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 THE DISCLOSURE OF THE DISPOSITION AND REASONS IN RELATION TO THE FITNESS HEARING OF

RICHARD WILLIAM FAIRGRIEVE

ON MARCH 11, 2020

Dated: **February 23, 2021**

Writer: **Alison MacPhail**
BC Review Board Chair

Introduction

[1] This decision is about whether the BC Review Board should disclose to Global News Ltd. (Global) all or part of the panel's March 11, 2020 disposition and reasons on its first "fitness to stand trial" review hearing in the matter of Richard William Fairgrieve.

[2] For the reasons that follow, I have concluded as follows:

A. The panel's reasons are to be disclosed to Global without redaction.

B. The panel's March 11, 2020 disposition is to be disclosed to Global, but only after condition 9 of the disposition is redacted by the Review Board for the protection of the third parties referenced in that condition.

[3] The proviso is that implementation of my direction will be delayed for seven days from the date of this decision, within which time any party or Global may notify the Review Board in writing that it intends to file an application for judicial review challenging this direction.

Procedural History

[4] This matter arises from Global's request on July 6, 2020 for the panel's reasons and disposition in the matter of Richard William Fairgrieve. My letter of December 17, 2020, attached as *Schedule A* to this decision, set out the procedural history in this matter, and notified the parties that I was referring the matter to the original panel that issued the March 11, 2020 disposition. That letter stated in part:

> As I read the parties' most recent submissions, and in particular the November 20, 2020 submission on behalf of the accused, there is a dispute about what the Panel intended or decided when it made reference to the s. 517 Publication Ban.
>
> I have concluded that it would not be appropriate for me, as Board Chair, to interpret or purport to clarify the Panel's order, including what legal view informed the Panel's intent when it made reference to the "Ban on Publication pursuant to s. 517(1) CCC". Any necessary or appropriate clarification, and any related issues arising from Global's disclosure request, should come from the Panel.

[5] On January 25, 2021, the panel chair issued a memorandum to me in my capacity as Review Board Chair, attached as *Schedule B* to these reasons. The memorandum states in part: "[t]he Panel's reference to the prior s. 517 ban on the Disposition did not imply a legal finding by the Panel that the ban restricted publication of the Disposition or

Reasons. S. 517 refers to the ban at the bail hearing only. This view is in accordance with applicable caselaw and recognizes the lawful scope of the s. 517 ban."

[6] With regard to the remaining issues, the panel stated:

> The Panel has considered whether it should consider the remaining issues arising from the submissions the Review Board has received on Global's application. These issues include whether the Disposition and Reasons are "disposition information" governed by the test in s. 672.51(7) and (11), whether the Review Board has the implicit power to order publication bans other than those provided for expressly in Part XX.1 and whether, if the *Dagenais/Mentuck* test applies, the Disposition and Reasons should be disclosed to Global in whole or in part.
>
> After careful reflection, we have concluded that these remaining issues are appropriately returned to you in your capacity as Review Board Chair rather than being addressed by the remaining members of the Panel. These arguments arose several months after the hearing, the Panel was not directly involved in seeking submissions from the parties, at least one of the parties has argued that the Panel was "functus" once it issued the Disposition, and the publication of Review Board Dispositions and Reasons is an issue that impacts the Board at an institutional level. While we recognize that these additional arguments must be addressed in order to properly respond to Global's July 2020 request, it is our respectful view that, having clarified the basis for our original order, these remaining issues are appropriately returned to you.

Responsibility for Decision-Making

[7] Decisions with respect to the disclosure or publication of Review Board dispositions and reasons have traditionally been the responsibility of the Review Board Chair. My December 17, 2020 letter took the view that in the particular circumstances of this application, it would be more practical for the panel to address all the issues on Global's application as only the panel could address the issue of its intention when it placed the "Section 517" notation on the disposition.

[8] As the panel has now clarified its intention and referred the remaining issues to me, and as Global is entitled to a principled answer to its request, I am now addressing the remaining issues.

Issues

[9] The submissions that have been made in respect of Global's application have given rise to three main issues:

(a) When the panel referenced the “s. 517 publication ban” on the March 11, 2020 disposition, did it intend to imply a finding that the s. 517 publication ban applies to the information set out in the disposition and reasons?

(b) Should the Review Board refuse to disclose the disposition and reasons to Global because, as matter of law, they are “disposition information” that meets the test in s. 672.51(7) of the *Criminal Code*?

(c) Should the Review Board issue a publication ban, or refuse to disclose the disposition and reasons to Global based on the “*Dagenais/Mentuck* test” discussed in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (*Toronto Star* 2005)?

[10] As noted above, the panel has answered “no” to question (a): *Schedule B.*

[11] Before I turn to questions (b) and (c), I address a preliminary issue raised by the counsel for the accused concerning the standing of counsel for Global to make submissions before the Review Board.

Standing of Counsel for Global

[12] Counsel for the accused on November 20, 2020 raised as a preliminary issue the standing of counsel for Global to make submissions to the Review Board in light of s. 2 of the *Criminal Code*, which defines “counsel” as follows:

> ***counsel*** means a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings;

[13] Counsel for the accused submitted that since Mr. Hughes (who filed Global’s first submission) is called to the Bar in Ontario but apparently not in BC, the Review Board “may wish to determine whether [he] is eligible to make legal submissions to the British Columbia Review Board on behalf of Global.”

[14] Since Global’s subsequent reply was filed by a British Columbia lawyer who adopted Global’s earlier submission, this issue is academic. Both submissions tendered on behalf of Global were helpful and have been considered.

What Analytical Test Should the Review Board Apply in Deciding Whether to Disclose the Reasons and Disposition to Global?

[15] Courts and Review Boards are the custodians of their records. As such they have implicit authority and discretion to decide whether to release their records to third parties.[1] The power to disclose, while conceptually distinct from the power to issue a publication ban,[2] must still be exercised in accordance with statutory limitations and governing constitutional principles.

[16] There is no express prohibition in Part XX.1 of the *Criminal Code* on the disclosure by a court or Review Board of its reasons in a fitness case or a "not criminally responsible" case. Review Board hearings, like court hearings, are presumptively open. Non-disclosure is the exception rather than the rule.

[17] No party provided an example of a case where fitness reasons were withheld from the media due to fair trial concerns. I take notice that the Ontario Review Board regularly posts fitness decisions on Quicklaw and that judicial fitness decisions are also publicly posted on CanLII and court websites: see *R. v. Kampos*, 2020 BCSC 1437. The British Columbia Review Board has in the past proactively posted selected BCRB reasons on its website, including both NCR and fitness reasons, where the Review Board Chair determined that there was an important legal issue discussed. While past practice does not determine legality, it does tend to support the view that any decision *not* to disclose will be highly contextual, and must be based on evidence that disclosure of a particular set of reasons would create a "real concern" (*R. v. Budai*, 2000 BCCA 266 para. 34) about unfairness to the accused.

[18] There are statutory non-disclosure provisions in Part XX.1. One of these is found in s. 672.51(7) ("the statutory test"):

> **672.51(7)** No disposition information shall be made available for inspection or disclosed to any person who is not a party to the proceedings…
>
> > **(b)** where the court or Review Board is of the opinion that disclosure of the disposition information would be seriously prejudicial to the accused and that,

[1] *R. v. Panghali*, 2011 BCSC 422.

[2] A decision not to disclose documents is akin to a sealing order. A publication ban, on the other hand, assumes the document or information has been tendered in an "open court" context or otherwise been made available to some, with the ban prohibiting publication of the information. A body that does not have the power to issue a publication ban still retains the power to control its own records. As noted later in these reasons, I do not in this case need to decide whether the Review Board has an implicit power to issue publication bans outside those expressly provided for in Part XX.1.

in the circumstances, protection of the accused takes precedence over the public interest in disclosure.

[19] If the disposition and reasons are “disposition information” within the meaning of this provision, they cannot be disclosed to a third party such as Global if disclosure (a) would be seriously prejudicial to the accused; and (b) the protection of the accused takes precedence over the public interest.

[20] If the disposition and reasons do *not* fall within the definition of “disposition information” in Part XX.1, disclosure is determined by the *Dagenais/Mentuck* test, summarized in *Toronto Star 2005*:

> 26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]
>
> 27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be real, substantial, and well grounded in the evidence: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

[21] While *Toronto Star 2005* arose out of media applications for access to sealed search warrants and supporting information, the court made clear that this test applies more broadly:

> 7. the *Dagenais/Mentuck* test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(b) of the Charter….

[22] The statutory test and the *Dagenais/Mentuck* test, while not precisely the same, overlap considerably. Either test would prohibit disclosure to Global where disclosure of the reasons and disposition information would threaten the accused's fair trial interest. Under the statutory test, a disclosure that threatened the accused's right to a fair trial would be "seriously prejudicial to the accused" and the accused's fair trial interest would "take precedence over the public interest in disclosure." Under the *Dagenais/Mentuck* test, a disclosure that threatened the accused's right to a fair trial would constitute a "serious risk to the proper administration of justice." In that case, the salutary effects of non-disclosure would outweigh the deleterious effects on the factors referenced in part (b) of that test.

[23] As the analysis is similar, I therefore need make no definitive finding on the legal issue of whether the reasons and disposition are "disposition information."

Should the Reasons be Disclosed?

[24] In *Schedule B*, the panel has clarified that it did not accept the position that s. 517 of the *Criminal Code* applies by its own force to the panel's disposition and reasons.

[25] Even where a s. 517 publication ban is in place, in *Toronto Star Newspapers Ltd. V. Canada,* 2010 SCC 21 (CanLII), [2010] 1SCR 721 *(Toronto Star 2010),* the court did not interpret that provision as forbidding public disclosure of all information related to the show cause hearing:

> 38 It is worth noting that the mandatory publication ban provided for in s. 517 is not an absolute ban either on access to the courts or on publication. The provision only prohibits the publication of evidence adduced, information given, representations made, and reasons given by the justice at a bail hearing. But the media can publish the identity of the accused, comment on the facts and the offence that the accused has been charged with, and that an application for bail has been made, as well as report on the outcome of the application. [emphasis added]

[26] Our system allows this kind of pre-trial publicity because of the value it places on the open court principle and also because it places a good degree of presumptive confidence in judges and jurors to do their duty and to decide cases based on the admissible evidence tendered at trial. This was emphasized by the Supreme Court of Canada in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*,

[1995] 2 S.C.R. 97, where the court refused to prohibit a public inquiry into a mine tragedy even though many of the principal witnesses were subject to criminal proceedings:

> 133 I am of the view that [a fair trial] is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.

[27] Moreover, as noted in *R. v. Budai*, *supra*, at para. 32, "there is nothing to suggest that the process of jury selection, including challenges for cause, instructions to the jury and similar safeguards would not assuage the risk of jury contamination" caused by the previous publication of information.

[28] I agree that the accused's status as an "unfit" accused distinguishes his circumstance from someone who has received a final verdict such as NCRMD. I also agree that if and to the extent that the disclosure and publication of the disposition and reasons could be shown to create a material risk to the accused's right to a fair trial, disclosure should be refused. I agree that impairing the right of a fair trial would be the ultimate injury to the administration of justice and would override freedom of expression.

[29] In *R. v. Cabero*, 2016 ONSC 3844, the court held that individual cases must be decided contextually, having regard to the nature of the proceeding, the nature of the information and the specific demonstrable risk to the specific accused. The court cited *R. v. CTVglobemedia Publishing Inc.*, 2007 CanLII 13706, where the Ontario Superior Court of Justice rejected the argument that even if the s. 517 publication ban did not exist of its own force, a new publication ban was a "logical extension" of that provision. That court held that because no evidentiary foundation in support of the discretionary publication ban had been established, and the application was dismissed. At para 45 the court noted:

> [45] [In *Re Thibault*, 2009 QCCS 572, the Quebec Superior Court] the court emphasized the need for the party requesting the restriction to the open court principle to present a sufficient evidentiary foundation supporting an argument that the restriction is necessary to prevent a serious risk to the proper administration of justice and that there was a need for the court to canvass less restrictive alternatives to the publication ban that had been ordered by the justice of the peace.

[30] The question is whether, in this case, there is any information in the reasons and disposition that, if published, could reasonably be expected to impair Mr. Fairgrieve's right to a fair trial.

[31] Global's October 30, 2020 submission strongly emphasized the importance of tendering clear grounds to support restrictions on disclosure. In response, the Crown made no submission, the Director did not address this issue on the facts and the accused rested primarily on the argument that s. 517 applies by its own force to the Review Board. While counsel for the accused did argue in the alternative that the issue should only be decided at a full Review Board hearing, the accused had a full and fair opportunity to respond to Global's submission and identify the specific risks to a fair trial.

[32] No party identified any specific risks that would justify a refusal to provide the reasons and disposition in this matter. Despite this, I undertook a review of the reasons and disposition to determine if I could identify any such risk.

[33] In this case, the vast majority of the panel's reasons discuss the procedural history leading to the fitness hearing, the charges, the accused's custodial status since arrest, his health history and the evidence and findings regarding whether, in the panel's opinion, he was fit to stand trial: reasons, paras. 1, 4-11, 13-27.

[34] In my view, nothing in any of those paragraphs comes close to justifying a finding that disclosure and publication of those paragraphs risk impairing the accused's right to a fair trial or the administration of justice. I am unable to see any plausible basis for concluding that such risks would arise from publishing information about the accused's course in the Forensic Psychiatric Hospital or about whether he meets the test for being fit to stand trial. Those parts of the reasons are in my view entirely collateral to any issue that could conceivably impact the fairness of a future trial. With deference to the Crown's submission that a jury's views of the accused "might" be affected by his current mental health, that concern is speculative and would arise from the finding of "unfit" itself, which is already public. I see no reasonable basis on which anything in that part of the reasons could impair the accused's right to a fair trial if and when he becomes fit and is required to stand trial.

[35] Three paragraphs of the reasons do, however, deserve special consideration: the alleged facts that gave rise to the charge (para. 2); the accused's prior convictions and substance use history (paras. 3 and 12); and an opinion about current risk (para. 12). I have carefully considered whether, in view of the serious charge the accused is facing, I

should redact these references before releasing the reasons. For the reasons that follow, I answer, “no.”

Alleged Facts — Para. 2

[36] To remove the sentence in the reasons about the alleged facts that gave rise to the charge would not in my view be justified either on the statutory test or on either branch of the *Dagenais/Mentuck* test. The public and a properly instructed jury can be taken to understand the fundamental difference between an allegation and a proven fact, which is the very point of a trial. If, as noted in *Phillips*, there is no presumption that a fair trial is harmed by a public inquiry into the facts that gave rise to criminal charges, the publication in fitness reasons of a brief description of the allegations giving rise to the charges cannot reasonably be found to impair the right to a fair trial or impair the administration of justice. As I noted in paragraph 25 above, the court in *Toronto Star 2010* held that even where a s. 517 ban is in place, the media can comment on the facts and the offence that the accused has been charged with.

Prior Convictions — Paras. 3, 12

[37] Nor am I satisfied that disclosure of the sentence in the reasons referring to the accused’s prior convictions would harm the accused’s right to a fair trial. In *Oshawa This Week v. Ontario Review Board* 2002 CanLII 42918 (ON SC), the court held that those parts of the Board’s reasons that referenced the accused’s “consistent involvement in criminal activity over the prior five years” (para 33) could be disclosed. Adult convictions, in the absence of a sealing order, are matters of public record that can be reported in the media and can be obtained by searching a court registry either in person or online, or by conducting a simple search on CanLII or a court’s website if the court has issued reasons for judgment in the criminal trial. Significantly, the law presumes that fair trials can take place even in retrial situations after the accused’s criminal record has been publicized either at trial or sentencing. While one might speculate about the impact on a particular juror of knowing before trial that an accused has prior convictions, such speculation, particularly given the nature of the prior convictions in this matter, does not in my view displace the credit jurors should receive for being able to apply a judge’s caution to decide

the case before them based solely on the admissible evidence, and does not displace the value of open proceedings.

Substance Use History — Para. 3

[38] I am also not satisfied that the reference to the accused's substance use history poses a risk to the accused's right to a fair trial. While such information is not otherwise a matter of public record, judicial fitness reasons have been published that identify an unfit or formerly unfit accused as, for example, having been diagnosed with substance use disorder: see *R. v. Klein*, 2018 BCSC 678 at para. 19. In my view, a reasonable juror who entered the court room with prior knowledge of this particular reference in our reasons would not be prejudiced by being unable to take judicial instruction to decide the charges based on the evidence.

Opinion of Significant Risk — Para. 12

[39] I am also not satisfied that the reference to the psychiatrist's opinion at the hearing about "significant risk" in any way impairs the accused's right to a fair trial. In my view, a reasonable and properly instructed juror can be expected to understand that an opinion about future risk given at a Review Board hearing when the accused was, or had recently been, incapable of participating in their trial has no bearing on whether the accused committed any particular action in the past (also see *Oshawa This Week* 2002).

Conclusion

[40] I conclude that the release of the reasons will not threaten the accused's fair trial interests and can and should be disclosed to Global in their entirety.

Should the Disposition be Disclosed?

[41] With regard to the disposition, no edits are, in my view, required to prevent a serious risk to the accused's right to a fair trial.

[42] However, one condition of the disposition does, in my view, raise administration of justice issues insofar as it lists the names of individuals with whom the accused is to have no contact.

[43] The law is clear that it is open to an adjudicative body, as custodian of the materials it holds, to protect the interests of vulnerable individuals: *R. v. Panghali*, 2011 BCSC 422 at paras. 34-38.

[44] I am satisfied that the no-contact condition of the disposition (condition 9) should be redacted prior to release in order to protect the privacy of the third parties referenced on the disposition. Those individuals are not the subject of this proceeding. They are not accused of any wrongdoing and they were also identified in the judicial no-contact order. The Crown specifically requested the removal of the list of names on the no-contact list, but otherwise supported release of the disposition. Global did not take issue with this redaction.

Conclusion

[45] In accordance with these reasons, I direct as follows, subject to the proviso set out at paragraph 47:

A. The panel's reasons are to be disclosed to Global without redaction.

B. The panel's March 11, 2020 disposition is to be disclosed to Global, but only after condition 9 of the disposition is redacted by the Review Board for the protection of the third parties referenced in that condition.

[46] The proviso is that implementation of my direction will be delayed for seven days from the date of this decision, within which time a party or Global may notify the Review Board in writing that it intends to file a judicial review application challenging this decision.

[47] If such notice is not received within seven days, the Review Board will disclose the reasons and the severed disposition to Global. If such notice is received, I will provide further directions as necessary. For example, if it were the case that only Global provided such notice (regarding non-disclosure of condition 9 of the disposition) and the parties provide no notice of challenge, there would be no prejudice if the Review Board were to disclose the reasons and severed disposition to Global. If a party were to give notice that it will challenge my disclosure decision, I am prepared to consider submissions further delaying disclosure pending completion of court proceedings or at least pending a judicial stay application.

[48] I make two final points, for completeness:

[49] First, since the narrow issue before me is whether the Review Board should disclose the disposition and reasons to Global, and I have decided to do so subject to one severance, I have found it unnecessary to address the Director's submission that the Review Board has "implicit" authority to go further and issue a publication ban to protect the accused's fair trial interests if s. 672.51(7) does not apply.[3] The question whether the Review Board has an implied power to impose a publication ban should be decided in a case where it is necessary to do so, and based on more thorough submissions than I have received in this case.[4]

[50] Second, in making this decision, I have taken into account ss. 61 and 62 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Those provisions state that the privacy protection provisions of the provincial *Freedom of Information and Protection of Privacy Act* have no application to a document or decision of the Review Board for which public access is provided by the Review Board. In short, *FIPPA* has no application to this ruling.

Reasons written by Alison MacPhail.

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[3] If s. 672.52(7) does apply, there is a mandatory statutory publication ban created by s. 672.52(11).
[4] See my discussion at paragraph 15 above.