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I *R. v. Oake,* 2017 NWTSC 41 S-1-CR-2017-000038

I IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

I IN THE MATTER OF:

# I

I HER MAJESTY THE QUEEN

I - v -

I DARCY OAKE

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Transcript of the Oral Decision on Bail delivered by The

Honourable Justice L. A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 25th day of May, 2017.

APPEARANCES:

Mr. D. Praught: Counsel for the Crown

Mr. C. Davison: Counsel for the Accused

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 - v -

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 Mr. D. Praught: Counsel for the Crown

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 An Order of the Court has been made prohibiting publication,

 broadcast or transmission of information contained herein

 pursuant to s. 525(8) and 517 of the Criminal Code of Canada

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 1 THE COURT: Would you like Mr. Oake seated

 2 with you?

 3 MR. DAVISON: Yes, please.

 4 THE COURT: You can have a seat, sir.

 5 MR. DAVISON: And, Your Honour, this is a

 6 matter that's here for decision, but I do want to

 7 mention, and I've mentioned this to Mr. Praught,

 8 that Mr. Oake has brought with him this afternoon

 9 some paperwork. He tells me he has been able to

 10 start a treatment program while in North Slave

 11 Correctional Centre. If he's granted release,

 12 what he's just briefly told me about the program

 13 is such he would be able to continue the program

 14 outside of the facility pending his departure for

 15 the treatment centre if that is arranged and

 16 permitted under the terms of release. The flip

 17 side is if he's not granted release, he will

 18 still be able to carry on with the program inside

 19 the correctional centre.

 20 THE COURT: You've made the Crown aware of

 21 just now.

 22 MR. DAVISON: Yes. I've just learned of

 23 this myself.

 24 THE COURT: There's no need to be file --

 25 the documents to be filed here. You're just

 26 telling me so I'm aware?

 27 MR. DAVISON: Yes. I haven't looked at the

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 1 documents myself. So I'm just telling you so

 2 you're aware.

 3 THE COURT: All right. Thank you. I am

 4 ready to give my decision on this. I'm just

 5 going to say at the outset and remind everyone

 6 that there is a publication ban in effect that

 7 relates to the evidence that was presented at

 8 this hearing a few weeks ago. That ban applies

 9 to the things I am about to say.

 10 Mr. Oake faces a number of charges arising

 11 out of events that are alleged to have happened

 12 here in Yellowknife. He has one Information that

 13 includes two breaches of recognizance said to

 14 have happened on the 19th of November, 2016, and

 15 he also faces charges on a five-count

 16 Information. The charges on that Information

 17 include importation of furanyl fentanyl between

 18 October 30th and November 28th, 2016; trafficking

 19 in fentanyl on the 23rd of November 2016;

 20 possession of fentanyl for the purpose of

 21 trafficking on November 25th, 2016; criminal

 22 negligence causing bodily harm on the 23rd of

 23 November 2016; and a breach of recognizance also

 24 on the 25th of November, 2016.

 25 I heard at the bail hearing that he is also

 26 awaiting trial in Alberta on a charge of

 27 possession of cocaine for the purposes of

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 1 trafficking in relation to events that date back

 2 to October 2015.

 3 Since his arrest on the charges most

 4 recently laid against him in the Northwest

 5 Territories, he has been on remand. His charges

 6 came before this Court for review by operation of

 7 Section 525 of the Criminal Code and he now

 8 applies for release for the first time.

 9 In support of his application, he has filed

 10 an affidavit that sets out his release plan. The

 11 Crown did not cross-examine him on that

 12 affidavit. Mr. Oake's parents also both

 13 testified at the hearing. They are both being

 14 proposed as sureties.

 15 The Crown opposes Mr. Oake's release on all

 16 three grounds of detention that are set out at

 17 Section 515 of the Criminal Code.

 18 I will start by summarizing the allegations.

 19 The Alberta charge, as I mentioned, stems from

 20 allegations dating back to October 18th, 2015. I

 21 was told that on that date a vehicle was

 22 intercepted by police following a complaint.

 23 There were three people in that vehicle: the

 24 driver and two passengers. Mr. Oake was one of

 25 the passengers.

 26 After the vehicle was stopped, the police

 27 officer noticed a strong odour of cannabis inside

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 1 the vehicle. The driver gave a false name when

 2 he identified himself to the officer. The

 3 vehicle was searched and cocaine was found in the

 4 vehicle. I heard that just over 141 grams of

 5 powder cocaine and 142 grams of crack cocaine

 6 were seized from the vehicle.

 7 According to the copy of the Indictment that

 8 was filed at the bail hearing, Mr. Oake and the

 9 driver of the vehicle are jointly charged with

 10 two counts of possession of cocaine for the

 11 purpose of trafficking.

 12 I heard the case has passed the preliminary

 13 hearing stage and is currently pending before the

 14 Court of Queen's Bench in Alberta.

 15 Mr. Oake was released on October 27th, 2015,

 16 on a recognizance with a cash deposit of $1500.

 17 His father was the one who provided the funds for

 18 that deposit and he is noted as the assignee on

 19 the recognizance. But Mr. Oake's father was not

 20 named as a surety. There were no sureties on

 21 that recognizance.

 22 The release conditions included, among other

 23 things, that Mr. Oake was to reside at 166 Borden

 24 Drive, in Yellowknife, (that is his father's

 25 residence) and that he was to abide by a curfew

 26 between 10 p.m. and 6 a.m. every day. He was

 27 also required from refraining to possess,

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 1 consume, or purchase illegal drugs.

 2 The Crown alleges that on November 19th,

 3 2016, Mr. Oake was a passenger in a vehicle that

 4 was intercepted in Yellowknife as a result of a

 5 traffic violation. This occurred at 1:50 a.m.

 6 The police officer who stopped the vehicle knew

 7 that Mr. Oake was on a curfew and that is what

 8 led to the two-count Information alleging

 9 breaches. There is a breach of the curfew and a

 10 breach of the condition that he keep the peace

 11 and be of good behaviour. The two charges are

 12 based on the same allegations.

 13 Mr. Oake was released on a recognizance

 14 before an officer in charge that same day, and

 15 the only condition in that recognizance was the

 16 requirement that he abide by a curfew between

 17 10 p.m. and 6 a.m.

 18 The next set of allegations are by far the

 19 most serious. Between November 23rd and 25th,

 20 2016, there were a number of fentanyl overdoses

 21 in Yellowknife. I heard that the situation was

 22 so serious that medical officials issued

 23 advisories in the media that there was a

 24 particularly potent and dangerous type of

 25 fentanyl being sold on the streets of

 26 Yellowknife.

 27 Mr. Oake was one of the people who overdosed

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 1 on fentanyl. This happened on November 25th at

 2 his father's residence at 166 Borden Drive. He

 3 was, as a result of that overdose, in extreme

 4 medical distress. Paramedics were called, and

 5 police were also called to assist. He was

 6 treated with the type of medication that is used

 7 in these situations and was rushed to the

 8 hospital.

 9 The police officers that were at the scene

 10 spoke with his parents. They learned that

 11 Mr. Oake had used fentanyl on multiple occasions

 12 at the residence. Police officers felt that they

 13 needed to search the residence based on exigent

 14 circumstances given the very dangerous nature of

 15 the drug and the possibility there could still be

 16 some in the residence. Mr. Oake's father

 17 consented to the search of the residence.

 18 As a result of the cursory search of the

 19 residence and garage, police found in Mr. Oake's

 20 bedroom a number of items, including a clear

 21 baggie that had a white substance in it and a

 22 digital scale. In the garage, they found a torn,

 23 empty envelope which appeared to have been mailed

 24 from Hong Kong. Police learned from Mr. Oake's

 25 father that Mr. Oake sometime spent time in the

 26 garage.

 27 One of the officers who was involved in the

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 1 search began to experience worrisome symptoms

 2 suggesting that he might be affected by the

 3 substance that was being handled. That officer

 4 required medical attention, but, as far as I

 5 heard, was ultimately fine.

 6 A search warrant was obtained for the

 7 residence. During the execution of that warrant,

 8 two more scales were found as well as another

 9 empty envelope which appeared to have been mailed

 10 from China. A laptop was also seized and it is

 11 still being examined, so at this point it is not

 12 known whether there is anything relevant to this

 13 investigation that will be found in it. The

 14 white substance in the baggies seized in

 15 Mr. Oake's room was tested and it was found to be

 16 furanyl fentanyl. Swabs taken from the inside of

 17 both envelopes tested positive for the same

 18 substance.

 19 During the investigation, police interviewed

 20 Courtney Janes, one of the persons who had

 21 overdosed on fentanyl during those days in

 22 November 2016. She advised that she went to 166

 23 Borden Drive and saw Mr. Oake there. They went

 24 inside the garage and there Mr. Oake made a line

 25 of drugs for them. He gave her some as well and

 26 some paper and told her to be careful on it as he

 27 had overdosed on it the day before. Ms. Janes

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 1 advised that later that day she blacked out. It

 2 is alleged that members of her family found her

 3 in medical distress and called emergency

 4 services. Ms. Janes also told police that she

 5 was present when Mr. Oake ordered some fentanyl

 6 from China.

 7 During the investigation, Mr. Oake's parents

 8 were also interviewed. They both confirmed they

 9 knew their son was using drugs. His mother is a

 10 nurse and had talked to him about getting into a

 11 treatment program and he had agreed to go.

 12 On November 28th, the police in Yellowknife

 13 were advised by their colleagues in British

 14 Columbia that as part of a seizure that occurred

 15 at the Vancouver airport an envelope addressed to

 16 Mr. Oake at 166 Borden Drive, mailed from China,

 17 was found to contain 11.7 grams of furanyl

 18 fentanyl.

 19 The charges arising out of the November

 20 events were sworn on November 30th and a warrant

 21 for Mr. Oake's arrest was issued. He was still

 22 in hospital at that point. The Crown alleges

 23 that he was, at that point or shortly after, in

 24 hospital voluntarily in the sense that there was

 25 no medical requirement for him to remain there.

 26 On December 2nd police made attempts to make

 27 arrangements for him to turn himself in.

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 1 Surveillance was established at the hospital

 2 because police were concerned that Mr. Oake might

 3 decide to leave and not turn himself in.

 4 The Crown alleges that Mr. Oake's mother was

 5 seen arriving at the hospital in a vehicle and

 6 that shortly after that Mr. Oake was seen walking

 7 out of the hospital with a hood over his head.

 8 The Crown further alleges that Mr. Oake went back

 9 inside the hospital and his mother drove away. I

 10 understand the Crown's allegation to be that this

 11 happened because they saw police were there. But

 12 the discussions continued and eventually Mr. Oake

 13 did come out of the hospital and was arrested.

 14 The Crown supplemented these allegation with

 15 background information about the drug fentanyl.

 16 These remain allegations at this stage, but the

 17 nature of this drug and its dangerousness has

 18 been the subject of comments by this Court over

 19 the past few months and by other Courts across

 20 the country as well, so at least some aspects of

 21 this are not really in issue.

 22 Fentanyl is a very potent drug that creates

 23 physical dependency and it involves a high risk

 24 of overdose. The Crown has provided statistical

 25 information about the drastic increase, over the

 26 past few years, in deaths resulting from fentanyl

 27 overdoses. There have been two separate public

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 1 health advisories in the NWT in relation to this

 2 drug, one in February and one in November. I do

 3 not think anybody takes issue with the fact that

 4 this is indeed a very dangerous drug.

 5 Mr. Oake's election on the five-count

 6 Information is trial by judge alone. At the time

 7 of the bail hearing, no date had been scheduled

 8 for the preliminary hearing into these matters,

 9 and I know from reviewing the file that the

 10 matter is actually to be spoken to in Territorial

 11 Court tomorrow unless something has changed since

 12 those endorsements were made on the Territorial

 13 Court file.

 14 Those are the allegations that provide

 15 context for this application for release. The

 16 other important piece of course is the release

 17 plan being proposed.

 18 It is clear on the evidence that Mr. Oake

 19 was born in Yellowknife and raised here. He

 20 spent virtually all his life here. His immediate

 21 family is here (his parents and his brother) and

 22 so are members of his extended family (an aunt,

 23 an uncle, and cousin). He is 22 years old and he

 24 does not have a criminal record.

 25 In his affidavit, Mr. Oake acknowledges that

 26 he is an addict and needs treatment. He has

 27 attended Narcotics Anonymous meetings while on

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 1 remand. At the time of the bail hearing, he had

 2 not been able to access the substance abuse

 3 program offered at the jail because priority is

 4 given to people serving sentences. At the time

 5 he swore his affidavit, he was on the waiting

 6 list, but I heard just after we opened court this

 7 afternoon that he has now been able to begin a

 8 treatment program within the jail and that is a

 9 very positive thing.

 10 Mr. Oake had taken steps to attend treatment

 11 before his arrest. I heard that he had been

 12 accepted into treatment at the Edgewood Facility

 13 in British Columbia and he was scheduled to

 14 attend in December 2016. His arrest prevented

 15 that from happening. His plan, if released, is

 16 to renew his application to attend this treatment

 17 facility.

 18 My understanding of the evidence and the

 19 submissions made on the application is that

 20 Mr. Oake is not able to reapply to Edgewood until

 21 and unless he is actually released on bail. His

 22 counsel advised that based on the information he

 23 has been able to gather, the application process

 24 to get into this treatment program requires the

 25 applicant to be "available", which to them means

 26 "not in custody" at the time the application is

 27 submitted.

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 1 I am going to open a brief parenthesis here

 2 just to draw to counsels' attention something

 3 that I came across more by coincidence than

 4 anything else, which does not change anything to

 5 my decision in this matter but I thought I should

 6 raise because it came to my attention.

 7 In an entirely different context recently,

 8 and Mr. Praught will be aware of this matter, as

 9 part of an estreatment hearing and, as part, I

 10 was provided background materials on another drug

 11 case. Of course, at the stage of the estreatment

 12 hearing, the only question was whether money

 13 should be forfeited, but I was provided the

 14 pre-sentence report that was prepared for that

 15 sentence as well as the Reasons for Sentence of

 16 the sentencing judge. And it may just be that

 17 information was reported incorrectly or that I

 18 misunderstood what I read, but it appeared that

 19 in that case when the accused had been released

 20 at some point during his case, he was released

 21 directly into the treatment plan at Edgewood. In

 22 other words, it sounded from what was referred to

 23 in the pre-sentence report that when he was in

 24 custody he was able to somehow apply while he was

 25 still in custody. Just so counsel are aware, the

 26 sentencing decision on that is reported at 2017

 27 NWTTC 01, and this court's estreatment file is

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 1 2017-000009. I did not look at this very

 2 closely, I just happened to notice it because I

 3 had just heard this bail hearing.

 4 I want to make it clear that I do not doubt

 5 for a second that the information I was provided

 6 at this hearing is the information that counsel

 7 were given and was an accurate representation of

 8 the situation as it was explained to counsel. I

 9 raise it only because it may be that there is a

 10 case where it does make a difference whether a

 11 person may be released directly to this treatment

 12 program. And, if not whoever is applying for

 13 release at any given point, the Crown would have

 14 an interest in knowing whether in fact it is

 15 possible or not to submit an application while in

 16 custody. But as I say, it makes no difference to

 17 my decision on this matter. I just wanted to

 18 raise it and now I close that parenthesis.

 19 Turning back to this case, the information

 20 and the evidence that I have is that there is

 21 some uncertainty about when Mr. Oake might be

 22 able to attend treatment if he is released. It

 23 would depend on how quickly his application

 24 process can be completed and, of course, when

 25 space is available for him at the facility.

 26 Also as part of the release plan, Mr. Oake

 27 is prepared to consent to provide samples of his

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 1 blood and urine, to allow his hands to be swabbed

 2 for the purposes of ensuring that he is

 3 continuing to abstain from consuming illicit

 4 drugs. He is prepared to subject himself to

 5 random testing without there being a need for the

 6 police officer requesting this to have any

 7 grounds to believe that he has actually breached

 8 his release terms, and he is prepared to waive

 9 his right to confidentiality as to any medical

 10 attention or intervention that he might receive

 11 and to authorization any medical personnel who

 12 deals with him to contact police and report

 13 details of his condition should he require

 14 intervention after have consumed illicit

 15 substances. So I guess, in summary, he is

 16 prepared to comply with any conditions the Court

 17 may place on him and he has proposed to give up

 18 several aspects of his rights to facilitate and

 19 encourage the monitoring of these conditions. It

 20 is proposed in the release plan that he would

 21 live with his mother.

 22 As I have said already, Mr. Oake's parents

 23 are both prepared for act as sureties for him.

 24 His father is prepared to cash in some of his

 25 investments and deposit an amount of $1,000. His

 26 mother is proposing to pledge a surety in the

 27 same amount but without a deposit. Both of them

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 1 testified that they are prepared to monitor their

 2 son's compliance with conditions and to call the

 3 police if there are any breaches. Neither of

 4 them was a surety on the earlier recognizance.

 5 Mr. Oake's mother was asked why she thought

 6 it would be any different this time if her son

 7 was released and why she believed this time he

 8 would abstain from consuming drugs and take

 9 treatment, considering that treatment had been

 10 discussed and arranged in the past and evidently

 11 he still continued to use. Her answer was "His

 12 death." I take this to mean that she believes

 13 that the near fatal consequences that he suffered

 14 as a result of his last overdose is what will

 15 make a difference to his resolve in tackling his

 16 addiction issues.

 17 With respect to what happened when the

 18 police were trying to execute the arrest warrant

 19 in early December, Mr. Oake's mother explained

 20 that her intentions when she went to the hospital

 21 that day were to facilitate her son's attendance

 22 at the treatment program. She answered those

 23 questions very directly and she did not try to

 24 put any other spin on that. She said the

 25 treatment was something that Mr. Oake's doctors

 26 had approved and that, in effect, his arrest and

 27 preventing him from attending treatment at that

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 1 point went against what she understood his

 2 doctors wanted to see happen. Of course I do not

 3 have any evidence from the doctors, but this is

 4 what she said in her testimony. I think her

 5 evidence makes it quite clear that her priority

 6 at that time was to try to get her son into

 7 treatment. She believed that is where he should

 8 be and not in police custody.

 9 She also testified that if her son is

 10 released and is accepted at the treatment

 11 facility, she intends on travelling there with

 12 him and take him to the treatment centre herself.

 13 She says she realizes it could take a long time

 14 before these matters go to trial, and she

 15 understands that by agreeing to be a surety and

 16 monitoring her son's compliance with conditions,

 17 she is making a major commitment. She maintained

 18 that she is prepared to follow through with that

 19 commitment.

 20 Mr. Oake's father said he never saw evidence

 21 of the drug-related activities in the garage at

 22 his house on Borden Drive. He did acknowledge

 23 that he saw evidence of drug use in his son's

 24 room from time to time. He was asked why he did

 25 not report this illegal activity to the police

 26 and he said he did not think it was his

 27 responsibility. He maintained that he does

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 1 understand that as a surety it would now very

 2 much be his responsibility to call the police if

 3 this were to happen again, or if he became aware

 4 of any breaches of the release terms. He

 5 testified that he is between jobs at the moment

 6 and he would have some time and flexibility to

 7 check in on his son and make sure he is complying

 8 with the terms of his release. He acknowledged

 9 it may be difficult for him to monitor compliance

 10 with the curfew as Mr. Oake would not be living

 11 with him, and he also added that there is no

 12 landline at the residence, but he said he could

 13 drive over and make some checks himself.

 14 Again, Mr. Oake did not seem to me to be

 15 trying to overstate anything. He answered the

 16 questions he was asked in a very matter-of-fact

 17 way and he did not try to justify or rationalize

 18 his conduct or any of the things that he was

 19 being cross-examined about during the hearing.

 20 The Crown, as I have said at the outset,

 21 opposes Mr. Oake's release on all three grounds,

 22 emphasizing particularly the second and the

 23 third.

 24 On the primary ground, the Crown says that

 25 the allegations involve very serious offences,

 26 that significant sentences will be imposed if

 27 Mr. Oake is found guilty, and that this gives

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 1 rise to a high risk that he may be tempted to

 2 abscond. The Crown also notes that Mr. Oake,

 3 knowing that there was a warrant for his arrest,

 4 appears to have attempted to leave the hospital,

 5 and his mother effectively confirmed that her

 6 intention, as I have said already, was to try to

 7 get him to treatment.

 8 With respect to the second ground, which is

 9 focused on public safety, the Crown notes that

 10 the allegations reflect increasingly serious

 11 behaviour and suggest that being on conditions,

 12 even with a cash deposit, has not been a

 13 sufficient incentive to ensure that further

 14 offences would not be committed. The Crown also

 15 noted that Mr. Oake's acknowledged addiction is a

 16 powerful factor and creates a high risk of

 17 reoffending. The Crown is concerned that the

 18 proposed plan is not sufficient to control that

 19 risk. Mr. Oake lived with one of his parents

 20 when he is alleged to have committed the breaches

 21 and the subsequent drug offences. There is no

 22 guarantee that he will be accepted into treatment

 23 and no certainty as to when he will go. The

 24 Crown is not suggesting that Mr. Oake's parents

 25 do not have the best of intentions, but argued

 26 that especially given his involvement in

 27 importing and trafficking a highly dangerous

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 1 substance, Mr. Oake poses a significant risk to

 2 others.

 3 On the tertiary ground, the Crown argues

 4 that its case is strong and, if convicted,

 5 Mr. Oake faces a significant penalty. The Crown

 6 says that it is of particular concern that

 7 Mr. Oake, having overdosed on the drug before,

 8 knew how dangerous it was and still provided it

 9 to another person. The Crown argues that

 10 Mr. Oake's release in light of all of this would

 11 cause the public to lose confidence in the

 12 administration of justice.

 13 Mr. Oake's counsel argues that the primary

 14 ground is not really a concern given Mr. Oake's

 15 ties to Yellowknife and his lack of criminal

 16 record. On the secondary ground, the defence

 17 notes that the allegations do not suggest that

 18 Mr. Oake is involved in commercial trafficking

 19 based on greed but, rather, that he is an addict

 20 and that this is what is at the root of his

 21 activities. Defence points out that the heart of

 22 the release plan is to ensure that Mr. Oake

 23 receives the treatment that he needs as soon as

 24 possible and that once that happens and the issue

 25 of his addiction is addressed, the concerns for

 26 public safety would no longer exist.

 27 Defence notes that because there were no

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 1 sureties before, Mr. Oake's parents were, in

 2 fact, not under any obligation to report anything

 3 to police in the past, but that they have both

 4 now sworn that they understand their

 5 responsibilities if they do become sureties and

 6 have sworn that they will abide by them.

 7 Defence notes that Mr. Oake is a young

 8 person without a criminal record and argues that

 9 his detention is not necessary to protect the

 10 public.

 11 On the tertiary ground, the defence

 12 acknowledges that the Crown's case on the

 13 importation charge is strong and that the likely

 14 sentence for that offence, if Mr. Oake is

 15 convicted, will be significant.

 16 The defence points to the other factors set

 17 out in the Criminal Code, however, including the

 18 circumstance of the offence. Defence notes again

 19 that the situation of an addict who is primarily

 20 supporting his habit engages different

 21 considerations than the situation of someone who

 22 traffics in these dangerous substances purely for

 23 commercial and mercantile purposes. There is no

 24 allegation here or evidence suggesting

 25 involvement with gangs, weapons, or violence.

 26 Defence argues that Mr. Oake's involvement is at

 27 the lower end of the scale and that his release

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 1 plan meets the concerns that may exist under the

 2 tertiary ground.

 3 I have given the evidence, the submissions,

 4 and the case law that I was referred to a lot of

 5 thought in what I consider to be a difficult

 6 decision to make in this case.

 7 On the primary ground, the question I must

 8 ask myself is whether Mr. Oake's detention is

 9 necessary to ensure that he will attend court.

 10 To be sure, he faces a significant sentence if he

 11 is convicted, and that is always something that

 12 can raise concerns about the temptation a person

 13 might have to try to flee to try to avoid facing

 14 the consequences of a possible conviction.

 15 At the same time, Mr. Oake is from

 16 Yellowknife, his family is here. I think that

 17 there are ways to craft release terms that will

 18 minimize any flight risk that he might represent.

 19 There can never be any guarantees in this regard.

 20 Decisions on bail always require a risk

 21 assessment, but, on the primary ground, I am

 22 satisfied that it is possible to craft tight

 23 conditions that would ensure Mr. Oake will come

 24 to court as required and face trial when the time

 25 comes.

 26 The question I must ask myself on the

 27 secondary ground is whether Mr. Oake's detention

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 1 is necessary for the protection of the public. I

 2 must consider whether there is a substantial

 3 likelihood that if released he will commit an

 4 offence or interfere with the administration of

 5 justice.

 6 With respect to this ground for detention,

 7 counsel have both referred to the Supreme Court

 8 of Canada decision in R. v. Pearson, [1992] 3 SCR

 9 665, and I want to say a few words about that

 10 decision.

 11 Pearson was the case where the

 12 constitutional validity of the reverse onus bail

 13 provisions for drug charges were challenged. In

 14 explaining why these provisions were Charter

 15 compliant, the Court made comments about the

 16 unique characteristics of drug trafficking

 17 offences, including how lucrative and organized a

 18 business it is and how strong the incentive is to

 19 continue trafficking even for someone awaiting

 20 trial. The Crown emphasized those comments and

 21 urged me to take them to heart and to recognize,

 22 when considering whether Mr. Oake's detention is

 23 necessary for the protection of the public, the

 24 incentive he will have to continue trafficking in

 25 this drug, because it is a very lucrative

 26 business and also because of the fact that he is

 27 an addict. Many addicts who traffic, traffic to

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 1 support their habits, and if Mr. Oake is not able

 2 to address his addiction, the risk that he may

 3 traffic again, if released, to resume supporting

 4 his habit is high. I have taken this into

 5 account, but, as noted by defence, there are

 6 other aspects of the Pearson decision that must

 7 also be considered.

 8 One of the arguments that was made in

 9 Pearson was that because of the very broad

 10 definition of the concept of trafficking in the

 11 Act, the effect of the reverse onus provisions on

 12 bail was too far reaching. The Supreme Court of

 13 Canada's answer to that argument was that for the

 14 "small fry", or people who traffic essentially by

 15 sharing drugs with their friends and supplying

 16 their friends, it would be easier to rebut the

 17 reverse onus and be granted release. That is

 18 discussed as page 698 of the decision.

 19 The Supreme Court recognized in this

 20 context, as it should, that not all trafficking

 21 offences are the same and not all drug

 22 traffickers are in the same position vis-a-vis

 23 the criminal organizations that effectively run

 24 drug trafficking activities and profit from it.

 25 The evidence adduced at this hearing is more

 26 consistent with Mr. Oake being an addict who

 27 trafficked primarily to support his habit as

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 1 opposed to being high up in an organized

 2 hierarchy of fentanyl distribution in

 3 Yellowknife. That is not to minimize the

 4 seriousness of what he is alleged to have done.

 5 But the allegations before me, taken at their

 6 highest, do not suggest, not at this stage at

 7 least, that he is a high level trafficker making

 8 considerable profit. There no evidence that

 9 score sheets were found, there is no evidence

 10 that large sums of money were found on him or at

 11 the house. His father was the one who put up

 12 that cash deposit to secure his release on the

 13 Alberta charges.

 14 Of course there is always a concern where

 15 there is evidence suggesting that an accused may

 16 not be inclined to comply with release terms, and

 17 there is that kind of evidence before me. The

 18 case on the breach of curfew appears to be

 19 strong, and, as the Crown noted, the next series

 20 of substantive charges that also represented

 21 breaches of the release terms arose just a few

 22 days after Mr. Oake was arrested for the breach

 23 of curfew. At the same time, I must recognize

 24 the difference between the release plan that was

 25 in place on the Alberta charges and the one that

 26 is being proposed now. The Alberta recognizance

 27 did not involve sureties. Mr. Oake was not being

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 1 supervised by anyone. The plan proposed now is

 2 much stronger. There is always a question as to

 3 whether a young adult's parents can actually have

 4 any control over his behaviour. I have not lost

 5 sight of the fact that Mr. Oake was living with

 6 his father when the November events arose. And I

 7 have not lost sight of the fact that one could

 8 say that his mother was not as cooperative or

 9 aligned with what the police were trying to do as

 10 she could have been when they tried to execute

 11 the arrest warrant. But, she has explained what

 12 her point of view was and she has sworn before

 13 this court that she understands what her

 14 responsibilities as a surety would be. She has

 15 sworn that she knows now that it would be her

 16 obligation to report any breach of the release

 17 terms immediately if that should happen.

 18 Mr. Oake lived with his father at the time

 19 of the November incidents. But, again, the

 20 father had supplied the cash deposit for the

 21 Alberta charges but he was not a surety. And he,

 22 too, at this hearing, swore that he understands

 23 the responsibilities that come with this. I have

 24 no reason to doubt the sincerity of either of

 25 these people and I did not understand the Crown

 26 to actually be questioning their sincerity

 27 either.

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 1 I am also mindful that Mr. Oake's parents

 2 also have a powerful incentive, quite apart from

 3 financial consequences to them should there be

 4 breaches, to keep a close eye on their son. It

 5 could be said that at this point for Mr. Oake to

 6 address in a meaningful way his addiction could

 7 very well be a question of life and death. And I

 8 am confident that for a parent that is a powerful

 9 incentive to do everything that they can to make

 10 sure that he does comply with his release terms.

 11 As I said already, bail always involves a

 12 risk assessment. Can I be certain today that if

 13 I release Mr. Oake he will not engage in illegal

 14 activities again? Can I be 100 percent certain

 15 of that? Absolutely not, but that is not what is

 16 required for him to meet his onus. I am

 17 satisfied that with two sureties, with strict

 18 conditions, with some of the random monitoring

 19 measures he is willing to subject himself to, and

 20 with the plan of accessing treatment for his

 21 addiction, the risk that his release presents

 22 from the point of view of public safety can be

 23 sufficiently mitigated to not make his detention

 24 necessary.

 25 That leaves the tertiary ground. The

 26 question that I must ask myself on that ground is

 27 whether Mr. Oake's detention is necessary to

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 1 maintain public confidence in the administration

 2 of justice. That proves to be a challenging

 3 ground, I think, in any case that involves

 4 allegations of trafficking in this very dangerous

 5 drug.

 6 The Supreme Court of Canada in St-Cloud,

 7 [2015] 2 SCR 328, has provided some welcome

 8 guidance as to how the tertiary ground should be

 9 approached. The Criminal Code itself says that

 10 some factors must be considered. They include

 11 the apparent strength of the Crown's case, the

 12 gravity of the offence, the circumstances of the

 13 offence, including whether firearms were used,

 14 and the fact that the accused could face a

 15 lengthy jail term if convicted. To this the

 16 Supreme Court of Canada has added in St-Cloud, at

 17 paragraph 71, that the circumstances of the

 18 accused should be considered: age, whether there

 19 is a criminal record, any physical or mental

 20 condition that is relevant, whether the person is

 21 part of a criminal organization.

 22 On this ground, the defence has fairly

 23 conceded that the Crown's case on the importation

 24 case is strong and that these are serious

 25 offences that would carry, in the event of

 26 conviction, lengthy sentences.

 27 The Alberta charge on its face is also

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 1 serious, but it is more difficult for me to

 2 assess the strength of the Crown's case on that

 3 charge based on what is before me. At the

 4 hearing, the Crown noted that there has been a

 5 committal to stand trial, but, in my respectful

 6 view, that means very little given the very low

 7 threshold under our law for committal after a

 8 preliminary hearing. The allegations as I heard

 9 them were in some respects quite vague. There

 10 are no details, for example, as to where the

 11 drugs were found in the vehicle. What I have is

 12 an allegation that there was a vehicle, three

 13 people in it, including Mr. Oake, and drugs found

 14 somewhere it. So the outcome of the application

 15 today and whether the onus and the tertiary

 16 ground can be met turns much more on the nature

 17 of the Yellowknife charges and their

 18 circumstances.

 19 The Crown has understandably emphasized the

 20 very dangerous nature of the drug fentanyl. The

 21 Crown also emphasized, also understandably, that

 22 Mr. Oake was aware how dangerous it was because

 23 he had overdosed on it already and still he chose

 24 to provide it to someone else. And there appears

 25 to be strong evidence that he is the one who was

 26 bringing this drug into the community.

 27 As I have said, the defence has acknowledged

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 28

 1 all of this but points that the overall

 2 circumstances do not suggest this was done for

 3 greed but rather, was the desperate action of an

 4 addict feeding his habit.

 5 In St-Cloud, the Supreme Court clarified

 6 which public must be considered when deciding

 7 whether an accused's release, and sometimes

 8 whether an accused's detention, would undermine

 9 confidence in the administration of justice.

 10 Some of the key things include that that public

 11 is supposed to be someone who understands that

 12 accused persons are presumed innocent until

 13 proven guilty, have the right to reasonable bail,

 14 and that the right to bail is constitutionally

 15 protected for everyone in this country.

 16 To be sure, there is considerable concern

 17 around drug trafficking in general and with

 18 respect to trafficking in fentanyl in particular.

 19 That concern is growing exponentially as the

 20 number of overdoses and death overdoses continue

 21 to rise across this country. That concern is

 22 well felt in this community as I have had

 23 occasion to mention in a few decisions where I

 24 sentenced people for trafficking in this drug.

 25 But that concern, real as it is, cannot overtake

 26 the entire analysis. If it did, no one charged

 27 with fentanyl trafficking would ever be released

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 1 on bail, no matter what the circumstances and no

 2 matter what release plan was presented. That is

 3 not an acceptable outcome under our law. Under

 4 our law, even people charged with very serious

 5 offences, even murder, are entitled to reasonable

 6 bail if their detention is not necessary for one

 7 of the three grounds listed in the Criminal Code.

 8 The detention has to be necessary, not just

 9 helpful or convenient.

 10 This Court is very concerned about the

 11 public health risk associated with fentanyl and

 12 its trafficking, but after considerable thought I

 13 have concluded that the release plan that

 14 Mr. Oake has presented meets the concerns under

 15 the tertiary ground as well. I conclude that

 16 given the nature of the terms that he is prepared

 17 to agree to, given his parents' willingness to

 18 act as sureties, given that they, too, know that

 19 for him at this point getting treatment may be a

 20 question of life and death, I have come to the

 21 conclusion that Mr. Oake has met his onus on the

 22 tertiary ground.

 23 Mr. Oake, I hope you understand that you are

 24 walking a very fine line for the next while. Do

 25 not expect leniency if you are caught breaching

 26 any of your release terms, at least not from me.

 27 There will be cumbersome conditions, that you

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 1 have agreed to, that you outlined in your

 2 affidavit. They could be in force for a long

 3 time. But if you do not want to end up back in

 4 custody, you have to follow them, as hard as it

 5 may be. The main objective here is get you to

 6 treatment and, once you return from treatment, to

 7 have you remain sober.

 8 The other case I was talking about, and you

 9 know about it, I am sure, was one where the

 10 person did go to treatment, came back and

 11 overdosed again. So it is a long road and I know

 12 you know that.

 13 It is essentially going to be up to you, and

 14 I hope that what happened in November has been

 15 the last lesson you needed to actually do what

 16 you need to do.

 17 I will grant the application and release

 18 Mr. Oake on a recognizance, and I followed for

 19 the most part the conditions that were set out at

 20 Exhibit "B" of Mr. Oake's affidavit. On the

 21 recognizance there will be two surety. Mr. Dean

 22 Oake will be the first surety and there will be a

 23 requirement for $1,000 cash deposit by him. Lori

 24 Dashney will be the second surety. There will be

 25 a $1,000 amount pledged by her but without a cash

 26 deposit. The other conditions are as follows,

 27 and listen carefully to these, Mr. Oake: You are

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 1 to attend court as required. You are to reside

 2 at 4919 - 44th Street in Yellowknife. You are to

 3 comply with a curfew every day from 8 p.m. until

 4 7 a.m. You are to come to the door of the

 5 residence or answer the telephone if the police

 6 or bail supervision authorities come to check on

 7 your curfew compliance. You are not to possess

 8 or consume any drugs except in accordance with a

 9 medical prescription. In order to enforce that

 10 term, I am going to include the three things that

 11 are listed in the exhibit to your affidavit. I

 12 will not read it all out here, Madam Clerk, but

 13 you can refer to the exhibit.

 14 COURT CLERK: Certainly, Your Honour.

 15 THE COURT: Essentially, you are agreeing

 16 that you are to provide samples of your blood or

 17 urine, if needed, and you are waiving a lot of

 18 your confidentiality rights with respect to

 19 medical matters, and you are saying that you

 20 understand that checks can be done at random.

 21 I am going to require you to report - this

 22 is cumbersome, but I feel it is important for all

 23 the reasons I have been talking about - Mondays,

 24 Wednesdays, Fridays, and Sundays in person. The

 25 proposed conditions refer to "bail supervision

 26 authorities". Often reporting conditions are

 27 worded as "requirements to report to the RCMP".

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 1 Mr. Davison, has the situation changed or is

 2 that intended to mean the RCMP? The reporting

 3 conditions, it is worded "to bail supervision

 4 authorities". I am more familiar with "report to

 5 the RCMP", but we do not deal with that many bail

 6 matters in this court.

 7 MR. DAVISON: I had put it that way because

 8 there is a bail supervisor -- effectively,

 9 they're probation officers that do the bail

 10 supervision duties as well. However, I'm going

 11 to guess that there is a duty probation office

 12 who's on call on weekends or holidays. But there

 13 wouldn't be anybody in the office. So --

 14 THE COURT: I think we will make the

 15 reporting requirement to the RCMP.

 16 MR. DAVISON: Thank you.

 17 THE COURT: To the RCMP detachment because

 18 we know that they are always there.

 19 The next condition is that if you obtain

 20 employment, you are to provide the full details

 21 of that employment to the RCMP in Yellowknife and

 22 to the bail supervision authorities, including

 23 who your employer is, where you are working, and

 24 what your schedule is going to be.

 25 I did not ask this at the hearing,

 26 Mr. Praught, but it was contemplated that there

 27 be a no-contact order. Are there specific

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 1 individuals you would like listed?

 2 MR. PRAUGHT: Yes, Your Honour.

 3 Ms. Courtney Janes.

 4 THE COURT: Yes.

 5 MR. PRAUGHT: There are other witnesses,

 6 potential witnesses, on the file we'd ask to

 7 include as well. That would be Dwight Carpenter,

 8 Samantha Janes, Barb Mezaros. Just if I may have

 9 a moment?

 10 THE COURT: Yes.

 11 MR. DAVISON: If I can help out. I did see

 12 a Lance Kristensen named in the file, and I think

 13 he's also somebody that is associated with the

 14 Section 145 charges. I would submit that's a

 15 name that should be on the list, too, if my

 16 friend wasn't going to propose --

 17 MR. PRAUGHT: I thank my friend for that,

 18 yes. And the Alberta recognizance will still be

 19 in place.

 20 THE COURT: Yes, and I know that file is

 21 not before me. So maybe when we are done here, I

 22 am just going to ask that you make sure the clerk

 23 has the correct spelling of those names.

 24 You recognize those names, Mr. Oake?

 25 THE ACCUSED: Yeah.

 26 THE COURT: All right. So you are to have

 27 no contact with any of them, directly or

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 1 indirectly.

 2 The next condition is that upon your release

 3 you will take immediate steps to complete the

 4 application process to be admitted to the

 5 Edgewood treatment program.

 6 The next condition -- here again, Madam

 7 Clerk, I am using essentially what was paragraph

 8 10 of the exhibit to Mr. Oake's affidavit.

 9 THE COURT CLERK: Certainly, Your Honour.

 10 THE COURT: It is a series of conditions

 11 that will apply if you are accepted into the

 12 treatment program. The idea there is that you

 13 will have to make sure the RCMP and the bail

 14 supervision authorities here know when you are

 15 going and when you come back so that they know

 16 where you are. Your lawyer prepared this, so I

 17 think you are familiar with it, but the

 18 conditions include: to provide your bail

 19 supervisor with full details and provide your

 20 written consent to allow the persons assisting

 21 you in accessing the treatment program to provide

 22 ongoing details about your program and your

 23 progress; provide the Yellowknife RCMP with the

 24 details of your travel itinerary to and from the

 25 treatment program, including when you will be

 26 travelling, the route, and your expected arrival.

 27 You are to report in person to the local police

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 1 department or the closest RCMP detachment upon

 2 your arrival at the treatment program in question

 3 and provide them with a copy of your release

 4 documents.

 5 Once you return to Yellowknife, the

 6 reporting conditions that I have already talked

 7 about will resume. You are to travel as directly

 8 as possible both to and from the treatment

 9 program in the company of your surety, Lori

 10 Dashney. This is not in what Mr. Davison had

 11 listed, but I think it is crucial that someone be

 12 with you. For the travel, I mean.

 13 There is another paragraph that refers to

 14 the requirement if you have to overnight on your

 15 way to the treatment program: to advise the

 16 Yellowknife RCMP of the details of where you are

 17 staying and to continue to obey all the terms of

 18 your release.

 19 The last subparagraph confirms, and I want

 20 this to be very clear to you, that all the other

 21 conditions, including the monitoring conditions,

 22 continue to apply whether you are in Yellowknife

 23 or at the treatment program. The only conditions

 24 that will not apply will be the residency

 25 requirement, obviously, because you will not be

 26 at home, and the reporting to the RCMP in

 27 Yellowknife requirement because you cannot do

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 1 that if you are not here. But whoever the police

 2 force is in the location you will be will be

 3 authorized to monitor your compliance with the

 4 other conditions exactly the same way as the

 5 police here are.

 6 The next condition -- you understand?

 7 THE ACCUSED: Yeah.

 8 THE COURT: The next condition is you will

 9 remain in regular contact with your counsel and

 10 you will keep yourself informed of all court

 11 appearance dates scheduled for your case.

 12 I forgot to ask this at the time of the

 13 hearing, but do you have a passport?

 14 THE ACCUSED: I think it's expired.

 15 THE COURT: All right. Well, if -- I am

 16 going to ask you to surrender your passport to

 17 the RCMP even if it is expired.

 18 THE ACCUSED: Okay.

 19 THE COURT: I doubt these days you would

 20 get very far with an expired passport --

 21 THE ACCUSED: Yeah.

 22 THE COURT: -- but surrender it.

 23 I am also -- this is not going to come up

 24 for some time, but I am going to include a

 25 condition that you are to surrender yourself to

 26 the custody of the North Slave Correctional

 27 Centre, I think would be the logical place, no

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 1 later than 72 hours before the date scheduled for

 2 the start of your trial. The proceedings in

 3 Territorial Court are another matter. I am just

 4 talking about trial here. When we get to the

 5 point of the trial in this court (we do not know

 6 when that will be but at some point you will

 7 know), 72 hours before that, at the latest, you

 8 have to surrender yourself in custody.

 9 THE ACCUSED: Yeah.

 10 THE COURT: Do you understand all that?

 11 THE ACCUSED: Yeah.

 12 THE COURT: Is there anything that I have

 13 overlooked, Mr. Praught?

 14 MR. PRAUGHT: Your Honour, I think a weapons

 15 -- firearm condition is mandatory pursuant to

 16 515(4.1) given that Mr. Oake is charged with a

 17 Section 5 and Section 6 CDSA offence.

 18 THE COURT: Do you agree, Mr. Davison?

 19 MR. DAVISON: I think I do. If I can just

 20 check?

 21 THE COURT: Yes, yes.

 22 MR. DAVISON: I hadn't thought about this,

 23 but I think my friend is right.

 24 Yes, I do agree.

 25 THE COURT: So that mandatory condition.

 26 And the reference, Madam Clerk, do you have it?

 27 COURT CLERK: Section 515, Your Honour?

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 1 MR. PRAUGHT: Sub (4.1) sub (c).

 2 THE COURT: (4.1)(c). Section 515 is a

 3 long section. Anything else Mr. Praught that I

 4 might have overlooked?

 5 MR. PRAUGHT: No.

 6 THE COURT: Anything not clear,

 7 Mr. Davison?

 8 MR. DAVISON: No. But if I might check one

 9 point with his mother?

 10 THE COURT: Yes.

 11 MR. DAVISON: I was just checking about the

 12 passport. Mr. Oake thinks it was at his

 13 mother's. His mother thinks it may have been

 14 disposed of given it was expired. I wonder if we

 15 could simply say surrender it by 4:30 tomorrow

 16 afternoon?

 17 THE COURT: If it, if it --

 18 MR. DAVISON: Or confirm that --

 19 THE COURT: Or confirm that there isn't

 20 one.

 21 MR. DAVISON: Yes. That they can't find

 22 one, yes.

 23 THE COURT: All right. So one or the

 24 other. Surrender or confirm that there isn't

 25 one.

 26 MR. DAVISON: And I am just thinking here.

 27 Often that clause comes with an obligation or

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 1 prohibition against applying for any further

 2 passport or further travel documents if that's of

 3 concern to the Court.

 4 THE COURT: Actually, now that you say

 5 that, I will include a condition that aside from

 6 the requirements of treatment, he is not to leave

 7 the Northwest Territories. And also I think it

 8 is a good idea as a subset of the passport

 9 condition that he is not to apply for a passport.

 10 That is clear enough, I think.

 11 MR. DAVISON: Now, in terms of not leaving

 12 the Northwest Territories, of course the

 13 treatment program is in British Columbia. So --

 14 THE COURT: Yes, I said except for the

 15 purposes of attending treatment.

 16 MR. DAVISON: Oh, I see. Okay. I'm sorry,

 17 I didn't hear that.

 18 THE COURT: Now, I think I made reference

 19 specifically to Edgewood in some of these

 20 conditions. That is the treatment program that

 21 is being applied for, correct?

 22 MR. DAVISON: It is. Now, I don't know if

 23 -- for example, if they say they're full, I don't

 24 know if the authorities here will have another

 25 alternative to offer. But that is the program

 26 that we had in mind and referred to in the

 27 affidavit, that we've had in contemplation

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 1 throughout.

 2 THE COURT: Well, I think that what I will

 3 say is if that does not work out for some reason,

 4 then presumably a written application for consent

 5 amendment to include whatever other treatment

 6 program could be submitted. I am deliberately

 7 not leaving it very vague because if it was going

 8 to be somewhere else, I would want the

 9 arrangements to have been made, confirmed, and

 10 that the Crown have an opportunity to make sure

 11 that it is a known program. And I hesitate to

 12 say legitimate, but there are all sorts of

 13 programs that could justify leaving the

 14 territories and that is not my intention.

 15 MR. DAVISON: No, I understand that.

 16 THE COURT: Now, the other thing,

 17 logistically -- I don't know. There is an

 18 appearance tomorrow in Territorial Court and on

 19 the endorsement its says "removal order by

 20 video". I do not know how long it will take to

 21 perfect this recognizance. The clerk has some

 22 work to do and I will have to review it and then

 23 there is the issue of the money deposit. So

 24 there is nothing I can do about the Territorial

 25 Court appearance other than to say, Madam Clerk,

 26 that the original Territorial Court file should

 27 be returned to them as soon as possible because

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 1 they will need it tomorrow morning at 9:30.

 2 COURT CLERK: Yes, Your Honour.

 3 THE COURT: And for the rest, if

 4 everything happens and you happen to be out of

 5 custody by tomorrow morning by 9:30, then you

 6 have to be next door.

 7 THE ACCUSED: Okay.

 8 THE COURT: I am not sure how long this

 9 would take, but it is already 2:30 and it may be

 10 some time.

 11 MR. DAVISON: Understandable, yes.

 12 THE COURT: Anything else?

 13 MR. PRAUGHT: No, Your Honour.

 14 THE COURT: Thank you, counsel.

 15 MR. DAVISON: Thank you, Your Honour.

 16 .................................

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 20 Certified Pursuant to Rule 723

 of the Rules of Court

 21

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 23 Jane Romanowich, CSR(A)

 Court Reporter

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