# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fairgrieve v. British Columbia Review Board,* 2022 BCSC 1882

Date: 20221027
Docket: 31565-2
Registry: Vancouver

Between:

**Richard William Fairgrieve**

Petitioner

And

**British Columbia Review Board**

Respondent

Before: The Honourable Mr. Justice Riley

(In Chambers)

## Reasons for Judgment

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| Place and Date of Hearing: | Vancouver, B.C.<br>May 5-6, 2022 |
| Place and Date of Judgment: | Vancouver, B.C.<br>October 27, 2022 |

**Introduction**

[1] The applicant Mr. Fairgrieve seeks prerogative relief in connection with a decision of the British Columbia Review Board (the "Review Board"). The decision in question pertains to the Review Board's authority to make redactions to its reasons for disposition under s. 672.52(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, following a determination that Mr. Fairgrieve was unfit to stand trial on a charge of second degree murder.

[2] In its disposition reasons, the Review Board determined that Mr. Fairgrieve continued to be unfit to stand trial, and ordered that he be held in custody at a forensic psychiatric institute for a period of 12 months, pending further review. A media outlet, Global News Ltd. ("Global"), later sought access to the disposition reasons. The Review Board then received submissions from Mr. Fairgrieve, Global, and the Attorney General, to determine whether public access to the disposition reasons should be restricted. In his submissions, Mr. Fairgrieve argued that the Review Board should redact its disposition reasons, to prevent public disclosure of certain personal information, including what he characterized as private medical information, within the reasons.

[3] The Review Board ultimately held that it did not have authority to make redactions to its disposition reasons, because the governing provisions of the *Criminal Code* did not expressly confer any such authority. The Review Board went on to hold, in the alternative, that even if it did have statutory authority to make redactions to its disposition reasons, there was no sound basis for any redactions in Mr. Fairgrieve's case.

[4] In this application for prerogative relief, Mr. Fairgrieve contends that the Review Board breached the principles of procedural fairness by failing to alert him to its concerns about jurisdiction, thereby depriving him of the opportunity to argue the point. Mr. Fairgrieve further contends that the Review Board erred in determining that it lacked authority under the relevant provisions of the *Criminal Code* to make redactions to its disposition reasons. Finally, Mr. Fairgrieve argues that the Review

Board committed a further reviewable error in proceeding to consider whether there was a basis for making redactions in this case, after determining that it lacked the jurisdiction to do so in the first place.

**The Scope of the Record**

[5] As a preliminary matter, I must address the scope of the record on this judicial review. On the one hand, counsel for the Review Board asserts that the record should be limited to the written reasons, together with the record of materials that the parties placed before the tribunal. On the other hand, Mr. Fairgrieve and Global invite the Court to consider a broader range of materials, documenting the full history of proceedings before the Review Board in connection with the issue of public access to the disposition reasons.

[6] Under s. 1 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] the term "record of proceedings" is defined to include: (a) a document by which the proceeding is commenced, (b) a notice of hearing in the proceeding, (c) an intermediate order made by the tribunal, (d) a document produced in evidence at a hearing before the tribunal, subject to certain limits, (e) a transcript, if any, of the oral evidence given at a hearing, and (f) the decision of the tribunal along with any reasons for the decision. The statutory definition is not exhaustive, nor is it strictly speaking applicable given my conclusion below that this matter is criminal and not civil in nature.[1] Despite this, I find the *JRPA* definition of the term "record of proceedings" to be a useful starting point in considering the scope of the record.

[7] It has been recognized that in judicial review proceedings, the reviewing court need not limit its assessment to the "narrow traditional concept" of what constitutes the "record". The reviewing court may take into account "the material that was considered by the tribunal, whether or not that material would, historically, have been considered part of the tribunal's 'record' ": *Air Canada v. British Columbia*

[1] In this particular case, for reasons stated at para. 69 to 77 below, I have concluded that this is not a civil proceeding for judicial review under the *JRPA*, but rather a criminal proceeding for prerogative relief under Part XXVI of the *Criminal Code*.

*(Workers Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 35. The important point to keep in mind is that the reviewing court must remain focused on "what went on before the tribunal", rather than embarking upon a "fresh examination of the substantive issues", and for this reason, the court generally ought not to stray beyond the tribunal's decision and the material that was placed before the tribunal for consideration in rendering its decision: *Air Canada* at para. 34.

[8] In exceptional cases, the record may be expanded to include additional material that is "relevant and necessary in the context of the grounds of review": *Fets Fine Foods Ltd. v. British Columbia (Liquor and Cannabis Regulation Branch)*, 2021 BCSC 1256 at para. 24. One such exception is engaged where extrinsic material is placed before the reviewing court to raise or respond to an issue of "natural justice" or "procedural fairness" that cannot be resolved on the record that was before the tribunal: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at para. 25; *Stein v. British Columbia (Human Rights Tribunal)*, 2020 BCSC 70 at para. 48.

[9] Applying these principles, I conclude that the record on the review in this case should include the entire history of proceedings relating to the question of public access to the Review Board's disposition reasons. This conclusion is the product of two somewhat interrelated points.

[10] First, while some of the material cited by Mr. Fairgrieve and Global goes beyond what the Review Board considered or acted upon in reaching the decision which is now under review, the tribunal was certainly aware of the procedural history that preceded its decision. Thus, the entire procedural history pertaining to the issue of publication was before the Review Board in a broader sense, even if some of the material relating to that procedural history does not qualify as part of the "record of proceedings" as defined in s. 2 of the *JRPA*.

[11] Second, Mr. Fairgrieve has raised issues of procedural fairness relating to the manner in which the issue of public access to the disposition reasons was argued before and determined by the Review Board. Thus, even if some of the material relating to the procedural history does not qualify as part of the "record" in the

conventional sense, I consider it necessary to consult that material in order to assess Mr. Fairgrieve's procedural fairness argument. In this context, the history of the proceedings is important to an assessment of "what went on before the tribunal", within the confines of the Court's judicial review function.



## Facts and Procedural History

### (i) Criminal Proceedings Against Mr. Fairgrieve

[12] On 9 August 2019, Mr. Fairgrieve was charged with second degree murder contrary to s. 235(1) of the *Criminal Code*.

[13] On 28 January 2020, in the course of the criminal proceedings on the murder charge, Mr. Fairgrieve was found unfit to stand trial under s. 672.45 of the *Criminal Code*. It is unclear from the record before me whether the finding was made by a Judge of the Provincial Court or a Justice of the Supreme Court,[2] although that detail is not particularly germane for the purposes of the proceeding before me. The Court referred Mr. Fairgrieve's matter to the Review Board for a disposition hearing.

### (ii) Disposition Hearing Under Part XX.1 of the *Criminal Code*

[14] On 11 March 2020, following a hearing under s. 672.47(1) of the *Criminal Code*, a three-member panel of the Review Board determined that Mr. Fairgrieve "remains unfit to stand trial", and ordered that he be held in custody at a forensic psychiatric institute for a period of 12 months, pending further review. The panel gave written reasons explaining its disposition ("Disposition Reasons"), and also issued an order ("Disposition Order") setting out a number of conditions governing Mr. Fairgrieve's remand.

[15] The Disposition Order stated, erroneously, that the Review Board proceedings were subject to a publication ban under s. 517 of the *Criminal Code*, which provides for publication bans in respect of bail proceedings under Part XVI of

[2] The Review Board's Disposition Reasons dated 11 March 2020 state (at para. 24) that Mr. Fairgrieve was found unfit to stand trial by the Provincial Court of British Columbia on 29 January 2020. The Review Board's Disposition Order, also dated 11 March 2020, states that Mr. Fairgrieve was found unfit to stand trial by the Supreme Court of British Columbia on 28 January 2020.

the *Criminal Code*. This provision has no application to mental disorder proceedings conducted by the Review Board under Part XX.1 of the *Criminal Code*.

### (iii) Global's Request for Access to the Disposition Reasons and Disposition Order

[16] On 6 July 2020, Global made a request to the Review Board for access to the Disposition Order and the Disposition Reasons. The Review Board then solicited written correspondence from the interested parties, that is, from Mr. Fairgrieve, the Attorney General, and Global.

[17] On 25 January 2021, the remaining two members of the Review Board panel submitted a memorandum to the Acting Chairperson of the Review Board regarding the publication ban issue. (The third member of the panel had since retired.)

[18] The memorandum is included within the record before me. In it, the two panel members reviewed the positions of the parties, the text of s. 517 of the *Criminal Code*, and the case law interpreting it. They concluded that the reference to s. 517 of the *Criminal Code* on the Disposition Order "did not imply a legal finding" by the panel that the ban restricted publication of the Disposition Reasons.

[19] The memorandum went on to address the remaining arguments, as follows:

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

> basis of our original order, these remaining issues are appropriately returned to you.

### (iv) Chairperson's Decision on Media Request for Access to Disposition Reasons

[20] On 23 February 2021, the Chairperson of the Review Board issued a written decision regarding Global's continuing request for access to the Disposition Reasons. In that decision, the Chairperson identified three issues raised by Global's request, which I would paraphrase as: (a) whether the Review Board panel intended that the publication ban under s. 517 of the *Criminal Code* (which, again, pertains to judicial interim release, not mental disorder proceedings) was to apply to its reasons; (b) whether the Review Board should refuse disclosure of the Disposition Reasons because, "as a matter of law", they constitute or include "disposition information" that meets the test for non-disclosure under s. 672.51(7) of the *Criminal Code*; and (c) whether the Review Board should issue a publication ban, or refuse disclosure of the Disposition Reasons to Global "based on the '*Dagenais/Mentuck* test' " as discussed in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41. The Chairperson noted that the Review Board panel had already answered "no" to question (a), leaving for the Chairperson's consideration questions (b) and (c).

[21] In her subsequent analysis of the issues, the Chairperson reasoned that "Courts and Review Boards are the custodians of their own records", and as such they have "implicit authority and discretion to decide whether to release their records to third parties". The Chairperson further reasoned that "Review Board hearings, like court hearings, are presumptively open". The Chairperson noted that "the Ontario Review Board regularly posts fitness decisions on Quicklaw, and judicial fitness decisions are also publicly posted on CanLII and court websites", citing *R. v. Kampos*, 2020 BCSC 1437, as an example. From this starting point, the Chairperson reasoned that past practice tended to support the view that "any decision not to disclose will be highly contextual, and must be based on evidence that disclosure of a particular set of reasons would create a 'real concern' ", citing *R. v. Budai*, 2000 BCCA 266, at para. 34.

[22] The Chairperson then turned her analysis to the statutory provisions governing disposition decisions, observing that under Part XX.1 of the *Criminal Code*, "disposition information" cannot be disclosed to third parties where (i) disclosure would be prejudicial to the accused, and (ii) the protection of the accused takes precedence over the public interest. This was, in essence, a paraphrase of s. 672.51(7)(b) of the *Criminal Code*, which gives the Review Board the authority to withhold disclosure of "disposition information" to anyone other than the Attorney General or the accused, where the two criteria just reviewed are satisfied.

[23] The Chairperson reasoned that if the Disposition Reasons fall within the meaning of the phrase "disposition information" in s. 672.51, then access to them would be limited by the statute. Alternatively, if the Disposition Reasons do not constitute "disposition information", then then any restrictions on public access to the reasons would be governed by the *Dagenais/Mentuck* test, as summarized in *Toronto Star*. On this basis, the Chairperson reasoned that while the statutory test for denial of access and the common law *Dagenais/Mentuck* test were "not precisely the same", there was considerable overlap between them. The Chairperson determined that since the analysis in the two frameworks was similar, it was unnecessary to make a definitive finding on whether the Disposition Reasons constituted "disposition information" within the meaning of s. 672.51.

[24] The Chairperson next considered whether there was any basis for non-disclosure of portions of the Disposition Reasons in Mr. Fairgrieve's case. The Chairperson considered the possible tension between public openness in respect of fitness proceedings under Part XX.1 of the *Criminal Code* on the one hand, and the potential prejudice to the accused on the other hand. With regard to the accused's interests, the Chairperson's analysis was focused on whether release of the Disposition Reasons would threaten the accused's right to a fair trial.

[25] The Chairperson noted that in the present matter, the parties advanced general propositions regarding the publication of information about Mr. Fairgrieve's fitness disposition before any trial had taken place. None of the parties presented

any case-specific arguments about how access to the Disposition Reasons in Mr. Fairgrieve's case would or could impact on the fairness of his trial. As the Chairperson explained:

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

[26] The Chairperson then carefully assessed each portion of the Disposition Reasons and concluded that nothing in them would, if released to the public, imperil Mr. Fairgrieve's fair trial rights.

[27] The Chairperson went on to consider whether there was any basis for withholding access to the Disposition Order. The Chairperson determined that public access to the terms of the order would not pose a threat to Mr. Fairgrieve's fair trial interests, but further held that the names of the individuals whom Mr. Fairgrieve was not to contact should be redacted to protect their privacy rights as third parties. The Chairperson cited *R. v. Panghali*, 2011 BCSC 422, at para. 22 in support of the proposition that as an adjudicative body that is the "custodian of its own records" the Review Board had the power to withhold material to "protect the interests of vulnerable individuals".

[28] In the result, the Chairperson ordered release of the Disposition Reasons and Disposition Order, subject only to the redaction of the names of third parties listed in the no-contact order. The Chairperson also stayed the operation of her decision for a period of time to permit a judicial review.

[29] In a postscript to the decision, the Chairperson noted that she was declining to rule on the alternative submissions of one of the parties that even if the Disposition Reasons and Disposition Order were released, the Review Board had the "implied power" to impose a publication ban, as a less intrusive means of remedying any concern about public access to the Disposition Reasons.

### (v) Judicial Review of the Chairperson's Initial Decision

[30] Mr. Fairgrieve applied to this Court for an order of *certiorari* to set aside the Chairperson's decision on the basis that the issue of public access to the Disposition Reasons and Disposition Order could only be determined by a properly-constituted panel of the Review Board. On 13 May 2021, by consent of all parties, Justice Davies granted Mr. Fairgrieve's application, set aside the Chairperson's decision, and remitted the matter to the Review Board.

### (vi) Review Board Panel Convened to Consider Restrictions on Access

[31] On 20 May 2021, counsel for Mr. Fairgrieve wrote to the Registrar of the Review Board, requesting that a panel be convened "to consider s. 672.51(7) of the *Criminal Code*", in the context of the media request for "disposition information". Mr. Fairgrieve sought restrictions on the disclosure of certain "disposition information". Counsel's position was basically that the Dispositions Reasons contained "disposition information" and that the Review Board had an obligation to consider whether restrictions on access to that information was justified under s. 652.51(7), based on concerns about Mr. Fairgrieve's privacy and fair trial interests.

[32] On 1 June 2021, the Registrar replied to Mr. Fairgrieve's letter, enclosing a copy of Global's original requests for access to the Disposition Reasons. The Registrar's letter expressly made "no comment" as to whether Global's requests pertained to "disposition information".

[33] On 8 June 2021, counsel for Global wrote to the Registrar, setting out Global's position in response to Mr. Fairgrieve's request for a hearing to address potential restrictions on access to the Disposition Reasons. Global asserted that the onus was on Mr. Fairgrieve to satisfy the Review Board that restrictions on access to the Disposition Reasons and Disposition Order were necessary to prevent a serious risk to the administration of justice, that reasonable alternative measures would not address the risk, and that the salutary benefits of any restriction on access outweighed their deleterious effects. This was, in effect, an appeal to the tribunal to

apply the most recent formulation of the *Dagenais/Mentuck* test, that is, the common law test setting out the parameters of the open courts principle.

[34] Thus, the Registrar of the Review Board was dealing with duelling requests regarding the status of the Disposition Reasons and the Disposition Orders. To some extent, the parties appeared to be at cross-purposes as to the proper analytical framework. On the one hand, Mr. Fairgrieve appeared to be taking the position that the Disposition Reasons constituted or contained "disposition information", access to which was regulated under s. 672.51 of the *Criminal Code*. On the other hand, Global appeared to be taking the position that the open courts principle applied to the Review Board's disposition in the case of Mr. Fairgrieve, such that any potential restriction on access to the Disposition Reasons had to be assessed under *Dagenais/Mentuck* test.

[35] On 10 June 2021, the Registrar wrote to Mr. Fairgrieve's counsel advising that the Chairperson of the Review Board convened a panel to consider Mr. Fairgrieve's request to restrict public disclosure of the Disposition Reasons and the Disposition Order. The Registrar's letter went on to set out the process by which the panel would consider the positions of the parties, based on written submissions on a specified timeline, leaving open the possibility of an oral hearing. The Registrar's letter stated that the submissions should set out "the precise relief sought, the grounds for such relief and the Board's authority to grant the relief sought" [emphasis added].

**(vii) Written Submissions to the Panel**

[36] Mr. Fairgrieve's subsequent written submissions dated 2 July 2021 included a section entitled "Authority for BCRB to Restrict Disclosure". Counsel appeared to rely exclusively on the Review Board's authority to regulate access to "disposition information" under s. 672.51. In my view, this submission was risky in that it depended entirely on the argument that the Disposition Reasons either constituted or contained "disposition information" within the meaning of s. 672.51(1). Mr. Fairgrieve's submission did not address whether the Review Board had any

other authority to restrict access to Disposition Reasons. More specifically, counsel did not advance any alternative argument that, even if the Disposition Reasons did not constitute or include "disposition information", the tribunal had the power to restrict access to the Disposition Reasons as part of its authority to control its own process.

[37] Moving beyond the issue of the Review Board's authority, counsel argued that at a substantive level, the Disposition Reasons ought to be redacted to protect Mr. Fairgrieve's fair trial and privacy interests. Counsel enclosed an appendix setting out proposed redactions. Counsel took the position that his proposed edits were warranted under s. 672.51(7) and the *Dagenais/Mentuck* test.

[38] In its written submissions dated 16 July 2021, Global argued, among other things, that the Review Board had "no authority" to order a publication ban. As Mr. Fairgrieve had done, Global focused its submissions on the Review Board's authority to withhold "disposition information" under s. 672.51 of the *Criminal Code*. Counsel argued that the Disposition Reasons did not constitute or contain "disposition information", such that the Review Board had no authority to restrict access to them. While the statute specified a means for the Review Board to restrict access to "disposition information", Parliament did not provide for any similar means for the Review Board to restrict access to its disposition reasons. As counsel put it, all exercises of authority by a statutorily constituted administrative tribunal must "find their source in law". This argument was explicitly framed as a question of jurisdiction. Counsel submitted that it was "not open to the Review Board to 'read-in' statutory authority that would not only dramatically increase its jurisdiction, but also have the deleterious effect of limiting freedom of expression and freedom of the press in contravention of s. 2(b) of the *Charter*".

[39] Global did not address the question of whether the Review Board had the power to restrict access to information as part of its authority to control its own process. Further, notwithstanding its position on the limitations of the Review

Board's jurisdiction, Global conceded that the tribunal had the authority to withhold the names of the third parties in the no contact term in the Disposition Order.

[40] Global went on to argue that in the alternative, if the Review Board did have authority to restrict access to the Disposition Reasons, Mr. Fairgrieve failed to discharge his onus by demonstrating that the redactions he sought were justified under the recently re-stated test for limiting "court openness" as set out in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38. According to Global, Mr. Fairgrieve failed to articulate how the release of any information in the Disposition Reasons would impair his fair trial rights. Counsel further submitted that the Disposition Reasons did not include any private information that had not otherwise been made public in the criminal proceedings against Mr. Fairgrieve, or was otherwise so sensitive that its disclosure would be an affront to Mr. Fairgrieve's dignity.

[41] In reply submissions dated 23 June 2021, counsel for Mr. Fairgrieve responded to Global's argument about the limited jurisdiction of the Review Board by once again repeating the position that the Disposition Reasons fell within the statutory definition of "disposition reasons" in s. 672.51(1). Counsel further stated that any "presumption of openness" governing Review Board proceedings "must be assessed in this specific context by reference to the language in s. 672.51(7)(b), which elevates protection of an accused person's interests over public interest in disclosure". Mr. Fairgrieve's reply went on to advance further submissions on interpretation of the phrase "disposition information" in s. 672.51, and on the importance and significance of Mr. Fairgrieve's privacy interests in "medical information" referenced in the Disposition Reasons.

### (viii) Review Board's Decision on Access to the Disposition and Disposition Reasons

[42] The Review Board panel was content to rely on the written submissions of the parties, and declined to order an oral hearing. The panel issued its decision on the issue of public access to the Disposition Reasons on 3 December 2021. For reasons explained in more detail below, the panel concluded, first, that it did not have the

statutory authority to make redactions to its Disposition Reasons, and second, that even if it did have such authority, no basis had been shown for redaction of the reasons in Mr. Fairgrieve's case. The panel held that, by consent of all parties, the names of third parties in the "no contact" term of the Disposition Order should be redacted. The panel further held that the Disposition Reasons were not to be released for a period of 21 days from the date of its decision, to allow for any potential judicial review.



**Overview of the Review Board Panel's Reasons**

[43] The Review Board panel's written reasons dealing with the question of public access to the Disposition Reasons and Disposition Order in Mr. Fairgrieve's case are some 27 pages in length. The panel began the reasons with a brief introduction, followed by a review of the procedural history of the dispute over public access to the Disposition Reasons.

[44] Critically, the panel then delineated the issue for determination. The overarching issue was whether to grant Mr. Fairgrieve's request for redaction of the Disposition Reasons and Disposition Order prior to their public release. This in turn raised two sub-issues, namely (i) whether the review board had "the power to make such redactions", and (ii) whether Mr. Fairgrieve "satisfied the test that he says applies", which was the statutory threshold for withholding disclosure of "disposition information" in s. 673.51(7) of the *Criminal Code*.

[45] The reasons then continued with a summary of the statutory scheme, followed by a heading entitled "Public Access to Board Hearings, Dispositions and Reasons", under which the panel made two points. First, the panel explained that tribunal hearings are presumptively public, citing s. 652.2(6), *Oshawa This Week v. Ontario (Review Board)*, 2002 CanLII 42918 (ONSC) and *Blackman v. British Columbia (Review Board)*, (1995), 95 C.C.C. (3d) 412 (B.C.C.A.). Second, the panel went on to state, "it is the policy of the Board that its dispositions and reasons are presumptively public", and "nothing in the *Code* suggests otherwise". The panel cited s. 672.501, which addresses orders for non-publication of information that could

identify a victim or witness, as an exception to the general rule in favour of public access to its disposition reasons and disposition orders.

[46] The panel then set out the positions of the parties, which I have summarized above and will not repeat.

[47] The panel began its legal analysis with a sub-heading entitled, “Jurisdiction”. The panel noted that “[n]o party has identified any possible source of jurisdiction for Mr. Fairgrieve’s requested redactions other than s. 672.51(7) of the *Code*”. The panel concluded its jurisdictional analysis by stating that the Review Board “is a creature of statute and its powers are limited to those conferred upon it by statute, in this case the *Code*”.

[48] The panel then turned its attention to the issue of statutory interpretation. The crux of the panel’s interpretive exercise was focused on the question of whether the definition of “disposition information” in s. 672.51(1) could authorize restrictions on public access to information set out in the Disposition Reasons. Relying on the text of the statutory definition, the panel concluded that the Disposition Reasons and Disposition Order were not “disposition information”, but rather the “*product* of the Board’s deliberations” [italics in original].

[49] Having determined that the Disposition Reasons and Disposition Order were not “disposition information”, the panel went on to consider the status of such information when it was later “reproduced or described in the Board’s reasons”. The panel reasoned that “[t]he answer to this 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”. On my review of the reasons, the panel considered five points leading to its conclusion that s. 672.51(7) of the *Criminal Code* “does not confer upon the Board the authority to make the redactions” to the Disposition Reasons sought by Mr. Fairgrieve.

[50] First, the panel found it notable that s. 672.51(7) makes no reference to disposition reasons. This was significant to the panel, since the Review Board would

be expected to make extensive reference to assessment reports and other material falling within the definition of “disposition information” in its reasons for disposition, which would often or “typically be necessary to explain the basis for the fitness decision and disposition”.

[51] Second, the panel observed that while there are many other provisions in the *Criminal Code* providing for publication bans, there is no statutory authority for a ban on publication of disposition reasons issued under Part XX.1. Thus, the panel reasoned that, “where Parliament has concluded that *reasons* can be subject to a publication ban it has expressly said so” [italics in original].

[52] Third, the panel pointed out that s. 672.51(7) applies not just to the Review Board, but also to the courts. In this regard, the panel was alluding to the fact courts and Review Boards have concurrent jurisdiction over disposition hearings under Part XX.1 of the *Criminal Code*. The panel reasoned that, “The court is not in the habit of redacting reasons for judgment, and doing so would be at odds with the open courts principle”. The panel cited a collection of both review board decisions and court decisions making reference to “the kinds of information that Mr. Fairgrieve seeks to have redacted” in this case.

[53] Fourth, the panel noted that the definition of “disposition information” was focused on “written information”. It did not apply to oral evidence given at disposition hearings, which are presumptively open to the public, absent an exclusion order. The panel reasoned that s. 671.51(7) contemplates limitations on disclosure of or access to “documents”, not witness testimony. The panel cited the Review Board’s statutory obligation under s. 671.52(1) to keep a record of its proceedings. The panel reasoned that “[j]ust as a court file is open to the public, the Board’s record of proceedings is publicly accessible, subject to statutory limits”. One such limit is s. 671.51(7), which provides the Review Board to restrict access to “disposition information”. Thus, in the panel’s view, one of the likely purposes of s. 671.51(7) is to distinguish the parts of the Review Board’s record of proceedings that are

accessible to the public (including disposition reasons) from those parts that will sometimes not be accessible (disposition information).

[54] Fifth and finally, the panel considered the "functional role of the Review Board", namely to decide whether a person accused of a crime is fit to stand trial, and to decide upon dispositions for accused persons who are unfit to stand trial or not criminally responsible by reason of mental disorder. When giving such decisions, the Review Board must consider the evidence, and must "justify its decision on the basis of that evidence". In this context, it is to be expected that the Review Board will extensively reference the evidence – including assessment reports, which constitute "disposition information" – in the disposition reasons. In the panel's view, it is in the public interest that the Review Board's decisions be "justified" by reference to the evidence. Absent reasons explaining, by reference to the 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 it were intended that the Review Board could redact its decisions to "obscure from public view the evidence relied upon by the Board", then Parliament "would have said so directly".

[55] The panel went on to consider Mr. Fairgrieve's reliance on the *Oshawa* decision. In *Oshawa*, the Ontario Review Board was dealing with an annual review of an accused's treatment status following a finding of not criminally responsible by reason of mental disorder. At the commencement of the proceedings, the Crown, the accused, and the treating psychiatric institution jointly requested to proceed *in camera*, to protect the details of an ongoing investigation. The Review Board acceded to the request, issuing an order that the hearing was to proceed *in camera* pursuant to s. 672.5(6), that dissemination of "disposition information" was prohibited under s. 672.51(7), and that publication of any such information was banned under s. 672.51(11): *Oshawa* at para. 5.

[56] On an application for prerogative relief, the Ontario Superior Court of Justice set aside the Review Board's order. The Court held that the stated justification for the order was not to withhold information for the treatment needs of the accused, but

rather to protect the integrity of the ongoing investigation, and to safeguard the accused's fair trial interests in relation to any potential future charges: *Oshawa* at paras. 11, 20-21. In stating the issue before the Court, Weekes J. proceeded on the footing that restrictions on public access to protect such interests could only be justified where the requirements of the *Dagenais/Mentuck* test were satisfied: *Oshawa* at para. 7.

[57] The Court accepted that the objective of protecting the ongoing investigation was of sufficient importance to justify at least some limitations on public access: *Oshawa* at paras. 12-24. However, the Court concluded that a reasonable and "less draconian" alternative would have been to (i) exclude the public under s. 672.5(6) from the portion of the hearing relating to the ongoing investigation, and (ii) withhold disclosure under s. 672.51(7) of that portion of the "disposition information" relating to the ongoing investigation. This, in turn, would result in an "automatic ban on the publication on that part of the disposition information" relating to the ongoing investigation, under s. 672.51(11). This "less intrusive approach" was found to balance the public right to know what transpired at the hearing with the legitimate need to protect the integrity of the ongoing investigation: *Oshawa* at para. 25-30. The Court went on to hold that it would be necessary to edit the Review Board's disposition reasons before they could be released to the public: *Oshawa* at para. 41.

[58] In Mr. Fairgrieve's case, the panel found *Oshawa* to be "of little assistance", since the Court did not squarely address "whether the Review Board had the power to redact its reasons before issuing them", nor did the Court discuss its authority to order editing of the Review Board's reasons for disposition.

[59] The panel concluded that s. 672.51(7) did not confer any jurisdiction to redact or edit its disposition reasons. Nonetheless, the panel went on to consider in the alternative whether Mr. Fairgrieve had established a basis for making redactions to the Disposition Reasons in his case. In doing so, the panel considered the statutory criteria for withholding "disposition information" under s. 672.51(7), and the parameters of the open courts principle as stated most recently in *Sherman Estate*.

[60] Under the heading “Prejudice Alleged by Mr. Fairgrieve”, the panel considered whether disclosure of the details Mr. Fairgrieve sought to redact from the Disposition Reasons would be “seriously prejudicial” to his interests as contemplated in s. 672.51(7)(b). In the panel’s view, Parliament’s use of the modifier “seriously” in the text of the provision “signifies that any prejudice must be significant”. After observing that information about an accused person’s medical and psychiatric state, behaviours, and history is commonly included in reasons for disposition issued by Review Boards across the country, the panel found it unlikely that Parliament intended such information to be routinely shielded from public view. Thus, the mere inclusion of personal information – including information about the accused’s medical conditions, psychiatric and behaviour characteristics, or potential risk to the public – in the Review Board’s reasons for disposition would not necessarily qualify as “seriously prejudicial” within the meaning of the statute.

[61] The panel first addressed Mr. Fairgrieve’s fair trial interests. The panel determined that Mr. Fairgrieve’s “general allegation” that disclosure of information in relation to his mental state “may have” an impact on his credibility or ability to mount a defence was too vague to satisfy the burden of establishing “serious prejudice”.

[62] The panel then turned to Mr. Fairgrieve’s privacy interests. The panel was not convinced by Mr. Fairgrieve’s “broad brush” argument that disclosure of any information about his personal circumstances or his medical or psychological background was “seriously prejudicial” to his privacy interests. The panel repeated its observation that private information is routinely included in disposition reasons. The panel was not satisfied that the release of any of the details that Mr. Fairgrieve proposed to redact would be seriously prejudicial to his privacy interests.

[63] Finally, under the heading “Balancing Mr. Fairgrieve’s Interests and the Public Interest”, the panel considered whether the accused’s stated interests in non-disclosure took precedence over the interest in public access to all relevant information as contemplated in s. 672.51(7)(b). In the panel’s view, the public has a significant interest in knowing the basis on which the Review Board exercises its

jurisdiction in deciding on issues of fitness, and on dispositions in relation to accused persons who are found to be unfit or not criminally responsible by reason of mental disorder. The panel emphasized that what was in issue was not public access to the raw assessment reports or medical documents, but rather public access to the disposition reasons themselves. As the panel put it, "[t]he public interest in knowing how courts and tribunals reach their decisions is high".

[64] The panel went on to consider the Supreme Court of Canada's most recent guidance on the open courts principle in *Sherman Estate*. The panel reviewed a number of legal propositions emerging from the majority judgment, including the strong presumption of openness (para. 39), the majority's re-statement of the three-part test for departing from the general rule of openness (para. 38), the responsibility of the courts to protect "dignity" arising from disclosure of "highly sensitive" information that would reveal "intimate or personal details" striking at an individual's "biographical core" (paras. 75, 79), the need to establish a "serious risk" to such interests (paras. 62, 76), and the need to consider the extent to which the information in issue is or is not already in the public domain (paras. 81-82).

[65] The panel then brought these principles to bear on its consideration of whether redaction of the Disposition Reasons was warranted under s. 672.51(7). The panel identified five propositions relevant to the balancing in s. 672.51(7)(b), which I would summarize as follows: (a) there is a strong presumption of openness, but "Parliament can modify this presumption, and the extent to which it has done so by enacting s. 672.51(7) must be considered"; (b) the protection of the accused's "dignity" is a relevant factor in balancing the accused's privacy interests and the public interest in disclosure of the Disposition Reasons; (c) the availability of reasonable alternative measures is another relevant consideration in determining whether disclosure should be withheld; (d) the fact that certain information is already in the public domain militates against any restriction on public access to the Disposition Reasons, although the panel could also not overlook the concern that further disclosures could exacerbate the negative impact on an accused's privacy;

and (e) the balancing process must also take into account the extent to which the information sought to be withheld is “central” or “peripheral” to the “judicial process”.

[66] The panel went on to consider both the privacy interests and the fair trial interests asserted by Mr. Fairgrieve.

[67] With regard to Mr. Fairgrieve’s privacy interests, the panel identified 14 separate subject matters within the Disposition Reasons (subparagraphs (a) through (n)) that Mr. Fairgrieve sought to redact. The panel noted that such matters are “routinely” included within the Review Board’s reasons for disposition. Certain aspects of Mr. Fairgrieve’s medical condition were already in the public domain, and much of the information that Mr. Fairgrieve sought to redact from the Disposition Reasons came out in testimony during the disposition hearing, which was open to the public because Mr. Fairgrieve never applied to restrict public access to the hearing. Although some of the information Mr. Fairgrieve sought to redact was not yet public and “could be described as intimate and private”, the “vast majority” of the information in the Disposition Reasons did not reflect upon Mr. Fairgrieve’s dignity interests as contemplated in *Sherman Estate*. The panel accepted that “limited pieces of information” arguably rose to that level, but concluded that the public interest in disclosure of the Disposition Reasons outweighed Mr. Fairgrieve’s privacy interest in relation to those details. The panel was unable to identify any reasonable alternative measures that would both (i) protect Mr. Fairgrieve’s privacy interests, and (ii) provide the public with access to the panel’s reasoning process in reaching a disposition in Mr. Fairgrieve’s case. The panel noted the seriousness of the charges, the public interest in the case, and the fact that much of the information Mr. Fairgrieve sought to redact was, in its totality, central to the panel’s reasoning process in deciding what disposition to impose in Mr. Fairgrieve’s case.

[68] The panel went on to consider and reject Mr. Fairgrieve’s argument about the impact of disclosure on his fair trial interests, finding that Mr. Fairgrieve’s concerns were “ill-defined and speculative”. The panel observed that jurors can be expected to honour their oath to decide cases based on the evidence presented at trial, and the

availability of challenge for cause procedures and jury instructions as a means of further protecting the fairness of the trial process. Furthermore, the likely gap between the release of its Disposition Reasons and any subsequent jury trial would also reduce the risk of any trial unfairness. The panel cited the concurring reasons of Mr. Justice Cory in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, for the proposition that "the vast majority of criminal trials can proceed fairly even in the face of a great deal of publicity". On balance, the panel concluded that Mr. Fairgrieve's concern about fair trial interests did not take precedence over the important public interest in unrestricted access to the Disposition Reasons.



## Analysis

### Nature of the Proceedings

[69] It is necessary at the outset to address the nature of the proceedings, and in particular whether this matter is civil or criminal in nature. If it is a civil matter, it is governed by the *JRPA* and the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Civil Rules*]. By contrast, if the matter is criminal in nature, it is governed by the *Criminal Code* and the *Supreme Court Criminal Rules*, SI/97-140 [*Criminal Rules*].

[70] The distinction can have important implications, both procedurally and substantively. At the procedural level, the distinction between a civil judicial review proceeding under the *JRPA* and a proceeding for prerogative relief under the *Criminal Code* could have a bearing on the proper identification of the parties and their right to participate in the process. At the substantive level, the scope of review and remedial orders on a judicial review under the *JRPA* is potentially broader than the scope of review and relief available on an application for prerogative relief under the *Criminal Code*.

[71] Mr. Fairgrieve's notice of application relies on Part XXVI of the *Criminal Code*, the *Criminal Rules*, and the inherent jurisdiction of the Court. In it, he seeks an order of *certiorari*, quashing the panel's decision and remitting the matter for reconsideration. On this basis it would seem that Mr. Fairgrieve conceives of his

application as a criminal matter. Despite this, counsel for the Review Board submits that the proceedings in this matter are civil in nature. In support of this position, counsel cites s. 672.38 of the *Criminal Code*, which provides that the Review Board is to be treated as having been established under the laws of the province. Counsel also refers to the Review Board's obligation under s. 672.52 to keep its own record of its proceedings, separate from that of the criminal court.

[72] Counsel did not cite any prior court decisions holding that applications for judicial review or prerogative relief from Review Board proceedings are civil rather than criminal in nature. Nor did counsel cite any case law discussing the manner in which courts determine whether a particular matter is criminal or civil in nature.

[73] My own review of the case law indicates that there are many cases in which applications for prerogative relief in respect of Review Board proceedings have been treated as criminal or quasi-criminal proceedings. See, for example, *Woods (Re)*, 2021 ONCA 190 at para. 36; *R. v. Carlyle*, 2019 YKSC 38 at paras. 34-39; *R. v. Ontario (Review Board)*, 2009 ONCA 16 at para. 57.

[74] Approaching the issue more broadly, the question of whether a prerogative relief proceeding is criminal or civil in nature will depend on the nature of the underlying order or subject matter: *Vukelich v. Mission Institution*, 2005 BCCA 75 at para. 32, citing *In Re Storgoff*, [1945] S.C.R. 526. The nature of the proceedings is not dependant upon the moving party's selection of the form of pleadings, but rather on the substantive character of the underlying subject matter as either civil or criminal: *British Columbia (Police Complaint Commissioner) v. The Abbotsford Police Department*, 2015 BCCA 523 at paras. 55, 57.

[75] Applying that reasoning in the case at bar, I find that this proceeding is criminal and not civil in nature. Although the Review Board is established under the laws of the province, it is a creature of federal statute, under a regime which is in pith and substance criminal law under s. 97(27) of the *Constitution Act, 1867*: *R. v. Demers*, 2004 SCC 46 at paras. 22-27. The Review Board plays an essential role in Part XX.1 of the *Criminal Code*, which is a comprehensive legislative scheme

focused on the “twin goals of protecting the public and treating the mentally ill accused fairly and appropriately”: *Demers* at para. 18.

[76] Where a “comprehensive procedure is prescribed by the legislative body having jurisdiction over the matter”, allowing an “admixture of civil procedure with criminal procedure” could result in an “unpredictable mish-mash” of jurisprudence: *British Columbia (Police Complaint Commissioner)* at para. 59, citing *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at p. 79-80. In such circumstances, there is “no room” for the operation of a provincial law, or resort to judicial power relying on provincial law: *British Columbia (Police Complaint Commissioner)* at para. 68.

[77] I conclude that the Review Board panel’s decision on public access to its Disposition Reasons is in substance a matter of criminal law. This means Mr. Fairgrieve’s application for prerogative relief is governed by Part XXVI of the *Criminal Code*. I refer specifically to s. 744 of the *Criminal Code*, which appears immediately below the heading “Extraordinary Remedies”, and states that “[t]his Part applies to proceedings in criminal matters by way of *certiorari*, *habeas corpus*, *mandamus*, *procedendo*, and prohibition”.

**The Parties to the Proceeding**

[78] Rule 4(1)(b) of the *Criminal Rules* provides that notice of an application for prerogative relief must be served “on all persons who appear to be interested in or likely to be affected by the proceedings”, and on the Attorney General. Where a person who claims to be interested in or affected by the proceedings has not been served, that person can apply under Rule 4(1)(c) to “take part in the proceedings as though served”.

[79] In Mr. Fairgrieve’s case, he properly served his application on, among others, the Review Board, the Attorney General of British Columbia, and Global. Despite this, Global seeks clarification of its status in the proceedings. In my view, while not a party to the initial disposition hearing in Mr. Fairgrieve’s case, Global’s interest in the proceedings crystallized when it sought access to the Disposition Reasons, and was granted the opportunity to make submissions to the Review Board on that issue.

On that basis, I am satisfied that Global has an "interest in" or is otherwise "affected by" Mr. Fairgrieve's application for prerogative relief in respect of the Review Board panel's ruling on public access. Global is therefore entitled to participate as a respondent in these proceedings pursuant to Rule 4(1)(b) of the *Criminal Rules*. Neither the applicant Mr. Fairgrieve nor any of the other named respondents suggested otherwise during the hearing of this matter.



### Scope of Review for *Certiorari* Proceedings under the *Criminal Code*

[80] The scope of review on an application for *certiorari* in criminal proceedings is highly circumscribed. As explained in *R. v. Russell*, 2001 SCC 53 at para. 19:

> The scope of review on *certiorari* is very limited. While at certain times in its history the writ of *certiorari* afforded more extensive review, today *certiorari* "runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense": *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 99. Thus, review on *certiorari* does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather *certiorari* permits review "only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction": *Skogman*, *supra*, at p. 100 (citing *Forsythe v. The Queen*, [1980] 2 S.C.R. 268).

[81] More recently, in *R. v. Awashish*, 2018 SCC 45, the Court clarified that while *certiorari* is available to parties to a criminal proceeding only for jurisdictional errors, the scope of review available to third parties affected by the proceedings is somewhat broader. In particular, where an order in a criminal proceeding affects the interests of a third party in a manner that is "final and conclusive", the third party may seek relief by way of *certiorari* on the basis of either "jurisdictional error", or an error of law "on the face of the record": *Awashish* at para. 20. That expanded scope of review is of no benefit to Mr. Fairgrieve, one of the two principal parties to the Review Board proceedings.

[82] Perhaps most directly on point is *Woods (Re)*, where the Ontario Court of Appeal described the scope of review available to an accused in an application for *certiorari* in connection with Review Board proceedings as follows (at para. 36):

> *Certiorari* is an extraordinary remedy that derives from the supervisory jurisdiction of the Superior Court over a tribunal of limited jurisdiction. For parties in criminal or quasi-criminal proceedings, *certiorari* is available to address alleged jurisdictional errors; that is, when a court or tribunal either (a) fails to observe a mandatory provision of a statute, or [page491] (b) acts in breach of the principles of natural justice: *Bessette v. British Columbia (Attorney General)*, [2019] S.C.J. No. 31, 2019 SCC 31, at para. 23. The standard of review is correctness: *Ontario (Attorney General) v. Taylor* (2010), 98 O.R. (3d) 576, [2010] O.J. No. 207, 2010 ONCA 35, at para. 16.

**Merits of Mr. Fairgrieve's Prerogative Relief Application**

[83] Mr. Fairgrieve argues that the panel decision regarding public access to the Disposition Reasons and Disposition Order should be set aside on three separate grounds. First, Mr. Fairgrieve says the panel committed reviewable errors in its statutory interpretation of s. 672.51 of the *Criminal Code*, by effectively holding that the Review Board's authority to withhold "disposition information" did not apply to the Disposition Reasons. Second, Mr. Fairgrieve says the panel failed to observe the principles of procedural fairness, by deciding that it did not have jurisdiction to make redactions to the Disposition Reasons, without giving the parties an opportunity to be heard on the jurisdictional issue. Third, Mr. Fairgrieve says the panel erred in failing to observe the principle of restraint when, after concluding that it did not have jurisdiction to make redactions to the Disposition Reasons, the panel went on in the alternative to decide whether there was any basis for making the redactions sought.

[84] In my view, there is a somewhat uneasy relationship between the issues raised by Mr. Fairgrieve. He seeks to draw a bright line between the first issue (statutory interpretation), and the second issue (jurisdiction), when in reality, given the way in which the case was argued before the panel, these two issues were effectively two sides of the same coin.

[85] Mr. Fairgrieve's entire argument turned on his interpretation of s. 672.51. On the one hand, if Mr. Fairgrieve was correct that the Dispositions Reasons either constituted or included "disposition information", then the panel would have the authority under ss. 672.51(7) and (11) to make redactions in order to restrict public access to the Disposition Reasons. On the other hand, if Mr. Fairgrieve was

incorrect in his submissions regarding the scope and meaning of the term "disposition information", and considering that Mr. Fairgrieve did not cite any other basis in law for the remedy he sought, there was a genuine risk that the panel could conclude that it lacked the authority to make redactions.

[86] While Mr. Fairgrieve's written submissions made no explicit reference to the panel's "jurisdiction", his submissions did include an argument under the heading, "Authority for the BCRB to Restrict Disclosure".[3] The sole source of such authority cited in Mr. Fairgrieve's submission was the statutory power to restrict access to "disposition information" as contemplated in s. 672.51 of the *Criminal Code*. If the panel disagreed with Mr. Fairgrieve's approach and found that s. 672.51 did not provide any statutory "authority" to redact the Disposition Reasons, there was a risk that the panel could conclude that it lacked "jurisdiction" to make such redactions.

[87] In view of these concerns, I propose to deal with the issues as framed by Mr. Fairgrieve in a slightly different order. I will first address Mr. Fairgrieve's procedural fairness argument. I will then go on to consider what I would characterize as the substantive issue in this case, namely the soundness of the panel's decision on Mr. Fairgrieve's request for restrictions on public access to the Disposition Reasons. This will involve consideration of two sub-issues, namely (a) whether the panel had "authority" to redact its disposition reasons, and (b) whether the panel's conclusion that Mr. Fairgrieve failed to establish a basis for redacting the Disposition Reasons was sound.

**(1) Procedural Fairness**

[88] In *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para. 58, Justice Dickson stated quite succinctly that, "[t]he standard of review on questions of procedural fairness is correctness, sometimes referred to as 'fairness' ". The rationale for this approach is that the first instance decision maker's manner of proceeding in a particular case either complied

[3] Mr. Fairgrieve Submissions (2 July 2021), at p. 2, "Authority for the BCRB to Restrict Disclosure".

with the duty of fairness or it did not. The reviewing court therefore "owes no deference to the decision maker on procedural fairness issues".

[89] Moving on to the merits of Mr. Fairgrieve's procedural fairness argument, he says that "if the panel was concerned about the possibility that it did not have jurisdiction to redact its reasons", it had an obligation to solicit submissions on that issue from the parties. Mr. Fairgrieve says the panel's failure to do so was a breach of the principles of procedural fairness.

[90] A "key component" of the duty of procedural fairness is the requirement for the parties to be made aware the issues under consideration by the tribunal, in order to make submissions on those issues. This is a manifestation of the *audi alteram partem* principle, under which each party must be given a fair opportunity to be heard on material issues that could have a bearing upon the tribunal's decision: *Saskatchewan (Employment Standards) v. North Park Enterprises Inc.*, 2019 SKCA 69 at para. 16.

[91] Mr. Fairgrieve submits that the panel's failure to seek out submissions from the parties on the issue of "jurisdiction" was procedurally unfair, given "how the matter unfolded" over the preceding two years. According to Mr. Fairgrieve, the panel's representations to the parties prior to its final decision "assumed" that the panel had jurisdiction to make redactions to its Disposition Reasons. Mr. Fairgrieve says the focus of both the parties and the panel was not on whether the tribunal had the power to redact, but rather on whether any redactions should be made.

[92] Accepting Mr. Fairgrieve's invitation to consider the entire history of the proceedings before the Review Board with respect to the issue of restrictions on public access to the Disposition Reasons, I would summarize the key points emerging from the record as follows:

a) From the very outset, the Review Board had concerns about the existence and source of its authority to make redactions to its Disposition Reasons. The panel initially struggled with whether the publication ban under s. 517 of

the *Criminal Code* (governing Mr. Fairgrieve's judicial interim release) somehow extended to the panel's Disposition Reasons.

b) In their memorandum dated 25 January 2021, the two remaining members of the original panel identified three live issues, namely (i) whether the Disposition Reasons constituted or included "disposition information"; access to which could be restricted under s. 672.51(7); (ii) whether the Review Board had the "implicit power to order publication bans other than those provided for expressly in Part XX.1"; and (iii) if the *Dagenais/Mentuck* test applied, whether there was a basis on the facts of Mr. Fairgrieve's case for withholding public access to the Disposition Reasons. Thus, both the jurisdictional issue and the statutory interpretation issue were flagged in the panel's memorandum.

c) The Chairperson's subsequent decision, dated 23 February 2021, picked up on those issues. For her part, the Chairperson concluded that the Review Board had the inherent power and discretion to restrict public access to its decisions. However, the Chairperson's position on the relationship between the Review Board's inherent power to restrict public access to the Disposition Reasons and the statutory test for restricting access to "disposition information" in s. 672.51(7) was not entirely clear. Further, the Chairperson flagged and left unresolved an issue of whether the Review Board had the implicit power to restrict publication of its Disposition Reasons, as a less intrusive alternative to redaction of the reasons.

d) In the Registrar's 10 June 2021 letter, setting out the procedure and parameters under which the panel would consider the issue of restrictions on public access to the Disposition Reasons, the parties were advised to include in their submissions "the precise relief sought, the grounds for such relief and the Board's authority to grant the relief sought" [emphasis added],

e) In his written submission dated 2 July 2021, Mr. Fairgrieve's counsel included a section entitled "Authority for BCRB to Restrict Disclosure".

Counsel chose to focus his submission under this heading on the scope of the panel's statutory authority to limit public access to "disposition information" pursuant to s. 672.51(7). Counsel argued that the panel's statutory authority to restrict access to "disposition information" extended to information contained within the Disposition Reasons.

f) In its written submissions dated 16 July 2021, Global argued that while s. 672.51(7) provided a means for Review Boards to restrict access to "disposition information", Parliament did not provide any similar means for Review Boards to restrict access to their reasons for disposition. Global further argued that all exercises of authority by a statutorily constituted administrative tribunal must "find their source" in the statute itself. This argument was explicitly framed as a question of jurisdiction. Global submitted that it was "not open to the Review Board to 'read-in' statutory authority that would dramatically increase its jurisdiction".

g) In his written reply of 23 July 2021, Mr. Fairgrieve responded to Global's submissions, but restricted his argument on the Review Board's "authority" to the scope of "disposition information" within s. 672.51, once again asserting that this gave the panel the statutory authority to redact details from the Disposition Reasons. Mr. Fairgrieve did not respond directly to Global's submission that in the absence of any statutory authority, the panel had no jurisdiction to restrict access to its Disposition Reasons.

[93] Based on this review of the history of the proceedings, I do not accept Mr. Fairgrieve's submission that the panel "assumed" it had jurisdiction to make redactions, or that the tribunal did anything to cause the parties to make such an assumption. Nor do I accept the argument that the panel's focus was on what redactions should be made rather than whether the panel had the authority to redact in the first place. Rather, I find that the question of the Review Board's "authority" or "jurisdiction" to make redactions to the Disposition Reasons was a live issue from the very outset. The Registrar advised the parties to address the Review Board's

authority to make redactions in their submissions to the panel. The parties in fact addressed that issue, although for reasons that may have suited them, they chose to focus their submissions on the statutory authority to restrict public access to "disposition information". Finally, when Global expressly asserted that the Review Board had no redacting authority outside of the relevant *Criminal Code* provisions, Mr. Fairgrieve chose to make no direct response, nor did he ask for an opportunity to make further submissions regarding the panel's jurisdiction.



[94] Against this backdrop, the panel framed two issues in its decision of 3 December 2021, namely (i) whether the panel had "the power" to make redactions to its Disposition Reasons, and (ii) if so, whether Mr. Fairgrieve had satisfied the statutory test in s. 672.51(7) for restricting access to "disposition information". In its subsequent analysis, the panel made the point that the parties only put forward one "source of jurisdiction" for the tribunal to make redactions to its Disposition Reasons, namely s. 672.51(7). I do not agree with Mr. Fairgrieve's submission that, in approaching the matter this way, the panel breached its duty of procedural fairness or somehow failed to respect the *audi alteram partem* principle. The question of the tribunal's jurisdiction to redact its Disposition Reasons was a live issue throughout the proceedings. The panel communicated this to the parties, and at least one of the parties expressly addressed the statutory limits of the panel's jurisdiction. Mr. Fairgrieve knew this, and yet he chose to focus his submission on the scope of the Review Board's statutory power to withhold public access to "disposition information". There was nothing procedurally unfair in any of this.

### (2) Panel's Decision on Mr. Fairgrieve's Request for Restrictions on Public Access to the Disposition Reasons

[95] I once again start the analysis with a consideration of the applicable standard of review. Although the parties focused their submissions on standards of review applicable to judicial review proceedings in administrative law, I have concluded above that this matter is properly characterized as an application for prerogative relief under Part XXVI of the *Criminal Code*. The scope of review in such matters is highly circumscribed. *Certiorari* is only available for jurisdictional errors or breaches

of natural justice. In the case at bar, I accept that the issue of the Review Board's authority to make redactions to its disposition reasons is a point of jurisdiction that is reviewable on a *certiorari* application. The standard of review applicable to determining whether the Review Board acted in excess of, or failed to exercise its jurisdiction is correctness: *Woods (Re)* at para. 36.

[96] As noted, the parties focused their arguments on the standards of review in administrative law proceedings. Counsel for the Review Board relied heavily on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. Counsel for Global and counsel for the Attorney General adopted the Review Board's position. Mr. Fairgrieve's written submissions were largely silent on the applicable standard of review. I have serious concerns about whether the highly nuanced jurisprudence discussing standards of review in judicial review proceedings is instructive or helpful in the context of prerogative relief proceedings under Part XXVI of the *Criminal Code*. Nevertheless, even if one were to consider the present case under the judicial review framework discussed in *Vavilov*, for the reasons that follow, the applicable standard of review would be correctness.

[97] In his initial written submission to this Court, counsel for the Review Board contended that the panel's analysis regarding the authority to make redactions to the Disposition Reasons was subject to a standard of reasonableness. Relying on *Vavilov*, counsel submitted that reasonableness was the presumptive standard of review for all administrative decisions, and none of the recognized exceptions to the presumption were engaged in this case. See *Vavilov* at paras. 16-17, 23, 33-64.

[98] However, the majority in *Vavilov* left open the possibility that there were other categories of administrative law questions that could warrant a "derogation from the presumption of reasonableness": *Vavilov* at para. 70. Writing for the majority in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, Justice Rowe expanded on this point, explaining that "[i]n rare and exceptional circumstances, new correctness categories can be recognized" in circumstances when applying a reasonableness standard of

review would "undermine legislative intent or the rule of law in a manner analogous to the five correctness categories discussed in *Vavilov*": *Society of Composers* at para. 27. The majority went on to apply this reasoning to recognize a new category of correctness review, for situations where "courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute": *Society of Composers* at para. 28.

[99] The present case is just such a situation. Under Part XX.1 of the *Criminal Code*, criminal courts and Review Boards are reposed with concurrent first instance jurisdiction over dispositions in respect of accused persons found not criminally responsible or unfit to stand trial. Pursuant to s. 672.45, where an accused is found not criminally responsible or unfit to stand trial, the court may on its own motion, or shall on the application of either the accused or the prosecutor, hold a disposition hearing. Where the court declines to exercise its jurisdiction under s. 672.45, then the Review Board is obliged under s. 672.47 to hold a disposition hearing. In other words, the Review Board must make a disposition where the court does not do so. Other parts of the statutory scheme also reflect that courts and Review Boards enjoy concurrent first instance jurisdiction over dispositions under Part XX.1. For example, the term "disposition" is defined in s. 672.1(1) of the *Criminal Code* to include "an order made by a court or a Review Board under s. 672.54". Further, s. 672.54 sets out the range of dispositions that may be made by a "court or Review Board".

[100] *Society of Composers* was released on 15 July 2022, some six weeks after the hearing of Mr. Fairgrieve's *certiorari* application. In light of this legal development, the Court solicited further submissions from the parties on the standard of review applicable to the panel's decision in Mr. Fairgrieve's case. In a letter dated 23 August 2022, counsel for the Review Board informed the Court that all of the parties accepted this was a proper case in which to apply the newly-recognized category of correctness review where a court and an administrative tribunal have "first instance concurrent jurisdiction over a legal issue in a statute".

[101] With respect to the scope and implications of this legal development, the Review Board's position was that "the standard of review applicable to the [p]anel's interpretation of s. 672.51 is correctness". Counsel went on to submit that while the panel's interpretation of s. 672.51 is reviewable on a standard of correctness, the reasonableness standard of review ought to be applied to the panel's subsequent, alternative analysis of whether the protection of the accused's interests took precedence over the public interest in unrestricted disclosure of the Disposition Reasons. In other words, the Review Board's position was that the panel's legal interpretation of the statute is reviewable on a standard of correctness, but the panel's subsequent case-specific determination that Mr. Fairgrieve's interests in redacting the Disposition Reasons did not outweigh the public interest in unrestricted access is reviewable on a more deferential standard of reasonableness.

[102] For my part, I would state the issues somewhat differently, in keeping with the manner in which the panel itself framed them in its decision of 3 December 2021. Recall that the panel identified two key issues.

[103] The first issue as framed by the panel was whether it had "the power" to make redactions to its Disposition Reasons. In my view, this is indeed an issue over which courts and Review Boards enjoy concurrent first instance jurisdiction under Part XX.1 of the *Criminal Code*. Since the statute gives criminal courts and Review Boards concurrent statutory jurisdiction to conduct disposition hearings and render dispositions, it stands to reason that both courts and Review Boards must have the jurisdiction to determine their authority to restrict public access to their reasons for disposition. Accordingly, whether one characterizes the matter as a criminal or quasi-criminal application for prerogative relief under Part XXVI of the *Criminal Code*, or an application for judicial review in administrative law, the panel's consideration of this point is reviewable on the standard of correctness.

[104] The second issue framed by the panel was, assuming the statutory authority to restrict access to "disposition information" could be extended to reasons for disposition, whether Mr. Fairgrieve demonstrated a basis for making redactions to

the Disposition Reasons in his case. The panel's decision on this point involved a case-specific assessment in which the tribunal weighed or balanced Mr. Fairgrieve's asserted interests in restricting access to the Disposition Reasons against the public interest in unrestricted access. It is questionable whether Mr. Fairgrieve's challenge to the panel's decision on this point raises any issue of jurisdiction that would be subject to review on an application for *certiorari* under Part XXVI of the *Criminal Code*. In any event, even if one were to consider this issue under the administrative law framework discussed in *Vavilov*, then I agree with the Review Board that the applicable standard of review would be reasonableness.



### *(2)(a) Review Board's Authority to Make Redactions to Disposition Reasons*

[105] The panel began its analysis of this issue by noting that the parties had only identified one "possible source of jurisdiction" for the Review Board to make redactions to its Disposition Reasons, namely s. 672.51(7) of the *Criminal Code*. Accordingly, the panel limited its analysis to that statutory provision. For reasons described in more detail below, I find that the panel erred in restricting its jurisdictional analysis in this way. However, since the panel focused its decision on s. 672.51(7), I will begin my analysis by considering the correctness of the panel's interpretation of the statute.

[106] I find that the panel was correct in its conclusion that the term "disposition information" in s. 672.51(1) cannot be interpreted to apply to disposition reasons, or information that is reproduced in disposition reasons. While I do not accept every aspect of the panel's interpretive analysis, I agree with and accept the following four points, which in my view are essential to the panel's conclusion, and dispositive of the result as to the scope of the Review Board's power to restrict public access to "disposition information" in s. 672.51(7).

[107] First, I agree with the panel's observation that based on the text of s. 672.51, the term "disposition information" is meant to apply to assessment reports and other written information placed before the Review Board at a disposition hearing. The

term “disposition information” does not capture oral evidence presented at a disposition hearing. I endorse the panel’s view that all of this “strongly suggests” that s. 672.51(7) is “concerned with the disclosure of availability of documents, and in particular documents placed before the Board or court at the hearing”.

[108] Second, I agree with the panel’s observation that disposition reasons and disposition orders cannot be viewed as information placed “before the Review Board or court about the accused that is relevant to making or reviewing a disposition” as described in s. 672.51(1). Rather, disposition reasons and disposition orders are “the product” of the Review Board’s deliberations.

[109] Third, I agree with the panel’s assertion that the functional role of the Review Board is also an important part of the interpretive analysis in determining the proper scope of s. 672.51(7). Review Boards and courts have concurrent jurisdiction to decide upon an accused person’s fitness at the time of the disposition hearing, and to determine appropriate dispositions for accused persons found to be not criminally responsible or unfit to stand trial. Parliament can be taken to have understood and expected that Review Boards and courts would “extensively reference the evidence, including [information] contained in assessment reports, when issuing reasons”. Despite this, Parliament did not expressly provide any mechanism for either removing “disposition information”, or restricting public access to “disposition information” that is later included in Disposition Reasons, which Review Boards are statutorily obligated to create under s. 672.52(3).

[110] Fourth, I agree with the panel’s conclusion that it is in the public interest for Review Boards and courts to make reference to evidence, including information included in assessment reports, where citing that evidence is necessary to justify their disposition decisions. As the panel put it, “[a]bsent reasons which explain, by reference to evidence, how Review Board decisions are reached, the public could lose confidence in the legislative regime”.

[111] I conclude that the panel was correct in holding that the statutory power under s. 672.51(7) to restrict public access to “disposition information” does not extend so

far as to authorize the Review Board to make redactions to disposition reasons or disposition orders. Nothing in Mr. Fairgrieve's written or oral submissions convinces me that the panel was wrong in its conclusion on the scope of its statutory authority under s. 672.51(7).

[112] Mr. Fairgrieve's main points in relation to the panel's analysis of the "possible source of jurisdiction" to make redactions to the Disposition Reasons are (i) a complaint that the panel breached the principles of procedural fairness by failing to seek submissions on jurisdiction, and (ii) a contention that the panel failed to consider its jurisdiction to redact the Disposition Reasons as part of the Review Board's power to control its own process. I have already dealt with point (i), the procedural fairness argument. This leaves for consideration point (ii), the Review Board's jurisdiction to control its own process. Of course, Mr. Fairgrieve did not actually invite the panel to consider its authority to control its own process, even though the panel advised the parties to address "the Board's authority to grant the relief sought" in their written submissions. Although it is hard to find fault with the panel's choice to limit its analysis to the specific sources of authority cited by the parties, I nevertheless find merit in Mr. Fairgrieve's complaint that the panel erred in failing to consider the jurisdiction to make redactions to the Disposition Reasons as a function of the Review Board's power to control its own process.

[113] As I have explained above, the panel began its analysis by noting that none of the parties had identified "any possible source of jurisdiction" to make redactions to the Disposition Reasons other than s. 672.51(7) of the *Criminal Code*. The panel therefore limited its analysis to that provision. Although as general rule it makes good sense for a decision maker in an adversarial system to consider only the positions put forward by the parties to the proceeding, in this particular instance I do not accept it was correct for the panel to take this approach. The key question the panel asked itself was whether it had "authority" or "jurisdiction" to redact its Disposition Reasons. In answering such a question, the panel was not required to limit itself to sources of authority or specific arguments advanced by the parties.

[114] The Review Board has statutory responsibility over certain issues in respect of mental disorder proceedings under Part XX.1 of the *Criminal Code*. It also has a statutory duty to maintain a record of proceedings under s. 672.52, including written reasons for its decisions as provided for under s. 672.52(3). The obligation to discharge these statutory duties is not dependant upon the positions advanced by the parties. As a general rule it is advisable for the Review Board to entertain submissions from the parties, but the tribunal is not bound by the positions advanced by the parties in relation to the discharge of its statutory duties. In my view, the panel failed to appreciate this point when it limited its analysis to a particular *Criminal Code* provision, simply because that was the only "source of jurisdiction" cited by the parties. I conclude that the panel erred in law in failing to consider whether it had the power to make redactions to its Disposition Reasons as part of the Review Board's authority to control its own process.

[115] Mr. Fairgrieve asks the Court to remit the matter to the panel for a first instance consideration of the existence and scope of the Review Board's authority to control its own process. I do not view this as a particularly palatable option, for a number of reasons. For one thing, more than two years have passed since the release of the Disposition Reasons, and the issue of public access has yet to be resolved. Moreover, I find it highly relevant that Mr. Fairgrieve was given ample opportunity to make submissions to the panel on the existence and scope of the Review Board's authority to make redactions to disposition reasons. The question of the Review Board's jurisdiction to do so has been a live issue from the outset. I also find it highly relevant that the question of public access to disposition reasons is a legal issue over which Review Boards and the courts enjoy concurrent first instance jurisdiction. I will return to this final point in a moment.

[116] For its part, the Review Board urges the Court to dismiss Mr. Fairgrieve's application on the basis that he failed to argue the inherent jurisdiction point despite being given ample opportunity to do so. In oral submissions, counsel for the Review Board explained that the existence and scope of the tribunal's inherent jurisdiction or common law powers outside of its statutory mandate under the *Criminal Code* is a

matter of considerable complexity and sensitivity. Counsel submitted that the Court should be reluctant to pronounce on the existence and scope of the Review Board's authority to control its own process, when the issue was not properly argued before the panel at first instance. The Court would be, in effect, pronouncing on the existence and scope of the Review Board's inherent powers, when the Review Board itself has not had the chance to weigh in on such important issues. Although there is some merit in the Review Board's submission, I conclude that it cannot carry the day in view of the passage of time, the procedural history of the case, and perhaps most importantly the fact that Review Boards and the courts have concurrent first instance jurisdiction over the question of the inherent power to restrict public access to disposition reasons under Part XX.1 of the *Criminal Code*.

[117] I agree with Mr. Fairgrieve's submission that the Review Board must have the power to make redactions to disposition reasons, as a function of the tribunal's power to control its own process. I do not need to wade any further into the scope of the Review Board's authority to control its own process than to observe that such authority must include the power to consider redactions to disposition reasons and disposition orders, for the reasons that follow.

[118] To begin with, the manner in which the panel restricted public access to the "no contact list" is strong evidence that the Review Board has at least some authority to control its own process. Even after finding that it had no authority to make redactions to its Disposition Reasons, the panel went on to direct that the Disposition Order be redacted to withhold disclosure of names of individuals Mr. Fairgrieve was not to contact. The fact that this direction was made by consent of all the parties could not have clothed the Review Board with jurisdiction it did not have. If the Review Board had the power to make this direction, it must have been a product of the tribunal's implied power to control its own processes. Denial of public access to the no contact list was entirely appropriate, and no one has suggested that the panel acted unlawfully in making a direction to that effect. Of course, this is just one piece of the puzzle. While the manner in which the panel restricted access to the no

contact list is indicative of the tribunal's authority to control its own process, it is not of much assistance in revealing the source of that authority.

[119] I also consider it highly relevant that Review Boards and courts have concurrent jurisdiction to conduct disposition hearings and make dispositions under Part XX.1 of the *Criminal Code*. The jurisdiction to make dispositions carries with it a statutory duty to provide disposition reasons. In circumstances where a court invokes this statutory jurisdiction, there could be no dispute that the open courts principle applies to the proceedings. The starting point of the open courts principle is the presumption of openness. However, to state the obvious, the presumption of openness is not absolute. Courts have the authority to make exceptions to the general rule of openness, but only when justified under the *Dagenais/Mentuck* test, as most recently re-stated or summarized in *Sherman Estate*. Thus, the very existence of the open courts principle carries with it the authority – indeed, in some instances, the obligation – to regulate its limits.[4]

[120] I should add that I do not agree with the sentiment behind the panel's remark that courts are "not in the habit of" redacting their reasons for judgment. Although exceptional, there are in fact many instances in which courts have found it necessary to make redactions to written reasons. See, for example, *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218; *R. v. Amer*, 2017 ABQB 651; *R. v. Huang*, 2018 ONSC 831. Of course, this can only be done when the court is satisfied that there is a basis for departing from the presumption of openness, under the analytical framework as described at para. 38 of *Sherman Estate*.

[121] It would be absurd to suggest that while courts have a duty to operate under the open courts principle in the exercise of their jurisdiction under Part XX.1 of the *Criminal Code*, Review Boards have no similar obligation when exercising their concurrent jurisdiction under the same statutory regime. There is nothing in Part XX.1 that suggests otherwise. Indeed, many provisions in the statutory scheme start

[4] See, for example, *Named Person v. Vancouver Sun*, 2007 SCC 43, discussing the duty of courts to raise and uphold the rule of informer privilege, at any stage of the proceedings where it arises, even where the parties fail to do so.

from a footing of presumptive public access to disposition proceedings.[5] Thus, in my view, the presumption of openness must apply to disposition reasons and orders issued by Review Boards, in the same way that it applies to disposition reasons and orders issued by courts.

[122] Both the Chairperson and the panel reached the same conclusion regarding the presumptive openness of Review Board decisions. The Chairperson stated in her reasons of 23 February 2021 that, "Review Board hearings, like court hearings, are presumptively open. Non-disclosure is the exception rather than the rule." The Chairperson went on to observe that the tribunal "has in the past proactively posted selected BCRB reasons on its website, including both NCR and fitness reasons, where the Review Board Chair determined that there was an important legal issue discussed". To the same effect, the panel stated in its 3 December 2021 decision that "it is the policy of the Board that its dispositions and reasons are presumptively public". In support of that position, the panel cited *Oshawa* and *Blackman*, and noted as I have that there is nothing in the *Criminal Code* to suggest otherwise.

[123] Global argues that the principle of openness applies to disposition proceedings, but as a creature of statute the Review Board has no implicit or inherent power to determine its limits. I disagree. The principle of openness is fundamental but not absolute. In my view, the conclusion that Review Boards have a duty to apply the open courts principle when considering public access to their disposition reasons and orders carries with it the recognition that Review Boards, like courts, have the authority to determine when limits or exceptions to openness are warranted.

[124] In other words, the duty to apply the open courts principle carries with it the authority to regulate its limits. The same conclusion has been reached with respect

[5] Having found that s. 672.51(7) does not apply to Disposition Reasons, Disposition Orders, or even extracts from "disposition information" later cited in Disposition Reasons, I do not need to decide whether the panel was correct in its view that Parliament can "modify" the presumption of openness, or in suggesting that Parliament did so in s. 672.51(7), in respect of raw "disposition information". See *Sherman Estate* at para. 38, where Kasirer J. stated that the open courts analysis was "subject only to valid legislative enactments".

to other statutory tribunals engaged in the conduct of judicial or quasi-judicial proceedings. See, for example, *Canadian Broadcasting Corporation v. The City of Summerside*, (1999) 170 D.L.R. (4th) 731 (P.E.I.S.C., T.D.) at para. 49; *C.B.C. v. Chief of Police*, 2021 ONSC 6935 at para. 28. To this end, the Review Board must have inherent authority or jurisdiction to make decisions regarding limitations on the scope of public access to disposition reasons and orders.

### *(2)(b) Basis for the Proposed Redactions to the Disposition Reasons*

[125] The final question is whether there is a basis for setting aside the panel's decision declining to make redactions to the Disposition Reasons in Mr. Fairgrieve's case. As alluded to above, I have serious questions about whether the arguments advanced by Mr. Fairgrieve on this point raise any point of jurisdiction or denial of natural justice that would be reviewable on an application for *certiorari* under Part XXVI of the *Criminal Code*.

[126] Mr. Fairgrieve argues that the panel committed a reviewable error in failing to adhere to the principle of judicial restraint. He says that once the panel concluded that it lacked jurisdiction to make redactions to the Disposition Reasons, the panel should not have gone on to consider the merits of request for redactions, and that the choice to do so violated the principle of restraint.

[127] It is doubtful that a decision not to apply the principle of judicial restraint engages any issue of jurisdiction or breach of procedural fairness. This principle is discretionary, and is generally invoked by courts when declining to pronounce on constitutional issues or abstract questions of law that need not be addressed in order to reach an outcome in a particular case. See *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 at p. 1580.

[128] Even if one were to accept that a failure to follow the principle of judicial restraint raises an issue of jurisdiction or procedural fairness, I agree with counsel for the Review Board that the panel did not run afoul of the principle in this case. It is not uncommon for courts and tribunals of first instance to make alternative findings, or to dispose of a particular matter on a number of alternative bases. See, for

example, *R. v. Beaumont*, 2019 BCSC 719 at para. 37; *Kawakami v. Brayer*, 2021 BCSC 267 at paras. 36-37, aff'd 2021 BCCA 413. This can produce obvious efficiencies, and there is nothing wrong with it, so long as it does lead to unnecessary pronouncements on abstract points of law or constitutional issues. Here, the panel was not making an academic pronouncement on some broad legal or constitutional issue, but simply deciding in the alternative whether there was a basis for making the redactions sought by Mr. Fairgrieve.

[129] The balance of Mr. Fairgrieve's submissions with respect to the panel's decision declining to make redactions to the Disposition Reasons in his case are, with respect, nothing more than a repetition or re-statement of the arguments he made before the panel. These arguments do not raise any jurisdictional error on the part of the Review Board. On an application for *certiorari*, the reviewing court cannot "overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached": *Russell* at para. 19.

[130] Even if this matter were dealt with as a judicial review in the administrative law context, Mr. Fairgrieve has failed to establish that the panel's decision runs afoul of the standard of reasonableness as discussed in *Vavilov*.

[131] The reasonableness standard involves a consideration of the panel's decision as a whole. A reasonable decision is one which, considered as a whole, bears the hallmarks of justification, transparency, intelligibility, and can be justified in view of the factual record and applicable legal constraints: *Vavilov* at paras. 15, 85, 99.

[132] I acknowledge that the panel's decision included an analysis of the proposed redactions put forward by Mr. Fairgrieve under the statutory test in s. 672.51(7) of the *Criminal Code*, a provision which both the panel itself and the Court have found to be inapplicable to information that is later included within disposition reasons. However, reading the panel decision as a whole, it is clear that the panel did not limit its analysis to the statutory test. The parties clearly framed their submissions by

reference to the open courts analysis as discussed in *Sherman Estate*, and the panel ultimately considered and applied that framework.

[133] The panel undertook an extensive review of the open courts principle as discussed in *Sherman Estate*, including the "three-step" analysis set out at para. 38, under which the party seeking to overcome the presumption of openness must establish that (i) court openness poses a serious risk to an important public interest, (ii) the order sought is necessary to protect the specified public interest, and no reasonable alternative measures that will suffice, and (iii) the benefits of the order outweigh its negative effects. The panel accepted that this three-part analysis "now defines the approach which must be taken when a part seeks to limit the application of the open courts principle". The panel went on to apply these legal principles to the facts of the case, conducting a "*Sherman Estate* analysis", albeit in conjunction with a "s. 672.51(7) analysis".

[134] With regard to the merits of the panel's open courts analysis, Mr. Fairgrieve argues in this Court that medical information is "inherently private". He points out that the Disposition Reasons make reference to "commentary from medical professionals and the BCRB about [his] ability to function and communicate, his treatability and prognosis, and the overall challenges and limits of his health status". Mr. Fairgrieve says that at least some of these details constitute "core identity-giving information" as contemplated in *Sherman Estate* at para. 71.

[135] However, the panel did not overlook Mr. Fairgrieve's argument about the importance of his privacy interests. The reasons demonstrate that the panel gave careful consideration to Mr. Fairgrieve's privacy interests, as well as his fair trial interests. In one part of the reasons, the panel listed 14 specific aspects or features of Mr. Fairgrieve's medical condition, treatment history, participation in the disposition proceedings, and future treatment needs (items (a) through (n)), observing that matters such as these are "routinely addressed in Review Board reasons". The panel concluded that, on balance, protection of Mr. Fairgrieve's privacy and fair trial interests in relation to the release of these details did not take

precedence over the public interest in unrestricted access to the Disposition Reasons. The panel observed that "the public 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", and "the public interest in knowing how courts and tribunals reach their decisions is inherently high". The information Mr. Fairgrieve asked the panel to redact from the Disposition Reasons was, in the panel's view, "central to the decision-making process", and "necessary" to explain the panel's decisions on fitness and disposition in Mr. Fairgrieve's case.

[136] In his written submission to this Court, Mr. Fairgrieve "agrees with" the panel's remarks "about the importance of the public's interest in knowing the justification for why an accused is unfit to stand trial", but maintains that "the public interest is satisfied with the requested redactions made". In effect, Mr. Fairgrieve invites this Court to conduct its own balancing of the relevant interests, to reach a different conclusion than the one reached by the panel. That is not the Court's function in conducting a reasonableness review. Mr. Fairgrieve evidently disagrees with the panel's decision, but he has not shown any failure of rationality in the panel's reasoning, nor has he demonstrated that the outcome is untenable in view of the relevant factual and legal constraints as contemplated in *Vavilov* at para. 101.

[137] The panel's decision bears the hallmarks of reasonableness. The reasons are transparent and intelligible, and the outcome is justifiable in light of the record and the relevant legal parameters discussed in *Sherman Estate*. Thus, Mr. Fairgrieve has failed to demonstrate that the panel's decision is unreasonable.

## Conclusion

[138] Mr. Fairgrieve's application for an order of *certiorari* is dismissed.

[139] With regard to the status of the Disposition Reasons, Mr. Fairgrieve's originating notice of application sought an interim order directing the Review Board not to release the Disposition Reasons until the application was addressed on its merits. In their application responses, the opposing parties consented to such an order. That order will be spent upon the release of these reasons. In the interests of

avoiding any unanticipated gap, and to ensure that all of the parties have an opportunity to fully consider their positions, I hereby extend the interim order for a further 14 days following the release of these reasons, with leave of any party to apply to shorten or set aside the order, on two days notice to all other parties.

"Riley J."