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 **Boucher v. New Brunswick (Review Board)**

Between

Fernand Boucher, applicant, and
The New Brunswick Review Board, respondent

[1999] N.B.J. No. 152

No. E/M/11/98

**New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Edmundston
Angers J.**

Heard: September 8, 1998.

Judgment: filed March 19, 1999.

Criminal law — Mental disorder — Preliminary trial of issue of fitness — Dispositions by court or review board — Jurisdiction and powers.

Application by Boucher for declarations that he could not be compelled to testify before the New Brunswick Review Board in a proceeding under section 672 of the Criminal Code, and that his attendance at a hearing was not compulsory or enforceable by the Board. Boucher had been found unfit to stand trial. A trial judge had ordered his release. The Review Board held a hearing to assess Boucher's capacity to stand trial and sought to examine Boucher.

HELD: Application allowed in part. The Board had the power to compel Boucher to attend the hearing, but Boucher could not be compelled to testify. The Board had jurisdiction to consider Boucher's case because the judge's disposition was no longer in force by virtue of section 672.63 of the Code.

Statutes, Regulations and Rules Cited:

Criminal Code, Part XX.I, ss. 672.5, 672.5(9), 672.5(10), 672.8, 672.21, 672.22, 672.23, 672.33, 672.45, 672.45(2), 672.47, 672.47(3), 672.48, 672.54, 672.63, 672.81.

Inquiries Act, R.S.C. 1970, ch. I-13.

Editors Note: This translation was prepared by the Centre de traduction et de terminologie juridiques de l'Université de Moncton.

Counsel:

G.C. Thibodeau, Q.C., for the applicant.

J.M. Marc Richard, for the respondent.

¶ 1 **ANGERS J.**— The applicant is charged with three counts under the Criminal Code, two for robbery and one for sexual assault against a male person. On April 25, 1997, following an inquiry held under s. 672.23 of the Criminal Code, Deschênes, J., of the Court of Queen's Bench, found the applicant unfit to stand trial. An order or rather a disposition (décision) releasing the applicant under guardianship was delivered on June 19, 1997 following a disposition hearing (audition) under s. 672.45. Because the words "audition" and "décision" in the French version can be confusing, I will use the English words in parentheses [in the French version]. The disposition of Deschênes, J., in accordance with subsection 672.45(2) and section 672.54, provided:

THE COURT ORDERS that the accused Fernand Boucher be released under the following conditions:

- (a) That the accused, Fernand Boucher, appear before this Court when so ordered.
- (b) That the accused, Fernand Boucher, be placed under the guardianship and custody of the Roman Catholic Bishop of Edmundston until further order of the Court.
- (c) That the accused, Fernand Boucher, submit to and be placed under the care of Dr. Éric Levasseur and Dr. Jean M'Pania, both of Edmundston, N. B., until further order of the Court.

¶ 2 Although the order is in force "until further order of the Court", s. 672.63 of the Code sets the following limitation:

A disposition shall come into force on the day that it is made or on any later day that the court or Review Board specifies in it, and shall remain in force until the date of expiration that the disposition specifies or until the Review Board holds a hearing pursuant to section 672.47 or 672.81.

¶ 3 It was only by chance that the Review Board became aware of this order in October 1997. As a result, it was unable to hold a disposition hearing within the 90 days stipulated in subsection 672.47(3) of the Code and to proceed in accordance with section 672.8. This is how these sections read:

672.47(3) Where a court makes a disposition under section 672.54 other than an absolute discharge in respect of an accused, the Review Board shall hold a hearing on a day not later than the day on which the disposition ceases to be in force, and not later than ninety days after the disposition was made, and shall make a disposition in respect of the accused.

672.48(1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.

- (2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.
- (3) The chairperson of a Review Board may, with the consent of the accused and the person in charge of the hospital where an accused is being detained, order that the accused be sent back to court for trial of the issue of whether the accused is unfit to stand trial, where the chairperson is of the opinion that
 - (a) the accused is fit to stand trial; and
 - (b) the Review Board will not hold a hearing to make or review a disposition in respect of the accused within a reasonable period.

¶ 4 The members of the Review Board met on December 5, 1997 and made the following disposition on December 10:

WHEREAS THIS MATTER came before the Review Board on October 21, 1997, for a hearing under subsection 672.47(3) of the Criminal Code of Canada ("C.C.C."); AND WHEREAS the hearing was held before a quorum of the Board on December 5, 1997 during which it was decided that the Court's disposition was not clear; AND WHEREAS it was decided not to proceed with this matter before obtaining additional information regarding the proceedings before the Court, including a transcript of the proceedings; AND WHEREAS the Board wishes to deliver its oral order in writing; THE REVIEW BOARD ORDERS AS FOLLOWS:

1. That the conditional discharge of Fernand Boucher be extended;
2. That Fernand Boucher continue to report to the Community Mental Health Services Centre in Edmundston, N.B., and follow treatment as prescribed by Dr. Éric Levasseur and Dr. Jean M'Pania, psychiatrists, or any other psychiatrist appointed to treat Fernand Boucher;
3. That the attending psychiatrist at the Community Mental Health Services Centre in Edmundston, N.B., report in writing to the Board no later than January 31, 1998, on Fernand Boucher's state of health;

4. That Fernand Boucher continue to comply with all the conditions of the Provincial Court (sic) order [Court of Queen's Bench], dated June 19, 1997, a copy of which is attached hereto.
5. That in the event that Fernand Boucher violates any of the conditions of this order (including those set out in paragraph 4 above), the attending psychiatrist at the Community Mental Health Services Centre in Edmundston, N.B., may, at his discretion, admit Fernand Boucher immediately at the Restigouche Hospital Centre in Campbellton, N.B., where he will be detained until further order of the Board.

(Emphasis is mine.)

¶ 5 It seems that the Board was of the opinion that the judge's disposition was not "clear". This is why the Board delivered its own decision. This is not a valid reason. The Board does not have the jurisdiction to judge or vary a judge's decision. However, and perhaps without the Board realizing it, the judge's disposition was no longer in force because of the operation of section 672.63.

¶ 6 The Board held another disposition hearing on February 19, 1998. The applicant did not appear but his solicitor objected to the Board's power to demand his attendance for examination as well as to the Board's jurisdiction given the delays and absence of rules of procedure and burden of proof. The matter was adjourned by consent, to a date and place to be determined. The Board, nevertheless, delivered a new disposition as follows:

WHEREAS THIS MATTER came before the Review Board on October 21, 1997, for a hearing under subsection 672.47(3) of the Criminal Code of Canada ("C.C.C.");
AND WHEREAS the hearing was held before a quorum of the Board on December 5, 1997 during which it was decided that the Court's disposition was not clear;
AND WHEREAS it was decided not to proceed with this matter before obtaining additional information regarding the proceedings before the Court, including a transcript of the proceedings;
AND WHEREAS the Board held a hearing in this matter on February 19, 1998 at Campbellton, in New Brunswick, to determine whether Fernand Boucher is fit to stand trial in accordance with section 672.48;
AND WHEREAS Fernand Boucher did not attend the hearing on his solicitor's advice, but that his solicitor did attend to make a preliminary objection as to the Board's jurisdiction to hear the case, and that the Review Board unanimously held that defence counsel's preliminary objection was without merit; and that a hearing to proceed with Fernand Boucher's examination should be held as soon as possible;
AND WHEREAS the Board wishes to deliver its oral order in writing;
THE REVIEW BOARD ORDERS AS FOLLOWS:

1. That the conditional discharge of Fernand Boucher be extended;

2. That Fernand Boucher continue to report to the Community Mental Health Services Centre in Edmundston, N.B., and follow treatment as prescribed by Dr. Éric Levasseur and Dr. Jean M'Pania, psychiatrists, or any other psychiatrist appointed to treat Fernand Boucher;
3. That Fernand Boucher continue to comply with all the conditions of the Provincial Court (sic) order, dated June 19, 1997, a copy of which is attached hereto.
4. That in the event that Fernand Boucher violates any of the conditions of this order (including those set out in paragraph 3 above), the attending psychiatrist at the Community Mental Health Services Centre in Edmundston, N.B., may, at his discretion, admit Fernand Boucher immediately at the Restigouche Hospital Centre in Campbellton, N.B., where he will be detained until further order of the Board;
5. That Fernand Boucher's attending psychiatrist, Dr. Jean M'Pania, prepare a report for the Board giving his medical opinion as to Fernand Boucher's mental fitness to stand trial on the charges against him, such report to be submitted to the Board in writing no later than March 31, 1998. In addition, Dr. M'Pania shall appear before the Board to testify on Fernand Boucher's mental capacity, at a date to be fixed by the Board.

(Emphasis is mine.)

¶ 7 Again, in my opinion, the Board had the power to act under 672.63, but not because the Board had decided that the judge's disposition was not "clear".

¶ 8 This application was made on April 9, 1998 and by consent the hearing before me was set for September 8, 1998. Deschênes, J.'s reasons for decision were not part of the record. I only received these at the end of October. On April 16, 1998 I ordered a stay of proceedings until my decision on the application.

¶ 9 In his application, Mr. Boucher is asking the Court for a declaration:

- (A) That the applicant, Fernand Boucher, cannot be compelled to testify before the New Brunswick Review Board in a proceeding under section 672 C.C.C.
- (B) That the New Brunswick Review Board must adopt or establish rules of practice and procedure within the meaning of section 672.44 C.C.C.
- (C) As to what the burden of proof in a proceeding under section 672 C.C.C. is.
- (D) That the New Brunswick Review Board does not have jurisdiction in this matter because the period of time for a hearing under subsection 672.47(3) has expired.
- (E) That the applicant's attendance at a hearing under section 672.5 is not compulsory or enforceable by the New Brunswick Review Board, given the provisions of the said section 672.5 C.C.C.

- (F) An interim order staying all proceedings before the New Brunswick Review Board until final determination of the issues before the Court or unless otherwise ordered;
- (G) An interim order directing the New Brunswick Review Board to produce the record and documents of the proceedings, in particular, the hearing of February 19, 1998, in accordance with section 672.52 C.C.C.

¶ 10 Items (F) and (G) of the application were resolved and the objections to the Board's jurisdiction because of time periods in (D) and the lack of rules of practice and procedure in (B) and burden of proof in (C) were abandoned.

¶ 11 There remains only two issues to be determined: Can the Board require the applicant to attend a hearing under section 672.5 of the Code (E), and can it compel him to testify (A)?

¶ 12 Before deciding these issues, I would point out that I had to review the Board's jurisdiction to make decisions because of the erroneous ground it had relied upon. As a matter of fact, this question is all the more important because the Board raised the issue of my jurisdiction to hear the application.

¶ 13 The Board acknowledges that judicial review is available to examine its jurisdiction. See *R. v. Gautreau* (1990), 109 N.B.R. (2d) 55. I agree and this is probably why the applicant withdrew part of his application. However, the Board's disposition to vary a judge's disposition because it was not clear directly raises the issue of its jurisdiction. There is no act giving the Board the power to review or vary a decision or order of a court, nor does Part XX.I (672.1 et seq.) confer such a power.

¶ 14 In addition, the Board's order notes the accused's absence and the holding of a hearing "to proceed with [the accused's] examination". On reading the record of the proceedings before the Board, it is clear that the Board is convinced that it has the power to compel the accused to attend and answer questions put to him by members of the Board. I do not know if it was done, but it is indicated that the Board will summon the accused to appear.

¶ 15 I am of the opinion that these questions directly address the Board's jurisdiction and therefore empower me determine this jurisdiction and answer the questions earlier identified.

¶ 16 Under sections 672.22 et seq., it is for the Court to decide whether an accused is fit to stand trial. This is what Deschênes, J. did in this case on April 25, 1997. I note that section 672.33 provides for a review of such a decision before or no later than every two years. This must be done before April 25, 1999.

¶ 17 Finally, section 672.45 provides that where a verdict of unfit to stand trial is rendered, a court may, and under certain circumstances, shall "hold a disposition hearing." In fact, on June 19, 1998 the Court did hold such a hearing and made a disposition. This disposition remains in force until the Board holds a hearing under subsection 672.47(3) and proceeds in accordance with section 672.48.

¶ 18 The procedure for the Court and for the Board at a disposition hearing is set out in section 672.5. Does this procedure provide for compelling the accused to appear and to testify?

¶ 19 There is no doubt that the issue of whether an accused is fit to stand trial is part of criminal procedure, as, for that matter, is the issue of not criminally responsible on account of mental disorder. The accused has the right to be present (subsection 672.5(9)) and the Court or the Board acting within the powers conferred upon them by the Inquiries Act, R.S.C. 1970, ch. I-13, has the right to compel his attendance. In fact, he must be present unless for reasons set out in subsection 672.5(10) his presence may be dispensed with.

¶ 20 However, the power to require him to be present does not give the power to compel him to testify. Because this is a stage in a criminal proceeding, neither the Court nor the Board can compel him to testify thanks to a protection clearly established in criminal law. In fact, section 672.21 provides protection against certain statements made by the accused in the course of treatment or assessment, and governs their admissibility for very specific purposes. As in a criminal trial, the accused is a competent but not a compellable witness.

¶ 21 Moreover, in this case, Deschênes, J. found that the accused "was unable to conduct his defence and to instruct counsel or provide relevant information" to his solicitor. By virtue of what logic can we conclude that if an accused is unable to instruct counsel about his defence, he is able to do so when it comes to deciding whether he is capable of defending himself, and to testify if compelled to do so? I cannot conclude that the Board has the power to compel the accused to testify.

¶ 22 I therefore find that the Board was acting within its power when it made its decisions, but I would cancel that part of the decision where it states that "the Court's disposition was not clear". In addition, I declare that the Board may require the accused to attend the hearings, but may not compel him to testify.

¶ 23 Since the judge must review his decision of April 25, 1997, in which he found the accused unfit to stand trial, before April 25, 1999, I would strongly suggest that the Board remit the matter to the judge. I award no costs.

ANGERS J.

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