Mental Health Review Board
Mental Health Act
(section 25, R.S.B.C. 1996, c. 288)

EXCERPTS FROM THE UNANIMOUS PANEL DECISION ILLUSTRATING INTERESTING LEGAL ANALYSIS OF SUBSTANTIVE ISSUES AND/OR PROCEDURAL CHALLENGES

To protect the confidentiality of the parties these Excerpts have been altered to refer to the Patient as the "Applicant", the Treating Physicians as " Dr XX " and the day of hearing has been redacted to show the month and year only.

Key Issues: Disclosure; Privileged Evidence

Date of Hearing: Wednesday, March 2020

Location of Hearing: Teleconference – Panel members and Patient's advocate at respective office locations, facility Case Presenters and Patient at the hospital facility.

Panel Members: Heather McDonald, Legal Member & Chair; Dr. Elena Lisiak, Physician Member, and Diane Lamb, Community Member.

Case Presenters for the Hospital: Dr. XX and Dr. XX

Patient's Advocate: Marianna Jasper, for MHLP of the Community Legal Assistance Society

INTRODUCTION

The Applicant is 15 years old. She has been involuntarily detained under section 22 of the *Mental Health Act* (the "Act") since admission to the hospital on February 4, 2020.

On February 24, 2020 the Applicant was detained under the Act based on the assessments of two physicians who each filed a Form 4 Certificate, both completed that same day. The first Form 4 was completed by Dr. XX, a hospital pediatrician, and the second Form 4 was completed by Dr. XX, a hospital physician specializing in child/adolescent eating disorders. Dr. XX also completed a Form 6 on March 12, 2020 extending the Applicant's detention under the Act. Dr. XX was a case presenter for the facility in this proceeding, together with Dr. XX, a hospital pediatrician.

The Applicant applied under section 24 of the Act for a MHRB panel hearing to review whether her detention should continue.

We are a three-person panel appointed under section 24.1 of the Act to decide the Applicant's application for review. Under section 25(2) of the Act, the purpose of this review hearing was to determine whether the Applicant's detention should continue because the four criteria set out in sections 22(3)(a)(ii) and (c) of the Act continue to describe the Applicant's condition. All four criteria must be met to continue the Applicant's detention.

Due to the current global health crisis involving the Covid19 virus, the review panel hearing on March XX, 2020 took place by way of teleconference. The facility's Case Presenters and the Applicant participated from telephones at the hospital. The Applicant's advocate and the panel members participated from their respective office telephones. The panel chair audio-recorded the hearing.

DETERMINATION

Based on the evidence and submissions before us at the hearing, we decided that all four criteria in section 22 of the Act continue to describe the Applicant's condition. Therefore, the Applicant's detention on extended leave is maintained. This was a unanimous decision.

At the end of the hearing, our decision was verbally communicated to the parties with the explanation that reasons would follow. These are our reasons for determination.

HEARING

Procedural Issues

We explained the process and purpose of the oral hearing to the Applicant, her advocate Ms. Jasper, and the Case Presenters for the Hospital.

Record Disclosure

A preliminary issue arose regarding pre-hearing disclosure of documents and whether the panel members had the same disclosure package of records which the hospital had sent to the Applicant's advocate some days earlier. The review panel chair confirmed that as of half an hour before the hearing commenced, the Mental Health Review Board (MHRB) head office had sent only Dr. XX's three-page Case Note to the three panel members. No panel member had received any other records.

After the hearing commenced, the review panel's community member noticed an email from the MHRB head office advising that it had just posted further records, received from the hospital some time earlier that morning, on the MHRB confidential case management system. After listening to the parties' submissions, it appeared that the late disclosure to the MHRB head office included not only the disclosure package it had sent days earlier to the Applicant's advocate, but also new records not disclosed to the advocate. The panel chair advised the panel members not to open the MHRB case

management system to look at the late disclosure as evidence for this proceeding. It was agreed with the parties that the hospital would refer to its Case Note as part of its hearing presentation, and would read in excerpts, as necessary, from records in the disclosure package it had sent to the Applicant's advocate. There would be no reference to other records that were not disclosed to the advocate.

Disclosure of Numerical measures of Applicant's weight and hospital's weight goals for the Applicant

Another preliminary procedural issue arose when Dr. XX indicated her intention not to refer to precise numerical measurements of the Applicant's weight and to the hospital's weight goals for the Applicant. On the Applicant's behalf, Ms. Jasper objected to this proposed presentation of the hospital's case.

Dr. XX's proposal was based on the hospital team's concern that the Applicant was fixated on her weight measurements as well as the appropriate weight at which she should be considered healthy, and that to disclose precise numbers to her during the hearing would be result in a deterioration in her mental condition. Dr. XX stated that the hospital's assessment of a person's healthy weight is not based on body-mass (BMI) index alone but also with an assessment of whether a person's body is functioning in a healthy way. Thus, considerations such as normal blood pressure, whether a young woman has regular menstrual periods, whether estrogen levels are normal, whether bone density is normal, and other vital signs are also taken into consideration. Dr. XX's point was that weight/height numbers alone are deceptive and do not tell the whole story of what constitutes a healthy weight for an individual.

Dr. XX testified that the Applicant's weight and shape were at the forefront of her mind, together with her opinion of what her weight and shape should be, with which opinion the hospital's multi-disciplinary team disagreed. Dr. XX said that it is very distressing for the Applicant to gain weight. The clinical team, therefore, avoided discussing weight numbers with the Applicant because doing so caused her to become even more distressed, impairing her ability to take in the nutrition she so desperately requires. Dr. XX expressed her concern that if the Applicant were to hear weight numbers during the review panel hearing, it might result in her no longer being able to eat an amount of sufficient food, thus necessitating a reversion to nasogastric ("NG") feeding, a type of tube feeding which is also distressing for the Applicant. In summary, the hospital's position was that to discuss weight numbers during the oral hearing would be anti-therapeutic for the Applicant. The point was that such disclosure would be prejudicial to the Applicant's health.

In advancing the hospital's position, Dr. XX also voiced her concern that she and the Applicant would continue to have a good therapeutic relationship. Dr. XX expressed her hope to the Applicant that would be able to continue working well together, and that she was advancing the hospital's position only out of concern for the Applicant's well-being,

The Applicant's advocate Ms. Jasper stated that it is, and has been, a source of great distress for the Applicant not to know her weight and the hospital's goal of a healthy weight, or weight range, for her. The advocate submitted that the hearing could not proceed fairly without the Applicant having full information about the hospital's position on her weight and its goals for her healthy weight, because that medical information is the focus of whether the Applicant has a mental disorder requiring treatment in or through a facility such as the hospital. Thus, the numerical value about the Applicant's weight is critical information regarding the Act's criteria for continued detention.

The Applicant herself testified that it was very important for her to know the numerical value of the hospital team's record of her weight and its weight goals for her. Her understanding from Dr.XX, the hospital's pediatrician, was that the hospital's goal is not to fully restore her to an optimal weight but rather to get her to a "safe zone" where she could be discharged into the community and not be at risk of serious illness if she contracted Covid19. The Applicant said it was a relief to hear that information, but that it would be helpful for her to know the weight numbers of such a "safe zone" range.

Ms. Jasper submitted that a review panel hearing is itself a challenge to the judgement of the hospital's medical team and diagnosis, because the Applicant is challenging the hospital's judgment that she has a mental disorder requiring continued detention under the Act. Ms. Jasper indicated that a large part of her cross-examination of the hospital's case presenters would be focussed on weight numbers and the concept of a healthy weight.

Ms. Jasper submitted that the hospital's information about the Applicant's actual weight and its weight goals for her would be important for Dr. Lisiak, the physician member of the review panel, to assess regarding whether continued detention in a facility is appropriate for the Applicant.

Ms. Jasper further submitted that it would be even more distressing for the Applicant to have critical information about her medical condition, necessary to make her case to the review panel, hidden from her.

The panel adjourned the hearing briefly and the parties terminated their telephone connection for ten minutes to allow the panel to deliberate privately on the procedural issue.

The panel concluded, unanimously, to allow the Applicant's objection and to require the hospital case presenters to disclose the numerical values of the Applicant's weight and the medical team's weight goals for her.

The basic test in Canadian law for admission of evidence is relevance. Canadian law generally requires all relevant and material evidence relating to an issue before a court or tribunal to be disclosed to all parties. Evidence is relevant if it tends to prove or disprove a matter in issue. Relevant issue may be excluded, however, on a number of grounds, such as being so unreliable as not worthy of being given any weight (e.g.

some hearsay evidence), it is prejudicial (against someone's important interests), or if it is considered "privileged".

"Privilege" is a legal concept which allows witnesses to resist compulsory disclosure of documents and information. In the Supreme Court of Canada decision *of M. (A). v. Ryan*, [1997] 1 S.C.R. 157 (the "Ryan decision"), Justice McLachlin stated that:

> "…the common law principles underlying the recognition of privilege…proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained."

Another important Supreme Court of Canada decision, *R. v. Seaboyer; R. v. Gayme*, [1991] 2 SCR 577 (the "Seaboyer" decision) also emphasizes that evidence which is "logically probative" of some matter should be received absent good reason to exclude it; a decision-maker should balance the value of the evidence against its potential prejudice, and only exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it. Further, the prejudice must "substantially outweigh" the value of the evidence before it can be excluded.

The general law, therefore, is that relevant evidence should be disclosed in legal proceedings, subject to specific exceptions such as "privileged" records or communications, or evidence which is so prejudicial to someone's interests that it outweighs the value of admitting it.

In these proceedings, the hospital's position essentially amounted to a claim of privilege, and prejudice, regarding the numerical evidence in its possession about the Applicant's weight and its goals for her healthy weight or weight range. Dr. XX's submission was that the hospital case presenters should be protected from stating weight numbers when giving testimony about the Applicant's medical and mental conditions. This is so, although such evidence was undeniably relevant and, in the hospital's view, supportive of its position that the Applicant continues to meet all statutory criteria for continued detention.

The context for this claim of privilege is unusual. Most claims of privilege regarding medical records or information about a Applicant involve confidential communications between a physician and Applicant which the physician has recorded in the Applicant's clinical chart. The claim of privilege is usually made in a legal proceeding where a third party (that is, not the physician and not the Applicant, the person whose information is at issue) seeks disclosure of the information to advance its case, often in a proceeding where the Applicant is the other party. So, the physician is often not a party to the proceeding but resists being compelled to disclosure information about their Applicant to a third party in litigation (civil or criminal) in which the third party's interests in the proceeding are opposed to the Applicant's interests.

Further, the hospital's claim of prejudice is also unusual because such claims are usually made in the criminal context, when it is argued that the evidence, if admitted, would prejudice or harm the credibility of a litigant, or otherwise damage their case. It is that litigant who asserts prejudice to protect her or his own interests. Here, the Applicant is not asserting she will suffer prejudice to her interests if numerical weight values are discussed in the hearing – it is the hospital who makes that claim. The Applicant seeks the evidence to support her case challenging her statutory detention. She says her legal interests will suffer if denied disclosure of her personal information.

The hospital claimed privilege over relevant medical information it had collected about the Applicant, and argued that its Case Presenters should not be compelled to disclose numerical information about the Applicant's weight, the Applicant's own personal information, to the Applicant. The claim of privilege was based on the hospital's view that it would be prejudicial to the Applicant's interests to compel disclosure because disclosure at the hearing might cause the Applicant's mental and medical conditions to deteriorate. The context is unusual because the claim of privilege is made by one party to the proceeding, about personal information it has collected and maintained in its possession about the other party to the proceeding, which information is relevant to the matters at issue in the proceeding.

The Ryan decision incorporates the common law "Wigmore criteria" to determine when confidentiality of information will be protected by upholding a claim of privilege. In the typical context of Applicant/physician communications over which a claim of privilege is made, those four criteria are as follows:

1. The information/communication originates in a confidence that it will not be disclosed;
2. The confidence must be essential to the relationship in which the communication/information arises;
3. The relationship must be one which should be sedulously fostered in the public interest; and
4. The interest served by protecting the information/communication from disclosure outweigh the interest in getting at the truth.

Although the hospital's claim of privilege was advanced in an unusual context, the Canadian judiciary has recognized that the legal concept of privilege may evolve and thus new confidentiality privileges may develop based on substantive policy reasons. We do not consider, therefore, that the hospital's claim should be denied simply because it was made in an uncommon, even rare, context. Neither should the hospital's claim of prejudice be denied simply because the context in which it is raised is unusual.

We observe, however, that while recognizing legal privilege is an evolving concept, Canadian law accompanies this recognition with a requirement that any expansion of the doctrine of privilege be founded on sound social policy balanced with the goals of

fact-finding to seek the truth. These principles are reflected in *R. v. Gruenke*, [1991] S.C.R. 263 (the "Gruenke" case), in which the Supreme Court of Canada observed that the Wigmore criteria:

> "…are not carved in stone and only provide a general framework within which policy considerations and the requirements of fact finding can be weighed and balanced on the basis of their relative importance in the particular case before the court."
>
> (majority opinion of Chief Justice Lamar)

and

> "…the extension of the doctrine of privilege consequentially obstructs the truth finding process, and, accordingly the law has been reluctant to proliferate the areas of privilege unless an external social policy is demonstrated to be of such unequivocal importance that it demands protection."
>
> (concurring opinion of Justice L'Heureux-Dube)

In claims of privilege or prejudice, the onus is on the party making the claim, seeking to prevent disclosure of information, to demonstrate on a balance of probabilities that its claim should take precedence over a party seeking disclosure of the information. In this case, therefore, we agree with the Applicant's advocate that the onus is on the hospital to prove that its claims of privilege, and prejudice, should succeed.

After considering the parties' submissions and reading the Case Note presented as evidence, we decided that the hospital did not meet its onus in this case.

First, we observed that page one of the Case Note contained specific numerical references to the Applicant's weight several days after her most recent hospital admission. The hospital ward T7 chart note recorded that on February 28, 2020 the Applicant's weight was 35.5 kg, or 68% of her suggested body weight, and that 52 kgs. was her suggested body weight. The hospital disclosed the Case Note to the Applicant's advocate some days before the review panel hearing. The hospital also disclosed a package of the Applicant's hospital records, some of which also referred to numerical weight figures. It would have been the advocate's right to discuss the contents of the Case Note and the hospital records with the Applicant, including the numerical weight figures, in preparing the Applicant's case for the oral hearing. That is precisely the reason for pre-hearing disclosure of evidence, so that the information in the hospital records and Case Note can be analyzed, assessed and a Applicant who is the subject of medical records can challenge the evidence referred to therein.

Given that some numerical weight figures had already been disclosed to the Applicant's advocate before the hearing, we found the hospital's submission less compelling in favour of prohibiting discussion of such numerical figures during the oral hearing. In this regard, we rely on the advocate's submission that a good portion of her cross-examination of the hospital's Case Presenters would be focussed on the rationale for the numerical weights accorded to their desired weight goals for the Applicant. It was clear that in preparing the Applicant's case on her behalf, the advocate had turned her mind to the numerical weight figures mentioned in the Case Note. The Applicant had also indicated her wish to understand the hospital team's reliance on numerical weight specifications as indications of unhealthy and healthy weights for her. The evidence supports a finding, therefore, that before the hearing both the Applicant and her advocate had already turned their minds to the implications of numerical weight figures.

We took seriously Dr. XX's concern that discussion of numerical weight figures during the oral hearing would cause the Applicant distress. However, the additional distress referred to by Dr. XX was a concern that the Applicant might decline to eat sufficiently such that the medical team might have to revert to NG feeding for some time, a situation that has arisen in the past and has resolved. This was not a submission that relied on evidence of imminent, irreparable danger to the Applicant that would likely arise from discussing aloud numerical weights at the oral hearing, which numbers had previously been disclosed in writing to the Applicant's advocate by the hospital.

Clearly, both the Applicant and her advocate were prepared and wanted to discuss specific numerical weight values at the hearing. Thus, we find it unlikely that significantly extra distress would be caused to the Applicant during the hearing where she and her advocate would have a reasonable and fair opportunity to challenge the implication of the numbers relied on by the hospital in presenting its case.

We also note that the Applicant expressed a clear, firm request to know the hospital's rationale for its opinion on healthy and unhealthy weights for her, including specific numerical weight values. We accept Ms. Jasper's argument that excluding the evidence would seriously prejudice the Applicant's ability to present her case.
In our view, there were competing arguments about sources of distress for the Applicant: the hospital's view that she would be distressed by a discussion at the hearing about specific numerical weight values, and her advocate's position that it would be distressing to the Applicant to be denied, at the review hearing, full disclosure of, and discussion about, her own personal information. Weighing all the evidence on a balance of probabilities, we found the hospital did not meet its onus of proving that more distress, in other words more prejudice, would be caused to the Applicant by openly discussing numerical weight values at the hearing, than the amount of distress she would experience by being denied her general legal right, as a party to a legal proceeding, to know the hospital's full case, that is, the case she had to meet.

Turning to the Wigmore criteria for assessing a claim of privilege, we note that the context of the hospital's claim is so unusual that those criteria are not easily applied in this case. It is clear, however, that the first Wigmore criterion does not apply because

the evidence does not establish that the parties had ever even implicitly agreed that the Applicant's actual weight and the hospital's weight goals would be hidden from her. Certainly, there was no agreement that the Applicant would be denied access to her personal information indefinitely, particularly in a legal proceeding where her healthy and unhealthy weights would be important evidentiary issues. Turning to the second and third Wigmore criteria, we agree with Dr. XX's concern about the importance of preserving a good therapeutic working relationship between the hospital medical team and the Applicant. We find, however, that disruption to that relationship would occur just as likely from denying the Applicant access to her own personal information during her review hearing, than from disclosing the evidence to her. Finally, applying the fourth Wigmore criterion, we find that the hospital's interests in preserving the numerical weight values from disclosure do not outweigh the Applicant's legal interesting in seeking truth at this legal proceeding.

In the Ryan decision, Justice McLachlin affirmed that the law of privilege may develop to reflect evolving social and legal realities, so that claims of privilege may arise, such as this case, in categories that do not involve communications between physicians and their Applicants.

However, we note the caution expressed by Justice L'Heureux-Dube in the Gruenke case that the doctrine of privilege should not be extended unless a rationale to do so is demonstrated to be "of such unequivocal importance that it demands protection."

We also rely on the direction given by the Supreme Court of Canada in the Seaboyer case that prejudice must "substantially outweigh" the value of the evidence at issue before a decision-maker should exclude relevant evidence.

With those judiciary cautions in mind, for all of the foregoing reasons, we find that the hospital has not satisfied its onus of proving that its claims of privilege and prejudice regarding the evidence of numerical weight figures outweighs the Applicant's legal interest in knowing the hospital's case for purposes of her detention review.

For these reasons, we upheld Ms. Jasper's objection on behalf of the Applicant, directing that during the oral hearing the hospital was not permitted to hide numerical weight figures relevant to the Applicant's medical and mental conditions, such as during cross-examination of the hospital case presenters.