Citation: *R.* v. *Schafer*, 2018 YKTC 18

Date: 20180523
Docket: 17-00735
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

CHRISTOPHER RUSSELL SCHAFER

Appearances:
Noel Sinclair — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR JUDGMENT

[1] These reasons were read in court on May 10, 2018, at which time I indicated that I would prepare them to publish.

[2] The Crown is seeking to have Christopher Schafer bound by the conditions of a peace bond pursuant to s. 810.2 of the *Criminal Code*. The issues to be decided are as follows:

1. Does the evidence establish that there are reasonable grounds to fear that Mr. Schafer will commit a serious personal injury offence;
2. If so, what conditions should be imposed; and
3. In particular, can the Court impose a condition requiring Mr. Schafer to provide bodily substances to confirm abstinence?

1. Assessment of grounds:

[3] With respect to the first issue, I am mindful of the 2001 decision of Stuart J. of this Court in *Haydock v. Baker,* 2001 YKTC 502. While the decision relates to a private citizen's application for a peace bond pursuant to s. 810, I agree with Judge Stuart that, absent express statutory language to indicate otherwise, there would appear to be no reason to apply a different standard to other types of peace bonds, including those pursuant to s. 810.2. Furthermore, I would note that there was no argument by counsel to suggest that a different standard ought to be applied to an application under s. 810.2.

[4] The test is clearly set out in the section as whether there are reasonable grounds to fear that the respondent will commit a serious personal injury offence. Reasonable grounds, in turn, are assessed from both a subjective and objective perspective on a balance of probabilities standard.

[5] The case for the Crown rests, primarily, on a detailed affidavit prepared by Corporal Kirk Gale, the Crime Reduction Coordinator for RCMP "M" Division. Cpl. Gale adopted the affidavit in his *viva voce* testimony.

[6] The affidavit of Cpl. Gale includes, as an exhibit, a risk assessment outlining the reasons for his fear that Mr. Schafer will commit a serious personal injury offence, which is based on materials provided to Cpl. Gale by Corrections Canada. The source materials upon which the assessment is based were not provided to the Court.

[7] Both the respondent, Mr. Schafer, and his mother, Marion Schafer, testified. Mr. Schafer, through his counsel, takes the position that the grounds as put forward by the

Crown do not meet the test. He says that he is a different person now and does not represent a risk to the community. His counsel submits that while the evidence does clearly indicate that Mr. Schafer is at high risk of breaching conditions to which he may be subject, the evidence falls short of establishing grounds to fear that he will commit a serious personal injury offence, noting, in particular, that Mr. Schafer's last conviction for a serious personal injury offence was in 2010.

[8] In assessing whether the test has been met, the affidavit of Cpl. Gale raises three areas relevant to the inquiry: Mr. Schafer's criminal record; his performance in custody and on court orders; and risk and psychiatric assessments completed in relation to Mr. Schafer.

Criminal Record:

[9] Crown has filed, as exhibit 8, a consolidation of Mr. Schafer's criminal convictions with 39 entries. Further information with respect to the facts of some of the more relevant entries is included in Cpl. Gale's affidavit and in reasons for judgment filed in relation to his two most serious convictions in 2000 and 2003.

[10] Of particular note are the following convictions for offences of violence:

- In 1998, Mr. Schafer was convicted of assault with a weapon in which he went to the male victim's home, and during the course of an argument, swung a knife at the victim at least twice, cutting through two layers of clothing, but not piercing the skin. Mr. Schafer was sentenced to serve a six-month conditional sentence to be followed by 12-month probation order;

- Also in 1998, Mr. Shafer was convicted of robbery in which he put a stranger in a choke hold, struck him in the face with a closed fist, and took his wallet. Mr. Schafer received a six-month conditional sentence;

- In 2000, Mr. Schafer was convicted of a sexual assault with a weapon. The circumstances are set out in more detail in the reasons for judgment filed as exhibit 2, but, in summary, involve an intoxicated Mr. Schafer forcing his way into the female victim's home, threatening her with a knife, and refusing to leave the residence. Over the course of the evening, Mr. Schafer committed one act of attempted sexual intercourse and two acts of forced full intercourse, all against the victim's will. Mr. Schafer was credited at 2:1 for four months spent in pre-trial custody and sentenced to two years less a day to be followed by a three-year probation order;

- In 2003, Mr. Schafer was convicted of a break enter and commit sexual assault with a weapon. Again the facts are set out in detail in the reasons for judgment also filed as part of exhibit 2. In summary, Mr. Schafer entered a home in which two young women were asleep, he overcame the resistance of the first victim by punching her and holding a knife with a seven and one half inch blade to her stomach and throat. He attempted sexual intercourse, but was unsuccessful due to the victim's struggles. The second victim woke up to see Mr. Schafer choking her friend. When she went to her friend's aid, Mr. Schafer grabbed her by the neck and dragged her into the living room, enabling the first victim to go for help. Mr. Schafer was given double credit for one year in pre-trial custody and sentenced to an additional five years followed by a five-year long term supervision order;

- Also in 2003, Mr. Schafer assaulted a correctional officer by threatening to throw coffee on the officer, and attempting to hit the officer in the stomach. Mr. Shafer was sentenced to 90 days in custody;

- In 2010, Mr. Schafer was convicted of robbery by threatening a bank teller, telling her that someone would be hurt if his demands were not met. He did not produce a weapon or use actual violence. He was sentenced to 32 months in custody.

[11] In addition to these offences of violence, Mr. Schafer's record includes numerous convictions for breaching various court orders, including five instances of breaching his long term supervision order, with sentences ranging from 30 days to 32 months.

Performance in custody and on court orders:

[12] At paragraph 14 of the risk assessment, Cpl. Gale indicates that "Mr. Schafer's institutional history is fraught with incidences of violence, threatening staff, disrespectful attitude and inmate fights." In November of 2012, Mr. Schafer was verbally aggressive and threatening towards correctional officers, and physically resisted efforts to apply handcuffs. In July of 2015, it was recommended that Mr. Schafer be transferred to Kent Institution after assaulting another inmate, following which the inmate required surgery. In total, Mr. Schafer committed 17 violations of rules and regulations including property damage, abusive language, contraband, and committing violence against a supervisor.

[13] Mr. Schafer's history on community supervision is equally poor. In addition to the numerous convictions on his criminal record for breaching various court orders, Mr. Schafer's long term supervision order was suspended at least 16 times, primarily for substance use or relationships with women. Breaches of his long term supervision order also include instances of being unlawfully at large.

[14] It should be noted that, on March 9, 2018, Mr. Schafer was placed on an interim undertaking pending hearing of this 810.2 application. On March 24, 2018, Mr. Schafer was the subject of an investigation in which it is alleged that he breached his curfew, provided a false name to the police, smelled of alcohol, and refused to provide a breath sample. On March 26, 2018, he pleaded guilty to obstruction by giving a false name and a curfew breach. He was sentenced to five days on the obstruction charge and 30 days on the breach of curfew.

Risk and psychological assessments:

[15] Cpl. Gale's affidavit refers to a number of risk assessments completed in relation to Mr. Schafer. While the affidavit is unclear with respect to when some of the tools were administered, Cpl. Gale testified that all were done between 2003 and 2011. The majority of the risk assessment tools administered place Mr. Schafer at high risk to reoffend violently and sexually. In addition, reference is made to psychological assessments completed in 2004 and 2008 that concluded that Mr. Schafer is in the high range for risk of general violence and moderate-high for sexual violence.

[16] Of particular interest for the purposes of this proceeding, are the risk factors identified as elevating Mr. Schafer's risk, which denote some common themes. The HCR-20 noted several static historical factors, but also identified a number of clinical factors including Mr. Schafer's limited insight, negative attitudes, impulsivity and unresponsiveness to treatment.

[17] A specialized sex offender assessment, completed in 2011, indicates that "Mr. Schafer's ability to succeed in the community is based on his transformation of anti-authority attitude and maladaptive behaviour, positive community support and a structured release plan."

[18] In the 2004 psychological assessment, issues identified as cause for concern included:

> …Mr. Schafer's low frustration tolerance and propensity for angry outbursts; his difficulty coping with authority figures towards whom he was openly defiant, threatening and aggressive; his distrust of others and unwillingness to accept assistance or interventions; his limited insight into

> his criminal offending; his lack of victim concern/empathy; his strong pro-criminal attitudes and beliefs and tendency to blame others and to adopt a victim stance; and the fact he demonstrated classic antisocial personality traits characterized by impulsive, irritable, aggressive, adventurous and hedonistic tendencies coupled with a poly substance abuse problem.

[19] Concerns are raised in the assessments with respect to Mr. Schafer's willingness both to engage in programming as well as his ability to internalize the programming and translate it into meaningful change. In particular, it is noted in the 2008 psychological assessment that Mr. Schafer had not successfully completed any further programming since the 2004 assessment.

[20] Mr. Schafer is noted to have quit the community integration program after attending only two sessions in July 2008. In November of that same year he attended a few sessions of a one-on-one substance abuse program, but was suspended due to substance use. In December 2008, he attended only two sessions of a sex offender treatment program. Similarly, he attended only two sessions with a psychologist in December 2008, before failing to attend for future appointments. He was released prior to completion of the Substance Abuse Management program in 2009, with the final report noting his need for "substantial guidance and assistance" if he is to be successful.

Mr. Schafer's evidence:

[21] Mr. Schafer provided a detailed account of his time in incarceration and on community supervision. His recall for dates was quite extraordinary, however, his evidence overall did little to persuade me that he does not present as a risk to reoffend violently or otherwise.

[22] Firstly, there were significant concerns with respect to his credibility which undermine the reliability of his assertions that he does not present as a risk. In particular, there were a number of times when Mr. Schafer contradicted himself.

[23] One clear example of this can be seen in his account of his most recent charges for breaching his undertaking. He says that he had received an anonymous call to collect his nephew at the 202 Hotel. Knowing it was past curfew, he nonetheless made the decision to go to the 202. He says the call was a ruse, his nephew was not present, and Mr. Schafer was essentially jumped by a number of individuals. Notwithstanding his guilty plea to obstruction, he now says he did not provide a false name to the police; they simply misunderstood something he had said.

[24] Mr. Schafer also insisted in direct examination that he only smelled of alcohol because someone else splashed a drink in his face. However, when challenged on cross-examination, he initially maintained that he had nothing to drink, but then said that he did actually grab a drink from someone's hand after the fight, put some on his face and then took a drink.

[25] Another example of Mr. Schafer contradicting himself relates to his assertion that he was able to go cold turkey from methadone in 2017 when he was unlawfully at large, only to concede on cross-examination that he knew he could not go to the drugstore to get his methadone as he would be caught, and also admitting that he used methadone prescribed for others over the time period he was supposedly going cold turkey.

[26] In addition to credibility concerns, Mr. Schafer's evidence also clearly demonstrated that several of the risk factors identified in 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.

[27] Firstly, blaming others and portraying himself as a victim was a consistent theme in Mr. Schafer's evidence. In describing his efforts to be transferred out of Kent penitentiary to be able to access programming, Mr. Schafer noted that a transfer required a six-month period free of infractions, but said that every time, they would find something to charge him with, preventing his transfer.

[28] Similarly, he references an incident where his medication fell out of his pocket and was found by someone who called the pharmacy, leading authorities to believe, unfairly, that he had sold his meds rather than lost them.

[29] Yet a third example can be seen in Mr. Schafer's description of his relationship with a girlfriend. Mr. Schafer says his girlfriend lied to his parole officer about him. First she told the parole officer that she was in a vehicle with Mr. Schafer when he tried to run them off the road. Next, she told the parole officer that he was using drugs. He denies both. Mr. Schafer says that these lies were in retaliation for him walking away from her when he learned she was using and his subsequent refusal to respond to her texts or phone calls.

[30] Mr. Schafer's tendency to blame others and portray himself as a victim is closely related to his deep distrust of anyone in the system. He spoke frequently of a reluctance to open up to service providers because of instances where information had

been used against him. He spoke of case managers and parole officers taking steps to have him detained without justification. On cross-examination, he even noted that he did not trust Elders in the system.

[31] With respect to substance abuse, Mr. Schafer admitted to a major heroin addiction, noting that being stressed leads him back into heroin. According to him, the longest period that he has been clean and out of jail is five months.

[32] Mr. Schafer disputes assertions that he did not avail himself of programming, pointing to a substance abuse program from February 9, 2004 to January 15, 2005; a sex offender program he says he almost completed in 2005, but got into trouble with a guard a week before graduation; a multi-faceted program called “In Search of Your Warrior” in 2007; and attendance at the sex offender treatment program for a second time in 2011.

[33] However, the extent to which attendance in programming has impacted on the risk of Mr. Schafer recidivating is questionable. Firstly, his obvious distrust of figures in authority admittedly led to him not being honest with service providers about his drug use. Secondly, Mr. Schafer demonstrates a clear lack of insight into his risk factors and how they can be appropriately managed.

[34] Notwithstanding the frequent suspensions of his long term supervision order for substance use and the fact he has not managed to stay clean for more than a five-month period, Mr. Schafer seems to believe that moving back to Old Crow and being near his family will be enough to ensure not only that he will not abuse illicit substances,

but that he will be able to go cold turkey without any professional support or the use of methadone or suboxone.

[35] Mr. Schafer does not seem to recognize the need for structure and supports to manage his risk factors. Other than a vague intention to possibly apply to go to a treatment centre at some point, he indicated no plans to access professional supports, although I am advised he has now made contact with Alcohol and Drug Services. While the support of his parents is not in doubt, the letter and petition filed as exhibit 3 raises at least a question about the extent to which there is community support for Mr. Schafer in Old Crow.

[36] His plan consists mainly of living in a family cabin upriver from Old Crow where he will not only be able to maintain sobriety, but he will help address the number of suicides in the community. It is a clear indication that Mr. Schafer, despite the programming he says he has completed, has little insight into the complexity of issues stemming from trauma, including his own, if he believes that he is qualified to deal with individuals in crisis.

Has the test been met?

[37] In determining whether the evidence meets the test under s. 810.2, counsel for Mr. Schafer argues that the lack of any serious personal injury offences since the 2010 conviction for robbery, an offence which involved threatened but not actual violence, and the fact that the various assessments date from 2011 or earlier, mean that the evidence falls short of establishing that there are reasonable grounds to fear that Mr. Schafer will commit a serious personal injury offence.

[38] The difficulty with this argument lies in the fact that, while there has not been a conviction for a serious personal injury offence since 2010, there are, nonetheless, instances of violent behaviour exhibited by Mr. Schafer more recently, including the assault on another inmate in 2015 which required surgical intervention. It must also be noted that for much of the time since 2003, Mr. Schafer has either been in custody or under close supervision, with external structure to manage his behaviour and risk factors.

[39] My primary concern in assessing whether or not Crown has met the burden in this case relates to the sufficiency of the evidence that was presented to me. In particular, the Crown's case rests on Cpl. Gale's summary of materials he received from Corrections Canada, effectively making it double hearsay. The failure to provide the Court with the source material raised concerns for me about whether the evidence can be said to be sufficient to satisfy me that the test has been met.

[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.

[41] However, I have concluded that the test has nonetheless been met for the following reasons.

[42] Firstly, it is clear that hearsay evidence can be considered in peace bond hearings. In *R. v. Budreo* (2000), 46 O.R. (3d) 481(C.A), Laskin J. noted:

> 53 (QL) Moreover, although an informant's fear triggers an application under s. 810.1, under subsesction (3) a recognizance order can only be made if the presiding judge is satisfied by "evidence" that the fear is reasonably based. Section 810.1(3) therefore requires the judge to come to his or her own conclusion about the likelihood that the defendant will commit one of the offences listed in subsection (1). Although the "evidence" the judge relies on might include hearsay, a recognizance could only be ordered on evidence that is credible and trustworthy.

[43] This is confirmed in *R. v. Flett*, 2013 SKQB 155, in which, following a review of the relevant case law since *Budreo*, the Court notes:

> 24 These decisions at all court levels up to and including the Supreme Court of Canada confirm that s. 810 hearings are not criminal trials. The usual rules of evidence applicable in criminal trials do not apply. Hearsay evidence is admissible. The question before the judge is to determine whether or not sufficient weight can be given to the hearsay evidence to establish the reasonable and probable grounds required for the individual to swear the information to justify the fear of harm to others by the respondent.

[44] I am also mindful of the fact that peace bond applications are preventative rather than punitive in nature such that it has been clearly accepted that the stringent evidentiary rules of a criminal trial do not apply. (see *Haydock v. Baker*; *R. v. Flett*)

[45] Secondly, in assessing whether the hearsay evidence provided by the Crown is credible and trustworthy, I note that, beyond highlighting the dated nature of much of the evidence, the validity of the information provided through Cpl. Gale was not, by and large, called into question by the respondent.

[46] And finally, the fact that so many of the risk factors identified in the admittedly dated risk and psychological assessments are clearly still evident in Mr. Schafer’s own

evidence bolsters the credibility and trustworthiness of the hearsay information provided.

1. Appropriate Conditions:

[47] Having determined that there are reasonable grounds to believe that Mr. Schafer will commit a serious personal injury offence, the next question to be determined is the duration and appropriate conditions.

[48] Pursuant to s. 810.2(3.1), as Mr. Schafer has been convicted of a previous serious personal injury offence, the Crown seeks a two-year order on the same conditions to which Mr. Schafer is subject on his interim undertaking. Counsel for Mr. Schafer submits that the conditions should be minimal, as any risk that exists is low given the fact there have been no substantive offences since 2010. She suggests the conditions be limited to reporting, advising the Bail Supervisor of his whereabouts, and no-contact and not-attend clauses in relation to his prior victims.

[49] Once satisfied that the test for the peace bond has been met, the Court is entitled to impose any reasonable conditions the judge considers desirable to secure the good conduct of the defendant.

[50] In light of the evidence before me, I am satisfied, firstly, that a two-year order is appropriate, and, secondly, that the following conditions are clearly reasonable:

1. Remain within the Yukon unless you obtain written permission from your Bail Supervisor;

2. Have no contact directly or indirectly or communication in any way with V.E., J.A., and G.B.;

3. Not attend any known place of residence, employment or education of V.E., J.A., and G.B.;

4. Not possess any firearm, ammunition, explosive substance or any weapon as defined by the *Criminal Code*;

5. Report to a Bail Supervisor within two working days and thereafter, when and in the manner directed by the Bail Supervisor;

[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;

[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. Accordingly, Mr. Schafer, you will be required to:

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 the 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 or substances that have not been prescribed for you by a medical doctor;

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

10. Attend and actively participate in all assessment and counselling programs as directed by your Bail Supervisor, and complete them to the satisfaction of your Bail Supervisor, for the following issues: substance abuse, anger management, and any other issues identified by your Bail Supervisor, and provide consents to release information to your Bail

> Supervisor regarding your participation in any program you have been directed to do pursuant to this condition.

[54] With respect to the remaining conditions sought, the evidence falls short of satisfying me that a condition barring attendance at the Vuntut Gwichin First Nation office in Whitehorse is reasonable or necessary to ensure Mr. Schafer's good conduct.

[55] I would also decline to add the condition that he carry any permission letters on his person at all times. While it would certainly be in Mr. Schafer's best interests to do so to avoid any confusion, I am reluctant to impose it as a condition making him subject to potential criminal jeopardy should he forget to do so.

2. Availability of testing condition:

[56] This leaves the question of the availability of a condition requiring the provision of samples of breath or urine for the purposes of analysis to ensure compliance with the abstain condition.

[57] Crown relies on subsection 810.2(4.1)(f) as authority for imposition of the sampling condition. It authorizes the addition of a condition:

> to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under paragraph 810.3(2)(a) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

[58] This subsection is one of 11 amendments to the *Criminal Code* providing express authority to impose sampling conditions in certain circumstances. The amendments, passed in response to the decision in *R. v. Shoker*, 2006 SCC 44, were proclaimed into force on March 31, 2015.

[59] While the *Code* clearly authorizes the condition, section 810.3 requires that the territory have a regulatory scheme for the seizure, storage, analysis and destruction of the samples and related records. The Crown takes the position that provisions of the *Corrections Act, 2009*, SY 2009, c. 3 and the *Corrections Regulation,* O.I.C. 2009/250 provide for sufficient regulatory authority to allow samples to be taken.

[60] With respect, I disagree.

[61] Section 810.3(1) states

> For the purposes of sections 810, 810.01, 810.011, 810.1 and 810.2 and subject to the regulations, the Attorney General of a province or the minister of justice of a territory, shall, with respect to the province or territory,
>
> (*a*) designate the persons or classes of persons that may take samples of bodily substances;
> (*b*) designate the places or classes of places at which the samples are to be taken;
> (*c*) specify the manner in which the samples are to be taken;
> (*d*) specify the manner in which the samples are to be analyzed;
> (*e*) specify the manner in which the samples are to be stored, handled and destroyed;
> (*f*) specify the manner in which the records of the results of the analysis of the samples are to be protected and destroyed;

> (*g*) designate the persons or classes of persons that may destroy the samples; and
> (*h*) designate the persons or classes of persons that may destroy the records of the results of the analysis of the samples.
>
> (emphasis added)

[62] The *Code* also includes a "Restriction" clause at subsection 810.3(3), which states that:

> Samples of bodily substances … may not be taken, analyzed, stored, handled or destroyed, and the records of the results of the analysis of the samples may not be protected or destroyed, except in accordance with the designations and specifications made under (1).

[63] Certain regulation-making authority is reserved for the federal Governor in Council. Specifically, Canada can regulate by prescribing the bodily substances that can be collected, and the period of time they can be held before destruction as well as with respect to the designations and qualifications of the people collecting and destroying samples, and "any other matters relating to the samples of bodily substances" (ss. 810.3(5)).

Samples of Bodily Substances Regulations*, *SOR/2014-304

[64] These federal *Regulations* were passed pursuant to s. 810.3(5) of the *Act*.

[65] The federal *Regulations* prescribe the bodily substances subject to collection as breath, urine, blood, hair and saliva (s.18). With respect to breath samples, the *Regulations* require that they be analyzed with specific instruments and that all substances must be destroyed after one year (ss. 20 and 22).

[66] Section 17 of the *Regulations* is entitled “Designations and specifications” and reads:

> If the Attorney General of a province or the minister of justice of a territory proposes to make designations or specifications under subsection 810.3(1) of the Code, they must notify the Attorney General of Canada in writing that the province or territory has the technical and operational capability to take, analyze, store, handle and destroy any samples of bodily substances that are to be provided. (emphasis added)

[67] This section refers back to all the designations and specifications that the provinces and territories shall make pursuant to the *Code* designations.

[68] The federal *Regulations* appear in the Canada Gazette with a “Regulatory Impact Analysis Statement”. Although the Statement does not form part of the *Regulations,* I find it instructive in terms of interpreting the application of the statutes.

[69] The Statement describes the federal *Regulations* as “intended to complement the provisions of the *Act* and create a framework … that ensures minimum standards across the country in the collection, storage and analysis” of bodily samples. Further down it states:

> The Regulations also specify that where a provincial or territorial jurisdiction decides to exercise its authority under the Act to establish specific rules (designations) setting out how samples shall be collected, handled, stored, tested and destroyed, the province or territory in question must first notify the Attorney General of Canada in writing that they have the capability to properly manage a sampling regime. (emphasis added).

[70] And then with respect to what could be construed as a requirement that provincial/territorial governments create a framework for collecting samples:

> … After consultation with all jurisdictions, the proposed Regulations were amended to clarify the discretionary nature of the operational designations under the Act. The amended Regulations now require, by sections 3, 10 and 17, that the attorney general of a province, or minister of justice of a territory, confirm in writing to the federal attorney general that they have the capacity to take a sample authorized in the Regulations before any designations may be made by that jurisdiction under subsections 732.1(8), 742.3(6) or 810.3(1) of the *Criminal Code* as amended by the Act. Designations under subsections 732.1(8), 742.3(6) and 810.3(1) of the *Criminal Code*, as amended by the Act, cannot be made and no samples may be collected until the letter is received. (emphasis added)

[71] To further bolster an interpretation that no samples can be taken without a proactive decision taken by a province or territory and in the absence of a written notice, under the heading "7. Implementation, enforcement and service standards", the Statement says:

> The Regulations will come into force on the same day as the Act. All provinces and territories that wish to permit the collection of bodily samples must eventually establish specific parameters for police and corrections officers to follow in the collection, handling, storage, testing and destruction of bodily samples, before any specific types of samples authorized by the Regulations can be taken under the authority of the Act. There is no specific time period stipulated in the Act for provinces and territories to establish the parameters. Jurisdictions will need to carefully consider the type of sampling regime they wish to establish, including what types of samples, if any, they intend to allow to be collected and used for compliance purposes. (emphasis added)
>
> Before a jurisdiction establishes its parameters for any specific type of bodily sample, the Regulations require the jurisdiction to notify the Attorney General of Canada, in writing, that it has the operational and technical capacity to properly collect, handle, test, store and destroy that specific type of sample. Once the letter is received, the jurisdiction may then establish the parameters required under the Act that dictate how its officials manage the regime for that type of sample. These steps ensure that any jurisdiction that decides to take a specific type of sample will have sufficient resources, training and privacy safeguards in place before any samples are taken. (emphasis added)

The Corrections Act, 2009 and Corrections Regulation

[72] As indicated, Crown counsel relies on the existing *Corrections Act* and *Corrections Regulation* as sufficient to satisfy the requirements of s. 810.3(1). Section 24 of the *Corrections Act* ("Illicit drug sampling") states:

> **24**(1) An authorized person may demand that
>
> (a) an inmate provide a biological sample from the inmate's body if the authorized person
>
> (i) has reasonable grounds to believe that the inmate has consumed or used an illicit drug, and
>
> (ii) requires the sample to confirm the consumption or use of an illicit drug; or
>
> (b) an inmate, offender or person granted judicial interim release provide a biological sample from their body if abstention from an illicit drug is a condition of a temporary absence, work program, voluntary treatment program, probation, judicial interim release or conditional release, and
>
> (i) the sample is required in order to monitor compliance with that condition, or
>
> (ii) the authorized person has reasonable grounds to believe that the inmate, offender or person granted judicial interim release has breached the condition.
>
> (2) An authorized person who makes a demand under this section must
>
> (a) first inform the inmate, offender or person granted judicial interim release of the basis of the demand and the consequences of failure to comply with the demand; and
>
> (b) carry out the demand in accordance with the regulations. *S.Y. 2013, c.12, s.9; S.Y. 2009, c.3, s.24*

[73] “Biological sample” is defined in section 1 as “a sample of urine, breath or any other prescribed bodily fluid or substance”.

[74] The *Corrections Regulation* provides a specific framework for urinalysis demands in s. 19, but is silent with respect to other bodily substances. Section 19 is titled “Illicit drug sampling” and reads:

> 19.(1) An authorized person may demand that an individual who is an inmate, and offender or a person granted judicial interim release (in this section referred to as the "subject") provide a urine sample or a breath sample.
>
> (2) Any authorized person making a demand under subsection (1) must
>
> (a) be the same gender as the subject of the demand;
>
> (b) provide to the subject an appropriate container or instrument to be used for obtaining the sample;
>
> (c) be present as the sample is provided;
>
> (d) ensure that the subject is kept separate from other people except the authorized person and is not left alone during the period referred to in subsection (4);
>
> (e) once the sample has been provided and in the presence of the subject, if applicable
>
> (i) seal the container,
>
> (ii) affix a label to the container identifying the sample in a manner that does not disclose the identity of the subject,
>
> (iii) certify on the label that the container contains the sample provided by the subject;
>
> (f) keep a written record that indicates the number on the container that corresponds to the name of the subject.
>
> (3) Before providing a sample as demanded under subsection (1), the subject must wash their hands.

> (4) The subject must provide the sample within 2 hours after the time of the demand.
>
> (5) If a subject fails to provide the sample as demanded and the requirements in subsection (2) have otherwise been met, the subject is deemed to have failed to comply with the demand.

[75] There are no regulations about the collection of blood samples.

[76] In my view, the *Corrections Regulation* fails to comply with the *Shoker Act* in several significant ways. While it does designate the persons that can take urine and breath samples, and also to some extent sets out the manner in which samples are to be taken and handled, it is completely silent about how samples are to be analysed, stored or destroyed, as well as about any scheme for the handling of records. To the extent that it is deficient in these key areas, it fails to include key components of what regulations 'shall' contain pursuant to s. 810.3(1).

[77] As well, the federal *Regulations* and the Regulatory Impact Analysis Statement make it clear that, before *Shoker* regulations are passed, a province or territory must send written notification to the Attorney General of Canada that they have the technical and operational capability to properly manage samples. While this letter may not be public record, any regulations properly passed pursuant to the *Shoker Act* would have to be Gazetted and would then be reflected as a regulation under the *Criminal Code* on the federal legislation website. Yukon has no such regulation.

[78] In conclusion, I am of the view that any sampling pursuant to s. 810.2(4.1)(f) must be done in accordance with the provisions of s. 810.3 and the regulations established in conjunction with the *Shoker* amendments. The regulations passed under

the *Corrections Act, 2009* fall well short of these requirements. While it may be arguable that the condition may still be imposed even if the samples cannot be lawfully taken, it makes no logical sense to me to include a condition which cannot be operationalized, and which may be misleading to defendants with respect to their obligations under the order. I would decline to impose the requested sampling condition.

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RUDDY T.C.J.