Order F05-26

FORENSIC PSYCHIATRIC SERVICES COMMISSION

David Loukidelis, Acting Information and Privacy Commissioner

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Summary: The applicant, a patient in a hospital operated by the Commission, requested his records from the Commission. The Commission said certain records are excluded from the Act under s. 3(1)(h). The applicant was found to be not criminally responsible under Part XX.1 of the *Criminal Code* for certain crimes. The applicant's prosecution ended with the verdict of not criminally responsible and the processes regarding his case under Part XX.1 are not proceedings in respect of the prosecution. The Act applies to the records and the Commission must process the applicant's request.

Key Words: Scope of the Act—prosecution—proceedings in respect of a prosecution.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 3(1)(h).

Authorities Considered: B.C.: Order No. 20-1994, [1994] B.C.I.P.C.D. No. 23; Order No. 202-1997, [1997] B.C.I.P.C.D. No. 63; Order No. 256-1998, [1998] B.C.I.P.C.D. No. 51; Order 290-1999, [1999] B.C.I.P.C.D. No. 3; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order F05-03, [2005] B.C.I.P.C.D. No. 3; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

Cases Considered: *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 2 S.C.R. 27; *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 140 C.C.C. (3d) 400 (Ont. C.A.); *Winko v. British Columbia (Forensic Psychiatric Institute,* [1999] 2 S.C.R. 733; *Davidson v. British Columbia (Attorney General) et al,* [1993] B.C.J. No. 2214 (C.A.); *Canada (Information and Privacy Commissioner) v. Canada Commissioner of the RCMP et al.*, [2003] S.C.J. No. 7, 2003 SC; *Nowegijick v. Canada* (1983), 144 D.L.R. (3d) 193; *Slattery (Trustee of) v. Slattery* (1993), 106 D.L.R. (4th) 212; *Technical Products Pty. Ltd. v. State Government Insurance (Qld.)* (1989), 167 C.L.R. 45, at p. 47, 85 A.L.R. 173; *Sarvanis v. Canada,* [2002] 1 S.C.R. 921, [2002] S.C.J. No. 27; *Markevich v. Canada (Minister of National Revenue)*, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8.

1.0 INTRODUCTION

[1] This decision arises from the applicant's request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Forensic Psychiatric Services Commission ("Commission") for his records from the date of his admission in April 1995 to the date of the request. The Commission denied access to the records on the grounds that they were excluded from the scope of the Act under s. 3(1)(h) of the Act. It also indicated that it had concerns that s. 19 of the Act applied to the information. The applicant requested a review by this office of the Commission's decision.

[2] Mediation was unsuccessful in resolving the request for review and I therefore held an inquiry under s. 56 of the Act. In addition to receiving submissions from the applicant and the Commission, this office invited submissions from the Ministry of Attorney General; the Canadian Mental Health Association (BC Division); the Community Legal Assistance Society; the British Columbia Review Board; the British Columbia Freedom of Information and Privacy Association; and the British Columbia Civil Liberties Association. All of them except the BC Civil Liberties Association provided submissions.

2.0 ISSUE

[3] The issue before me in this inquiry is whether the requested records are excluded from the scope of the Act by virtue of s. 3(1)(h) of the Act.

[4] The Commission says in its initial submission that the preliminary issue in this inquiry is whether "some or all of the records" are covered by the Act. It goes on to maintain that "the majority of the remaining records (which comprise several hundred pages)" should be withheld under s. 19 or severed under ss. 15 and 22.

[5] The Commission then says that the application of these exceptions to the "remaining records" is not at issue in this inquiry, because I am dealing here only with the preliminary issue of whether s. 3(1)(h) applies to some of the requested records (paras. 2-3, initial submission).

[6] The Commission mentions withholding and severing the "remaining records" under ss. 15 and 22, apparently for the first time, in its initial submission. There is no indication in the material before me that the addition of ss. 15 and 22 was ever communicated to the applicant before the Commission's initial submission was made in this inquiry.

[7] In its decision letter to the applicant, the Commission said it was relying on s. 19 as well as s. 3(1)(h) in withholding all of the requested records. It is not clear if it was saying that s. 19 applied in the alternative or if it considered s. 3(1)(h) to apply to some records and s. 19 to apply to others. The Commission supplied with its initial submission an affidavit from its Manager, Patient Access Services, Information & Privacy Co-ordinator, who describes the types of files the Commission has on patients as, first, "legal information"

(*e.g.*, court records, Crown counsel correspondence, Criminal Review Board records, records related to proceedings before the *Mental Health Act* Review Panel) and, second, hospital and medical information (*e.g.*, physician progress notes, medical administration records, medical, dental and psychological records, general administration records, patient correspondence). The Commission does not refer to this affidavit in its submission, but I take its purpose to be to distinguish between what the Commission considers to be records excluded from the scope of the Act by virtue of s. 3(1)(h) (the legal information) and records covered by the Act (the medical and administration information).

[8] The only issue mentioned in the notice of written inquiry that this office issued to the parties is whether s. 3(1)(h) of the Act excludes records from the scope of the Act and that is the only issue I have considered. I have not considered whether ss. 15, 19 and 22 apply to the requested records or the "remaining records", whatever those might be.

3.0 DISCUSSION

[9] **3.1 Application of 3(1)(h)**—Section 3(1)(h) of the Act reads as follows:

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

[10] Schedule 1 to the Act contains these relevant definitions:

> **"exercise of prosecutorial discretion"** means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (a) to approve or not to approve a prosecution,
> (b) to stay a proceeding,
> (c) to prepare for a hearing or trial,
> (d) to conduct a hearing or trial,
> (e) to take a position on sentence, and
> (f) to initiate an appeal; …
>
> **"prosecution"** means the prosecution of an offence under an enactment of British Columbia or Canada; …

[11] A number of orders have considered the application of s. 3(1)(h), including Order No. 20-1994,[1] Order No. 202-1997,[2] Order No. 256-1998,[3] Order No. 290-1999,[4] Order

[1] [1994] B.C.I.P.C.D. No. 23.
[2] [1997] B.C.I.P.C.D. No. 63.

No. 331-1999,[5] and Order F05-03.[6] I also considered this section in a March 28, 2003 decision as to whether the Act applied to certain records.[7]

[12] **3.2 Submissions of the Parties & the Interveners**—The applicant's submission is brief. He says he is aware of other patients who have applied for access to their own personal information through "this process"—presumably the access to information process under the Act—including an individual whom he names. He also says that every year he is represented at an annual hearing in front of the British Columbia Review Board ("Review Board") by the Mental Health Law Program and that, each year, he signs an authorization for release of information allowing his lawyer to have access to the files he wishes to obtain.

[13] He says he is able to obtain records through the Review Board process and it is therefore "somewhat ridiculous" that he cannot obtain them under the Act

> …because the prosecution centering around them has not been completed. Our legal structure does not attempt to hide material from the defence any more than it does from the prosecution. A complete disclosure is considered to be in the interests of good jurisprudence.

[14] The Commission and the interveners made helpful, and detailed, submissions. I will summarize those submissions at some length in recognition of their efforts in assisting with this inquiry.

Commission's submissions

[15] At para. 1 of its initial submission, the Commission says the records in dispute include:

- Correspondence between Crown counsel and Hospital doctors, Police Report to Crown counsel and some other police records;
- Criminal trial court records, including a Pre-Sentence Report and transcripts;
- Review Board disposition orders and decisions and related records, psychiatric assessment reports relating to both court and disposition proceedings prepared by Commission psychiatrists and case management reports relating to disposition proceedings prepared by Commission staff;
- Mental Health Review Panel information, including hospital psychiatric assessment and case management reports;
- Medical, dental and psychological consultation reports and related records;
- Medication administration records;
- Physician progress notes, patient care notes and progress notes; and

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[3] [1998] B.C.I.P.C.D. No. 51.
[4] [1999] B.C.I.P.C.D. No. 3.
[5] [1999] B.C.I.P.C.D. No. 44.
[6] [2005] B.C.I.P.C.D. No. 3.
[7] That decision, found at http://www.oipc.bc.ca/orders/other_decisions/15884matasfinal.pdf, is referred to below as the "Reyat decision".

- Hospital administration records, for example, authorization for release of information and related correspondence, letters from patient to hospital doctors and staff, voluntary consent to treatment, admissions records and similar records.

[16] The Commission takes the position that some of these records are not accessible under the Act at all because they "are related to a prosecution" and "all proceedings in respect of the prosecution have not been completed", such that s. 3(1)(h) excludes them from the Act's scope. At para. 11 of its initial submission, the Commission says that only some records relating to the applicant are excluded from the Act's scope, being these:

- correspondence between Crown counsel and Hospital doctors (including psychiatric assessment information), Police Report to Crown Counsel and some other police records
- criminal trial court records, including a Pre-Sentence Report, and transcripts
- Criminal Code Review Board disposition orders and decisions and related records, psychiatric assessment reports relating to both court and disposition proceedings prepared by Commission psychiatrists and case management reports relating to disposition proceedings prepared by Commission staff.

[17] The Commission says that, in 1995, the applicant was found not guilty of a number of offences, including arson and attempted murder, by reason of a mental disorder. The technical term for that finding is "not criminally responsible on account of mental disorder" (s. 672.34, *Criminal Code*).[8] The Supreme Court of British Columbia ordered that the applicant be held in custody at the Forensic Psychiatric Hospital ("Hospital") operated by the Commission and referred the matter of the applicant's disposition to the Review Board, a provincial board established under the *Criminal Code* mental disorder provisions (paras. 4-5, initial submission).

[18] The Review Board determined that the applicant should remain in custody at the Hospital on the basis that, if he were released into the community, he would be a significant threat to the safety of the public. The applicant has remained in custody at the Hospital since then. Annual reviews by the Review Board have found that the applicant continues to be a significant threat to the safety of the public and that the only disposition that can be made safely to protect the community and care adequately for the applicant is one where he remains in the Hospital's custody (para. 6, initial submission).

[19] The Commission acknowledges, at paras. 21 and 23-24 of its initial submission, the proper approach to statutory interpretation set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*[9] and says that a contextual interpretive analysis of s. 3(1)(h) requires consideration of the larger objects and purposes of the Act and the nature of Review Board proceedings under Part XX.1 of the *Criminal Code*. The Commission also

[8] For convenience, I will refer to the disposition under the *Criminal Code* of not criminally responsible by reason of a mental disorder as "NCR" and a person found to be such as a "NCR person".
[9] [1998] 2 S.C.R. 27, paras. 21 & 23-24.

discusses the meanings of "exercise of prosecutorial discretion" and "offence", and the responsibilities of Crown counsel and the Criminal Justice Branch in initiating and conducting prosecutions of criminal offences, as set out in the *Crown Counsel Act*. It acknowledges that one of the Act's purposes is to provide a right of access to records but suggests that, nevertheless, an interpretation of s. 3(1)(h)—which it notes is a jurisdiction-limiting provision—should be approached cautiously (paras. 54-60, initial submission).

[20] The Commission says that the first question is whether these records "relate to a prosecution" and, if they do, the second question is whether "all proceedings in respect of the prosecution are completed". If they are, the records are subject to the Act (paras. 11-12, initial submission).

[21] The Commission reviews a number of the orders that deal with s. 3(1)(h) and acknowledges they have interpreted the term "prosecution" as meaning the "prosecution of a criminal or quasi-criminal offence". It says the intent of s. 3(1)(h) is, on its face, to preclude access to any records relating to or arising in the context of the prosecution of an offence, until such time as the prosecution proceedings have been "completed". In light of the definition of "exercise of prosecutorial discretion", it continues, one may infer that such proceedings are not complete until all matters relating to the prosecution—including sentencing and any appeals arising from the conviction and or sentencing, or both—are concluded. It does not believe the intent of s. 3(1)(h) is to limit access to records related to a prosecution in the hands of Crown counsel (where the prosecution proceedings are not complete) but not to limit access to such records in the hands of other public bodies, such as the Commission (paras. 13-16, initial submission).

[22] With the support of affidavit evidence from Gerry Nelson, the Commission's Acting Director of Patient Care and Client Services, the Commission describes the workings of the disposition process. Once a verdict of "not criminally responsible by reason of mental disorder" ("NCR") is entered, it says, the provisions of Part XX.1 of the *Criminal Code* are triggered and the "NCR accused" (the person who has been found to be NCR) is diverted to what the Commission refers to as a "special stream". Either the court or the Review Board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions or unconditionally discharged. A court may make the initial disposition order, but the Review Board then assumes responsibility for ongoing assessment and management of the NCR accused (para. 17, initial submission).

[23] In its initial submission, the Commission combines its discussion of the process for dealing with the "NCR accused" with that for the "unfit accused" (a person found unfit to stand trial) and says that s. 3(1)(h) applies to records related to both processes. The Commission says that, in the case of those found unfit to stand trial, the charges are effectively stayed until the accused is found to be fit to stand trial. It says that the prosecution in such cases cannot be said to be complete and that "it would lead to an absurd result if … disposition proceedings relating to an NCR accused were characterized differently than those in relation to an unfit accused" (para. 63, initial submission).

[24] At para. 19 of its initial submission, the Commission says it functions primarily to:

- provide adult forensic psychiatric services to the courts;
- give expert forensic psychiatric evidence;
- provide forensic psychiatric services for persons remanded by the courts for psychiatric examination, persons held at the direction of the Lieutenant Governor in Council under the *Criminal Code* or the *Mental Health Act*, persons in need of psychiatric care or assessment while in custody and persons held under a court order; and
- provide inpatient and outpatient treatment for persons described in 3 above.

[25] The Commission also provided considerable detail about its functions, the services it provides and its organization and administration. The Commission says it plays an important role in disposition hearings relating to NCR persons who, like the applicant, have been ordered detained in custody at the Hospital or who have been conditionally discharged into the community under the supervision of the Commission's Director (para. 25, initial submission).

[26] The Commission says that provincial review boards such as the Review Board are established and regulated under Part XX.1 of the *Criminal Code* and that their jurisdiction is triggered by a verdict that someone charged with a criminal offence is not fit to stand trial or the accused committed the act or made the omission that is the basis of the offence charged but is NCR (paras. 26-28 & 30, initial submission).

[27] Citing *Winko v. British Columbia (Forensic Psychiatric Institute)*[10] and *Davidson v. British Columbia (Attorney General) et al.*,[11] the Commission says that Part XX.1 of the *Criminal Code* reflects a new approach to the problem of the mentally ill offender and that the Review Board's task is to balance the protection of society with the right of an accused to liberty, with the proceedings being neither adversarial nor penal, but inquisitorial.

[28] The NCR accused is neither convicted nor acquitted, the Commission says, and the focus of disposition proceedings is on providing for confinement of dangerous mentally disordered accused persons and setting criteria for conditional and absolute release of mentally disordered accused persons into the community. It contends that disposition proceedings are an "extension of the criminal proceedings that began with the mentally disordered accused being charged with an offence" (paras. 46-47, 49 & 51, initial submission).

[29] The Commission views the disposition proceedings as criminal proceedings, like trial and sentencing proceedings. It does acknowledge that disposition hearings have a different character, reflecting the fact that the NCR accused is treated in a "special way". It says the disputed records relate to the "legal proceedings involving the applicant" that have been and are being carried out under authority of the *Criminal Code*". It says the Attorney General is

[10] [1999] 2 S.C.R. 733.
[11] [1993] B.C.J. No. 2214 (C.A.).

entitled to be present at disposition hearings and that Crown counsel routinely appear at those proceedings to address public safety concerns, although, beyond this, it does not say what role Crown counsel plays (para. 62, initial submission).

[30] The Commission says that the records it considers to be excluded from the scope of the Act all pertain to the administration of criminal justice under the *Criminal Code* through the courts and the Review Board, which share jurisdiction respecting Part XX.1 disposition proceedings. These records include records that Crown counsel would have considered initially in exercising prosecutorial discretion in favour of charging the applicant. In addition, the Commission says, without giving particulars, Crown counsel has had continuing involvement in the court and Review Board proceedings respecting the applicant. The Crown must apply to be a "party" to the disposition proceedings, but as a party, it has a statutory right to appeal a court or Review Board disposition decision, the Commission says, adding that, "in deciding whether to do so, presumably [the Crown] exercises prosecutorial discretion (which discretion has been defined inclusively, not exhaustively, under the Act)" (para. 64, initial submission).

[31] In the Commission's view, the disputed records remain outside the scope of the Act until such time as the applicant is discharged and any appeals with respect to the absolute discharge have been exhausted. The applicant can have access to some or even all of the records through other legal means, the Commission acknowledges (para. 65, initial submission).

BC Review Board's submissions

[32] The Review Board describes how, from a criminal and regulatory perspective, its process operates as compared with the prosecution that precedes the process. It suggests that the key issues are, first, whether "disposition information" (clinical and assessment reports prepared for a Review Board hearing) can be understood as "records relating to a prosecution" and, second, whether "proceedings respecting the prosecution have not been completed" once the Review Board has exclusive jurisdiction over a person given a verdict of NCR. It says that the answer to these questions may turn on how one interprets the terms "relating to" and "respecting" (paras 11, 15-16, initial submission).

[33] The Review Board says that a criminal prosecution comes first, followed by, in the case of an NCR accused, a final judicial verdict and the Review Board proceeding. It says that there is a constitutional connection between the criminal and Review Board proceedings and also some overlap between the evidence tendered in both types of proceedings, but that there are also significant differences between them.

[34] Like the Commission, the Review Board acknowledges, referring to *Winko*, that a Part XX.1 proceeding respecting an NCR accused is not adversarial. The Review Board says its proceedings are not governed by prosecutorial discretion. The Crown does not drive proceedings respecting an NCR accused and cannot "stay" the matter, it says. The Crown may, but does not always, participate and there is no legal burden of proof on any party. It again points to *Winko* regarding the distinction between a Review Board proceeding

regarding an NCR accused and the preceding prosecution. The Review Board's mandate is to determine if a person would pose a significant risk to the public if discharged absolutely and this is very different, the Review Board says, from the question determined in the prosecution, adding that "[a] criminal prosecution is retrospective and focuses on events that took place in the past. A Review Board hearing is prospective and focuses on future risk" (paras. 18-26, initial submission).

[35] The evidence in a Review Board hearing is designed to support its unique mandate, the Review Board says. The "prosecution" information that forms part of the package for a first hearing is augmented by other reports, it says, and in cases such as the applicant's, the "prosecution" records form only a small part of the records in evidence before the Review Board and only part of the larger history that develops over the years (paras. 27-28, initial submission).

[36] It acknowledges that the *Criminal Code* uses the term not criminally responsible "accused" and says that this term is used to distinguish the new regime from the previous one, in which the person was referred to as an "acquitee". Referring again to *Winko*, the Review Board says that this new system reflects the fact that the person originally accused is found neither guilty nor innocent, but receives a third verdict, *i.e.*, that the person is not criminally responsible (para. 29, initial submission). It says that once the court renders the NCR verdict, the prosecution is left behind and the NCR accused enters "a special stream tailored exclusively for treatment of mentally ill persons who are neither acquitted nor found guilty" (para. 30).

[37] The Review Board concludes by saying it leaves me to decide whether there is a sufficient nexus between a prosecution and a Review Board disposition hearing to conclude that records tendered before the Review Board are records "relating to a prosecution" or whether "proceedings respecting the prosecution have not been completed" while Review Board proceedings remain extant. It also leaves me to decide if it would lead to "an absurd result" if I were to find that, as the Commission contends, disposition proceedings respecting NCR accused are to be characterized differently for the purposes of s. 3(1)(h) than proceedings respecting unfit accused.

Community Legal Assistance Society's submissions

[38] The Community Legal Assistance Society ("CLAS") argues that s. 3(1)(h) does not apply to the records in dispute. It says that ss. 672.1 and 672.34 of the *Criminal Code* make it clear that a verdict is rendered by the court that the accused committed the act or omission that formed the basis of the offence charged. It argues that the prosecution is completed by virtue of the special verdict of NCR and that all proceedings relating to that verdict and to the prosecution are completed at that point. The Review Board acquires jurisdiction over the accused when the court renders the NCR verdict, CLAS says, unless the court orders an absolute discharge (paras. 14-17, initial submission).

[39] CLAS continues by saying that the disposition hearings under Part XX.1 of the *Criminal Code* do not form part of the prosecution once the NCR verdict has been rendered

and that they are different from court proceedings involving Crown counsel. The NCR person is entitled to yearly reviews by the Review Board, CLAS says, and there is no provision in Part XX.1 of the *Criminal Code* for returning the accused to court, by the Crown or anyone, after the court or Review Board has made a disposition (paras 18-20, initial submission).

[40] The disposition hearing is not penal, CLAS says. Any "disposition information"—consisting of an assessment report and any other recorded information provided to the court or Review Board for its consideration at a disposition hearing—is not compiled or generated for ongoing prosecutorial purposes, CLAS says, but to determine the least restrictive and least onerous disposition order respecting the NCR person (as I have outlined above). CLAS notes that the Attorney General, represented by Crown counsel, is not necessarily present at all disposition hearings. Referring to *Winko* and *Davidson*, CLAS says that once a disposition hearing begins, the proceedings depart from the traditional criminal model (paras. 21-26, initial submission).

[41] The Canadian Mental Health Association submission says it supports CLAS's position.

Ministry of Attorney General's submissions

[42] The Ministry of Attorney General ("Ministry") argues that s. 3(1)(h) applies to the disputed records. It first refers me to Order 03-32,[12] where, at para. 33, I discussed the term "relate to", referring to *Canada (Information and Privacy Commissioner) v. Canada Commissioner of the RCMP et al.*, [2003] S.C.J. No. 7, 2003 SC, at para. 25. The Ministry then refers to previous orders on s. 3(1)(h) and outlines the Review Board process for NCR persons under Part XX.1 of the *Criminal Code*. It also says that access to disposition information is governed by s. 672.51 of the *Criminal Code* (paras. 1-27, initial submission).

[43] In the Ministry's view, a Review Board disposition hearing under Part XX.1 of the *Criminal Code* is a "proceeding" for the purposes of s. 3(1)(h). It argues that the purpose of the section is to insulate the criminal law process for a time from access requests under the Act and to ensure that *Criminal Code* provisions governing access to information (while that process is underway) prevail. The Ministry argues that there would be confusion if the *Criminal Code* and the Act were in conflict with each other as to whether certain records should be disclosed. The purpose of s. 3(1)(h), it suggests, is to prevent such a conflict from arising. The Ministry therefore believes that "prosecution" should be interpreted to cover any proceedings conducted under the authority of the *Criminal Code*, including Part XX.1 proceedings. As long as an accused is subject to the jurisdiction of the court or the Review Board under the *Criminal Code*, as is the case with an NCR person, the Ministry argues that the prosecution should not be viewed as being complete (paras. 29-34, initial submission).

[12] [2003] B.C.I.P.C.D. No. 32.

BC Freedom of Information and Privacy Association's submissions

[44] The BC Freedom of Information and Privacy Association ("FIPA") says the annual Review Board review of the status of an NCR person is not a proceeding relating to a prosecution that has not been completed. While a prosecution may include the sentencing of offenders, an NCR person is not sentenced at the time of his or her offence and sentencing is not the purpose of a disposition hearing under Part XX.1 of the *Criminal Code*, it says. It argues that the NCR verdict ends the prosecution of the offence, with disposition hearings for NCR patients being a distinct administrative process that follows. It also says that the Commission's interpretation would have the effect of preventing an NCR accused from having access under the Act to his or her personal information for an indefinite and potentially lengthy period of time (paras. 6-8, initial submission).

[45] FIPA then refers to the interpretation of "prosecution" and "offence" in previous orders regarding s. 3(1)(h). It acknowledges that an NCR person is first charged with an offence and is then found to have committed the act or omission that is the basis of the offence charged. The "prosecution" of the offence would, it says, then normally proceed with a determination of the appropriate punishment for the offence. In the case of an NCR person, however, the determination takes the form of entering a verdict of NCR, which is, in effect, a judicial determination that no punishment is appropriate. The NCR person's liberty is then brought under the jurisdiction of the Review Board under Part XX.1 of the *Criminal Code*.

[46] FIPA says that the Supreme Court of Canada recognized in *Winko* that this is a unique process that emphasizes "individualized assessment" and that is designed to balance the twin goals of public protection and fairness to the NCR person. It says that this is achieved through a process that is inquisitorial rather than adversarial and that the process is no longer the "prosecution" of an offence. There is no determination of guilt or innocence and the patient does not face punishment or penal consequences. In FIPA's view, therefore, the comparison with sentencing or "prosecution" of an offence breaks down (paras. 9-11, initial submission).

[47] FIPA points out that the Attorney General is not a necessary party at disposition hearings for an NCR patient and that the Attorney General may simply apply for party status. The Attorney General thus does not have to be present to "prosecute" the NCR patient. FIPA suggests that this is consistent with the fact that a disposition hearing is not a proceeding in respect of a prosecution, or at least no longer has the character of a prosecution (para. 12, initial submission).

[48] FIPA argues that the Act's definition of "exercise of prosecutorial discretion" should not lead to a broad interpretation of the s. 3(1)(h) exclusion. Even if the Attorney General might exercise prosecutorial discretion in deciding whether or not to appeal a disposition order by the Review Board, it says, the "exercise of prosecutorial discretion" is broader than the "prosecution of an offence". Just as Crown counsel may exercise prosecutorial discretion before laying charges and thus before the prosecution of the offence, FIPA says, Crown

counsel may also exercise prosecutorial discretion in deciding whether or not to appeal a Review Board disposition decision. This does not, in FIPA's view, change the nature of the proceeding from administrative to prosecutorial. Thus, in FIPA's view, s. 3(1)(h) should not apply where the prosecution of the NCR person has concluded and the only ongoing proceedings relate to the appropriate disposition of the patient under Part XX.1 of the *Criminal Code* by the Review Board (paras. 13-17, initial submission).

[49] **3.3 Does Section 3(1)(h) Apply to the Records?**—As noted earlier, s. 3(1)(h) of the Act excludes from the Act records "relating to a prosecution if all proceedings in respect of the prosecution have not been completed". In essence, the Commission says that the records it holds relate to a prosecution and proceedings respecting that prosecution have not been completed. For so long as the applicant is held at the Hospital by order of the Review Board, as I understand the Commission's position, the prosecution-related "proceedings" continue and s. 3(1)(h) applies to the above-described records. For the reasons given below, I am not persuaded by the Commission's arguments.

[50] It is useful to begin by summarizing the relevant aspects of Part XX.1 of the *Criminal Code*:

- A person accused of a crime is not "criminally responsible" where that person is "suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong." (*Criminal Code*, s. 16(1))
- A judge or jury trying someone who is adjudged to be exempt from criminal responsibility by virtue of s. 16(1) has no choice but to "render a verdict" that the person committed the act or omission, "but is not criminally responsible on account of mental disorder" (s. 672.34)
- After an NCR verdict, the court can, on its own motion, hold a "disposition hearing" and make a "disposition" and must do so if asked by the accused or the prosecutor (s. 672.45)
- A "disposition" is an order by the court or Review Board. It can order the release of the accused (known as an absolute discharge), the discharge of the accused subject to conditions, or detention in a hospital on conditions considered appropriate (s. 672.54)
- If the court does not hold a disposition hearing, the Review Board must do so within 45 days after the verdict and must make a disposition (s. 672.47)
- If the court has made a disposition, the Review Board must, unless the disposition was an absolute discharge, hold a disposition hearing within a specified time and must make a disposition (s. 672.47)
- A disposition cannot, without the consent of the NCR person, require the person to submit to psychiatric or other treatment (s. 672.55)
- The court or Review Board must, on application, designate the Attorney General as a disposition hearing party and can designate as a party anyone else who has a substantial interest in protecting the interests of the accused (s. 672.5). (The prosecutor is a party where the court holds the disposition hearing.)
- Notice of the hearing must be given to the accused, who has the right to legal counsel, and to the Attorney General (s. 672.5)

- Any party can call witnesses, adduce evidence, make submissions and cross-examine witnesses (s. 672.5)
- Any assessment by a medical practitioner of the NCR accused, and any other written information that is before the court or Review Board and is relevant to making a disposition, must be made available to each party and to counsel for the accused (s. 672.51)
- Information can be withheld where the court or Review Board concludes that disclosure would be likely to endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused" (s. 672.51)
- Any party to a disposition hearing can appeal the disposition to the Court of Appeal (s. 672.72)
- The Review Board must review any disposition it has made at least once every 12 months after the disposition, until the NCR person is given an absolute discharge (s. 672.81).

[51] The courts have considered the nature of the powers and processes found in Part XX.1 on a number of occasions. As the Commission and other inquiry participants noted, the British Columbia Court of Appeal has said that the proceedings are neither adversarial nor penal in their intent or effect:

> ¶36 As its composition and powers indicate, a board of review set up under Part XX.1 of the Code is a specialized administrative tribunal, the skills of whose members provide institutional insight into the legal and medical problems of mental health. It is given inquisitorial powers to summon witnesses and compel them to give evidence.
>
> ¶37 Its task, and here I speak only of a disposition of one found not criminally responsible for a criminal act, is to balance the protection of society on the one hand, and the right of the subject to his or her liberty unless deprived of it in accordance with the principles of fundamental justice. Although the proceedings are informal, a record must be kept such as to provide the basis for an appeal to the Court of Appeal. Post-trial detention is neither arbitrary nor indeterminate. The requirements of s. 672.54 direct the Board to put into perspective the mental condition, goals and needs of the mentally disordered person with the interests of the public and, where an absolute discharge is not warranted, to choose the least onerous and least restrictive conditions on the liberty of that person's liberty [*sic*].[13]

[52] More recently, the Supreme Court of Canada said this about Part XX.1:

> ¶20 …Parliament introduced sweeping changes by enacting Part XX.1 of the *Criminal Code* in 1991: *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, S.C. 1991, c. 43. Part XX.1 reflected an entirely new approach to the problem of the mentally ill offender, based on a growing appreciation that treating mentally ill offenders like other offenders failed to address properly the interests of either the

[13] *Davidson*, above.

offenders or the public. The mentally ill offender who is imprisoned and denied treatment is ill-served by being punished for an offence for which he or she should not in fairness be held morally responsible. At the same time, the public facing the unconditional release of the untreated mentally ill offender was equally ill-served. To achieve the twin goals of fair treatment and public safety, a new approach was required.

¶21 Part XX.1 rejects the notion that the only alternatives for mentally ill people charged with an offence are conviction or acquittal; it proposes a third alternative. Under the new scheme, once an accused person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, that individual is diverted into a special stream. Thereafter, the court or a Review Board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions, or unconditionally discharged. The emphasis is on achieving the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately.

¶22 Daniel Préfontaine, then an Assistant Deputy Minister at the Department of Justice, summarized the objectives of Part XX.1 before the Standing Committee on Justice and the Solicitor General:

> The legislative proposals continue the long-standing objective of protecting the public from presently dangerous people who have committed offences, and the long-standing principle of fundamental fairness we have had in our laws that we do not convict people who are incapable of knowing what they are doing.
>
> The aim of the bill is twofold: to improve protection for society against those few mentally disordered accused who are dangerous; and to recognize that mentally disordered offenders need due process, fundamental fairness and need the rights accorded to them for their protection when they come into conflict with the criminal law.
>
> (House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General, Issue No. 7, October 9, 1991, at p. 6.)

¶23 Part XX.1 of the Criminal Code rests on the characterization of the person who commits an offence while mentally ill as "not criminally responsible", or NCR: s. 16. Under the new regime, once a judge or jury enters a verdict of "not criminally responsible on account of mental disorder", the person found NCR becomes subject to the provisions of Part XX.1. The court may, either on its own motion or on application by the prosecutor or the NCR accused, hold a disposition hearing: s. 672.45(1). At such a hearing, the court may make an immediate disposition with respect to the accused if it is satisfied that a disposition should be made without delay and that it can do so readily in the circumstances: s. 672.45(2). If the court does not make a disposition, the custodial provisions in force at the time of the verdict continue until a hearing is held by the Review Board of the province, established under s. 672.38 of the Code: s. 672.46(1).

…

> ¶42 By creating an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy, Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation. The NCR accused is not to be punished. Nor is the NCR accused to languish in custody at the pleasure of the Lieutenant Governor, as was once the case. Instead, having regard to the twin goals of protecting the safety of the public and treating the offender fairly, the NCR accused is to receive the disposition "that is the least onerous and least restrictive" one compatible with his or her situation, be it an absolute discharge, a conditional discharge, or detention: s. 672.54.
>
> ¶43 In summary, the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. Under Part XX.1, the NCR accused is neither convicted nor acquitted. Instead, he or she is found not criminally responsible by reason of illness at the time of the offence. This is not a finding of dangerousness. It is rather a finding that triggers a balanced assessment of the offender's possible dangerousness and of what treatment-associated measures are required to offset it. Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused.[14]

[53] Again, the Commission and the Ministry argue that the Act does not apply because proceedings under Part XX.1 of the *Criminal Code* respecting the applicant are, within the meaning of s. 3(1)(h) of the Act, "proceedings in respect of" a prosecution and the records are "records relating to" the prosecution. The Commission and the Ministry also contend, without definitively saying why, that it would be "absurd" if processes applicable to someone found under Part XX.1 to be NCR were characterized differently, for the purposes of s. 3(1)(h), from processes relating to someone found under Part XX.1 to be unfit to stand trial.

[54] Section 3(1)(h) will apply to records only if there is a "prosecution" as defined in the Act, the records in question are records "relating to" the prosecution, and "all proceedings in respect of the prosecution have not been completed". This last element of s. 3(1)(h) effectively places a time limit on that provision's exclusion of records from the right of access under the Act. Once all proceedings "in respect of" the prosecution are over—for example, where all appeal periods have expired—the Act will apply. The Act's application does not mean, of course, that an access applicant will receive all records, since one or more of the Act's exceptions to the right of access may apply to some or even all of the information in the records.

[55] Regarding the first element of s. 3(1)(h), there is no doubt that the applicant in this case was the subject of a "prosecution". He was prosecuted for certain *Criminal Code* offences and a verdict of NCR was handed down at the conclusion of the trial. There is no

[14] *Winko*, above.

doubt that a prosecution for a criminal offence found in the *Criminal Code* is a "prosecution" for s. 3(1)(h) purposes.[15]

[56] As for the second element, I will assume, for the purposes of discussion only and without making any finding, that the disputed records are records "relating to" the prosecution that ended with the NCR verdict. This assumption is necessary because the disputed records have not been provided to me for review.

[57] The remaining question is whether "all proceedings in respect of the prosecution have been completed." In *Nowegijick v. Canada*,[16] Dickson J. held that the words "in respect of" have a broad meaning in the *Indian Act*. He added that the words "in respect of" carry "such meanings as "in relation to", "with reference to" or "in connection with".[17] The Court went on to say this in *Nowegijick*:

> The words "in respect of" are, in my opinion, words of the widest possible scope.…The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.[18]

[58] In *Slattery (Trustee of) v. Slattery*,[19] Iacobucci J. quoted this passage and said that "these comments are equally applicable" to the phrase "relating to" in s. 241(3) of the *Income Tax Act*.

[59] As I noted in the Reyat decision, various cases interpreting the words "in relation to" or "relating to" illustrate how the same or similar words can yield narrow or broad interpretations, with differences in interpretation being the result of different statutory contexts. The relevance of statutory context and purpose is evident in *Nowegijick* and *Slattery*.[20] More recently, Iacobucci J. underlined the importance of statutory context in *Sarvanis v. Canada*,[21] which addressed the meaning of the phrase "in respect of" in the federal *Crown Liability and Proceedings Act*:

> ¶22 It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.
>
> …

[15] For example, see the Reyat decision, which proceeds on this basis.
[16] (1983), 144 D.L.R. (3d) 193.
[17] *Nowegijick*, at p. 200.
[18] *Nowegijick*, at p. 200.
[19] (1993), 106 D.L.R. (4th) 212, at p. 226.
[20] The relevance of context has also been made in the observation that the words "in respect of" have "a chameleon-like quality in that they commonly reflect the context in which they appear": *Technical Products Pty. Ltd. v. State Government Insurance (Qld.)* (1989), 167 C.L.R. 45, at p. 47, 85 A.L.R. 173, at p. 175.
[21] [2002] 1 S.C.R. 921, [2002] S.C.J. No. 27.

> ¶24 In both cases [the English and French versions of the statutory provision], we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, in discussing the preferred approach to statutory interpretation, the Court stated, at para. 21:
>
> > …Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> In my view, the nature and content of this approach, and the accuracy of Professor Driedger's succinct formulation, has not changed. Accordingly, we cannot rely blindly on the fact that the words "in respect of" are words of broad meaning.[22]

[60] As regards the general interpretive approach to the Act, I have previously acknowledged and applied the approach mentioned in *Sarvanis*, as well as the need to interpret the Act in light of s. 8 of the *Interpretation Act*.[23] As regards the statutory context of s. 3(1)(h), I said this at p. 9 of the Reyat decision:

> At the end of the day, the scope of the words "relating to" in s. 3(1)(h) depends on analysis of the statutory context in which they occur. Section 2 of the Act is an important part of that context:
>
> > **Purposes of this Act**
> >
> > 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
> >
> > (a) giving the public a right of access to records,
> > (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
> > (c) specifying limited exceptions to the rights of access,
> > (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
> > (e) providing for an independent review of decisions made under this Act.
> >
> > (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[22] See also *Markevich v. Canada (Minister of National Revenue)*, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, in which Major J. approved of the above passage from *Nowegijick*, while acknowledging the relevance of statutory context in interpreting statutory language.

[23] See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 47-49.

> The s. 2(1) legislative goal of accountability through a public right of access to records is relevant to but not determinative of the meaning of s. 3(1)(h). Section 2(1)(a) specifies that the accountability goal is to be advanced by giving the public a "right of access to records". As the opening words of s. 3(1) affirm, however, the right of access only applies to records that are "in the custody or under the control of a public body" and are not otherwise excluded from the Act's application under s. 3(1). The effect of s. 3(1) is to exclude records from the scope of not only Part 2 of the Act—with the possible exception of s. 25—but also from the privacy protection code found in Part 3 of the Act.

[61] In the Reyat decision, I rejected a "but for" interpretation of the words "relating to" in s. 3(1)(h) but found that records relating to the payment of legal fees were related "specifically and directly to the prosecution of criminal offences" and were "sufficiently closely connected to the conduct of the trial proceedings involved" to be records "relating to a prosecution". Reyat's guilty plea and sentencing and the stay of other charges against him, however, meant that the "prosecution" had ended. Section 3(1)(h) therefore did not exclude records specific to Reyat's defence.

[62] As noted earlier, the Commission argues that disposition proceedings under Part XX.1 are an "extension of the criminal proceedings that began with the mentally disordered accused being charged with an offence" (paras. 46-47, 49 & 51, initial submission). It says the records pertain to the administration of justice under the *Criminal Code* (para. 64, initial submission). While the records may in some sense "pertain to the administration of justice under the *Criminal Code*", I do not agree that disposition proceedings under Part XX.1 are part of the "prosecution" of the applicant.

[63] There is a connection between Part XX.1 and the prosecution of an individual, since an NCR accused would not be the subject of Part XX.1 proceedings "but for" the fact that she or he was prosecuted for a criminal offence. To say, however, that this turns Part XX.1 proceedings into "proceedings in respect of the prosecution" gives the phrase "in respect of" an over-inclusive effect. The following comments at p. 12 of the Reyat decision are useful here in considering the words "in respect of":

> …Even if one accepts that the aim of s. 3(1)(h) is to enhance the fairness and effectiveness of proceedings in respect of the prosecution of criminal and quasi criminal offences by relieving public bodies of their obligations under the Act respecting records that relate to those proceedings, while the proceedings are under way, a 'but for' test extends s. 3(1)(h) far beyond that rationale.

[64] As McLachlin C.J.C. observed in *Winko*, the NCR accused "is neither convicted nor acquitted",[24] and the NCR verdict leads to "an assessment-treatment alternative for the mentally ill offender to supplant the traditional criminal law conviction-acquittal dichotomy".[25] That alternative to the traditional conviction-acquittal approach flows from

[24] *Winko*, para. 43.
[25] *Winko*, para. 42.

a "prosecution" as defined in the Act ("an offence under an enactment of British Columbia or Canada"). This does not mean, however, that proceedings under Part XX.1 of the *Criminal Code* respecting an NCR accused are proceedings "in respect of" the "prosecution" of the offence charged or that records connected with Part XX.1 matters are records "relating to" a "prosecution".

[65] The applicant was tried for offences under the *Criminal Code*. At the end of the trial, a verdict was, as contemplated by s. 672.34 and s. 16 of the *Criminal Code*, rendered respecting those offences. The applicant was not found guilty or not guilty—he was found to be not criminally responsible on account of mental disorder.[26] This special verdict at the completion of the trial encompasses a verdict that the applicant committed the acts or omissions alleged against him.[27] With the handing down of that verdict, in my view, the "prosecution" ended and any Part XX.1 processes or proceedings are not "proceedings in respect of" the prosecution within the meaning of s. 3(1)(h).[28] I agree with the Review Board's submission that, as *Winko* and other decisions indicate, once the court has handed down a NCR verdict, the prosecution is over:

> 30. It may fairly be stated that, for *Criminal Code* purposes, once Court [*sic*] has rendered its verdict regarding the charges, this marks, both functionally and operationally, a "leaving behind" of the prosecution and an "entering into" a special stream tailored exclusively for the treatment of mentally ill persons who are neither acquitted nor found guilty. Once an NCR verdict is rendered, the NCR accused is released from the power of the prosecutorial arm of the law. The charges have been disposed of. The subsequent review proceedings are inquisitorial in nature and focus not on culpability, but on the question of significant threat in the context of a threat assessment and treatment regime.

[66] I should add that my finding is not affected by the right of a party to a disposition hearing to appeal the disposition to the Court of Appeal, a right of appeal that extends to dispositions the Review Board makes during the mandatory periodic review of dispositions. The possibility of an appeal respecting a disposition made by the court after the NCR verdict, or a disposition made as a result of periodic review by the Review Board, does not mean proceedings under Part XX.1 are proceedings "in respect of" the prosecution. The availability of an appeal does not transform Part XX.1 proceedings into proceedings "in respect of" the "prosecution". Again, the prosecution ended with the NCR verdict, and records created in respect of Part XX.1 matters are not records "in respect of the prosecution" that somehow survive the end of the prosecution.

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[26] In the Reyat decision, the "prosecution" ended for Reyat with his guilty plea and the stay of other charges against him.

[27] Section 672.1(1) of the *Criminal Code* defines the term "verdict of not criminally responsible on account of mental disorder" as "a verdict that the accused committed the act or made the omission that formed the basis of the offence with which the accused is charged but is not criminally responsible on account of mental disorder."

[28] This is not to suggest, however, that an appeal of the NCR verdict itself would not have been a proceeding in respect of the prosecution.

[67] Nor do I see any absurdity, as the Ministry and Commission would have it, in this result as compared to the situation of someone who is found to be unfit to stand trial by reason of a mental disorder. In the situation at hand, a trial would have taken place and a verdict of NCR would have been rendered, carrying with it the underlying verdict that the applicant committed the acts or omissions charged. An unfit accused has, by definition, yet to be tried. The Commission asks in its reply that I make a finding on whether s. 3(1)(h) applies to both processes. I appreciate the Commission's desire for guidance on that point, but decline to say more about application of s. 3(1)(h) to records associated with the "unfit accused" process under Part XX.1.

4.0 CONCLUSION

[68] I find that s. 3(1)(h) does not exclude the records the applicant has requested from the Commission. Those records are covered by the Act. Whether one or more of the Act's exceptions to the applicant's right of access will apply, in whole or in part, remains to be seen.

[69] Under s. 58 of the Act, I require the Commission to respond to the applicant's request for access to records in accordance with Part 2 of the Act.

August 25, 2005

ORIGINAL SIGNED BY

David Loukidelis
Acting Information and Privacy Commissioner