

Citation: *R. v. Schafer*, 2019 YKTC 41

Date: 20191010  
Docket: 17-00735  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Cozens

REGINA

v.

CHRISTOPHER RUSSELL SCHAFER

Appearances:  
Paul Battin  
Greg Johannson

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] Chris Schafer has applied, by Notice of Application filed May 1, 2019, to vary the terms of the s. 810.2 Recognizance he was placed upon by Ruddy J. on May 10, 2018, with written reasons set out in *R. v. Schafer*, 2018 YKTC 18 released May 23, 2018, appeal dismissed 2018 YKSC 52, leave to appeal granted 2019 YKCA 12.

[2] When I rendered my decision on September 26, 2019, I originally advised counsel that this was to be an oral decision. However, following giving my decision, after hearing from counsel for Mr. Schafer, I advised that I would provide written Reasons for Judgment. These are those Reasons. These are substantially the same as I rendered orally in Court.

[3] In particular, Mr. Schafer wishes the following terms to be removed from the Recognizance, or otherwise modified:

6. Reside as directed by your Bail Supervisor and not change that residence without the prior written permission of your bail Supervisor.

7. Abide by a curfew by being inside your residence between 10:00 p.m. and 7:00 a.m. daily except with the prior written permission of your Bail Supervisor or except in the actual presence of an adult approved in advance by your Bail Supervisor. You must answer the door or telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition.

8. Not possess or consume alcohol and/or controlled drugs and substances that have not been prescribed for you by a medical doctor.

[4] In submissions, counsel for Mr. Schafer also requested that the following condition be removed:

9. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, bar, pub, tavern, lounge or nightclub.

[5] The grounds relied upon by Mr. Schafer are that:

1. The s. 810.2 recognizance has now been in force a year.

2. In that time, the Applicant has not committed (or been alleged to have committed) any serious personal injury offences.

3. The s. 810.2 recognizance has carried significant consequences on the liberty of the Applicant. These consequences undermine the well-being of the Applicant.

[6] Since being placed on the s. 810.2 recognizance, Mr. Schafer has incurred the following charges related to the breaches of the Recognizance (Court file #17-00735):

17-00735

May 15 + June 17, 2018: 17-00735A: s. 811 – not possess or consume alcohol – GP – 60 days (54 of which were time served)

June 17, 2018: 17-00735B: s. 811 – not possess or consume alcohol/not possess firearm etc. – withdrawn

July 31 – August 6, 2018: 17-00735C: s. 811 – fail to abide by a curfew – GP – 30 days (8 days of which were time served)

August 6, 2018: 17-00735D: s. 811 (x2) not possess or consume alcohol/fail to abide by a curfew – SOP

December 28, 2018: 17-00735E: s. 811 – fail to abide by curfew – GP – 15 days time served (consecutive) (s. 811 not possess or consume alcohol SOP)

January 24, 2019: 17-00735F: s. 811 – fail to abide by curfew – GP – 15 days time served (consecutive)

February 2, 2019: 17-00735G – s. 811 – not possess or consume alcohol – SOP

March 9, 2019: 17-00735H – s. 811 – fail to abide by a curfew – GP - 11 days (10 days of which were time served)

March 21, 2019: 17-00735 I: s. 811 – not possess or consume alcohol – GP – one day deemed served

April 5 – May 2, 2019: 17-00735J: ss. 811 - fail to report to Bail Supervisor – GP – 15 days time served (733.1(1) fail to report SOP)

April 20, 2019: 17-00735K: s. 811– not possess or consume alcohol – GP – 7 days time served (consecutive) (s. 733.1(1) fail to keep the peace and be of good behaviour SOP)

May 14, 2019: 17-00735L: s. 811 – fail to report to a bail supervisor - GP – 7 days time served (consecutive)

June 4, 2018: 17-0035M: ss. 733.1(1)/811 – fail to keep the peace and be of good behaviour – not attend premises whose primary purpose is the sale of alcohol (SOP)

August 11, 2019: 17-00735N: s. 811 – not possess or consume alcohol – GP - 1 day time served (consecutive) (s. 811 fail to abide by a curfew SOP)

August 20, 2019: 17-00735O: ss. 811/733.1(1) – not possess or consume alcohol/fail to keep the peace and be of good behaviour – ongoing

[7] In addition, Mr. Schafer was charged as follows:

August 4, 2018: 18-00368: s. 334(b) – theft – GP – 30 days time served and six months probation

March 12, 2019: 18-00368A: s. 811 – fail to report as directed - GP – 6 days (5 of which were time served) (s. 733.1(1) fail to report as directed – SOP)

April 30, 2019: 19-00110: ss. 320.14(1)(b)/811 – operate conveyance over .08/not possess or consume alcohol – GP – fine/seven days time served (concurrent) – (s. 320.14(1)(a) – SOP)

May 17, 2019: 19-00160: ss. 264.1(1)(a)/733.1(1) – utter threats/fail to keep the peace and be of good behaviour – acquitted after trial – (s. 811 – not possess or consume alcohol – dismissed)

June 4, 2019: 19-00206: ss. 811/334(b) – not possess or consume alcohol/theft – GP – 1 and 10 days time served consecutive – 733.1(1)/811/334(b) – fail to keep the peace and be of good behaviour/not attend premises whose primary purpose is the sale of alcohol/theft – SOP

August 12, 2019: 19-00376: ss. 811/733.1(1)/129(a) – not possess or consume alcohol/fail to keep the peace and be of good behaviour/resist arrest – ongoing – (NG 2 and 3)

August 20, 2019: 19-00394A: ss. 264.1(1)(a)/733.1(1)(a) – threats/fail to keep the peace and be of good behaviour – ongoing – NG

August 25, 2018: 18-00352: ss. 266/334(b)/811 – assault/theft/not possess or consume alcohol – SOP

[8] As of September 26, 2019, Mr. Schafer will have spent in excess of 300 days in custody on remand since the Recognizance was imposed. The sentences imposed for the offences to which he entered guilty pleas attributed some of this remand, perhaps approximately 191 days, to the custodial dispositions imposed.

[9] On May 21, 2019, on consent, an Order was made for a Psychological Assessment. On June 10, 2019, a further Order was made for disclosure of the documents Cpl. Kirk Gale reviewed for his Affidavit in support of the original s. 810.2 application (the “Affidavit”). This Order was made in order to assist the professionals who were to conduct the risk-focused Assessment. This Assessment was not completed, however, and I understand that is due to Mr. Schafer deciding not to participate. There may well be a valid reason for his decision not to do so.

[10] I understand that the issuance of the s. 810.2 Recognizance is before the Yukon Court of Appeal. That may or may not be the reason. There may be another reason.

[11] This said, while I will not draw a negative inference against Mr. Schafer as a result of his decision not to participate, I am simply left without a current risk assessment, and must make my decision on the basis of the information otherwise before me.

[12] Crown counsel is opposed to any of the above terms being varied. Counsel submits that there is no evidence that any of the risk factors identified by Ruddy J. in her decision have changed. In particular counsel points to para. 26 of Ruddy J.’s decision wherein she states:

**26** In addition to credibility concerns, Mr. Schafer’s evidence also clearly demonstrated that several of the risk factors identified in the earlier assessments continue to be present including blaming others and portraying himself as a victim, distrust of authority figures and others in the system, ongoing concerns in relation to substance abuse, a lack of insight into his risk factors and the lack of a structured and feasible plan to address his risk factors.

[13] I note that the evidence of the Crown in support of the s. 810.2 application before Ruddy J. was the Affidavit evidence of Cpl. Gale, as well as his *viva voce* testimony. The source documents upon which the risk assessment contained in the Affidavit was prepared were not proffered as evidence. In her decision, Ruddy J. made note of her concern that she was not presented with the documentation from which Cpl. Gale prepared the Affidavit. In para. 40 she stated:

**40** After much consideration, I have decided that the evidence in this case is sufficient to satisfy me that there are reasonable grounds to fear that Mr. Schafer will commit a serious personal injury offence, though reaching this conclusion would certainly have been easier had the source material upon which Cpl. Gale's affidavit is based been provided to the Court.

[14] Ruddy J. was provided information that the community of Old Crow was concerned about Mr. Schafer being allowed to return to the community. Ruddy J. was aware that she could not banish Mr. Schafer from the community.

[15] In paras. 51 and 52 Ruddy J. stated:

**51** With respect to residency, while there is some evidence before me to suggest that at least some residents of Old Crow do not want Mr. Schafer to return to the community, Crown has conceded that I cannot impose an order banishing Mr. Schafer from the community. On the other hand, I am mindful of the fact that the isolation and resource limitations of the community, make it difficult to ensure that Mr. Schafer's risk factors can be effectively managed to ensure community safety. For example, the email from Dahn Casselman filed as exhibit 6 makes it clear that Old Crow is unable to administer and monitor methadone or suboxone.

**52** For this reason, I am of the view that it is reasonable to task the bail supervisor with ensuring that Mr. Schafer only return to the community if and when the appropriate supports and structure can be put in place to manage his risk factors. For that reason, Mr. Schafer, the order will include the condition that you will:

6. Reside as directed by your Bail Supervisor and not change that residence without the prior written permission of your Bail Supervisor;

[16] Ruddy J. stated in para. 53:

**53** I am further satisfied that Mr. Schafer's risk factors are such that conditions to ensure that he is not in the community at high risk times, that he abstain from substance use and that he seek programming to assist him in managing his risk factors are reasonable and desirable.

[17] Ruddy J. then imposed conditions 7 – 10 of the Recognizance.

[18] The situation in Old Crow has changed only to the extent that there is a different Chief and Counsel in Old Crow as compared to the time the hearing was before Ruddy J. This said, while the idea of reintegrating Mr. Schafer into the community is not necessarily opposed, there is as yet no substantive plan in place to facilitate such a reintegration. The same general concerns would appear to continue to exist.

[19] In the course of the present application, additional documentation, in particular that which comprised the source material that underlay Cpl. Gale's affidavit, was to be provided to the psychologist(s) who were to prepare the risk assessment.

[20] Subsequent to learning that the risk assessment would not be prepared, although initially indicating that I expected that I would not need to see these documents in making my decision, I then informed counsel that I had changed my mind.

[21] Crown counsel expressed a concern about having these documents provided to me for review. The matter was brought back before me for further submissions as to whether I should be provided these documents.

[22] Crown counsel submitted that, as there was nothing new in Mr. Schafer's circumstances, a review of these documents was tantamount to participating in what was essentially an appeal of Ruddy J.'s decision.

[23] With all due respect, I disagree on this point. We are well over a year from the date that the Recognizance was imposed, and there is evidence as to what Mr. Schafer has been doing in the course of time since, both positive and negative, evidence that was obviously not before Ruddy J. My interest in looking at these documents was not to perhaps come to a different decision than Ruddy J. did on essentially the same evidence, albeit with the underlying documentation Ruddy J. did not have before her. Rather it was to see whether there was anything in these documents that, factored alongside the circumstances in Mr. Schafer's life and taking into account the time period since the Recognizance was imposed, that may address the issue of any present and future risk presented by Mr. Schafer. So Crown counsel's concerns in this regard are, in my mind, misplaced. Other than this concern, I am not aware of any reason why the disclosure of these documents would be a contentious issue.

[24] This said, and to be frank, the reality is that the likelihood that any information would be contained within these documents that would have a significant bearing on the issue of current and future risk is, in my mind, remote at best. I had simply wished



to avail myself of all potentially relevant information so as to “leave no stone unturned” so to speak.

[25] However, in the interests of moving this matter forward and, given the unlikelihood that a review of this documentation would provide relevant information of any substantial probative value for the purpose of this Application, I am rendering this decision without reviewing this additional documentation.

[26] Filed as Exhibits on this Application were the following:

- Yukon Community Corrections certificate of Achievement for successful completion of the 12 session Substance Abuse Program July 5 – August 9, 2019;
- Mr. Schafer’s criminal record.

[27] I also note that, although Mr. Schafer at one point agreed for a Suitability Assessment to be completed in order to assess whether he was suitable for the Yukon Community Wellness Court, this was not completed. The reason provided is that Mr. Schafer, on July 5, 2018, advised Probation Officer Alex Campbell that he intended to relocate out of the Yukon.

[28] Mr. Schafer finds himself in a precarious situation. His antecedents resulted in him being placed upon the s. 810.2 Recognizance for a period of two years, on the basis that there were reasonable grounds to fear that he may commit a serious personal injury offence, as assessed from both a subjective and objective perspective on a balance of probabilities (para. 4 of **Schafer**).

[29] The terms of the Recognizance are designed to place only such restrictions on Mr. Schafer's liberty as are considered necessary to reduce the risk he was found to pose for the future commission of such a serious personal injury offence. They are not intended to be punitive.

[30] The result, however, is that Mr. Schafer, primarily on the basis of his failing to comply with the terms of the Recognizance, has not found himself spending most of his time "at liberty" on this Recognizance, but rather in fact in custody, which is a punitive result.

[31] He is displaced from his community, and somewhat isolated in Whitehorse, where he has little in the way of roots, as compared to what is potentially available for him in Old Crow. Such roots can be rehabilitative.

[32] However, the concerns with respect to Mr. Schafer being allowed to return to the community without a clear indication that his risk factors have been mitigated are legitimate. In saying this, I recognize that the risk Mr. Schafer is considered to pose remains a present risk within the Whitehorse community as well, and is not limited to Old Crow. However, Whitehorse is not a remote community like Old Crow, and has more resources available. I am not saying that Whitehorse is or will be the best place for Mr. Schafer to reside and try to move forward with his life in a positive and pro-social manner. In fact, I suspect that re-connecting with his roots in the place he grew up and is more foundationally connected with, and where his family supports are present and available, is likely to offer the best rehabilitative structure. The question,

however, is when the balance point tips, such as to allow Mr. Schafer to reside in Old Crow.

[33] I note that there is nothing in the Recognizance that prevents Mr. Schafer from going to Old Crow, as long as he is back the same day for curfew compliance. That is likely not feasible, of course, given the remoteness of the community and air travel schedules.

[34] Mr. Schafer wishes the reside and curfew clauses struck from the Recognizance. While a discretion is vested in the Bail Supervisor to allow Mr. Schafer to reside elsewhere or to have curfew exceptions, such as would allow him to travel to, and stay in, Old Crow, or elsewhere, this discretion has not been exercised. This, in large part, is due to concerns related to whether there has been a significant enough change in circumstances such as would show there has been a reduction in Mr. Schafer's risk factors since the time the Recognizance was imposed, and/or that there is a structured and workable plan in place to manage Mr. Schafer, in particular in the community of Old Crow, for such time as he would be allowed to visit or reside other than in Whitehorse.

[35] A Catch-22 of sorts: his rehabilitation may best be effected through living "at home" where his roots and supports are, however, he will not be allowed to do that, until he has shown that he has been sufficiently rehabilitated. And in the meantime he spends the majority of his time in custody, for being insufficiently rehabilitated to comply with the terms of the Recognizance. And there is a very real possibility that this

entire scenario may be repeated in April/May 2020 when the current Recognizance expires.

[36] Mr. Schafer is here, of course, because of his past criminal actions. He bears this responsibility and cannot avoid the consequences of his past choices. He is not without options: he could avail himself of all the rehabilitative programming available to him in Whitehorse and, through such rehabilitative efforts and better compliance with the terms of the Recognizance, establish a solid evidentiary foundation to demonstrate that his risk factors have been reduced.

[37] However, it must be kept in mind that Mr. Schafer does not work from a solid and stable foundation himself; he struggles and his struggles cannot be separated from his status as an Indigenous individual. **Gladue** factors (*R. v. Gladue*, [1999] 1 S.C.R. 688), are applicable in Mr. Schafer's circumstances and, while not an excuse for his criminal and anti-social behaviour, these provide a context in which his behaviour must be measured and his moral blameworthiness and culpability assessed. He needs help. It is our, society's, obligation to provide him this help.

[38] As I stated in the course of this Application, there is an aspect of the sociological construct of anomie/strain theory at play here. In simplest terms, Mr. Schafer is told that he is expected to comply with certain societal norms and goals. If he does not comply, he will be punished. However, Mr. Schafer lacks certain means and skills to live in compliance with these expected norms and goals and finds himself in non-compliance. The larger the gap becomes between expectations and his inability to comply or lack of success in attempting to do so, the more he experiences the

disconnection from society that contributes to feelings of frustration, resentment, hopelessness and anger. This then contributes to his criminality and anti-social behaviour.

[39] By way of analogy: he stands on one side of a chasm and the expectations of society are on the other side. There is no bridge and he lacks the necessary tools and skills to build one himself. He cannot get across. So, frustrated and angry, he reacts, and he does so in a manner inconsistent with his rehabilitation.

[40] While this is not an excuse for criminal behaviour, as Mr. Schafer remains accountable for his actions, it nonetheless provides a context for his behaviour to be explained and rationalized. It also provides a context for a bridge-building blueprint to be designed.

[41] As I stated, he needs help.

[42] I would expect, in this regard, that there would be efforts made within the community of Old Crow to work towards reintegrating Mr. Schafer. It is his home, and these are his people. In all likelihood, unless Mr. Schafer reoffends criminally in a significant manner, he will be returning there at some point. It would be best if he were able to do so as part of a rehabilitative plan while he remains young enough to become a positively contributing member of his community.

[43] Mr. Schafer also must make some decisions to take advantage of the rehabilitative programming available to him in Whitehorse and do his best to make better choices.

[44] Turning to the application to strike the reside and the curfew clauses, I find that, in the absence of sufficient evidence to establish that Mr. Schafer has taken such steps as would show that he has established to a satisfactory level that the risk factors identified by Ruddy J. have been reduced, I cannot remove either of these clauses. I appreciate that Mr. Schafer has completed some programming and there is some evidence that he is becoming more self-aware of his responsibility for his choices, and his actions, and of the need for him to mitigate his risk factors. In saying this, I wish to ensure that it is understood I am not saying that a formal risk assessment is necessarily required. In the absence of such an assessment other evidence may serve to show that sufficient risk-reduction has been achieved.

[45] I also recognize that Mr. Schafer's actions while on the Recognizance have continued along the path of low-level breaches and minor substantive offences. This, of course, is similar to the evidence before Ruddy J. as to Mr. Schafer's actions in the years just before the hearing came before her.

[46] This said, I am prepared, however, to amend both Clauses 6 and 7 to add the words: "or except with the permission of the Court". The Bail Supervisor operates with a different level of discretion than the Court does, which may be at times somewhat fettered, whereas the Court's may not. These amendments also serve to simplify the process for Mr. Schafer to obtain permission from the Court. A simple Court appearance will suffice, upon sufficient notice to the Crown; a more formal variation application is not required. In this regard, I suggest that every effort be made to put such a permission request before Ruddy J. or myself, as it is best that such an

application be dealt with by a judge very familiar with the circumstances of the Recognizance and Mr. Schafer.

[47] With respect to Clause 8, the not possess or consume alcohol and/or controlled drugs and substances Clause, for the same lack of risk-reduction evidence as above, I find that I cannot remove this Clause. Alcohol abuse remains a significant risk factor for Mr. Schafer and to remove this Clause would not only put the public at risk, but also Mr. Schafer for the potential commission of a serious personal injury offence and the resultant consequences.

[48] This said, this Clause is preventative in nature and, if breached in isolation, should be treated that way. It allows intervention and a restriction of Mr. Schafer's liberty at a time when he is most at risk, but should be as limited to that as possible. I appreciate and understand the submission that this Clause sets Mr. Schafer, as a struggling alcohol abuser, up for failure, so to speak. I would expect that the consequences for any such breach, in particular custody whether on remand or at a sentencing hearing, would generally be minimal, if any custody is to be imposed at all. In saying this, I am not to be seen as fettering the discretion of any Judge or Justice dealing with such a breach in future.

[49] If Mr. Schafer is able to find a way to not abuse alcohol, at least in part due to this restriction on his liberty, it also has the potential to set him up for success.

[50] With respect to Clause 9, I will not change this Clause. There is no need for Mr. Schafer to attend any such place. I appreciate that in saying this, if Mr. Schafer decides that he needs/wants to drink, it deprives him of the "legal" ability to attend such

a place (which would, of course, if alcohol was purchased and/or consumed result in him breaching Clause 8), or to attend any such place with others, even if he was not consuming alcohol. To me, however, it would be illogical to uphold Clause 8 and strike Clause 9. If anything, being allowed to attend any such place would potentially have the impact of allowing Mr. Schafer to be in a situation that would have the effect of putting him, and therefore the community, at risk.

[51] To conclude, the impasse of sorts that Mr. Schafer appears to be at needs to be surpassed. Mr. Schafer carries the bulk of the load in this regard. He needs to make better decisions and avoid putting himself into high-risk situations. But others also need to step in to make this load more manageable for Mr. Schafer. It is not only in Mr. Schafer's interest to do so; it is in the interest of society, both for the protection and security of the public, but also because it is the right thing to do, and doing the right thing serves us all.

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COZENS T.C.J.