BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE *CRIMINAL CODE*
R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6

IN THE MATTER OF AN APPLICATION FOR AN ORDER RESTRICTING PUBLICATION OF THE REVIEW BOARD'S DISPOSITION AND REASONS
IN THE MATTER OF

BLAIR EVAN DONNELLY

DATED:	**October 10, 2023**	
BEFORE:	**CHAIRPERSON:**	**J. Threlfall**
	MEMBERS:	**Dr. J. Smith, psychiatrist**
		Dr. L. Murdoch
SUBMISSIONS:	**ACCUSED/PATIENT:**	**Blair Donnelly**
	ACCUSED/PATIENT COUNSEL:	**G. Orris, K.C.**
	MEDIA PARTIES:	**D. Burnett, K.C.**

INTRODUCTION

[1] By letter to the British Columbia Review Board (the Board) dated September 20, 2023, Mr. Donnelly, through counsel, notified the Board of his opposition to the public release of the Board's reasons concerning his April 13, 2023 annual disposition hearing.

[2] The Board convened a panel (the panel) to consider Mr. Donnelly's application. The Board also notified interested parties of Mr. Donnelly's application and invited submissions. The panel received written submissions from counsel on behalf of Mr. Donnelly and from counsel on behalf of the Canadian Press, Canadian Broadcasting Corporation, Global News, CTV and the Globe and Mail (the Media Parties). Crown counsel took no position and filed no submissions. The Director took no position and filed no submissions. Counsel for Mr. Donnelly was given the opportunity to reply but did not do so.

PROCEDURAL HISTORY

[3] On April 13, 2023 the Board held an annual hearing to review the disposition of Blair Evan Donnelly. Mr. Donnelly was before the Board as a result of a verdict of not criminally responsible on account of mental disorder (NCRMD) rendered on January 23, 2008 in the Supreme Court in Terrace. The verdict related to a single count of second-degree murder contrary to section 235(1) of the *Criminal Code*. Mr. Donnelly stabbed his daughter in the neck, heart and back in response to religious delusions. Following the NCRMD verdict, Mr. Donnelly was detained at the Forensic Psychiatric Hospital and has remained subject to a custody order since.

[4] At the April 13, 2023 annual hearing, all parties agreed that a custodial disposition was necessary. In its reasons for disposition (the reasons) the Board concluded that Mr. Donnelly continued to require intensive supervision at the Forensic Psychiatric Hospital to ensure that he was appropriately monitored before "forays" into the community. The Board did, however, provide that at the Director's discretion Mr. Donnelly could have escorted and unescorted access to the community depending on his mental condition, having regard to the risk he posed to himself or others.

[5] On September 10, 2023 Mr. Donnelly was granted an unescorted pass. He attended a community event in Vancouver where he is alleged to have stabbed three different persons. He was subsequently charged with three counts of aggravated assault. His counsel on those charges is Glen Orris, KC.

[6] The arrest of Mr. Donnelly and the subsequent charges of aggravated assault in the context of the April 13, 2023 Board disposition resulted in significant media and public attention. The Premier of British Columbia announced an inquiry into the circumstances leading to Mr. Donnelly's unescorted day pass. Terms of that inquiry have not been made public. The Board has released its disposition dated April 24, 2023 but has not released its reasons for that disposition. The Board sought submissions from "interested parties" as to whether the April 13, 2023 reasons should be made public. Mr. Donnelly opposes the release of the reasons. This panel was appointed to review the parties' submissions on that issue and determine the outcome.

[7] Relevant to the Board's consideration of the issue is the fact that, prior to this application, the reasons were somehow provided to at least one member of the media without the consent of the Review Board and were aired by CHEK TV News. As a result, the reasons (originally disclosed solely to the parties to the disposition hearing) are in the public domain already.

THE LAW

[8] Review Board hearings and Review Board decisions are presumptively public. The applicability of the open court principle to the Review Board and other quasi-judicial public tribunals has long been recognized, going back at least to *Blackman v. British Columbia (Review Board)*, 1993 CanLII 14664 (BC SC). Brennan J. (later Chief Justice Brennan) at p. 18 held:

> Disposition hearings are essentially an extension of the criminal process. The presumption of public access to criminal proceedings under s. 486(1) and disposition hearings under s. 672.5(6) is consonant with the common law principle which mandates openness of judicial proceedings.

[9] The importance of openness and transparency is not hard to understand particularly as those principles relate to Review Board decision-making. The role of the Review Board and how it functions is not widely understood even by those involved in the criminal justice system. The Review Board's role is to deal with individuals charged with criminal offences, often very serious criminal offences, who are either unfit, by reason of a mental illness, to stand trial or judged not criminally responsible as a result of a mental illness. It is easy to understand how, from a public perspective, there is a sense that these

individuals have never been properly held to account for their actions. The deliberations of the Review Board as to fitness and criminal responsibility and the Review Board's rationale for disposition, including important considerations relating to the protection of the public, are of significant public interest and, except in extraordinary cases, the public has a strong interest in knowing how Review Board decisions were reached. It is critical that the public have trust and confidence in their justice system.

[10] Because disposition hearings are presumptively open, the courts have been clear that the onus is upon those seeking to deny access to justify their position. The test for denying access was set out by the Supreme Court of Canada, in *Toronto Star Newspapers v. Ontario* [2005] 2 SCR 188 at paras. 26-29. The court made it clear that there is a presumption of access to documents. An order limiting access will only be made when such an order is necessary to prevent a serious risk to the proper administration of justice and the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and public. The rights of the accused to a fair and public trial and the efficacy of the administration of justice are considerations.

[11] The Supreme Court of British Columbia's decision in *Fairgrieve v. British Columbia Review Board,* 2022 BCSC 1882 has reinforced the importance of openness in the context of Review Board proceedings. The decision has also clarified the distinction between disposition information and disposition reasons and the jurisdiction of the Review Board in controlling its own processes.

[12] In *Fairgrieve* the accused sought to have the Review Board extensively redact its reasons for disposition, relying on *Criminal Code* section 672.51(7) which provides that no "disposition information" shall be made available for inspection or disclosure to a non-party where the Board is of the opinion that disclosure of the disposition information would be seriously prejudicial to the accused and that, in the circumstances, protection of the accused takes precedence over the public interest in disclosure. Prior to *Fairgrieve,* whether "disposition reasons" were "disposition information" was an unresolved matter. Mr. Justice Riley in *Fairgrieve* clarified that "disposition information" referred to the assessments, reports and other evidence the Board considered in reaching a decision (except for oral evidence). Disposition reasons and disposition orders are the "product" of the Review Board's deliberations. Accordingly, section 672.51(7) does not empower or require the Board to refuse to release its reasons for disposition, even if those reasons make reference to disposition information.

[13] In referring to disposition reasons, Mr. Justice Riley in paragraph 110 had this to say:

> Fourth, I agree with the panel's conclusion that it is in the public interest for Review Boards and courts to make reference to evidence, including information included in assessment reports, where citing that evidence is necessary to justify their disposition decisions. As the panel put it, "[a]bsent reasons which explain, by reference to evidence, how Review Board decisions are reached, the public could lose confidence in the legislative regime".

[14] With respect to the Board's ability to restrict disclosure of disposition reasons Mr. Justice Riley noted at paragraph 123:

> In my view, the conclusion that Review Boards have a duty to apply the open courts principle when considering public access to their disposition reasons and orders carries with it the recognition that Review Boards, like courts, have the authority to determine when limits or exceptions to openness are warranted.

[15] With respect to whether the presumption of openness is absolute Mr. Justice Riley at paragraph 119 had this to say:

> I also consider it highly relevant that Review Boards and courts have concurrent jurisdiction to conduct disposition hearings and make dispositions under Part XX.1 of the *Criminal Code*. The jurisdiction to make dispositions carries with it a statutory duty to provide disposition reasons. In circumstances where a court invokes this statutory jurisdiction, there could be no dispute that the open courts principle applies to the proceedings. The starting point of the open courts principle is the presumption of openness. However, to state the obvious, the presumption of openness is not absolute. Courts have the authority to make exceptions to the general rule of openness, but only when justified under the *Dagenais/Mentuck* test, as most recently re-stated or summarized in *Sherman Estate*. Thus, the very existence of the open courts principle carries with it the authority – indeed, in some instances, the obligation – to regulate its limits.

THE ISSUES

[16] The issue before the panel is, therefore, whether Mr. Donnelly has rebutted the presumption of openness.

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THE ARGUMENTS

I. Mr. Donnelly argues that the release of the Review Board's reasons is presumed to be an unreasonable invasion of his personal privacy. In support of this contention, he cites section 22(3) of the *Freedom of Information and Protection of Privacy Act* (*FoIPPA*), RSBC 1996, c.165 which states that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[17] The presumption in section 22(3) is not governing in the present context. Section 33(2)(e) of *FoIPPA* provides that a public body may disclose personal information in accordance with an enactment of Canada that authorizes its disclosure. Section 22(4)(c) of the same *Act* provides that disclosure is not unreasonable if an enactment of British Columbia or Canada authorizes it. As Mr. Justice Riley noted at paragraph 119 in *Fairgrieve*, *supra*, Review Boards and courts have concurrent jurisdiction to conduct disposition hearings and to make dispositions under Part XX.1 of the *Criminal Code*. That jurisdiction carries with it a statutory duty to provide reasons [*Criminal Code*, s. 672.52(3)]. *Fairgrieve* also confirmed that the open court principle applies to the Review Board and that disposition reasons are presumptively public. Accordingly, in the panel's view, the inclusion of sections 33(2)(e) and 22(4)(c) in *FoIPPA* means that section 22(3) of *FoIPPA* does not govern the disclosure of the reasons because an enactment of Canada authorizes their disclosure.

II. Mr. Donnelly argues that the Review Board is required by section 672.51 of the *Criminal Code* to withhold the reasons from public release. That section deals with "disposition information" and Mr. Donnelly asserts that section 672.51(7)(b) prohibits disclosure of such information where disclosure would be seriously prejudicial to the accused.

[18] In *Fairgrieve,* Mr. Justice Riley made it clear that "disposition information" cannot be interpreted to include disposition reasons or information reproduced in those reasons. As a result, the panel has concluded that section 672.51 of the *Criminal Code* is not applicable to this application.

III. Mr. Donnelly argues that his *Charter* rights would be violated if the reasons were disclosed. In particular Mr. Donnelly asserts that public disclosure of reasons jeopardizes and violates his right to be tried by an independent and impartial tribunal. He also argues that the release of the reasons would be a violation of his section 7 *Charter* right to security of the person.

[19] Mr. Donnelly does not have a *Charter* right to the non-issuance of Review Board reasons *per se.* He did not explain how his right to security of the person would be violated by the public release of the reasons, nor lead any facts or evidence in support. As for Mr. Donnelly's right to a fair trial, this is a matter considered under the *Dagenais/Mentuck/Sherman Estate* test, and is balanced against competing interests such as freedom of expression and freedom of the press. However, no particulars are provided by Mr. Donnelly as to how his right to a fair trial would be impaired by disclosure of the reasons.

[20] This matter was addressed by Mr. Justice Riley in *Fairgrieve, supra*, at paragraph 133, where he concluded that the Review Board correctly applied the three-step analysis from *Sherman Estate*. He had this to say:

> [133] The panel undertook an extensive review of the open courts principle as discussed in *Sherman Estate*, including the "three-step" analysis set out at para. 38, under which the party seeking to overcome the presumption of openness must establish that (i) court openness poses a serious risk to an important public interest, (ii) the order sought is necessary to protect the specified public interest, and no reasonable alternative measures that will suffice, and (iii) the benefits of the order outweigh its negative effects. The panel accepted that this three-part analysis "now defines the approach which must be taken when a part seeks to limit the application of the open courts principle".

[21] The above-noted analysis demands a careful balancing of competing interests that is fact-specific. Mr. Donnelly has not provided any particulars or facts to which the *Sherman Estate* test could be applied. He makes the bald assertion that public disclosure of the reasons will jeopardize his right to be tried by an independent and impartial tribunal,

but does not explain how this is so. As indicated above, Mr. Donnelly also asserts that release of the reasons would amount to an unreasonable invasion of his privacy. Again, however, this is a bald statement with no supporting facts, and with no explanation as to how this case is distinguishable from *Fairgrieve* in which the same argument was made and rejected. In these circumstances, the panel concludes that Mr. Donnelly has not met the onus upon him to overcome the presumption of openness.

IV. Mr. Donnelly argues that the Review Board is not independent or impartial because he contends it is in a conflict of interest. Mr. Donnelly asserts that the conflict of interest has arisen because of alleged "extensive criticism" of the Review Board in connection with the fact that Mr. Donnelly is alleged to have committed three aggravated assaults while on a day pass. Mr. Donnelly argues that the release of the reasons may benefit the Board but not Mr. Donnelly. He argues that the Board "must not decide to authorize anything that can or will breach Mr. Donnelly's *Charter* rights".

[22] As noted above, and as noted in *Fairgrieve,* Board reasons are presumptively public as a matter of law and as a matter of Review Board policy. The reasons were generated as a result of an annual disposition hearing conducted April 13, 2023. They speak for themselves. Their disclosure, unless the openness principle is rebutted, is in the public interest and required under *Sherman Estate*. There is no evidence before this panel which would justify the assertion that the Board is in a conflict of interest. Review Boards operate independently. The composition of the panel changes daily, monthly and yearly. Moreover, not only is the disposition public but the reasons are already in the public domain. We see no merit in Mr. Donnelly's argument.

V. Mr. Donnelly argues that the question of whether the reasons should be publicly released should be left for the individual undertaking the inquiry announced by the Premier.

[23] Review Boards and courts have concurrent jurisdiction to conduct disposition hearings and make dispositions under Part XX.1 of the *Criminal Code*. They are a fundamental part of the criminal process. The production of reasons is statutorily mandated. The reasons are presumptively a public document. As indicated in *Fairgrieve,* the Review Board has control over the release of its documents. There is no merit to the notion that the person heading the inquiry announced by the Premier should make the decision. That person would not have the jurisdiction to make the decision in any event.

DECISION

[24] Mr. Donnelly has not rebutted the presumption of openness. His application to prohibit public disclosure of the reasons is dismissed. While the panel did not find it necessary to reference the submissions of the Media Parties, those submissions were carefully reviewed and the panel is grateful to have received them.

Decision written by J. Threlfall with Dr. J. Smith and Dr. L. Murdoch concurring.