

IN THE COURT OF APPEAL OF NEW BRUNSWICK

Ayles, Drapeau and Larlee, JJ.A.

BETWEEN:

THE NEW BRUNSWICK)	J.C. Marc Richard,
REVIEW BOARD)	for the appellant;
(Respondent) APPELLANT)	
)	
- and -)	
)	
FERNAND BOUCHER)	G.C. Thibodeau, Q.C.,
)	for the respondent
)	
(Applicant) RESPONDENT)	

TRIAL DECISION:	J.-C. Angers, J.C.Q.B.,
	March 19, 1999
DATE OF THE HEARING:	September 29, 1999.
DATE OF THE DECISION:	October 13, 1999.
REASONS FOR DECISION:	Drapeau, J.A.
CONCURRING:	Ayles and Larlee, JJ.A.

[TRANSLATION]

THE COURT

The appeal and the cross-appeal are dismissed without costs.

DRAPEAU, J.A.

The appellant, the New Brunswick Review Board (the "Board"), is a review board established under subsection 672.38(1) of the *Criminal Code* of Canada. Its powers include the review of dispositions concerning any accused found unfit to stand trial. The respondent, Fernand Boucher, is an accused who has been found unfit to stand trial on three charges under the *Code*, i.e. two charges of robbery and one for sexual assault against a male person.

In this appeal, the Board attack a decision of Angers, J. of the Court of Queen's Bench, in which he held that the chairperson of the Review Board did not have the power to compel Mr. Boucher to testify at a Review Board hearing of the decision which found him unfit to stand trial. The trial decision is reported at (1999), 210 N.B.R. (2d) 185 (QB).

In his cross-appeal, Mr. Boucher asked this Court to set aside the decision of the trial judge upholding the Board's power to compel his attendance at any hearing that could be held with respect to him.

Analysis and Decision

To begin with, it is worth noting that this appeal only deals with the questions set out in my introduction. In particular, the appeal does not settle the issue whether, given the alleged breach of section 672.33 of the *Code*, the Board has the power to hold a hearing to review the decision declaring Mr. Boucher unfit to stand trial.

(a) The Appeal

The appellant's case rests on section 672.43 of the *Code* which provides that at a hearing held by the Review Board, the chairperson has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act*, R.S.C. 1985, c. I-11, on persons appointed as commissioners under Part I of that Act. In particular, the commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases. It therefore follows, according to the appellant, that section 672.43 vests upon the chairperson of the Board the power to enforce the attendance of the accused to give evidence at its hearing and that Angers, J. has, by his decision, effectively declared that part of section 672.43 unconstitutional. The appellant concludes its pleading by agreeing that this declaration of unconstitutionality is void given that the notice required by subsection 22(3) of the *Judicature Act*, R.S.N.B. 1973, c. J-2 was not given.

With all due respect, I think the underlying premise of the conclusion which the appellant invites us to draw as to the scope of the trial decision is completely unfounded. In fact, the record shows that Angers, J. only interpreted section 672.43. He did not deal with its constitutionality. Furthermore, I am of the view that the interpretative process he followed to reach his conclusion as to the meaning of section 672.43 reflects a judicious application of relevant principles.

By and large, I share, for the most part, the reasons of the trial judge as to whether the Board can compel an accused to give evidence at its hearings. Nevertheless, I must add the following to the range of reasons supporting the finding that the Board does not have the power that it claims. The interpretation of section 672.43 advanced by the Board would vest in the Board quite an extraordinary power, a power that the law does not even confer

upon a judge who must ultimately settle the matter of the accused's fitness to stand trial. See section 672.48 of the *Code*. There is nothing to suggest that the Parliament of Canada wanted to establish, through section 672.43, a scheme which would vest the Board with powers higher than those of the court.

Furthermore, it must be recalled that during its hearing, the Board deals with the fate of an accused charged with an offence and that a court continues to have jurisdiction with regard to the offence. See subsection 672.33(1) of the *Code*. Given this reality, I think it is imperative to construe section 672.43 in a way that is consistent not only with the entire legislative context, including subsection 4(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and the scheme of Part XX.1 of the *Code*, but also with the relevant provisions of the *Canadian Charter of Rights and Freedoms*, in particular its paragraph 11(c).

I am of the view that although they are broad, the powers of the chairperson of Board do not include the power to compel an accused to give evidence at its hearings. The principles set out by McLachlin, J. in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31 (QL), at paragraphs 61 and 62, were formulated carefully following a detailed analysis of the provisions of Part XX.1 of the *Code*. Still, one cannot infer therefrom any express or implied support for the case of the appellant. In fact, they include an exhortation to respect the constitutional rights of the accused in the context of any hearing held under Part XX.1. The right not to be compelled to give evidence is obviously part of these constitutional rights.

For these reasons, I would dismiss the appeal.

(b) The Cross-Appeal

From the start, I agree that the Board has only those powers conferred by its constituting statute, either expressly or impliedly, and that neither the *Code*, nor the *Inquiries Act* confer upon the Board the express power to compel Mr. Boucher to attend any hearings that it could hold concerning him. It is however my view that this power is implied, in particular, based on paragraph 672.5(10)(a) of the *Code*. Indeed, this provision confers upon the chairperson of the Board the power to permit the accused to be absent during the whole or any part of the hearing on such conditions as the chairperson considers proper.

It follows therefore that the trial judge did not err at law when he held that the chairperson of the Board may enforce the attendance of Mr. Boucher at any hearing that it could properly conduct in order to determine the decision to be taken concerning him.

As a result, I am of the view that the cross-appeal should be dismissed.

Disposition

I would dismiss the appeal and the cross-appeal without costs.

(signed) J. Ernest Drapeau

J. Ernest Drapeau, J.A.

WE CONCUR:

(signed) Lewis C. Ayles
Lewis C. Ayles, J.A.

(signed) M.E.L. Larlee
M.E.L. Larlee, J.A.