IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE R.S.C. 1985 c. C-46, as amended 1991, c. 43

AND

IN THE MATTER OF A REQUEST FROM THE VANCOUVER SUN FOR ACCESS TO DISPOSITION INFORMATION FILED AT THE DISPOSITION HEARING OF THE ACCUSED HELD ON AUGUST 21, 2003

THE BRITISH COLUMBIA REVIEW BOARD

DECISION

October 8, 2003

CHAIRPERSON: B. Walter
MEMBERS: Dr. G. Laws, Psychiatrist
N. Avison

1.0 Introduction and Background to this Decision

On July 17, 2003 the British Columbia Supreme Court issued a verdict of not criminally responsible on account of mental disorder (NCRMD) on the offence of murder, in the matter of The Accused.

In rendering its verdict the court deferred the matter of disposition to the British Columbia Review Board (the Review Board), thereby requiring it to convene a hearing and to make a disposition within 45 days: s.672.47(1); s.672.54 *Criminal Code*.

On August 21, 2003 the Review Board convened a hearing at the Forensic Psychiatric Hospital (FPH) pursuant to s. 672.47(1) *Criminal Code*. Parties to the hearing included the accused, the Attorney General of British Columbia and the Director, FPH. All parties were represented by Counsel.

Documents tendered and entered as disposition information for the hearing included a report by supervising/treating psychiatrist Dr. L. Meldrum, (Ex 21), and Victim Impact Statements, (EX 19): s.672.51(1), (2);s.672.5(14), *Criminal Code*.

At the commencement of the disposition hearing counsel for the accused applied for an order to exclude a Vancouver Sun reporter during certain aspects of the psychiatric evidence. As elaborated in its Reasons for Decision dated August 21, 2003, and referenced below, the Review Board rejected the application.

On August 25, 2003 the Review Board received a request from the Vancouver Sun for access to certain documents pursuant to the *Freedom of Information and Protection of Privacy Act* (RSBC 1996, c.16) (*FOIPPA*), specifically:

- Dr. Meldrum's psychiatric report prepared for The Accused's first Review Board hearing;
- Victim Impact Statements concerning The Accused's crime;
- Any writings of The Accused herself in the possession of the Board.

The Board is not in possession of any writings of The Accused. This decision therefore relates to Review Board Exhibit 21, Dr. Meldrum's Psychiatric report, and Review Board Exhibit 19, Victim Impact Statements.

In considering the legal framework governing the request, and given the relative rarity of such requests, the Review Board determined that it would be appropriate and fair to provide parties the opportunity to make submissions as to their understandings of the governing legislative scheme, as well as on the ultimate issue of whether or not the Review Board should disclose the requested documents.

Mr. Hillaby, representing the Attorney General of British Columbia, and Ms. Fisher representing the Director, FPH, both provided written submissions, arguing that the Review Board should not disclose the requested documents. Their arguments are discussed below. No Submissions were received from counsel for the accused or the Vancouver Sun.

2.0 *FOIPPA* vs. the *Criminal Code*: The Legislative Scheme Governing This Request

British Columbia's *Freedom of Information and Protection of Privacy Act* lists the British Columbia Review Board as a "public body". Section 22(3)(a) presumes that medical or psychiatric information is "personal information", the disclosure of which is an unreasonable invasion of a third party's privacy. The Director relies on this in support of the position that Dr. Meldrum's report should not be disclosed.

In support of its argument that the *Criminal Code* covers the records in question the Crown cites s. 3(1)(h) of the *FOIPPA*:

> 3(1) This Act applies to all records in the custody or under the control of a public body including court administration records, but does not apply to the following:
>
> (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

The Director points out that s. 2(2) *FOIPPA* states "this Act does not replace other procedures for access to information", and accepts that "In the case of

conflicting results arising from the two regimes . .. s. 2(2) and the specific provisions of the *Criminal Code* indicate that the *Code* ought to govern."

We observe also that s. 22(4)(c) of *FOIPPA* provides:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (c) an enactment of British Columbia or Canada authorizes the disclosure.

Section 672.51(7) of the *Criminal Code* (below) is such an enactment. We do not agree, as is argued by the Director, that s. 22(4)(c) is limited in its application to federal enactments that require disclosure; s. 672.51(7) of the *Criminal Code* clearly authorizes disclosure pursuant to a principled exercise of discretion.

It is our conclusion for present purposes that ss. 2(2) and 22(4)(c) *FOIPPA* recognize that we are governed by the *Criminal Code* despite this request having been made in an *FOIPPA* format.

3.0 Relevant Access and Publication Issues at the Accused's Trial

At trial, counsel for The Accused requested that Taylor, J., of his own motion, ban publication of specific details surrounding her child's death on essentially two grounds:

- their negative effects on the memory of the child;
- their negative effects on the accused's care and treatment by staff and peers at FPH

On July 15, 2003, Taylor, J. determined that this request was inappropriate for the following reasons:

- the circumstances surrounding the child's disappearance (though not her demise) and the accused's arrest were already publicly known;
- insofar as the case involved an NCRMD defense, the allegation and the underlying evidence are matters of public interest; i.e. the public has a legitimate interest in knowing what happened in order to have a proper understanding of the

process and the evidentiary basis for any outcome or verdict reached;

- There is no basis to presume that FPH could not adequately provide the accused with protective care and treatment.

Justice Taylor did qualify this ruling by ordering the sealing of a book of forensic photographs (B.C.S.C. ex. 2) which he considered of "prurient and puerile" interest: Par 24.

In so restricting his ruling he obviously considered that public access to court exhibits should only be restrained or withheld in special circumstances where disclosure does not contribute to public understanding of the process.

Following The Accused's July 17, 2003 NCRMD verdict, media organizations applied for access to additional trial exhibits including appendices to an Agreed Statement of Facts (B.C.S.C. ex. 1); psychiatric assessment (and Curriculum Vitae's of the author) (B.C.S.C. ex. 5), and video and audio interviews of the accused (B.C.S.C. ex. 3, 4).

In ruling on access to these exhibits Taylor, J. reiterated the public's interest in open judicial proceedings as a cornerstone principle of democracy, as well as the critical role of the press to responsibly and accurately inform the public about serious issues. The court found no convincing reason to make an exception to the presumption of openness in the interests of the proper administration of justice.

Of relevance to the British Columbia Review Board, in the context of the current request for disclosure of documents, Taylor, J. cited R. v Haynes, [1995] B.C.J. N.O. 2714 (S.C.), which involved an application to the court for the psychiatric reports of an NCR accused. He stated that the court's right to disclose trial exhibits exists without prejudice to the Review Board's decisions to subsequently disclose or withhold information at a disposition hearing under s.672.51 of the *Criminal Code*. Haynes established that s. 672.51(7)(b) does not govern a trial court which is **not** conducting a disposition hearing.

As to the effect of disclosure on The Accused's recovery and reintegration, Taylor, J. held that those responsible for her care and treatment, i.e. FPH,

should be trusted or relied upon to protect and insulate her from the consequences thereof.

Regarding the potential for harm or upset to third parties, the court found that insofar as these persons were already aware of the information in question, further disclosure would be unlikely to occasion additional harm to an extent that would outweigh the value of openness.

This discussion of the court proceedings underlines that the press has already been granted access to trial evidence, e.g.; psychiatric reports, (including from Dr. Meldrum), which contains substantially more detail than the documents which are the subject of the current request.

4.0 Application to Exclude the Public from Review Board Hearing (August 21, 2003)

On August 21, 2003, The Accused's counsel applied for an order excluding a reporter for the Vancouver Sun from the accused's first hearing before the Review Board.

Following evidence and submissions from all parties the Review Board rejected the application.

In its Reasons for Decision the Review Board referred (inter alia) to s. 672.5(6) of the *Code*:

> 672.5(6) 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.

In applying the two stage test in s. 672.5 (6), as interpreted in Blackman, [1995] B.C.J. No. 95 (C.A.) and Oshawa This Week, [2002] O.J. No. 554 and 5383 (S.C.), as well as considering the evidence of Dr. Meldrum and the comments of Taylor, J. at trial, the Review Board held that the application to close the hearing failed on the basis that the first branch of the s. 672.5(6) was not satisfied: See BCRB Reasons, August 21, 2003, P. 7.

In other words the panel concluded on the evidence that the accused would not be prejudiced by an open hearing. The ruling was not challenged. As a result the media representative was permitted to attend throughout the hearing.

5.0 Request for Access to Review Board Exhibits (August 25, 2003)

The scope of this request is outlined at page 1 above. Our analysis considers the submissions of the Attorney General of B.C. and the Director, Forensic Psychiatric Hospital.

The documents in question are "disposition information" as that term is defined in s. 672.51(1) of the *Criminal Code.*

In addition to the test regarding exclusion of the public (s. 672.5(6)) the *Code* provides specific guidance regarding access to disposition information:

> 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:
>
> (a) where the disposition information has been withheld from the accused or any other party..., 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.**

The highlighted clause articulates the legal standard to be met to prohibit disclosure of disposition information:

- that the disclosure would be seriously prejudicial to the accused;
- that, in the circumstances, protection of the accused takes precedence over the public interest.

The test under s. 672.51(7)(b) was described in Brown as follows:

> Section 672.51(7)(b) recognizes that there are circumstances in which protection of the Accused takes precedence over the public interest in disclosure. This recognition of protection against disclosure in some circumstances only makes sense in the context of an assumption by Parliament of an existing 'prima facie' right of the public to access; otherwise, why would Parliament need to have stated when this right would be limited?: In the Matter of Harold Douglas Brown, B.C.R.B., 1993, p. 9.

Brown preceded Blackman (supra) and Haynes (supra). As the jurisprudence has subsequently developed, the test under s. 672.5(6) for access to the hearing, the test under s. 672.51(7)(b) for access to documents, and the open court principle of s.486 of the *Criminal Code* have converged somewhat. This is evident in the comments of Taylor, J. in the trial proceedings in this case, which recognized that demonstrable harm to the accused is relevant to the decision whether to disclose documents.

As we read s. 672.51(7)(b), there may well be cases where disclosure could be seen as seriously prejudicial but protection of the accused would still not take precedence over the public interest, in the circumstances.

6.0 Arguments Against Disclosure

The Director argues that Dr. Meldrum's evidence at the August 21, 2003 hearing related only to whether the presence of the press would be harmful to the accused. The Director submits that as the hearing was held in public, the public interest in the exhibits is attenuated.

The Director relies on the 1993 Review Board decision in Brown (supra), and submits that disclosure of reports is of a different character than exclusion from a public hearing; that the decision to disclose a psychiatric report must consider both The Accused's privacy interests in her personal medical information and "the need to preserve the trusting and sensitive relationship between The Accused and her psychiatrist…".

The Director refers to Dr. Meldrum's August 5, 2003 report, which states that "the nature of the offence and the degree of publicity that has surrounded this case *may* cause The Accused herself and her supports ongoing distress in the future and *may* hamper her efforts to reintegrate into her home community of Nanaimo."

As to the victim impact statements, the director argues that release of these documents "would have a similar detrimental effect on The Accused's recovery

and reintegration prospects" and may raise issues with respect to the privacy of the authors.

On balance, the Director submits that the prejudice to The Accused of disclosure (and the prejudice to the public interest in her rehabilitation) outweighs any public interest in disclosure.

We are unable to accept the Director's arguments in this case.

Section 672.51(7) of the *Criminal Code* is not satisfied by opinion, unsupported by evidence, that additional publicity occasioned by the disclosure of documents "may" cause an accused distress and "may" hamper rehabilitation efforts.

We agree with the Review Board in Brown. We must have regard to the sensitive nature of the relationship between the accused and her treatment team. Our legal duty under the first branch of the test however is whether disclosure ***would be seriously prejudicial to the accused***. If the public hearing could not be shown to seriously prejudice The Accused, it is difficult to see how providing access to the two requested documents would change that conclusion, given the facts of this case and the nature of the documents. Unlike Brown, there is no factual basis before us on which to found a demonstrable conclusion, (particularly given the evidence in this case concerning The Accused, her unique mental condition and her responses thus far), that disclosing the two exhibits in question would seriously prejudice The Accused, her relationship with her treatment team or her prospects for reintegration at some unknown future date. Neither has the Director provided any indication that new evidence exists to support the suggestion that we should convene a further hearing to address this issue.

We agree that the public nature of our August 21, 2003 hearing is a factor to consider in deciding whether to also disclose exhibits from that hearing. But this factor cannot be conclusive without undermining the presumption of access to exhibits. As recently held by the Ontario Court of Appeal in CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region), [2002] O.J. No. 1141 (C.A.) at para. 22:

> I think it is clear from this jurisprudence that the court's jurisdiction to determine access to court records (including exhibits) rests on the premise that public accessibility should be curtailed only with the greatest reluctance, taking into account the need to protect the innocent and other considerations described in *Vickery*. ***It is also clear that this jurisdiction does not vanish simply because it is shown that these exhibits were filed in open court***.... [See also Tallis J.A. in *R. v. S.J.S.*, [2000] S.J. No. 49 (C.A.) at para. 11: "...once an exhibit is publicly displayed, the interest in subsequently denying access to it is necessarily diminished.]

Section 672.51(7) is not drafted to suggest that the interest in public access to exhibits is diminished when the Review Board has held a public hearing. The test in s. 672.51(7) is as protective of public access to disposition material as s. 672.5(6) is of public attendance. This is not to deny, as reflected in Justice Taylor's decision to seal the photographs in this case, that the disclosure of certain types of exhibits raises special considerations that do not arise where the issue is simply public attendance at the hearing. In the Review Board context, for example, it may be one thing to disclose a psychiatric report after a hearing, and another thing altogether to disclose it before the hearing: Brown (supra), p. 13. [See also Vickery v. Nova Scotia Supreme Court, [1991], S.C.R. 671]

A comparison of s. 672.5(6) and s. 672.51(7) indicates that, to Parliament, the general principle of openness underlying both was important and strong. This is consistent with the public access approach taken by Mr. Justice Taylor in this case, and the decisions of courts in cases such as CTV Television Inc., (supra); R. v. Arenburg, [1997] O.J. No. 2386 (O.C.J.), and R. v. Warren, [1995] N.W.T.J. No. 9 (S.C.).

Parliament has clearly decided that a meaningful presumption of openness is inextricably linked with the accountability of the Review Board process. Review Boards have a very difficult function in making decisions about the risks posed by, and the liberties that should be granted to, NCR accused under s. 672.54 of the *Criminal Code*. After the first hearing the Review Board's function is ongoing and exclusive up to the point where an accused receives an absolute discharge.

In this context, Parliament has concluded that it is in the public interest that Review Boards should be subject to public scrutiny; that the public be given a

full opportunity to fairly understand Review Board decisions. Understanding and fair criticism are not possible without public access to the evidence that informs a Review Board's decision-making. This interest should be overridden only where there are demonstrable and compelling interests to the contrary. That disclosure "may" cause an accused distress or "may" hamper rehabilitation efforts does not suffice to override the presumption.

The Crown has expressed concern that disclosure of Dr. Meldrum's report would "adversely affect the nature of future psychiatric opinion letters". This submission is not far from arguments advanced in years gone that psychiatric reports should not be disclosed even to accused persons because of the potential chilling effect on the authors. Parliament's creation of a presumption that an accused is entitled to see the reports written about him or her has not adversely affected the content or candour of those reports. Nor is there any evidence that expert forensic psychiatrists alter their psychiatric opinions to the courts because of public access to those opinions. Forensic psychiatrists are professionals. We have no basis for concluding that they would fail in their solemn, ethical and statutory duty, pursuant to the *Forensic Psychiatry Act*, to provide their most helpful, complete and candid opinions to the Review Board, particularly since there is statutory provision for the Board to refuse disclosure to the public (and for that matter the accused) when the evidence warrants it: s.672.51(3), (5).

The Crown has also opposed the release of the victim impact statements on the basis that the authors of those statements do not support such release. In the absence of a more compelling foundation to refuse disclosure, it is our view that these statements should be open to the public. The authors chose to provide them to the Crown for use in the administration of justice. Each victim impact statement specifically provides permission for the statement to be used by provincial and federal parole boards and corrections services, making clear that these are not private documents. The *Criminal Code* specifically provides that such statements should be considered by Review Boards: s. 672.541. The statements were entered as exhibits in the open hearing. On the facts here, we see no convincing basis for refusing to disclose them.

Finally there is nothing in the requested documents which approximates or approaches the material (e.g. photographs) sealed by Justice Taylor. We find no basis for withholding Dr. Meldrum's report or the victim impact statements in question.

7.0 Conclusion

For the reasons given, the Review Board has determined that the two documents affected by this request will be disclosed to the requestor.

The Panel will defer implementation of this decision for five days from the date hereof to allow the parties to give notice whether they intend to challenge this decision. If such notice is given within that period of time, consideration will be given to whether disclosure should be stayed pending the conclusion of litigation.

Oct 8/03