PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. A.H.*, 2017 NSPC 80

Date: 20170908
Docket: 2937047, 2937048, 2937049
2937067, 2937068, 2937071
2907073, 2937074, 2937075
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

A.H.

DECISION ON CROWN APPLICATION FOR ASSESSMENT UNDER S. 752.1

Judge:	The Honourable Judge Elizabeth A. Buckle
Heard:	August 15th, 31st and September 8th, 2017, in Halifax, Nova Scotia
Decision:	September 8th, 2017 with reasons released, July 4, 2019
Charges:	Section 151 and section 753.3(1) *Criminal Code* (x 9)
Counsel:	Rick Woodburn, for the Crown/Applicant Malcom Jeffcock, Q.C., for A.H./Respondent

By the Court:

Introduction

[1] This decision addresses how the court should choose the court-appointed assessor for a s. 752.1 Dangerous Offender Assessment in circumstances where counsel do not agree. The Crown applied for the Assessment Order, the defence consented to the conduct of that assessment but objected to the appointment of the assessor proposed by the Crown, Dr. Shabehram Lohrasbe. The defence requested that the Court order the assessment be completed by any qualified expert at the East Coast Forensic Hospital (ECFH).

[2] Shortly after hearing the Application, I advised counsel of my decision to designate Dr. Scott Theriault of the ECFH to conduct the assessment. I delayed releasing my reasons, intending to release them together with my decision on the Dangerous Offender Application.[1]

Issues

[3] Counsel agreed that the assessor must be designated by the Court. Counsel did not agree on how the Court should choose the assessor.

[4] The Crown argued that the Court should designate the expert selected by the Crown unless the defence could show lack of qualification, bias or conflict. The

[1] Prior to releasing the Dangerous Offender decision, the Court of Appeal heard and overturned the predicate offence conviction on the basis of ineffective assistance of trial counsel (not Mr. Jeffcock - *R. v. A.W.H.*, 2019 NSCA 40). As a result, the Dangerous Offender proceedings are now moot, but I thought this decision on the procedural issue might be of some assistance to others.

defence argued that the Crown's selection of an expert is not entitled to deference. It further argued that, in the circumstances of this case, the Court should have concerns about the actual and perceived neutrality of the expert proposed by the Crown.

[5] So, the ultimate issue is who should the Court designate to conduct the assessment of A.H.? This requires me to consider:

1. Whether a court should defer to the Crown's proposed expert;
2. If the Crown's proposal is entitled to deference, has the defence demonstrated a real concern about the Crown expert; and,
3. If the Crown's proposal is not entitled to deference, what factors should be considered in designating the expert?

Background

[6] At the time of the initial request for an assessment, Crown counsel advised that the Crown had "retained" Dr. Shabehram Lohrasbe from British Columbia to conduct the assessment. Counsel for A.H. was asked if he consented to Dr. Lohrasbe being designated and he did not. Proceedings were adjourned for submissions.

[7] The Crown argued that experts at the ECFH would not be able to conduct the assessment within a reasonable period of time and/or would be disqualified due to an apprehension of bias arising from one or all of the following: a prior therapeutic relationship with A.H.; concerns that A.H. had been part of a complaint filed against one of the physicians; and/or, by virtue of being part of a clinical

group including physicians who had a prior relationship with A.H. or who had been the subject of a complaint.

[8] It was clarified by A.H. and his counsel that A.H. had not filed a complaint against any of the physicians at ECFH nor was he a factual witness to any complaint filed by anyone else. He had merely witnessed the signature of a patient who was filing a complaint. As such, neither A.H. nor his counsel were concerned that this would lead to any actual bias against A.H. or perception of bias by either that physician or another physician who worked at ECFH.

[9] Counsel for A.H. agreed that the physician who was the subject of the complaint and any physician who had been previously involved in a true therapeutic relationship with A.H. might feel uncomfortable conducting the assessment but that this would not preclude other physicians in the group from conducting the assessment.

[10] It was agreed that the Court would seek clarification of some of these issues directly from Dr. Brunet, the Clinical Director of the ECFH. That was done by letter, a copy of which was provided to counsel and retained in the court file.

[11] Dr. Brunet responded with the following information:

1. The ECFH is able, given its resources and workload, to conduct an assessment within the timelines allowed by the Code;
2. Some of the physicians at ECFH have had previous treating relationships with A.H. so would not be comfortable assessing him. However, Dr. Scott Theriault is qualified to conduct assessments and has no such history with him. Neither Dr. Theriault nor Dr. Brunet

feel that Dr. Theriault's professional relationship with other psychiatrists within the unit who have had a treating relationship with A.H. would impact his ability to ethically perform the assessment; and,

3. A Copy of Dr. Theriault's CV was provided.

Law

[12] Section 752.1(1) of the *Criminal Code* provides as follows:

> On application by the prosecutor, if the Court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, **the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.**
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> (*emphasis added*)

[13] Most decisions interpreting this provision have concluded that the legislation requires the Court to designate the expert, and where Crown and defence do not agree, the Court must make the selection. However, the legislation does not provide a test or criteria for how that is to be done and there is no consistent approach in the caselaw.

[14] In arguing that its choice should be deferred to, the Crown relied primarily on the decision in *R. v. Billings* (2017 ONSC 278). In that case, the Court concluded that the Court should defer to the Crown's choice of an expert "absent cogent and compelling reasons indicating that the Crown's choice is inappropriate"

(at para. 9). In doing so, the Court relied on *R. v. Gray* (an unreported decision of Maranger, J., dated September 8, 2016 (ONSC)) where a similar position was apparently taken.

[15] In other cases where the Court has been required to designate the expert, there is no indication of any deference or presumption in favour of the Crown's choice. In *R. v. Blackwood*, (2010 ONSC 6178) the Court designated one of the experts proposed by the defence over the six proposed by the Crown. The Crown had agreed the expert proposed by the defence was competent and he had previously testified for both Crown and defence. The defence objected to one of the Crown experts because of lack of neutrality and two were not available in a reasonable time. The Court did not explain how it chose the expert proposed by the defence but there is nothing in the decision to suggest that the Court felt it should defer to the Crown choice.

[16] In *R. v. Hall* ([2000] O.J. No. 2717 (Ont. S.C.J.)), judicial review was denied because the trial judge was acting within his discretion to choose one of the recommended Crown experts who had impressed him. Again, in that case there is no indication that the trial judge was giving deference to the Crown's choice.

[17] In *R. v. Torres* ([2007] O.J. No. 1885 (Ont. S.C.J.)), the Crown and defence were able to reach agreement on who should be designated, however, the Court went on to say that if counsel had been unable to agree on the choice of assessor, the Court would have considered "the qualifications, the experience, the nature and location of the assessment proposed. Perceived neutrality between the Crown and the defence may be an important factor in the choice of assessor." (at para. 20).

This language is consistent with an approach that puts the Crown and defence on equal footing.

[18] In *R. v. J.V.* (2015 ONCJ 766), the Crown had argued that in the absence of agreement, the Crown should choose the expert. Justice Paciocco, then of the Ontario Court of Justice, disagreed. He ultimately was not required to determine what the applicable test or criteria should be because apparently defence and Crown came to agreement after he gave his decision. However, his reasons, which I will refer to in some detail below, are also consistent with an approach that would put the Crown and defence on equal footing.

Application to this Case

Issue – 1 – Should the Court defer to the Crown's choice of expert?

[19] The Crown in this case argues that the Court should designate the expert selected by the Crown unless defence can demonstrate a real foundation for a concern that the proposed individual "is biased, has a conflict or lacks qualifications to complete a proper assessment." (Crown brief, pp. 1 & 3). While the decisions in *Billings* and *Gray* support the Crown's position that its choice is entitled to deference, neither restrict the grounds for rejecting the Crown's choice to bias, lack of qualification or conflict.

[20] In *Gray,* the Court said, "in the absence of a cogent reason not to select the expert proffered by the Crown, such as qualifications or bias, it seems to me that the expert put forward by the Crown should be designated" (as cited in *Billings,* para. 10). In *Billings*, the Court specifically provided the example of a situation

where the Crown expert might be rejected because he/she is not available within a reasonable period.

[21] So, under *Billings* and *Gray* the Crown choice of expert should be deferred to in the absence of cogent reason not to, which could include but would not be limited to, lack of qualification, conflict or bias.

[22] In *Billings,* the Court concluded that the Crown's choice should be entitled to deference for the following reasons:

> . . . the purpose of s. 752.1 is to prepare an assessment that the Crown can take to the Attorney-General in order to request consent to proceed to a dangerous or long-term offender application. The Crown will also be the party presenting that report to the court in the event consent is obtained. In these circumstances, the Crown needs to have confidence in the assessor chosen. Moreover, if the Crown has that confidence it will not be put in the awkward position that occurred in *Stratton.* In that case, the Crown was required to put forward the expert designated by the court but chosen by defence counsel as part of its case. The expert report did not support the Crown's position in relation to the issue of dangerousness and the Crown had to request the opportunity to cross-examine their own witness. (at para. 9)

[23] The primary concern identified in this passage is that because the Crown relies on the assessment when seeking the consent of the A.G. and in presenting its case, it should have confidence in the expert.

[24] In the case before me, the Crown relies on the reasoning and conclusion in *Billings* and argues that in the context of s. 752.1, "it would seem absurd for defence to be able to select the expert to be used on the Crown's application" (Crown Brief, at p. 2). To be clear, the defence in this case is not advocating that the defence should select the expert. Rather, he argues that the Court should select the expert.

[25] The Crown further argues that using an approach that defers to the Crown's choice of expert causes no prejudice to the defence as the defence is always able to seek an assessment from the expert of its choosing should it not be satisfied with the assessment produced by the court-ordered assessment.

[26] As I have said, in *J.V.*, Paciocco, J. (as he then was) was dealing with a slightly different issue than the one before me, however, he made some general comments that are applicable and addressed some of the specific arguments the Crown raises to support its submission that the Crown's choice is entitled to deference.

[27] Justice Paciocco said that requiring the Court to designate the expert enhances the appearance of justice since any concern that the appointment was made to secure a litigation advantage disappears (para.10).

[28] He also said, at para. 11, that having a court-appointed expert:

> . . . diminishes the insult that a court-ordered assessment of the offender does to the offender's right to silence. It is one thing to remove the right to silence and the right not to have an adverse inference drawn from silence in order to arm the presiding judge with expert information to assist in evaluating the dangerous offender application made by the Crown. It is quite another to remove that protection to enable the Crown to support a dangerous offender application with the expert of its choosing.

[29] I agree with these general statements and, in my view, they apply equally to the issue before me. Putting the Crown and defence on equal footing similarly enhances the appearance of justice.

[30] Justice Paciocco went on to address the Crown's specific arguments. In doing so, he stressed the Crown's role as a minister of justice. He was not persuaded that the mere fact that the Application under s. 753.1 is a Crown

application would necessitate the Crown choosing the expert (p. 12) or that the Crown would be at a "litigation disadvantage" if it could not choose the expert. In dealing with this latter argument, he said as follows:

> **16** First, if the report of a neutral expert does not support the Crown theory, this is not a litigation disadvantage so much as a strong signal the application may be misconceived.
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> **17** Second, if the Crown wishes to go ahead with a second opinion, it is not without remedy where the accused unreasonably refuses to co-operate. The Crown can seek an adverse inference: *R. v. Stevenson* [1990] O.J. No. 1657 (Ont. C.A.); *R. v. Sweeney (No.2)* (1977), 35 C.C.C.(2d) 245 (Ont. C.A.).
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> **18** Third, by way of a more broadly principled observation, the litigation disadvantage argument is predicated upon an unhealthy conception of the role of expert witnesses as "our witnesses" and "their witnesses." Canadian courts have increasingly come to accept that because of their superior knowledge and the vulnerability this creates, even when called by one of the parties, experts owe a higher obligation to the court than the party calling them. Experts must strive to offer impartial, unbiased and restrained assistance to the court, and testify in disregard to the litigation interests of the party calling them. This provision goes one step further in reducing the risk of litigation bias by inviting a court appointed expert.

[31] I agree with these comments and again find them to be applicable to the issue before me.

[32] I do not dispute that the Crown needs to have confidence in the expert who is appointed to conduct the assessment. However, the offender also must have confidence in the expert. A process that deferred to the Crown's choice would undermine the offender's confidence in the expert and in the fairness of the overall process. It would not, in my view, be "absurd" for the Court to select a qualified, unbiased expert after receiving proposals from both Crown and defence. Both the Crown and defence should have confidence in that process and in that person.

[33] Further, this process does not prejudice either the Crown or the defence as either is entitled to retain their own expert if not satisfied with the assessment prepared by the court-designated expert.

[34] After giving my decision in this case but prior to release of these reasons, two decisions from Nova Scotia were released that touch on these issues: *R. v. A.H.* (2018 NSCA 47); and, *R. v. Melvin* (2018 NSSC 176). I have reviewed both. Neither would have impacted my ultimate decision to appoint Dr. Theriault or my interpretation of the law on this specific issue.

[35] So, in conclusion on this issue, in my opinion, the Crown's choice of expert is not entitled to deference.

Issue 2: If the Crown's proposal is entitled to deference, has the defence demonstrated a real concern about the Crown expert?

[36] Given my conclusion on issue 1, I do not need to address this issue but will comment on the concerns raised by the defence when addressing Issue 3.

Issue 3: If the Crown's proposal is not entitled to deference, what factors should be considered in designating the expert?

[37] The Court in *Billings* rejected the creation of comprehensive criteria for selection and said that the Court should not be put in the position of "wading through *curriculum vitae* trying to determine who would be the best assessor" (at para. 8).

[38] In *Torres*, if called upon to decide, the Court would have considered: the perceived neutrality of the expert between the Crown and defence; the

qualifications, and experience of the proposed experts; and the nature and location of the assessment proposed (at para. 20).

[39] In this case, the Crown has proposed Dr. Shabehram Lohrasbe, a psychiatrist who practices in B.C. The defence is opposed to Dr. Lohrasbe for several reasons. The defence argues that Dr. Lohrasbe has been criticized by another court, his CV discloses that he currently hires himself out as an expert primarily to Crown and finally that the process the Crown has used in this case gives rise to an appearance of lack of neutrality.

[40] The Crown objects to the designation of any psychiatrist from the ECFH. He takes no issue with their qualification or actual neutrality. The objections were as follows:

1. The Crown's general understanding that the ECFH is too busy to accommodate the timelines for assessment – this concern has been addressed in the correspondence from Dr. Brunet; and,
2. The risk of an appearance of bias or lack of neutrality. That submission is based on three concerns:
    a. A.H.'s involvement in a complaint against one of the psychiatrists who works at the ECFH. To assess this submission, it is important to understand the available information. In his written submission, counsel for the defence indicated that this doctor may not be comfortable doing the assessment because of A.H.'s involvement in a complaint that had been filed against the doctor. In his oral submissions, the Crown indicated that A.H. had sued that doctor. At the hearing, A.H. and his counsel clarified that A.H. had not sued the doctor, had not filed a complaint

against the doctor and had not witnessed any event that resulted in a complaint against the doctor. He had simply "witnessed" a signature for another individual who had filed a complaint against the doctor. The Crown maintains that this would make that doctor an inappropriate choice but would also make any of that doctor's colleagues inappropriate due to the appearance of bias. As I understand the Crown's argument, there is a risk that colleagues of that doctor might appear to be biased against A.H. because he had "witnessed" that signature. The defence has no such concerns;

b. During the hearing, A.H. indicated that Dr. Neilson had previously done a report about him as part of a parole process and that he disagreed with the conclusions in that report. The Crown argues that this would give rise to an apprehension of bias. The defence does not apparently share that concern; and,

c. A doctor at ECFH had been involved in providing A.H. with injections which he was taking as part of his LTO supervision, the order he has pleaded guilty to breaching. The Crown clarified that this doctor is not required as a substantive witness during the sentencing proceeding. The Crown's argument is that this doctor is a treating psychiatrist so should be excluded for the reasons the defence proposed psychiatrist was excluded in *Billings*. The defence advised that other than the injections, there was no other treatment or psychiatric therapy provided. The Crown argued that any psychiatrist in the ECFH group should be excluded from consideration because of their professional relationship with a "treating psychiatrist".

[41] I have briefly reviewed reported cases in Nova Scotia involving Dangerous Offender proceedings. In the vast majority of those cases, the assessments were performed through the ECFH.

[42] There may be circumstances where there is a need to go outside of the ECFH. Those might include situations where ECFH cannot accommodate the request due to ethical or resourcing issues, where there would be a real perception of bias or lack of neutrality or where there is a case that requires a special area of expertise. In my view, absent some reason, it would raise a real concern in the mind of the offender and the reasonably informed public if the Crown were choosing an expert from elsewhere. It could be perceived as contrary to the normal practice and incurring unnecessary public expense. It could also be legitimately perceived by the offender as giving the Crown an unfair advantage which would undermine the individual's confidence in the assessor and the process.

[43] I am not setting out a comprehensive list of criteria that a court should consider in choosing an expert as each case will be unique. In the case before me, I am not required to wade through stacks of CVs as I have only two and both Crown and defence agree that each is qualified. There are cases where that might be necessary. I am not persuaded by my review of Dr. Lohrasbe's CV and the case referenced by counsel that he favours the Crown or that I should have concerns about him. I am also not persuaded that there would be any appearance of bias if Dr. Theriault were to conduct the assessment. Neither he nor Dr. Brunet, the clinic director, feel that he has an ethical conflict because he is in the same clinic where A.H. was treated, and A.H. has no concerns. In this case I conclude that both proposed experts are qualified, I have no evidence that either would be actually

biased and nothing about either of the two individual psychiatrists creates an apprehension of bias or lack of neutrality.

Conclusion

[44] In summary, I have decided that the Court must designate the expert to perform the assessment under s. 752.1 and the Crown's choice is not entitled to deference. There is nothing in the legislation that supports a presumption in favour of the Crown's proposed expert. Nor am I persuaded by the reasoning in *Billings* or the arguments made by the Crown before me. Where the defence and Crown do not agree on who should be designated, they should have an equal role in assisting the Court in designating the assessor. In that respect, I disagree with the rulings in *Billings* and *Gray*.

[45] I have decided to designate Dr. Theriault of the ECFH because using a doctor from the ECFH is typical for these assessments in the province of Nova Scotia and I see no valid reason in this case to depart from that practice. To depart from the normal practice at the request of the Crown and without reason would, in my view, give rise to a reasonable apprehension on the part of the offender that the process was unfair. Further, using an expert from British Columbia would involve unnecessary expense. The doctor would have to travel here to meet with the offender and again to testify. Certainly, there will be some cases where experts from outside the ECFH will be necessary. It is possible that in a particular case, all of the ECFH experts will be in a conflict due to a previous treatment relationship, where due to resources and caseload, the assessment could not be done within the timelines allowed for in the Code or where highly specialized expertise is required that the ECFH psychiatrists do not possess. None of those exist here.

[46] The Order under s. 752.1 designated Dr. Scott Theriault of the East Coast Forensic Hospital to conduct the assessment.

Elizabeth A. Buckle, JPC.