SUPREME COURT OF YUKON

Citation: *R. v. Carlyle*, 2018 YKSC 45

Date: 20180925
S.C. No. 18-01507
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

Respondent

AND

CHAD DANIEL CARLYLE

Applicant

AND

Ms. Jennifer Cunningham Associate Chairperson of the Yukon Review Board
-and-
The Yukon Review Board

Respondents

Before Madam Justice E.M. Campbell

Appearances:

David A. McWhinnie and Cathy Rasmussen	Counsel for the Applicant
Karen Wenckebach and Kimberly Sova	Counsel for Government of Yukon
Debra L. Fendrick	Counsel for the Associate Chairperson of the Review Board and the Review Board

REASONS FOR JUDGMENT

INTRODUCTION

[1] On September 10, 2018, I made an order orally regarding the Yukon Review Board and its Associate Chairperson's application for standing in this matter with written Reasons to follow. Here are my Reasons.

[2] The Yukon Review Board and its Associate Chairperson (referred to collectively as the "YRB") apply to this Court for a declaration that they have standing in Mr. Carlyle's application for:

(i) an order in the nature of *certiorari* seeking to quash the order of the YRB to hold Mr. Carlyle's hearing outside the Yukon, at the Alberta Hospital in Edmonton, Alberta, based on want of jurisdiction or, in the alternative, on the basis that it is unreasonable, that it adversely affects Mr. Carlyle's legal rights, and that it is contrary to the rules of natural justice; and

(ii) an order in the nature of *mandamus* requiring the Associate Chairperson to issue the necessary order to have Mr. Carlyle brought before the YRB at Whitehorse, Yukon, for the completion of his hearing

[3] The YRB also seeks leave to make submissions on all issues raised by Mr. Carlyle in his application in order to respond to the challenge to its jurisdiction and the reasonableness of its decision.

BACKGROUND

[4] On November 28, 2005, the Honourable Judge H. Lilles of the Territorial Court of Yukon found Mr. Carlyle not criminally responsible ("NCR") by reason of mental disorder with respect to charges contrary to ss. 266, 264.1(1)(a) and 733.1(1) of the *Criminal Code of Canada*, R.S.C., 1985, c. C46 (the *Criminal Code*").

[5] Mr. Carlyle's disposition hearing was held by the YRB on December 22, 2005, in Whitehorse, Yukon. The YRB ordered that Mr. Carlyle be committed to a designated hospital facility pursuant to s. 672.54 (c) of the *Criminal Code*.

[6] Since then, Mr. Carlyle has appeared regularly before the YRB as required by Part XX.1 of the *Criminal Code*.

[7] On July 7, 2017, Mr. Carlyle's annual review was held by the YRB in Whitehorse, Yukon. Mr. Carlyle was brought to Whitehorse from the Alberta Hospital in Edmonton, where he is detained, to attend his hearing in person. Following the hearing, the YRB ordered that he continue to be detained in a forensic psychiatric hospital pursuant to s. 672.54 (c) of the *Criminal Code*.

[8] For the purpose of this preliminary application, I do not find it necessary to enter into a detailed finding of facts regarding the procedural and substantive steps that have taken place thus far in Mr. Carlyle's annual review, nor to enter into a detailed description of the parties' exchanges and positions regarding those steps. However, it is useful to review the chronology of events that led to Mr. Carlyle's application for the purpose of this application.

[9] Mr. Carlyle's 2018 annual review hearing was first scheduled for April 5, 2018.

[10] On March 28, 2018, counsel for Mr. Carlyle sent an email to the YRB indicating that Mr. Carlyle wished to attend his hearing in person.

[11] The review was adjourned to May 4, 2018.

[12] The review hearing commenced on May 4, 2018, in Whitehorse, Yukon, with Mr. Carlyle attending by video conference from the Alberta Hospital in Edmonton. The

discussions focussed on potential Whitehorse accommodations for Mr. Carlyle during the review hearing.

[13] The matter was adjourned but the next hearing date was not immediately scheduled.

[14] On June 5, 2018, the YRB advised the parties to the hearing in writing of the following:

> Mr. Carlyle has requested to appear in person before the Yukon Review Board at his annual disposition review. The Panel has decided on balance due to Mr. Carlyle's clinical presentation based on the evidence from his Treatment Team that the Panel will attend the hearing with Mr. Carlyle in person at the Alberta Hospital. The Parties to the hearing may appear by video link from the Boardroom at YG.
>
> Please confirm your availability for Mr. Chad Carlyle's next disposition review hearing on **Friday, June 15th at 9:30**. (emphasis already added)

[15] In response to the YRB's correspondence, counsel for Mr. Carlyle, counsel for the Director of Mental Wellness and Substance Use Services as well as counsel for the Public Prosecution Service of Canada ("PPSC") wrote to the YRB opposing its decision to set the hearing in person at the Alberta Hospital in Edmonton.

[16] On July 25, 2018, the YRB issued an interim order stating that:

> … the upcoming hearing for the Accused be held in Edmonton at Alberta Hospital where the Accused is detained on a Hospital disposition. The parties to the proceedings may appear in Edmonton, Alberta or by videoconference at the Law Centre in Whitehorse, Yukon on August 2, 2018 at 9:30am.

[17] On July 28, 2018, Mr. Carlyle filed his application before the Court.

[18] Mr. Carlyle is currently detained at the Alberta Hospital and has been so for a number of years.

POSITIONS OF THE PARTIES

[19] The YRB takes the position that this Court should grant the YRB standing to respond to Mr. Carlyle's challenge to both its jurisdiction and the reasonableness of its decision. It contends that, as the other parties oppose its order, the Court would benefit from allowing the YRB to make submissions as it would provide fairness and balance to the hearing by ensuring that all legal positions and aspects surrounding this case are presented to the Court. The YRB's position is premised on the application of administrative law principles and Rule 54 of the *Rules of Court* of Supreme Court of Yukon which governs the procedure applicable to judicial reviews. It also relies on administrative law precedents from this court and on *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 ("*Ontario (Energy Board)*"), which identifies the relevant factors to consider in determining whether to grant standing to an administrative tribunal in a judicial review or appeal of its decision.

[20] The YRB submits that Mr. Carlyle's application for judicial review was filed naming the YRB and its Associate Chairperson as respondents as required by Rule 54 and that the rule clearly sets out they are entitled to participate as respondents in this matter. The question should therefore not be one of standing but one that relates to the extent to which they should be permitted to make submissions. The YRB also relies on four cases from this court, *Byblow v. Yukon (Workers' Compensation Appeal Tribunal)*, 2012 YKSC 31 ("*Byblow*")*; Western Copper Corp. v. Yukon Water Board,* 2010 YKSC 61; *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd*, 2011 YKSC 29; and *Silverfox v. Chief Coroner*, 2012 YKSC 35, in support of its position. The YRB points out that these decisions demonstrate that the court has taken an expansive

view of the participatory role of administrative tribunals in judicial reviews and has permitted boards to not only make submissions on legal issues but also on the reasonableness of their decisions. There is no reason, the YRB submits, that warrants doing otherwise in this case. The YRB relies more particularly on the decision of *Byblow,* at paras. 28 and 29 where the court reiterated the view that in judicial review proceedings: "the broader the representation at the hearing, the better equipped the Court will be to make an appropriate and just decision."

[21] Mr. Carlyle takes the position that this application for standing arises in the context of a purely criminal proceeding governed by the *Criminal Code* and criminal law principles and that neither the *Criminal Code* nor the Common Law provide for standing to the YRB in Mr. Carlyle's application for *certiorari* and *mandamus.* Mr. Carlyle submits that, as a general rule, judges whose decisions are being challenged have no standing in applications for an extraordinary remedy or on appeal of their decisions. Considering that under Part XX.1 of the *Criminal Code* the jurisdiction of the YRB overlaps in many ways with that of the Territorial and Superior Court judges, there is therefore no principled reason to grant standing to the YRB in this case. Mr. Carlyle further points out that this proceeding does not raise a constitutional issue nor is it the type of case that would warrant granting intervenor status to the YRB or appointing *amicus curiae.* In the alternative, if the Court were to find that administrative law principles are applicable, Mr. Carlyle submits that his application does not raise issues regarding the specialized expertise of the YRB.

[22] PPSC mainly supports the arguments presented by Mr. Carlyle in this application. In addition to PPSC's support for Mr. Carlyle's position on the issue of

jurisdiction, counsel for the PPSC indicated at the hearing that he is aware of his duty towards the Court and will ensure that all relevant legal precedents be provided to the Court in this matter.

[23] The Government of Yukon ("Yukon") takes the position that there is no statutory provision in the *Criminal Code* or *Act* of Parliament that explicitly provides for or denies standing to the YRB in this type of proceedings. The Court must therefore turn to the *Common Law* to determine if standing should be granted. Yukon submits that the issue of standing must be determined on a case-by-case basis, based on the principles and factors identified in *Ontario (Energy Board).* Considering the fact that the YRB will be the only party advancing the position that it has jurisdiction to hold a hearing outside the Yukon and the fact that the questions of law raised in this matter are being entertained by the Court in Yukon for the first time, Yukon submits that the YRB should be granted limited standing to make submissions on the questions of law raised in this matter (i.e. the YRB's jurisdiction to conduct hearings outside the Yukon, the authority to refuse to sign a warrant and the ability to put conditions on the warrant). Yukon submits that the YRB should not be permitted to make submissions on the reasonableness of its decision, on the duty of fairness or its compliance with s. 672.5 (11) of the *Criminal Code*.

ANALYSIS

Nature of Proceeding

[24] In the recent decision of *R. v. Brassington*, 2018 SCC 37, at para. 19, the Supreme Court of Canada stated that: " … in determining whether an order is civil or

criminal in nature, what is relevant is not the formal title or styling of the order, but its substance and purpose. …"

[25] The Supreme Court of Canada went on, at para. 20, to adopt the following statement of Doherty J.A. in *Canadian Broadcasting Corp v. Ontario*, 2011 ONCA 624, at para. 17, as to how to distinguish between "civil" and "criminal" orders or proceedings:

> Usually, it will not be difficult to distinguish criminal proceeding from a civil proceeding. An application for an order made in the course of a criminal proceeding, an application for an order directly impacting on an ongoing or pending criminal proceeding, or an application for an order rescinding or varying an order made in a criminal proceeding will all be criminal proceedings. ...

[26] Mr. Carlyle's application for *certiorari* and *mandamus* is made pursuant to Part XXVI of the *Criminal Code*. His application arises from a proceeding governed by Part XX.1 – Mental Disorder of the *Criminal Code* and challenges an interim order made by the YRB in the course of that proceeding. It does not raise a constitutional issue.

[27] The criminal nature of this type of proceedings has been recognized in *R. v. Leyshon-Hughes*, 2009 ONCA 16. In that case, the Court of Appeal for Ontario had to determine whether the presiding judge had erred in awarding costs against the intervenor, the Ontario Review Board ("ORB"), in the context of an application for an extraordinary remedy seeking, amongst other things, an order quashing the ORB's decision arising out of proceedings before it. The Court of Appeal stated at paras. 53 and 57 to 59 of its decision,:

> [53] … Although the respondent made some submissions before the application judge relating to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, the application

> judge made no findings in that regard and did not invoke any *Charter* jurisdiction to award costs that may exist.
>
> …
>
> [57] ... I see no basis for treating this matter as if it is somehow akin to a civil matter in which Superior Courts may exercise a much broader inherent discretionary jurisdiction in awarding costs. Although NCR accused are found not criminally responsible, they are subject to the jurisdiction of the ORB because they committed an act that was contrary to the *Criminal Code*. The ongoing assessment and management of NCR accused is dealt with under Part XX.1 of the *Criminal Code* and forms a part of the criminal justice system.
>
> [58] Moreover, proceedings under Part XX.1 of the *Criminal Code* are not similar to civil proceedings. As already noted, they have an important public interest component that must outweigh factors that may mandate an award of costs in civil cases. …
>
> [59] Accordingly, to the extent that the application judge had jurisdiction to award costs against the ORB, that jurisdiction must surely reside within and be circumscribed by the Superior Court's inherent jurisdiction to award costs in criminal law matters.

[28] I agree with the Court of Appeal for Ontario in this regard and conclude that this application arises in the context of a criminal proceeding and is governed by criminal law principles.

Is Rule 54 of the *Rules of Court of* Supreme Court of Yukon applicable to criminal proceedings?

[29] As stated in Rule 1(1) of the *Rules of Court of* Supreme Court of Yukon, the *Rules of Court* were adopted pursuant to s. 38 of the *Judicature Act*, R.S.Y. 2002, c. 128 :

> These rules are made under section 38 of the *Judicature Act*, effective September 15, 2008, and may be cited as the Rules of Court.

[30] Rule 1(4) of the *Rules of Court* further states that:

> These rules govern every proceeding in the Supreme Court except where an *Act*, statute or regulation otherwise provides.

[31] Section 38 of the *Judicature Act* provides that:

> The Commissioner in Executive Council may, on the recommendation of the judges, prescribe rules in relation to the practice and procedure of and in the Supreme Court *in all civil proceedings*. (my emphasis)

[32] Therefore, the *Rules of Court* adopted pursuant to s. 38 of the *Judicature Act* only govern the practice and procedure of this Court in civil proceedings as opposed to criminal proceedings. As I have concluded that this application arises purely in the context of a criminal proceeding, the rules of civil practice and procedure cannot be invoked as a valid route to determine the YRB's standing, if any, in this matter. In the same vein, the expansive view that the court has taken of the participatory role of administrative tribunals in judicial reviews in civil or administrative matters is of limited assistance in this case.

[33] I now turn to the question of what standing, if any, may be granted to the YRB.

Standing of the YRB

[34] There is no provision in the *Criminal Code* or related *Act* of Parliament that specifically grants or denies standing to the YRB in this proceeding. While ss. 672.72 to 672.78 of the *Criminal Code* specifically provide for grounds for appeal, the powers of a

court of appeal and the procedure on appeal of a disposition made by a review board, no similar provisions govern the procedure applicable to applications for extraordinary remedies under the *Criminal Code*.

[35] Also, apart from the *Summary Conviction Appeal Rules*, which do not govern the within application, the Supreme Court of Yukon has not enacted rules under the authority of s. 482 of the *Criminal Code*.

> **Power to make rules**
>
> 482 (1) *Every superior court of criminal jurisdiction* and every court of appeal *may make rules of court not inconsistent with this or any other Act of Parliament, and any rule so made apply to any* prosecution, *proceedings*, action or appeal, as the case may be, within the jurisdiction of that court*, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal*.
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> …
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> (3) **Purpose of rules** – Rules under subsection (1) or (2) may be made:
>
> (…)
>
> (c) to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under section 625.1, proceedings with respect to judicial interim release and preliminary inquiries, and, in the case of rules under subsection (1), proceedings with respect to *mandamus, certiorari, habeas corpus,* prohibition and *procedendo,* and proceedings on an appeal under section 830; (*my emphasis*)

[36] There are therefore no specific rules to consider in determining what standing, if any, the YRB should be granted in this matter.

[37] In the course of my deliberations, I came across a few reported decisions on the specific issue of review boards' standing in applications such as this one.

[38] In *R. v. Leyshon-Hughes,* [2007] O.J. No. 2157, the NCR accused filed an application for extraordinary remedies arising out of proceedings before the ORB. The application raised issues of breach of natural justice and reasonable apprehension of bias as well as *Charter* issues.

[39] Initially, the ORB was not a party to the application. It brought an application to intervene. The parties agreed that the ORB could intervene in order to address issues concerning its jurisdiction to make the order in question as well as the procedure and practice it adopted and followed. The ORB also requested that it be permitted to make submissions to address allegations of breach of principles of natural justice, whether the conduct of the Alternative Chairperson gave rise to a reasonable apprehension of bias, and the NCR accused's allegation that his *Charter* rights had been violated. The NCR accused objected to the ORB's request arguing that those questions did not touch upon the particular expertise of the ORB. He also submitted that if the ORB was permitted to argue a case challenging the panel's own conduct, the ORB risked becoming partial, thus prejudicing him in any possible subsequent appearance before the ORB. The NCR accused acknowledged that the ORB had specialized knowledge and expertise with respect to the scope of the ORB legislative inquisitorial powers and jurisdiction, under what conditions and in which manner such powers are exercised, as well as any specialized procedure adopted and followed by the ORB in its hearings.

[40] The application judge noted that: "unlike other Ontario administrative tribunals, which are entitled to party status in judicial reviews from their decisions by virtue of statutory provisions, the ORB is not entitled to participate as a party in this proceeding without leave of the Court." (para. 13) The application judge then relied on her

discretionary power to grant intervenor status in constitutional and C*harter* matters pursuant to the *Criminal Proceedings Rules* of the Ontario Superior Court of Justice and the factors identified in the jurisprudence with respect to granting intervenor status to the ORB in such cases. It also appears that the *Criminal Proceedings Rules* in Ontario stated that where matters are not provided for in the *Rules*, the practice shall be determined by analogy to them. (Rule 1.04 (2))

[41] The application judge ordered the ORB be added as an intervenor but restricted its involvement to the questions that had been agreed to by the parties. No submissions were permitted on the issues of breach of natural justice and reasonable apprehension of bias as the judge found that they were the very subject matter of the application and: "would put the ORB in the unseemly position of justifying its own actions and of making arguments defending the substantive merits of its decision because it is the ORB which is under examination in this hearing." (para. 17) The application judge also determined that: "The appropriate latitude for the ORB's participation in this hearing is one referenced exclusively to its statutory obligations and the statutory context of its creation." (para. 20)

[42] The application judge also relied on the principles set out in *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684, regarding the limits imposed on the participation of administrative tribunals in judicial review or appeal of their decisions to support her determination that the ORB should not be entitled to make submissions on its actions and the substantive merits of its decision.

[43] On the merits of the case, the application judge granted the orders sought by the NCR accused against the ORB. She found that the applicant's right to natural justice

and procedural fairness had been violated. She also found there was a reasonable apprehension of bias.

[44] In a subsequent related proceeding (*R. v. Leyshon-Hughes*, [2007] O.J. No. 3309), costs were awarded against the ORB. The ORB appealed the order. The standing of the ORB was not considered on appeal (*R. v. Leyshon-Hughes*, *supra*, at para. 25). The Court of Appeal for Ontario simply referred to the ORB's status in the proceedings as background information about the case:

> [28] The ORB was not initially a party to the application. The respondent consented to the ORB intervening to address its jurisdiction to make the order in issue as well as its practice and procedure in relation to such an order but resisted its request to intervene on substantive issues. The application judge dismissed the ORB's motion to intervene in relation to the substantive issues.

[45] In *Ontario (Attorney General) v. Penetanguishene Mental Health Centre*, [2008] O.J. No. 2744, the Ontario Superior Court of Justice was seized with an application for an order of *certiorari* quashing an order made by the ORB requiring the NCR accused to be assessed by a gender identity clinic and the Ministry of the Attorney General of Ontario to pay the reasonable costs of the assessment.

[46] While the court did not have to enter into an analysis of the principles underlying the ORB's standing in these proceedings, it is worth noting that the applicant, the Attorney General of Ontario, named the ORB as a respondent. The application did not raise a constitutional or *Charter* issue. On consent of all parties, the ORB was removed as a respondent and granted leave to intervene on the two jurisdictional issues raised in that case: (i) whether the ORB had jurisdiction to order the assessment and (ii) whether it had jurisdiction to order the Ministry of the Attorney General of Ontario to pay for the

reasonable costs of the assessment. The court found that the assessment was not obtained in a situation where it was necessary to do so. The court ruled that the ORB had therefore acted outside its jurisdiction and quashed the order. As the issue regarding costs had become moot, the court did not rule on it.

[47] The question of standing also arose in the related case of Ontario (*Attorney General) v. Ontario (Review Board)*, [2009] O.J. No. 1053, where the Ontario Superior Court of Justice was again seized with an application for an order in the nature of *certiorari* quashing an order of the ORB requiring the Attorney General of Ontario to bear the costs of an independent psychiatric assessment the ORB had ordered. Similarly, this case did not raise a constitutional or *Charter* issue.

[48] The ORB submitted that it should be a party to the proceedings whereas all the other named parties submitted it should only be granted status to intervene. The application judge stated that if he were to grant party status to the ORB, "it would then become entitled to be a party in all future judicial review applications involving them." (para. 12). The judge referred to *R. v. Leyshon-Hughes* and *Northwestern Utilities Ltd.* He also referred to *Ontario Review Board v. The Queen, the Mental Health Centre Penetanguishene et a*l. (indexed as *R. v. Lepage*, [2006] O.J. No. 3994 (C.A.)), where the ORB was granted leave to intervene on appeal to explain the "… general practices of the Board in relation to the assignment of panel members to conduct hearings and the reasoning underlying such assignments, without reference to the particular panel whose conduct has been brought into question on this appeal." (para.1(b)) However, the ORB was not permitted to make submissions on the merits of the appeal and in particular on the allegations of bias or lack of due process.

[49] Based on those decisions, the application judge concluded that the ORB should only be granted status to intervene. On the substantive issue raised by the application, the judge ruled that the ORB did not have jurisdiction to order the Ministry of the Attorney General to pay for the costs of the assessment, and quashed the order.

[50] The Court of Appeal for Ontario upheld the application judge's decision on the ORB's lack of jurisdiction (see *Ontario (Attorney General) v. Ontario (Review Board),* 2010 ONCA 35*).* In doing so, the court noted that it was unnecessary to rule on the issue of the ORB's standing as all parties agreed that the main issue concerning the ORB's jurisdiction was one of public importance that the court should seize itself of and stated:

> [6] … The application judge ruled at the outset that the Board could only be named as an intervenor in the proceedings and not as a party. He went on to find that the Board lacked the jurisdiction to order the Attorney General to pay and quashed the order as requested. The Board now appeals to this court.
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> [7] It is unnecessary for this court to decide three of the issues on this appeal, namely, whether the application judge erred in removing the Board as a party and changing it to the status of intervenor, and incidental to this issue, the standing of the Board to bring this appeal. The third issue is whether, since the order appealed from is a "costs order", leave to appeal is required. None of these issues raise a live concern, as there is no opposition to this court hearing the appeal. All parties agree that it is a matter of public importance for this court to determine the fundamental issue at the centre of this case. Accordingly, I will not address any of the above issues in these reasons.

[51] As stated earlier, this Court's jurisdiction to grant status to the YRB in this proceeding must reside in and be circumscribed by the Superior Courts' jurisdiction in criminal law matters.

[52] I was not referred to any statutory provision in the *Criminal Code* or any other *Act* of Parliament that would specifically purport to grant or deny status to the YRB in the context of an application for an extraordinary remedy under the *Criminal Code*. Further, as mentioned, there are no rules of criminal proceedings in Yukon that govern the within application.

[53] Similarly, I was not directed to any precedent where full party or respondent standing was, after analysis, granted to a review board or decision-maker where the authority to grant such standing was found in the Superior Courts' inherent jurisdiction in criminal matters.

[54] The few reported decisions from Ontario that I mentioned all concluded that if standing is to be granted to a review board, it is as an intervenor with a limited role to argue questions of law and explain its internal practice and procedure, and not as a respondent.

[55] I recognize that these decisions rely, at least in part, on the view expressed in *Northwestern Utilities Ltd*. that the role of administrative tribunals in judicial reviews or appeals of their decision should be limited based on concerns aimed at preserving their impartiality. I also recognize that this view has been modified by the more expansive and contextual view expressed in *Ontario (Energy Board)*.

[56] Finally, I recognize that the Court of Appeal for Ontario has left the specific question of review boards' standing in an application for an extraordinary remedy unanswered in *Ontario (Attorney General) v. Ontario (Review Board), supra.*

[57] Nevertheless, I come to the conclusion that the provisions and appeal framework set out in Part XX.1 of the *Criminal Code* reveal that Parliament did not intend review

boards to be entitled to full party status with right to make full submissions either on appeal or review of their decisions.

[58] While the *Criminal Code* provides that the clerk of the Court of Appeal shall notify review boards of an appeal against one of their dispositions or placement decisions, for the stated purpose of ensuring that their records be transmitted to the Court of Appeal, review boards are not defined nor included as a party to an appeal nor do they have a statutory right to be heard on judicial appeals. (See definition of party under ss. 672.1 and 672.72 to 672.76 of the *Criminal Code).*

[59] It would run contrary to the stated intent of Parliament if the YRB were granted full party or respondent status in an application for an extraordinary remedy regarding its decision and conduct of proceedings, while at the same time not being entitled to full party status for the purpose of an appeal which could raise similar issues.

[60] There is, therefore, neither authority nor a principled basis upon which this Court should grant full party or respondent status to the YRB in the context of this application.

[61] This conclusion should not be interpreted as automatically meaning that the YRB is not entitled to notice of an application for an extraordinary remedy arising out of its proceedings; simply that standing does not automatically flow from it.

[62] Both Mr. Carlyle and the PPSC acknowledge that this Court, as a Court of superior jurisdiction, possesses inherent jurisdiction to grant intervenor status in criminal proceedings. However, they both submit that this is neither a matter that raises a constitutional issue nor an exceptional case for which this Court should exercise its discretionary power to do so. They further submit that the questions of jurisdiction and of legal interpretation raised by Mr. Carlyle’s application are questions that courts hear

and decide on a regular basis and that do not fall within the particular expertise of the YRB. The YRB submits to the contrary that Mr. Carlyle's application involves the particular expertise of the YRB with respect to the scope of its statutory jurisdiction, the interpretation of its home statute (Part XX.1 of the *Criminal Code*) and its experience regarding the procedure adopted for and followed at its hearings.

[63] I recognize this is not a matter that raises a constitutional issue for which different and relaxed rules governing the granting of intervenor's status would apply. (*R. v. White*, 2008 ABCA 294; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 OR (2d) 164 (CA).)

[64] As for the scope of this Court's exercise of its discretionary power to grant leave to intervene, the PPSC relies on the following statement of the Court of Appeal for British Columbia in *R. v. Duncan,* [1995] B.C.J. No. 674 (C.A.), to support its position that intervenor status should only be granted sparingly and in exceptional cases in criminal matters:

> [30] On the other hand, there is authority for the proposition that intervenors should only be granted standing in criminal cases in exceptional circumstances since to grant such standing may result in unfairness to the accused, or, at least, may create the appearance of unfairness."

[65] Those very concerns were echoed by the Court of Appeal of Alberta in *R. v. Neve*, [1996] A.J. No. 570 (C.A.) at para.16:

> Any granting of intervenor status is discretionary, and ought to be exercised sparingly. Interventions have been permitted in criminal proceedings although normally such interventions are intended to offer a broader perspective beyond the merits of a particular prosecution. Canadian criminal proceedings, procedurally and in their purpose, must remain a simple *lis* between the accused person and the accusing Crown. We were shown no case where an intervention was

> permitted when it stated purpose was to argue the merits of the appeal itself. Where intervention is sought on a point of law, that should be defined with particularity, rather than in vague and elusive terms.

[66] The courts reluctance to exercise their discretionary jurisdiction to grant intervenor's status in criminal cases is grounded on the adversarial nature of a criminal proceeding and on the overarching principle of fairness to the accused's person.

[67] However, because of the particular nature of the YRB, as an administrative tribunal, and of the proceedings over which it presides, I find that while those concerns arise in this case, they do so in a different context that needs to be factored into the exercise of this Court's discretionary power to grant leave to intervene.

[68] While the YRB is a quasi-judicial tribunal with significant jurisdiction and authority over the liberty of an NCR accused (*R. v. Conway,* [2010] 1 S.C.R. 765, at para. 84), there are important differences between the adversarial regime that usually governs criminal proceedings and the specialized inquisitorial scheme provided for by Part XX.1 of the *Criminal Code*.

[69] As stated in *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 ("*Winko*"), at para. 54:

> The regime's departure from the traditional adversarial model underscores the distinctive role that the provisions of part XX.1 play within the criminal justice system. The Crown may often not be present at the hearing. The NCR accused, while present and entitled to counsel, is assigned no burden. The system is inquisitorial. It places the burden of reviewing all relevant evidence on both sides of the case on the court or Review Board. The court or Review Board has the duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present. This is fair given

> that the NCR accused may not be in a position to advance his or her own case. The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or Review Board. If the court or Review Board is uncertain Part XX.1 provides for resolution by way of default in favour of the liberty of the individual. (my emphasis)

[70] In *R. v. Owen*, [2003] 1 S.C.R. 779 ("*Owen*"), at para 34, Justice Binnie, in determining that the standard of review applicable in administrative law matters was applicable to the review of disposition orders, pointed out that review boards are administrative tribunals not courts, which preside over inquisitorial not adversarial proceedings, and that review boards' disposition orders are not punitive.

> [34] The Crown asks us to apply the test of "unreasonable verdict" in criminal cases, [citations omitted]. There are parallels between the language of s. 672.78 *Cr. C.* dealing with appellate review of an NCR disposition order, and s. 686 *Cr. C.* dealing with appellate review of verdicts in criminal cases, and there is authority for that proposition: [citations omitted]. However, with respect, we should be mindful of the differences in context, regardless of the similarity in the wording of the statutory provisions. An NCR disposition order is not punitive: *Winko*, *supra*, at paras. 41 and 71. It arises out of a process that is inquisitional, not adversarial, that takes place before an administrative board, not a court. To the extent the Crown seeks to raise the bar of judicial review higher than reasonableness *simpliciter*, I think the attempt should be resisted. An NCR disposition order is to be reviewed on the basis of administrative law principles. Resort must therefore be taken to the jurisprudence governing judicial review on a standard of reasonableness *simpliciter*, as most recently discussed in *Dr. Q*, *supra*, at para. 39, and *Ryan*, *supra*, at para. 47. (my emphasis)

[71] I note that in *Alberta (Attorney General) v. Malin*, 2016 ABCA 396, the Court of Appeal of Alberta stated as well that an administrative tribunal is not a court of record.

[72] I also note that review boards, not courts, are mandated with the continued supervision of NCR accused. (see s. 672.81 of the *Criminal Code*, *Winko* at para. 29 and *Owen* at para. 26)

[73] In my view, the decisions in *Winko* and more specifically in *Owen* demonstrate that administrative law principles need not be completely set aside simply because review boards exist and operate in a criminal law setting. While recognizing that the power to grant standing must be grounded and exercised within this Court's inherent jurisdiction in criminal matters, incorporating factors developed in the administrative law context into the Court's analysis of its discretionary power to grant leave to intervene simply recognizes that such a determination is contextual. It must take into consideration the specific and very special nature and place that review boards and review board proceedings occupy in the criminal law process.

[74] I am therefore of the view that the factors identified in *Ontario (Energy Board)* may also be considered in determining whether to grant leave to intervene to the YRB and the extent to which it should be permitted to make submissions in Mr. Carlyle's application. These factors, listed at para. 59, are the following:

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative

> role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[75] Furthermore, as noted in *Neve*, successful applications to intervene in criminal proceedings usually raise issues of public interest that go beyond the specific factual issues of a particular case.

[76] I further note that in *Ontario (Attorney General) v. Ontario (Review Board)*, 2010 ONCA 35, at paras. 6 and 7, the Court of Appeal for Ontario decided to set aside the question of standing on the basis that all parties agreed that the issue regarding the ORB's jurisdiction to order the Ministry of the Attorney General of Ontario to pay the costs of an assessment was a matter of public importance.

[77] In my view, there was also an element of public interest in all the Ontario decisions mentioned previously and, where, in each case, intervenor status was granted to the ORB.

[78] I find that an element of public interest is present in this case as Mr. Carlyle's application for extraordinary remedies raises questions regarding the statutory jurisdiction of the YRB to hold a hearing outside the Yukon and the extent of its authority and powers surrounding the issuance of warrants pursuant to s. 672.85 of the *Criminal Code.* These questions of law clearly go beyond Mr. Carlyle's specific case.

[79] The same cannot be said of the allegations regarding the unreasonableness of the YRB's decision and breach of principles of natural justice in the conduct of Mr. Carlyle's hearing.

[80] As for the factors identified in the *Ontario (Energy Board)*'s decision, I agree with Yukon and the YRB, that Mr. Carlyle's position regarding the YRB's lack of jurisdiction to hold a hearing outside the Yukon will be left unopposed unless the YRB is granted leave to intervene. I have no doubt that counsel for the PPSC will bring all relevant precedents on this issue to the attention of the Court even though PPSC takes the position that the YRB does not have jurisdiction to hold its hearings outside the Yukon. The PPSC does not represent the YRB and is, therefore, not well positioned to represent the YRB's unique view and perspective regarding its interpretation of its statutory jurisdiction and power related to the conduct of a review hearing. I also note that in *R. v. Leyshon-Hughes* the specialized expertise of the ORB in relation to the interpretation of its legislative powers and jurisdiction was recognized by the parties and the application judge. So was its expertise regarding its own practice and procedure in the conduct of its hearing.

[81] However, as stated by the Supreme Court of Canada in *Ontario (Energy Board)* at para. 55:

> Canadian Tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal impartiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[82] While the proceedings before review boards are not adversarial but inquisitive in nature, it remains that the YRB does not make policy recommendations to the government nor serve as a regulatory body. It is a quasi-judicial tribunal whose decision

impacts directly on the liberty of the NCR accused and determine his or her continued involvement with the criminal justice system.

[83] Furthermore, as indicated in *Owen*, at para. 26 :

> Once a determination is made, the task of monitoring whether an NCR individual *continues* to constitute a significant threat to safety of the public is given to the Board which is required to hold a hearing to review the status of each NCR individual no less frequently than every 12 months (Cr.C. s. 672.81(1)). (emphasis already added)

[84] As review boards have ongoing supervisory jurisdiction over an NCR accused until he or she is discharged unconditionally, the principle of impartiality as well as the statutory framework mentioned previously warrant against the YRB being granted leave to make submissions on the reasonableness of its decision and its conduct during the hearing. As Mr. Carlyle's annual review hearing has not been completed and as the YRB has yet to make a disposition order in his case, I find that the importance of maintaining confidence in the YRB's objectivity and impartiality towards Mr. Carlyle and of ensuring fairness in Mr. Carlyle's ongoing review hearing process, warrant limiting the YRB's submissions to the questions of law and of general procedure and practice that can be argued without delving into Mr. Carlyle's specific case.

CONCLUSION

[85] I find that the questions of public importance raised in this application, the special expertise of the YRB regarding its jurisdiction and powers as well as its procedure and practice, and the fact that the issue of jurisdiction would be otherwise left unopposed, warrant granting the YRB leave to intervene in the present case and to make submissions on the following issues:

(i) the scope of its jurisdiction to make an order to hold a hearing outside the

Yukon, and more specifically at the Alberta Hospital in Edmonton, Alberta;

(ii) the authority to issue or refuse to issue a warrant pursuant to s. 672.85 of the *Criminal Code,* and the authority or ability to impose conditions on such warrant;

(iii) its practice and procedure regarding the conduct of its hearings in general;

[86] The YRB is not granted leave to make submissions on the following issues:

(i) the reasonableness of its decision;

(ii) its conduct of the Applicant's hearing to date;

(iii) its compliance with the principles of natural justice applicable to this particular case; and

(iv) its compliance with s. 672.5 of the *Criminal Code* in this particular case.

[87] As for the Associate Chairperson of the YRB, I was not provided nor have I found any compelling reasons to grant her standing independent from that of the YRB in this matter.

[88] Considering my decision to grant leave to the YRB to intervene, I need not consider whether appointing an *amicus curiae* is appropriate in this case.

[89] The style of cause should be amended accordingly.

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CAMPBELL J.