672-54

COURT OF APPEAL

PROVINCE OF QUEBEC
OFFICE OF THE CLERK OF THE COURT, MONTREAL

No.: 500-10-000200-939

February 18, 1994

CORAM: BEAUREGARD
LeBEL
BROSSARD, JJ.C.A.

DENISE LAJOIE,

APPELLANT - Applicant

v.

THE QUEBEC REVIEW BOARD

RESPONDENT - Respondent

and

THE ATTORNEY GENERAL OF QUEBEC

INTERVENOR

The **COURT**, ruling on the appeal of the Appellant, Mrs. Denise Lajoie, against a disposition of the Quebec Review Board rendered at Montreal on May 20, 1993 pursuant to section 672.54 of the *Criminal Code*, ordering the continuation of her detention but prescribing her transfer to the Maisonneuve-Rosemont Hospital,

For the reasons set forth in the opinion of LeBel J., filed with this judgment, with which Beauregard and Brossard JJ. concur:

ALLOWS the appeal in part for the purposes of varying the disposition of the Quebec Review Board rendered on May 20, 1993, by referring the case back to it for re-examination, within sixty days, of the nature and the necessity of the disposition made with regard to the Appellant, taking into account the services and mechanisms available to control her relations with her daughter outside the detention facility.

MARC BEAUREGARD, J.C.A.

LOUIS LeBEL, J.C.A.

ANDRÉ BROSSARD, J.C.A.

Guy Poupart, Esq.
for the Appellant;

Patrice Claude, Esq.
for the Intervenor.

Hearing Date: December 14, 1993.

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OPINION OF LeBEL J.

The Appellant, Mrs. Denise Lajoie, is appealing a disposition of the Quebec Review Board made pursuant to

sections 672.38 and 672.39 of the *Criminal Code*, ordering the continuation of her detention in a psychiatric hospital, but prescribing her transfer from the Pinel Institute, where she was treated, to the Maisonneuve-Rosemont Hospital, (A.B., p. 62). Filed with our Court pursuant to section 672.72 of the *Criminal Code*, this appeal seeks judicial review of the disposition and the discharge of the Appellant or, in the alternative, the imposition of conditions less restrictive of her personal liberty. The Attorney General of Quebec intervened orally at the hearing to contest the application.

This case causes our Court to examine the interpretation and the criteria for implementing the powers accorded to provincial Review Boards, with respect to persons against whom a verdict of not criminally responsible on account of mental disorder has been entered, but who have been detained under a warrant of the Lieutenant Governor of the Province. Certain decisions, to which we will make later reference, have nevertheless been rendered by other provincial courts of appeal, on this matter. In substance, the Appellant argues that the Board incorrectly interpreted and applied, in her case, the criterion of dangerousness required to justify, in her opinion, either the continuation of her detention or the restrictive conditions on her personal liberty.

To examine this case, we will have to summarize the factual basis of the appeal, review the history of the legislative

enactments in question, analyze the Quebec Review Board's disposition and the evidence submitted with respect to the Appellant's mental state and her detention, and also analyze the Board's interpretation and implementation of section 672.54 of the *Criminal Code*. After completing this exercise, we will be able to assess the validity of the disposition made by the Board.

THE HISTORY OF THE APPEAL

The history of this case goes back several years. The Appellant, now thirty-six years of age, had been accused, in 1986, of the manslaughter of her two children. Following the break-up of the relationship that she had been in for several years with a companion, she had killed the two children born of that cohabitation. She was acquitted, however, by reason of insanity. In May of 1987, in accordance with the procedure then established under section 542.2 of the *Criminal Code*, the judge ordered her detention at the pleasure of the Lieutenant Governor, who required her detention at the Philippe-Pinel Institute in Montreal.

Her detention, in that maximum security hospital environment, continued until April, 1989. Mrs. Lajoie then obtained a relaxation of the conditions of her detention. She was ultimately granted

a complete discharge from the Pinel Institute, in September, 1990, following temporary leaves of longer and longer duration. Her discharge did not, however, entail the cancellation or removal of the Lieutenant Governor's warrant which still remained in force.

Following her discharge, Mrs. Lajoie found a job. She also entered into a new relationship with a Mr. William Clarkson, whom she married. She had a daughter, Laurie, born on February 24, 1992. Unfortunately, marital difficulties developed shortly after the birth of their child. In the summer of 1992, she threw her husband out of the matrimonial home. Informed of these developments by both the Appellant's husband and father, the psychiatrist treating the Appellant at the Pinel Institute, Dr. Renée Roy, fearing a recurrence of the events of 1986, came to the house after speaking with the Appellant on the telephone and requested that she return to the hospital with her. The Appellant agreed to do so. The child was left in the custody of the Direction de la protection de la jeunesse, which was responsible for her placement and for maintaining legal custody of her. The DPJ followed up her case from that incident forward.

Subsequent to these events, the Appellant remained under observation at Pinel, for several weeks. Her psychiatrist, Dr. Roy, concluded that her mental condition did not require the continuation of her total imprisonment. It was decided, in cooperation

with the Direction de la protection de la jeunesse, that Mrs. Lajoie be first directed to a half-way house, the Rosalie-Jetté House. She was to stay there part-time with her daughter. After a three month stay, the authorities chose to decide to let Mrs. Lajoie to move into a separate apartment, and provided for supervised visits from her daughter. In the meantime, on September 24, 1992, she ended up before the Review Board in an attempt to have the Lieutenant Governor's warrant lifted (see A.B., pp. 120 ff.).

In the month of December, 1992, that system of supervised visits completely unravelled. Mrs. Lajoie no longer accepted the established structure of the visits and expressed grave concerns during those visits about the quality of care given to her daughter. She refused to continue to see her daughter in that environment. During the same period, from October 1992 to February 1993, the Appellant nevertheless continued to attend regularly her psychotherapy sessions as an out-patient at the Pinel Institute.

It was on February 10, 1993 that the incident occurred which finally led to her recommitment and to the reexamination procedures for her case before the Quebec Review Board. The Appellant made a telephone call from the Pinel Institute to her daughter's guardian. That communication was interpreted as a threatening telephone call. Under the circumstances, taking into account that specific incident and what

she perceived as a gradual deterioration of Mrs. Lajoie's psychological health, and in particular the reappearance of paranoid symptoms, her attending psychiatrist decided to recommit her, on the basis of a breach of a condition of her discharge, namely the prohibition against communicating with her daughter.

On March 11, 1993, the Quebec Review Board held a first hearing. It ordered the detention of the Appellant without conditions, for breach of the attending physician's order and for making threats (A.B., p. 267). It appears that Dr. Renée Roy, in her assessment of the behaviour of Mrs. Lajoie, feared that sh presented a psychological state similar to that which had led to the death of her first two children. She believed that the Appellant constituted, at that time, a grave danger to her daughter.

After new psychological and psychiatric assessments, the Quebec Review Board once again heard the Appellant, on April 23, 1993. Its disposition of May 20, 1993 refused to lift the warrant of committal and confirmed the detention of Mrs. Lajoie, but ordered her transfer as an in-patient to the Maisonneuve-Rosemont Institute, by reason of the apparent impasse in her therapeutic relationship with the health care staff at the Pinel Institute (A.B., pp. 58 to 84, disposition and reasons of the Board).

THE DISPOSITION OF THE QUEBEC REVIEW BOARD

The disposition of the Board, then chaired by Roch Rioux, Esq. and composed of lawyers and psychiatrists as required under the Act, reviewed at length the evidence and the observations submitted by the Appellant, her counsel and the representatives of the Pinel Institute and of the Direction de la protection de la jeunesse. Over the course of these hearings, the Board became familiar with all the psychiatric and psychological reports prepared by the representatives of the Pinel Institute, and in particular by the psychiatrist who had treated Mrs. Lajoie for several years, Dr. Renée Roy, and her psychotherapist, Nora Dembri, a psychologist. In addition, Mrs. Lajoie's counsel had submitted the psychiatric expert evidence of Dr. Maufette and Dr. Marquette.

All parties were in attendance before the Board on April 23, 1993. The Board heard their observations and their arguments, together with the personal submissions of Mrs. Lajoie herself and of her counsel. After a brief history of Mrs. Lajoie's case (A.B., pp. 64-65) the Board's disposition analyzes the various psychological reports, particularly those of Dr. Claude Marquette, the Appellant's expert (A.B., pp. 65-66), and Dr. Renée Roy's assessment report

of March 16, 1993 (A.B., p. 66). It emphasizes that the Board had already held several hearings in the past on Mrs. Lajoie's case. After a further review of the facts, based in particular on the expert report of Dr. Marquette, a psychiatrist, dated April 20, 1993, it returns to the analysis of the question in dispute. It reviews its functions within the framework of section 672.54 of the *Criminal Code* and defines its role as follows:

> "The Board must decide on a disposition that is the least onerous and least restrictive from among three (3) provisions in section 672.54 of the *Criminal Code*, namely: an absolute discharge, a discharge with conditions or detention of the accused in a hospital with or without conditions. Before making its decision, the Board must assess, for reasons given later in this disposition, whether Mrs. Lajoie represents a significant threat to the safety of the public." (A.B., pp. 69-70)

The Board therefore believes that its primary role is to determine the degree of dangerousness of the person in question, in order for it to then decide on the disposition that it believes appropriate to the case. In order to do so, it proceeds to examine in detail the psychiatric reports and observations of each of the witnesses, starting with the report of Dr. Maufette, a psychiatrist, and carefully notes Dr. Roy's fears of a renewed path towards a homicide. It also mentions the difficulties in identifying "psychiatric dangerousness" (A.B., p. 72).

At the time of the Appellants' hospitalization at the Louis-Hippolyte-Lafontaine Hospital, at the time of the events of 1986, there had been diagnoses of paranoid-psychotic disorder. The Board mentioned that Dr. Maufette, who at first had reported that he had not observed paranoid personality disorder in September of 1992, had nevertheless, in March of 1993, following further observations, concurred with Dr. Roy in her diagnosis of paranoid personality disorder (A.B., p. 72). On the other hand, notwithstanding that diagnosis, Dr. Maufette did not conclude that Mrs. Lajoie was dangerous.

The Board acknowledges that it encountered major difficulties in identifying the degree of Mrs. Lajoie's dangerousness. The exercise was made even more complicated insofar as even Dr. Roy of the Pinel Institute acknowledged that, according to the criteria in the provincial legislation on the protection of mental patients, it was not possible under such conditions to obtain close treatment. The mental state of Mrs. Lajoie did not at all meet those criteria:

> "Dr. Maufette acknowledges with Dr. Roy that the assessment of dangerousness was a complex exercise. Moreover, the exercise can be made even more complex when the argument over the issue of dangerousness on the medical level is approached from the perspective of the *Mental Patients Protection Act*, R.S.Q. c. P-41. For example, Mr. Poupart put the following question to Dr. Renée Roy at the hearing:

> "At the present time and in the immediate future, is Denis (sic) in your opinion a danger to others or to herself?"

To which Mrs. Roy responded:

> "In the immediate future, according to the criteria for close treatment: no".

And Mr. Poupart put exactly the same question to Dr. Maufette whose response was:

> "No". (A.B., p. 73)

As the Board correctly notes, the case at bar does not raise the issue of the application of the provincial legislation on the protection of mental patients. A different legal notion is under interpretation here, the one found in section 672.54 of the *Criminal Code*, namely the notion of a significant threat to the safety of the public. According to the Board, the notion of danger, in section 672.54 of the *Criminal Code*, does not contain an element of immediacy. Rather, it corresponds to a notion of potential threat:

> "We believe that the notion of dangerousness to which reference was made in the exchange between the prosecution and the psychiatrist is a clinical notion confined wholly to the application of the *Mental Patients Protection Act* and, as such, it remains completely outside the legal notion found in section 672.54, namely the significant threat to the safety of the public. Dr. Roy's response seems to us to be perfectly clear in that regard. Moreover, the notion of immediacy is in direct conflict with the notion of potential threat which has developed in the case law, as we shall see later in this disposition... " (A.B., pp. 74-75).

At the April 23, 1993 hearing, Dr. Marquette, discussing his own clinical observations, had acknowledged that Mrs. Lajoie might present a threat to her daughter. He had however maintained that the presence of the Direction de la protection de la jeunesse was likely to prevent that threat (A.B., p. 76). In all, according to the observations of Dr. Marquette, there would appear to be no danger for the child as long as external protection measures were put in place. He would have reservations if none existed (A.B., p. 76).

Generally, upon completion of its analysis of the evidence and the reports, the Board concluded that there existed a threat to the child, Laurie. It even seems that the Board believed that such a threat existed in spite of the protection mechanisms established by the Direction de la protection de la jeunesse. It bases this belief on an incident where Mrs. Lajoie had succeeded having her daughter hospitalized, using ambulance drivers, in spite of the prohibitions against direct communication and the supervision of the Direction de la protection de la jeunesse:

> "From the reports of the psychiatric experts and from testimony that they and other witnesses gave at the hearing, the Board concludes that Mrs. Lajoie is in (sic) danger to her child. Moreover, Mr. Normand Osadchuck of the Direction de la protection de la jeunesse explained during his

> testimony that Mrs. Lajoie had succeeded in slipping through the DPJ net, relating the incident of November 2, 1992 when Mrs. Lajoie had asked Urgence Santé ambulance drivers to intervene because, according to her, her daughter was suffering from a rash on her buttocks requiring medical attention." (A.B., p. 77)

Convinced of the existence of a threat to the public and, more particularly, to the child Laurie, the Board next sought to determine whether it corresponded to the notion of a significant threat to the safety of the public, in section 672.54 of the *Criminal Code*. Did the threat in question correspond to that notion? The finding of an absence of this type of threat, in the British Columbia Court of Appeal's interpretation in Orlowski v. Attorney-General of British Columbia (1992), 75 C.C.C. (3rd) 146, would force it to order the discharge of the prisoner. (A.B., pp. 78-79).

In the interpretation that it gave to section 672.54 of the *Criminal Code*, relying on the Orlowski case and also on a judgment of the Nova Scotia Court of Appeal, Cluney v. The Queen, S.C.C. no. 2737, September 30, 1992 (A.B., p. 81), the Board felt that it did not have to apply as a criterion the immediacy of the danger. In its opinion, the law, in using the word "threat" as opposed to "danger", implied the notion of a possible danger that was more or less foreseeable or potential (A.B., p. 81).

In its opinion, Mrs. Lajoie presented a threat to her child. That threat would remain significant, despite the presence of mechanisms for intervention by the Direction de la protection de la jeunesse. It felt that the evidence demonstrated a significant threat of a repetition of the Appellants' actions in 1986. It found a strong similarity between the evolution of Mrs. Lajoie's mental condition and her attitudes in 1992 and 1993, as well as between the events that provoked them and the circumstances that surrounded the death of her two children in 1986:

> "Is the accused a threat?
>
> From the testimony, information bearing on the decision and evidence submitted to the Board, the Board concludes that Mrs. Lajoie represents a danger; the Review Board can only be of the opinion that Mrs. Lajoie represents a significant threat to the safety of the public. This conclusion is all the more unavoidable insofar as the evidence reveals that Mrs. Lajoie is afflicted with a serious mental illness, that she refuses to acknowledge that she is ill, that the current circumstances are identical to those which brought Mrs. Lajoie before the courts, that the presence of the Direction de la protection de la jeunesse does not remove the threat that Mrs. Lajoie represents to her child, but that it merely diverts the threat without giving any assurance of its being definitively removed.
>
> Is the threat significant?
>
> The Board is of the view that the threat is significant because it involves a possible reoccurrence of what originally brought the accused before the courts, that is, doing to her present child what she did to the two whose lives she took. In fact, the Board finds that Mrs. Lajoie brought about the deaths of her children in circumstances that

> deteriorated following the breakdown of her relationship with her first husband, Denis. In the months preceding the offence, she had made the decision to separate from her husband. She suffered from serious mental confusion; she felt, at the time, persecuted, misunderstood and threatened. Since that time, Mrs. Lajoie's mental health has seen its ups and downs. She is no longer taking medication, which leads her back to the same mental state she was in at the time she committed the offence. Furthermore, the breakdown of her relationship with her husband, Bill Clarkson, and the separation that followed, give rise to circumstances that are likely to create the same threats that eventually led to the deaths of her first two children." (A.B., pp. 81-82)

In the Board's opinion, the danger of an attack on the safety of the child would involve a significant threat to the safety of the public, within the meaning of section 672.54 of the *Criminal Code*. Such a finding precluded them from giving the Appellant an absolute discharge. They then had to consider the alternatives available under section 672.54 of the *Criminal Code*, i.e. they had to seek out the least onerous disposition. The Board dismissed the possibility of an absolute discharge. It believed that detention was essential to an effective return to treatments, which in its opinion would require hospitalization for at least a few months and treatments on an in-patient basis in order to re-establish an adequate therapeutic relationship between Mrs. Lajoie and her care givers. In this disposition, the Board saw a condition that was essential to the removal of the threat that, in the opinion of the Board, Mrs. Lajoie's current state of mental health would present. Accordingly, it dismissed the possibility of out-patient treatments:

> "The alternative provided in paragraph (b) does not appear to the Board to be suitable in the circumstances. In fact, a conditional discharge does not contain the circumstances necessary to an improvement in the health of the accused, a factor necessary to reduce the threat that she represents to the safety of the public, nor those necessary to the protection of her child.
>
> Dr. Maufette, called as an expert by the accused, is of the opinion that it is absolutely necessary that there develop between Mrs. Lajoie and the staff responsible for her care a therapeutic relationship as a condition essential to her effective return to treatments. That expert, while acknowledging that the Pinel Institute staff was competent in its treatment of Mrs. Lajoie, felt compelled to acknowledge that there seemed to have developed, due to Mrs. Lajoie's condition, tension between the attending staff and Mrs. Lajoie and that there may be merit in trying to establish new therapeutic relationships with the accused. Dr. Maufette testified that such therapeutic relationships can only truly be established after hospitalization of a minimum of three (3) months. In other words, both the attending psychiatrist and this psychiatrist called by the Appellant as an expert are of the view that Mrs. Lajoie should continue to be detained if there was to be hope of re-establishing a therapeutic relationship, the only circumstance that might lead to an improvement in her mental condition and, as a result, a diminution of the threat that she represents." (A.B., p. 83)

It is that disposition and the reasons therefore that are the subject of this appeal. A judge of our Court granted leave to appeal on two related grounds: error in the interpretation of the criteria to be applied under the provisions of section 672.54 of the *Criminal Code*; and error in issuing the order for detention, in light of the

testimony heard and the information obtained at the Board's hearing on April 23, 1993 (A.B., p. 53).

THE HISTORY OF THE LEGISLATIVE PROVISIONS IN DISPUTE

This appeal brings into play some of the new legislative provisions adopted by the federal Parliament to define more precisely the scope of the power traditionally vested in the Lieutenant Governor to order the detention under warrant of persons acquitted by reason of insanity. Historically, although administrative review bodies have been gradually established, the *Criminal Code*, at the beginning, accorded broad power to the Lieutenant Governor. Anyone acquitted by reason of insanity, under section 542(2) of the *Criminal Code*, had to be imprisoned. The law gave no discretion to the judge. He had to order the accused's imprisonment, at the pleasure of the Lieutenant Governor:

> "Section 542(2) ... Where the accused is found to have been insane at the time the offence was committed, the court, judge or provincial court judge before whom the trial was held shall order that he be kept in strict custody in the place and in the manner that the court, judge or provincial court judge directs, until the pleasure of the lieutenant governor of the province is known."

Section 545(1) of the *Criminal Code* authorized the Lieutenant Governor to make an order of detention. Finally, section 547 provided for the possibility of appointing a board of review to re-examine a detention case. Such boards, however, essentially played a consultative role.

The coming into force of the *Canadian Charter of Rights and Freedoms* gave rise to a legal challenge to the system of detention then in use. The challenge focused particularly on the discretionary nature of such detention, which was said to give it an arbitrary aspect under section 9 of the *Charter* and was further said to violate the security of the individuals involved, within the meaning of section 7 thereof.

In R. v. Swain, [1991] 1 S.C.R. 933, the Supreme Court of Canada re-examined the system in its entirety. It did not call into question the legitimacy of a system of detention whose purpose was the temporary protection of the public from dangers presented by a prisoner suffering from mental disorder nor the need for periods of observation of the individual (see the opinion of Chief Justice Lamer, pp. 1015 to 1017). The majority of the Supreme Court felt that the purely discretionary system then in force violated too severely the rights of prisoners, even though they conceded that the means chosen by Parliament, namely

automatic detention, furthered the achievement of a rational objective:

> "Therefore, the means chosen by Parliament, automatic detention, furthers the objective in two important ways. First, if individuals acquitted by reason of insanity are immediately ordered into custody, they cannot pose a threat to society in the short term. Secondly, if observation of the individual on an inpatient basis results in more accurate predictions of recurring mental illness, crime is prevented and society protected in the future." (Opinion of Chief Justice Lamer, p. 1018)

Notwithstanding its recognition of that objective, the Supreme Court concluded that the institution of an indeterminate period of detention, without clear recourse for the accused, did not respect the provisions of sections 7 and 9 of the *Charter*. It could not be saved by the application of section 1 thereof:

> "However, the minimal impairment component of the Oakes test requires that insanity acquittees be detained no longer than necessary to determine whether they are currently dangerous due to their insanity. Parliament has provided for remands of a fixed duration for psychiatric observation elsewhere in the *Criminal Code* which indicates that they are aware of the constitutional concerns raised by indeterminate detention.

> For example, remands for psychiatric observation can be ordered at the time of the preliminary hearing (s. 465); at the time of trial to determine fitness (s. 543); at the time of a dangerous offender application (s. 691); or at the time of an appeal (s. 608.2). The language in all of these other provisions of the *Code* is consistent: the remand is limited to a 30-day period in most instances, except in exceptional cases when it can be extended to 60 days. Without pronouncing on the constitutionality of these other remands, the fact that the indeterminate remand provided for in s. 542(2) is an anomaly clearly demonstrates that the means chosen by Parliament do not impair the appellant's s. 7 right to liberty, as little as possible.
>
> In conclusion, s. 542(2) cannot be justified as a reasonable limit on the appellant's rights under s. 7 and is accordingly of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*." (R. v. Swain, [1991] 1 S.C.R. 933, Opinion of Chief Justice Lamer, pp. 1018-1019)

Following that decision, the Parliament of Canada re-examined section 542 of the *Criminal Code* and adopted a package of provisions, found in Part XX.1 of the *Criminal Code* (sections 672.1 to 672.95). It is not necessary to analyze the whole of that Part which deals with a wide variety of situations, involving various aspects of the problems posed by the assessment of the effects of the mental disorders of the accused or prisoners on the operation of the penal system. We are interested only in cases where there has been a verdict

of not criminally responsible by reason of mental disorder.

In substance, the *Criminal Code* provides for the maintenance of a system of detention, but defines and expands the powers of the provincial Review Boards. Those boards must periodically review detention cases and may make any disposition that they see fit, including the absolute discharge of the prisoner. Furthermore, section 672.72 creates a right of appeal to the Court of Appeal of the province with respect to dispositions of the Review Board on any ground of appeal that raises a question of law or fact alone or of mixed law and fact. Such appeal, however, requires the leave of a judge of the Court. This regime corrects the defects of the discretionary system of detention established under the old regime. It is intended to maintain the safety of the public but it seeks, at the same time, to limit the restrictions on the liberty of prisoners. It gives a very important role to the Review Board, a specialized administrative body. The board must assess the case in a concrete fashion and, ultimately, determine whether the detention should continue or whether the prisoner may enjoy a partial or absolute discharge, or establish the conditions of a conditional discharge.

INTERPRETATION AND APPLICATION OF *CRIMINAL CODE* SECTION 672.54

In her appeal, the Appellant challenges the interpretation given by the Board to its role in implementing section 672.54 of the *Criminal Code*. She contends that the Board misunderstood its role by substituting:

> "... its subjective opinion on what would be clinically good for her for its legal obligation under the *Criminal Code* to assess objectively the question of whether she represents a significant threat to the safety of the public." (A.B., p. 11).

Without a finding of dangerousness, in the legal sense of the word under section 672.54, but in seeking instead a clinical approach that would allow adequate treatment of the Appellant, the respondent Board is alleged to have ordered, improperly, that her detention be maintained. To test the validity of that challenge, we must re-examine section 672.54 of the *Criminal Code*.

The role given the Board under this provision should be clearly defined here. In order to remove the administrative arbitrariness of which the old system was accused, the Board intervenes periodically to review a detention and its conditions. It does not follow, however, that the imposition of any detention or of any restriction on liberty is predicated

upon a concrete finding of a state of immediate dangerousness.

In the Orlowski case, the Chief Justice of British Columbia described accurately the structure and the role of the Review Board. The Board does not undertake its analysis focusing solely on the demonstrable proof of the existence of a significant threat to the safety of the public. Indeed, the Board must order the absolute discharge of the accused without conditions only where it concludes that there is no significant danger. If it finds a present immediate danger, it may choose the method that it deems most appropriate to ensure both the protection of the safety of the public and the treatment and, if possible, the cure of the prisoner.

Sometimes, the Board finds itself in grey areas, where it cannot conclusively find an absence of danger. In such circumstances, the Board makes the disposition that it sees fit, but always as little restrictive of liberty as the circumstances warrant. The following remarks of Chief Justice McEachern in the Orlowski case on the role of the Board seem particularly appropriate:

> "In addition, however, the board must also struggle with other questions, and it is not possible to say that any of these factors are free-standing and

independent of each other. The legislative objective is to decide what disposition should be made that is the least onerous and least restrictive upon considering the "preamble" factors and the language of s. 672.54.

This exercise does not centre only upon whether the accused is a significant threat to public safety. For example, a patient may be perfectly lucid at the time of his disposition hearing yet still be a significant threat because of his history and prognosis. The question of "significant threat", however, is a most important question because Parliament has left the board with no alternative other than absolute discharge, if it has the opinion that the accused is not a significant threat.

The language of s. 672.54, however, does not require the board to reach a conclusion, "yes" or "no", as to whether the accused is not a significant threat as some of counsel's submissions suggest. This is because s. 672.54(a) is phrased in such a way that the requirement for an absolute discharge only arises when the board does not have the opinion that the accused is not a significant threat. If the board does not have that opinion, then it need not order an absolute discharge.

In other words, in my view, the board need not order an absolute discharge when it has doubts as to whether the accused is a significant threat or not. The board must affirmatively have an opinion that the accused is not a significant threat before s. 672.54(a) applies. It seems to me, with respect, that if a board is concerned that an accused with an appropriate history is not a present significant threat and will not become one if he continues with prescribed medications, but the board also has the opinion that he may be a significant threat if he does not take his medication, then the board cannot be said to have an opinion that the accused is not a significant threat. The word "threat", in my view, has a future connotation." (Orlowski v. British Columbia, (1992) 75 C.C.C. (3d), Opinion of Mr. Justice McEachern, p. 146)

More recently, in Davidson v. Attorney General of British Columbia, C.A.O. 161182, Vancouver Registry, July 7, 1993, the British Columbia Court of Appeal revisited this question. An opinion drafted by Goldie J. analyzed the nature of the review process provided under section 672.54 of the *Criminal Code*. It pointed out that the section is not a penal process in purpose or effect. Rather, it represents a mixed process, of a preventive nature, intended firstly for the protection of the public, but also, to the extent possible, for the treatment and cure of the individual:

> "Under s. 672.54 of the Code, the treatment of one unable to judge right from wrong is intended to cure the defect. It is not penal in purpose or effect. Where custody is imposed on such a person, the purpose is prevention of anti-social acts, not retribution." (Opinion of Mr. Justice Goldie, p. 13)

The composition and powers of the Board confirm the nature of this process. The Board, a specialized body simultaneously calling upon legal, medical and psychological expertise, had to choose from among a set of possible dispositions the one that appeared most appropriate, in light of the imperatives of protection of the public and minimization of restrictions on the liberty of the individual:

> "As its composition and powers indicate, a board of review set up under Part XX.1 of the *Code* is a specialized administrative tribunal, the skills of whose members provide institutional insight into the legal and medical problems of mental health. It is given inquisitorial powers to summon witnesses and compel them to give evidence.
>
> Its task, and here I speak only of a disposition of one found not criminally responsible for a criminal act, is to balance the protection of the society on the one hand and the right of the subject to his or her liberty unless deprived of it in accordance with the principles of fundamental justice. Although the proceedings are informal, a record must be kept such as to provide the basis for an appeal to the Court of Appeal. Post-trial detention is neither arbitrary nor indeterminate. The requirements of s. 672.54 direct the Board to put into perspective the mental condition, goals and needs of the mentally disordered person with the interests of the public and, where an absolute discharge is not warranted, to choose the least onerous and least restrictive conditions on the liberty of that person's liberty.
>
> Unlike the polar opposites of conviction and acquittal the options open to the Board where absolute discharge is not an acceptable alternative cover a wide spectrum." (Opinion of Mr. Justice Goldie, p. 14)

The opinion of the British Columbia Court of Appeal in the Orlowski case, clarified in the Davidson case and endorsed by our colleagues on the Nova Scotia Court of Appeal in Cluney, correctly defines the subtle and complex role of the Board. That opinion warns us of the danger of seeing the Board as having purely penal powers and requiring the clear demonstration of a state of immediate dangerousness as a condition precedent to the imposition of restrictions on liberty under section

672.54 of the *Criminal Code*. On the contrary, there must be a finding of an absence of dangerousness before the Board may allow a person completely to leave the system of supervision established first with the entering of a verdict of not criminally responsible on account of mental disorder and subsequently with the issuance of the Lieutenant Governor's warrant.

On this point, with reference to the present case, notwithstanding the Appellant's criticisms, we are unable to conclude that the Board could have found an absence of dangerousness within the meaning of section 672.54 of the *Criminal Code*. The Appeal Book contains several psychiatrists' and psychologists' reports as well as the transcript of the observations they made before the Board. Those reports and representations, whether submitted by representatives of the Pinel Institute or Mrs. Lajoie's experts, sought to analyze and assess, as precisely as possible, an evolving and complex psychological state. It can be concluded from those reports and testimony that there was the presence of a possible danger, of an intensity that was difficult to measure and centred on the child. Furthermore, it was noted that Mrs. Lajoie was capable of showing, prior to the incidents of 1992, that she was capable of living autonomously and of re-entering the labour market.

The illness with which Mrs. Lajoie is afflicted is not easy to identify. The prognosis of its evolution remains uncertain.

One thing seems to emerge in a probative way: even in the observations of her own experts, it was recognized that Mrs. Lajoie's mental state involved an element of risk for her daughter, the degree of which remains debatable. It was up to the Board to assess it and it has not been demonstrated that there was an error in its legal interpretation of section 672.54 of the *Criminal Code* or in its definition of its own role, particularly in its application of the Orlowski case.

However, the Board concluded that in-patient treatment was necessary and therefore ordered a committal to the Maisonneuve-Rosemont Hospital. It is on this point that the real difficulty with the disposition arises. As we have seen, it can be reasonably concluded that Mrs. Lajoie poses a significant danger to her daughter. The notion of danger must not be examined in the abstract, outside of the context in which Mrs. Lajoie and her daughter will be living. In reality, the Board's disposition found that a significant danger existed by assuming that all the systems of intervention set up for the protection of children and youth would fail.

In order to assess the necessity for the most onerous disposition, i.e. detention in custody, the Board should have considered more fully the

degree of danger that Mrs. Lajoie presented, taking into account all the mechanisms already in place to protect her child. The Board chose, in her case, the most restrictive disposition, and yet there seem to exist mechanisms administered by the Direction de la protection de la jeunesse that allow contacts with her child to be limited, structured or completely disallowed, if need be. In short, in order to decide on the appropriate disposition for Mrs. Lajoie, the Board should have considered this mother and her child in the actual context of their life, taking into account what the Direction de la protection de la jeunesse could normally do. Its reassessment of dangerousness and its choice of appropriate disposition under section 672.54 of the *Criminal Code* should have been made within those parameters. Otherwise, will the Appellant ever be allowed to reclaim her life? If, medically, a definite opinion on the nature and evolution of the illness cannot be formed, will it be necessary to detain her indefinitely, by using the powers under Part XX.1 of the *Criminal Code*, as if society were unable to provide any other method of controlling or reducing the apprehended threat?

For these reasons, I would suggest that the appeal be allowed in part. The case will be referred back to the Quebec Review Board for it to re-assess within sixty days the nature and the necessity of the disposition made with regard to Mrs. Lajoie,

taking into account the services and mechanisms available to control her relations with her daughter outside the detention facility.

LOUIS LeBEL, J.C.A.