

**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 L.M. AUNE HELD
ON AUGUST 21, 2003**

THE BRITISH COLUMBIA REVIEW BOARD

DECISION

October 8, 2003

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

ORIGINAL

1
2 **1.0 Introduction and Background to this Decision**
3

4 On July 17, 2003 the British Columbia Supreme Court issued a verdict of not
5 criminally responsible on account of mental disorder (NCRMD) on the
6 offence of murder, in the matter of Laurina Marie Aune (the accused).

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

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

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

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

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

- 28 • Dr. Meldrum's psychiatric report prepared for Ms. Aune's first
29 Review Board hearing;
- 30 • Victim Impact Statements concerning Aune's crime;
- 31 • Any writings of Ms. Aune herself in the possession of the Board.

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

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

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

15
16 **2.0 FOIPPA vs. the Criminal Code: The Legislative Scheme Governing This**
17 **Request**

18
19 British Columbia's *Freedom of Information and Protection of Privacy Act* lists
20 the British Columbia Review Board as a "public body". Section 22(3)(a)
21 presumes that medical or psychiatric information is "personal information", the
22 disclosure of which is an unreasonable invasion of a third party's privacy.
23 The Director relies on this in support of the position that Dr. Meldrum's report
24 should not be disclosed.

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

27 3(1) This Act applies to all records in the custody or under the control of a public
28 body including court administration records, but does not apply to the following:

29 (h) a record relating to a prosecution if all proceedings in respect of the
30 prosecution have not been completed.

31
32 The Director points out that s. 2(2) *FOIPPA* states "this Act does not replace
33 other procedures for access to information", and accepts that "In the case of

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

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

4 22(4) A disclosure of personal information is not an unreasonable invasion of a
5 third party's personal privacy if

6 (c) an enactment of British Columbia or Canada authorizes the disclosure.
7

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

13 It is our conclusion for present purposes that ss. 2(2) and 22(4)(c) *FOIPPA*
14 recognize that we are governed by the *Criminal Code* despite this request
15 having been made in an *FOIPPA* format.
16

17 **3.0 Relevant Access and Publication Issues at the Accused's Trial**

18

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

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

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

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

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

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

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

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

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

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

22 Of relevance to the British Columbia Review Board, in the context of the
23 current request for disclosure of documents, Taylor, J. cited R. v Haynes,
24 [1995] B.C.J. N.O. 2714 (S.C.), which involved an application to the court for
25 the psychiatric reports of an NCR accused. He stated that the court’s right to
26 disclose trial exhibits exists without prejudice to the Review Board’s decisions
27 to subsequently disclose or withhold information at a disposition hearing
28 under s.672.51 of the *Criminal Code*. Haynes established that s.
29 672.51(7)(b) does not govern a trial court which is **not** conducting a
30 disposition hearing.

31 As to the effect of disclosure on Ms. Aune’s recovery and reintegration,
32 Taylor, J. held that those responsible for her care and treatment, i.e. FPH,

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

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

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

11
12 **4.0 Application to Exclude the Public from Review Board Hearing (August 21,**
13 **2003)**

14
15 On August 21, 2003, Ms. Aune's counsel applied for an order excluding a
16 reporter for the Vancouver Sun from the accused's first hearing before the
17 Review Board.

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

20 In its Reasons for Decision the Review Board referred (inter alia) to s.
21 672.5(6) of the *Code*:

22 672.5(6) Where the court or Review Board considers it to be in the best
23 interests of the accused and not contrary to the public interest, the court or
24 Review Board may order the public or any members of the public to be
25 excluded from the hearing or any part of the hearing.

26 In applying the two stage test in s. 672.5 (6), as interpreted in Blackman,
27 [1995] B.C.J. No. 95 (C.A.) and Oshawa This Week, [2002] O.J. No. 554 and
28 5383 (S.C.), as well as considering the evidence of Dr. Meldrum and the
29 comments of Taylor, J. at trial, the Review Board held that the application to
30 close the hearing failed on the basis that the first branch of the s. 672.5(6)
31 was not satisfied: See BCRB Reasons, August 21, 2003, P. 7.

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

5 **5.0 Request for Access to Review Board Exhibits (August 25, 2003)**

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

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

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

14 672.51(7) No disposition information shall be made available for
15 inspection or disclosed to any person who is not a party to the
16 proceedings:

17 (a) where the disposition information has been withheld from
18 the accused or any other party..., or

19 (b) **where the court or Review Board is of the opinion that**
20 **disclosure of the disposition information would be**
21 **seriously prejudicial to the accused, and that, in the**
22 **circumstances, protection of the accused takes**
23 **precedence over the public interest in disclosure.**

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

- 26
- that the disclosure would be seriously prejudicial to the accused;
 - that, in the circumstances, protection of the accused takes
28 precedence over the public interest.

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

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

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

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

11

12 **6.0 Arguments Against Disclosure**

13

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

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

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

29 As to the victim impact statements, the director argues that release of these
30 documents "would have a similar detrimental effect on Ms. Aune's recovery

1 and reintegration prospects” and may raise issues with respect to the privacy
2 of the authors.

3 On balance, the Director submits that the prejudice to Ms. Aune of disclosure
4 (and the prejudice to the public interest in her rehabilitation) outweighs any
5 public interest in disclosure.

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

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

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

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

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

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

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

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

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

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

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

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

