# SUPREME COURT OF YUKON

Citation: *R. v. Carlyle*, 2019 YKSC 38

Date: 20190723
S.C. No. 18-01507
Registry: Whitehorse

**BETWEEN**

**HER MAJESTY THE QUEEN**

**Respondent**

**AND**

**CHAD DANIEL CARLYLE**

**Applicant**

**AND**

**THE YUKON REVIEW BOARD**

**Intervenor**

Before Madam Justice E.M. Campbell

Appearances:

| | |
|---|---|
| Noel Sinclair | Counsel for the Director of Public Prosecutions |
| David McWhinnie and Baird Makinson | Counsel for the Applicant |
| Kimberly Sova and Karen Wenckebach | Counsel for the Government of Yukon |
| Debra L. Fendrick | Counsel for the Yukon Review Board |

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] This application arises from the decision of the Yukon Review Board ("YRB") to hold Mr. Carlyle's annual review hearing outside the Yukon, and more specifically at the

Alberta Hospital in Edmonton, Alberta, where he is detained pursuant to a YRB disposition order.

[2] Mr. Carlyle brings this application for *certiorari* to quash the YRB order to hold his annual review hearing outside the Yukon. Mr. Carlyle also seeks an order in the nature of *mandamus* to compel the Chairperson of the YRB (in this particular case, the Associate Chairperson) to issue an order for his attendance at his review hearing in the Yukon.

[3] This application raises the following issues:

1- With regard to the application for *certiorari*:

a) Does the YRB have jurisdiction to hold a disposition or review hearing outside the Yukon?

b) Did the YRB act in contravention to the rules of natural justice?

2- With regard to the application for an order in the nature of *mandamus*:

a) Can the Chairperson of the YRB be compelled to issue an order or warrant to bring a not criminally responsible accused person, who is detained, to a hearing, pursuant to s. 672.85(a) of the *Criminal Code*?

b) Can the Chairperson of the YRB attach conditions to an order or warrant issued pursuant to s. 672.85(a) of the *Criminal Code* to bring a not criminally responsible accused person, who is detained, to a hearing?

**FACTS**

[4] On November 28, 2005, the Honourable Judge H. Lilles, of the Territorial Court of Yukon, found Mr. Carlyle not criminally responsible on account of mental disorder ("NCR") with respect to charges contrary to ss. 266, 264.1(1)(a) and 733.1(1) of the *Criminal Code* and referred him to the YRB.

[5] On December 22, 2005, the YRB held Mr. Carlyle's disposition hearing in Whitehorse, Yukon. At that time, the YRB found that Mr. Carlyle posed a significant risk to the safety of the public and ordered that he be committed to a designated hospital facility, pursuant to s. 672.54(c) of the *Criminal Code*.

[6] From 2005 to 2017, Mr. Carlyle appeared regularly before the YRB as required by Part XX.1 of the *Criminal Code*.

[7] On July 7, 2017, the YRB held Mr. Carlyle's annual review hearing in Whitehorse, Yukon. Mr. Carlyle was brought to Whitehorse from the Alberta Hospital in Edmonton, where he was detained, to attend his hearing in person. Mr. Carlyle stayed at the Whitehorse Correctional Centre ("WCC") while in Whitehorse to attend his hearing.

[8] Following the hearing, the YRB found that Mr. Carlyle continued to pose a significant threat to the safety of the public and ordered that he continue to be detained in a forensic psychiatric hospital, pursuant to s. 672.54 (c) of the *Criminal Code*. The YRB also ordered that Mr. Carlyle's next review hearing occur on or about April 5, 2018.

[9] On March 28, 2018, the YRB was advised by email that Mr. Carlyle wished to attend his hearing of April 5, 2018 in person.

[10] On March 29, 2018, the YRB and the parties received a report from the Alberta Hospital regarding Mr. Carlyle's diagnosis, progress, conduct and current circumstances.

[11] On the same day, the YRB advised the parties that the April 5, 2018 hearing would have to be adjourned to a later date as there was insufficient time to arrange for Mr. Carlyle's travel from the Alberta Hospital to Whitehorse.

[12] On April 13, 2018, the YRB informed the parties that the review hearing had been rescheduled to May 4, 2018, in Whitehorse "to accommodate Mr. Carlyle's request to attend his hearing in person."

[13] On April 26, 2018, the YRB informed the parties by email that the review hearing would commence on May 4, 2018, in Whitehorse, with Mr. Carlyle attending by video conference from the Alberta Hospital in Edmonton. The YRB advised the purpose of the hearing was for the parties to address the issues of accommodations and logistics, with respect to Mr. Carlyle's attendance in Whitehorse. The hearing would then be adjourned to a later date to have Mr. Carlyle attend the remainder of his hearing in person.

[14] On April 30, 2018, the YRB and the parties received an addendum to the report provided by the Alberta Hospital on March 29, 2018.

[15] On May 1, 2018, counsel for the Director of Mental Wellness and Substance Use Services ("MWSUS") sent an email to the YRB and to the other parties stating that the Director had made travel arrangements to have Mr. Carlyle attend his hearing in person on May 4, 2018, in Whitehorse prior to the YRB deciding otherwise.

[16] At the May 4, 2018 hearing, Mr. Carlyle attended by video-conference from the Alberta Hospital in Edmonton. Mr. Carlyle's counsel and all the other parties attended

the hearing in person in Whitehorse. The Associate Chairperson acknowledged that Mr. Carlyle wanted to attend his review hearing in person. She indicated that the purpose of the hearing that day was to discuss accommodations for him while attending his hearing. The panel and the parties heard from a representative of the Whitehorse General Hospital ("WGH") regarding the hospital's limited capacity to house Mr. Carlyle at its secure facility. They heard about the option of housing Mr. Carlyle at the WCC, which is designated as a hospital facility in the Yukon, for two to three days to attend his hearing. They also heard from the medical team at the Alberta Hospital.

[17] During that hearing, the Associate Chairperson raised, for the first time, with the parties the possibility of holding Mr. Carlyle's review hearing at the Alberta Hospital in Edmonton.

[18] Counsel for Mr. Carlyle, the Director of Public Prosecutions ("DPP"), and the Director of MWSUS as well as a representative of MWSUS voiced their concerns regarding the hearing process and the lack of communication regarding the purpose of the hearing.

[19] The Associate Chairperson acknowledged that Mr. Carlyle wanted to attend his hearing in person and that the panel was considering its options in that regard.

[20] The panel adjourned the hearing to a date to be determined.

[21] On June 5, 2018, the YRB advised the parties 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)

[22] On June 11, 2018, counsel for the DPP, counsel for Mr. Carlyle and counsel for the Director of MWSUS wrote to the YRB to voice and explain their opposition to its decision to hold Mr. Carlyle's review hearing at the Alberta Hospital in Edmonton. They asked the YRB to reconsider its decision concerning the extra-territorial sitting. The three counsel invited the YRB to hear and consider their submissions on the issue of territorial jurisdiction, summarized in that letter. Counsel also informed the YRB that Mr. Carlyle was content to be lodged at the WCC for the relatively brief period that his presence would be required for the hearing.

[23] On June 20, 2018, the YRB advised the parties that it would consider additional written submissions on the issue of extra-territorial sittings, to be filed by July 9, 2018.

[24] Counsel for the DPP provided brief supplemental submissions on the law. Counsel for Mr. Carlyle provided a brief update on her client's instructions. She reiterated that he wished his hearing to proceed in the Yukon and that he had no concerns about being housed at WCC for a few days, as he had done in the past.

[25] On July 5, 2018, the YRB emailed the parties to canvass the date of August 2, 2018, for the continuation of Mr. Carlyle's review hearing.

[26] On July 25, 2018, the YRB issued an interim order stating that after considering the parties' written submissions, it had decided 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.

The interim order made no mention of written reasons to follow.

[27] On July 28, 2018, Mr. Carlyle filed his application for an order of *certiorari* and an order in the nature of *mandamus*.

[28] On August 22, 2018, I heard the YRB's application for standing in Mr. Carlyle's application.

[29] On September 10, 2018, I ordered, with reasons to follow, that the YRB be granted intervenor status in these proceedings. The YRB was permitted to make submissions on the scope of its territorial jurisdiction; its jurisdiction or authority to issue or refuse to issue an order or warrant pursuant to s. 672.85 of the *Criminal Code*; its jurisdiction or authority to attach conditions to such an order or warrant; and its practice and procedure regarding the conduct of its hearings in general. The YRB was not permitted to make submissions on the reasonableness of its decision to hold Mr. Carlyle's review hearing in Alberta, its conduct of Mr. Carlyle's hearing to date; its compliance with the principles of natural justice in this case, and its compliance with s. 672.5 in this case. On September 25, 2018, I issued my written reasons, cited as *R. v. Carlyle*, 2018 YKSC 45.

[30] On the same day that I granted the YRB intervenor status with permission to make submissions on a number of issues raised in this matter, the YRB issued written reasons regarding its orders of June 5 and July 25, 2018. Essentially, the YRB explained that its decision to hold Mr. Carlyle's review hearing at the Alberta Hospital was based on Mr. Carlyle's uncertain clinical presentation and risk factors; as well as the YRB's concerns regarding Mr. Carlyle's proposed travel to the Yukon and the

likelihood of Mr. Carlyle's being housed at WCC for a few days, if he were brought to Whitehorse for his hearing, which the YRB did not find appropriate.

[31] On November 19 and 20, 2018, I heard Mr. Carlyle's application for *certiorari* and for an order in the nature of *mandamus*. I reserved my decision.

[32] Counsel for the DPP indicated at that hearing that the parties were trying to agree on a process whereby Mr. Carlyle's review hearing could take place while awaiting this Court's decision on the issue of the YRB's territorial jurisdiction.

[33] However, on June 4, 2019, the parties informed this Court that Mr. Carlyle's review hearing had not taken place.

**1) Availability of *certiorari* and standard of review**

[34] In *R. v. Awashish*, 2018 SCC 45, at para. 2, the Supreme Court of Canada described the availability of *certiorari* as follows: "Certiorari is an extraordinary remedy that is available only in narrow circumstances." The Court went on to state that *certiorari* is available to parties to a criminal proceeding only in cases of a jurisdictional error.

[35] A jurisdictional error occurs where "the court fails to observe a mandatory provision of a statute or where a court acts in breach of the principles of natural justice." (*Awashish*, para. 23)

[36] The determinative question is: "whether the error alleged would result in a loss of jurisdiction over the proceedings." The answer to that question depends upon the nature, effects and consequences of the decision (*Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 ("*Bessette*"), at paras. 33).

[37] The parties agree that *certiorari* is a remedy available in this case as the YRB's decision to hold a hearing outside the Yukon goes to the scope of its territorial jurisdiction, i.e. if the YRB were to sit in Alberta without authority to do so, it would loose jurisdiction over the review hearing.

[38] The parties are in agreement that the standard of review applicable to this issue is correctness not reasonableness.

[39] Also, a breach of the rules of natural justice may also result in a loss of jurisdiction. The standard of review applicable to this question is correctness (*Mission Institution v. Khela*, 2014 SCC 24, at para. 79; *Judicial Review of Administrative Action in Canada*, Brown and Evans, pp. 14-57 to 14-62).

**Positions of the parties on the issues of territorial jurisdiction and the rules of natural justice**

**The applicant, Mr. Carlyle**

[40] Mr. Carlyle submits that the YRB does not have express or implied jurisdiction to hold, on its own motion, a review hearing outside the Yukon.

[41] Mr. Carlyle submits that the YRB is a creature of statute. As such, its powers are restricted to those expressly provided for and by its enabling legislation, and those that are necessarily incidental to perform the function and accomplish the duties set out in Part XX.1 of the *Criminal Code*.

[42] Mr. Carlyle submits that there is no provision in the *Criminal Code* that expressly allows the YRB to sit outside the Yukon.

[43] Mr. Carlyle submits that the review board process is part of an ongoing criminal process against a NCR accused person provided by the *Criminal Code*. According to

the principles of statutory interpretation, the Court must look at the spirit and intent of the *Criminal Code* as a whole, not only Part XX.1, when determining the powers that are necessarily incidental to the mandate of the YRB.

[44] Mr. Carlyle submits that there is a presumption against extra-territoriality in criminal law. The criminal law has a number of geographical constraints and restraints.

[45] More specifically, Part XX.1 of the *Criminal Code* contains provisions that tie geography to jurisdiction. For example, s. 672.72 provides that the appeal of a review board's disposition order is heard by the Court of Appeal of the province or the territory where the disposition order is made. If the YRB has jurisdiction to hold a hearing in Alberta and the YRB makes a disposition order in Alberta, it is the Alberta Court of Appeal, not the Court of Appeal of Yukon that would have jurisdiction over the appeal. This could lead to an unwieldy situation where different courts of appeal become seized from year to year with appeals from the YRB's annual disposition orders, concerning the same individual subject to the YRB's annual disposition orders.

[46] Mr. Carlyle also submits that Parliament has turned its mind to jurisdiction and interprovincial transfers of NCR accused persons (s. 672.86 to 672.89). To that effect, s. 672.9 specifically provides that a warrant or order issued in one province or territory is valid and has the same effect in any place in Canada outside that province or territory as if it had been made in that province or territory. With this provision, Parliament has clearly tied geography to jurisdiction in providing for extra-territorial effects of process or orders issued by review boards in their home province or territory. To the contrary, Parliament has chosen to remain silent and not grant review boards the authority to sit outside their home jurisdiction.

[47] Mr. Carlyle also submits that Parliament has enacted provisions to ensure that review boards can compel or bring NCR accused persons to their hearing even if detained in another jurisdiction (ss. 672.5(10), 672.5(13) and 672.85).

[48] Mr. Carlyle submits there is no practical need or necessity for the YRB to possess the extraordinary authority to sit outside its jurisdiction. There is no good reason why review boards would be any different than statutory courts or judicial officers exercising powers or authority under the *Criminal Code*. Further, there was no need in this case to hold a hearing in Alberta. The YRB granted a remedy no one asked for. Mr. Carlyle was prepared to travel to the Yukon for his hearing even if it meant spending a few nights at WCC. The Government of Yukon was also prepared to transport and house Mr. Carlyle for his hearing in the Yukon. The YRB indicated no concern that Mr. Carlyle would be unable to have a fair hearing in the Yukon. Instead, the YRB appears to have been concerned generally by Mr. Carlyle being housed for a few days at WGH or at WCC to attend his hearing in the Yukon. However, Mr. Carlyle's stay at WGH or WCC would have been of a very short duration compared to the cases the YRB relied on to justify its decision to hold a hearing in Alberta. Mr. Carlyle submits that in looking into his transitional housing situation while in the Yukon to attend his hearing, the YRB went too far and exceeded its jurisdiction.

[49] Also, Mr. Carlyle submits that the decision of where to sit affects not only the NCR accused person but other parties who have the right to participate in the hearing.

[50] Mr. Carlyle points out that this is not a *Charter* case. I therefore need not decide whether the YRB would have the authority to hold a hearing outside the Yukon as a *Charter* remedy.

[51] Counsel for Mr. Carlyle indicated at the hearing that this Court need only consider the alleged breach of the rules of natural justice argument in the alternative.

**The DPP**

[52] The DPP agrees with Mr. Carlyle that the YRB does not have express or implied jurisdiction to sit outside the Yukon.

[53] The DPP adds that the YRB has narrowly confined statutory powers. As such, the YRB does not have the authority to sit outside the Yukon by necessary implication, because the present case does not meet the circumstances enumerated in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, ("*ATCO*"). Amongst other things, the DPP submits that the power to conduct a review hearing outside the Yukon is not necessary to accomplish the objects of the legislative scheme and not essential to the YRB fulfilling its mandate.

[54] The DPP submits that even if the YRB were to possess broadly drawn powers, as argued by the YRB, the doctrine of necessary implication would be of less help to the YRB. For broadly drawn powers, the doctrine is restricted to those powers that include only what is rationally related to the purpose of the regulatory framework. The DPP submits that, in this case, the authority sought by the YRB is not rationally related to the purpose of the regulatory framework and the YRB can fulfill its mandate without travelling outside its jurisdiction.

[55] The DPP submits that there was no issue regarding the availability of a facility to hold Mr. Carlyle's review hearing in the Yukon. Mr. Carlyle was aware that he was likely to be housed at WCC for a few days to attend his hearing in the Yukon in the presence of his lawyer. Mr. Carlyle indicated to the YRB that he was willing to proceed that way.

The report filed by Mr. Carlyle's treatment team prior to the May 4th hearing did not raise any concerns regarding Mr. Carlyle having to stay at WCC and being transported to the Yukon. The YRB was not seized with a *Charter* challenge regarding Mr. Carlyle's transport to the Yukon and/or accommodation in the Yukon to attend his hearing. According to the regulations, WCC and WGH are defined as hospitals where Mr. Carlyle can be housed. The YRB disregarded the jurisprudence from the Court of Appeal of Yukon confirming the validity of that designation.

[56] Also, the DPP submits that holding the hearing outside the Yukon may be an impediment to counsel acting for the parties in this matter in a proceeding in Alberta, as they may not be authorized to practice law outside the Yukon. The DPP also points out that the YRB was aware that Legal Aid would not cover the costs for Mr. Carlyle's counsel to travel to Alberta to attend the hearing when it made its decision to proceed with the hearing at the Alberta Hospital. The DPP adds that there are no federal funds to cover such travel.

[57] The DPP further submits that the *Criminal Code* specifically provides that the YRB shall be treated as having been established under the laws of the Yukon (s. 672.38(2)). Its jurisdiction does not exceed the territorial limits of the Territory.

[58] The DPP argues that there is a high likelihood that the YRB would be called upon to exercise its coercive powers as part of the review hearing process. This factor militates against the YRB having jurisdiction to conduct a review hearing outside the Yukon. The DPP submits that Alberta has its own review board, which practice and procedure may differ from that of the YRB. Holding a YRB hearing in Alberta may create tension and lead to confusion regarding the state of the jurisprudence in that province.

[59] With regard to the rules of natural justice, the DPP submits that they include the right to know the case to be met; the right to respond; and the right to be heard by an impartial decision-maker.

[60] The DPP submits that those rights were breached by the YRB at the May 4th hearing. The DPP submits that the YRB, on its own motion, formulated a concern regarding transportation and accommodation for Mr. Carlyle; that it held a hearing without providing meaningful notice to the parties; that it invited a representative of the WGH to provide information at the hearing without informing the parties; that it did not invite the parties to make submissions or present evidence at the hearing; that it effectively started Mr. Carlyle's review hearing without Mr. Carlyle being physically present as he had requested; that it did not act judicially; and that it made a decision without a proper evidentiary record.

[61] The DPP submits that there were significant procedural issues in this case that warrant the intervention of the court.

**The Government of Yukon**

[62] Counsel for the Government of Yukon indicated at the hearing that it agrees that the YRB lacks jurisdiction to hold a hearing outside the Yukon. Counsel also indicated that the Government of Yukon relies on Mr. Carlyle's and on the DPP's submissions in that regard. Counsel further indicated that the Government of Yukon would focus its submissions on the questions of whether the Chairperson of the YRB could be compelled to issue an order or warrant to bring a detained NCR accused person to their hearing in the Yukon and whether the Chairperson has the authority to attach conditions to such a warrant.

**The YRB**

[63] The YRB submits that the issue before the court regarding its territorial jurisdiction is one of statutory interpretation.

[64] The YRB recognizes that there is no express statutory provision in the *Criminal Code* or the federal *Inquiries Act*, R.S.C. 1985, C.1-II ("*Inquiry Act*") granting it authority to hold a hearing outside the Yukon. However, the YRB submits that it does have that authority by necessary implication.

[65] The YRB submits that review boards are quasi-judicial tribunals with significant jurisdiction and authority over NCR accused persons. According to the YRB, Parliament intended review boards to have broad discretionary powers to manage their proceedings to ensure the attainment of the intent and purpose of Part XX.1 of the *Criminal Code*, as well as to balance individual and public rights and interests.

[66] The YRB submits that the fixing of the place of hearing is a procedural matter not a substantive one, such as the right of a NCR accused person to an oral hearing itself.

[67] The YRB submits that s. 672.5 of the *Criminal Code*, headed "Procedure at Disposition Hearing", read in the context of Part XX.1 of the *Criminal Code*, does, by necessary implication allow the YRB to fix the place of the disposition or review hearing, which would include places outside the Yukon.

[68] Also, s. 672.5(9) of the *Criminal Code* provides that a NCR accused person has the right to be present at his review hearing, which is central to the analysis of the YRB's jurisdiction.

[69] Section 672.5 provides that notice of the review hearing shall be given to the parties, including the Attorney General of the interested province or territory, within the

time and in the manner prescribed, or within the time and in the manner fixed by the rules of the court or review board. According to the YRB, even if not specifically provided for, the notice of hearing must include the place of the hearing.

[70] The YRB indicates that it has not adopted rules of practice and procedure, nor has the Governor in Council made regulations pursuant to s. 672.44 of the *Criminal Code* regarding review boards' practice and procedure. The YRB also points out that the court has not adopted rules to that effect.

[71] Consequently, the YRB submits that the fixing of the venue or place of the oral hearing is left to its discretion on a case-by-case basis, keeping in mind that what is critical is the statutory right of NCR accused persons to be present at their hearing.

[72] Also, the YRB submits that while it is deemed by statute to be a territorial board, the YRB is established through federal legislation, the *Criminal Code*, and exercises its federal jurisdiction and powers across the country over the NCR accused persons it supervises. The YRB also notes that the Chairperson of the review panel has all the powers that are conferred by ss. 4 and 5 of the *Inquiries Act*. The YRB is, in that sense, different from territorial and provincial tribunals created by provincial or territorial legislation seeking to apply their domestic legislation outside their provincial or territorial boundaries.

[73] In this case, the YRB is simply exercising its exclusive federal jurisdiction under s. 672.89 of the *Criminal Code*, with respect to the NCR accused person in the province in which he is detained pursuant to its order.

[74] The YRB submits that s. 672.89 of the *Criminal Code* specifically provides that the YRB retains jurisdiction over a NCR accused person detained pursuant to its order who is transferred to an other province or territory.

[75] In that context, the YRB submits that its jurisdiction is not confined by place in the Yukon. The YRB must have the powers, which, by practical necessity and necessary implication, flow from its inquisitorial authority, to carry out review hearings of persons detained in southern Canada pursuant to its orders, in the location in which they are detained.

[76] The YRB further submits that Part XX.1 of the *Criminal Code* gives it, by necessary implication, jurisdiction to hold review hearings outside the Yukon in all matters within its authority when reasonable to do so, not only in matters where the NCR accused person is detained in southern Canada.

[77] The YRB further submits that the decision of the Supreme Court of Canada in *Endean v. British Columbia*, 2016 SCC 42 ("*Endean*"), supports its position. The YRB submits that in this case, it has personal jurisdiction over Mr. Carlyle, the NCR accused person; it has subject matter jurisdiction over the proceeding it intends to conduct at the Alberta Hospital; there is no suggestion that the hearing in Alberta would be contrary to Alberta law; and the review hearing involves parties and matters wholly in Canada.

[78] As for the use of coercive powers, the YRB submits that since the hearing would take place at the hospital where Mr. Carlyle is detained and there are no anticipated witness, the YRB would not have to exercise its coercive powers. In any event, counsel for the YRB submitted at the hearing that its coercive powers emanate from federal

legislation, the *Criminal Code* and the *Inquiries Act*, which in turn allow the YRB to exercise those powers across Canada.

[79] Further, the YRB submits that procedural fairness is achieved through its order that the hearing take place in Alberta.

[80] According to the YRB, by hearing this matter at the Alberta hospital, Mr. Carlyle has the benefit of being present at his oral hearing. He will have the opportunity to hear the case against him and to respond to it, with the assistance of his counsel, which extra travel fees shall be paid by the Attorney General of Canada according to s. 672.5 (8.1) of the *Criminal Code*, if necessary. It may not be what Mr. Carlyle wants, but Mr. Carlyle is not entitled to the most advantageous procedure, in general or from his own view.

[81] In its written submissions, the YRB briefly submits that, in the alternative, the authority to fix the place of the hearing can be read-in, in order to give effect to the true intent of Parliament. In doing so, the court would not be adding words, it would simply be expanding the scope of the legislative text to matters that are neither implicit or explicit in the legislation.

[82] In the further alternative, the YRB briefly submits that Parliament failed to anticipate the particular scenario of the northern territories transferring NCR accused, who have a fundamental right to an oral review hearing, to southern institutions.

[83] Finally, the YRB submits that its order and conduct should be reviewed on the basis of administrative law principles.

[84] The YRB did not make submissions on its compliance with the rules of natural justice in this specific case, as I did not permit it to do so in my order of September 10, 2018.

**Analysis**

**a) Does the YRB have jurisdiction to hold a disposition or review hearing outside the Yukon?**

[85] The YRB is a creature of statute. As such, it only possesses the powers expressly conferred upon it by its enabling legislation and those by necessary implication "that are reasonably necessary to accomplish its mandate" or intended functions (*R. v. 974649 Ontario Inc*., [2001] 3 S.C.R. 575 ("*974679 Ontario Inc.*"), at para. 70, *ATCO*, at para. 51).

[86] The YRB acknowledges that it does not have the express statutory power to hold a disposition or review hearing outside the Yukon. The YRB also states that it does not rely on the doctrine of inherent jurisdiction to support its position that it has the authority to sit outside the Yukon. The question therefore is whether the YRB has the power to hold a disposition or review hearing outside the Yukon by necessary implication.

**Doctrine of jurisdiction by necessary implication and applicable test**

[87] The doctrine of jurisdiction by necessary implication has been relied on by the courts to determine the scope of the powers of statutory courts and tribunals.

[88] In *ATCO,* Bastarache J., at para. 51, writing for the majority, described its application as follows:

> The mandate of this Court is to determine and apply the intention of the legislature … without crossing the line between judicial interpretation and legislative drafting … That being said, this rule allows for the application of the

> "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature ….. Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate. … (my emphasis) (citations omitted)

[89] Bastarache J., at para. 73, enumerated the circumstances in which the doctrine of jurisdiction by necessary implication may be applied:

> [73] …
>
> 1. [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
>
> 2. [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
>
> 3. [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
>
> 4. [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
>
> 5. [when] the legislature did not address its mind to the issue and decide against conferring the power to the Board.

[90] However, Bastarache J. went on to state that the doctrine of jurisdiction by necessary implication is of less help for "broadly drawn powers" than it is for "narrowly drawn" ones. For broadly drawn powers, the application of the doctrine is limited to cases where the power is rationally related to the purpose of the regulatory framework. At para. 74, he relied on the following passage of Professor Sullivan at p. 228 of

*Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont: Butterworths, 2002:

> [74] …
>
> > In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. (emphasis already added)

[91] For example, in *ATCO*, Bastarache J, concludes that a power "to impose additional conditions" was a broadly drawn one.

[92] The DPP and the YRB disagree on whether the circumstances enumerated by Bastarache J., at para. 73 of *ATCO,* are conjunctive or disjunctive. Based on Bastarache J.'s view that the doctrine would only apply to "broadly drawn powers" in very specific circumstances, and the fact that an enumeration simply consists of listing one thing after another, I conclude that the circumstances listed at para. 73 of *ATCO* are disjunctive because they simply illustrate the different situations where the doctrine may be applied. The decisions of the Ontario Court of Appeal in *Pierre et al. v. McRae, Coroner,* 2011 ONCA 187, at paras. 33 and 34; and *R. v. Fercan Developments Inc*., 2016 ONCA 269 ("*Fercan*"), at para. 45, support this conclusion.

[93] That being said, keeping in mind the narrower application of the doctrine to broadly drawn powers, the question at the center of the court's inquiry remains whether the specific power at issue is "practically necessary for the accomplishment of the object

intended to be secured by the statutory regime created by the legislature" (*ATCO*, at para. 51).

[94] I note that the power at issue does not have to be absolutely necessary for the court or tribunal to realize the objects of its statute. It only needs to be practically necessary to effectively and efficiently carry out its purpose (*974649 Ontario Inc*., at para. 71; *Fercan*, at para 48).

[95] Whether a power is necessarily implied or not depends on the courts' interpretation of the enabling legislation by which the tribunal derives its powers. (*ATCO*, para. 36)

[96] The guiding rule of statutory interpretation was reiterated recently by the Supreme Court of Canada in *Bessette,* at para. 54:

> [54] …
>
> > 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. (citation omitted)

[97] As stated by Bastarache J. in *ATCO*, at para. 49:

> [49] … As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme. … (citations omitted)

[98] In order to determine whether the YRB has the implied power to sit outside the Yukon, it is therefore necessary to ascertain the nature and scope of the YRB's mandate in the context of its enabling legislation.

**The history and purpose of Part XX.1**

[99] The history and purpose of Part XX.1 of the *Criminal Code* as well as the nature and scope of review boards' mandate have been described by the courts on a number of occasions (see *Winko v. B.C. (Forensic Psychiatrist Institute*), [1999] 2 S.C.R. 625 ("*Winko*"); *R v. Owen*, 2003 SCC 33 ("*Owen*"); *R. v. Conway*, 2010 SCC 22 ("*Conway*")).

[100] Part XX.1 of the *Criminal Code* was enacted in response to the Supreme Court of Canada's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, which struck down the automatic and indefinite detention of mentally ill offenders prescribed by the previous regime as contrary to s. 7 of the *Charter*.

[101] Part XX.1 introduced a new regime and a new approach to deal with mentally ill offenders. It replaced the previous regime with an independent and specialized tribunal, the review board, to be set up in each province and territory (House of Commons Debates, 34th Parliament, 3rd Session: Vol. 4, November 21, 1991, at p. 5132).

[102] As an alternative to the two verdicts historically available, conviction or acquittal, the legislation created a third possible verdict, that of not criminally responsible on account of mental disorder (*Winko*, at para. 21, *Conway*, at para. 87). This third verdict diverts the individual found not criminally responsible into a different regime where the court or the review board determines "whether the person poses a continuing threat to society coupled with an emphasis on providing opportunities to receive appropriate treatment" (*Winko*, at para. 39; s. 672.54 of the *Criminal Code*). Depending on the review board's finding, the NCR accused person may be detained in custody in a hospital subject to conditions, released on conditions or discharged absolutely.

Individuals found unfit to stand trial are also diverted into this stream. The regime is inquisitorial, not adversarial (*Winko*, at para. 54).

[103] It is important to note that Part XX.1 was enacted with the intention to achieve "the twin goals of protecting the public, and treating the mentally ill offender fairly and appropriately" (*Winko*, at para. 21).

**Mandate and function of a review board**

[104] Review boards were established and are governed by Part XX.1 of the *Criminal Code*. They are specialized quasi-judicial tribunals with significant authority over the liberty of NCR accused persons as they have jurisdiction over the detention and discharge of NCR accused persons (*Conway*, at para. 84).

[105] In *Mazzei*, Bastarache J., at para. 42, described the role of a review board as follows:

> [42] … The role of a Board is to assess the risk to public safety posed by certain NCR accused persons, to provide opportunities for appropriate and effective medical treatment with a view to controlling and reducing that risk, to work towards the ultimate goal of rehabilitation and reintegration, and to safeguard the liberty interests of the accused in this process. (my emphasis)

[106] As stated by the Supreme Court of Canada in *Conway*, at para. 88 "The Board fulfills its "primary purpose" therefore by protecting the public while minimizing incursions on patients' liberty and treating patients fairly."

[107] Generally, the mandate of a review board is to manage and supervise the assessment and treatment of NCR accused persons under its jurisdiction by conducting annual hearings and making disposition orders (*Conway*, at para. 88, *Owen*, at para. 26)

**The procedure before a review board**

[108] The specific procedure at a disposition or review hearing is set out at s. 672.5 of the *Criminal Code*.

[109] It provides that the hearing may be conducted in as informal a manner as is appropriate in the circumstances.

[110] The section gives a review board the power to make orders to compel the attendance of witnesses to the hearing; to exclude the public from any part of the hearing; to add an interested party who has a substantial interest in protecting the interests of the accused to the hearing; to assign counsel to act for the unrepresented accused; and to adjourn the hearing for a certain period of time in certain circumstances.

[111] Section 672.5 also provides for specific procedural rights for the NCR accused person. NCR accused persons have the right to be present at their hearing, except in certain specified circumstances, and to participate in the hearing. They also have the right to be represented by counsel. Of note, s. 672.81 provides that NCR accused persons have a right to an annual review hearing.

[112] Pursuant to s. 672.5, any party to the proceeding may present evidence, make oral or written submissions, call witnesses, cross-examine witnesses called by another party and, on application, cross-examine a person who has submitted a written assessment report to the review board.

[113] Notice of the hearing shall be given to the parties within the time and in the manner prescribed by the review board. Victims, at their request, are also entitled to notice.

[114] Also, s. 672.501 provides that review boards may issue publication bans.

[115] Section 672.43 provides that, at a hearing, the Chairperson has all the powers that are conferred by ss. 4 and 5 of the *Inquiries Act*, which include the power to compel witnesses to attend a hearing, to produce documents, and to compel the testimony of witnesses. The Chairperson has the powers to enforce the attendance of witnesses and to compel them to give evidence, as is vested in any court of record in civil cases.

[116] Finally, to supplement the procedure provided by Part XX.1, review boards may, subject to the approval of the lieutenant governor in council of the province, make rules providing for the practice and procedure before them.

[117] This series of provisions coupled with the mandate of review boards and the informal and inquisitorial nature of the proceedings before them lead to the conclusion that Parliament intended review boards to have broad powers to control their proceedings.

**Did Parliament intend a review board to have the power to sit outside its province or territory?**

[118] Part XX.1 of the *Criminal Code* is a part of the overall framework provided by the *Criminal Code* overseeing the prosecution of criminal offences in Canada. In that respect, the provisions of Part XX.1, and more particularly the powers conferred to a review board, must be interpreted in the context of the legal framework provided by the *Criminal Code*.

[119] As mentioned above, s. 672.5 provides that a review board hearing may be conducted in as informal a manner as is appropriate in the circumstances. The review board must provide notice of its hearing to the parties within the time and in the manner

prescribed, or within the time and in the manner fixed by the rules of the court or review board. No rules have been adopted in the Yukon. In order to be meaningful, the notice must include not only the time but also the place of the disposition hearing. It is clearly for the review board to determine the venue of the hearing. That venue may be fixed in light of the review board's broad powers to control its proceedings and to conduct its hearing in as informal a manner as is appropriate in the circumstances.

[120] However, does the authority to fix the venue of a hearing in the context of the review board's broad powers over the conduct of its proceedings, by necessary implication give the YRB authority to fix the place of its hearing outside of the Yukon? I have concluded that the YRB does not have that authority for the following reasons.

[121] As I have concluded that a review board has broad powers to control its proceedings, the doctrine of necessary implication may apply if the power to sit outside the review board's province or territory is rationally related to the purpose of the framework.

[122] Specifically, in this case, I must determine if the power to sit outside the Yukon is practically necessary to fulfill the YRB's mandate to manage and supervise the assessment and treatment of NCR accused persons by conducting annual hearings and making disposition orders; and if that power is rationally connected to the purpose of its enabling legislation of protecting the public, and treating the mentally ill offender fairly and appropriately.

[123] The analysis must also take into consideration the NCR accused persons' right to be present and represented by counsel at their review hearing.

[124] As stated in R. v. *Lepage*, [2006] 217 O.A.C. 82 (O.N.C.A.), and *Endean*, the court must not take an overly restrictive or technical approach in making its determination.

[125] The court must also consider the existence of constitutional, common law or statutory restrictions to that power.

[126] Review boards are established or designated for each province and territory (s.627.38). The term review board is defined at s. 672.1(1) as meaning: “the Review Board established or designated for a province pursuant to subsection 672.38(1)”. The French version of the definition reads: “commission d’examen” À l’égard d’une province la commission d’examen constituée ou désignée en vertu du paragraphe 672.38(1). The term “à l’égard” means with regard to or with respect to.

[127] Even though review boards are created by federal legislation and exercise federal powers, they are expressly deemed to have been established under the laws of their province or territory, making them provincial or territorial entities.

[128] The intention of Parliament is clear. Each of the thirteen review boards is to be considered as a provincial or territorial entity having jurisdiction over NCR accused persons and NCR proceedings in and for their respective province or territory.

[129] This intent is in line with other parts of the *Criminal Code* where geography and jurisdiction are intrinsically connected. It is also consistent with the provisions of the *Criminal Code* dealing with the territorial jurisdiction of the courts over the criminal prosecution of a NCR accused person prior to that accused being found not criminally responsible and diverted into the NCR regime (see s.468 and following on jurisdiction).

[130] Provincial and territorial entities are constrained by their territorial limits (*Ewachniuk v. The Law Society of British Columbia*, [2003 B.C.J. No. 823). The YRB's broad procedural powers have to be read as subject to the statutory barriers or limits provided by the legislation and the Constitution (*Endean*, at para. 40).

[131] In that context, I am unable to accept the YRB's submission that it has the power by necessary implication to fix a hearing outside the Yukon in all matters before it, providing it is reasonable to do so, when its enabling legislation clearly states that the board is deemed to be a provincial board operating for and in a province or territory. Clearly, Parliament intended review boards to operate in the province or territorial limits circumscribed by the *Criminal Code*. The fact that the *Criminal Code* provides that review boards may retain jurisdiction, in certain circumstances, over NCR accused persons transferred to another province or territory, is another indicator that Parliament did not intend review boards to preside over matters outside the territorial limits of their province or territory, with respect to all matters before them.

[132] Furthermore, I note that review boards do not have the power to adopt rules of practice and procedure allowing them to fix the venue of a hearing outside the limit of their provincial or territorial jurisdiction. As stated by the Ontario Court of Appeal in *R. v. Conway*, 2008 ONCA 326, at para. 61, "a statutory tribunal cannot augment its own limited jurisdiction by promulgating rules".

[133] However, this is not the end of the inquiry regarding the situation before me. The *Criminal Code* specifically provides that in certain circumstances, a review board may continue to exercise its powers and fulfill its duties over NCR accused persons who are transferred to another province or territory.

[134] Sections 672.86 to 672.89 of the *Criminal Code* address interprovincial transfers of NCR accused persons and specify which review board has jurisdiction over the NCR accused person as a result.

[135] In relation to a transfer effected pursuant to s. 672.86, the review board of the receiving province is deemed to have full jurisdiction over the NCR accused person, unless the Attorney General of the two provinces, involved in the transfer, enter into an agreement enabling the review board of the province from which the accused was transferred to exercise the powers and perform the duties mentioned in ss. 672.5 and 672.81 to 672.84 in respect of the accused, subject to the terms and conditions set out in the agreement. (see s. 672.88)

[136] In the case of a transfer pursuant to s. 672.89, the review board of the province from which a NCR accused person is transferred retains full jurisdiction and continues to exercise the powers and perform the duties mentioned in sections 672.5 and 672.81 to 672.84 in respect of the NCR accused person unless the Attorney Generals of the two provinces and/or territories involved in the transfer agree otherwise.

[137] The powers and duties referred to in these provisions are related to the duty to conduct a review hearing every 12 months; the right of a NCR accused person to be present and represented by counsel at their annual hearing; the powers related to the conduct of a hearing; and the power to order an assessment and make a disposition order.

[138] Clearly, in a situation where the review board of the province or territory from which the NCR accused person is transferred retains jurisdiction over them, Parliament intended the review board to be in a position to continue to fulfill its duties and exercise

its powers over the assessment and treatment of the NCR accused person. However, does the power to sit outside its territorial jurisdiction by necessary implication flow from that situation?

[139] All parties agree that Mr. Carlyle was transferred to the Alberta Hospital pursuant to s. 672.89(1) and that the YRB retains full jurisdiction over him. I am therefore not seized of a case of an interprovincial transfer where the review board's jurisdiction would be subject to the conditions of an agreement between two provincial or territorial governments (see s. 672.88(2) or s. 672.89(2)). My analysis will therefore not delve into the possibility, and/or legality, of two provincial, territorial governments agreeing to the review board of the province or territory from which the NCR accused person is being transferred, holding a hearing in the province or territory where the NCR accused person is transferred.

[140] The YRB relies on *Endean* to submit that since it has personal and subject-matter jurisdiction over the NCR accused person it should have the power to hold a review hearing outside the Yukon, in this case to sit in Alberta where Mr. Carlyle is detained.

[141] The specific issue in *Endean* was whether superior court judges, from British Columbia and Ontario, who were implementing a pan-national class action settlement had the power to sit together, with a superior court judge from Quebec, outside their home provinces to hear submissions by counsel and decide a motion relating to it. The motion was brought in the context of a settlement agreement which required orders "without any material differences" to be made in all three courts. The situation came at the request of the parties and the judges were to adjudicate the issue based on paper.

[142] In that case, the Supreme Court of Canada adopted a broad interpretation of statutory provisions found in the Ontario *Class Proceedings Act* and the British Columbia *Class Proceedings Act*, which the Court stated at para. 4 of *Endean*: "confirms and reflects the inherent authority of judges to control procedure helps to fulfil the purpose of class actions and to ensure that procedural innovations in aid of access to justice will not be stymied by unduly technical or time-bound understandings of the scope of the class action judge's authority".

[143] The Supreme Court of Canada found that there were no clear common law, statutory, or constitutional barriers to the superior courts sitting outside their territorial boundaries. If there were, then the broad language of the provisions would have to be read as subject to those limitations.

[144] The Supreme Court of Canada also recognized that there is a "deep-seated sense" in the common law that courts conduct their business within their geographical boundaries. The Court stated that the broader principle against out-of-province sittings is supported by a number of considerations such as the concerns regarding the sovereignty of the jurisdiction where the hearing is held and concerns about the territorial limits of the courts' coercive powers.

[145] I recognize that s. 672.89(1) of the *Criminal Code* provides that a review board retains full jurisdiction over a NCR accused person and the NCR proceedings they are subject to, even though the NCR accused person is transferred to another province or territory.

[146] However, I find that Parliament has turned its mind to the practical issues raised by interprovincial transfers in enacting s. 672.9 of the *Criminal Code*, which provides that:

> Any warrant or process issued in relation to an assessment order or disposition made in respect of an accused may be executed or served in any place in Canada outside the province where the order or disposition was made as if it had been issued in that province.

[147] Essentially, s. 672.9 gives extra-territorial effects to a warrant or process issued by a review board sitting in its designated province or territory. This ensures that the review board of the originating jurisdiction can effectively exercise its jurisdiction over the NCR accused person transferred to another province or territory. In contrast, Parliament has not enacted any provision expressly recognizing the validity of a warrant or process issued outside the review board's provincial or territorial limits.

[148] Therefore, it follows logically that Parliament did not intend to grant a review board the power to sit outside its provincial or territorial boundaries, even in the context of interprovincial transfers.

[149] Part XX.1 also contains a toolkit allowing a review board to fulfill efficiently its duties even in cases where a NCR accused person is transferred outside its province or territory (see *Chaudry (Re)*, 2015ONCA 317, at para. 97). Section 672(13) provides that a NCR accused person can choose to appear at their hearing by video-conference. Section 672.85 provides that a review board has the authority to issue a warrant to bring a NCR accused person to its hearing. Section 672(10) gives a review board authority to remove the NCR accused person from the hearing or proceed in the absence of the NCR accused person, in certain circumstances.

[150] I understand that the implicit power to sit outside the Yukon does not have to be absolutely necessary for the YRB to realize its mandate or the objects of its statute, it simply needs to be practically necessary. However, I find that the above-mentioned provisions address a wide range of situations. I also find that they provide sufficient flexibility to the YRB to fulfill its mandate and duties and give effect to the NCR accused person's right to an annual review hearing even for NCR accused persons transferred to another jurisdiction.

[151] Also, I find that the YRB would undoubtedly be called upon to exercise its coercive powers if it were to hold review hearings outside the Yukon. This acts as a barrier to the YRB sitting outside the Yukon. The provisions of the *Criminal Code* or the *Inquiries Act*, do not remove this barrier.

[152] There is no concern or evidence in this case that the YRB would be unable to hold a fair hearing in the Yukon. While I am prepared to accept that the YRB had genuine concerns about Mr. Carlyle's travel arrangements en route to and housing arrangements while in Whitehorse to attend his hearing, the evidence before this Court falls short of establishing that it is practically necessary for the YRB to possess the authority to hold a hearing outside the Yukon based on travel, housing, or treatment needs of NCR accused persons detained in southern institutions under a hospital disposition order. I acknowledge that Yukon Courts have raised concerns regarding the use of WCC, and its segregation unit, to house, for extended period of time, offenders suffering from mental disorders. My decision should not be taken to suggest otherwise. As stated by the Court of Appeal of Yukon in *R. v. Germaine*, 2009 YKCA 3, at para. 45: "There is no question that WCC is not the ideal place for the appellant, or for any person

suffering a mental disorder". However, the Court of Appeal of Yukon went on to determined that in Ms. Germaine's circumstances and, considering the specific conditions attached by the YRB to her custodial hospital disposition order, it was not unreasonable or impermissible to house her at WCC.

[153] In addition, it was acknowledged at the May 4th hearing that NCR accused persons detained in southern institutions pursuant to a YRB disposition order are only brought and detained in Whitehorse for a few days pending their review hearing. It should also be noted that Mr. Carlyle's treatment team expressly indicated during the May 4th hearing that they did not have any concerns with Mr. Carlyle travelling to Whitehorse for his hearing in terms of interruption of treatment or other negative impacts on Mr. Carlyle.

[154] There is also no evidence before this Court that the government authorities would not be in a position or willing to adapt any proposed travel plan or housing arrangement, even within WCC, to address the specific needs of NCR accused persons detained in southern hospitals pursuant to a YRB disposition order, who choose to exercise their right to attend their review hearing in person in the Yukon.

[155] I am mindful of the fact that the *Charter* has not been invoked by the parties in this case and, considering the lack of an evidentiary basis, I will therefore refrain from commenting any further on the possible application of the *Charter,* and any appropriate remedy as the case may be, in a future case. I will simply indicate that the evidence before this Court in this case does not support the YRB's argument that the authority to hold a hearing outside the Yukon is practically necessary to accomplish its mandate and to further the objects of Part XX.1 of the *Criminal Code*.

[156] I am therefore of the view that the doctrine of necessary implication does not apply and that the YRB does not have jurisdiction by necessary implication to sit or hold a hearing outside the Yukon.

[157] The YRB briefly pleads in its written submissions that the authority to fix the place of a hearing outside the Yukon can be "read in" to give effect to the true intention of Parliament in enacting Part XX.1.

[158] Courts have been cautious in utilizing the "reading in" technique of legislative interpretation as it expands the scope of the legislation to matters that are not explicit or implicit in the legislation. Based on the above-noted reasons for rejecting the application of the doctrine of necessary implication, I find that any attempt to read in words to provide the YRB the authority to conduct a hearing outside the Yukon, would be, in essence, amending the legislation and crossing the line between legislative interpretation and legislative drafting, which is within the purview of Parliament. I therefore decline to do so (Ruth Sullivan, *Sullivan on the Construction of Statutes*, Fifth Edition, pps 166 to 168 and 179 to 183; and *Woodstock v. Stone*, 2006 NBCA 71).

[159] Also, I am unable to accede to the YRB's argument that Parliament failed to anticipate the situation of the northern territories having to transfer NCR accused persons under their jurisdictions to southern institutions, as Parliament specifically enacted provisions addressing interprovincial transfers.

[160] I therefore grant the application of *certiorari* and quash the YRB's order to hold Mr. Carlyle review hearing at the Alberta Hospital in Edmonton.

**b) Did the YRB act in contravention to the rules of natural justice?**

[161] As I have determined that the YRB's order to hold a hearing in Alberta should be quashed for lack of jurisdiction, I do not need to make a finding in relation to the alleged contravention to the rules of natural justice or the duty of fairness in this matter.

[162] I would, however, make the following comments about the procedure surrounding the YRB's May 4th hearing.

[163] All the parties to a disposition or review hearing possess a number of statutory procedural rights, including the right to notice of the hearing, the opportunity to make oral and written submissions and to adduce evidence. However, any irregularity regarding the procedure followed by the YRB must be assessed in light of s. 672.53, which provides that "any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice."

[164] In addition, at common law, an administrative tribunal, including the YRB, owes a duty of procedural fairness to individuals when making a decision that affects their rights, privileges or interests (*Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2.S.C.R. 817, at para. 20; *Chaudry (Re),* 2015 ONCA 317, at paras. 111 to 114).

[165] The purpose of the rights emanating from the duty of procedural fairness has been described as follows in *Baker*, at para. 22:

> [22] ... the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[166] The content of the duty of procedural fairness is variable and will depend on the rights affected and the statutory context (*Baker*, at para. 22; and *Osawa (Re),* 2015 ONCA 280*,* at paras. 38 to 40). In order to determine what procedure the duty of fairness requires, the courts have to consider a number of criteria, including but not limited to:

- The statutory scheme, the nature of the decision and the process followed in reaching a decision;
- The tribunal's own procedure;
- The legitimate expectations of the person challenging the decision.

[167] In this case, Mr. Carlyle's review hearing was set to proceed in Whitehorse on May 4, 2018, in the presence of Mr. Carlyle. However, as noted earlier, a week or so prior to the hearing, the YRB sent an email to the parties advising them that it had decided that the review hearing would start on May 4th "by hearing from the parties to address the accommodations and logistics of Mr. Carlyle attending his hearing in person". The YRB further indicated that Mr. Carlyle would attend the first part of the hearing by video-conference. In effect, the YRB adjourned, on its own motion, Mr. Carlyle's review hearing to deal with a preliminary matter. (I do not need to decide in this case whether the YRB would have the power to convene such a preliminary hearing.)

[168] If I am wrong and Mr. Carlyle's review hearing started on May 4th, the YRB's actions were in direct contravention to the statutory right of Mr. Carlyle to appear in person at his review hearing.

[169] The short email the YRB sent to the parties to advise them of this change made no mention of any specific concerns regarding the travel and housing arrangements for Mr. Carlyle while en route to or in Whitehorse. The YRB did not inform the parties that it had invited a representative of WGH to participate in the hearing. Also, it was only part way through the hearing that it became clear to the parties that the YRB had concerns about Mr. Carlyle's accommodations while in Whitehorse and was considering travelling to Alberta to hold the hearing. The YRB did ask the parties if they wanted more time before it made a decision. The parties responded that they did not need more time and wanted Mr. Carlyle brought to Whitehorse to have his hearing. The transcript reveals that the discussion at the hearing was unproductive. This was partly due to the frustration of the parties, who by that point did not want to engage in any further discussion, and partly due to the YRB's difficulty articulating its specific concerns and the issues on which the parties might consider making submissions.

[170] The issues raised at the May 4th hearing had the effect of delaying Mr. Carlyle's annual review hearing scheduled for that date. Also, the possibility of holding Mr. Carlyle's review hearing outside the Yukon raised an important legal issue concerning the scope of the YRB's territorial jurisdiction.

[171] While the caselaw suggests that the DPP and the Government of Yukon may not meet the requirement of being an individual to whom the Board would owe a duty of procedural fairness under the common law (see *Kachkar (Re)*, 2014 ONCA 250, at paras. 40 and 41), the extent of the YRB's territorial jurisdiction certainly qualifies as a question of importance and interest to the Government of Yukon. The decision to hold a hearing outside of the Yukon also has a financial impact on all the parties involved in

the hearing. Further, the decision to hold the review hearing outside the Yukon could have an impact on the statutory procedural rights of the parties (s. 672.5). Additionally, the decision raises issues regarding Mr. Carlyle's legal representation.

[172] In that context, I am of the view that the parties, in particular Mr. Carlyle and the Government of Yukon, were entitled to clear notice of the issues the YRB, on its own motion, intended to canvass at the May 4th hearing in order to allow them to prepare for the hearing, make necessary submissions and to adduce necessary evidence. I acknowledge the informal and inquisitorial nature of the YRB's proceedings. However, even if the YRB only first considered the possibility of holding Mr. Carlyle's review hearing in Alberta during the discussion that took place at the May 4th hearing, it was incumbent upon the YRB to clearly state its concerns and the issues it intended to make a decision on, in order to give the parties an opportunity to address them.

[173] The absence of notice, even part way through the hearing, and of a meaningful opportunity for the parties to make submissions on the issues that were of concern to the YRB, resulted in the YRB's making its first order to hold Mr. Carlyle's hearing at the Alberta Hospital in Edmonton without a full evidentiary basis or submissions from the parties.

[174] However, I am of the view that the YRB cured, at least, in part the effects of its defective notice and hearing in accepting, at the invitation of the parties, to reconsider its decision to hold Mr. Carlyle's hearing in Alberta, and in inviting the parties to make written submissions on this specific issue. This exercise led to the YRB's order of July 25th, which confirmed the YRB's decision to hold Mr. Carlyle's hearing at the Alberta hospital.

[175] In conclusion, I would add that it would have been helpful for all involved, if the YRB had indicated in its order of July 25, 2018, that it intended to provide written reasons for its July 25th order, which written reasons were released unexpectedly on September 10, 2018.

**2. The application for an order in the nature of *mandamus***

[176] The applicant seeks an order in the nature of *mandamus* requiring the Chairperson of the YRB, as defined in s. 672.1(1), to issue the necessary order pursuant to s. 672.85 of the *Criminal Code* to have the applicant brought before the YRB at Whitehorse, Yukon, for the completion of his pending review hearing.

[177] Mr. Carlyle's application also raises the question of whether the Chairperson of the YRB (in this case the Associate Chairperson) has the authority to attach conditions to an order he or she issues pursuant to s. 672.85(a) of the *Criminal Code*.

***Mandamus***

[178] *Mandamus* is a remedy by which a superior court compels a lower court, tribunal, public body or decision-maker to do or refrain from doing a specific act which that court, tribunal, public body or decision-maker is obliged to do or refrain from doing. It is available when the lower court, tribunal, public body or decision-maker expressly or implicitly refused to perform the specific act it is required to perform (*Halsbury's Laws of* Canada – Administrative *Law* (2018 Reissue) HAD-132; *Apotex Inc. v. Canada (Attorney General) (C.A.)*,[1994] 1 F.C. 742 (F.C.A.), at para. 45).

[179] *Mandamus* is not a remedy available to compel the exercise of a discretionary act or power in a certain way. However, a superior court may issue an order in the nature of *mandamus* to compel the lower court, tribunal, public body or decision-maker

to give proper consideration to a matter (***Halsbury's Laws of*** Canada – Administrative *Law* (2018 Reissue) HAD-132; *Apotex Inc.*, at para. 45).

**Positions of the parties**

[180] Mr. Carlyle, the Government of Yukon and the DPP submit that the use of the word "shall" in s. 672.85(a) expressly requires the Chairperson of the YRB to issue an order to compel the person having custody of an accused to bring the accused to the hearing at the time and place that is fixed.

[181] These parties submit that the use "shall" in s. 672.85(a) is imperative and leaves no discretion to the Chairperson in the case of a NCR accused person who is detained. This is in contrast to the use of "may" in s. 672.85(b), which is permissive and affords discretion to the Chairperson to issue, or not, a summons or a warrant in the case of a NCR accused person who is not in custody.

[182] The applicant further submits that it would be grammatically incorrect to find that the expression "shall" in s. 672.85(a) is directed at the "person having custody of the accused" instead of at the Chairperson, as argued by the YRB.

[183] The YRB submits that s. 672.85 was amended to permit review boards to compel the attendance of an accused person for any type of hearing whereas before the amendment, the review board's power to compel was limited to mandatory review hearings.

[184] The YRB submits that the term "shall" is directory as opposed to mandatory, if interpreted in the context and purpose of Part XX.1 of the *Criminal Code*.

[185] The YRB submits that s. 672.85(a) does not compel the Chairperson to issue an order. Instead, it permits the review board to issue a mandatory order for the

compulsory attendance of an accused person at the hearing. Once the Chairperson issues a warrant or summons, the order is then imperative and binding on the individual upon whom it is issued.

[186] The YRB further submits that to accede to the argument that the issuance of the order is mandatory would be to usurp its authority to control its own process provided under the *Criminal Code*.

[187] Finally, the YRB submits that there is no evidence in this case that it has refused or neglected to issue the order or that it would refuse to issue an order to compel the appearance of Mr. Carlyle, if necessary. The YRB says that the Court cannot grant an order in the nature of *mandamus* without evidence that the YRB refused or neglected to issue the order.

**Analysis**

**a) Can the Chairperson (or Associate Chairperson in this case) of the YRB be compelled to issue an order or warrant to bring a NCR accused person who is detained to a hearing pursuant to s. 672.85(a) of the *Criminal Code*?**

**i) Is the issuance of an order pursuant to s. 672.85(a) imperative or discretionary?**

[188] Section 672.85 reads:

> For the purpose of bringing the accused in respect of whom a hearing is to be held before the Review Board, including in circumstances in which the accused did not attend a previous hearing in contravention of a summons or warrant, the chairperson
>
> (a) shall order the person having custody of the accused to bring the accused to the hearing at the time and place fixed for it; or

> (b) may, if the accused is not in custody, issue a summons or warrant to compel the accused to appear at the hearing at the time and place fixed for it. (My emphasis)

[189] Section 11 of the *Interpretation Act*, R.S.C., 1985 c.I-21, provides that in every act of Parliament: "The expression "shall" is to be construed as imperative and the expression "may" as permissive" (see also ss. 2 and 3 of the *Interpretation Act*).

[190] The word "shall" signals or imposes an obligation or a requirement. It is always imperative. It does not confer discretion. As Professor Sullivan states in *Sullivan on the Construction of Statutes*, 5th ed., Markham, Ont: LexisNexis Canada, 2008, at pp. 74 and 75:

> **Mandatory or directory "shall" / "must".**
> When "shall" and "must" are used in legislation to impose an obligation or create a prohibition or requirement, they are always imperative. A person who "shall" or "must" do something has no discretion to decide whether or not to do it. A person prohibited from doing something is equally devoid of lawful choice. The issue that arises in connection with "shall" and "must" is not whether they are imperative, but the consequences that flow from a failure to comply. In some legislation, the consequences of failing to do what one is obliged to do (or not do) are clearly set out, but in other contexts the legislation is silent and it is left to the courts to determine whether non-compliance can be cured. (my emphasis)

[191] As indicated, the YRB submits that the use of "shall" in s. 672.85(a) is directory not mandatory. Therefore, an order in the nature of *mandamus* cannot be issued. I find that this distinction is of no assistance to the YRB in this case. Courts have drawn the directory-mandatory distinction when dealing with the effects of a decision-maker's non-compliance with an imperative provision. The obligation to act and the lack of discretion associated with the use of the term "shall" remains whether the provision is found to be

directory or mandatory, it is the consequence of the non-compliance that will differ (*British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] S.C.J. No. 35, at para. 148; *Doucet v. British Columbia (Adult Forensic Psychiatric Services, Director),* 2000 BCCA 195, at para. 13).

[192] As further explained by Professor Sullivan at page 75:

> If breaching an obligation or requirement imposed by "shall" entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate in so far as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion. … "Shall" and "must" are always imperative (binding); neither ever confers discretion. …

[193] Also, Parliament's use of "shall" in s. 672.85(a) as opposed to the use of "may" in s. 672.85(b) indicates that s. 672.85(a) is imperative as opposed to discretionary.

[194] Further, the wording and grammatical construction of s. 672.85 is clear. The term "shall" and the obligation that ensues, are directed at the Chairperson not at the person having custody of the accused.

[195] This interpretation is supported by the French version of s. 672.85. which reads:

> Afin d'assurer la présence de l'accusé visé par une audience, notamment s'il ne s'est pas présenté à une telle audience en contravention d'une sommation ou d'un mandat, le président de la commission d'examen :
>
> (a) si l'accusé visé par l'audition est détenu, ordonne que la personne responsable de sa garde l'amène devant la commission d'examen à l'heure, à la date et au lieu fixés pour l'audience;
>
> (b) si l'accusé n'est pas détenu, peut, par sommation ou mandat, le contraindre à comparaître devant la commission d'examen à l'heure, à la date et au lieu fixés pour l'audience.

[196] In the French version, the subject of the verb “ordonne” (“to order”) is the Chairperson not the person who has custody of the NCR accused person. Further, the use of the verb “to order” in the present tense in the French version of s. 672.85(a) as opposed to the use of the verb “peut” in s. 672.85(b), which translates into the expression “can” or “may”, confirms the imperative nature of s. 672.85(a) and the discretionary nature of s. 672.85(b) (see also ss. 2 and 3 of the *Interpretation Act* ).

[197] Also, the opening words of the French version of s. 672.85, which read: “Afin d’assurer la présence de l’accusé visé par une audience”, clearly indicates that the purpose of the provision is to ensure the presence of NCR accused persons at their hearing.

[198] The imperative nature of s. 672.85(a) is in line with the mandate of a review board, which is to manage and supervise the assessment and treatment of NCR accused persons by conducting annual hearings and making disposition orders; and the statutory right of NCR accused persons to be present at their review hearing.

[199] NCR accused persons who are detained in hospitals as a result of the review board’s disposition orders are not at liberty to go where they want, when they want. The person who has custody of the NCR accused person must detain them in accordance with the review board’s orders. The authority of that person to move, transport and/or bring a NCR accused person to a certain location comes from the orders issued by the review board. Therefore, in order to ensure that NCR accused persons can exercise their right to be present at their hearing, there must be a clear order emanating from the review board that provides for or compels the person who has custody of a NCR accused person to bring them to the hearing. The imperative nature of s. 672.85(a)

ensures that a NCR accused person detained in a hospital will be present at his hearing.

[200] Furthermore, s. 672.85(a) does not impede on the YRB's discretion to fix, within its jurisdiction, the time and place of its hearings, it simply ensures that NCR accused persons can attend the hearing at the time and place fixed by the YRB.

[201] Section 672.5(10) gives a review board discretion to allow NCR accused persons to be absent at or during their review hearing. It also gives a review board the power to cause the NCR accused person to be removed and barred from re-entry for the whole or any part of the hearing in certain circumstances. However, the discretion afforded to a review board by s. 672.5(10) does not preclude a finding that s. 672.85(a) is imperative.

[202] As previously stated, the purpose of an order issued pursuant to s. 672.85(a) is to ensure the attendance of a NCR accused person, who is detained, at a hearing. The Chairperson would therefore only be compelled to issue such an order once it determines that the presence of the NCR accused person is required; and/or that the NCR accused person wants to attend the hearing in person; and/or that there is no reason to excuse the NCR accused person from the hearing. Also, s. 672.85(a) does not interfere with the Chairperson's discretion during the hearing to remove the accused from the whole or part of the hearing pursuant to s. 672.5(10)(b), because by that point the order compelling the attendance of the accused at the hearing has already been executed.

**ii) Has the Chairperson (or Associate Chairperson in this case) refused to issue the order?**

[203] Mr. Carlyle's review hearing was scheduled to commence in Whitehorse on May 4, 2018, with Mr. Carlyle attending in person. Instead of issuing the order to compel the attendance of Mr. Carlyle at his hearing in Whitehorse, the YRB decided that Mr. Carlyle would appear by video-conference on that date in order to discuss Mr. Carlyle's travel arrangements en route to and accommodations while in Whitehorse. In so doing, the Associate Chairperson of the YRB effectively declined to issue the order to compel the person having custody of Mr. Carlyle to bring him to his hearing in Whitehorse. The YRB then chose to hold Mr. Carlyle's hearing at the Alberta hospital in Edmonton instead of issuing an order to bring him to the Yukon. Again, in effect, the Associate Chairperson of the YRB declined to issue an order pursuant to s. 672.85(a) to compel the person having custody of Mr. Carlyle to bring him to the Yukon for his review hearing.

[204] As I have determined that the YRB does not have jurisdiction to hold a hearing outside the Yukon and quashed the YRB's order that Mr. Carlyle's review hearing be held in Alberta, Mr. Carlyle's review hearing shall take place in the Yukon.

[205] In this case, Mr. Carlyle has stated his desire to exercise his right to appear in person at his review hearing in the Yukon. There is nothing before the Court indicating that he has changed his mind. Mr. Carlyle has a right to appear in person at his review hearing. Also, there is no evidence before the Court that would trigger the application of s. 672.5(10) prior to the hearing in this case.

[206] In light of the imperative language of s. 672.85(a) and in light of the YRB's decision, now quashed, to hold Mr. Carlyle's review hearing in Alberta, instead of bringing him to the Yukon for his hearing, I find that the conditions for the issuance of an order in the nature of *mandamus* are met.

[207] I therefore order the Chairperson of the YRB, as defined in s. 672.1(1), which includes the Associate Chairperson, to issue an order pursuant to s. 672.85(a) to compel the person having custody of Mr. Carlyle to bring Mr. Carlyle to his review hearing in the Yukon at a specific time and location, within the Yukon, to be fixed by the YRB.

**b) Can the Chairperson (in this case the Associate Chairperson) of the YRB attach conditions to an order or warrant issued pursuant to s. 672.85(a) of the *Criminal Code*?**

[208] Mr. Carlyle, the Government of Yukon and the DPP submit that the *Criminal Code* does not authorize the Chairperson of the YRB to attach conditions to an order or warrant issued pursuant to s. 672.85(a).

[209] They submit the wording of s. 672.85 does not grant authority to the Chairperson to place conditions on an order or a warrant issued under that section.

[210] They submit that their position is supported by the fact that the wording of other sections of the *Criminal Code*, including Part XX.1, do specifically grant authority to attach conditions to a warrant or to an order. If Parliament had intended to grant the Chairperson the authority to attach conditions to a warrant or to an order, it would have used similar language to that contained in those provisions.

[211] Additionally, they say that Part XX.1 of the *Criminal Code* provides that all substantive decisions regarding NCR accused persons are made by a majority of the quorum of the review board. The Chairperson is only afforded administration type powers. They submit that if Parliament had intended to authorize the placement of conditions on an order or warrant issued pursuant to s. 672.85(a), it would have given that authority to the review board and not to the Chairperson.

[212] They further submit that there are practical reasons why the Chairperson does not have the authority to attach conditions to an order or warrant issued pursuant to s. 672.85(a). They say government authorities in charge of executing such orders require flexibility to address changes in circumstances that cannot be anticipated by the decision-maker who issues the order or warrant. This situation does not leave NCR accused persons without legal protection. The government authorities are bound to act in conformity with the law and the *Charter*. NCR accused persons do have legal recourses if the authorities do not conform with their obligations or breach the rights of the NCR accused persons.

[213] DPP acknowledges that while the Chairperson does not have the authority to attach conditions to an order or warrant issued pursuant to s. 672.85(a), the Chairperson can make recommendations regarding the execution of the order or warrant. Recommendations could be made regarding transportation for example. However, such recommendations would not be binding.

[214] The YRB submits that its Chairperson has authority to place conditions on an order or warrant issued pursuant to s. 672.85(a) that are necessarily incidental to its mandate, such as the use of physical restraints, the manner in which NCR accused

persons travel, or where NCR accused persons should be housed pending their hearing.

[215] The YRB submits it has jurisdiction to supervise treatment of NCR accused persons through its disposition orders and that those powers remain in force while NCR accused persons are transported to attend their hearing.

**Analysis**

[216] Section 672.85 grants the Chairperson of a review board the power to compel the attendance of a NCR accused person to a hearing at the time and place fixed by the YRB. Section 672.85 does not expressly give the Chairperson power to attach conditions to that order other than the time and place of the hearing.

[217] In comparison, s. 527 of the *Criminal Code*, states that a judge may issue an order to procure the attendance in court of a person who is in custody. This section confers specific and express authority upon the judge to give directions regarding the manner in which that person is to be kept in custody and the manner by which that person is to be returned to their place of detention after their presence in court is no longer required.

[218] Also, it is to be noted that Parliament expressly conferred upon a review board the power to attach “such conditions as the Review Board considers appropriate” to its disposition orders (ss. 672.54(b) and (c)).

[219] Consequently, if Parliament had intended for the Chairperson of a review board to have the authority to attach conditions, other than the time and place of the hearing, to an order issued pursuant to s. 672.85(a), it would have used language similar to that provided in ss. 527 and 672.54.

[220] While the express power to compel a NCR accused person's appearance to a hearing is necessary for the review board to fulfill its mandate to manage and supervise the assessment and treatment of NCR accused persons by conducting annual hearings and making disposition orders, I do not find that the power to attach conditions to such an order is practically necessary to fulfill its mandate.

[221] This does not mean that the government authorities in charge of executing the Chairperson's order pursuant to s. 672.85(a) have free reign over NCR accused persons, and that NCR accused persons are without legal recourses. The government authorities are bound to respect the *Charter* rights of NCR accused persons and abide by the applicable legislation when bringing NCR accused persons from where they are detained to their hearing.

[222] Furthermore, as conceded by the DPP, there is no provision that would prevent the Chairperson of a review board from making recommendations when issuing an order or warrant pursuant to s. 672.85(a). However, those recommendations would not be binding on the government authorities.

[223] Therefore, I find that the Chairperson of the YRB does not have the authority to attach conditions to an order or warrant issued pursuant to s. 672.85(a) of the *Criminal Code*.

**CONCLUSION**

[224] In summary, I conclude that:

1. The YRB does not have jurisdiction to hold a disposition or review hearing outside the Yukon;

2. Section 672.85(a) is imperative and compels the Chairperson (in this case the Associate Chairperson) of the YRB to issue an order or a warrant to a NCR accused person who is detained to a hearing;

3. The Chairperson (in this case the Associate Chairperson) of the YRB does not have the authority or power to attach conditions, other than the time and place of a hearing, to an order or warrant issued pursuant to s. 672.85(a) to bring a NCR accused person who is detained to a hearing;

[225] I therefore grant Mr. Carlyle's application for *Certiorari* and quash the YRB's order to hold Mr. Carlyle's review hearing at the Alberta Hospital in Edmonton.

[226] I also grant Mr. Carlyle's application for an order in the nature of *mandamus* requiring the Chairperson of the YRB (as defined in s. 672.1(1), which includes the Associate Chairperson) to issue the necessary order pursuant to s. 672.85(a) to have Mr. Carlyle brought before the YRB at a time and place, within the Yukon, for the completion of his annual review hearing.

[227] No other condition shall be attached to the order issued pursuant to s. 672.85(a).

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CAMPBELL J.