October 8, 2010

Is there a doctor in the house? Challenges in the assessment process of s.752.1 of the Criminal Code

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Cases Considered:
R. v. Gow, 2010 ABQB 564

In September, Mr. Justice V.O. Ouellette of the Alberta Court of Queen's Bench gave reasons in the trial of *R. v. Gow*. The key issue in the case was whether the court had jurisdiction to grant an extension for an assessment pursuant to s.752.1(1) of the *Criminal Code of Canada*, R.S.C. 1985, c.C-46 in the context of an application for long-term offender status. Justice Ouellette determined that the court could not grant an extension as the language of the section, when considered in the context of the amendments made to the *Code* in 2008 and other provisions of the *Code*, was clearly mandatory. However, a survey of other cases dealing with s.752.1 revealed some interesting interpretations of the provision and demonstrated that Canadian courts have read parts of this section as being substantive rather than procedural. This allows for a certain amount of wiggle room depending on the circumstances surrounding any delay in the assessment process.

In *Gow*, the prosecutor applied to have the accused, Neil Gow, named as a long-term offender. Briefly, a long-term or dangerous offender designation may be sought by the Crown when an offender commits a serious personal injury offence, that is an offence that involves either the use or attempted use of violence against a person, conduct that endangers the life or safety of another person, or conduct that inflicts or may inflict serious psychological damage against another person. Although the trial reasons in Gow's case were not published, Justice Ouellette indicated that Mr. Gow had been convicted of several offences, including assault with a weapon, making Mr. Gow a candidate for a long-term offender designation (para. 5).

The *Code* outlines the assessment process required when the Crown applies for an accused to be designated as either a long-term or dangerous offender. Section 752.1 requires that the Crown apply for an expert assessment after conviction but prior to sentencing. Following court approval, the assessment "shall" be completed within 60 days, and the written report of the assessment "shall" be filed with the court no later than 30 days after the assessment period. Section 752.1(3) allows the Crown to apply for an extension of time which can be no more than 30 days. The total time allowed for such an assessment, then, is approximately four months.

In Mr. Gow's case, the assessment and report were not going to be ready within the required time due to the assessing doctor's contention that such a timeline was impossible to comply with. The court acknowledged that the prosecutor did everything possible to ensure the report would be submitted within the allotted time but to no avail (para. 7). Regardless of these best efforts, the court felt its hands were tied. No efforts were made by the assessing doctor to have the

assessment or report completed on time (para. 8). The mandatory language of "shall" meant that the court was required to interpret the timelines as required rather than discretionary (see paras. 48-56 for the court's discussion of statutory interpretation). In addition, the analogous provisions of ss.672.14 and 672.15 which deal with assessments of the fitness of an accused to stand trial contain similar language and had previously been interpreted to be mandatory by the B.C. Court of Appeal in *Doucet v. Adult Forensic Psychiatric Services and AGBC*, 2000 BCCA 195 (cited in *Gow* at para. 61).

Justice Ouellette, near the end of his reasons, stated: "Although the assessment scheme as currently legislated has its flaws, it is nonetheless the scheme that has been established by Parliament. I am therefore required to abide by it." (para. 89). The flaws that are spoken of here stem from different levels of government being responsible for different parts of the assessment process. While Parliament enacts the *Code* and institutes assessment periods that are standard across the country, it is the provinces that administer the assessments. The court is required to refer the accused for assessment, though the guidelines indicating to whom the accused should be referred are quite general; in Gow's case, it was to a forensic psychiatrist from Alberta Health Forensic Assessment and Community Services (para. 6). The assumption by Parliament seems to be that all provinces have sufficient resources in place to meet the demands of this system and therefore there is no need for judicial flexibility in these circumstances. A more generous interpretation of these timelines may be that Parliament is unwilling to subject those convicted of crimes causing serious personal injury to more than a four month wait in remand while the Crown organizes an assessment. Whatever the case may be, the court found that when an assessing doctor flatly refuses to complete an assessment in what he or she perceives to be an unreasonable amount of time, there will be no extensions granted.

One interesting aspect of this case, however, is the court's survey of other cases dealing with the assessment provision under the *Code*. While there was no flexibility provided in *Gow*, there may still be an open question about whether and when courts will allow extensions when assessments or reports are in progress.

R. v. W.T.V., [2003] O.J. No. 2272 (Ont. Sup. Ct. J.) (cited in *Gow* at paras. 14-15) stands in contrast with the *Gow* case. An assessment was completed within the required time period but the report was not filed for some four months. The court held that the word "shall" in the provision indicated that the deadlines were directive only. A clerical error on the part of a private individual was an unacceptable reason for trumping "substantive justice", and the proceedings were allowed to continue.

Similarly, in *R. v. Howdle*, 2004 SKCA 39 (cited in *Gow* at paras. 16-17), the Saskatchewan Court of Appeal dismissed an application by an accused to have a report rendered a nullity after the reporting doctor missed the submission deadline due to a misunderstanding on the part of the doctor. The trial judge's reasons stated that "… it is not obvious that parliament intended that non-performance within the remand period through a misunderstanding as in this case or impossibility of performance by the assessor as in the case of illness of the assessor or the person to be assessed should automatically result in nullification of the entire proceedings at the incipient stage." (2002 SKQB 440 at para. 11).

In *R. v. Small*, 2000 BCCA 433 (cited in *Gow* at paras.11-12), the B.C. Court of Appeal allowed a report that had not been filed by the registrar to be deemed as filed according to the provision. Because the purpose of the section was seen to be to give the court access to at least one expert

opinion and the court had received a copy of the report in this case, the procedural error on the part of the registry was overlooked.

Justice Ouellette also considered (at para. 23-27) *R. v. Acoby*, [2009] O.J. No. 197 (Ont. Sup. Ct. J.), one of only two cases addressing s.752.1 after the 2008 amendments came into force. Very interestingly, the court in that case dismissed arguments from the accused that the mandatory timelines meant that the Crown could not obtain an extension for filing the assessment report beyond the 60 day limitation. Instead, the court exercised its discretion to extend the time for filing and stated further that even if it refused the application for an extension, the Crown could make another application to obtain a new assessment.

It appears that there is some consensus in these judgments that the courts have the discretion to let in a late or improperly filed assessment. *Gow* is distinguishable on the basis that the assessing doctor had refused to even begin the assessment process, whereas in the surveyed cases the assessment was complete and the Crown was seeking an extension for filing the report. What is confusing, though, is that these cases all acknowledge that the court has some discretion in granting extensions to some degree. In *Gow*, Justice Ouellette found that none of the cases were helpful because they do not directly deal with extending the assessment period. Arguably, however, all of s.752.1 contains mandatory language which defines the timelines, and distinguishing cases based on whether the assessment period or filing period can be extended at the court's discretion leads to absurd results.

One final point on the assessment and filing periods outlined in s.752.1. An accused may have an argument against a discretionary extension of the assessment period if their entire matter has extended beyond the time limits that are deemed acceptable under s.11(b) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada has clearly stated that the right to a speedy conclusion of a criminal matter extends to sentencing: see *R. v. MacDougall*, [1998] 3 S.C.R. 45 at para. 57, and *R. v. Gallant*, [1998] 3 S.C.R. 80 at para. 8. Although s.752.1 assessments have been provided for within the statutory scheme of the *Code*, if granting an assessment will lead to an untenable delay, the courts will be faced with pitting the request of the prosecutor against the accused's right to a timely resolution of their matter. Engaging in a speculative *Charter* analysis here is likely of little value. The question appears to be as yet untested, and should the perfect storm arise it will be interesting to see whether discretionary extensions will be justifiable under the *Charter*.