COURT OF APPEAL OF YUKON

Citation: *R. v. Charlie*,
2019 YKCA 17

Date: 20191105
Docket: 18-YU839

Between:

Regina

Appellant

And

Franklin Junior Charlie

Respondent

Before: The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Butler
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: Orders of the Territorial Court of Yukon, dated July 24, 2018 (*R. v. Charlie*, 2018 YKTC 30, Whitehorse Dockets 17-00191; 17-00488A); and December 12, 2018 (*R. v. Charlie*, 2018 YKTC 44, Whitehorse Dockets 17-00191; 17-00191B; 17-00488A).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference November 5, 2019):	N. Sinclair
Counsel for the Respondent:	V. Larochelle
Place and Date of Hearing:	Vancouver, British Columbia October 22, 2019
Place and Date of Judgment:	Vancouver, British Columbia November 5, 2019

Summary:

The Crown appeals a sentence imposed for aggravated assault. In addition to challenging the fitness of the sentence, the Crown asks this Court to set aside the trial judge's dismissal of an application to have the respondent remanded for a dangerous and long-term offender assessment (s. 752.1 of the Criminal Code). The Crown's notice of appeal was filed more than five months past the dismissal, without an application for an extension of time. The respondent asserts that the Court lacks jurisdiction to hear this aspect of the Crown's appeal because the notice of appeal was filed outside the prescribed time for filing. Held: In the absence of an extension of time to file, this Court is without jurisdiction to hear the appeal from dismissal of the assessment application. The Crown's right of appeal from that order arises under s. 759(2) of the Code and the 30-day period for filing an appeal ran from the date of pronouncement.

[1] **DEWITT-VAN OOSTEN J.A.**: In May 2018, the respondent, Franklin Junior Charlie, was found guilty of aggravated assault contrary to s. 268(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. An appeal from conviction has been dismissed: *R. v. Charlie*, 2019 YKCA 13.

[2] After the trial and before sentence was imposed, the Crown brought an application under s. 752.1(1) of the *Code* to have Mr. Charlie remanded for an assessment of whether he might be found a dangerous or long-term offender.

[3] On July 24, 2018, the trial judge dismissed the Crown's application: *R. v. Charlie*, 2018 YKTC 30. The matter proceeded to sentencing, and on December 12, 2018, Mr. Charlie received a sentence of 14 months' imprisonment for the aggravated assault, less three months' credit for pre-sentence custody. The judge also imposed 30 months' probation and various ancillary orders. Mr. Charlie was sentenced on other offences at the same time; however, those matters are not relevant to the issue addressed in these reasons.

[4] On January 11, 2019, the Crown filed a notice of application for leave to appeal and an appeal from sentence. The appeal challenges two determinations made by the trial judge: (a) his dismissal of the Crown's application for an assessment under s. 752.1(1); and (b) the sentence imposed after the dismissal.

[5] On the appeal, the Crown seeks the following relief: (a) leave to appeal from sentence; (b) an order "directing the preparation of an assessment report under s. 752.1"; (c) an order "remitting the matter back to the Territorial Court for a new sentencing hearing"; and (d) in the alternative, an order varying the sentence.

[6] The appeal was set for hearing on October 22, 2019. A few days prior, counsel for Mr. Charlie advised the Court that he considered the appeal from the dismissal under s. 752.1(1) to be out of time. If he is right about that, the Court has no jurisdiction to hear this aspect of the Crown's appeal without an extension of time as authorized by s. 678(1) and (2) of the *Code*, and made manifest in Rules 16 and 17 of the *Yukon Territory Court of Appeal Criminal Appeal Rules*, *1993*, SI/93-51 [*"Criminal Appeal Rules"*]. Counsel for Mr. Charlie took no issue with the Court's jurisdiction to hear the second aspect of the Crown's appeal, namely, the challenge to the fitness of the sentence.

[7] On the date of the appeal, submissions were heard on the jurisdictional issue and judgment was reserved. The remainder of the appeal was adjourned to await the outcome of the ruling.

Issue

[8] Does the Court have jurisdiction to hear the Crown's appeal from dismissal of its application for an assessment under s. 752.1(1) of the *Code*?

Statutory Framework

[9] As explained in *R. v. Steele*, 2014 SCC 61, there are a number of procedural steps that must be taken before a trial court can designate someone as a dangerous or long-term offender:

> [32] … First of all, <u>the prosecutor must apply to have the offender remanded for assessment: s. 752.1(1)</u>. An assessment report must then be filed before the prosecutor can apply for a finding that the offender is a dangerous offender or a long-term offender: ss. 753(1) or 753.1(1). The prosecutor must give notice to the offender outlining the basis on which it is intended to found the application: s. 754(1)(*b*). The Attorney General of the

> province must consent to the application: s. 754(1)(a). All these procedural protections enhance the overall fairness of the scheme.
>
> [Emphasis added. Internal references omitted.]

[10] To obtain an assessment under s. 752.1, the Crown must establish reasonable grounds to believe that the convicted accused "might be found" a dangerous or long-term offender:

> **752.1(1)** 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) <u>might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1</u>, 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.
>
> [Emphasis added.]

[11] The Crown's application to have Mr. Charlie remanded for an assessment was dismissed. For the purpose of these reasons, it is sufficient to note that the trial judge was not satisfied the Crown had met the reasonable grounds threshold. There was no dispute that the offence of aggravated assault constitutes a "serious personal injury" offence within the meaning of s. 752.1, also a statutory pre-requisite to obtaining an assessment in the circumstances of this case.

[12] Section 752.1 falls under Part XXIV of the *Code.* Section 759(2) grants the Crown a limited statutory right of appeal from "decisions" made under Part XXIV:

> **(2)** The Attorney General may appeal to the court of appeal <u>from a decision made under this Part</u> on any ground of law.
>
> [Emphasis added.]

[13] The powers of the appeal court on an appeal brought pursuant to this provision are delineated in s. 759(3) of the *Code*:

> **(3)** The court of appeal may
>
> > **(a)** allow the appeal and
> >
> > > **(i)** find that an offender is or is not a dangerous offender or a long-term offender or impose a

> > sentence that may be imposed or an order that may be made by the trial court under this Part, or
> >
> > **(ii)** order a new hearing, with any directions that the court considers appropriate; or
>
> **(b)** dismiss the appeal.

[Emphasis added.]

[14] The procedures governing a s. 759(2) appeal are the same procedures applicable to appeals from sentence under Part XXI of the *Code*, "with such modifications as the circumstances require" (s. 759(7)).

[15] As a result, s. 678(1) and (2) apply. Section 678(1) stipulates that an appellant who seeks to appeal must give notice of the appeal as directed by the rules of court. Section 678(2) authorizes an appeal court to extend the time for notice. The *Criminal Appeal Rules* require that appeals brought on behalf of the Attorney General be filed "within 30 days after the pronouncement of the order under appeal" (Rule 4(1)).

[16] If the Crown's appeal of the dismissal of its application for an assessment comes within s. 759(2) of the *Code*, it means that the Crown was obliged to commence this aspect of its appeal within 30 days of the dismissal (Rules 16 and 17 of the *Criminal Appeal Rules*). As noted, the order dismissing the s. 752.1(1) application was made on July 24, 2018.

[17] At a case management conference held in this Court on March 6, 2019, the presiding justice raised the possibility that the Crown's appeal from dismissal may have been filed out of time. Counsel for the Crown expressed the view that the right of appeal did not crystallize until sentence was imposed. He acknowledged that if he was wrong about that, the Crown would be required to bring an application for an extension of time. It was suggested that the issue be addressed at a subsequent case management conference (along with other matters); however, that does not appear to have occurred.

[18] As at October 22, 2019 (the day of hearing), the Crown had not filed an application for an extension of time or any materials in support.

Judicial Interpretation of Section 759(2)

[19] There has been limited judicial consideration of the scope of the Crown's right of appeal under s. 759(2) specific to dismissal of an application for an assessment under s. 752.1(1). However, there are a number of decisions that I consider instructive on the jurisdictional question.

[20] Counsel referred the division to *R. v. Boutilier*, 2016 BCCA 24 [*Boutilier* (CA)]. There, the phrase "a decision made under this Part" as contained in s. 759(2) was broadly construed and held to encompass "final decision[s] made in proceedings [under Part XXIV]" (at para. 51, emphasis added). From the Court's perspective, a final decision includes a constitutional declaration made during a dangerous offender hearing under s. 753(1) of the *Code*. The declaration granted in *Boutilier* (CA) was a "final order in the proceeding directed at the constitutionality of s. 753(1), binding on the Crown and on other trial courts of this province" (at para. 45).

[21] Finality also carried analytical significance in *R. v. S. (C.L.)* (1999), 133 C.C.C. (3d) 467 (Ont. C.A.), a case in which a stay of proceedings entered by a judge during the course of a dangerous offender hearing (but before its completion), was held appealable under s. 759(2). McMurtry C.J.O., writing for the court, found that the stay "did not simply serve to suspend the proceedings but effectively brought the dangerous offender application to a final conclusion" (at para. 23).

[22] A second decision cited by counsel is *R. v. Fulton*, 2006 SKCA 115. In that case, the prosecution applied for an assessment under s. 752.1(1). The application was granted, but limited to an assessment for possible long-term offender status. Once the assessment was filed with the trial court, the Crown applied to have Mr. Fulton designated a dangerous offender. The trial judge dismissed the application. He was only prepared to order a long-term offender hearing because of

his first ruling. In his view, the Crown was limited to seeking a long-term offender designation consistent with the nature of the assessment (at para. 4).

[23] The Crown appealed. In response, Mr. Fulton raised a jurisdictional objection, arguing there was no right of appeal until the entirety of the sentencing process had completed:

> [6] In the submission of counsel for the respondent, the determination of an application under section 753 to have an offender declared a dangerous offender is part of the sentencing process and that, until that process is complete by the imposition of a sentence, no appeal lies. In advancing this submission counsel contended the matter is governed by Part XXI of the *Criminal Code*, headed **Appeals—Indictable Offences**, and, more particularly, by subsection 676(1)(d).
>
> [Emphasis added.]

[24] The Saskatchewan Court of Appeal rejected Mr. Fulton's submission and held that there was jurisdiction to hear the Crown's appeal. At the material time, the right of appeal under s. 759(2) was worded this way:

> The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part, or against the length of the period of long-term supervision of a long-term offender, on any ground of law.[1]
>
> [Emphasis added.]

[25] Cameron J.A. wrote for the court:

> [7] We do not agree with [Mr. Fulton's] submission for the following reasons. First, the rights of appeal conferred by section 759 are specific to dangerous and long-term offender proceedings. Second, the right of appeal conferred on the Attorney General by subsection 759(2) speaks to a right of appeal "against the dismissal of an application for an order under this Part [Part XXIV]." Third, the application brought by the prosecutor, following the filing of the assessment report, was an application brought pursuant to section 753 of Part XXIV for an order declaring the respondent to be a dangerous offender. Fourth, the trial judge expressly denied the application. In other words, he dismissed it, although he then went on to order a hearing under section 753.1, a hearing directed at determining whether the offender should be found to be a long-term offender, not a dangerous offender.

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[1] Section 759(2) was amended to its current form in 2008 by the *Tackling Violent Crime Act*, S.C. 2008, c. 6.

> [8] Since the trial judge dismissed the application, and since subsection 759(2) confers a right of appeal on the Attorney General "against the dismissal of an application for an order under this Part", it seems obvious that a right of appeal then arose in the Attorney General. And there is little indication to the contrary. It is true that the right of appeal conferred by subsection 759(2) is largely oriented to the dismissal of an application after a hearing (as evidenced by the powers bestowed on the Court of Appeal by subsection 759(4)), and that there was no hearing in this instance. However, we see no reason to suppose that the right of appeal is not engaged where, as here, the application is dismissed before the hearing gets under way, rather than after it has been concluded. The effect is the same, and to hold otherwise would run counter to the ordinary meaning of the words of subsection 759(2), as well as to the purpose of the subsection.
>
> [Emphasis added.]

[26] In *R. v. Goforth*, 2005 SKCA 12, leave to appeal refused [2005] S.C.C.A. No. 456 (S.C.C.), the trial judge dismissed the Crown's application for an assessment on grounds that Mr. Goforth had not been convicted of a serious personal injury offence. The judge went on to impose a conventional sentence.

[27] The Crown appealed the dismissal. The Saskatchewan Court of Appeal specifically noted in its reasons that the appeal was brought pursuant to s. 759(2) of the *Code* (at para. 16). The Court overturned the trial judge's ruling and remitted the matter back "for further consideration … of whether there exist[ed] reasonable grounds to believe Mr. Goforth might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1" (at para. 84).

[28] In *Steele*, the Supreme Court of Canada reviewed a decision to dismiss a Crown application for an assessment. As with *Goforth*, the application was denied because the judge concluded that Mr. Steele had not been convicted of a serious personal injury offence. The Crown appealed the dismissal; however, the Manitoba Court of Appeal upheld the ruling. The matter made its way to the Supreme Court and the dismissal was set aside. The Supreme Court remanded Mr. Steele for an assessment under s. 752.1.

[29] The reasons of the Manitoba Court of Appeal do not specify the right of appeal relied upon by the Crown in seeking a review of the dismissal: *R. v. Steele*, 2013 MBCA 21. However, in tracing the history of the litigation, it is apparent that

the Crown's application for an assessment was dismissed in 2011. The Court of Appeal released its judgment in March 2013. Mr. Steele was sentenced in September 2013 and received a global eight-year term of imprisonment (less credit for pre-sentence custody): *R. v. Steele*, 2013 MBQB 219. The Supreme Court released its decision on the Crown's appeal in 2014. An assessment was completed under s. 752.1 and in 2016, Mr. Steele was found to be a dangerous offender and received an indeterminate sentence: *R. v. Steele*, 2016 MBQB 147.

[30] The logical inference to draw from the case history is that at the time of the Crown's appeal to the provincial appeal court, Mr. Steele had not yet been sentenced; in fact, sentencing did not occur until the appeal was heard and resolved. From this, I conclude that the Crown's appeal from the dismissal of its assessment application must have been brought under s. 759(2) of the *Code* and, importantly, before sentencing. There is no suggestion in the related decisions that this was an improper avenue for appeal, or that the appeal should have awaited the imposition of sentence.

[31] In the above-noted cases, s. 759(2) of the *Code* has been broadly interpreted and found to capture Part XXIV orders that are final in nature. Moreover, appeal courts have accepted, both explicitly and impliedly, that this is the proper appellate route for the Crown in the specific context of an appeal from dismissal of an application for an assessment under s. 752.1(1), even when sentence has not yet been imposed.

Analysis

[32] Similar to the argument advanced in *Fulton*, counsel for the Crown on this appeal submits that the right of appeal from a dismissal under s. 752.1 does not arise under s. 759(2) of the *Code* (or, at the very least, the Crown submits that there is considerable doubt on this point). Instead, it is contended that if the Crown seeks to appeal this form of ruling, it must do what the prosecution did here: wait for the sentencing process to complete and then challenge the dismissal as part of an application for leave to appeal and appeal from the conventional sentence. In

accordance with the *Criminal Appeal Rules*, this would allow the Crown 30 days post-sentence in which to file its notice of appeal.

[33] The Crown's position relies on a characterization of the s. 752.1 ruling as interlocutory. It is well-established that interlocutory orders in criminal proceedings cannot be appealed mid-stream. See *R. v. Verma*, 2016 BCCA 307 at para. 23 and the cases cited therein. The Crown says the scope of s. 759(2) should be construed in a manner consistent with the rule against interlocutory appeals. The application for an assessment is determined before the sentencing process has been completed, whether that ultimately occurs under Part XXIV or in the ordinary course. The policy reasons behind the rule against interlocutory appeals were explained by Neilson J.A. in *Boutilier* (CA). The rule seeks to avoid fragmented and delayed proceedings; appellate determination of issues that are properly left with the trial judge; and appeals of issues that may be rendered moot by the ultimate outcome of the case (at para. 42). The Crown says these concerns are equally applicable to a dismissal under s. 752.1.

[34] Counsel for Mr. Charlie argues that an assessment order (whether granted or denied) is not interlocutory. To the contrary, a determination made under s. 752.1 functions as a jurisdictional gatekeeper in Part XXIV proceedings. If the Crown's application for an assessment is denied, there can be no dangerous or long-term offender hearing. Instead, the case must proceed to a conventional sentencing.

[35] I agree with the respondent on this point. A judge's refusal to order an assessment effectively puts an end to the Part XXIV proceedings. In *Goforth*, the consequences of a dismissal were explained this way for prosecutions involving a serious personal injury offence:

> [28] Subsection 752.1(1) constitutes an entry-like provision, in the sense it provides for entry, on application by the prosecution, to the sentencing regime reserved for dangerous and long-term offenders. In the scheme of Part XXIV, an application to gain entry constitutes the first stage of proceedings to have an offender sentenced as a dangerous or long-term offender.
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> [29] Entry is restricted, of course, for it is subject to two requirements. First, the offender must have been convicted of a "serious personal injury

> offence" as defined in section 752. Second, the court must be satisfied that "there are reasonable grounds to believe the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1". If one or the other of these requirements is not met entry cannot be gained, and that spells an end to the proceedings. If both are met, entry will be gained, but only for a limited purpose at this stage of the proceedings, namely for the purpose of obtaining an assessment of the risk posed by the offender as contemplated by subsection 752.1(2).
>
> [Emphasis added.]

See also *Steele* (SCC) at paras. 32–37 and *R. v. Boutilier*, 2017 SCC 64 at para. 39.

[36] In light of this impact, the respondent is correct that a dismissal of a Crown application for an assessment is a final decision.

[37] *Boutilier* (CA) holds that final decisions under Part XXIV are captured by s. 759(2). The Crown attempts to distinguish *Boutilier* (CA) on grounds that what was at issue in that case was a constitutional declaration, rather than a ruling made under s. 752.1. However, that position ignores the Court's focus on the final nature of the order (see paras. 45 and 51, in particular), a shared feature with the decision at issue in this case.

[38] Consistent with *Boutilier* (CA), the approach taken to Crown appeals from a dismissal under s. 752.1 in other cases, and the plain wording of the provision, I am satisfied that the Crown's right of appeal from dismissal of an application for an assessment lies under s. 759(2). This right of appeal is specifically intended for Part XXIV matters and the s. 752.1 assessment forms an integral part of the dangerous and long-term offender process. Indeed, on a successful Crown appeal, it is s. 759(3)(a)(i) that authorizes a reviewing court to order a remand for the purpose of an assessment. This is precisely the nature of relief sought by the Crown in this case.

[39] The Crown's application for leave to appeal and appeal from sentence does not specify the *Code* provision on which it relies. However, given the nature of the issues sought to be raised on the appeal and the relief requested, the notice functionally melds and jointly invokes the rights of appeal under ss. 759(2) and

676(1)(d), as well as the powers of the Court under ss. 759(3) and 687(1)(a) of the *Code.*

[40] I am aware of nothing at law that precludes ss. 759(2) and 676(1)(d) issues from being heard and resolved together. In *R. v. Roy*, 2008 SKCA 41, for example, the Crown's appeal invoked both rights (at para. 18). The court dismissed the appeal from the ruling under s. 752.1, finding no error of law, but went on to vary the conventional sentence.

[41] Whether the issues are heard together will depend on the particular circumstances of the case, including (but not limited to) how closely after the denial of the assessment a conventional sentence was imposed. Again using *Roy* as an example, the sentence in that case appears to have immediately followed the dismissal. As such, the orders addressed in the appeal were likely pronounced the same day. In other cases, the s. 759(2) appeal may proceed on its own, before the imposition of sentence (as occurred in *Steele*), or be filed by the Crown and held in abeyance, by consent or otherwise, to await the completion of sentencing.

[42] However, whichever of these scenarios may be engaged, each of the independent appeal rights under ss. 759(2) and 676(1)(d) must be invoked and given form in accordance with the period prescribed for notice by the applicable rules of court. In the circumstances of this case, s. 678(1) of the *Code* and Rule 4(1) of the *Criminal Appeal Rules* obliged the Crown to file its appeal from the dismissal under s. 752.1(1) within 30 days from pronouncement of the order (July 24, 2018). It did not meet that deadline. Instead, the notice of appeal was filed more than five months past that date.

Disposition

[43] For the reasons provided, I would hold that the Crown had 30 days from the pronouncement of the order of dismissal under s. 752.1 to file its appeal pursuant to s. 759(2). Accordingly, the Court has no jurisdiction to hear this aspect of the Crown's appeal in the absence of an extension of time to file.

[44] **MACKENZIE J.A.**: I agree.

[45] **BUTLER J.A.**: I agree.

[46] **MACKENZIE J.A.**: This Court lacks jurisdiction as described with respect to this aspect of the Crown's appeal.

[Discussion with counsel re: extension of time application]

[47] **MACKENZIE J.A.**: This matter will go before the Yukon Court of Appeal on November 15, 2019, at 9:00 a.m. for the application for an extension of time.

"The Honourable Madam Justice DeWitt-Van Oosten"