Indexed as:

Fisher (Re)

IN THE MATTER OF the Criminal Code R.S.C.
Chapter C-34
AND IN THE MATTER OF an Act to amend the
Criminal Code (Mental Disorder), Chapter
C-30, 1991
Re: Cathryn Fisher

[1992] B.C.R.B.D. No. 2

British Columbia Review Board
N.J. Prelypchan, Chairperson, M. Anderson,
J. Bubbs and A. Marcus, Members

September 30, 1992.
(27 paras.)

Appearances:

R. Lambert, counsel for the accused.
W. Pearce, Q.C., counsel for the hospital.
S. Tucker, articled student.
D. Ryneveld, Q.C., and P. Insley, for the Attorney General.
K. Pemberton, for the Vancouver Sun.

[Quicklaw note: J. Bubbs, Board Member, dissents from the majority decision of the Board. See paras. 22 - 27.]

DECISION ON EXCLUSION OF A MEMBER OF
THE PUBLIC

¶ 1 CHAIRPERSON:-- This is an application pursuant to section 672.5(6) by the Director of the hospital who is a statutory party under Part XX.1 of the Criminal Code. That section provides that:

> Where the court or Review Board considers it to be in the best interests of the accused and not contrary to the public interest the court or Review Board may order the public or any members of the public to be excluded from the hearing or any part of the hearing.

¶ 2 The application by the hospital in this case is to exclude Kim Pemberton, a representative and reporter for the Vancouver Sun, as a specific member of the public pursuant to that section.

¶ 3 The application arises from the context of the case of Cathryn Fisher, also known as Cathryn Shaw, who is a person found not guilty by reason of insanity on a charge of second degree murder by the Honourable Mr. Justice Melvin of the Supreme Court, at Victoria, on February 7th, 1991. She was then ordered to be held in strict custody at the Eric Martin Pavilion, Victoria, until the 8th of February, 1991 by a subsequent order of counsel No. 279 ordered and approved the 28th of February, 1991. The accused was discharged subject to a variety of conditions some of which should be read into the record. She was to be subject to the direction and supervision of the Director of the Forensic Psychiatric Services or his nominee. She was to reside in the Eric Martin Pavilion or at such place operated by the Forensic Psychiatric Commission as deemed appropriate at the time. She should remain at that place of residence for the purpose of treatment or rehabilitation as directed by the Director and she should take medication and treatment prescribed by the Director. She was not to acquire, possess, or use any firearm or offensive weapon. She was to keep the peace and be of good behaviour and refrain from use of alcohol and she present herself before the Review Board when required. So far as the Review Board has been advised that is the order presently in place and under which she was lawfully in the care of the Director.

¶ 4 The application heard today was supported by Cathryn Fisher and her counsel and opposed by the Vancouver Sun. The Attorney General was also a party. For the sake of the record it is important that we comment in part on what positions were taken. The hospital maintained that the Vancouver Sun, as a specific identifiable member of the public, could be excluded and chose to support its application with argument and tendered two reports. Exhibit 1 was a letter from Dr. Ian A. Gillespie, the attending psychiatrist to the patient, Cathryn Fisher. His report dated September 25th, 1992. Exhibit 2 was the report of the attending psychiatrist of the Adult Forensic Psychiatric Outpatient Services, Dr. Mills, dated September 14th, 1992. In addition, the Review Board heard evidence from Cathryn Fisher herself and an argument from her counsel supporting the application. The Attorney General chose not to take a position though his counsel made observations on some aspects of arguments made by counsel for the hospital. The representative of the Vancouver Sun, Kim Pemberton, filed written argument, which could be introduced into the record if she wishes, but, nevertheless, we will leave that option available to her. There was other written argument tendered. As it is not usually the practice to introduce written argument as exhibits, I am not encouraging the Vancouver Sun's argument to be marked. However, I leave that to you.

¶ 5 The evidence heard focused largely on the concern that Cathryn Fisher was in a very delicate mental state at this time. She was concerned that the press reporting of the evidence in its complete sense at this Review Board was contraindicative of her progress. In fact it may be the cause of some relapse.

¶ 6 To review Dr. Gillespie's report he says there are some unusual aspects to her case. I am quoting from page one:

> The criminal offence she committed, homicide, occurred as a result of a psychotic state precipitated by medically advised withdrawal of maintenance medication. This is the only time she has been off medication in the last five years of which I am aware. She has been entirely cooperative with taking medication since I reassumed her care in March of 1990. She has never been reported to be aggressive other than during manic episodes. The tragedy of Mrs. Fisher's daughter's death received repeated intense coverage by radio, T.V., and newspapers on local and national level. As you have described...,

(in reference to Mr. Mills' letter),

> ...repeated publication of Mrs. Fisher's name, photograph, addresses and details of the homicide made her exquisitely sensitive to public scrutiny and complicated her treatment. The local television station, part of the CTV network, obtained personal photographs of Mrs. Fisher and her daughter from the police without her permission and broadcast these along with the videos of her home repeatedly when updates on the case were reported.

¶ 7 He goes on to say:

> Mrs. Fisher has made significant progress but remains understandably apprehensive. Being the renewed focus of attention in the media will greatly disrupt her sense of comfort in the community and her efforts at improved socialization. I agree with you...

(in reference to Dr. Mills letter),

> ...that there is a distinct possibility that this could lead to decompensation and complicate her continued treatment.

¶ 8 Dr. Mills, said the following to quote from Exhibit 2, paragraph 1:

> Mrs. Fisher's psychotic behaviour which led to the death of her child was made into a media spectacle by radio, television, and press over an extended period of time. Her response to this exposure was such that it took several months before we were able it to obtain her full compliance with clinical investigation and treatment. She was noticeably hostile, suspicious, and prone to withhold information. She was, also non-compliant with a variety of testing processes. She stated that she was fearful of further exposure. There was thus significant interference in the treatment process that was brought about in part by her experience of having her psychotic disorder and symptomatic behaviour being a matter of public attention.

Dr. Mills goes on to say in paragraph 10 of his letter:

> Therefore to my opinion the presence of the press at the Review Board hearing for this woman is strongly contraindicated. At worst she could decompensate again into a psychotic state requiring return to hospital and all that that would entail and at least it would render her more actively hostile and less liable to cooperate with her physicians -- and the board -- in any future management.

¶ 9 The majority of the Review Board members who have associated themselves with these my reasons had some significant concerns with the strong statements made in both letters about the anxiety over the media spectacle that could befall Mrs. Fisher. We were particularly concerned in view of the fact that she admitted to us in my questions to her that she was previously part of at least two of those events and one of which was on CBC Radio. Nevertheless, we believe that the advice that we heard and read from the two psychiatrists in question cannot be disregarded. I will focus more on their conclusions during the course of these reasons.

¶ 10 Under the law, as we perceive it, the question of attendance of the public is a uniquely sculpted right under Part XX.1 of the Criminal Code. It is clear that subsection 6 of section 672.5 allows discretion in the Review Board to order exclusion of all or part -- rather all or any member of the public of a hearing or any part of a hearing, where it considers it in the best interest of the accused and not contrary to the public interest. The Review Board has had some difficulty in previous cases in the acceptance by the general forensic community of the existence of the rights of attendance by the public at Review Board hearings. This matter has been the subject of more than one case and most latterly the Ahluwalia case as reflected in our reasons on the 27th of July, 1992. We incorporate by reference into these reasons pages 4 through to 12 our reason in the Ahluwalia case. We have concluded that the public has a right of attendance at any time and it is only on application for exclusion can members of the public be forced to leave such proceedings.

¶ 11 The next question that faces us is, when can the public be excluded? There are two interests reflected in subsection 6 of 672.5, that is the best interests of the accused and those of the public interest. We believe that the evidence given through Exhibits 1 and 2 were very persuasive in our coming to the conclusion that best interests of the accused, focused correctly, indicated that this particular member of

the public, and that is the press, be excluded in this hearing. We are concerned, however, as I said earlier, that we were not offered the opportunity of explanation from either doctors as, to why the other two occasions of Mrs. Fisher's participation with the media did not have the same result. They warned us about such media exposure in this case now. Nevertheless, we could not ignore their advice and their conclusions today. On a balance of probabilities, which we hold is the proper evidential test, we feel the first interest test, the best interest of the accused, favours exclusion.

¶ 12 Turning next to the public interest. We said again, as we said in the Ahluwalia case, I quote from page 20:

> We cannot exclude the public or any member of the public without the accused's best interests being adversely affected and (emphasis added) without our being satisfied that the exclusion of the public in a particular case would not be contrary to the public interest.

We said we respectfully concluded that otherwise the Review Board would not be possessed of jurisdiction to exclude anyone.

¶ 13 In considering the request of the hospital and the accused for the exclusion of this member of the public, in that case the Review Board was there, and we are, here similarly, mindful of the regard that has to be paid by statutory tribunals such as ours to the tradition of openness, particularly in cases such as this one where liberty of the subject is an issue. There is an undeniably long held English Common Law tradition upholding the need for scrutiny in the operation of courts and tribunals as is afforded by allowing public attendance and by reporting of their proceedings.

¶ 14 Any decision to exclude the public must be exercised by a tribunal such as the Review Board very cautiously and only where special circumstances demand. Indeed, specific provision in the Criminal Code provides for the exercise of this power to be it discretionary - ". . . the Review Board may order the public or any member of the public to be excluded from the hearing or any part of the hearing...". We feel such exclusion of the public could be ordered by the Review Board, but is intended to be made on a case by case basis under the Criminal Code. In issue in our case today is whether a case sufficient for the exclusion of the public for the disposition hearing has been made out, in support of the public interest test.

¶ 15 In support of the public interest test the decision of the MacIntyre case was of particular relevance as was Lefebvre. R. v. Lefebvre, a decision of the Quebec Court of Appeal, 17 C.C.C. (3d) page 277, dealt with the issue of whether an accused y could be excluded during the hearing of evidence from a witness where the attendance of an accused I should say, "unsettled", the victim who was giving the testimony. The Court of Appeal said at page 280:

> I am of the opinion that a trial judge may exclude the public when a witness is giving evidence in the interests of the proper administration of justice where the circumstances of the case may give rise to stress for the witness which would render him incapable of testifying. This is the situation in the present case.

¶ 16 We heard from Cathryn Fisher about her concerns for the attendance of the press as a member of the public here. We also heard from her two psychiatrists and considered the argument that was addressed in this context. We have been persuaded that without the fullest and frankest cooperation afforded Cathryn Fisher to speak to us as to her present mental condition without the attendant anxiety over the presence of the press, we would not be acting correctly and as envisaged by the law. It would be contrary to the proper administration of justice in the circumstances of this particular case to continue to allow the members of the press if Mrs. Fisher's response would be to leave, as she has done before, and as she has said she would today, if the press remained. For that reason we believe that the public interest in exclusion of the press has been met in our ordering them to absent themselves from the hearing.

¶ 17 In turning attention to the MacIntyre case, other considerations were indicated as assisting in determining what is the public interest, those being, shortly abbreviated, rehabilitation, protection of the administration of justice, which I have now covered, the particular health of the accused, and, lastly, her privacy. We reject the concept that privacy in circumstances such as this case is an appropriate consideration for exclusion of a member of the public. we don't propose to dwell at length upon this issue except to say that the Parliament of Canada clearly must be taken to have had in mind, the discussion of the principles in the MacIntyre case, as it predates the Part XX.1 amendments. As well, Parliament must be taken to have had in mind, the legislation that was being interpreted in the Southam case which was the Young offenders Act.

¶ 18 The Young Offenders Act legislation specifically provides protections which do not exist in Part XX.1. Section 38 of the Young Offenders Act provides that the reporting of a crime committed by a young person could be absolutely prohibited, including, we believe in our interpretation of the legislation, identifying a particular young person. Such protection does not appear to be evident in Part XX.1, and for these reasons we feel consideration for the privacy of the accused in cases reviewed under Part XX.1 were rejected by Parliament of Canada, particularly in granting the discretionary power under section 672.5(6). Therefore we cannot consider respect for privacy of the accused as one of the aspects in considering the public interest. On the other hand, we are persuaded that in consideration of the implementation of the will of Parliament being manifest by granting Review Boards such wide scope to inquire into the mental health of the accused, the integration of the accused into society, any significant threat that may be imposed on the safety of the public, and as well the general needs of the accused requires us to look at a person as such as Cathryn Fisher as these considerations appear today. She may have been well guided or misguided, in being a willing participant in the public media events in the CBC and in the Victoria Times. Colonist newspaper. She said clearly in her evidence that she was not concerned with the result of those events. On the other hand, we are persuaded by her statements to us that she felt she was not concerned with their result or in her willing participation in those events because, "she had control of the situation," she had control of the interview process, and she felt that she would be fairly represented in the outcome, albeit that it was not made available to her before

publication. We, therefore, consider, that in the public interest we should have regard to proceeding in a fashion allowing for the implementation of the will of Parliament. It was intended that we consider how this person appears before us today having regard to the inquiries we were to make. In light of her past experiences and in light of what she sees facing her in the future with media coverage, her anxiety is real. This anxiety is supported by her care-givers here today. For that reason we believe that it should be taken into account. We therefore find that it is not contrary to the public interest to exclude the press from the hearing. Parliament intended us to take that into account.

¶ 19 In conclusion, therefore, I would like to say that these are the reasons of three of the members of the Board. We were concerned to focus on whether a member of the public, the representative of the Vancouver Sun here, could be excluded from the complete hearing. Since that was the application and supported we hold by the evidence, we think, that should be our order and will be our order.

¶ 20 On the other hand, Miss Pemberton is welcome to stay as any other member of the public would. In any event she would of course be bound by our order. I draw to her attention the fact that the Criminal Code provides under section 127 that if she breaches the result of our order in publishing as a result of her attendance, she may face whatever consequences one would assume could arise if that Criminal Code section was applied to these circumstances.

¶ 21 I am now available to questions if necessary, however I would rather that the other member of the Board deliver reasons next. If there are any questions arising from what I have said you are welcome to raise them. Thank you.

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Dissenting Reasons of J. Bubbs, Member

¶ 22 MS. BUBBS: Reluctantly, I can't concur with the decisions of my fellow board members in this case. I am satisfied that the applicant has clearly met the first arm of the test set out in section 672.5(6) of the Criminal Code. The evidence proffered by Drs. Mills and Gillespie together with the oral evidence of Mrs. Fisher are together sufficient in my view to establish that the best interests of the accused would be served by exclusion of the public from her disposition hearing. All parties to the proceeding have acknowledged that both arms of the subsection 6 test must be satisfied and have further acknowledged that is the end the final decision must be one of balancing the interests of the accused against the need of the public and the interest of the public to know and to oversee the actions of this and other tribunals.

¶ 23 In my opinion the second test has not been met by the applicant. The accused, Mrs. Fisher, and I use that term "accused" because that is what is stated in the Criminal Code, it is a harsh one but I don't have the ability to use another one, has on two occasions chosen voluntarily to grant interviews to the media first in writing to the Times Colonist newspaper in Victoria and secondly to the CBC.

¶ 24 In his letter of September 14th, Dr. Mills states that Mrs. Fisher's psychotic behaviour which led to the death of her child was made into a media spectacle. I submit that in some ways she was a willing participant in volunteering to speak to the media at a later date following the trial and the events which she then ensued.

¶ 25 Mrs. Fisher has told this board that she has suffered no negative repercussions from either event and indeed experienced some positive consequences. She also stated that she would have liked to have given the radio interview now because she is, "feeling better now". Mrs. Fisher consented to the interviews in spite of her psychiatrist's knowledge and concerns, because she quite understandably wished to set the record straight and to enable the truth concerning the incident to be told. In responding to the Board's inquiry as to the difference between those two interviews and the press, presence here today, she indicated that on the former occasions she was in control. Again this is most understandable. However, the public interest cannot be subjugated to the needs of the accused to exercise control over the narration of the events which fall within the realm of public scrutiny. The accused cannot be allowed to say that the presence of the press is acceptable only when she consents to it and can control its content.

¶ 26 I agree with the argument of Ms. Pemberton of the Vancouver Sun that the Review Board can only suspend the rights of the Charter of Rights and Freedoms in the clearest of cases. This case has been clouded by the accused's own utilization of the media at her instigation. I further adopt the reasons of Mr. Justice Dixon in the MacIntyre case that at every stage the rule should be one of public accessibility and judicial accountability. He goes on to say that as a general rule the sensibilities of the individuals involved are no basis for the exclusion of the public from judicial proceedings. Neither Mrs. Fisher nor her psychiatrist brought forward the very material facts of Mrs. Fisher's media interviews. It was left to us, the weigher of evidence, to bring out we are disappointed that that was the case because we felt that either Mrs. Fisher or her counsel or her psychiatrist could have brought this forward in the correct context and could have either explained it or diffused the effect it might have on this Board. As some consolation, we of course were aware of the fact that these interviews had taken place. We would want Mrs. Fisher to feel that the fact that she chose to testify somehow let the cat out of the bag, it certainly did not.

¶ 27 Based, therefore, on all of the aforementioned reasons I would dismiss the application of the hospital to exclude press from this disposition hearing.

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