

COURT OF APPEAL OF YUKON

Citation: *R. v. Schmidt*,
2025 YKCA 13

Date: 20250814
Docket: 24-YU919

Between:

Rex

Respondent

And

Nichollis Schmidt

Appellant

Before: The Honourable Justice Fleming
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated
April 30, 2024 (*R. v. Schmidt*, 2024 YKSC 18, Whitehorse Docket 23-AP007).

Oral Reasons for Judgment

Counsel for the Appellant:

J. Budgell

Counsel for the Respondent
(via videoconference):

L. Whyte

Place and Date of Hearing:

Whitehorse, Yukon
August 14, 2025

Place and Date of Judgment:

Whitehorse, Yukon
August 14, 2025

Summary:

The appellant seeks an order appointing counsel under s. 684 of the Criminal Code to assist in his appeal. The appeal is from an order of the Supreme Court of Yukon allowing the Crown's conviction appeal and ordering a new trial for impaired driving. Held: Application dismissed. The appellant failed to establish insufficient means to obtain legal assistance, the first branch of the two-part test for appointment of counsel under s. 684.

FLEMING J.A.:

Introduction

[1] The appellant, Nichollis Schmidt, applies for an order appointing counsel under s. 684 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] Mr. Schmidt is represented by counsel on this application pursuant to a limited appointment of counsel order.

Background

[3] Mr. Schmidt was charged with impaired driving contrary to ss. 320.14(1)(a) and (b) of the *Criminal Code*.

[4] He was acquitted on July 10, 2023 by the trial judge of the Territorial Court of Yukon: 2023 YKTC 32. Defence counsel argued successfully that Mr. Schmidt's rights under ss. 8, 9, 10(a) and (b) of the *Charter* had been breached and evidence of his breath samples was excluded under s. 24(2).

[5] On April 30, 2024, the Supreme Court of Yukon allowed the Crown's conviction appeal and a new trial was ordered. The summary conviction appeal judge found the trial judge erred in interpreting the elements of the reasonable suspicion test, the constable did have a reasonable suspicion grounding the ASD demand, and the demand was made immediately.

[6] Mr. Schmidt filed a notice of appeal in this Court on May 30, 2024.

[7] On September 17, 2024, he was informed that his application for legal aid had been denied by the Yukon Legal Services Society ("YLSS") on financial grounds.

[8] Justice Iyer made the limited appointment of counsel order on March 18, 2025. In her reasons she observed that Mr. Schmidt had provided "limited financial information": at para. 16. Her reasons also indicate he deposed to an income of \$70,000, debts of \$40,000; assets in the same amount; and expenses of \$3,500 per

month. He also explained he lived in his trailer, which is the main source of his debt, on his parents' property; and he works for his dad repairing and maintaining heating systems.

[9] After that order was made, Mr. Schmidt appealed the legal aid decision. On August 5, 2025, the YLSS Board of Directors upheld the decision to deny Mr. Schmidt representation on the grounds of financial ineligibility.

Legal Framework

[10] Section 684 of the *Criminal Code* provides in part:

684 (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[11] The test for an order under s. 684 was summarized in *R. v. Silcoff*, 2012 BCCA 463 (Chambers):

[20] The overriding purpose of s. 684 of the Code is to protect the right to be heard and to ensure the fairness of the proceedings: *R. v. Barton and Federici*, 2001 BCCA 477 at para. 7.

[21] Appointment of counsel under s. 684 is subject to a two-part test, generally considered in the following order:

1. The accused must have insufficient means to obtain legal assistance; and
2. Appointment of counsel must be in the interests of justice.

...

[23] The factors to be considered under the requirement of "interests of justice" were summarized in *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632 at para. 6 and 13, 94 B.C.L.R. (3d) 67 (Levine J.A. in Chambers). They are as follows:

- a. The points to be argued on appeal;
- b. The complexity of the case;
- c. Any point of general importance in the appeal;
- d. The applicant's competency to present the appeal;
- e. The need for counsel to find facts, research law or make argument;

- f. The nature and extent of the penalty imposed; and
- g. The merits of the appeal.

Positions of the Parties

[12] Mr. Schmidt argues he has established both elements of the test for appointment of counsel.

[13] An opinion letter provided by counsel identifies four grounds of appeal as having “considerable merit”. She asserts the appeal judge erred in:

- a) finding the officer’s suspicion the applicant had alcohol in his body was objectively reasonable;
- b) substituting her own findings of fact for those of the trial judge;
- c) relying on her substituted findings of fact to conclude the officer read the breath demand to the applicant immediately upon forming his suspicion; and
- d) finding that, because the ASD test was administered immediately, it followed that the ASD demand was read immediately.

[14] Crown counsel does not dispute Mr. Schmidt has met the merits threshold and does not have the necessary skills to present the appeal.

[15] His affidavits filed June 16 and August 8, 2025, describe the following financial circumstances:

- a) He was able to retain counsel privately for his trial and the summary conviction appeal because both lawyers accepted modest retainers (\$8,000 and \$4,000, respectively). He has no additional funds to pay for a further appeal.
- b) He works as an oil burner mechanic for his family’s business. His gross income is approximately \$80,000, and approximately \$60,000 after taxes.

- c) Along with living in his trailer on his parents' property, during the winter he lives in their home and pays rent. He also pays for utilities and approximately \$1,500 per month toward the debt on his trailer which is his only major asset.
- d) The rest of his income goes to his living expenses and he will not be able to save money for another appeal.
- e) His parents have advised him they will not assist him with the cost of the appeal and he has no other relatives or friends who could provide financial assistance for his appeal.

[16] The Crown asserts the application should be dismissed because Mr. Schmidt has failed to establish that he lacks the financial means to retain counsel.

[17] The Crown also identifies other considerations which it says weigh against appointing counsel being in the interests of justice. First, it emphasizes that Mr. Schmidt does not have a criminal record and so is very unlikely to be sentenced to a term of imprisonment, noting the mandatory minimum penalty is a fine of \$1,500 and a one-year driving prohibition. Crown counsel also highlights that Mr. Schmidt is not appealing from a conviction, but only the ordering of a new trial. Finally, the Crown points to unexplained delay, including five months between Mr. Schmidt being informed he was financially ineligible for legal aid and the date he first brought the application under s. 684.

Discussion

[18] With respect to the stand alone financial-circumstances criterion under s. 684, an appellant must establish that they do not have the means to fund the appeal. As Justice Frankel discussed in *R. v. Lawson*, 2017 BCCA 288, this is something the Court determines regardless of any previous assessment made by legal aid officials: *R. v. Assoun*, 2002 NSCA 50 at para. 49 (Chambers), 203 N.S.R. (2d) 316; *R. v. Lubin*, 2016 ONCA 780 at para. 9 (Chambers).

[19] In *United States of America v. Fraser*, 2016 BCCA 79, Justice Bennett identified the financial information and factors considered in authorities dealing with applications for state-funded counsel at trial, what is commonly referred to as *Rowbotham* applications, in deciding whether the appellant had met the financial criteria for a state funded appeal (at paras. 12–13 (Chambers): *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)). The factors include not only the applicant's financial circumstances and ability to raise funds from other sources, but also whether they have made efforts to save money, organized their financial affairs so as to be able to cover the anticipated legal costs or looked for counsel willing to work at LSS rates.

[20] The Crown argues the financial information Mr. Schmidt has provided is not adequate to meet the insufficient financial means branch of the test under s. 684. Crown counsel points to the absence of information about his disposable income of approximately \$18,000 per year assuming a net income of \$60,000 and monthly expenses of \$3,500. Nor has he addressed whether his expenses could be pared down, if he could obtain financing to cover the cost of counsel, or whether he could increase his income by working more.

[21] Mr. Schmidt indicated today that he is not able to provide further financial information.

[22] I agree with the Crown that based on the information he has provided, and in particular, the information regarding his gross and net incomes relative to his estimated monthly expenses, which appear to leave him with not insignificant disposable income, he has not established that he has insufficient means to pay for counsel. Along with the missing information the Crown has highlighted, Mr. Schmidt has not addressed why he has been unable to save money over the rather extended period since filing his notice of appeal, or what the anticipated cost of counsel would be.

[23] Having failed to establish the first branch of the test, it follows that Mr. Schmidt's application cannot be made out.

[24] I dismiss his application.

"The Honourable Justice Fleming"