Citation: Schoenborn (Re Application), 2024 BCRB 1001
Date: 2024-04-12

BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE *CRIMINAL CODE*
R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6

IN THE MATTER OF AN APPLICATION FOR AN ORDER UNDER S. 672.51(7)(b) OF THE *CRIMINAL CODE* TO PARTIALLY RESTRICT PUBLICATION OF THE ACCUSED'S NAME

RE: ALLAN DWAYNE SCHOENBORN

HELD BY:	**Written Submissions**	
CLOSING ON:	**2024-04-12**	
BEFORE:	**CHAIRPERSON:**	**B. L. Edwards**
SUBMISSIONS:	**ACCUSED/PATIENT COUNSEL:**	**R. Gill**
	DIRECTOR'S COUNSEL:	**D. Lovett, KC**
	ATTORNEY GENERAL:	**T. Shaw, G. Kabanuk**
	COUNSEL FOR GLOBAL NEWS:	**D. Coles**

I. INTRODUCTION AND PROCEDURAL BACKGROUND

[1] On February 22, 2010, Justice Powers sitting in the Supreme Court of British Columbia at Kamloops found that the accused, Allan Dwayne Schoenborn, had committed first degree murder of his three children but was not criminally responsible on account of mental disorder (NCRMD). The Court deferred disposition under s. 672.47(2) of the *Criminal Code* to the Review Board.

[2] For the purpose of this decision, the Board may refer to the accused as Mr. Schoenborn or the Applicant, as appropriate in the context. Mr. Schoenborn is 56 years old. He has been under the Review Board's jurisdiction and subject to successive custodial dispositions since the Court issued the NCRMD verdict. At each of his ten hearings prior to the hearing set for this year the accused has appeared before the Board as Allan Dwayne Schoenborn. On each occasion, the Board has made a custodial disposition.

[3] On May 25, 2021, Mr. Schoenborn was granted a legal name change by the Registrar General, Vital Statistics Agency, for the Province of BC. At the last Board hearing on March 3, 2022, the panel hearing the review of disposition was not aware that Mr. Schoenborn had been granted a legal name change. As a result, the Review Board's disposition and reasons for that disposition, issued March 3, 2022, referred to the accused, again, as Allan Dwayne Schoenborn. On February 16, 2023, Mr. Gill, on behalf of Mr. Schoenborn, asked that the Board extend its March 3, 2022 order for 12 months as provided for in s. 672.81(1.1) of the *Criminal Code.* Counsel for the Attorney General consented to the extension and the Board granted the request.

[4] On February 23, 2024, in the lead up to the annual hearing (then set for March 19, 2024), legal counsel for the Director provided the Board Registry and counsel for the accused with a Certificate of Change of Name and a BC Identity Card in Mr. Schoenborn's new legal name. On March 11, 2024, counsel for the accused filed a brief (four page) application seeking to ban the publication of Mr. Schoenborn's new legal name in any proceeding during the upcoming hearing. The Board posted notice of the application to its website and set a timetable for submissions from the parties and any interested media.

[5] The Board received submissions from counsel for the Director of the Forensic Psychiatric Services, Crown counsel and counsel for Global News. Mr. Schoenborn's counsel filed an affidavit in support of his application but did not make any further submissions.

[6] Although I have read the entirety of the submissions and supporting materials, for the purpose of these reasons, I will refer only to that which is necessary to the decision.

II. THE APPLICATION

[7] The Notice of Application filed by Defence Counsel Gill provides a brief factual background, as follows, before identifying the relief sought:

> 1. On February 22, 2010, a Justice of the Supreme Court of British Columbia found that Mr. Schoenborn, an accused person, was suffering from a mental disorder ("NCRMD") when he killed his three children.
> 2. Since that time, Mr. Schoenborn has been detained per the NCRMD regime.
> 3. Mr. Schoenborn has now legally changed his name and seeks to ban any publication of his new name during the upcoming review hearing.
>
> Relief sought:
>
> > [T]hat Mr. Schoenborn's new name be redacted prior to the public release or Board's decision, and that his new name not be published in any public proceeding unless approved by the Review Board.

III. RELEVANT LEGISLATION

[8] The Board is established pursuant to s. 672.38 of Part XX.1 of the *Criminal Code.* Its role is to make or review dispositions concerning any accused in respect of whom a verdict of NCRMD or unfit to stand trial is rendered [*Code*, s. 672.38(1)].

[9] The *Code* further provides that where the Court has not made a disposition, the Board must hold a hearing and make a disposition [s. 672.47(1)]. Section 672.5(1) provides for the procedure at a Board hearing to make or review a disposition.

[10] Section 672.501 authorizes the Board to restrict the publication of certain information in cases involving sexual offences, child pornography and where publication may identify a victim or a witness and the Board is satisfied that the order is necessary for the proper administration of justice.

[11] Section 672.51 provides for a ban on inspecting and disclosing disposition information in certain circumstances. The term "disposition information" is defined in s.672.51(1):

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

[12] Section 672.51(7) prohibits the disclosure of disposition information to anyone other than a party to the proceedings in certain circumstances:

> **672.51(7)** No disposition information shall be made available for inspection or disclosed to any person who is not a party to the proceedings
>
> (a) where the disposition information has been withheld from the accused or any other party pursuant to subsection (3) or (5); or
>
> (b) where the court or Review Board is of the opinion that disclosure of the disposition information would be seriously prejudicial to the accused and that, in the circumstances, protection of the accused takes precedence over the public interest in disclosure.

IV. THE ISSUES:

[13] The application raises the following issue:

> Whether the Review Board has the jurisdiction and ought to order a publication ban/redaction of Mr. Schoenborn's new legal name from the Board's disposition and reasons for disposition.

The Applicant's submissions

[14] The Applicant's submissions are brief. He submits that he recognizes that the Board's policy is that its disposition and reasons for disposition are presumptively public. That said, he asserts that the public nature of dispositions and reasons for those dispositions is subject to *Criminal Code* provisions such as s. 672.501 which requires the Board to protect certain categories of information from publication such as the names of victims or witnesses and must also be subject to applications limiting disclosure under s. 672.51(7)(b).

[15] The Applicant submits that redactions to the disposition and disposition reasons should be made because disclosure of certain content (his new name) is prejudicial to his privacy and fair trial rights. He further submits that the sole purpose for having a new name is privacy and disclosing his name would defeat that purpose. He says that it is common knowledge that his matter has drawn much public scrutiny (such as from the former Prime Minister) and that publishing his new name will open him up to "further public abuse" and jeopardize his mental well-being and physical security. Finally, the Applicant submits that the redactions he seeks would be minimal. He says that he would not voluntarily disclose his new name to the public.

[16] In support of his application, the Applicant filed an Affidavit, affirmed by defence counsel's articling student, affirming that Mr. Schoenborn advises that he changed his name in order to rejoin the community without having his notoriety impact his daily interactions, he believes that disclosing his new name would negatively impact his

community rehabilitation efforts, he has been attacked by co-patients and called a “child killer”, his case has received media attention on both a local and national level, and that former Prime Minister Harper used his matter in a political ad in 2015.

The Director’s submissions in response

[17] The Director supports the Applicant’s application. The Director submits that the Review Board, as a function of the tribunal’s power to control its own process, has the power to make redactions to disposition reasons citing Justice Riley’s decision in *Fairgrieve (Re)* 2022 BCSC 1882 at para. 117 (*Fairgrieve*). In *Fairgrieve* Justice Riley was reviewing a Board decision where Mr. Fairgrieve sought redactions to the evidentiary portions of the Board’s disposition and reasons, relying in part on s. 672.51(7) of the *Criminal Code.* Justice Riley held that while s. 672.51(7) did not provide authority to make the requested redactions, as reasons and dispositions were not “disposition information,” the Board has the inherent authority or jurisdiction to make decisions regarding limiting the scope of public access to disposition reasons and orders, in appropriate circumstances.

[18] The Director further submits that in *Donnelly (Re Application to Restrict Publication)* 2023 BCRB 2 (*Donnelly*), the Board found that its proceedings are presumptively public and that the applicability of the open court principle to tribunals has long been recognized, dating back to at least the Board’s decision in *Blackman v. British Columbia (Review Board)*, [1993] BCJ No. 1366 (BCSC) (*Blackman*).

[19] The Director accepts that, presumptively, Review Board proceedings are open to the public but argues that in the unique circumstances of this case, anonymizing or redacting Mr. Schoenborn’s new name is justified on the public interest grounds of protection of physical safety and furtherance of treatment goals, including the accused’s need to reintegrate into the community as provided for in Part XX.1 of the *Criminal Code.*

[20] The Director refers to evidence from the record that it argues supports its submission. The Director submits that, on March 13, 2022 (after the Board’s last hearing), the Board Registry received an email that threatened harm to Mr. Schoenborn if he was not kept in hospital. The Director submits that the email is an example of the types of threats that Mr. Schoenborn has been subject to because of his notoriety. The Director also cites evidence on record that Mr. Schoenborn has been assaulted, threatened and subjected to derogatory and inflammatory comments by fellow patients at the Forensic Psychiatric Hospital (FPH) and has reported that there was a website with a countdown clock to his next hearing.

[21] Apparently to further its argument that Mr. Schoenborn's case is notorious, the Director notes that in 2014 the federal government introduced the *Not Criminally Responsible Reform Act* (Bill C-14) which included a provision for a "high risk accused" designation that was known as the "*Schoenborn* amendment*"* and that the then BC Attorney General advocated for the amendment. The Director points out that the Crown unsuccessfully applied to BC Supreme Court in 2015 to have Mr. Schoenborn declared a "high risk offender" under s. 672.64 of the *Criminal Code*: *R. v. Schoenborn*, 2017 BCSC 1556*.*

[22] The Director argues that the benefits of limiting publication outweigh any negative effects and is necessary to prevent the risks that are likely to otherwise result. The Director says that there are no other reasonable alternatives available and that the requested ban is highly restrictive and ought to include a ban on Mr. Schoenborn's name when it appears in disposition information.

Crown counsel's submissions

[23] Crown counsel opposes the Applicant's application to ban the publication of any reference to the Applicant's new name in these proceedings. Crown counsel says that the Applicant's name is not "disposition information" for the purpose of the non-disclosure provision in s. 672.51(7)(b)*.* Crown counsel agrees with the Director that s. 672.51(7) does not apply to the Applicant's request. The Board has previously determined that disposition information includes psychiatric reports, nurse coordinator reports, and psychiatric social work reports about the accused [*Lepine (Re)* [1993] BCRBC No. 3 and para. 52] and does not include disposition reasons and disposition orders (*Fairgrieve*, para. 108). Section 672.51 does not apply to the Review Board's disposition reasons or orders (*Fairgrieve,* para. 111).

[24] Crown counsel further submits that while the Applicant's new name may appear in a document that is before the Board, it is not the type of information contemplated in s. 672.51 which is, essentially, designed to protect assessment and treatment information. Merely appearing in a report does not render the accused's name "disposition information."

[25] Crown counsel submits that while the Review Board may have a limited discretionary power to impose such a ban, the evidence cited in support of doing so is speculative and does not outweigh the principle of openness recognized by the Supreme Court of Canada in *Sherman Estate v. Donovan,* 2021 SCC 25 (*Sherman Estate*)*.* Crown counsel also submits that openness serves broad public interests (free speech, public debate, confidence in institutions). It also serves individual interests (e.g., the ability to

make a decision about how and who to interact with and to deter further misconduct by the perpetrator): *Schuetz v. Pyper,* 2023 BCCA 343, affirming 2021 BCSC 2599. If the Board were to grant the publication ban request in this case and on the evidence offered in support of the application, the public could lose confidence in the legislative regime.

[26] Finally, Crown counsel submits that "fair trial rights" are not engaged in this analysis as, unlike the situation in *Fairgrieve* and *Palmer,* the Applicant has already been tried. Crown counsel adds that the Review Board has no authority to bind other public agencies or to bind the media or the public from publishing the Applicant's new name where that name is sourced independently from the Review Board's procedure and records. As a result, Crown counsel argues that the second part of the application request (seeking a publication ban "in any public proceeding unless approved by the Review Board") exceeds the inherent power of the Board to regulate its own process.

Global News' submissions

[27] Global News agrees with the Director and Crown counsel that Review Board processes are presumptively open to facilitate scrutiny, accountability, transparency and understanding of the tribunal's work and decisions.

[28] Global News says it is significant that neither the Applicant nor the Director have pointed to any precedent for the order sought. Global News says they are asking the Review Board to "chart a bold and dangerous new course" that is antithetical to the open court principle and the Review Board's mandate when making dispositions – public safety is the paramount consideration.

[29] Global News argues that the ban sought is not narrow – it is designed to hide from the community who is being evaluated and who may be released into the community and on what terms; the ban sought is substantial.

[30] Global News states that the Applicant and the Director's concerns about Mr. Schoenborn's physical safety ought to be addressed with the relevant authorities (police and other community actors and social services) in a manner that is minimally invasive to the constitutionally protected rights of freedom of expression and the media.

[31] Global News rejects the Applicant's submission that the publication of disposition reasons in the usual course, with his full legal name, would be prejudicial to his privacy and fair trial rights. Global News stresses that disposition reasons are presumptively public and by design contain personal, even intimate, details about an accused or detained person. Mr. Schoenborn does not and cannot have a privacy interest in information contained in a public document created under Part XX.1 of the *Criminal Code.* Neither can he create a

privacy interest for himself by changing his name. Further Global News says that the Applicant has declined to particularize exactly what further jeopardy he faces, if any, and how his “fair trial rights” could be impacted by the release of disposition reasons in the usual course.

[32] Global News submits that if the Board applies the *Sherman Estate* test, the order sought is not necessary to prevent the identified risk to physical safety and would unnecessarily limit expression and the open court principle without offering real protection to Mr. Schoenborn. Further, it says that there are reasonably alternative measures that would afford him real protection.

[33] Global News argues that the negative effects of the order sought are dramatic and outweigh the possible benefits of the order. Global News asserts that the negative effects are that a “high-profile child killer” (an NCRMD accused) may be released into the community with his new identity shielded from the public. This will obscure the ability of journalists, academics, historians, and law enforcement officials to locate and review the Board’s disposition reasons and related documentation. Further, if the order is granted, Mr. Schoenborn will, in some respects, vanish from the public record as the chain of court and Review Board orders will be broken, making future scrutiny of the underlying decision, and the justice system’s treatment of him, difficult if not impossible to trace. Any future inquiry would reach an abrupt end as of the Board’s last reasons for disposition in 2022.

The Applicant’s Reply

[34] Although provided the opportunity, the Applicant did not file a reply to the responses from the Director, Crown counsel and Global News.

The Director’s Reply

[35] The Director, by email, replied to the submissions of Global News and the Crown. The Director disagreed with both Crown and Global News’ submissions, suggested that the Director’s submissions had been misconstrued and clarified that it does not ground its public interest arguments in privacy and individual dignity. The Director argued that neither the Crown nor Global News addressed the Director’s view that the proposed order is justified in furtherance of the treatment goal of reintegration into the community. The Director argues that the Crown has not fully grappled with the evidence of risk of harm to Mr. Schoenborn and notes that the March 14, 2022 email was from a member of the public, not a patient. In response to Global News’ argument that Mr. Schoenborn will be recognizable in the community notwithstanding his name change, the Director submits this is speculative.

V. ANALYSIS AND CONCLUSION

[36] The Applicant asserts that s. 672.51(7) provides the legal basis for his request that the Board redact his new name from the Board's disposition or disposition reasons and that his new name not be published in any public proceeding unless approved by the Review Board. I disagree for the reasons which follow.

[37] I begin my analysis by considering that Review Board hearings and Review Board decisions are presumptively public: *Donnelly* at para. 8. Indeed, the applicability of the open court principle to the Review Board and other quasi-judicial tribunals has been recognized in British Columbia for at least 30 years. In 1993, in *Blackman v. British Columbia Review Board* at page 18*,* the court discussed the import of the open court principle:

> Disposition hearings are essentially an extension of the criminal process. The presumption of public access to criminal proceedings under s. 486(1) and disposition hearings under s. 672.5(6) is consonant with the common law principle which mandates openness of judicial proceedings. In *Nova Scotia (Attorney-General) v. MacIntyre* (1982), 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, [1982] 1 S.C.R. 175 (S.C.C.), Dickson J. observed that "covertness is the exception and openness the rule". Curtailment of public accessibility to judicial proceedings can only be justified (at p. 147) "where there is present the need to protect social values of superordinate importance."

[38] Openness and transparency are essential to ensuring that the public maintains confidence in the criminal justice system. The Review Board acknowledged in *Donnelly* that its role is not widely understood even within the justice system. In my view, it therefore falls to the Board to ensure that, to the greatest degree possible, Review Board decision-making and the reasons for the Board's decisions, including the degree to which public safety has been taken into account, are open to public scrutiny. In this way, the public may have confidence in the administration of justice.

[39] Recently, in *Fairgrieve,* Justice Riley of the Supreme Court of British Columbia revisited the importance of openness in Review Board proceedings. In that case, the accused sought to have the Review Board extensively redact its disposition reasons relying, as does Mr. Schoenborn, on s. 672.51(7) of the *Criminal Code.* That section provides that no "disposition information" shall be made available for inspection or disclosure to a non-party (e.g., the public) where the Board is of the opinion that disclosure of the information would be seriously prejudicial to the accused and that, in the circumstances, protection of the accused takes precedence over the public interest in

disclosure. Justice Riley held that “disposition information” referred to the assessments, reports, and other written evidence the Board considered in reaching its decision.

[40] In reaching his decision, Justice Riley considered the principle of openness applicable to courts and the Review Board:

> [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, most recently re-stated or summarized in *Sherman Estate*.

[41] Further, as the Supreme Court of Canada found in *Sherman Estate*, the open court principle is one of the foundations of a free press as access to the courts is fundamental to newsgathering. Writing for the Court, Justice Kasirer emphasized the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (*Sherman Estate*, at para. 39).

[42] Because Review Board disposition hearings are presumptively open, the onus falls on those seeking to deny access to justify their position: *Sierra Club of Canada v. Canada (Minister of Finance,)* 2002 SCC 41. In *Sherman Estate,* the Court established a three-step analysis that Applicants must meet when seeking a discretionary decision which seeks to restrict that openness, including decisions to ban publication. Those steps require that the Applicant persuade the Court/Review Board that:

i. adherence to the openness principle poses a serious risk to an important public interest; and
ii. the order sought is necessary to prevent that risk; and further,
iii. as a matter of proportionality, the Applicant must persuade the Court/Review Board that the benefits of the order sought outweigh its negative effects.

[43] Though not framed in those terms, I understand Mr. Schoenborn to argue that the publication of his new name in the Review Board’s disposition and disposition reasons would place his privacy and fair trial rights at *serious risk*. The Board considered whether the privacy interests of the accused justified a publication ban on disposition information in

Palmer (Re Application to Restrict Publication) 2023 BCRB 1 at para. 21. In that case, the Board observed that in *Sherman Estate* the Supreme Court of Canada held that intrusions upon privacy which merely disturb the "sensibilities of the individuals involved," or which cause "discomfort and embarrassment," or are "disadvantageous," or "distressing" do not invoke an important public purpose (*Sherman Estate* at paras. 48, 56, and 63). The decision establishes that the aspect of privacy which does invoke an important public interest is the protection of dignity. The Court further held that dignity is at stake where the information that will be revealed consists of "intimate or personal details" that is "sufficiently sensitive to strike at an individual's biographical core" (at para. 75 and 79).

[44] In my view, Mr. Schoenborn's self-selected new name is not protected by a privacy interest that rises to the level of public importance. Mr. Schoenborn has chosen a new name and used it to obtain another legal document, a BC Identity Card, by which he hopes to identify himself to the public. By changing his name legally and having it attributed to a provincially issued identity document, he has put his new name into the public realm. I am not persuaded by the Applicant's or other's submissions that publishing his legal name, in the usual course in a Review Board disposition or in the Board's reasons for disposition, in any way threatens his dignity or strikes at a core aspect of his private life. In other words, I am not satisfied that there is a "serious risk" to Mr. Schoenborn's dignity that arises from publishing his new name.

[45] I accept that Mr. Schoenborn may find it "embarrassing" (as per *Sherman Estate*) to have his name associated with the crime that he committed and that he may wish to shield himself from what he perceives as public harm by assuming a new identity. Mr. Schoenborn's "discomfort and embarrassment" in having his new identity forged to his old past, including the crime for which he has been found NCRMD, is not a matter of public importance. Rather, as he has described it, it is a matter of private import. As he says, it is not information that he would voluntarily provide to the public.

[46] I have also considered that Mr. Schoenborn and the Director argue that his physical and mental wellbeing are at serious risk if his name is published. According to Mr. Schoenborn, publishing his new name will open him up to "further public abuse" that could jeopardize his mental well-being and physical security. I am not persuaded that past public scrutiny, including that roughly a decade ago a former Prime Minister and a former Attorney General lobbied for amendments to the *Criminal Code* referencing Mr. Schoenborn's matter, involved "public abuse" as Mr. Schoenborn implies. Rather, political and media scrutiny is part of the public discourse in a free and democratic society. Neither am I

persuaded by his argument that it is necessary to redact Mr. Schoenborn's new name from the Board's disposition and reasons for disposition because he has been taunted, insulted, and been subjected to aggression by co-patients at FPH. I address this further in connection with the Director's submissions.

[47] I also considered the Director's submissions in support of Mr. Schoenborn's application. The Director offered evidence of occasions when Mr. Schoenborn has been insulted, called derogatory names, and otherwise provoked to react with violence while under the Director's care and subject to a custody order at FPH. I recognize that in 2011 there was a serious assault on the accused by co-patients resulting in criminal charges against the assailants. I accept that the Director is concerned for the accused as a patient.

[48] I also considered the email threat to the Board in 2022 from an individual who said that they would "hunt down" the accused if the Board did not do its job. It is not clear to me whether the email is from a member of the public, but clearly it could be. I note that the Director has submitted that Mr. Schoenborn may be unaware of the email – he did not raise it in his application. Regardless, it is clearly unsettling.

[49] I am also mindful that in its Reasons for Disposition March 3, 2022 (following the last hearing) the Board accepted the risk assessment of Dr. Lacroix (Record, Tab 92-1), which highlighted that Mr. Schoenborn is most at risk in hospital and from fellow patients:

> 21. Dr. Lacroix reports that Mr. Schoenborn's risk of reactive violence is much higher in the confined environment of an institutional setting where he is subjected to repeated taunting and insults and where patients are forced to deal with each other 24 hours a day. That kind of situation would not be replicated in the community. Dr. Lacroix testified that Mr. Schoenborn carries a great deal of guilt and shame. If he were recognized and taunted in an employment situation or by a neighbour, Mr. Schoenborn would be unlikely to engage in violence but would rather simply leave and return to hospital. (underlining added)

[50] As a result, the Board granted Mr. Schoenborn the opportunity to continue to access the community on unescorted leaves as he had been since 2020 and added the privilege to remain in the community for up to 28-day visit leaves – subject to an assessment of his mental condition and the risk that he poses to the public at the time the leave is sought. In that way, the Board sought to balance the risk to public safety and Mr. Schoenborn's needs, including his need to reintegrate into the community when safe to do so.

[51] The evidence before me is that, since 2020, Mr. Schoenborn has been unescorted in the community on dozens of occasions, and there have been no reported

untoward interactions with the public. I am not convinced that the public interest in successful treatment and reintegration necessitates the order sought.

[52] Finally, I considered the evidence that Mr. Schoenborn sees the world through a hostile lens and is sensitive to perceived disrespect or condescension (Record, Tab 104-1). I also note the evidence that the treatment team continues to work with Mr. Schoenborn on his perceptions and to mitigate the risk of any negative interactions between him and others (Record, Tab 104-1). I am mindful of the evidence that transparency will be important to assisting Mr. Schoenborn to reintegrate through employment and community living:

> Dr. Lacroix testified that the treatment team will be working hard to attempt to limit the potential for these kinds of scenarios to develop in the community. This will involve any future employers and landlords being fully aware of Mr. Schoenborn's case and all of the issues that may arise given his notoriety.
> (Reasons for Disposition, March 3, 2022, at para. 22)

[53] I do not accept that because Mr. Schoenborn has been mistreated by co-patients while in custody, he faces a serious risk if he were to reintegrate into the community with public knowledge of his new name. Mr. Schoenborn's fellow patients at FPH are not a representative sample of the population. They are in hospital because of an NCRMD verdict, and the Board has found that they continue to pose a significant threat to public safety. Many have committed violent crimes and suffer from mental disorders that leave them impaired in their ability to tell right from wrong, and to show restraint in interacting with others. I am persuaded by Global News' argument that granting the order sought will not prevent Mr. Schoenborn from being recognized. The victim's surviving family, elected representatives, members of the public, and media have attended his Review Board hearings and are familiar with his appearance. His past image, and sketches of his more recent image have been widely circulated in the media. Staff and co-patients who have resided alongside or worked with Mr. Schoenborn at FPH know him well. He has not had a low profile at FPH since he came under the Board's jurisdiction.

[54] I am mindful of the evidence that, according to Crown counsel's submissions, in staff interactions Mr. Schoenborn has often shown himself to be the aggressor. The record contains numerous instances of his acting with verbal aggression and threatening behaviour. It is reasonable to assume that some of those incidents have caused staff to fear for their physical safety and mental wellbeing. By way of example only, I note the most recently documented incidents of Mr. Schoenborn's verbal aggression and threatening

behaviour toward staff who are trying to enforce hospital rules and administer patient care (Record, Tabs 103-1 and 104-1).

[55] Based on the totality of the evidence, I find that Mr. Schoenborn has failed to meet the onus of establishing that publishing his new name, in the usual course, would pose a *serious risk* such as was contemplated by the Supreme Court of Canada in *Sherman Estate*. This includes either a risk to his safety or a risk that treatment goals, including reintegration, will be undermined.

[56] If I am wrong, and these interests are seriously at risk, I would still find that there are *alternative measures* available to him and the Director to mitigate that risk such that the threshold for engaging the Board's authority to redact the disposition and reasons for disposition is not met in any event. As both Crown counsel and counsel for Global News noted, if Mr. Schoenborn feels for his physical safety and mental wellbeing, he can work with law enforcement to develop a safety plan, call on police in urgent circumstances, seek support from his treatment team, take accountability for his own safety and the decisions he makes about where he visits, when and with who. He can also continue to work on his conflict management and interpersonal skills, such that he is better able to engage with others.

[57] I turn to whether the order sought in this instance is *proportionate* to the risk that Mr. Schoenborn might face if his new identity were disclosed in a presumptively public document such as Board dispositions and reasons. I find that it is not. The remedy he seeks is extraordinary – no precedent for such an order has been cited to me. In terms of proportionality, I find that on one side of the scale lies the presumption of openness and the value of openness in this case, and on the other side lies Mr. Schoenborn's legitimate goal of reintegrating into the community, safely and successfully, under a new identity. Openness includes ensuring: 1) that members of the public are informed of how and why the Board arrives at its decisions (including whether and how public safety is addressed) and may conduct themselves in accordance with that knowledge; and 2) the media is not obstructed in reporting on Board proceedings and the product of those proceedings. All parties note that this is a case which has attracted significant public and media interest. This militates in favour of, rather than against, continued openness. Balancing the important public interests against Mr. Schoenborn's privacy, safety and community reintegration needs, I conclude that the scale tips in favour of protecting and preserving the openness principle.

[58] Finally, I find that there is no evidence that Mr. Schoenborn's fair trial rights are engaged in this application. He has been tried. Further, the court record of proceedings is before the Board and the Board is aware of the name under which he was charged and his current name. There is no need for secrecy to ensure that he is not prejudiced at trial or in the extension of his criminal proceedings before the Board. That said, to ensure that Mr. Schoenborn is not prejudiced pending any judicial review of this decision to deny the Application, I directed that the Board and the Parties would refer to him only as Mr. Schoenborn at his upcoming disposition hearing.

[59] As to the Applicant's request that Mr. Schoenborn's new name not be used in "any legal proceedings" unless approved by the Board, I am not persuaded that the Board has the authority to grant that request. The Board is a creature of statute, and I can find no basis in the *Criminal Code* for such an order. Neither is it a function of the Board's authority to control its own process for the Board to purport to reach beyond its own borders and bind another tribunal or court.

DECISION

[60] For all the above reasons, I find that Mr. Schoenborn has not rebutted the presumption of openness. I decline to exercise my discretion to grant the relief sought. The application is dismissed.

Decision written by B. L. Edwards, Chairperson.