

Citation: *R. v. Nehass*, 2014 YKTC 23

Date: 20140610
Docket: 13-00181A
13-00385A
13-00835
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

MICHAEL DAVID ARCHIE NEHASS

Appearances:

Leo Lane
Robert Dick

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] This is my decision following a trial on the issue of Michael Nehass' fitness to stand trial. I delivered these reasons orally on May 30, 2014 and advised counsel that I would release them in written form. With the exception of minor editorial changes, the written and oral reasons are identical.

[2] As will be outlined below, the hearing has been relatively protracted, with a number of adjournments and, ultimately, two assessment reports authored by the same forensic psychiatrist. To some extent, I will set out the process chronologically before giving my reasons for my finding that Mr. Nehass is unfit to stand trial.

[3] Michael Nehass has been charged on Informations 13-00181A and 13-00385A with having committed offences contrary to ss. 144(b), 430(3) x2, 733.1(1), 270(2), 264.1(1) and 264.1(1)(a) x2 of the *Criminal Code*. These offences are alleged to have been committed in June, July and August 2013 while Mr. Nehass was in custody at the Whitehorse Correctional Centre (“WCC”).

[4] Crown counsel has proceeded by indictable election on both of these Informations. On September 18, 2003, while represented by legal counsel David Tarnow, Mr. Nehass elected to proceed before a Territorial Court Judge and entered guilty pleas to one of the s. 430(3) offences and to the s. 270(2) offence.

[5] Mr. Nehass has also been charged on Information 13-00835 with having committed offences contrary to ss. 270(1)(a) and 264.1(1)(a) of the *Code*. Crown has proceeded by indictable election. Mr. Nehass has not yet made any election with respect to venue on this Information, although it was agreed to by Crown and defence counsel that my decision on fitness would apply to this Information as well.

[6] He also faces charges in the Yukon Supreme Court on Indictment 12-01503 alleging offences under ss. 88, 264.1(1)(a) x2, 733.1(1), 266, 267(a), 279(2), and 423(1) of the *Code*. The dates of the alleged offences are all within December 2011. Mr. Nehass appears to have made his first appearance on these charges on December 30, 2011. He has remained in custody since that date.

[7] Given that Mr. Nehass was sentenced by Ruddy J. (*R. v. Nehass*, 2010 YKTC 64), on June 11, 2010 to two years less one day in custody after being given credit for one year for his time on remand, plus two years’ probation to follow, it would appear that

these latter offences are alleged to have occurred shortly after Mr. Nehass' release into the community.

[8] Crown counsel previously brought an application pursuant to s. 672.11 of the *Code* for an order to have Mr. Nehass assessed to determine whether he was suffering from a mental disorder that made him incapable of appreciating the nature and consequences of his acts, and thus not criminally responsible for them. This application was denied by Schmidt J., with reasons given September 20, 2013, on the basis that there was, in his opinion, no evidence before him to indicate that Mr. Nehass was suffering from a mental disorder (**R. v. *Nehass***, 2013 YKTC 79, unpublished).

[9] On January 21, 2014, Crown counsel advised the court that the Crown was applying for an order under s. 672.12 of the *Code* declaring Mr. Nehass to be unfit to stand trial. Mr. Nehass continues to oppose the Crown application.

[10] On January 22, 2014, Gower J. (sitting as a Territorial Court Judge), appointed Robert Dick to act as counsel for Mr. Nehass for the purpose of the Crown's application for a psychiatric assessment and, if necessary, for the trial of Mr. Nehass' fitness.

[11] An assessment order was made by Gower J. on January 24, 2014. The duration of the assessment order was five days, commencing January 27, 2014, with forensic psychiatrist Dr. Shabreham Lohrasbe to conduct the assessment at WCC. Dr. Lohrasbe filed a report with the court on January 30, 2014.

[12] When the matter came before the Court on March 14, 2014, Mr. Nehass was granted an adjournment of the fitness hearing to May 23, 2014 in order to attempt to

obtain his own psychological or psychiatric assessment. The matter was subsequently brought forward from that date to April 1, 2014 due to concerns regarding Mr. Nehass' deteriorating mental condition while in custody and the apparent lack of progress he was making towards obtaining an independent psychological or psychiatric assessment. A trial date for the fitness issue was set for April 11, 2014.

[13] On April 11, 2014 Mr. Nehass sought a further adjournment in order to obtain an independent psychological assessment. He advised the court that, that morning, a supporter of his had obtained the name of an individual who was qualified to conduct an assessment through one of the law journals in the Law Courts library. No actual contact, however, had been made to confirm this psychologist's availability.

[14] I declined to grant the adjournment, at which point Mr. Nehass stated that he no longer wished to be represented by his legal counsel, Mr. Dick. Mr. Dick, however, agreed to continue to act as court-appointed counsel and the hearing proceeded.

Evidence of Dr. Lohrasbe

[15] As noted, Dr. Lohrasbe filed his first report on January 30, 2014 and was present by telephone to provide testimony on April 11. Dr. Lohrasbe's qualifications as an expert were set out in his *curriculum vitae*, which was filed as an exhibit in the proceeding, as well as through his evidence-in-chief. I ruled that he was qualified as an expert in the field of forensic psychiatry to provide an opinion with respect to the assessment of accused persons as to whether they are fit to stand trial.

[16] Dr. Lohrasbe had prepared his report on the basis of documentation that he had received, but noted that he had not been able to interview Mr. Nehass due to Mr. Nehass' refusal to be interviewed by him.

January 30 Report

Mental Disorder

[17] In his original report, dated January 30, Dr. Lohrasbe stated that it was his belief that Mr. Nehass suffered from a major mental disorder. He noted that by use of the qualifier 'major' in regard to mental disorders he was focusing on mental disorders that:

...are serious, persistent, and interfere with functioning in important life domains (vocational, social, educational, familial, financial, health and legal). Most major mental disorders are characterized by disturbances of cognition or affect. They include psychotic disorders such as schizophrenia and related disorders, major mood disorders such as bipolar disorder, and other mental disorders characterized by symptoms reflecting significant impairment of intellectual, cognitive or social/interpersonal functioning.

[18] Noting in particular the document Dr. Lohrasbe referred to as the "recusal motion document", authored by Mr. Nehass, as well as the WCC progress log entries, Dr. Lohrasbe stated that in his opinion:

...there is ample indirect information, available through the recusal motion document and through a review of his progress logs, that Mr. Nehass is psychotic. His psychosis is manifest through paranoid and grandiose delusions. ...For the foreseeable future, it should be assumed that he would remain delusional unless he receives appropriate treatment, primarily in the form of anti-psychotic medications".

[19] Dr. Lohrasbe qualified his opinion by noting that, in the absence of conducting an interview with Mr. Nehass, there were significant limits placed upon his assessment of Mr. Nehass' mental condition. As such he was "...not in a position to provide the Court

with a detailed understanding of Mr. Nehass' current mental functioning". Dr. Lohrasbe stated that his assessment was therefore to be seen as tentative and preliminary.

Impact of Mental Disorder on Fitness for Trial

[20] In his written report, Dr. Lohrasbe expressed strong reservations about Mr. Nehass' ability to conduct his defense or to instruct his counsel to do so. He was of the opinion that Mr. Nehass would be unable to "...participate in a meaningful way in the court process until he was no longer delusional".

[21] Dr. Lohrasbe concluded that his assessment "...would strongly support a legal consideration for finding him unfit to stand trial".

Testimony of Dr. Lohrasbe on April 11, 2014

[22] After preparing his report, but prior to his testifying, Dr. Lohrasbe received and reviewed transcripts of the proceedings in Territorial Court before Luther J. on January 21, 2014 and Ruddy J. on March 14, 2014, and in Supreme Court before Hawco J. on March 5, 2014 and Gower J. on April 1, 2014. He had also received and reviewed a nine page document authored by Mr. Nehass titled "Whitehorse Correctional Centre Special Request".

[23] Dr. Lohrasbe stated in his testimony that his review of these transcripts and the nine page document served to strengthen the opinion he provided in his report.

[24] Dr. Lohrasbe testified that it was his opinion that Mr. Nehass' writings and court attendances made it hard for him

...to see how the legal process can reasonably continue in any kind of meaningful way. Mr. Nehass' understanding of the proceedings is obviously

irrational, it's psychotic, its confused, and it seems to me that he cannot consult rationally with his counsel.

[25] Dr. Lohrasbe also testified that Mr. Nehass' apparent resistance to the authority of the courts was "...directly intercepting with his understanding of what is actually going on, why he's in custody and so on... .He's injecting what are psychotic themes in the current legal process and I think this is what significantly affects his fitness for trial". He further expressed the opinion that

...in addition to being grandiose and paranoid, there is...a[n] incoherence. His communications are disconnected, disorganized and quite incomprehensible at times. The themes are of paranoia and grandiosity, but he can't hold a thought and continue it in a way that he can convey in a...precise way what he's trying to say, it's all jumbled up.

[26] Dr. Lohrasbe, in direct examination, expressed the opinion that with a relatively small amount of anti-psychotic medications over a relatively brief period of time Mr. Nehass would become fit.

[27] In cross-examination by Mr. Dick, Dr. Lohrasbe testified that he had no indication that Mr. Nehass did not understand the role of the parties in court (being the judge, Crown counsel and defence counsel), the nature of the charges he faced, or the consequences of a trial and conviction. He stated, however, that having a "...concrete kind of intellectual individual understanding of the roles of various players in court and the process" still requires that

...the individual has to be rational in his apprehension of what is going on.

And if that is so thoroughly disorganized, then the fact that he may be able to properly identify the roles of various people in court and so on,...it doesn't overrule the fact that he has become irrational in his understanding of the whole process.

[28] When cross-examined by Mr. Nehass, Dr. Lohrasbe told Mr. Nehass that his mental disorder "...specifically intrudes into your ability to participate meaningfully in the legal process". He responded to Mr. Nehass' questions on this point by stating that he based his opinion

...primarily on your writings, Mr. Nehass, and in those writings it is apparent to me that you have very confused ideas about the state of the world, its impact on you, various organizations and individuals who are thought to persecute you and you have linked that with the legal process.

[29] Subsequently during the course of Mr. Nehass' cross-examination of Dr. Lohrasbe, Mr. Nehass stated that he would now agree to let Dr. Lohrasbe interview him. Dr. Lohrasbe agreed to do so, stating that it would be beneficial and, over the opposition of Crown counsel, the matter was further adjourned to allow Dr. Lohrasbe to conduct this interview.

May 22, 2014 Report

[30] Dr. Lohrasbe interviewed Mr. Nehass and provided a further assessment. This interview was video-taped at Mr. Nehass' request.

[31] In addition to all the earlier materials he had reviewed, Dr. Lohrasbe received and reviewed several assessment reports regarding Mr. Nehass from 1999 and a number of the transcripts of proceedings in Territorial and Supreme Court from December 2013 through to May 2014.

[32] Dr. Lohrasbe wrote that the earlier reports:

...suggest the firm diagnoses of Conduct Disorder and Attention Deficit/Hyperactivity Disorder (ADHD), the presence of multiple cognitive deficits likely related to FASD and head injury, the early onset of substance abuse, and

vague potential symptoms of psychosis and/or dissociation, but no clear evidence of a mental disorder of psychotic proportions. Hence, by age 15, Mr. Nehass presented with multiple and complex psychiatric diagnoses. This is not unusual in the histories of individuals who go on to develop major psychiatric disorders in adulthood.

[33] Dr. Lohrasbe noted that Mr. Nehass had a number of diverse preoccupations that

...collectively portray a chaotic and expanding mix of paranoid and grandiose delusional themes, interconnected by reasoning that appears to make sense to him, but which, from an outsider's perspective, appears impervious to signals from reality.

In addition to abnormal *content* of his thinking (paranoid and grandiose ideas) the *process* of Mr. Nehass' thought (as judged by his speech) is marked by loose associations, illogicality, circumstantiality, and tangentiality, i.e. Mr. Nehass exhibits many features of thought disorder.

[34] While Dr. Lohrasbe concluded that the presence of a major mental disorder was confirmed by his interview with Mr. Nehass, he noted that Mr. Nehass was capable of "keeping track" of real life events. He wrote that some of Mr. Nehass' statements to him "...appear to reflect Mr. Nehass' intact capacity to think through his options within the real life legal process. Mr. Nehass appears aware of his status within the justice system and more broadly his 'street smarts' appear intact".

Mental Disorders

[35] Dr. Lohrasbe wrote that it is his opinion, without being able to come to a firm diagnosis on the basis of one interview, that the most likely primary psychiatric diagnosis for Mr. Nehass is Bipolar I Disorder. He stated that this disorder is characterized by manic episodes which are of greater functional severity than the hypomanic episodes more closely associated with Bipolar II Disorder. He notes that Mr.

Nehass displays many symptoms of mental disorders with respect to both the content and process of thought, pointing to:

- The content of his thinking being dominated by paranoid and grandiose ideas of delusional proportions; and
- The process of his thinking being frequently chaotic and disorganized, with pressured speech and “flight of ideas” (which I note is defined in Wikipedia as referring to “Excessive speech at a rapid rate that involves fragmented or unrelated ideas. It is common in mania”).

Impact of Mental Disorder on Fitness for Trial

[36] Dr. Lohrasbe stated that:

On any given day, *if* Mr. Nehass were to gather his cognitive resources and stay very focused on his real life situation, he would be capable of keeping track of events, in Court and elsewhere, as they are happening in real life, in real time. However, if his attention shifts to his delusional ideas, those ideas become the lens through which he interprets the real life events, including Court proceedings. As perhaps is apparent from transcripts of prior Court proceedings, such shifts in Mr. Nehass’ attention have been extraordinarily rapid.

[37] Dr. Lohrasbe expressed the opinion with respect to Mr. Nehass’ understanding of the consequences he faces, that Mr. Nehass “...is acutely aware of the real-life jeopardy he may be in”.

[38] He noted that while Mr. Nehass has the capacity to communicate with counsel at a basic level, the “...actuality of his communication would depend on both his mood and the primary focus [of] his attention (real-life or delusional) at the time of those communications.”

[39] Dr. Lohrasbe further expressed the opinion that Mr. Nehass’ grasp of the nature and object of the proceedings was not rational or reality-based. He stated that while Mr.

Nehass can grasp the charges and their potential consequences, "...his mental disorder often intrudes in his capacity to do so", with considerable variation in this level of intrusiveness.

[40] Dr. Lohrasbe concluded that Mr. Nehass has the capacity to attend to practical issues that are relevant to his fitness for trial and is capable of establishing situational alliances as long as certain pre-conditions are met. Countering this, however, is what Dr. Lohrasbe describes as Mr. Nehass' participation in the process being filtered through his delusional beliefs.

Testimony at Hearing

[41] The fitness hearing continued on May 26, 2014 with Dr. Lohrasbe still under cross-examination. I note that Mr. Nehass had reconsidered his decision to no longer have Mr. Dick represent him as counsel and was content that he continue to do so. Nonetheless, Mr. Nehass continued to conduct the cross-examination of Dr. Lohrasbe personally.

[42] After a very lengthy 'question' put to him by Mr. Nehass, Dr. Lohrasbe responded by stating that the "flight of ideas" he spoke of in his reports was very apparent in the cross-examination by Mr. Nehass.

[43] Dr. Lohrasbe stated that this made it clear to him that Mr. Nehass could not effectively act in court.

[44] Dr. Lohrasbe agreed that he was not an investigator and not in a position to speak to the validity of each of Mr. Nehass' claims regarding certain persons and events described by Mr. Nehass in his writings and in court statements. Dr. Lohrasbe stated

that the way that Mr. Nehass presented his claims and looking at them all collectively was consistent with Mr. Nehass having a major mental disorder.

[45] Dr. Lohrasbe stated that while he could not say that each component of Mr. Nehass' claims was not possible, when put together they do not make sense or hang together very well. He stated that Mr. Nehass' claims were similar to those he has heard many times from mentally disordered individuals.

[46] Dr. Lohrasbe testified that it was not his role to determine fitness, that was the role of the court, but he was here to define the features of mental disorder as they applied to Mr. Nehass. He described Mr. Nehass as

- jumping from one idea to another with at best tenuous links between these ideas;
- having tangential thinking in that he was shooting from one topic to another;
- being circumstantial in that he was going around and around and is perseverated (I note that Wikipedia states that:
 - o In psychology and psychiatry, **perseveration** is the repetition of a particular response, such as a word, phrase, or gesture, despite the absence or cessation of a stimulus, usually caused by brain injury or other organic disorder. Symptoms include "lacking ability to transition or switch ideas appropriately with the social context, as evidenced by the repetition of words or gestures after they have ceased to be socially relevant or appropriate...")
- not having things hang together very well or make sense when he speaks.

[47] In cross-examination by Mr. Dick, Dr. Lohrasbe agreed that the ability of Mr. Nehass to participate in a sentencing hearing as distinct from a trial would likely be different, as the sentencing process in which there was a guilty plea, an acceptance of facts put forward by the Crown and submissions on sentencing, was simple when compared to the greater complexities present within a trial.

[48] Dr. Lohrasbe agreed that Mr. Nehass can keep focused in short bursts and when he forms a situational alliance. Whether Mr. Nehass would be able to do so on any particular day was questionable. While acknowledging that it was conceivable that Mr. Nehass could do so for a trial, Dr. Lohrasbe felt that this would be much more difficult for him.

[49] Dr. Lohrasbe testified that Mr. Nehass would need to remain focused and would need to step away from his delusional issues. If he lost himself in his preoccupations, participating in the trial process would be difficult, albeit not impossible with the assistance of counsel.

[50] When being re-examined by Crown counsel, Dr. Lohrasbe stated that his conclusion in the January 30, 2014 report that his psychiatric assessment would strongly support a finding that Mr. Nehass was unfit to stand trial, had been altered since his interview with Mr. Nehass. Based upon information he had to that point, he had understood Mr. Nehass to be “relentlessly antagonistic” to correctional staff. Contrary to his expectations, he found Mr. Nehass to be quite friendly to correctional staff, and that he had a greater capacity to stay on topic for longer periods of time once he calmed down after being given an opportunity to speak.

[51] Although Mr. Nehass’ ability to stay on topic was unsatisfactory, Dr. Lohrasbe stated that given enough patience and allowance to “ventilate”, his counsel could get to the point where a more reasonable reality-based discussion could take place. Mr. Nehass could be encouraged to separate out his complaints, such as his anger and frustration with his treatment at WCC, from the need to deal with different court

proceedings. Dr. Lohrasbe found Mr. Nehass' global impairment to be less than he initially thought.

[52] Dr. Lohrasbe stated that while Mr. Nehass has a narrow understanding of the consequences he faces as a result of these charges, he does not have a broader understanding, as his understanding is framed through his delusions.

[53] He stated that Mr. Nehass would be capable of forming a situational alliance and conveying instructions on a good day and for short periods. He stated that the best way to describe Mr. Nehass was as having a "double-consciousness" in this regard.

[54] Dr. Lohrasbe expressed concern about Mr. Nehass' ability to understand the object of the proceedings. He stated that it is clear that Mr. Nehass is massively invested in this vast combination of conspiracy theories and in seeing life through this lens. He has seen nothing to demonstrate that Mr. Nehass has any clarity in this area. He concluded that he has no doubt that Mr. Nehass is delusional.

Testimony of Mr. Nehass

[55] Mr. Nehass testified as to his understanding of the nature of a trial, the roles of the various players, including the police, the court process, the possible consequences of being convicted and the need to communicate with counsel. His answers in direct examination were appropriate and demonstrated a reasonable degree of understanding in these areas.

[56] In cross-examination, however, Mr. Nehass confirmed his beliefs in regard to what he had repeatedly stated in his writings. He digressed considerably into espousing his theories regarding certain conspiracies and actions by named individuals,

entities and governmental organizations. Given that Crown counsel specifically asked Mr. Nehass questions about his writings and beliefs, to a certain extent this was understandable.

[57] Mr. Nehass was adamant that he is fit to stand trial.

Law

[58] Section of 2 of the *Code* sets out the criteria when considering the issue of fitness to stand trial.

“unfit to stand trial” means unable on account of mental disorder to conduct a defence at any stage of 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 proceedings,
- (b) Understand the possible consequences of the proceedings, or
- (c) Communicate with counsel.

[59] In *R. v. Triano*, [2014] O.J. No. 2303, (C.J.), Colvin J. reviewed in paras. 48 – 70 the jurisprudence regarding the issue of fitness to stand trial (many of the citations below were referred to in *Triano*). Colvin J. notes in para. 49 that the starting point in case law is the case of *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.) which enunciated the “limited cognitive capacity” test. The court in *Taylor*, at p. 566, stated that an accused must have sufficient mental fitness “...to participate in the proceedings in a meaningful way”.

[60] *Taylor* was cited in *R. v. Morrissey*, 2007 ONCA 770 where the Court stated in para. 27 that the threshold for fitness

...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.

[61] In para. 36 of **Morrissey**, the court continued:

An accused must be mentally fit to stand trial in order to ensure that the trial meets the minimum standards of fairness and accords with the principles of fundamental justice such as the right to be present on one’s own trial and the right to make full answer and defence. ...Meaningful presence and meaningful participation at trial, therefore, are the touchstones of the inquiry into fitness.

[62] In **R. v. Adam**, 2013 ONSC 373 Trotter J., referring to **Morrissey**, stated at para. 29:

...the fitness inquiry demands an assurance that, despite suffering from a mental disorder, the accused person is able 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. ...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 her self.

[63] Crown counsel filed the case of **R. v. Xu**, [2007] O.J. No. 5796 (C.J.), (also referred to in **Triano**). In para. 8, Schneider J. considered the limited cognitive capacity test as articulated in **Taylor**:

At the risk of oversimplification, a distillation of the decision is that in order to be fit to stand trial an accused need only have a rudimentary factual understanding of his/her legal predicament. It is not necessary that the accused have a “rational” understanding of his legal predicament or be able to act in his “own best interests”.

[64] Noting the attempt in *Taylor* to find an effective balance between the objectives of the fitness rule and the right of an accused to choose his own defence and proceed to trial in a reasonable time, Schneider J. stated in para. 9 that:

...While expediency must be considered in setting the fitness standard, it may be the case that the “right to choose” is a rather empty right where the accused does not have a rational understanding of his legal predicament; where choice is not [a] rational choice. The right to choose must be read as ‘rational choice’ otherwise, from a protection perspective, it is a ‘right’ of questionable worth.

[65] Schneider J. in finding Ms. Xu unfit to stand trial, noted the following in para 10:

The Canadian Oxford Dictionary defines 'rational' as follows: 1 of or based on reasoning or reason, 2 sensible, sane, moderate; not foolish or absurd or extreme, 3 endowed with reason, reasoning. 'Irrational' is defined as follows: 1 illogical; unreasonable, 2 not capable of reasoning, 3 not rational. Ms. Xu's pervasive paranoid delusional thinking has very clearly rendered her irrational. Ms. Xu becomes fixated upon irrelevancies that are a direct product of her mental illness. And, while she has a rudimentary factual understanding of her legal predicament and therefore against the 'limited cognitive capacity test' would be fit to stand trial, she is not able to proceed. She is not able to conduct her own defence. She is not governable by the court. She is motivated by her mental disorder to behave within the process in a manner that is not consistent with its objectives. At the same time she is unable to instruct counsel to act on her behalf because she wishes to speak for herself in order to demonstrate her sanity. She is in my view, as a result of her mental disorder, not able to adequately respond to the state's prosecution and should be protected from that process by the fitness rules. To my mind her lack of a rational understanding of her legal predicament has rendered her unfit to stand trial and should engage the fitness rules. The limited cognitive capacity test as articulated in *Taylor* fails to adequately protect Ms. Xu. The fitness rules must have as a central requirement a rational understanding of one's legal predicament.

[66] In *R. v. Thompson*, 2011 ONCJ 209, in para. 16, Nadel J. referred to the fitness criteria as requiring that an accused

...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. ...

[67] In *R. v. Blackjack*, 2010 YKTC 117, Ruddy C.J. noted that the accused "...exhibited at least a very basic understanding of the nature and objects of the proceedings and of the possible consequences" (para. 9). Citing the decision of Lilles J. in *R. v. T.J.*, [1998] Y.J. No. 124 (T.C.), and the decision in *Xu*, Ruddy C.J. stated in para. 16 that:

In reviewing the case law, it becomes evident that the application of the limited cognitive capacity test enunciated in *Taylor* cannot be a simplistic exercise. It is not simply a matter of determining whether an accused demonstrates a rudimentary understanding of the legal proceedings. That in and of itself is not enough. The level of understanding, while not required to be comprehensive and nuanced, must be sufficient to enable the accused to participate in his or her own defence in a meaningful way.

Conclusion as to Fitness

[68] I am satisfied beyond any doubt that Mr. Nehass suffers from a major mental disorder. The evidence of Dr. Lohrasbe, which I accept without reservation, is very clear in this regard and, in my opinion, well supported by the documentation before the court. I also find that Mr. Nehass' in-court appearances, insofar as how he has spoken and conducted himself, whether in submissions or in examination and cross-examination, are consistent with his suffering from a major mental disorder.

[69] I recognize that the determination that Mr. Nehass suffers from a major mental disorder does not automatically or necessarily lead to a further finding that he is unfit to stand trial. I must determine whether he fits within the definition of unfit to stand trial as set out in s. 2 of the *Code*.

[70] I concur with the jurisprudence that broadens the test for a determination that an accused is unfit to stand trial. The limited cognitive capacity test set out in *Taylor* cannot be narrowly construed in such a way that fitness can be established simply by the fact that an accused possesses a rudimentary understanding of the criteria set out in s. 2.

[71] An accused must be able to participate in his or her defence in a meaningful way and I concur that this requires a rational understanding of the fundamental tenets of the process and procedure of the criminal case in which he or she is involved. This does not require that the accused individual possess any complex or detailed knowledge, but simply an ability to comprehend enough to understand why he or she is before the court, what the possible consequences he or she faces are, and how to connect this understanding to making full answer and defence, whether represented by counsel or not. An accused who suffers from limitations in this regard may nonetheless be found fit if he or she is able to communicate with counsel to the extent that he or she can provide sufficient instruction to counsel based upon receiving advice and internalizing it to a satisfactory degree.

[72] It is not sufficient to possess understanding in each separate and distinct area of the court proceedings; the accused individual must be able to take these pockets or spheres of understanding and link them together in a rational way, in a manner that allows him or her to make full answer and defence. Only then can the accused participate in the process in a meaningful way.

[73] If I use the analogy of a 'connect the dots' drawing, it is not enough to be able to identify the individual numbers; one must be able to connect the numbers in a

sequential and rational manner in order to produce an intelligible drawing at the end. And if one intends to colour the drawing, such as in a 'paint by number' drawing, there should be a fundamental ability to consistently associate the appropriate colour with each number and to stay at least close to being within the lines.

[74] When I consider how the law applies to Mr. Nehass, I find that he is unfit to stand trial.

[75] Mr. Nehass is passionate in his beliefs about the roles of certain individuals, entities and governments. These beliefs, however, simply overwhelm his ability to participate in the criminal law process in a meaningful way. While it is no doubt true that Mr. Nehass can for brief periods and at certain times be rationally connected to his involvement in these proceedings, I find that the evidence is overwhelming that he cannot maintain this rational connection for any sustained period of time, and certainly not for anywhere near long enough to participate in the criminal trial process in a meaningful way.

[76] It is clear that Mr. Nehass views the prosecution against him and this fitness hearing as an attempt to keep suppressed the information he possesses about individuals, entities and governments being involved in a vast network of conspiracies and cover-ups. I find that this severely impacts his ability to understand the nature and object of the criminal proceedings.

[77] I also find that, while he has a basic understanding of some of the potential criminal consequences that he faces if convicted of any of the allegations against him, he entangles these with other non-criminal process consequences he believes he has

suffered and will suffer in future, such as what he describes as his forced sterilization and poisoning while in custody.

[78] I also find that any successful attempt to establish a situational alliance with counsel for the purposes of making full answer and defence will likely quickly be derailed by the delusional beliefs Mr. Nehass possesses.

[79] I want to make it clear that I am not saying anything about the veracity of any of Mr. Nehass' claims taken individually. It is not necessary for me to do so. It is clear, however, that any attempt by Mr. Nehass to stay on track will be unsuccessful as his thinking quickly becomes overwhelmed by these beliefs.

[80] What Dr. Lohrasbe refers to as "a flight of ideas" is particularly descriptive of Mr. Nehass' fragmented and disorganized thought processes.

[81] Although there are considerable examples of how Mr. Nehass' mental disorder impacts upon his ability to meaningfully participate in the trial process, no better example of this could be demonstrated than what occurred in closing submissions.

[82] After Crown counsel made his submissions, Mr. Dick commenced making submissions on behalf of Mr. Nehass. Mr. Dick was appropriately addressing the legal criteria in a step-by-step process, connecting the facts to the applicable law. He was quickly interrupted by Mr. Nehass who, obviously unsatisfied, indicated that he wanted to make the closing submissions, which he did.

[83] Mr. Nehass' submissions had little to do with the issue at hand but quickly devolved into a further detailing of his beliefs regarding numerous conspiracies and cover-ups by individuals, entities and governments. He completely undermined the

advocacy of Mr. Dick in order to further espouse the conspiracy and cover-up theories in which he is so deeply invested and entrenched.

[84] This was a prime example of what Dr. Lohrasbe pointed to in regard to Mr. Nehass: that his delusional thinking and his tendency to be drawn back into this thinking would be a threat to his rational participation in the criminal proceedings.

[85] It must be remembered that at the heart of the fitness issue is trial fairness. An accused individual stands against the power of the state with all its resources; to force an accused person to defend himself or herself when he or she cannot participate in a meaningful, (i.e. rational), way, would undermine trial fairness. The requirement for an accused person to be fit before they are forced to defend themselves against the power of the state is necessary to ensure trial fairness. This fitness requirement is designed for the protection of the accused individual.

[86] To find Mr. Nehass fit to stand trial when he so obviously cannot participate in a meaningful way would be unfair to him and would be contrary to the requirement for fairness in the trial process.

[87] As such, I find that he is unfit to stand trial.

COZENS T.C.J.