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 UNDER S. 672.51(7) OF THE *CRIMINAL CODE* TO PARTIALLY RESTRICT PUBLICATION OF THE REVIEW BOARD'S REASONS AND DISPOSITION IN THE MATTER OF

RICHARD WILLIAM FAIRGRIEVE

MARCH 11, 2020

DATED:	**December 3, 2021**	
BEFORE:	**CHAIRPERSON:**	**S. Boorne**
	MEMBERS:	**Dr. P. Constance, psychiatrist**
		P. Acton
SUBMISSIONS:	**ACCUSED/PATIENT:**	**R. Fairgrieve**
	ACCUSED/PATIENT COUNSEL:	**T. Arbogast**
	ATTORNEY GENERAL:	**J. Fogel**
	GLOBAL NEWS:	**D. Coles**

Introduction

[1] By letter to the British Columbia Review Board (the "Board") dated May 20, 2021, Mr. Fairgrieve, through counsel, notified the Board of his intention to apply to restrict public disclosure, in whole or in part, of the Board's disposition and reasons concerning Mr. Fairgrieve dated March 11, 2020.

[2] The Board convened a panel (the "Panel") to consider Mr. Fairgrieve's application. By letter to the parties dated June 10, 2021, the Panel directed a schedule for written submissions. The Panel also directed the parties to address whether they sought an oral hearing.

[3] The Panel received written submissions from Mr. Fairgrieve, Crown counsel, and Global News. Mr. Fairgrieve also delivered a written reply to the submission of Global News.

[4] Mr. Fairgrieve seeks an "order partially restricting public disclosure" of the Board's disposition and reasons. More particularly, Mr. Fairgrieve submits that portions of the disposition and reasons should be redacted by the Board prior to any release of the Board's disposition and reasons to the public, including the media.

[5] No party sought an oral hearing. The Panel has concluded that this matter can be decided on the basis of the parties' written submissions.

Procedural History

[6] On January 28, 2020 a Justice of the Supreme Court of British Columbia found that Mr. Fairgrieve, an accused person, was unfit to stand trial on account of mental disorder. Mr. Fairgrieve was ordered to be held in custody at the Forensic Psychiatric Hospital until disposition by the Board.

[7] On March 11, 2020 the Board held a hearing pursuant to section 672.48(1) of the *Criminal Code* to determine whether, in its opinion, Mr. Fairgrieve was fit to stand trial at the time of the hearing. A panel of the Board (the "Hearing Panel") determined that Mr. Fairgrieve was unfit to stand trial at the time of the hearing.

[8] The Hearing Panel issued its disposition dated March 11, 2020, directing, *inter alia,* that Mr. Fairgrieve be detained in custody and reside in the Forensic Psychiatric Hospital subject to various enumerated conditions (the "Disposition").

[9] In addition, the Hearing Panel issued reasons for the disposition (the "Reasons"). The Reasons summarize the evidence that was before the panel, the positions of the parties, and explain the basis for the Disposition.

[10] On July 6, 2020, Global News sought disclosure of the Disposition and Reasons. By that time, the Disposition and Reasons had not been publicly released. Global's request set in motion a series of procedural steps which the Panel concludes need not be fully set out here. Suffice it to say that as of the date of this decision, the Board has not publicly released the Disposition and Reasons. Global News maintains its position that disclosure should be made.

Issues

[11] The issue before the Panel is whether to grant the relief sought by Mr. Fairgrieve – i.e., order that portions of the Disposition and Reasons be redacted prior to their public release.

[12] This issue raises the following questions:

a. does the Review Board have the power to make such redactions?

b. if so, has Mr. Fairgrieve satisfied the statutory test which he says applies, namely that disclosure of the information would be seriously prejudicial to him and that, in the circumstances, protection of his interests takes precedence over the public interest in disclosure?

The Statutory Scheme

[13] The Board is established pursuant to section 672.38 of Part XX.1 of the *Criminal Code* (the "*Code*").

[14] The role of the Board is to "make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered" (*Code*, s. 672.38(1)).

[15] The *Code* contemplates that the Board will hold hearings (s. 672.43 and s. 672.47) and confers powers on the Chairperson to summon witnesses and to compel witnesses to produce records and give evidence.

[16] Subsection 672.48(1) of the *Code* provides that where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.

[17] Subsection 672.5(6) of the *Code* provides that where the Board considers it to be in the best interests of the accused and not contrary to the public interest, the Board may order the public or any members of the public to be excluded from the hearing or any part of the hearing. No such order was sought or made in the present case.

[18] Subsection 672.5(11) of the *Code* provides that any party may adduce evidence, make oral or written submissions, call witnesses and cross-examine any witness called by any other party and, on application, cross-examine any person who made an assessment report that was submitted to the court or Review Board in writing.

[19] If an assessment report is received by the court, the court shall send it to the Review Board "to assist in determining the appropriate disposition to be made in respect of the accused": s. 672.2(3). If there is no prior assessment report or no assessment of the mental condition of the accused in the last 12 months, the Review Board may order an assessment if it has reasonable grounds to believe, amongst other things, that such evidence is necessary to make a disposition under section 672.54 (see s. 672.121). Assessment reports "shall be filed" with the court or Review Board that orders the report: s. 672.2(2).

[20] The *Code* requires the Board to keep a record of proceedings of its disposition hearings, and that it "state its reasons for making a disposition in the record of the proceedings". The Board is required to provide every party with a copy of the disposition and reasons: s. 672.52.

[21] The *Code* defines “disposition” to include “an order made by a court or Review Board under section 672.54” (see s. 672.1(1)).

[22] Section 672.54 provides that in the case of an unfit accused the court or Board shall, depending on the circumstances, either direct that the accused be discharged subject to conditions, or direct that the accused be detained in a hospital, subject to such conditions as the court or Board considers appropriate. In making a disposition, the court or Board must take into account various factors, but the safety of the public is the paramount consideration.

[23] The *Code* contains several provisions which compel or permit the Board, in certain circumstances, to make orders restricting the publication of certain kinds of information. In summary, the relevant provisions are as follows:

(a) Section 672.501(1) compels the Board to make an order prohibiting the publication of information that could identify a victim, or a witness under the age of 18, in cases where the accused has been declared unfit to stand trial for an offence referred to in subsection 486.4(1). In the present case, Mr. Fairgrieve was not charged with such an offence.

(b) Section 672.501(2) compels the Board to make an order prohibiting the publication of information that could identify certain classes of person in a case where the accused has been declared unfit to stand trial for an offence referred to in section 163.1. Mr. Fairgrieve was not charged with such an offence.

(c) In cases other than those identified in paragraphs (a) and (b) above, the prosecutor, a victim, or a witness may apply to the Board for an order directing that any information that could identify the victim or witness shall not be published if the Board is satisfied that the order is necessary for the proper administration of justice (s. 672.501(3)). Mr. Fairgrieve does not rely on this provision.

[24] An order made by the Board under s. 672.501(1), (2) or (3) does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community (s. 672.501(4)). In the present case, no order was sought or made under s. 672.501.

[25] Section 672.51 of the *Code* addresses how the court and the Board should handle "disposition information". "Disposition information" means:

> all or part of an assessment report submitted to the court or Review Board and any other written information before the court or Review Board about the accused that is relevant to making or reviewing a disposition.
>
> (s. 672.51(1))

[26] Subsection 672.51(2) of the *Code* provides that, subject to s. 672.51, all disposition information shall be made available for inspection by, and the court or Review Board shall provide a copy of it to, each party and any counsel representing the accused. The *Code* sets out circumstances in which disposition information can be withheld from the accused or other parties, but that is not an issue in the present case.

[27] Subsection 672.51(7) of the *Code* is central to the current application. It provides as follows:

> (7) No disposition information shall be made available for inspection or disclosed to any person who is not a party to the proceedings
>
> (a) where the disposition information has been withheld from the accused or any other party pursuant to subsection (3) or (5); or
>
> (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, in the circumstances, protection of the accused takes precedence over the public interest in disclosure.

[28] Mr. Fairgrieve relies on paragraph (b) of this provision in support of his application.

[29] Subsection 672.51(9) of the *Code* provides certain exceptions to subsection (7). Those exceptions include disclosure for research or statistical purposes or for the proper administration of justice. Subsection 672.51(9) has no application to the application presently before the Panel.

[30] Subsection 672.51(11) of the *Code* erects a ban on publication of certain kinds of disposition information, including disposition information that is prohibited from being disclosed pursuant to subsection 7.

Public Access to Board Hearings, Dispositions and Reasons

[31] Hearings before the Board are presumptively public: *Oshawa This Week v. Ontario (Review Board),* [2002] O.J. No. 554 at para. 19. It is for the Board to make an exclusion order, and according to subsection 672.5(6) of the *Code* it may only do so where the Board considers that excluding the public is in the best interests of the accused and not contrary to the public interest: *Blackman v. British Columbia (Review Board)* [1995], 95 C.C.C. (3d) 412.

[32] In the present case, no party sought an order excluding the public from the disposition hearing.

[33] Further, it is the policy of the Board that its dispositions and reasons for dispositions are presumptively public. Nothing in the *Code* suggests it should be otherwise. The public nature of dispositions and reasons is subject to *Code* provisions such as s.672.501 (above) which require the Board to protect certain categories of information from publication in certain cases (e.g., the names of victims or witnesses). Mr. Fairgrieve argues that it must also be subject to applications limiting disclosure made pursuant to subsection 671.51(7).

The Parties' Positions

[34] Mr. Fairgrieve argues that redactions to the Disposition and Reasons should be made because certain content is allegedly prejudicial to his privacy and fair trial rights.

[35] The only statutory authority cited by Mr. Fairgrieve in support of his position is s. 672.51(7) (above) which concerns the disclosure of disposition information.

[36] Mr. Fairgrieve does not argue that the Board has any other source of jurisdiction to make the order sought.

[37] Mr. Fairgrieve argues that information such as medical diagnoses, medical plans, and information he provided to medical professionals is private, and disclosure of such information would violate his privacy interests. He argues that his privacy interests overlap with his fair trial rights in the sense that "issues relating to his mental disposition may have an impact on his ability to advance any defence as he sees fit in terms of his credibility and,

as such, his fair trial interests may be engaged by releasing certain medical information relating to his mental state" (Submission of Mr. Fairgrieve at para. 15). Mr. Fairgrieve argues that these interests outweigh the public interest in disclosure.

[38] Mr. Fairgrieve's requested redactions are substantial, amounting to more than 50% of the Reasons.

[39] Crown counsel argues that subsection 672.51(7) is not implicated in this case. Crown counsel does not identify any source of jurisdiction for the Board to make the order sought by Mr. Fairgrieve.

[40] The Crown cites the Supreme Court of Canada's recent decision in *Sherman Estate v. Donovan*, [2021] SCC 25 ("*Sherman Estate*") for the importance of the open court principle. Crown counsel argues that release of the Disposition and Reasons will not impact Mr. Fairgrieve's fair trial interests.

[41] Crown counsel submits, however, that there should be a publication ban limited to the names on the "no contact list" in the Disposition. Mr. Fairgrieve agrees that these names should be redacted from the Disposition, and Global News consents to this. The Board need not decide the point in view of this agreement, but this proposed redaction appears to be consistent with s. 672.501(3) of the *Code*. It is also consistent with past practice of the Board. Accordingly, the Panel agrees to direct the redaction of the names on the "no contact list" in the Disposition. This is the only redaction sought in relation to the Disposition and accordingly the remainder of these reasons are concerned with Mr. Fairgrieve's application for redaction of the Reasons.

[42] Global News argues that the onus is on Mr. Fairgrieve to displace the "presumption of openness" which Global submits applies to the work of the Board, and that Mr. Fairgrieve has not met that onus.

[43] Global News argues that the Board has no jurisdiction to make the order sought by Mr. Fairgrieve. Global argues that the Disposition and Reasons are not captured by the definition of "disposition information" in the *Code*.

[44] Global News further argues that Mr. Fairgrieve has failed to lead any evidence of prejudice to his fair trial rights or privacy interests absent the requested redactions.

[45] Global News argues that *Sherman Estate* stands for the proposition that only in rare cases will the privacy interests of individuals defeat the public's interest in openness in the justice system.

[46] In his reply submission, Mr. Fairgrieve disagrees with Global's interpretation of "disposition information" and argues that s. 672.51(7)(b) "elevates protection of an accused person's interests over public interest in disclosure". He further argues that he was not required to lead "evidence" of how his privacy interests would be impacted, as this is clear given the nature of the information contained in the Reasons.

[47] Mr. Fairgrieve further argues in reply that his position is supported by *Sherman Estate* which recognizes that "intimate and personal" information can be entitled to protection from publication.

Analysis

Jurisdiction

[48] No party has identified any possible source of jurisdiction for Mr. Fairgrieve's requested redactions other than subsection 672.51(7) of the *Code*, and only Mr. Fairgrieve argues that subsection 672.51(7) confers such jurisdiction.

[49] The Board is a creature of statute and its powers are limited to those conferred upon it by statute, in this case the *Code*.

Interpretation of Section 672.51

[50] The central question of law on this application is the interpretation of section 672.51, and in particular subsection (7) which again provides:

> (7) No disposition information shall be made available for inspection or disclosed to any person who is not a party to the proceedings
>
> > (a) where the disposition information has been withheld from the accused or any other party pursuant to subsection (3) or (5); or
> >
> > (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, in the circumstances, protection of the accused takes precedence over the public interest in disclosure.

[51] The modern approach to statutory interpretation requires that the words of a statutory provision be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament: *1704604 Ontario Ltd. v. Pointes Protection Association*, [2020] SCC 22 at para. 6.

[52] The first observation the Panel makes in relation to subsection 672.51(7) is that it does not, on its face, appear to contemplate applications, and makes no mention of any "order" the Board may make. Rather, the provision appears to simply restrict disclosure of disposition information in certain circumstances as a matter of law. This distinguishes subsection 672.51(7) from, for example, subsection 672.501(3) which expressly provides that an application for an order can be made by the prosecutor, the victim or a witness.

[53] As this issue was not raised by any party, and as the Panel previously agreed to receive submissions, the Panel proceeds on the basis that it may receive and consider an application pursuant to subsection 672.51(7).

[54] The parties disagree over what it means to disclose "disposition information". As indicated above, "disposition information" is defined in the *Code* to mean "all or part of an assessment report submitted to the court or Review Board and any other written information before the court or Review Board about the accused that is relevant to making or reviewing a disposition".

[55] The Disposition and Reasons are clearly not "all or part of an assessment report". It is equally clear that the Disposition and Reasons cannot be viewed as "written information before the Review Board" that is "relevant to making a disposition". Rather, they are the *product* of the Board's deliberation.

[56] However, those observations do not end the analysis. The question raised by Mr. Fairgrieve's application is *what if disposition information is reproduced or described in the Board's reasons?* In that situation, does s. 672.51(7)(b) apply so as to potentially prohibit public disclosure of those parts of the reasons (if the other elements of paragraph 672.51(7)(b) are met)? The Panel is not aware of any decision of a Board or court that addresses this question.

[57] The answer to the question lies in an analysis of the words of subsection 672.51(7)(b), the definition of disposition information, and in a broader examination of the *Code* and the role of Review Boards.

[58] First, Parliament made no reference to *reasons* in subsection 671.51(7). This is notable because the Board would be expected to routinely make reference to the content of assessment reports and other such information in its reasons. Such reference will typically be necessary to explain the basis for the fitness decision and disposition.

[59] The Panel notes that there are provisions outside Part XX.1 of the *Code* which specifically contemplate that reasons can be subject to a publication ban, for example subsection 517(1) which concerns the evidence taken and reasons given in contested bail applications. In other words, where Parliament has concluded that *reasons* can be subject to a publication ban it has said so expressly. There is no equivalent language in section 672.51.

[60] Further, subsection 671.51(7) applies not just to the Board but also to the court. The court is not in the habit of redacting reasons for judgment, and doing so would be at odds with the open court principle. If Parliament intended such an outcome, it likely would have said so expressly. There are many decisions of courts and Review Boards in Canada which are public and which make reference to the kinds of information that Mr. Fairgrieve seeks to have redacted. See for example, *Re Szajkovics,* [2015] B.C.R.B.D. No. 12; *Re Bicknell*, [2016] O.R.B.D. No. 1246; *Re Mekanak,* [2021] O.R.B.D. No. 755; *R. v. Kampos,* 2018 BCSC 2206; *R. v. Klein,* 2018 BCSC 678; and *United States of America v. Rapacinska*, [2018] O.J. No. 2529.

[61] Notably, the definition of “disposition information” is limited to *written* information (i.e., all or part of an assessment report, and any other *written* information). Oral evidence given at a hearing, including by medical professionals, is not captured by the definition. This observation must be considered alongside the fact that court and Board hearings are presumptively public and that absent an exclusion order, members of the public may listen to the oral evidence of all witnesses. These observations strongly suggest that when subsection 671.51(7) speaks of not disclosing disposition information or making it “available for inspection” it is concerned with the disclosure or availability of *documents*, and in particular documents placed before the Board or court at the hearing.

[62] The implication is that paragraph 671.51(7)(b) cannot have been intended to mean that by issuing reasons which describe witness testimony, the Board is disclosing, or making available for inspection, disposition information. Part of what Mr. Fairgrieve seeks to redact from the Reasons is references to testimony. The Panel does not agree that such references can or should be redacted.

[63] The further implication is that where *documents* are not disclosed or made available for inspection, disposition information is not disclosed. Therefore, where reasons refer to the content of disposition information, this does not constitute disclosure of disposition information.

[64] This view gains force when subsection 671.51(7) is considered alongside the *Code* provision which requires the Board to keep a record of its proceedings (subs. 671.52(1)). Just as a court file is open to the public, the Board's record of proceedings is publicly accessible, subject to statutory limits. Because disposition information, by definition, consists of reports submitted to a Board or written information "before the Board", all such documentation will form part of the Board's record of proceedings. In the Panel's view, one of the likely purposes of subsection 671.51(7) is to distinguish those parts of the record of proceedings that will be accessible by the public (e.g., the disposition and reasons) from those parts that sometimes will not (disposition information).

[65] The functional role of Review Boards is also important when interpreting subsection 671.51(7). On the basis of evidence, the Board must decide whether a person accused of a crime is fit to stand trial (s. 672.48(1)). This is inherently a matter of significant public interest. The Board must also decide whether the accused should be discharged absolutely (in the case of a not criminally responsible on account of mental disorder ["NCR"] accused), discharged with conditions, or detained in custody in a hospital (s. 672.54). This is likewise a matter of significant public interest. When making such decisions, the Board must consider the evidence, including as contained in any assessment report, and must justify its decision on the basis of that evidence. In this regard, the following authorities are notable.

[66] In the context of an NCR accused, the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute*), [1999] 2 S.C.R. 625 extensively examined Part XX.1 of the *Code* including the role of Review Boards in deciding whether the discharge of the accused is to be conditional. The majority observed as follows:

…The NCR accused, while present and entitled to counsel, is assigned no burden. The system is inquisitorial. It places the burden of reviewing all relevant evidence on both sides of the case on the court or Review Board. The court or Review Board has a duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present. This is fair, given that the NCR accused may not be in a position to advance his or her own case. The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or Review Board. If the court or Review Board is uncertain, Part XX.1 provides for resolution by way of default in favour of the liberty of the individual. (para. 54)

As a practical matter, it is up to the court or Review Board to gather and review all available evidence pertaining to the four factors set out in s.672.54: public protection; the mental condition of the accused; the reintegration of the accused into society; and the other needs of the accused. The court and the Review Board have the ability to do this. They can cause records and witnesses to be subpoenaed, including experts to study the case and provide the information they require. Moreover, with particular reference to the Review Board that may assume ongoing supervision of the NCR accused, Parliament has ensured that its members have special expertise in evaluating fully the relevant medical, legal and social factors which may be present in a case: s. 672.39. If the court or Review Board, after reviewing all the relevant material, cannot or does not conclude that the NCR accused poses a significant threat to public safety, it must order an absolute discharge. If it concludes that the NCR accused does represent such a threat, then it must order the least restrictive of the two remaining alternatives of conditional discharge or detention consistent with its analysis of the four mandated factors. (para. 55)

…

It follows that the inquiries conducted by the court or Review Board are necessarily broad. They will closely examine a range of evidence, including but not limited to the circumstances of the original offence, the past and expected course of the NCR accused's treatment if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community and, perhaps most importantly, the recommendations provided by experts who have examined the NCR accused. The broad range of evidence that the court or the Review Board may properly consider is aimed at ensuring that they are able to make the

> difficult yet critically important assessment of whether the NCR accused poses a significant threat to public safety. (para. 61)

[67] In *R. v. J.A.P.,* [2000] S.J. No. 260, the court spoke about the role of the court on a fitness assessment as follows:

> Whether or not the young person is found to be unfit is a question for the Court to determine, Having said that, the medical evidence is highly relevant. The medical opinion addresses how the mental question is viewed or characterized medically. The medical experts are trained observers of the mental condition and have observed this young person. They are best able to put in perspective the mental condition of J.A.P. and characterize it for the benefit of the Court. The extent to which his ability to understand the nature or object of the proceedings, to understand the possible consequences of the proceedings or to communicate with counsel is for the Court to determine, having had the benefit of the observations and opinions of all of the experts. I must try to reconcile the opinions of the experts and failing that accept the opinion of one or more over another. See *R. v. Rabey* (1977) 37 C.C.C. (2d) 461 (Ont. C.A.), *R. v. Cooper* (1980) 51 C.C.C. (2d) 129, *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 and *R. v. M.S.R.* (1996) 112 C.C.C. (3d) 406 (Ont. Ct. Gen. Div.). (para. 29)

[68] Similarly, a panel of this Board has previously observed:

> The role of the Review Board is not to conduct its own risk assessment. Rather it is required to appraise the evidence presented or adduced to determine whether it supports a finding of significant threat as that concept has been identified in law.
>
> *Re Moisson,* [2008] B.C.R.B.D. No. 183 at para. 27.

[69] In this context, Parliament must have expected that Review Boards (and courts) would extensively reference the evidence, including as contained in assessment reports, when issuing reasons. It is in the public interest that they do so, so that decisions are justified: *Nouvelliste (The) c. Mental Disorders Review Commission*, [2012] QCCS 712 at paras. 57-64. Absent reasons which explain, by reference to evidence, how Review Board decisions are reached, the public could lose confidence in the legislative regime contained in Part XX.1 of the *Code*. In this context, if Parliament intended that Review Boards be empowered to redact their decisions, so as to obscure from public view the evidence relied upon by the Board in coming to its decision, it likely would have said so directly.

[70] For all of the foregoing reasons, the Panel concludes that s. 672.51(7) of the *Code* does not confer upon the Board the authority to make the redactions to the Reasons requested by Mr. Fairgrieve.

[71] In support of his argument, Mr. Fairgrieve cites the Ontario Superior Court of Justice decision in *Oshawa This Week v. Ontario Review Board*, [2002] O.J. No. 5383. In that case, the accused, the Crown and the Whitby Mental Health Centre (from which the accused was an outpatient) jointly applied to exclude the public from the hearing and for a prohibition on disclosure of disposition information to non-parties. These requests were opposed by Oshawa This Week, a local newspaper.

[72] The Board granted the relief sought following an *in camera* hearing. The Board also ordered a publication ban with respect to the *in camera* hearing itself. No application for such relief was sought in Mr. Fairgrieve's case. The application made in the present case is to redact the reasons for disposition, something that was not at issue in *Oshawa This Week*.

[73] On judicial review, the court in *Oshawa This Week* framed the question as being whether the restrictions on public access were justified under *Dagenais* and *Mentuck*. The court concluded that the orders made by the Board were overbroad. The court quashed the order excluding the public from the hearing and quashed the order prohibiting disclosure of disposition information except to the extent that these orders protect the information disclosed to the Board about a recent homicide investigation. The court held, apparently on its own motion, that "it will be necessary to edit the Reasons for Disposition… before they can be released to the public" (para. 41) and ordered a process for their editing. The purpose of the editing was to protect information disclosed by the Crown which might negatively impact a homicide investigation, and to ensure the Crown was not disincentivized from sharing such information with the Board in the future.

[74] In *Oshawa This Week* there was no discussion of whether the Review Board had the power to redact its reasons before issuing them. Indeed, there was no discussion of what jurisdiction the court had to order the editing of the Board's Reasons for Disposition. The Panel finds *Oshawa This Week* to be of little assistance in resolving the present case.

[75] The Panel concludes that the Reasons are not disposition information and s. 672.51(7) does not confer jurisdiction on the Board to redact its Reasons.

Applying Subsection 672.51(7) - Prejudice to the Accused and the Public Interest

[76] In the event that the Panel is wrong in its interpretation of the *Code*, and that the Board does in fact have jurisdiction to redact the Reasons of the Hearing Panel as Mr. Fairgrieve contends, the Panel turns to a consideration of whether the information Mr. Fairgrieve seeks to have redacted would be "seriously prejudicial" to him and that, in the circumstances, protection of his interests takes precedence over the public interest in disclosure: subsection 672.51(7).

[77] Mr. Fairgrieve argues that an application of the "*Dagenais/Mentuck* framework" militates in favour of the redactions he seeks. This is a reference to the Supreme Court of Canada's decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, [2001] SCC 76, both of which addressed publications bans in criminal proceedings. Mr. Fairgrieve argues that his privacy and fair trial interests are at stake and that these interests outweigh the public interest in the release of unredacted reasons.

[78] Global News argues that if the Board has jurisdiction to make the requested redactions, which Global rejects, the Board's approach to restrictions on publication should be guided by the Supreme Court of Canada's recent decision in *Sherman Estate v. Donovan*, [2021] SCC 25 ("*Sherman Estate*"). Global submits that the court in *Sherman Estate* re-cast the two-step *Dagenais/Mentuck* inquiry into a three-step test, and that Mr. Fairgrieve has not satisfied the elements of that test. Global argues that pursuant to *Sherman Estate,* restrictions on publication should only occur in exceptional cases. Global argues that Mr. Fairgrieve offered no evidence that his privacy rights or fair trial rights would be impacted by publication of the Reasons.

[79] Crown counsel argues that *Sherman Estate* upholds the importance of the open court principle, and that its application does not support the requested restrictions on publication other than the redaction of the names of individuals with whom Mr. Fairgrieve has been ordered to have no contact.

[80] In his reply submissions, Mr. Fairgrieve argues that the impact on his privacy interests is "evident on its face by the very nature of the inquiries into his mental and medical state and the findings attendant thereto". Mr. Fairgrieve argues that the law does not require him to give evidence as to how dissemination of his private information causes

him prejudice. Mr. Fairgrieve agrees that the *Sherman Estate* decision provides "guidance" on the *Dagenais/Mentuck* test, and argues that the information he seeks to redact goes to the core of his identify as that concept is used in *Sherman Estate*.

[81] Mr. Fairgrieve notes that *Sherman Estate* was recently applied by the British Columbia Court of Appeal in *A Lawyer v. The Law Society of British Columbia,* [2021] BCCA 284 which concerned a restriction on publication to protect the reputational interests of a law firm. Mr. Fairgrieve argues that if such an interest justifies restrictions on publication, then *a fortiori* his privacy interests in the present case must also justify restrictions on publication.

Prejudice Alleged by Mr. Fairgrieve

[82] As indicated, Mr. Fairgrieve's argument rests on the application of s. 672.51(7) of the *Code*. Accordingly, he must show that disclosure of disposition information through the Board's Reasons would be seriously prejudicial to him and that, in the circumstances, protection of the accused takes precedence over the public interest in disclosure.

[83] As is set out below, the Supreme Court of Canada's decision in *Sherman Estate* is relevant to the question of whether Mr. Fairgrieve's interests take precedence over the public interest in disclosure of the Panel's unredacted Reasons.

[84] However, the first issue is whether the issuance of the Reasons would be "seriously prejudicial" to Mr. Fairgrieve absent the requested redactions.

[85] The *Code* does not define the phrase "seriously prejudicial". Parliament's use of the word "seriously" signifies that any prejudice must be significant.

[86] Further, disclosure of information about an accused's medical/psychiatric state, behaviours, and history of past conduct are routinely the subject matter of reasons issued by Review Boards across the country. This is how dispositions are justified. When Parliament used the phrase "seriously prejudicial" it is unlikely that Parliament intended that such information which is typically the subject matter of Board analysis is to be routinely shielded from public view.

[87] In other words, the mere fact that the information is personal medical information, or is information relating to an accused's psychiatric or behavioural characteristics, or is

information relating to risks the accused may pose to the public if not detained in a hospital, cannot mean that reference to the information in reasons of a Review Board amounts to serious prejudice. The applicant must go further and demonstrate, on the basis of the applicant's circumstances, or on the basis of likely repercussions, that disclosure would be seriously prejudicial to the applicant's interests.

[88] Further, in the Panel's view, as the party seeking the redactions and seeking to rebut the presumption that the open court principle applies, Mr. Fairgrieve has the burden of showing that issuing the Reasons without the requested redactions would be seriously prejudicial to him.

[89] In the present case, Mr. Fairgrieve argues that his fair trial rights and privacy interests will be prejudiced by the public release of the unredacted Reasons.

[90] With respect to his fair trial rights, Mr. Fairgrieve argues that disclosing issues relating to his mental state "*may* have" an impact on his ability to advance any defence as he sees fit "in terms of his credibility". He further argues that his fair trial interests "*may be engaged*" by releasing "certain medical information" relating to this mental state (emphasis added).

[91] Mr. Fairgrieve has not specified what particular information is of concern or how disclosure of this information *may* impact his ability to advance a defence or obtain a fair trial. The vague and general allegation that release of the reasons "*may*" have an impact on an unspecified defence due to the publication of unspecified medical information is insufficient to satisfy Mr. Fairgrieve's burden to establish serious prejudice.

[92] With respect to his privacy interests, Mr. Fairgrieve notes that the information he seeks to have redacted is "clearly intimate and personal in nature" and is not information he would voluntarily provide to the public. He argues that references to medical diagnoses and "plans and information that he has disclosed to medical professionals" clearly trigger his privacy interests.

[93] Mr. Fairgrieve does not address each of the redactions he seeks. He has taken a broad brush, proposing the redaction of all passages of the Reasons that could negatively impact upon his privacy interests. Mr. Fairgrieve does not state how any of the numerous passages he seeks to have redacted will be "seriously prejudicial" to him. Effectively, he is arguing that the disclosure of any information that is personal and private amounts to

serious prejudice. He does not otherwise explain how, on the facts of this case, he will be seriously prejudiced.

[94] The information that Mr. Fairgrieve seeks to have redacted is the kind of information that is routinely contained in Review Board and court reasons. In the Panel's view, for the reasons set out above, it is not enough that the information concerns someone's medical state, behavioural characteristics or risk factors. The party applying to restrict the open court principle must demonstrate that the inclusion of the information in the Board's Reasons will be "seriously prejudicial". Mr. Fairgrieve has not shown how that will be so. Accordingly, in the Panel's view, Mr. Fairgrieve has not satisfied his burden.

[95] If the Board is in error on this point, it proceeds to consider the balance between Mr. Fairgrieve's interests and the public interest, and examine the parties' submissions on *Sherman Estate*.

Balancing Mr. Fairgrieve's Interests and the Public Interest

[96] If the disclosure of disposition information would be seriously prejudicial to the accused, the Board must then consider whether, "in the circumstances, protection of the accused takes precedence over the public interest in disclosure" (s. 672.51(7)(b)).

[97] In the Panel's view, the public interest in knowing how the Board reaches its fitness decisions and how it justifies its dispositions is high. This goes to the heart of the open court principle. The public clearly has an interest in knowing why an accused person is not required to stand trial. Likewise, the public has a strong interest in knowing why the Board has concluded that the accused may be conditionally discharged into the community, or alternatively should be detained in custody in a hospital. Finally, the public also has a strong interest in knowing why certain conditions have been imposed or not imposed in relation to an accused person who may be at large in the community.

[98] In this regard, it is important to re-emphasize that what Mr. Fairgrieve is seeking to prevent is not public access to assessment reports or medical documents. Rather, he seeks to limit public access to the Board's Reasons. The public interest in knowing how courts and tribunals reach their decisions is inherently high.

[99] When it comes to balancing Mr. Fairgrieve's privacy interests with the public interest in disclosure of unredacted Reasons, the Panel finds that a review of *Sherman*

Estate is useful as it concerns the balancing of privacy interests with the open court principle.

[100] In *Sherman Estate,* trustees of the Sherman Estate sought to counter the intense press scrutiny prompted by the deaths of Bernard and Honey Sherman which were being investigated as homicides. They sought a sealing order in relation to the court file to protect the interests of the trustees and beneficiaries of the estate from intrusions into their privacy and potential threats to their safety in view of the fact that those responsible for the deaths remained at large.

[101] Mr. Justice Kasirer, for a unanimous Supreme Court of Canada, noted that *Dagenais* and *Mentuck* (above) and the court's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] SCC 41 (*"Sierra Club*") stand for the proposition that limits on court openness can be imposed to protect participants in the justice process but that this is done sparingly, with an eye to preserving a strong presumption that justice should proceed in public view (*Sherman Estate at para. 30*). In certain circumstances, privacy concerns can form a basis for such limits (*Sherman Estate at para. 7 and 31*).

[102] The court recast the former two-step inquiry involving the necessity and proportionality of the proposed restriction on publication into a three-step analysis under which the applicant for the limits on the open court presumption must establish that:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> *Sherman Estate* at para. 38

[103] In formulating the above three-part test, the court did not distinguish between criminal and civil cases, and relied upon both in its analysis. It is apparent from a reading of *Sherman Estate* as a whole that it applies to all judicial proceedings and that it now defines the approach which must be taken when a party seeks to limit the application of the open court principle.

[104] The court reaffirmed that “the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering” and reaffirmed “the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process”. These and other concerns give rise to a “strong presumption – albeit one that is rebuttable – in favour of court openness” (*Sherman Estate* at para. 39).

[105] As for whether privacy concerns constitute an “important public interest”, the court in *Sherman Estate* held that intrusions upon privacy which merely disturb the “sensibilities of the individuals involved” or which cause “discomfort and embarrassment” or which are “disadvantageous” or “distressing” do not invoke an important public interest (paras. 48, 56 and 63). However, the court recognized that in some settings the protection of privacy is in the interest of society as a whole (paras. 48-54 and 61). The court held that “…the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts” (para. 55).

[106] The dimension of privacy which the court held invokes the broader public interest is the “protection of dignity” (*Sherman Estate* at paras. 61, 63 and 74). The court linked the interest in dignity to the concept of public order, holding that all of society has a stake in its preservation (paras. 67-68). Further, the court observed that where dignity is impaired this can have real human consequences, including psychological distress (para. 72).

[107] Accordingly, the court held that “protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test” (*Sherman Estate* at para. 73).

[108] The court held that dignity will be at stake where the information that will be revealed consists of “intimate or personal details” that is “sufficiently sensitive to strike at an individual’s biographical core”. The court also used the phrase “highly sensitive” to describe the information that may trigger a dignity interest (*Sherman Estate* at paras. 75 and 79).

[109] Not only must there be an important public interest at stake, but the applicant must show there is a “serious risk” to this interest (*Sherman Estate* at para. 62). In the context of

the concern for dignity, the court held that "[r]ecognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness" (*Sherman Estate* at para. 76).

[110] Examples of sufficiently sensitive information include stigmatized medical conditions, stigmatized work, sexual orientation, and subjection to sexual assault or harassment (*Sherman Estate* at para. 77).

[111] In assessing the risk to the applicant, the court held that it will be appropriate to consider what information is already in the public domain although this fact is not necessarily decisive (*Sherman Estate* at para. 81). The more likely the sensitive information will be disseminated, the greater the risk relating to the protection of dignity (*Sherman Estate* at para. 82).

[112] The court concluded its analysis with these words:

> An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).
>
> (*Sherman Estate* at para. 84).

[113] Concerning the third element of the test (whether as a matter of proportionality the benefits of the order outweigh its negative effects) the court observed as follows:

> In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

(*Sherman Estate* at para. 106)

[114] When applying the *Sherman Estate* analysis to the s. 672.51(7) analysis, the Panel concludes as follows:

(a) there is a strong presumption that justice should proceed in public view. Parliament can modify this presumption, and the extent to which it has done so by enacting s. 672.51 must be considered;

(b) when deciding if an accused's privacy interests take precedence over the public interest in disclosure, a relevant factor to be considered is whether the privacy interest asserted invokes a concern for the "protection of dignity" as that phrase is used in *Sherman Estate*. The Panel does not suggest that the accused *must* establish this, as this is not a requirement of s. 672.51(7), but in a balancing of competing interests it is a factor;

(c) whether there are reasonable alternative measures to protect the privacy interests of the accused will be relevant to the question of whether disclosure should be withheld;

(d) if the information is already public this militates against a restriction on the open court principle; but one must be mindful that making the information available again may exacerbate the impacts on privacy; and

(e) whether the information sought to be withheld from the public is peripheral or central to the judicial process will influence the balancing exercise.

[115] In the present case, for the reasons set out below, the Panel concludes that the balance weighs against the requested restriction on the public disclosure of the Reasons.

[116] Despite the Panel's view that Mr. Fairgrieve's written submissions fail to make out a case that disclosure of unredacted Reasons will be "seriously prejudicial" to him, the Panel has nonetheless reviewed each of the passages in the Reasons which Mr. Fairgrieve seeks to redact. As these reasons will themselves be presumptively public, the Panel has chosen not to reproduce the passages of the Reasons which Mr. Fairgrieve applies to have redacted. In the Panel's view, the comments below are sufficient to address Mr. Fairgrieve's application.

[117] Mr. Fairgrieve seeks to have the Board redact passages from the Reasons which:

(a) address medical issues and impairments he has faced (some of which are public as described below);

(b) reference injuries from a car accident;

(c) reference his demeanour and level of cooperativeness when meeting with a psychiatrist at the Forensic Psychiatric Hospital;

(d) address whether he has a good rapport with his medical doctor;

(e) refer to his communications relating to rehabilitation and therapy;

(f) address whether it is easy or difficult to communicate with him; and address characteristics of his communication style;

(g) reference the results of an occupational therapy assessment;

(h) describe impediments to his communication with counsel;

(i) describe the opinions of a psychiatrist as to his fitness to stand trial;

(j) describe his behaviours;

(k) describe how he appeared, and his ability to communicate, when he testified before the Board;

(l) describe some of his answers to questions put to him by his appointed counsel at the Board hearing;

(m) describe submissions made by the Director and by counsel appointed to act for him, which submissions make reference to his level of communication; and

(n) set out the Hearing Panel's conclusion on the issue of whether the accused requires treatment and rehabilitation, including comments relating to the actions of Mr. Fairgrieve's treatment team.

[118] These are matters which are routinely addressed in Review Board reasons.

[119] Aspects of Mr. Fairgrieve's medical condition are matters of public knowledge as a result of publication in a June 6, 2020 article in the *Vernon News*. That article quoted statements made by Mr. Fairgrieve's counsel in open court in an unrelated proceeding, indicating that Mr. Fairgrieve had suffered a stroke and had an "organic brain injury". Further, a considerable amount of information relating to Mr. Fairgrieve's medical condition and ability to communicate was disclosed in open court at the January 28, 2020 fitness

hearing in the British Columbia Supreme Court, including by Mr. Fairgrieve's counsel. Similar to the news coverage, this includes references to a brain injury caused by strokes or seizures.

[120] The Reasons in the present case refer to brain injuries resulting from strokes and seizures. This information is public. Other information contained in the Reasons relating matters such as mental or cognitive deficits, difficulties communicating, and issues with anger, were referenced by Mr. Fairgrieve's counsel in open court at the January 28, 2020 hearing.

[121] The Panel further notes that Mr. Fairgrieve did not seek an order excluding the public from the March 11, 2020 hearing before the Board. Much of the information Mr. Fairgrieve seeks to have redacted from the Reasons was the subject of testimony and submissions at that hearing which was open to the public.

[122] However, the Panel is mindful that issuance of unredacted Reasons could exacerbate the risk to Mr. Fairgrieve's privacy interests as a result of publication by Global News or otherwise.

[123] In the Panel's view, some of the passages in the Reasons consist of information that is not public and that could be described as intimate and private. However, the Panel finds that the vast majority of the information Mr. Fairgrieve seeks to redact, as described in the above list, would not undermine his dignity in the *Sherman Estate* sense were it made public. The Panel finds that there are limited pieces of information which may arguably rise to that level (for example the results of a particular medical test which Mr. Fairgrieve underwent in September of 2019) but for the reasons set out herein the Panel concludes that the public interest in disclosure of the Reasons outweighs Mr. Fairgrieve's privacy interest.

[124] The information which Mr. Fairgrieve seeks to have redacted from the Reasons, viewed in its totality, is central to the decision-making process of the Hearing Panel and necessary in order to explain the basis for the Hearing Panel's decisions on fitness to stand trial and disposition. In the Panel's view, there is a strong public interest in ensuring that the public understands the basis for the Hearing Panel's conclusion that Mr. Fairgrieve was unfit to stand trial and whether the necessary and appropriate disposition requires detention in hospital or a discharge with conditions into the community. This necessarily involves a

consideration of medical evidence, behavioural evidence, Mr. Fairgrieve's ability to communicate, and whether he poses a risk to the community if not detained in custody at a hospital.

[125] The Panel finds that the nature of the charge is relevant to the public interest. In this case, Mr. Fairgrieve is charged with murder in a case that is of significant public interest in the Vernon area where the victim lived. The fact that Mr. Fairgrieve was charged with murder is itself public.

[126] Concerning the information contained in the Reasons that is not already public, the Panel is unable to identify any reasonable alternative measures that would both protect the privacy of the accused and provide the public with access to the Hearing Panel's reasoning process and reasons for disposition.

[127] Finally, as alluded to above, it is relevant to the balancing exercise that Mr. Fairgrieve is not seeking a restriction on disclosure of an assessment report or other written materials put before the Hearing Panel, but rather is seeking to have the Hearing Panel's Reasons significantly redacted. While the Panel recognizes that the Reasons contain references to information contained in such documents, this is nevertheless a factor that weighs in favour of upholding the open court principle.

[128] Mr. Fairgrieve relies on *A Lawyer v. The Law Society of British Columbia,* [2021] BCCA 284. The Panel finds that this case is distinguishable from the matter before us. In *A Lawyer*, the issue was not a publication ban on the court's reasons or the redaction of the court's reasons. Rather, the application was to seal certain affidavits and to have the proceeding anonymized.

[129] In *A Lawyer,* the information sought to be sealed was described by the court as containing "serious allegations of dishonesty that [are] under investigation by the LSBC". It would "affect the livelihood of the applicants and other employees at the firm…". The court held that this was information that would "strike at the core of the persons sought to be anonymized" (para. 75). The court held that the reputation of multiple legal professionals was at stake due to the unproven allegations and that this was an important public interest. The court held that the deleterious effects to the open court principle would be minimal given the limited nature of the orders made (para. 80). The decision in *A Lawyer* concerns

a very different fact pattern in a very different legislative context and in the Panel's view provides little useful guidance to the present case.

[130] Taking all of the foregoing into account, and weighing the competing interests, the Panel concludes that in the circumstances of this case, protection of the accused's privacy interests does not take precedence over the public interest in disclosure of the Reasons.

[131] The Panel reaches the same conclusion in relation to Mr. Fairgrieve's concerns for his fair trial interests. Even if "substantial prejudice" exists in relation to these interests, which we do not find, it cannot be said that "in the circumstances, protection of the accused takes precedence over the public interest in disclosure". The "circumstances" here include that the potential for actual harm to Mr. Fairgrieve's fair trial interests is ill-defined and speculative; that juries can be expected to behave in accordance with their oaths (*R. v. Sherratt,* [1991] 1 S.C.R. 509); and that challenges for cause and jury instructions offer a further protection against an unfair trial: *R. v. Haevischer*, [2013] BCSC 2014 at para. 39. Likewise, courts have held that gaps in time between the reporting of information in the media and the date of the jury trial reduces risk of an unfair trial: *R. v. Haevischer* at paras. 28-38. There is likely to be such a gap in this case, if indeed Mr. Fairgrieve ever stands trial.

[132] Global News cites *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 for the proposition that the vast majority of criminal trials can proceed fairly even in the face of a great deal of publicity. The Panel agrees that this observation militates in favour of a conclusion that the public interest in the present case outweighs Mr. Fairgrieve's interests, especially as he has not particularized how his fair trial interests will be harmed.

[133] At the same time, for the reasons given above, the public interest in unredacted Reasons of the Board is high. On balance, the Panel concludes that the protection of the Mr. Fairgrieve's fair trial interests, on the facts and submissions in this case, do not take precedence over the public interest in disclosure.

Conclusion

[134] Mr. Fairgrieve's application, that the Board redact a series of passages from the Reasons before releasing them publicly, is dismissed.

[135] By consent, the Panel directs that the names on the "no contact" list contained in the Disposition be redacted in any copy of the Disposition released to the public.

[136] The Panel directs that the Reasons will not be publicly disclosed for a period of 21 days from the date of these reasons.

Reasons written by S. Boorne, with Dr. P. Constance and P. Acton concurring.

[[[[[[[[[