

S-1-CR-2008000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

KELLY OVAYUAK

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Transcript of the Decision, on an O'Connor Application by  
the Accused, of The Honourable Justice J.E. Richard, at  
Yellowknife in the Northwest Territories, on February 12th  
A.D., 2009.

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APPEARANCES:

Ms. S. Tkatch:	Counsel for the Crown
Ms. C. Wawzonek:	Counsel for the Accused
Mr. R. Shepard:	Counsel for the Government of the Northwest Territories

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Charge under s. 268 Criminal Code of Canada

1 THE COURT: The application before the  
2 Court today is an O'Connor application by the  
3 accused in which he seeks an order for production  
4 of records from the North Slave Correctional  
5 Centre regarding Andrew Gruben while Mr. Gruben  
6 was an inmate at that institution. The context  
7 of this application is the fact that the accused  
8 is charged with aggravated assault and the named  
9 complainant is Andrew Gruben.

10 The Crown allegations are that the accused  
11 and Mr. Gruben were engaged in a physical fight  
12 in Tuktoyaktuk in December 2007. Mr. Gruben  
13 received serious injuries and was hospitalized.  
14 There were several witnesses present at the time  
15 of the physical fight; witnesses who are expected  
16 to testify at the trial.

17 The accused's jury trial is scheduled to  
18 commence in Tuktoyaktuk on April 14th, 2009.

19 As a result of injuries sustained in  
20 connection with this physical altercation in  
21 December 2007, Mr. Gruben is today a quadriplegic  
22 and is resident at the extended care unit at  
23 Stanton Regional Hospital in Yellowknife. The  
24 Court is told that Mr. Gruben has difficulty  
25 communicating and he will not be a witness at the  
26 trial.

27 It is expected that self-defence will be the

1 main issue at trial.

2 On this application, evidence was tendered  
3 of Mr. Gruben's criminal record which includes  
4 crimes of violence. The record shows that  
5 between 2002 and 2007, Mr. Gruben was convicted  
6 of 11 separate assaults and that three of those  
7 convictions were for assault causing bodily harm.

8 At trial, it is expected that the accused  
9 will seek to adduce evidence of Mr. Gruben's  
10 propensity for violence as being relevant to show  
11 the probability that Mr. Gruben was the aggressor  
12 in the December '07 incident on the basis of the  
13 Scopelliti decision.

14 It is also expected that at trial the  
15 accused will contend that he perceived violent  
16 aggression or attack from Mr. Gruben, and that  
17 the trier of fact will need to determine the  
18 reasonableness of the accused's belief and of his  
19 actions and reactions.

20 On this O'Connor application, the accused  
21 seeks production of Andrew Gruben's records in  
22 possession of the North Slave Correctional  
23 Centre. In his affidavit filed in support of  
24 this application, the accused states that Andrew  
25 Gruben was incarcerated several times at the  
26 North Slave Correctional Centre. The accused  
27 states that he himself was also incarcerated at

1 the North Slave Correctional Centre and that  
2 there were times when both of them were  
3 incarcerated there at the same time. During one  
4 of such overlapping periods, the accused says  
5 that Andrew Gruben assaulted him.

6 In seeking production and disclosure of  
7 "Andrew Gruben's Correctional Service records",  
8 the accused affirms in his affidavit as follows,  
9 at paragraphs 4 and 5:

10 "4. Andrew Gruben and I have been  
11 incarcerated at the North Slave  
12 Correctional Centre during  
13 overlapping periods of time since  
14 2001. During one of these periods,  
15 Andrew assaulted me and it is my  
16 recollection that he was disciplined  
17 as a result.

18 5. Based on my observations and  
19 experiences at the North Slave  
20 Correctional Centre, and based on  
21 antidotal evidence from other  
22 inmates, I believe that Andrew has  
23 been involved in other violent  
24 altercations while incarcerated at  
25 the North Slave Correctional  
26 Centre".

27 On this application, counsel have referred

1 me to relevant case law, from the 1995 decision  
2 of the Supreme Court of Canada decision in  
3 O'Connor up to and including the McNeill decision  
4 which was issued just a few weeks ago.

5 The O'Connor procedure is a common law  
6 procedure for ordering production of any record  
7 or document that is in the possession of a third  
8 party entity but which is beyond the possession  
9 or control of the prosecutor in the criminal  
10 proceeding before the Court.

11 The first step in the O'Connor procedure is  
12 for the person seeking the production, the  
13 accused in this case, to satisfy the Court that  
14 the documents or records are likely relevant to  
15 the criminal proceedings in question. Here, the  
16 accused seeks to meet this onus with his  
17 affidavit provided to the Court, particularly  
18 paragraphs 4 and 5.

19 The alleged prior assault incident at North  
20 Slave Correctional Centre between the complainant  
21 and the accused in this case, referred to in  
22 paragraph 4 of the accused's affidavit, is a  
23 discrete matter and I have no difficulty in  
24 finding that it is likely relevant to the  
25 accused's upcoming criminal proceedings, in the  
26 sense that there is a reasonable possibility that  
27 the NSCC records of this incident is logically

1 probative to an issue at the accused's trial.

2 However, in all of the circumstances and on  
3 the materials before me on this application, I  
4 find that the balance of the accused's  
5 application is not unreasonably characterized as  
6 a mere "fishing expedition".

7 Firstly, the actual request for production  
8 of all of "Andrew Gruben's Correctional Services  
9 records" is far too broad.

10 Secondly, even if one limits the request to  
11 records or documentation of "violent altercations  
12 while incarcerated at NSCC", there is no factual  
13 foundation put forward for the accused's belief.  
14 He states in paragraph 5 that his belief that  
15 Andrew Gruben "has been involved in other violent  
16 altercations while incarcerated at NSCC" is based  
17 on his observations at NSCC yet he does not state  
18 what those personal observations were. He states  
19 that his belief is based on his experiences at  
20 the NSCC yet he does not state what those  
21 personal experiences were. He states that his  
22 belief is based on anecdotal evidence from other  
23 inmates yet he does not state what those  
24 narratives were or from which particular inmate  
25 or inmates.

26 He either made these observations, had these  
27 experiences, heard these narratives, or he did

1 not. It is not a situation where the accused is  
2 in an impossible situation or a so-called Catch  
3 22 situation as described in some of the case  
4 law.

5 Although the onus on the accused at stage  
6 one is not a stringent one, this accused has not  
7 shown "likely relevance" of the documents of  
8 which he seeks production and disclosure from the  
9 files at NSCC, that is, apart from the one  
10 specific incident of assault that I have referred  
11 to.

12 The Court's role as gatekeeper at stage one  
13 of the O'Connor procedure is an important or  
14 significant one. The Court has a responsibility  
15 to ensure that criminal proceedings in this Court  
16 are focused on the issues to be tried and that  
17 time and resources are not expended in review or  
18 examination of irrelevant material. So other  
19 than records at NSCC pertaining to the one  
20 incident referenced at paragraph 4 of the  
21 accused's affidavit, the application for  
22 production of Andrew Gruben's records is denied.

23 Consequent upon the accused's O'Connor  
24 application herein, the prosecutor filed with the  
25 Court an application for disclosure of the  
26 accused's Correctional Services records at NSCC  
27 relating to the same incident of assault referred

1 to in the accused's affidavit.

2 In consideration of what I have already  
3 decided about the accused's application regarding  
4 that specific incident and the accused's stated  
5 purpose for seeking production and disclosure, I  
6 find that the prosecutor's request is reasonable  
7 and I will include that relief in the one order  
8 directed to the custodian of the records at NSCC.

9 I will hear further from counsel about the  
10 precise wording of the order to be issued but it  
11 is my intention that the order would read  
12 something like the following.

13 1. I hereby order the production of any  
14 records in the possession of NSCC concerning  
15 inmate Andrew Gruben and an alleged assault by  
16 him on another inmate Kelly Ovayuak while these  
17 inmates were incarcerated at NSCC.

18 2. I further order the production of any  
19 records in the possession of NSCC concerning  
20 inmate Kelly Ovayuak and an alleged assault upon  
21 him by another inmate Andrew Gruben while these  
22 inmates were incarcerated at NSCC.

23 3. Certified copies of these documents are  
24 to be provided for the Court's inspection by  
25 placing them in a sealed envelope and delivering  
26 the envelope to the Clerk of the Court for my  
27 attention.



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4. Leave is granted to the custodians of the records at NSCC to attach a memorandum to the Court detailing any guidance or submissions they may have about the expectations of privacy of any person whose identity is disclosed in the documents, that is, other than Andrew Gruben and Kelly Ovayuak.

Before concluding these reasons for the Court's decision, perhaps I will just state for the record that notice of the accused's O'Connor application before the Court today was served on Andrew Gruben and that in a communication from him via a letter from his mother, he advised that he was opposed to the release of his correctional records. He was not, however, represented by anyone at the hearing of this application.

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Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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Lois Hewitt, CSR(A), RPR, CRR  
Court Reporter