

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MARTY RYAN BOUVIER

REASONS FOR SENTENCE
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at: Yellowknife, Northwest Territories

Date of Decision: November 19, 2019

Counsel for the Crown: Morgan Fane

Counsel for the Accused: Alyssa Peeler

[Section 811 *Criminal Code*]

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A. INTRODUCTION

[1] Marty Ryan Bouvier is a 25 year old Tłchq man who is being sentenced pursuant to section 811 of the *Criminal Code* for breaching a section 810.1 recognizance. Mr. Bouvier pleaded guilty to breaching the condition which required him to abstain from consuming alcohol.

[2] On September 21, 2019, Mr. Bouvier went to the Behchokq Cultural Centre in Behchokq, NT to attend a hand games tournament, an area and event where children under the age of sixteen would have been known by Mr. Bouvier to be present. He was accompanied by his brother, a sober adult who knew of Mr. Bouvier's criminal history. They became separated and Mr. Bouvier was unaccompanied for a time at the Cultural Centre. At 11:10 p.m. Mr. Bouvier was reported to be intoxicated. The police located and arrested Mr. Bouvier in the Cultural Centre parking lot. He was, in fact, intoxicated.

[3] The Crown elected to proceed by way of indictment. Therefore, Mr. Bouvier is liable to imprisonment for a term of not more than four years. The Crown is seeking 9 to 12 months of custody. The defence suggests a term of imprisonment of 3 to 6 months and invites a period of probation. It is agreed that Mr. Bouvier has spent 60 days in pre-trial custody.

B. THE BASIS FOR THE SECTION 810.1 RECOGNIZANCE

[4] In order to understand the seriousness of Mr. Bouvier's breach, it is necessary to understand the reason why he was under a section 810.1 recognizance. The reason relates to the risk of Mr. Bouvier committing a sexual offence involving children under 16 years of age.

[5] On July 10, 2017, Mr. Bouvier was sentenced to four years in prison (less credit for remand time) for a sexual assault of a 15 year old girl. The warrant for Mr. Bouvier's prison term expired on July 25, 2019. An RCMP officer swore the Information seeking the 810.1 recognizance and Mr. Bouvier was arrested shortly after. Mr. Bouvier was released on bail on July 30, 2019 while awaiting the hearing of the application for a section 810.1 recognizance. Mr. Bouvier consented to the issuance of the 810.1 recognizance on August 13, 2019. He is being sentenced for a breach of this recognizance.

[6] The purpose of the 810.1 recognizance is to lessen the risk of Mr. Bouvier committing another sexual offence by imposing conditions which placed restrictions on his behaviour, restrictions on where he could be and when and supervision and reporting to the police. The recognizance included, among its 13 conditions, a condition not to drink and a condition not to be in public places where children under the age of 16 could be expected unless Mr. Bouvier was in the company of a sober adult who was aware of his criminal past.

[7] The basis for the 810.1 recognizance was set out in an affidavit sworn by Cst. Ryan Meko. The affidavit contained Mr. Bouvier's criminal record, the reasons for sentence for the most recent sexual assault, the reasons for sentence for a previous sexual assault and assault, two parole board decisions, a criminal profile report, a psychological assessment report, and various program performance reports.

[8] The following is a brief summary of Mr. Bouvier's criminal background and his progress during his term of imprisonment after the July 10, 2017 sentencing.

[9] On July 10, 2015, as a youth, Mr. Bouvier was convicted of forcible intercourse with a 12 year old girl. On July 10, 2015, he was also convicted, as an adult, of the assault of another 12 year old girl that he was trying to drag into a wooded area. On July 10, 2017, as an adult, he pleaded guilty to sexually assaulting a 15 year girl and received a 4 year sentence.

[10] Chief Justice Charbonneau states in her Reasons for Sentence on July 10, 2017:

Mr. Bouvier's counsel has told me about his personal circumstances, including the fact that he himself was abused as a child. Unfortunately, we often see this cycle repeated. Something has to happen to break that cycle. Mr. Bouvier, I think, needs help, professional help. Alcohol alone cannot explain his behaviour. Right now, he is a danger to young girls and women, and if he does not address his issues, he will be back before the Court.

, . . .

But I do think that access to programs geared to reducing his risk of re-offence need to be the priority, as opposed to only dealing with the alcohol issue, for instance.

[11] While in custody, Mr. Bouvier completed the ICPM Sex Offender Primer Program on April 17, 2018. Although Mr. Bouvier participated well during the group and individual sessions, following completion of that program, program coordinator Bernice Mazur noted that “Considering the rating completed for each personal target above, it is determined that Mr. Bouvier’s current overall ability and commitment to use the skills required managing his various risk factors needs a lot of improvement.”

[12] On November 8, 2018, Mr. Bouvier completed the Sex Offender Moderate Intensity Program. Following the completion of the program, coordinator Bernice Mazur raised his overall ability and commitment from “needs improvement” to “moderate”. However, she noted that “it is important to mention that it is very difficult to properly assess the level of ability/commitment while the participant is incarcerated.”

[13] While he was in the institution, Mr. Bouvier appeared to have adapted well to the institutional setting.

[14] Mr. Bouvier was released on statutory release to a community based residential facility. He began the Community Maintenance Program on December 5, 2018. He did not complete this program. He was only able to attend one session of the program before he twice breached his parole conditions and his parole release was suspended in mid-December, 2018. Program coordinator Bonnie Parks noted that “Although he made significant gains while attending the main program while incarcerated, Marty struggled to practice the skills once he was in the community and faced with real life challenges.”

[15] The Parole Board Decision of March 22, 2019 states:

Despite the opportunities to access community interventions and to demonstrate an improved commitment to sobriety and an honest working relationship with your case management team, you twice breached your abstain from alcohol special condition within a matter of weeks. Substance abuse remains a primary factor in your offending and this continued use of substances indicates a return to your crime cycle.

...

It is apparent to the Board you are unable to manage your negative emotions and you continued to use alcohol as a coping mechanism. You are assessed as a moderate-high risk of reoffending sexually. Your use of alcohol is identified as a contributing factor to your index offence and when you made the decision to return to using alcohol, you have placed both yourself and society at risk. [emphasis added]

[16] Mr. Bouvier was released on parole on May 9, 2019. After 4 ½ weeks in the community, he breached his condition to avoid being around children when he went to Galaxyland and a carnival in the West Edmonton Mall. He was arrested and remained in prison until his warrant expiry date of July 25, 2019

[17] On July 19, 2019, the Parole Board issued a report which stated:

The CSC recommends revoking your release. CSC is of the opinion you are not ready to lead a pro-social life. They give you credit for demonstrating good behaviour at the onset of release, abiding by CRF rules and being respectful; however, they feel you deliberately placed yourself in a high risk situation soon after. You were dishonest by failing to mention the exact location you planned to attend and not being forthcoming of your whereabouts afterwards. Your risk is deemed by CSC as unmanageable at this time.

[18] In the Risk Analysis Report by Cpl. Ryan MEKO, he states:

Marty BOUVIER is a recidivist, who at the age of 23 has a documented pattern of committing sexual motivated offences. He has proven himself a risk to the community in which he resides and is by all accounts a high risk to reoffend.

BOUVIER intends to return to the community of Behchokq, NT. Behchokq is a community where addictions issues are prevalent, and there are a high proportion of vulnerable youth. This is of particular concern due to BOUVIER's predilection for female youth as the object of his sexual desires. All of BOUVIER's violent and sexual convictions involved a female youth as victim. In his psychological assessment conducted by Correctional Services Canada it was noted that he targets young girls as he has challenges with peer aged relationships and views younger girls as less demanding and available. BOUVIER has used alcohol as a mitigating factor in his commission of these offences. Yet while on statutory release he was unable to last one full month before he was twice discovered to be under the influence of alcohol and had his release revoked.

[19] The above summary summarizes the reason for the issuance of the s. 810.1 recognizance and highlights the importance to risk management of the two conditions that Mr. Bouvier abstain from alcohol and contact with children under 16 years of age.

C. SENTENCING CONSIDERATIONS FOR A BREACH OF A S. 810.1 RECOGNIZANCE

[20] Section 810.1 allows a person to lay an information if he or she fears, on reasonable grounds, that the defendant will commit one of the specified sexual offences in respect of children under 16 years of age. The judge makes the order where he or she is satisfied on evidence that the informant has reasonable grounds for this fear.

[21] In *R. v. Zimmerman*, [2011] A.J. No. 1060, the Alberta Court of Appeal stated the purpose of a section 810.2 *Criminal Code* recognizance. This description applies equally as well to a section 810.1 recognizance.

33. A Recognizance under s. 810.2 of the *Criminal Code* is intended as an instrument to manage risk in the community and to protect the public. It is not primarily a rehabilitative tool as is the case with a Probation Order.

[22] In *Zimmerman*, the Court of Appeal accepted the following considerations for imposing a sentence for a section 810.2 breach. These considerations had been summarized by the sentencing judge:

- (i) the primary purpose of sentencing for a breach of a s. 810.2 recognizance is the protection of the public and paramount consideration should be placed on this purpose and on the sentencing objectives of specific and general deterrence;
- (ii) the gravity of the breach must be examined in the context of the offender's history;
- (iii) the sentencing judge must never lose sight of the proportionality principle;
- (iv) a breach of a s. 810.2 recognizance will usually result in a more serious sentence than a breach of a probation order as s. 810.2 recognizances and probation orders have different primary purposes and come with different risks when breached;
- (v) a s. 810.2 recognizance has similar purpose and method as a long-term offender order but should not be confused with a long-term offender order;
- (vi) when sentencing for a breach of a s. 810.2 recognizance, the sentencing judge should be concerned about managing the offender's risk to the community;
- (vii) deliberately absencing oneself to subvert the conditions of close supervision in a s. 810.2 recognizance is an aggravating factor; and,
- (viii) the sentencing judge must consider all of the principles of sentencing in s. 718 to s. 718.2 of the *Criminal Code*.

[23] As Crown counsel concedes, *Zimmerman* was decided in 2011, before the Supreme Court of Canada released *R. v. Ipeelee*, 2012 SCC 13. In *Ipeelee*, the SCC stated that to say that “rehabilitation has a limited role to play” in the sentencing of a long-term offender for a breach of a condition of the long-term offender supervision order is incorrect.

50 The foregoing characterization of the long-term offender regime is incorrect. The purpose of an LTSO is two-fold: to protect the public and to rehabilitate offenders and reintegrate them into the community. In fact, s. 100 of the *CCRA* singles out rehabilitation and reintegration as the purpose of community supervision including LTSOs. As this Court indicated in *L.M.*, rehabilitation is the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime. To suggest, therefore, that rehabilitation has been determined to be impossible to achieve in the long-term offender context is simply wrong. Given this context, it would be contrary to reason

to conclude that rehabilitation is not an appropriate sentencing objective and should therefore play “little or no role” (as stated in *W. (H.P.)*), in the sentencing process.

[24] Although Section 810.1 of the *Criminal Code* does not state that rehabilitation is the goal of a section 810.1 recognizance, the wording of section 810.1 indicates that rehabilitation is one of its objectives. In this regard, I agree with Judge Robinson who decided *R. v. Ballantyne*, 2012 SKPC 168 and who is cited at paragraph 29 of *R. v. Napope*, 2019 SKPC 23:

29 . . . Judge Robinson states in paragraph 51 [of *Ballantyne*] that section 810.2 is itself alive to the prospect of rehabilitating an offender as 810.2(3.1) speaks of securing “the good conduct of the offender” and, in so doing, surely envisages a rehabilitated defendant. One listed condition for such a recognizance is that a defendant “participate in a treatment program”. This condition is clearly aimed at rehabilitation.

[25] These comments are equally applicable to a section 810.1 recognizance given the identical wording in section 810.1(3.02).

[26] In this context, the first and sixth sentencing considerations from *Zimmerman* should be modified as follows:

(i) the primary purpose of sentencing for a breach of a s. 810.2 recognizance where the breach is related to management of the risk to the community is the protection of the public and paramount consideration should be placed on this purpose and on the sentencing objectives of specific and general deterrence; however, this consideration cannot be to the exclusion of rehabilitation;

(vi) when sentencing for a breach of a s. 810.2 recognizance, the sentencing judge should be concerned about managing the offender’s risk to the community while recognizing that the offender is to be re-integrated into the community;

[27] This takes into consideration the nature of the condition that was breached and in particular, whether it was a technical breach or related to management of the risk to the community. As stated in *R. v. Zimmerman, supra*:

46 In *R. v. Ballantyne* (2009), 324 Sask.R. 71, 451 W.A.C. 71, 2009 CarswellSask 103, [2009] S.J. No. 104 (Sask. C.A.), the Saskatchewan Court of Appeal was dealing with two breaches of Recognizance under s. 810.2 for failing to abstain from the consumption of alcohol. At para. 5 the Court of Appeal stated that the purpose of a s. 810.2 Recognizance was to protect the public by preventing future criminal activity. At para. 12 the Court of Appeal stated as follows:

12. In sentencing of offenders such as Mr. Ballantyne for a breach of a s. 810 recognizance, the primary sentencing principles are the protection of the public and general and specific deterrence. The breaches must be looked at in light of the potential consequences of the offender breaching a condition. This requires that the gravity of the breach be examined in the context of the offender’s history.

51 The Court of Appeal considered that breaches may cover a continuum of conduct. Some breaches may be mere technical breaches of the Order, but where the condition relates to the management of the risk to the community, such breaches are more serious. At para. 45 the Court of Appeal stated:

45. It is evident that breaches will cover a continuum of conduct. It is therefore impossible to set an exact range or starting point for breaches of conditions attached to long-term offender supervision orders. At the same time it is clear that breaches of conditions that are central to the management of the offender in the community are always serious and invite incarceration that is substantially longer than would be the case for the same act relative to a condition attached to a probation order.

52 The Court of Appeal went on to state at para. 47 that breaches central to the management of an offender within the community will be regarded as serious breaches. Where such an offender absents himself from supervision by breaching conditions relevant to that supervision this constitutes a serious breach and should be sentenced accordingly.

55 Where breaches relate to conditions for the management and supervision of the offenders, which were designed to protect society from serious offences, such breaches should result in serious sentences. Where dealing with high-risk offenders, management within the community is absolutely essential. Where such offenders deliberately absent themselves from close supervision, they should face serious sentences.

[28] Mr. Bouvier's relative youthfulness and the *Gladue* factors which are summarized below are additional reasons to give more weight to rehabilitation as an appropriate sentencing objective in sentencing him for his breach. The Courts comments in *Ipeelee* with respect to a breach of an LTSO are equally applicable to a breach of a section 810.1 recognizance.

87 The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

[29] The Court was provided with a number of cases including the following: *R. v. Ballantyne*, 2012 SKPC 168; *R. v. Chocolate*, NWTTC T-1-CR-2013-001111, unreported, Reasons for Sentence, November 1, 2013; *R. v. Chocolate*, NWTTC T-1-CR-2014-000291, unreported, Sentencing Hearing, March 21, 2014; *R. v. Kematch*, 2016 ABPC 58; *R. v. Keyuajuk*, NWTTC T-1-CR-2015-001482, unreported, Submissions, December 21, 2014; *R. v. Keyuajuk*, NWTTC T-1-CR-2015-001482, unreported, Sentence Decision, December 22, 2015; *R. v. Napope*, 2019 SKPC 23; *R. v. Noksana*, NWTTC T-1-CR-2012-000777, Reasons for Sentence, July 20, 2012; *R. v. Noksana*, NWTTC T-1-CR-2013-00166, Reasons

for Sentence, April 16, 2014; *R. v. Zimmerman*, 2011 ABCA 276 and *R. v. Green*, 2013 ONCJ 423.

[30] As a general observation, it appears that the range of sentences for a section 811 breach involving recognizances issued under sections 810.1 or 810.2 is from two months to 18 months. Longer sentences are imposed where there have been previous convictions for breaches of section 810.1 or section 810.2 recognizances, where there is an aggravating criminal record, where the breach occurs shortly after the imposition of the recognizance or where the condition or conditions that were breached go to the heart of the management of risk of the offender.

D. SENTENCING MR. BOUVIER FOR THE BREACH

[31] It is acknowledged that there are relevant *Gladue* factors which apply to Mr. Bouvier. In this regard, one of the reports by the Parole Board summarizes these factors as follows:

BOUVIER was born in Yellowknife, NT and has lived the majority of his life in Behchokq [community approximately 100 kms outside of Yellowknife]. He is of Dogrib descent. . . . and substance abuse in the home appears to have never been a major concern. BOUVIER indicates his dad went to Residential School, but his mom did not. His parents have been sober for 28 years, and according to BOUVIER appear to be very pro-social individuals. He appears to have had a very positive upbringing and indicates that his parents “raised him right” and continue to be very supportive of him. BOUVIER has 4 sisters and 2 brothers all of whom he remains close with.

The family suffered a terrible loss in July of 2017 when one of his sisters died in a car accident. BOUVIER and his family remain in mourning for the sudden loss of his sister, and this appears to have affected BOUVIER greatly.

BOUVIER said that he first tried alcohol at the age of 15 with friends. He said that he started drinking slowly, but then it became increasingly prevalent in his life. He said it took him a while to admit it, but he now knows he is an alcoholic.

Overall, it appears that BOUVIER has experienced *Gladue* factors in his life. It is noted that BOUVIER’s father attended Residential School, however his mother did not. The family have been involved in culturally related activities and traditions most of their lives. On the land activities appear to be very important to the family.

[32] Mr. Bouvier also reported that he was sexually abused at the age of six while staying with a relative. I also accept that the community of Behchokq has its issues with respect to alcohol and violence.

[33] Mr. Bouvier has entered a guilty plea at an early stage and this is a mitigating factor. At the sentencing hearing, he apologized to the Court and expressed his desire to learn from his mistake and move forward. Although, I accept that Mr. Bouvier is sincere in this sentiment when he expressed it to the

Court, I must recognize that this is the same sentiment that he expressed to the Parole Board after he was caught drinking in December of 2018 and after he was caught at Galaxyland in June of 2019.

[34] In the end, I consider the nature of this breach to be one that is close to the heart of the reason for the section 810.1 recognizance. The behaviour that Mr. Bouvier engaged in, that is, being intoxicated in the late evening in the parking lot of a place where children under 16 could be expected to be present, is the behaviour that the recognizance was trying to prevent. This is precisely the behaviour that creates the risk that Mr. Bouvier will sexually offend.

[35] It is for this reason that public denunciation and deterrence, both specific and general, are the primary sentencing objectives. The blameworthiness of this offender is significant, although I recognize the tempering effect of the *Gladue* factors. It is for this reason that I need to place some importance on rehabilitation.

[36] Mr. Bouvier says that he was taking counselling with the counsellor in Behchokq for each of the 4 or 5 weeks before he breached. He states that his father, Jonas Bouvier, has found him a job working on the all-weather road to Whatì, when he is released. These are all positive steps. Further, as stated by Jonas Bouvier in Court, his father has committed to helping his son to seek and find traditional healing.

[37] I also recognize that Mr. Bouvier was not able to finish the Community Maintenance Program which is normally completed while the offender is on parole. The purpose of this program is to reinforce the skills learned in the two in-custody sex offender programs while the offender is re-adjusting to the pressures of life in the community. In my view such a program would still be useful to Mr. Bouvier.

[38] Mr. Bouvier will be subject to his section 810.1 recognizance until August 12, 2021. As I stated earlier, the conditions of the recognizance deal with reporting, supervision and restriction of behaviour and activity. There are no conditions dealing with rehabilitation. In my view, Mr. Bouvier needs to have supervision by a probation officer along with counselling and programs. In addition, because he did not complete the community maintenance program during parole, it would be useful to complete this type of programming now.

E. CONCLUSION

[39] For the reasons I have stated in this decision, I impose a jail sentence of 7 months. From this will be deducted credit for 60 days of remand. That credit is 90 days. In addition, Mr. Bouvier will be subject to a probation order of 18 months.

In addition to the standard mandatory conditions, the probation order will contain the following conditions:

- Report (d) Report to a probation officer within two (2) working days of your release from imprisonment and thereafter as directed by the probation officer;
- Counselling (e) Actively participate in counselling or programs as directed by the probation officer and to the satisfaction of the probation officer, including but not limited to counselling or programs for substance abuse, life skills and sexual offending. If it is available, you should participate in a program similar to the Community Maintenance Program – Aboriginal Sex Offender stream offered through the Correctional Service of Canada;
- Sign Releases (f) Sign releases in favour of your probation officer to enable the probation officer to confirm attendance at counselling or programs;
- s.810.1 Recognizance (g) This probation order is to run concurrently with the section 810.1 Recognizance which you entered into on August 13, 2019 and which expires on August 12, 2021. This probation order does not affect your obligation to follow the conditions of that Recognizance; and
- Report Back to Court (h) Attend Territorial Court in Behchokq, NT on **Tuesday, April 28, 2020 at 10 a.m.** for the purpose of reporting your progress with respect to this probation order.

[40] Given Mr. Bouvier's personal circumstances and in particular, his financial circumstances, I decline to impose a victim surcharge since it would cause him undue hardship.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest Territories, this 19th day of November, 2019.

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