the person."

[49] The provisions of the **Criminal Code** including the interpretation of the meaning of "unfit to stand trial" in s. 2 of the **Code** falls under the protective umbrella of the *Charter*.

[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.

[53] The Crown motion to summarily dismiss that portion of the Defence's application which seeks to advance a s. 7 *Charter* challenge is granted.

McDougall, J.