QUEEN'S BENCH
THOMPSON, MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN

-and-

KENNETH RHODES

Accused.

TRANSCRIPT OF PROCEEDINGS had and taken before the Honourable Mr. Justice Dewar, in the City of Thompson, Province of Manitoba, on the 18th day of February, 2011.

Restriction on publication: By court order pursuant to s. 486.4(1) of the ***Criminal Code***, any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

APPEARANCES:
S. Seesahai, & D. Gray, ON BEHALF OF THE CROWN
D. Coggan, ON BEHALF OF THE ACCUSED

February 18, 2011
R. v. Kenneth Rhodes

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The Court: Appearances for the record.

S. Seesahai: Seesahai, first initial S, for the Crown. That's S-E-E-S-A-H-A-I, first initial S. And also present for the Crown is my colleague, Mr. Gray.

D. Coggan: Coggan appearing for Mr. Rhodes my Lord, first initial D. Mr. Rhodes is present in the body of the court.

The Court: Right.

D. Coggan: Don't know if you are fine with his sitting there or if you wanted him in the prisoner's dock. I believe --

The Court: That's fine for now.

D. Coggan: -- we're prepared to proceed.

S. Seesahai: My Lord, your Lordship has convicted the accused, Kenneth Rhodes, of the sexual assault committed on C.P. on August 19th, 2006. I open my comments by drawing to My Lord's attention that without public confidence in the Criminal Justice System, respect for the rule of the law is imperiled. This sentencing by your Lordship will raise a number of issues related to maintaining public confidence in the sentencing process. And I say that My Lord because I expect that the submissions that you'll hear this morning from Crown and from Defence will be quite different in terms of the sentence that we

propose is appropriate. We are quite far apart as I except you will hear. So there will be a number of issues to consider.

The facts established at trial in – in brief summary, My Lord, were that C.P. was raped in the middle of the night on the side of a dark highway. It was an isolated spot in a remote area of the Province. C.P., a petite 26 year old woman at the time, found herself in a situation well beyond her own control when she was at the side of that highway. She was at the mercy of the larger and older accused, Kenneth Rhodes. He did take advantage of C.P. for his own sexual satisfaction. And the actions of the accused that night, in the Crown's submission, were repugnant and reprehensible.

Sexual assault, according to Section 271 of the Criminal Code of Canada, carries a maximum sentence of ten years imprisonment. There is a procedure for sentencing that the sentence must satisfy. And I draw to My Lord's attention the pertinent provisions of the Criminal Code of Canada. A fundamental purpose of sentencing – this at Section 718 of My Lord's Criminal Code – a fundamental purpose of sentencing is:

> To contribute along with crime prevention initiatives. To respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: to denounce unlawful conduct, to deter the offender and others from committing offences, to separate offenders from society where necessary, to assist in rehabilitating

offenders, to provide reparations for harm done to victims and to the community and to promote a sense of responsibility in offenders.

Parliament has deemed at 718. 1 of the Criminal Code of Canada that a sentence must be proportionate to the gravity of the – the offence and to the degree of responsibility of the offender. The Criminal Code also mandates at 718.2 of the Code that your Lordship shall take into consideration a number of secondary principles in sentencing. This is again, at 718.2 of the Criminal Code and it includes the principle of reducing or increasing sentence based on mitigating or aggravating circumstances. And you will see that section that there are a number of factors that the Criminal Code suggests would be relevant. This section, of course, also does say that that is not an exhaustive list, it's a – a list without limiting the generality of the foregoing and suggests a number of different factors that the court might look at.

The Court: And – and in this case, though there's no specified aggravating factor that is applicable.

S. Seesahai: I don't believe so, your Honour.

The Court: Yeah.

S. Seesahai: Not from my review of that particular list. And again, that's a non-exhaustive list.

The Court: I – I appreciate that.

S. Seesahai: Before continuing, your Honour, my comments on sentencing, I – I've set out for your Lordship the procedure to be followed and what the sentence must satisfy. I will also have an exhibit on sentencing that I will be referring to shortly in my comments. It is a Victim

Impact Statement from the victim, C.P. And I would like to file a copy of that as exhibit S1.

The Court: Mr. Coggan, have you seen it?

D. Coggan: I have, yes.

S. Seesahai: I hand that now to Madam Clerk.

The Clerk: Exhibit S1 (inaudible).

EXHIBIT "S1": VICTIM IMPACT STATEMENT

S. Seesahai: And I would ask that the Pre-Sentence Report, I trust my Lord already has a copy of that on the court pocket, by marked as exhibit 2 – exhibit S2 on sentence.

The Court: Here it is.

S. Seesahai: And I'll just give My Lord a moment to peruse the Victim Impact Statement. It's not lengthy.

The Clerk: Exhibit S2 My Lord.

EXHIBIT "S2": PRE-SENTENCE REPORT

The Court: Alright.

S. Seesahai: My Lord, the Crown submits that there are a number of aggravating factors surrounding the circumstances of this offence and the offender. I draw to My Lord's attention that is his testimony, Mr. Rhodes, made comments which shifted blame to the victim of the offence. I further note that Mr. Rhodes continued with penile penetration of the victim's vagina and briefly her anus, after she had expressed pain from her comment when he was digitally penetrating her vagina and fear. Your Lordship did find on the facts that there was a comment from her asking if he planned to kill her.

I also draw to My Lord's attention that the victim's back was injured with bruising over the, essentially, entire backside of her body. This was before the court from S.M.'s uncontested evidence. And I would respectfully submit that those injuries come from either the accused rape of the victim, C.P., or from the victim's partially unclothed flight through the woods and likely, both.

I draw to My Lord's attention that the victim was so afraid that she fled through the pan – without pants through the woods. It was dark. It was the middle of the night in a remote area. She did this because the victim had to flee to escape Mr. Rhodes' attack on her. She ultimately had to go onto a dark highway, without pants, trying to flag down help. And ultimately she had to ride back to safety in a vehicle with her abuser.

It is the Crown's position that Mr. Rhodes took advantage of the victim while she was intoxicated and therefore, vulnerable. There is a significant size and age differences between the victim and the accused at the time of the offence. He did pursue the victim after she had clearly rebuffed him. Although, the Crown does concede that this attenuate by the victim's response to subsequent advances by Mr. Rhodes during the walk to the highway.

I also draw to My Lord's attention that there were three separate types of unwanted violations to the sexual integrity of the victim, C.P. There was digital penetration, vaginal and brief anal penile penetration and there was cunillingus. I draw to My Lord's attention that the victim, for all intents and purposes, was as stranger to Mr. Rhodes. He had known her for approximately a 20 minute ride from a parking lot down to Ospwagon Lake.

The Victim Impact Statement, which is filed as exhibit S1, illustrates to My Lord the terrible emotional impacts that this particular crime has had on C.P. And I draw to My Lord's attention, from her comments, that these effects are ongoing. She indicates on an ongoing basis that she feels at sometimes a prisoner in her own home. That she will not go out and do anything. It still causes stress in her personal life and relationships.

She also has provided My Lord with comments about more immediate trauma she suffered as a result of the offence. The bruises on her back, she indicates, were painful for a short time. She indicates that shortly and sometime after the incident she was in shock, fear, pain and traumatized. She indicates it took her awhile to confide in her family about it because she was afraid of what they would think or do. I note that she also has a permanent reminder. She has a scar on her leg, which she indicates is a reminder when she looks at it of what she had to go through on that particular night.

At the time C.P. was caring for her – for her Kohkum, which is her grandfather or grandmother, I'm sorry. So although she wasn't – she didn't have employment that was affected as a result of the result, she was a caregiver and she was unable to engage for a period of time in – in caring for her grandmother.

She also indicates, I note, that she will not go anywhere alone. And that is information provided from C.P., now a number of years after the offence occurred. So it is clear from the Victim Impact that this harm that she has suffered in several ways is ongoing and will be ongoing throughout her life.

The actions of Mr. Rhodes on the night question constitute, in the Crown's submission, a major sexual assault. I have submitted to My Lord a number of authorities in relation to major sexual assault. And you will have noted from the case law that I filed, that there is discussion about what this category constitutes.

I draw My Lord's attention to the case of Sandercock at tab two on the Crown's book of supplementary materials.

The Court: Right.

S. Seesahai: At paragraph 13 of that decision the Alberta Court of Appeal set out, and this is in 1986 My Lord, a definition of major sexual assault.

The Court: Right.

S. Seesahai: And – just a moment My Lord. Just to read in the – the pertinent parts of that quote, your Honour. At this point the Alberta Court of Appeal said that:

> A major sexual assault was where a person, by violence or threat or violence, forces an adult victim to submit to sexual activity or a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lastly emotional or psychological injury, whether or not physical injury occurs. Injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two.

They – they go on to describe specific behaviours that the court would place within this category. And they include rape, which is non-consensual sexual intercourse and

they also include attempted rape; fellatio, cunillingus and buggery.

Now this case has been reconsidered in the recent and very thorough judgment of Arcand, that I filed for My Lord's consideration. In this case the Alberta – Alberta Court of Appeal was considering a number of cases that followed from Sandercock in their jurisdiction, which were argued to have watered down or – or affected both the definition and the expected sentence that was appropriate for a major sexual assault. So in this judgment at paragraph 171, the majority of the Alberta Court of Appeal in a decision penned by the Chief Judge – Chief Justice Catherine Fraser, the do redefine a major sexual assault as:

> Where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect the situation or from any combination of the two. A major sexual assault includes, but is not limited to; non-consensual vaginal intercourse, anal intercourse, fellatio and cunillingus.

The court also says that:

> They are satisfied that making this assessment of whether a sexual assault is a major sexual assault is well within the capacity of sentencing judges.

At paragraph 172, the Alberta Court of Appeal begins to discuss the aspect of violence as it relates to major sexual assault. They do find it unnecessary to include in the definition of major sexual assault an express reference to violence or threat of violence in perpetrating the sexual assault.

> It goes without saying that a major sexual assault is an act of violence. The three year starting point again, set in Sandercock, assumes that this is so. Therefore, this language would be redundant.

And they go on to provide further rational in that paragraph 172 about this issue of violence.

So essentially what the Alberta Court of Appeal has done is recognized that a major sexual assault in and of itself is a crime of violence. A specific enunciation of violence or threat in the facts is required.

The Alberta Court of Appeal at paragraph 173 expressly recognized that cases post Sandercock had failed to recognize the gravity of a major sexual assault and the harm that is inherent in them.

At paragraph 176 of that decision, the court makes clear that rape is non-consensual vaginal intercourse.

And they go on later in the decision at paragraph 275, to note that violence is inherent. If I may just have a moment your Honour. I'm looking for a different paragraph in the decision. I'm looking for the part in the judgment, your Honour, where – My Lord, excuse me, where they refer to the Supreme Court of Canada in McCraw. I don't see the

particular paragraph in front of me at the moment, but in any event, I'll have a look for it.

But going forward from that and – and continuing with this point, they do make it clear in a discussion of the facts, both of – of the incident that had occurred in Arcand and in the reconsider cases that they were reviewing, that the fact of a penis in the vagina is, in their words, incontrovertibly a major sexual assault. That's at paragraph 266 of the decision.

In that part of the decision and in the paragraphs that follow, the Alberta Court of Appeal, in reviewing some comments by the sentencing judge, make it clear that there is no such thing as a "technical major sexual assault". They also discuss that major sexual assault intrinsically includes the likelihood of very real psychological or emotional harm. And they also discuss apart from the harm to the victim, that they intrinsically include harm to society that needs to be addressed. In the case before you, apart from the fact that it is understood now in appellate case law that harm is intrinsic to the offence, you have before you the impact of the victim in this particular case.

Given these particular tests as set out by the Alberta Court of Appeal and bearing in mind that Sandercock itself has been followed in Manitoba, and I will get to that further in my argument when I – I talk about the case law that the Crown filed, but the Alberta Court of Appeal has certainly been recognized as the court that set up that definition. And for that reason the case of Arcand is a – as case which I – I don't believe, as far as I'm aware, has been considered yet in our jurisdiction in a reported decision. Certainly Sandercock has been repeatedly.

It would be my submission that given these very clear comments from the Court of Appeal, when you have before you a set of facts where Mr. Rhodes penis was in C.P.'s vagina, it touched her anus; his fingers were in her vagina and her performed oral cunillingus on her, that it is incontrovertibly a major sexual assault.

The paramount principles of sentencing for major sexual assault must be considered. The paramount principles for an offence of the type are deterrence, both specific and general and denunciation. This is reflected by the fact that Parliament has now disallowed conditional sentences for offences of this type. There is a discussion of that in the Arcand decision. It starts around paragraph 145.

In the case that you have before you, given the date of the offence, a conditional sentence is among the range of sentences available for a sexual assault simplisitor. It certainly is not appropriate here given the gravity of the offence and the fact that the paramount principle My Lord will consider – will be denunciation and deterrence, both specific to Mr. Rhodes, which I'll discuss in a moment, and general deterrence. Parliament did take away this option of conditional sentencing for the crime of sexual assault specifically because such sentences did not reflect the gravity of the offence and because Parliament intended --

D. Coggan: My Lord, I'm just going to object, if I can. My friend is talking about political consequences that occurred after the date of the offence.

The Court: Yeah, you can – you – make your argument when it's your turn. Well.

D. Coggan: I'm raising an objection My Lord, if I can, that I think she's --

The Court: I – I think I'm entitled to hear it. You can tell me why she's wrong when it comes time --

D. Coggan: Thank you My Lord.

The Court: -- for your submission.

D. Coggan: Thank you. That's fine.

S. Seesahai: In – in terms of this particular point, your Honour, there is, of course, a discussion and I'll, given the objection, I'll just – I just need the. This issue of Parliament's intent has been considered by an appellate court, of course, in the Arcand decision. At paragraph 281 of that decision, the Alberta Court of Appeal, which of course in the decision, has been referring to Hansard and other such things that assist in determine – determining Parliamentary intent, discusses this – this issue itself.

In the Arcand decision, of course, what the sentencing judge had done was sentenced an accused to a 90 day intermittent sentence. So it wasn't a conditional sentence, but it was a short sentence. It was not a penitentiary term. And the Crown had appealed on that basis. And the court addresses this at paragraph 281.

> The 90 days in jail, which is the maximum period possible for an intermittent sentence, does more than suggest that important principles such as parity, denunciation and deterrence got little or no weight. It suggests that the arithmetic was adjusted to force a pre-determined answer. Parliament did not close the door to conditional sentences for major sexual assaults (because they failed to reflect the gravity of the – the

> offence) so that the courts might open another one, the 90-day intermittent sentence option, that depreciates the gravity of the offence even further. Selecting the top end of the intermittent sentence as the lowest custodial sentence for a major sexual assault is akin to searching for a way round Parliament's intention in barring conditional sentences for sexual assault. That intention is clear. Major sexual assaults are to be sentenced for the serious crimes they are.

The Court: But why though is Mr. Rhodes to be tarred with the thinking of Parliament after the date of the offence? That's what I have some trouble with. I understand you saying rule it out because it's not - it's not appropriate.

S. Seesahai: Yes.

The Court: I understand that. Where I have difficulty is, if Parliament decides to change the sentencing regime and take away conditional sentences, is it appropriate for me to say to – extrapolate that back to the time of the offence?

S. Seesahai: Well overall, what My Lord is going to do is sentence Mr. Rhode – Mr. Rhodes to the sentence that is appropriate given the gravity of the offence and the circumstances of --

The Court: Right.

S. Seesahai: -- the offender. I would suggest that what has happened with sexual assault sentencing post 2007, subsequent to this offence, shed lights on appropriateness of sentences. So while a conditional

sentence may have been available pre 2007, the fact that it changed later certainly doesn't, of itself, disentitled Mr. Rhodes to that type of sentence. But it allows My Lord to reflect upon the seriousness of this particular category of sexual assault. I'm not sure in terms of your questions about sort of tarring him with that brush and so forth.

The Court: That may have been a poor choice of words. But you – you have my point. That today there is no alternative, for something like this, other then jail.

S. Seesahai: Correct.

The Court: In 2006 there was.

S. Seesahai: Yes. There – there was that option certainly. And that option is foreclosed now.

The Court: Right.

S. Seesahai: Just because there was an option, in – in my respectful submission, doesn't mean it was appropriate, doesn't mean it was ever appropriate.

The Court: And I accept that submission.

S. Seesahai: Appellate courts, generally speaking, have been in agreement, and – and I feel comfortable submitting that to My Lord that approximately a three year point is the starting point or guideline. This is not an absolute, but it is a starting point. The Saskatchewan Court of Appeal so found in April of 2010 in the case of the Queen and Revet, R-E-V-E-T; that's Saskatchewan Court of Appeal – get My Lord the exact citation. I'll read My Lord the quote just so that --

The Court: That doesn't ring a bell. That's not in these authorities.

S. Seesahai: It's not. I didn't have other reasons to file the whole decision itself, but this is what they said My Lord. The citation of this case is – neutral

citation (2010) SK C.A., 71. At paragraph 24 of that decision the court says, and I quote:

> This Court has repeatedly held that in major sexual assaults involving adult offenders and victims, three years would be considered a starting point from which a sentencing judge should start, increasing or decreasing the term according to the aggravating and mitigating factors.

That's appellate law from the Saskatchewan Court of Appeal.

The most recent decision that I could find for a clear statement from the Manitoba Court of Appeal, on this point, is a case of Queen and Wright, that's W-R-I-G-H-T, neutral citation (2010) MB C.A., 80. This is a case – I didn't file it My Lord. It was not a major sexual assault. It was not found by the Court of Appeal to be such. So on the facts (inaudible) not pertinent for our purposes, but the court makes the following comment at paragraph 21 of that decision. This was delivered September 7th of 2010. So, from my research, this was the most recent comment from our appellate court on this issue. And I'll just read you the full paragraph so that's it clear.

> The accused points out that the sentencing judge found, on the facts of this case, that the attack on the victim was not a major sexual assault. He also makes the point that this court has repeatedly stated that the

> starting point guideline for a major sexual assault is three years' imprisonment, subject to the required adjustment resulting from the aggravating and mitigating factors surrounding the offence and offender.

The defence in this case had gone on to argue about the four year sentence that had been imposed on Mr. Wright for a sexual offence that was not a major sexual assault and the case deals primarily with that.

This was the most recent case that I could find where there was mention of this particular standard being accepted in our jurisdiction.

One of the first cases that I filed, Borkowsky - and unfortunately, that's not in the supplementary book. That would have been a case that I filed separately My Lord.

The Court: I've got it.

S. Seesahai: Is another case from our Court of Appeal dealing with major sexual assault that discusses Sandercock. There was an argument in that case that the sentencing judge had misapplied Sandercock in terms of starting at three years and adjusting for aggravating and mitigating factors. This argument starts at paragraph 51 of the Borkowsky decision. It goes on to evaluate the argument the defence was making.

I draw your attention to paragraph 58. Borkowsky was a case where the offender, when he was sentenced, was 70 years old My Lord. He had committed the offence when he was 66 years old and sentenced when he was 70. There were a number of health issues that were plaguing the accused at the time that he was sentenced. And there was a fair bit or argument about his three year sentence that he had received was

appropriate and that the court had misapplied or not taken adequate consideration of the mitigating factors being the fact that he didn't have a criminal lawyer – criminal record and the fact that he was elderly and in – (inaudible) and so forth.

So at paragraph 58, about midway through the paragraph, it states:

> These types of mitigating factors were accounted for, however, in the underlying premise for a three-year starting-point sentence as outlined in Sandercock." The starting point of three years presumed a mature accused with no criminal record and prior good character.

At paragraph 59, the Court of Appeal says:

> Moreover, the court in Sandercock stated:

Goes on to talk about a secondary category where the attack is planned and deliberate.

In their review of the sentencing judge's decision to send Mr. Borkowsky to the penitentiary for three years, at paragraph 62, they conclude that:

> In the end, she, being the sentencing judge, balanced the mitigating factors of the absence of a criminal record, age, lack of danger and employment with the aggravating factors of premeditation, calculation, breach of trust, lack of remorse and failure to take

> any sexual offender counselling since the incident four years previous. She goes on to conclude that it warranted a sentence of greater two - than two years.

And at paragraph 63, the court says:

> She was entitled to find that in this case the aggravating factors outweighed the mitigating ones. A conditional sentence would not adequately reflect the need for deterrence and denunciation posed by the facts.

So in that case, My Lord can see that there was an argument that went to the Appeal Court about the application of Sandercock and about where and how mitigating factors, such as lack of a criminal, the fact that an accused is employed and so forth, how that should be accounted for in terms of Sandercock and it's application.

I would submit that when you look at Borkowsky, the paragraph in Wright, which is a very recent decision that I just read to you, it's quite clear that in this and other cases - I obviously didn't bring every case, I can provide the court with other citations if – if the court would find that helpful – but Sandercock certainly has been applied, it has been applied in our jurisdiction. Again, not for the proposition that three years is a sentence that's set in stone, but that it's a guideline, it's a starting point and from there the court will adjust for mitigating and aggravating factors. The mitigating factors that My Lord may see in this particular case are accounted for, in my

respectful submission, in the guideline already set by Sandercock.

In terms of mitigating factors, in my submission there are no mitigating facts. In terms of mitigating circumstances, what you have is the lack of prior criminal record. One of things that will be important for the court to consider will be the Pre-Sentence Report that is before you. The probation officer assessed Mr. Rhodes assessed that he was not a high risk to reoffend.

I make a number of points to My Lord in – in disagreement with that overall statement given the lack of remorse present, the lack of acknowledgment or apparent understanding from Mr. Rhodes that he did anything wrong, Mr. Rhodes lack of knowing and understanding that a woman is not encouraging him sexually because of what she wears or the fact that she's been drinking or gets into a vehicle with him. This displays that Mr. Rhodes is an individual that has little respect for women. This was evident, in my submission, from his attitude displayed by his comment during his attack on the victim that it would "only hurt for a little while". And I draw to My Lord's attention that in testimony Mr. Rhodes characterized that as a sort of a stupid comment that he had made and he acknowledged making it, but said it was just something stupid he had said. A comment that displays that he does not recognize the dominating and threatening nature of that comment to C.P., under the circumstances at hand. He just sees it as something stupid he said.

Also relevant and something that I would ask the court to consider when you sentence Mr. Rhodes is that there has apparently, as far as the Crown is aware, been no sexual offending treatment undertaken by the accused. We therefore

have an uncertain prognosis for the future. Also of concern is the lack of any explanation for the offending behaviour leaving the court, in my respectful submission, really in the dark as to the risk presented by the accused and what may have motivated the accused to behave in the manner that he did.

Concerns of that nature were alive and relevant to the sentencing court in the sentence of Dalas Broekaert. That is at tab four the Crown's supplementary book of materials. And in paragraphs 20 and 27 of that decision, you can see that this issue was relevant to the sentencing judge. At paragraph 20, the appellate court in reviewing the sentence that was imposed on – on Mr. Broekaert for a major sexual assault, it says:

> Of major concern to the sentencing judge was the absence of any explanation for the appellant's conduct.

It goes on to say:

> She had placed little weight on the medical evidence filed on his behalf and commented that nothing had been provided to her about the proposed treatment for the appellant's alcohol addiction.

At paragraph 27, the Court of Appeal in upholding the lengthy penitentiary sentence that had been imposed on Mr. Broekaert says:

> The sentencing judge carefully considered all the applicable principles for sentencing and all relevant factors. In so doing, she took into account the mitigating factors with respect to the appellant. While the appellant's rehabilitation was a factor in sentencing, she focused primarily on the principles of deterrence, denunciation, and the protection of the public. She was right to do so, given the nature of the appellant's unexplained violence, his history of severe alcoholism and blackouts, coupled with his minimal treatment to date and the lack of evidence with respect to his prognosis.

The Court: In that – that case was an aggravated assault.

S. Seesahai: It was, yes. And – and the point being that in Broekaert, although – I believe Mr. Broekaert had somewhat of a limited criminal record, he didn't have a history of committing sex offences or sex crimes. He had no similar history. He then went out and committed a, really what can only be described as a – a horrifying sexual assault on a woman. And at the time of sentencing, this was a factor that was alive enough concern to the court. I filed this case, not because of the facts – it's in fact not – it's a more serious charge and – and the facts are not similar, but because what you have before you is a similar concern. You've got a – a Pre-Sentence Report that says Mr. Rhodes doesn't have any problems with drinking. He --

The Court: (Inaudible). It says we put him through a couple of tests – whatever the word. This looks

like a one off. It doesn't look like it'll happen again as he has a – a difficulty in this activity. That's what the Pre-Sentence Report says. What do you say about that portion of it?

S. Seesahai: I would say that that in itself should concern the court with respect to the risk that Mr. Rhodes may present --

The Court: Why?

S. Seesahai: -- in the future to the public.

The Court: Why if --

S. Seesahai: Because there's no explanation for how he could possibly have thought that this was acceptable behaviour. He committed a major sexual assault with no apparent prior history of such behaviour. This isn't somebody who, for example; as we see in some of the cases, has a long standing drug or alcohol addiction that coloured their behaviour on the night in question. You head testimony from him in terms of his attitude about what had happened.

The Court: (Inaudible).

S. Seesahai: It doesn't appear that this is a situation where Mr. Rhodes was so drunk he didn't know what he was doing. None of those factors are present. All of those or similar findings to those were found by the court in Borkowsky. It was inexplicable why he had gone out and done that. And that was a concern to the court. You don't have before you, as far as I'm aware, a report from a doctor or a psychologist or psychiatrist evaluating this and giving you with sort of medical backdrop, risk assessment of Mr. Rhodes. You had, as was in Borkowsky, an inexplicable crime that was committed. It has to concern the court in terms of what he may do in the future.

And again – again, I'm not disputing the – the findings in the Pre-Sentence Report. What I'm asking the court to do is consider the other comments that I have – have made to the court about comments that Mr. Rhodes made during his testimony and the lack of explanation for the offending behaviour.

And again, just to return to the case law that the Crown did file in – in this matter. I do submit that there is appellate agreement that approximately three year penitentiary sentence is a starting point or guideline with respect to a major sexual assault. It does presume a mature offender of good character, with no prior criminal record. All characteristics which fit the accused, Kenneth Rhodes.

Arcand itself is a good example of the application of Sandercock in relation to that accused. Arcand was young. He was 18 year old. His rape of a sleeping distant relative merited two years less a day of jail. Ultimately the court, in Arcand, when they reviewed that 90 day intermittent sentence and found that it was unfit started with the three year point.

And there were factors in – in Mr. Arcand's case that merited a downward departure. And those were his youth; he was very young, his immaturity at the time of the offence, there was a possible neurological deficit or a cognitive issue. Mr. Arcand had sought counselling immediately after the offence. He had had a very troubled childhood and he had sought counselling; sex offender and sex offender related counselling. And had served his 90 day intermittent sentence, had completed counselling and all of that. At the time that the court imposed the two year sentence, they of course, stayed the execution of that sentence given that he'd already served his full sentence. But it is a good

example of what types of factors would merit a downward departure from the three year starting point and what types of factors would not.

Again, it's my respectful submission that you have before you a mature offender of good character with no previous criminal record. Those are not factors that would merit a downward departure from Sandercock.

You also have to consider in the sentence that you impose whether there are aggravating circumstances. And I went through a number of those at the beginning of my submission. It is the Crown's respectful submission that there are a number of aggravating factors the court will have to consider, including the fact that C.P. was injured on her back and so forth. I won't go through all of those factors again, but I ask My Lord to pay close attention to those.

In – in terms of the case law filed by my learned friend, I don't intend to make too many lengthy comments about that. I do note – if I can just have a moment to get my booklet here. Two of the cases that my learned friend filed being Nikkanen and Killam.

The Court: What tabs?

S. Seesahai: Oh, I'm sorry. (Inaudible) got the book there. Killam is at tab one.

The Court: Right.

S. Seesahai: Of his materials. And Nikkanen is at tab three.

The Court: Right.

S. Seesahai: In both of those decisions, I – I just draw to – to my Lord's attention the dates of those decisions. They are, at this point, quite dated and they were decisions where courts had seen fit to impose

conditional sentences on accused persons. I would like to draw to My Lord's attention in the Killam case – can I – in the Killam case, which is the tab one case of my learned friend's materials, the – the court in that case – the case is more so, in my respectful submission, an application of Shropsure (phonetic) and those principles about deference to the trial judge's decision. And in the end, they upheld the decision that the judge had made. But at paragraph 14, --

The Court: Yeah.

S. Seesahai: -- Justice Doherty said:

> I admit to considerable doubt as to whether a conditional sentence could adequately reflect the gravity of this offence and send the proper denunciatory message to the public.

It goes on to say that – that there is deference. And he also finds that it necessary to say at paragraph 16:

> I must stress, I am not suggesting that a conditional sentence should become the norm in cases like this one. Far from it. My reasons should be taken only as indicating that in the circumstances of this case, a conditional sentence was not outside the broad range of sentences available to the trial judge. I do not suggest that other sentences, particular a significant term of imprisonment, would have been inappropriate. Indeed, I might go so far as to say a period of incarceration would have been more appropriate.

The Court: It's a problem with appellate cases on sentencing, they're really not – they're really not saying generally; this one does, what we would have done had it been us. They are just saying; is it so far out of the range that makes it inappropriate.

S. Seesahai: Correct. And again, this, when you look at the date of that case and the sentences that were available at that time, still Justice Doherty is making those comments. And he chooses to stress those comments.

The other --

The Court: But implicit in that is it's not so far out of line that I feel obliged to interfere with it.

S. Seesahai: In that case.

The Court: In that case, yeah.

S. Seesahai: In that case specifically. My learned friend also filed S.(J.S.), a Manitoba Court of Appeal decision, that's --

The Court: Right.

S. Seesahai: -- at tab four of his materials. This was a case where the accused had been sentenced – he was a 20 year old male. I would suggest good – good – apparently good character, no criminal record, university student, member of the varsity wrestling team, volunteer wrestling coach. He was sentenced to 30 months of imprisonment for a sexual assault, a major sexual assault. And he appealed that decision arguing that a conditional sentence would have been fit. This is in 2001. Again, the legislative scheme is different. Based on those facts, which again, was a major sexual assault, the – the court – Justice Twaddle is his reasons stated that:

> The accused appeal from sentence would be dismissed.

That result was concurred in by Justice Monnin. So this is the majority decision with respect to the sentence. Justice Twaddle said:

> With respect to the sentence appeal, I find it to have no merit.

This is at paragraph 35.

> Given the enormity of the accused crime I would have thought a sentence less then a penitentiary term would have been an error in principle. The accused may well have led an exemplary life up to this incident, be a low risk of reoffending and a good candidate for total rehabilitation, all as noted by the trial judge, but the objectives of denunciation and general deterrence could not possibly be met, in my opinion, by sentence of less then two years imprisonment. Equally given what the trial judge called his "offensive and demeaning behaviour" significant amount of moral blame worthiness, which she attached to it, I do not think a lesser sentence would have been proportionate to the gravity of the offence of the accused degree of responsibility for it.

And again, that was a set of facts where this wrestling coach, no prior history, had gone into the room and engaged in vaginal sexual intercourse with a woman who had passed out or – or fallen asleep from intoxication approximately a half hour before. Occurred in, I believe, it was the bed a roommate.

And again, there was no prior history. So it – it certainly, in my submission, supports the Crown's contention that when we're dealing with a major sexual assault, the appropriate sentence that will satisfy all of the sentencing objectives that I – I spoke about earlier and that will place priority on the appropriate objectives being denunciation and – and deterrence, both specific and general, can only be met by a substantial penitentiary sentence. Now Sandercock talks about three years. Again, this is a – a guideline, a number that has been supported in our Province. But again, My Lord will have to adjust that in terms of aggravating and mitigating factors. Again, I can not find any mitigating factors that would, according to the case law, reduce that sentence.

The Court: Is alcohol a mitigating factor?

S. Seesahai: No. And that's made quite clear in the case law. I can – I'm sorry, was My Lord talking about alcohol use by the accused or by?

The Court: By the accused.

S. Seesahai: By the accused. No, it is not a mitigating factor. That was made quite clear right from the time of Sandercock and has been reiterated in Arcand.

Just to summarizing all of that, I'll just read to you paragraph 36. This is where they're summarizing --

The Court: Oh – of?

S. Seesahai: -- their findings. In the circumstances --

The Court: Which case?

D. Gray: Which case is it?

S. Seesahai: Sandercock. I'm sorry, your Honour.

The Court: And paragraph?

S. Seesahai: That is at tab one of the Crown's supplementary book of materials. And I (inaudible) --

D. Gray: Two (inaudible).

S. Seesahai: On two. Sorry, two.

The Court: Sorry.

S. Seesahai: Tab two.

The Court: What are you – what are you referring me to?

S. Seesahai: And I'm at paragraph 36 --

The Court: Sandercock.

S. Seesahai: -- of the decision. So it's really right at the end of the decision. It talked about it earlier in the decision. It may be better if we start at paragraph number 27. This is sort of the clearest statement in the case.

> Drunkenness generally should not be a mitigating factor. Nonetheless, the fact that an assault is totally spontaneous can offer mitigation, sometimes drunkenness is a factor in determining whether the attack is spontaneous or whether the likely consequences were fully appreciated.

At paragraph 36, summarizing it. They talk in this case about the victim being imprudent as to her own safety. I suppose that was suggested. The paragraph says:

> In the circumstances of this case, it could be said that the victim was imprudent as to her own safety. This does not, however, offer the slightest mitigation. Nor is the drunkenness of the accused relevant except in support of the argument that the attack was spontaneous. Nor can Sandercock claim that he previously had good character nor that he spared the victim the added pain of offering testimony. In the circumstances, any claim of remorse rings hollowly.

Sandercock again, was a guilty plea and he was sentenced to four and a half years for the major sexual assault. So back in 1986, starting in that decision, the court made that clear. That is reiterated as well in Arcand.

So I would submit to the court that it is not a mitigating factor in this case except insofar as your Lordship may find that this was a spontaneous --

The Court: Spontaneous.

S. Seesahai: -- event. But not a mitigating factor in the typical sense that we would --

The Court: What about the signals that were given by the complainant, and I know for – I know what her purpose was, but the fact is they were given, as they walked up the road to the highway. Is that – are those mitigating factors?

S. Seesahai: No, your Honour, because the major sexual assault occurred after that. And the major sexual assault occurred after – after that had happened and in addition, after she had made her – her feelings clear. Your Honour, I mean, I'm sorry, My Lord found as a fact that the offence did occur while she was on her back.

The Court: Right.

S. Seesahai: On the side of a highway. So she's placed on her back and while he is digitally penetrating her --

The Court: Right.

S. Seesahai: -- she indicates that there is pain. She asks if he's going to kill her. He tells her it will only hurt for a little while. I would respectfully submit that the behaviour leading up to the highway or – or on the walk on the way to the highway at that point doesn't mitigate his further conduct from that point.

The Court: Okay.

S. Seesahai: I also would just refer My Lord to Ewanchuk – Ewanchuk. It's not a case that I filed, but Ewanchuk is, of course the – the seminal case supporting the proposition that, of course, no means no. I also discussed, in my trial argument, the fact that passivity and that sort of thing doesn't alleviate the need for the accused to make inquiries, it doesn't --

The Court: And that goes to conviction. The question I have though, is does it – does it enter the mix anywhere on sentence?

S. Seesahai: Does it enter.

The Court: It's one thing – the fact that a complainant is passive does not satisfy the – does not act as some sort of a defence – does not satisfy the consent

issue. And if there's no consent then there's a conviction. So then you come to sentencing. And – and (inaudible) there may be circumstances which are ruled out for conviction that may have some bearing. I don't know how much, but some bearing on sentence. The fact that she didn't say no, at any time, is not a defence to the conviction. But does it add anything; is it part of the sentencing consideration?

S. Seesahai: I'd respectfully submit that it's not My Lord. And in – in terms of my answer to this particular issue that My Lord has raised, I would like to refer you again back to the Arcand case. Beginning at paragraph 290 of that decision. And in this part of the decision – Arcand was as situation where Mr. Arcand had sexually assaulted his relative while she was asleep. So it was a case of where there's certainly no question that she couldn't have said --

The Court: Right.

S. Seesahai: -- you know no or anything else.

The Court: Right.

S. Seesahai: She was not conscious. At paragraph 290 and going on to 291, the court is talking about this. At 291, I'll refer you to. It says:

> With respect to intoxication, the seriousness of a sexual assault is not lowered because an offender was intoxicated by drugs or alcohol while committing it. It should not generally be a mitigating factor in sentence.

So that goes to the other arguments --

The Court: Right.

S. Seesahai: -- that we were having. But certainly – Arcand is quite clear setting out that - in that case the fact that Mr. Arcand had sexually assaulted an unconscious woman was an aggravating factor. That --

The Court: Right.

S. Seesahai: -- mer - merited an increase. That's someone who couldn't possibly have said no. So I – I'm finding it difficult to understand how it would assist the accused in this case that she didn't say or do anything to make him stop.

The Court: Well, it's not --

S. Seesahai: In the sense of – of words. Like saying no that you're suggesting.

The Court: It's not so much just that. But it's what – what concern I have is the – is the conduct on the highway – on the road leading up. And I think when I made the decision; I found that at that point in time there was no intention on the accused to sexually assault the lady. And there was a possibility out there – the door wasn't closed and --

S. Seesahai: Which – which door is My Lord speaking --

The Court: The door to any kind of sexual conduct was no closed as they were walking up to the highway.

S. Seesahai: I guess I'm just – perhaps I'm misunderstanding what My Lord is saying.

The Court: If you look at Arcand, there's one sentence at paragraph 13 that says:

> The sentencing judge found that prior to passing out, the complainant had done nothing

to encourage the offender to have sex with her.

Now in this case, and I'm not critical of the complainant, I understand she was frightened, but she did something, he said – he made some comment about sexual activity and she said; let's go to the highway.

S. Seesahai: Yes and My Lord did find that she said that because she was afraid of him.

The Court: Yeah. It's – there is – can I take that into account in sentencing in this case?

S. Seesahai: No, My Lord. I would suggest that there's – I do want to respond to this issue as I can see it's an issue that's pertinent to the – to the court and My Lord wants an answer from the Crown. If we may take a brief recess at this point, I'd like to formulate an argument --

The Court: Can – can you – are you almost done? Why don't we finish and then we'll break and then you can deal with it in the break.

S. Seesahai: After the break?

The Court: After the break.

S. Seesahai: Yes.

The Court: But finish first.

S. Seesahai: Yes. Just go back to my notes here. Just moving on with the case law then that I had filed My Lord. Again, the case of Shalley is another case from our jurisdiction of a major sexual assault. This is a rape of a – a woman passed out at a party. Somewhat similar on the facts to Arcand, I suppose. The appropriate sentence on that case, on a guilty plea, for an offender of good character, who expressed remorse, was two to three years imprisonment. The important factor there, in the Crown's

submission, is that it was a plea bargain situation and that's made clear in the case. So it was a guilty plea, there was an expression of remorse and it was given to the judge as a plea bargain.

This case, Arcand and other cases are cases where we have accused persons committing sexual assaults on – on woman who are sleeping or passed out intoxicated and vulnerable for those reasons.

And I know that there is some discussion in the case law about ranges for that particular type of offence. That happens in the case of White, from the Yukon Supreme Court. That's at tab three of – of the supplementary book of authorities. And I would respectfully suggest that again, when My Lord imposes a sentence it's important to go back to the principles, the facts of the specific case and – and the sentencing procedure that I laid out at the outset. I would submit that it's not a particularly useful exercise to parse differences between when victims of sexual assault are – are sleeping or passed out and victims that are conscious in terms of trying to determine if – if one is worse or – or merits more time or less time. Here --

The Court: Why – why not?

S. Seesahai: -- we don't have someone who was --

The Court: But why – why not?

S. Seesahai: -- sleeping. But we have a woman who was awake. We have a woman who is experiencing her pain and her fear. She expresses both to the offender, who goes on to pull her to a standing position and - and rape her vaginally and perform cunillingus on her.

So in terms of the court evaluating what is worse that, at the end of the day, I would submit is somewhat of an academic exercise that's not helpful. What you have to look

at is what is aggravating, what is mitigating. If you accept that Sandercock – that he committed a major sexual assault and that the guideline is a three year starting point, how are these various factors going to adjust that starting point, if at all.

So I – I acknowledge that some of the cases that are filed are women who were - back to our discussion that we had a few moments ago – not even in a position to be awake or to experience the moment of the penetration of their body. That's why the decision in Arcand is so important in – in how it lays out that a major sexual assault is a major sexual assault. (Inaudible) is intrinsic. Whether or not the woman is awake and experience – experiencing it, in my view, is really somewhat six of one and half a dozen of the other. The harm that that woman experiences is the same. The moral culpability – culpability of the offender, while there might be some sort of hairsplitting differences, is really quite similar. They're committing a major sexual assault; penetration of the complainant's body.

Here you have those issues in relation to what may have happened leading up to the road, but you have in a – a woman who is awake and experiencing moment to moment the rape of her body. She's so traumatized by what happens that she runs away with no pants in the middle of nowhere, into the woods. She's trying to flag down cars while she's not even dressed. She experienced things that a passed out woman wouldn't have. So either way, it's a major sexual assault.

If My Lord accepts that the guideline that I have suggested applies and is relevant in our jurisdiction, I would suggest that overall the factors that we have here aggravate the situation beyond what one had in Shalley, for

example; where it's my understanding that she was asleep or intoxicated.

This is a very serious rape case. It's a very serious sexual assault. The harm to the complainant can't be underestimated and – and it's that harm that the Alberta Court of Appeal talks about when they make their lengthy comments about major sexual assault and why harm is presumed.

I still want to find the comment in McCraw because it speaks to this issue.

But in any event, looking at all of the case law and every case obviously has to be sentenced on it's own facts. Sentencing is an individualized process. The cases that are filed provide some – some guidance. They're precedential in – in that – in that sense. But I certainly would suggest to the court that the overwhelming weight of the authority suggests that a penitentiary sentence is called for in this case.

And I've already, I believe, gone through my submission that I believe there is appellate agreement that a penitentiary – a three year penitentiary sentence is a starting point guideline. I don't see any downward departure from that number. And in fact, I see aggravating circumstances; injuries to the victim's body and the other aggravating circumstances that I laid out at the beginning of my submission.

So for those reasons, I would suggest, your Honour – My Lord, that what you're looking at is the three year penitentiary sentence guideline and adjusting from there if there are appropriate factors that, in your view, would reduce that, mitigating factors in favour of the accused. I

do not see any. And the aggravating factors in the case are numerous.

I would submit that a penitentiary sentence in excess of the three year starting point is called for in this case for the reasons that I've already laid out.

Now we are also seeking certain ancillary orders.

The Court: Right.

S. Seesahai: We are seeking the DN – DNA order. It's a primary designated offence. Section 487 of the Criminal Code. We are also seeking an order under Section 490 of the Criminal Code that the accused be registered under the Sexual Offender Registry for a term of 20 years.

The Court: Just a sec.

S. Seesahai: That's 490.013(2)(b) of the Criminal Code.

The Court: 490.013.

S. Seesahai: Point 013(2)(b).

The Court: And – and is that in any way discretionary or is that automatic on a conviction for this offence?

S. Seesahai: That's automatic. And in addition --

The Court: And that's – that's registration on the Sexual Offender --

S. Seesahai: Sexual Offender Registry. Yes. We are also suggesting that --

The Court: For – for 20 years.

S. Seesahai: Yes.

D. Coggan: What section, sorry?

D. Gray: 490.

The Court: Point 013(2)(b).

S. Seesahai: Section 109(1)(a) of the Criminal Code also applies. There is a mandatory weapons prohibition.

The Court: What was the section again?

S. Seesahai: 109.

The Court: Just – any subsection numbers?

S. Seesahai: Sub 1, sub a, I believe it is.

The Court: It's a mandatory.

S. Seesahai: Weapons prohibition.

The Court: Weapons or firearms?

S. Seesahai: Firearms, I'm sorry. Yes. Prohibition, which is mandatory. It's firearms, crossbows, explosive substances, prohibited devices and so forth. And that is a mandatory order.

The Court: Right.

S. Seesahai: My Lord, subject to the other issue that I'll address after the break, the other comments that I would leave My Lord with are that in terms of whether or not my learned friend wants to make any comments about Gladue, we would like to respond in – in terms of --

D. Coggan: No.

S. Seesahai: -- whether there's --

The Court: There's no Gladue consideration.

S. Seesahai: It doesn't look like he's raising any Gladue component. The second thing is if My Lord is contemplating any sentence of less then two years imprisonment – two years or less imprisonment --

The Court: Right.

S. Seesahai: -- for the accused, probation orders would, of course, attach and we would like to respond in terms of conditions that we would deem appropriate. We've, of course, taken the position that --

The Court: That's not appropriate.

S. Seesahai: -- a penitentiary sentence is called for. But just to reserve the right to respond in terms of conditions that we may wish to suggest.

The Court: In the event I was disposed in that direction.

S. Seesahai: Yes. And I would like to respond to the other issue that is pressing on My Lord's mind after the recess. Thank you.

The Court: Alright. We'll let's take our – our morning break. 15 minutes.

D. Gray: Yes, My Lord.

S. Seesahai: Yes. Thank you.

The Court: And then we'll hear from you and then Mr. Coggan.

(RECESS)

D. Gray: My Lord, with the court's indulgence I expect to respond to your inquiry with respect to mitigation of behaviour – mitigation virtue - by virtue of behaviour of the complainant from the area by the lake up through the road to the – to the highway.

The Court: Right.

D. Gray: With the greatest of respect, I suggest that no mitigation to the accused is available in those circumstances. And I say that for two separate but related reasons.

Firstly, one of the findings that I believe you made was that there had been at least three independent indicia of rebuffing of the accused prior to that circumstance. There was a specific rebuffing in the car, there was a

certain coldness, as described even by the accused, and there was the fact that she'd gone off into the bush. Those indicia would not have led a reasonable person to believe that there was a reasonable likelihood of behaviour after that.

Your Lordship, in your decisions, noted the disparity in size, in age and experience of the parties and I say that as the facts are in this case, where a person reasonably causes the fear of another person and that fear acts in a certain way, they do not later get to ask that the court consider that as mitigation.

The Court: Where's the fear caused here?

D. Gray: The fear is caused by the circumstances of the events where the party – the other – the car and the other parties have left and --

The Court: Right.

D. Gray: -- she's left there alone with him.

The Court: Well didn't cause that.

D. Gray: No, no, but he causes – his – he doesn't cause it. His circumstance and his behaviour in continuing to pursue her causes the behaviour. If he'd said, at that point, listen; it's obvious you don't want nothing to do with me, and then she'd thrown herself at him, I think that we may have a different situation. But moreover, she picks up a stick, which is agreed, and that's seems to me not something that a person wouldn't say; hey, that's a bit strange. And for those reasons I say there would not be mitigation even if there wasn't another reason which is related.

The Court: Okay.

D. Gray: And that is that the relevant time for considering the mitigation isn't in those moments

before, but from the time she says no his behaviour continues. And you don't get to borrow backwards from the walk up the roadway and say; oh yes, but I was no enamoured with her that my – that I was out of control and couldn't control myself. Once she has said no or at least there's a reasonable apprehension that she – he should have ascertained that she'd said no, any like – any reasonableness of mitigation is ended.

The Court: And then the no – she says no when?

D. Gray: When she says no by saying; that hurts.

The Court: Okay. That's the time.

D. Gray: And – and – at that point, everything after that there's no – and all of the major events happen after that point.

The Court: Alright.

D. Gray: There is no mitigation. At most, even – even if you don't count those two arguments, and I think both of them are compelling and should be followed My Lord, but even if you didn't follow them, at most, what there is is an absence of aggravation and not mitigation.

The Court: Alright.

D. Gray: My Lord, those are my (inaudible).

The Court: I have one question.

D. Gray: Sure.

The Court: Another – another question.

D. Gray: Either – one of us will answer it.

The Court: What's – what disturbs me about this case, is it has taken four years to get to here.

D. Gray: I can speak to that.

The Court: And - and there was – the charge wasn't even laid for a year and a half, almost maybe a year

and three quarters after the event. And all of the evidence was available at that time.

D. Gray: I think it was about 15 months. And in fact, I think what happens is there's a complaint early on and then it isn't until March, I believe, that Mr. Lederhous is finally interviewed and it's sometime after that, after our Crown opinion and it just takes some time for that Crown opinion. This was not a case where the police felt comfortable in laying the charge in their own right.

The events from that point on are not within the control of the Crown. The – the preliminary inquiry proceeds actually fairly quickly, in the scope of this jurisdiction, after the charges are laid. After that point, there are two separate delays of Queen's Bench trials occasioned by former counsel for the defence. I do not criticize them; I just say that there is nothing to accord difficulty for the Crown.

The Court: Right.

D. Gray: Those are factors that are related – are unrelated to the Crown's conduct of the case. And while there was some investigative delay, I will concede that and there is a very junior detachment here, in reality nothing turns on that in – with my – with the greatest of respect.

The Court: Other then it's all up in the air --

D. Gray: Well --

The Court: -- for anybody facing these kinds of charges for longer then it probably should.

D. Gray: Right. Except that he was – he wasn't in fact facing the charges – I mean I guess he knew they were out there, but there was no charge extant.

The Court: Alright.

D. Coggan: My Lord, thank my friend for their submissions, but I will say that I believe that they were, in my submission, an absurd misstatement of the facts as you found them. And that your reasons for decision were very cogently thought out and demonstrated what occurred on that night. And you say in your decision that this occurred on the highway and became a lapse of judgment on his part and I believe that that is the correct statement of these facts in this case and that my friend has misstated what took place on the night in question with her inflammatory comments.

I say that, in going through your decision My Lord where you term this basically that the complainant experienced unwanted sexual relations and – that's on page one of your decision – and you point out that the accused pleaded not guilty in this case because he believed that she consented to this. And that was the issue that came to court.

You describe both of their judgments being affected by alcohol, on page three, and that was clear from the – your reasons from decision throughout that – in your comments to my friend that you were asking if alcohol was a mitigating factor, I think you've – you seen what the comments are in the case law is that it's not mitigating, but it's a – it's the surrounding circumstances. Did the alcohol affect the spontaneous nature of this event? Did they affect Mr. Rhodes judgment? Clearly they did. And clearly your Honour found that. I don't say that that's mitigating, but it's a

factual circumstance of the case that you should consider obviously and you have in your reasons for decision.

You talk in your reasons for decision, your Lordship, that at various times during the night that you had difficulty accepting the complainant's version that she made her discomfort known and that was with regard to what my friend said was her rebuffing him in the car, at page five of your decision. So again, it's another indication that there were some factual problems. That Mr. Rhodes did not know that there was not – no consent until we got to the highway, which is when your Honour found that he was guilty of the – of the offence.

The Court: Well, I – I think she did rebuff him – I think I found she did rebuff him in the backseat of the car.

D. Coggan: Yeah.

The Court: I don't know whether, and it really doesn't matter to me whether it was before they made their stop or – or after.

D. Coggan: Correct. Yes. Yeah. And then at the end of your decision or page 14 --

The Court: Right.

D. Coggan: -- you talk about the apparently consensual actions of the complainant and whether or not they demonstrated consent. What we're talking about in all this, My Lord, is what did the accused know at the time. It – it's apparent that the complainant in this case was traumatized by what took place. But she had a very different understanding of what was in the accused mind that night then the accused did. And I think that comes clear as well in your – in your reasons for decision as well.

And you – you quote from Ewanchuk, page 15 of your decision, and you talk about the fact that the common law recognizes a defence of mistake of fact, which removes culpability for honest but mistaken belief that they had consent to touch. And as such, later on in that paragraph, being reckless or wilfully blind to a lack of consent takes away his defence. And in that case, that's what you found here I believe. That's my understanding of your reasons for decision.

And you say at page 16th – page 16, that if the accused did not take reasonable steps to ascertain that the complainant is consenting, the defence does not apply. And that was your reason for finding the guilt in this case My Lord.

For my friend to characterize this as a situation that was well beyond the control of the complainant. They were all in the same circumstance. They went out to the lake, as you said in you decision, there had to be some twinking in their mind that this was for sexual purposes, they were going swimming in the lake. So was this beyond her control? She was with a friend. It's an overstatement of who had control of the situation. All four of these people went out to the lake freely and all four of them had apparently different ideas and motives as to what was going to take place.

You also, in your reasons for decision, indicate that there was a demonstrated willingness on the gravel road to hold onto him and kiss him and pretend to like him that could surely leave an impression that the door was then not closed to further sexual activity. You – you've commented on that in my friend's submissions as well. You note that there was no evidence that there were any threats or

excessive advances made by the accused and that the accused was not aware of the complainant's fear of him and that he honestly believed that increased sexual activity was still a possibility.

You then say at page 20, of your decision, that notwithstanding that the complainant gave no overt signals to the accused that the conduct which was to occur and which subsequently occurred was in anyway something she wanted to do.

So you've set it out, I think, clearly, factually as to what happened and you've taken a great – taken great consideration to consider what was in the mind of the accused at the time, what he should have known, what he ought to have known and how he acted improperly on the night in question. You say, in page 21, I do not accept that he was especially receptive to any signals which the may have given and therein lies his fault and lies his culpability in this case. You say at page 22, at sentence nine, I conclude that although the accused was led by the circumstances to conclude that sex was in the air, he was insensitive to the fact that the complainant was not a willing participant and then you find that he did not take reasonable steps to verify. For – later on in the paragraph, forging on with the sexual activity on the side of the highway without further inquiry does not satisfy the test of Section 273.2 and you mention that.

Your final paragraph My Lord, you indicate what I believe is the crux of this case. Perhaps somewhat blinded by his own consumption of alcohol, he did not see the need when they arrived at the highway to be sure that she was a willing participant. And you then say, I'm convinced beyond a reasonable doubt that when they reached the highway the

accused failed to take any reasonable steps to ascertain the complainant was consenting to further sexual activity and imposed his will upon her.

Now those comments all being said My Lord, the test when you consider sentence is normally twofold. You have to consider the seriousness of the offence and the moral blameworthiness of the offender. My friend has gone to great length to talk about the starting point of Sandercock and three years. There's no dispute that if you find this a major sexual assault, and I'm not going to argue strenuously against that, but ask you to consider the circumstances of this case. Is the fact that there was vaginal penetration sufficient in itself to categorize this as a major sexual assault? Or is this a lapse of judgment on the part of the accused in the context of sexual activity? Was this full sex? Yes. Was it a major sexual assault? I leave that to the court to decide.

If you find that that I think is one of two aggravating factors that you can find here. Is that this may have been a major sexual assault and your Lordship is at liberty to make that ruling and make that finding. The second aggravating factor is that Mr. Rhodes did not plead guilty, but My Lord --

The Court: That's not an aggravating factor.

D. Coggan: It's not an aggravating factor.

The Court: It's just not a mitigating factor.

D. Coggan: It's – it's a mitigating factor if they plead guilty, yes.

The Court: Right.

D. Coggan: You're right. I've – I've said that before.

The Court: He's entitled to his trial.

D. Coggan: Yes, he is. And – and you can see why it went to trial. You pointed out that – and my friend has just admitted that the police had to seek an opinion, they didn't know if they had reasonable and probable grounds to lay this charge. They went to the steps of getting a polygraph to determine, what they don't know because they're not admissible in court, but they got a statement from the accused in trying to pin it down on him and see if they had enough evidence. So you have those factors.

As far as mitigating factors, I find it incredulous that my friend says there's no mitigating factors in this case. Mr. Rhodes comes before you with a clean record. He's never been convicted of a criminal offence. He's 40 years of age.

The Court: I – I think though what they're saying is follow Sandercock and if you look at Sandercock, it says that assumes we're looking at a no record, unblemished --

D. Coggan: Yes.

The Court: -- unblemished record.

D. Coggan: Yeah. But --

The Court: So you don't mitigate on something you've already credit for.

D. Coggan: Well, --

The Court: That's the theory, I think.

D. Coggan: Yeah, it – it's a factor, obviously that the court will consider. As far as other mitigating factors, you say in page 19 of your decision as I've already reiterated to you, that there was – there's no evidence that there were any threats or excessive advances made by the accused. Now that's – again, you're talking about when they got out of the car by the lake. But I would submit that on

the facts of this case, my friend says that there's physical injuries to her back. She wasn't struck by the accused. She wasn't beaten by him. She was placed on the ground and the gravel and the highway caused some bruising on her back. It's not as though he was violent towards her except for the unwanted sexual act. He did not raise a fist to her. He did not scream at her. He did not yell at her. He did nothing – her fear of him was not brought forth by his actions. It was brought forth by the circumstance of being with a strange man in a strange place. And it's understandable that she had that fear. But was he to know that and is it not mitigating that he did not do anything of physical force in the sense, as I say, inflicting a blow, using a weapon, anything like that. None of that is present.

He also, My Lord, and I think this is mitigating and goes to his state of mind, picked up her pants and her shoes and held onto them while he waited for her to come out of the bush. Now that suggests to again to me not a lot of malice on his part towards her. It suggests to me that he's showing some concern for, you know, we got to get back to Thompson, this lady's going to need her clothing.

In the morning, when they come back to get the wallet, he again, and My Lord may look at this differently, but I say and Mr. Rhodes' evidence is that he was concerned as to why she was so upset with him the next day. I don't think I could characterize it as being remorseful for what took place, but at that point it shows an indication that he didn't understand that he had hurt her or done anything wrong to her and he ought to have, which is your reasons. He ought to have known that, but he didn't.

I also say that this Pre-Sentence Report is an extremely mitigating factor. It shows that you have a man of good character in front of you who understands the criminal law, who has led a fairly exemplary life in keeping his work history for the last few years, in his family relationships, in his relationships with employers. And you can see, through that Pre-Sentence Report, there is no or minimal risk to reoffend as submitted by them.

As to the comments about whether or not her misleading him was mitigating, I wouldn't go so far as to say that My Lord. Again, I don't think that's mitigating in his favour, but it's a circumstantial piece of the puzzle that goes to his state of mind at the time of the offence. And in coming to an appropriate sentence, I would ask you to consider that obviously.

When looking at the Section 718 of the Criminal Code, My Lord, it is clear in a case like this that denunciation and deterrence must be on your mind. But I think it's also a case where it's difficult to say that denunciation would have much or I'm sorry, not denunciation, deterrence would have much of an affect in this case. It was the circumstances of that evening as it took place. As you've heard, Mr. Rhodes didn't believe he was doing anything wrong at the time. You found that he ought to have known that he was and that he was imposing his will upon her.

But this is not, in the sense of the cases that have been presented to you, a predatory crime; it is not a crime where he took advantage of a sleeping woman who had no choice in the matter. And I would say to you that those cases and the cases you have before you scream for deterrence and denunciation. That to victimize a woman who is asleep is the most degrading act of sexual assault other

then a violent, violent rape. Is that what we have in this case? We have a man who did not use proper judgment in knowing when to stop his sexual activity on the night in question.

And I would suggest that it is not necessary to separate him from society. That some reparation to the victim is obviously appropriate and some rehabilitation may be necessary in the form of counselling to ensure that Mr. Rhodes is considerate to women's needs; a woman's state of mind in situations like this. But I don't believe that a penitentiary sentence is needed to express the court's denunciation of this conduct in this case.

My learned friend indicated that she felt there was a number of aggravating factors. I've gone through some of them so I won't go through them all. She says that the Pre-Sentence Report seems to indicate that he has little respect for women. I'd ask your Lordship to read that Pre-Sentence Report. I don't know where that came from.

The Court: I didn't – I didn't hear her say that.

D. Coggan: She did. I wrote the quote down exactly My Lord and it's --

The Court: (Inaudible).

D. Coggan: -- one of the reasons I said that it was an inflammatory submission because to suggest that he had little respect for women is just not borne out by this Pre-Sentence Report.

She tells me – she told you that another aggravating factor is that he shifted the blame to the victim in his testimony. I'd ask you to consider what Mr. Rhodes, in his mind, was thinking. He was not suggesting that she was to blame for this. He was suggesting that he didn't have the

communication given to him to understand what she was feeling and going through that night. He never said that this was her fault. He said that her actions that night confused him and that's not shifting blame. He takes responsibility, accepts your decision, but has difficulty understanding it. That's the best way, I think, to put it.

I won't comment, as I – my objection to the comments about the Parliamentary changes My Lord. You made fair comment that we're dealing with an offence from 2006. Parliamentary law is as important as Court of Appeal law. Both are branches of the government and both are owed deference by my friend's office and too often they go to the politics and away from the Court of Appeal, which is reasoned decisions by learned members of the bench. And you have ample Court of Appeals decisions in front of you to take that into consideration.

As I said, my friend had indicated that there was no mitigating facts. I've obviously explained those to you. Indicates that – that in the Pre-Sentence Report there is no explanation for the appellant's conduct. And I'm wondering when she said that, what explanation is required. He was out with friends. They went out to a situation which could only be construed as having sexual connotations and his misinterpreted the mindset of the victim in this case. There's your explanation for his conduct. It's very straightforward. I – my friend is looking, in my submission My Lord, for malice where no exists. Mr. Rhodes was no malicious that night. He was sexually aggressive and did not heed the warnings that you say he should have seen and he understands that decision. There's no malice here. There's no extreme aggravating factors in his behaviour.

In cases where a victim is sleeping, you heard me indicate that that is a predatory situation. That woman has no say at all. She's woken up to something horrible happening to her. This was a continuation of events on this night. It was not predatory in nature except insofar as, I guess, a man seeking sexual relations with a woman is predatory. But it's not predatory in the – in the sense that he was exhibiting any violent behaviour or anything like that and did not have any consideration for her thoughts or her wellbeing. He did, clearly. He helped her to the road. He picked up her clothes. There was not the malice that my friend is suggesting there was in his behaviour that night.

I – My Lord, confess that I was a little shocked this morning when I had some discussions with my friend and the case law that she submitted on each of them, with the exception of two I believe, indicate that sentences of two years imprisonment minus a day are appropriate. And these are cond – these are sentences where in Arcand, the trial judge imposed a 90 day sentence. Was later increased and I – appropriately, I think, that the Court of Appeal obviously made a – a very thoughtful decision in that case. But they didn't sentence him to three years. They sentenced him to two years. In a case where that woman was in – unconscious and intoxicated and, if I recall – I apologize, I didn't highlight whether or not he had a prior record or not, but I believe in most of these cases – he didn't in that case?

S. Seesahai: No.

D. Coggan: Okay. Maybe that's one of the cases he didn't have a prior record. But that was a decision --

The Court: And that was – that was an attack on a sleeping woman.

D. Coggan: A sleeping – and – and all of the cases we put to you today, I think, are similar. I confess, I – I searched for something along the lines of wilful blindness, along the lines of lapse of judgment, as we have in this case where he should have made the proper inquiries and I couldn't find anything as far as a sentencing precedent. So My Lord has the burden today, I think, of establishing a new precedent in a case like this.

The Court: It's not really a precedent because the law has changed.

D. Coggan: True enough. True enough. Perhaps you can consider it a comment on the – this is a situation where I would respectfully submit, minimum sentences don't take into consideration all the factors of an offence, but again, that's a political consideration that I don't want to comment too much on.

In the Shalley case, My Lord, again a 90 intermittent sentence, which was increased on appeal to two years less a day. Again, my friend has submitted that and again, that is a case where the accused had non-consensual intercourse who was passed out from intoxication once again.

The Court: Right.

D. Coggan: The Borkowsky case can be distinguished quite easily by the court, I believe My Lord. Borkowsky is a decision of the Manitoba Court of Appeal.

The Court: That's the aggravated assault case.

D. Coggan: No, that's Broekaert.

S. Seesahai: No, that was Broekaert.

The Court: Okay.

D. Coggan: Borkowsky is – is similar in some regards to this case in – in that it's a younger woman, an older man, extreme differences in age though. This was the – the workplace incident.

The Court: Oh, that was the employer.

D. Coggan: Yes. A 66 year old employer --

The Court: He's in a position of trust --

D. Coggan: Position of trust.

The Court: -- with that lady. That young girl.

D. Coggan: And that was so predatory. He clearly took her out with the intent --

The Court: Yeah.

D. Coggan: -- to do something like this.

The Court: (Inaudible).

D. Coggan: So it is distinguishable, I would submit. The other cases – again, in Wells, at tab one of my friend's supplementary book, received a 20 month jail sentence. The court showed deference to this trial judge in that case. And that accused, I checked the Court of Appeal record, had a two prior assaults on his record. He did not come to court with a clean record as Mr. Rhodes has in this case.

The Court: That was Wells?

D. Coggan: That's Wells, at tab one, yes. It's not indicated in the Supreme Court case what the accused prior record, but I checked the Court of Appeal case and indicates that he had two prior convictions for assault.

The Court: Not sexual assault?

D. Coggan: No, not sexual assault, but crimes of violence nonetheless. And as I indicated he was sentenced to 20 months incarceration.

Now some of these cases talk about how the accused had done counselling and things of that nature after the offence took place. I ask the court to consider what counselling's necessary in this case; some empathy, obviously for the victim from Mr. Rhodes and an understanding of the roles men and women play in sexual relations; something of that nature. But Mr. Rhodes can not in any way be considered a sexual offender in the sense that he's going to repeat this behaviour. The PSR shows that. It almost suggests that there's no need for counselling. Obviously, I'm not going to suggest that. An offence of this nature has to be spoken about with some people to ensure that it doesn't happen again. I don't think it will happen again in this case.

Again, my friend submitted White as a case. That accused was sentenced to 26 months in prison, but had a lengthy criminal record in that case. And again, it was – in that case it was a friend of his who he waited till she was felt – fell asleep and had sexual intercourse with her. And it was – so they indicate in there it's a breach of trust, taking advantage of the victim's condition.

And finally, Broekaert. I don't have much to say there. That's an aggravated sexual assault. It's not even closely related to this case. My friend used it for some other purposes so. I understand that. She's not saying the sentence being proposed there is appropriate to this case, but.

And I ask you to consider the case law which I have provided to you. I think it is more – a more authoritative, but more relevant to the case which we have before us. It took a look, in each of those cases, at the mitigating factors, aggravating factors and found that conditional sentences can be appropriate. My Lord knows that from the

case in Proulx that conditional sentences can address deterrence and denunciation. I don't – I think that's clear from the – from the prior law. And we are speaking of an offence that occurred in 2006 so it is appropriate to consider the conditional sentence.

In the case of Killam again, a situation where the victim was passed out and the accused had sexual intercourse with here. A sentence of two years less a day and (inaudible) varied on appeal to a conditional sentence, if I recall correctly. Yes. I'm sorry, was that – I might be misreading.

S. Seesahai: I think it was a Crown appeal.

D. Coggan: Yeah, that's right. Yeah. Yeah. It was deference to the conditional sentence that was granted at trial or after the incident took place so. So I'm sorry. Basically, - I mean my court – my cases My Lord, stand for the proposition that conditional sentence is available to you. I think it is wholly appropriate in these circumstances. Even in cases where in White, the accused had a record of eight offences, dangerous use of a firearm, impaired driving, there was significantly less mitigating factors in that case then there is in the case of Mr. Rhodes, who comes before you with a clean past.

You also have the Nikkanen case from the Court of Appeal in Ontario before you, at tab three. That was a sentence of 18 months incarceration and the sentence was varied to a conditional sentence having a look at all the facts of that case.

My main point in giving you S.(J.S.) from the Court of Appeal of Manitoba, My Lord, is to show that Justice Twaddle, in that case, was deferring to the trial judge. He did make some comments that basically a penitentiary

sentence was appropriate. Again, that was a situation where we have intoxicated female passed out and this man preys upon her while she's sleeping. Your Brother, as he was, Justice Huband, again, very respected jurist, provided a strong dissent in that case saying that; wait a second, it's not out of the realm to have a conditional sentence and let's look at the circumstances of this young man. Or in our case, let's look at the circumstances of Mr. Rhodes in coming to an appropriate sentence.

And finally again, the Lamirande case where the conditional sentence was upheld by the appellate --

The Court: That's a completely different kind of case, isn't it?

D. Coggan: Yeah, it is. It's a different case. I – I think I put that in My Lord more to – to comment of the moral culpability of somebody who has HIV and who's having unprotected sex. Is – is Mr. Rhodes' moral culpability to that high of a level or did he make a mistake of judgment in this case, as you've found in your reasons? And I think that was my reason for throwing that case in at the end there.

The Pre-Sentence Report – I believe I have – demonstrates a man before you My Lord of good character. He contributes to society. He's described as having an excellent work ethic. His former employee again, described him as having an excellent worth – work ethic. He's at very low risk in most of the categories and a low risk in the other categories. He is not a big drinker. Alcohol does not seem to be a huge consideration.

The Court: I tell you, I have trouble with that, but anyhow.

D. Coggan: Yeah, I think My Lord when you see what we see in court in the North from time to time and you see the alcoholism that goes up here – goes on up here, and in cases like this it's often worse --

The Court: Everything's related.

C. Coggan: It – it is.

The Court: Everything's relative, is what you're saying.

D. Coggan: Yeah. Yeah. Exactly. You know, Mr. Rhodes drinks a bit, but – and it definitely affected his judgment on the night in question, but it doesn't seem to be something that gets out of hand very often. And was – the night in question, he's out at a stag or a bachelor party with his friends, led to more consumption then I think he normally does.

The recommendation, as you can see – well, I want to talk a bit about again, the interviewer, which I believe was Mr. Konrad, who is the head of probations up here. And in the report it says at page seven; Kenneth expressed a solid foundation of mutual consent and of general issues related to sexual offending. He was very cooperative in the preparation of this report. So again, contradicting what my friend said. I think it shows that he does have an understanding of the issues in this case. And scored, My Lord again, moderate low on the overall risk assessment. And the writer then contends that he is a viable candidate for community supervision.

He is employed by the City of Thompson My Lord. Right? And I am asking you to allow him to continue that employment and be a productive member of society. He will be walking of eggshells, obviously, if you do place him on a conditional sentence and I've explained that to him. That

it is a jail sentence and that any breaches would lead to further incarceration.

That being said My Lord; I'm going to ask you to consider probation in this case. I think that you will probably reject that quite quickly because it is – I – I believe your Lordship will categorize this as a major sexual assault so I – I'm not going to stand here and say that probation would be appropriate for that. In the circumstances of this offender, I think it's something you should consider. But my – the crux of my position, My Lord, is that a conditional sentence is available to Mr. Rhodes. I would ask you to impose it. It will have meaningful consequences to him. It will be punitive. It can be deterrent. And it does denounce what he did that night by not properly determining what the will of that woman was on the night in question.

Mr. Rhodes resides, My Lord, at 35 Hickory Avenue, here in the City of Thompson. It's a home that he owns. Lives there with his mother and his brother and another family member. Or two brother?

K. Rhodes: (Inaudible).

D. Coggan: Mother, two brothers and one of their children, I believe. I'm asking you to consider conditions that he reside at that address. That he keep the peace, be of good behaviour. The mandatory conditions, of course. That he be subject to a curfew. My Lord, often times the curfew is suggested for absolute curfew with exceptions for work. I leave that to your Lordship to structure appropriately. His normal work hours are 7:30 to 4:30, but there is times where he works in the evening shift from 2:30 to 11:30. He is requesting four hours for personal errands on Saturdays from 11:00 till 3:00,

something of that regard. And because his work schedule may change, I would ask you to consider a curfew of 5:00 p.m. to 7:00 a.m., but absolute with exceptions for employment is appropriate. And he can provide a work schedule to his supervisor in advance if he has to work any overtime or – or work that evening shift. He does usually have some notice of the evening shift. You get.

K. Rhodes: I get notice (inaudible).

D. Coggan: Okay. So it is something he can report to the supervisor if necessary. Obviously it's a jail sentence so he should not be allowed to consume alcohol, should not attend licensed premises. Should not possess any weapons, firearms or ammunition. Should be ordered to attend, participate and complete any and all counselling as directed. And of course, no contact or communication with the victim in this case, which he has not had.

I ask My Lord to consider the very strange circumstances of this case, the moral culpability of my client and consider his past record as a citizen My Lord. He has no prior criminal record. He's been on bail – the incident took place in August of 2006. He hasn't reoffended since then. He's been on bail conditions, which I don't believe were extremely onerous, but he's been on bail since March of 2008.

The Court: What kind of conditions?

D. Coggan: I believe it was just keep the peace and no contact. Was there a no drinking clause?

K. Rhodes: (Inaudible).

D. Coggan: Yeah, I couldn't find – My Lord had the court record when I was looking for his conditions prior to court, but I – I don't believe they were extremely onerous conditions. But again, trust me, in the is

jurisdiction for somebody to go three years without breaching is quite an amazing feat from what we normally see in the courts up here so. It – it shows his character and shows how seriously he's taken these charges since he's been charged. And the fact that he's not a threat to society and he's a good candidate for a conditional sentence My Lord.

With regard to the other orders that my friend is seeking, I take no issue with the DNA; that's mandatory. The Section 109 order is mandatory. On the SOIRA application --

The Court: The which?

D. Coggan: The Sexual Offender Registry application --

The Court: Right.

D. Coggan: -- that my friend has made under Section 490, there is an exception where the interests of the accused outweigh the – the privacy – his privacy interests outweigh the interests of society in investigating sexual offences and things of that nature.

Again, I'd ask you to consider the circumstances of this case and the offender as to whether or not he needs to be branded as a sexual offender the next 20 years, My Lord. And I think that's a simplified way of – of saying it, but that is basically the test; is that's a balancing interest between the interest of the accused and the interest of society.

The Court: So it's not mandatory?

D. Coggan: It is with that proviso. It's – it's – it's a mandatory that you consider it, mandatory that you impose it unless his interests are outweighed or his interest outweigh society's interests. Mr. Gray might have something to say.

D. Gray: (Inaudible) to the court.

D. Coggan: Yeah, it's – I can tell My Lord that I've had one case where it was not ordered by a Provincial Court Judge. But, for the most part, it's generally ordered.

The Court: Alright.

D. Coggan: Two last comments My Lord. No, I think I've spoken about the alcohol. I – as I said, I don't believe it's mitigating. My friend read the comments from Sandercock and Arcand, which indicate that it's – it goes to the spontaneity of the offence in this case. It's not mitigating, but it's factually important and it should be a factor in coming to your sentence. Base – it basically affects his – his moral culpability at the time is – is what I would suggest.

And you made a comment, My Lord, which I – I wrote down; the fact that she didn't say no. Is that a factor on sentence? I submit that it is because it's a factor which goes to his state of mind at the time of the offence. And again, you have to consider that in considering his moral culpability.

Subject to any questions you have My Lord; I believe those are my comments. I ask you to consider some form of punishment for Mr. Rhodes that does not involve an incarceratory sentence. Subject to any questions, those are my comments.

The Court: I'm going to ask you the converse of question I asked the Crown. If I were inclined to order a period of incarceration, do you have any submission to make on the length of that other then as short as possible?

D. Coggan: Well, I think what's been demonstrated from the case law is that a three year starting

point in Sandercock is for cases unlike this one. This case is not, as I said - it's going to be hard, I think, My Lord, for you to find a lot of malice in what Mr. Rhodes did that night. You've said it in your decision that it was as lapse of judgment on his part. He ought to have been aware that she was not consenting at the time. Is his level of culpability such that he deserves to go a penitentiary; a man who's 40 years of age with no prior record? Is a penitentiary sentence appropriate? I – I say it isn't, My Lord and I ask you to come to the same conclusion.

If you do impose a jail sentence, I think the sentencing considerations under the Code can be met by a sentence of two years less a day. In all honesty, I – I believe a – a sentence in a range of a year to 18 months is probably appropriate, but it should be a conditional sentence My Lord. I'm, I think, cognizant of the fact that you may go up – above that a little bit, but I think he's a very good candidate for a conditional sentence.

On the facts of this case, I think it calls for not lenience from the court, but an understanding of the circumstances of that night and the circumstances which were known to Mr. Rhodes at the time.

The Court: Thank you Mr. Coggan.

D. Coggan: Thank you.

The Court: Any response on the question of conditional sentence and the terms? I think that's all that you should be entitled to respond to.

D. Gray: Well, I do think there are a couple of other points My Lord, but I – I – but I will respond to that initially. Do you mean what terms we would be seeking?

The Court: Yes.

D. Gray: If in fact --

The Court: If that – I'm not saying --
D. Gray: I'm not – I know.
The Court: But I want to get as much as I can from you people while I've got you here.
D. Gray: If in fact a conditional sentence is considered if should, of course, be for the maximum term.
The Court: That's two years less a day.
D. Gray: Two years less a day. It should require that the accused be bound throughout that term to an absolute curfew with the following exceptions: for medical emergencies involving himself or his immediate family.
The Court: Including his girlfriend even though she does not live there?
D. Gray: My Lord, quite candidly, I would not necessarily agree with that. I think it depends on the circumstances and you would need to hear some evidence as to their relationship, with the greatest of respect, to – to do that. However, I could see how you could make the order. I just don't think it's appropriate unless they're actually living together. I think that truly is the test and I --
The Court: Alright.
D. Gray: -- I – that's my feeling on that. The second is for the purpose of employment providing he provides his work schedule in advance in writing to the supervisor. The third is for compliance with the order or any other court order. Compliance with the – the conditional sentence - so that I assume that one of the conditions of the order --
The Court: Yes.
D. Gray: -- will be that he attend, participate and complete – complete counselling; as an example.

The Court: Well if – that would be one.
D. Gray: Right. And if that was one of the conditions --
The Court: Yeah.
D. Gray: -- it would be --
The Court: Okay.
D. Gray: -- (inaudible) to say he has an absolute curfew, but he can't actually go out to do the counselling. That would be --
The Court: You just articulated, you (inaudible). Okay.
D. Gray: Yeah.
The Court: I – I hear you.
D. Gray: And lastly, the usual has been a four hour period for personal items and my learned friend has already provided for that. He should not possess or consume alcohol.
The Court: Is that – that's the weekly – a weekly.
D. Gray: Four – it's weekly.
The Court: Four hours.
D. Gray: Yes. Some judges have started allowing supervisors some discretion after a period of time.
The Court: Yeah.
D. Gray: I do not necessarily subscribe to that. I think the Court of Appeal has not suggested that should be – should be delegated, but you know that's something we can debate, I suppose, if we get into the nuance of it.
The Court: Right.

D. Gray: That deals with the – the curfew issue. He should also present himself to the door for curfew compliance checks.

The Court: Right.

D. Gray: And he should, of course, maintain a working landline and provide the supervisor and RCMP with that number.

I would suggest that he should not possess or consume alcohol or other intoxicants. That he should not possess illegal drugs. That he should not possess prescription drugs unless he has a prescription for that drug and he should not use any substance in a way that would make him intoxicated. I suggest that he should not attend at any licensed premises perhaps excepting restaurants. Although, with only four hours, I'm not sure that there great need for him to do that.

He should not possess weapons of any kind.

He should, of course, have no contact at all with C.P. and I'm going to actually add S.M., even though she isn't actually resident in this community. Well, she may have moved back.

He should attend, participate and complete counselling as directed by the supervisor. And of course, you should specify sexual offender counselling.

He probably should have --

The Court: That would be sexual offender counselling.

D. Gray: Yes, I mean it could be all counselling, but he specify that. He should attend for an alcohol or addictions assessment and comply with any treatment required by that assessment.

With the greatest of respect, my learned friend, if a sentence under two – under two years plus one day; that is even a penitentiary sentence of two years, a three year probation period should follow with all of those same conditions. The only exceptions, with the greatest of respect, being the curfew and the curfew compliance.

My Lord as that was the point that you asked for comment, I stop now. I do have a couple of other points if you wish to hear them. If you feel that it's inappropriate, I'm – I'm certainly cognizant.

The Court: I think we've heard from the Crown and we've heard from the accused.

D. Gray: That's fine My Lord. If – if – it's your courtroom.

The Court: Mr. Rhodes, would you stand up please? Do you have anything to add from what your counsel has said?

K. Rhodes: (Inaudible).

The Court: Thank you. I had thought I knew what to do last evening. But I'd like to deal with it today if I can because everybody's here and it's gone on long enough.

D. Gray: I can advise that I – we have – I have no plans (inaudible) and I know that Ms. Seesahai is here for the day so whatever time you wish to proceed this afternoon.

The Court: If I – if I ask people to come back at 3 o'clock, can you deal with that?

D. Coggan: Yes.

S. Seesahai: Yes.

D. Gray: Absolutely.

The Court: It may be – you'll excuse me if I'm a few minutes late even then. I want to get this as right as I can.

D. Gray: Yes, My Lord.

S. Seesahai: Yes, My Lord.

The Court: But let's aim – and it may be that you'll come at 3 o'clock and I'll say I need more time, but let's aim for 3 o'clock.

S. Seesahai: Understood My Lord.

(RECESS)

The Court: Alright. I wanted, if I could, to do this today to bring some closure to it on a timely manner. And so if a transcript of whatever I say is required, I just am reserving my right to make some grammatical or clerical changes to it.

Thank you for the submissions that you both made. They made a tough case for me tougher.

Whatever might be said about this case, it is not the archetypical case described in R. v. Sandercock, 1985 Carswell Alta., 190. That case appears to be the starting point for the starting point of three years for major sexual assaults. At paragraph 13 Mr. Justice Kerans wrote:

> One archetypical case of sexual assault is where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological

> injury, whether or not physical injury occurs. The injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two. This category, which we would describe as major sexual assault, includes not only what we suspect will continue to be called rape, but obviously also many cases of attempted rape, fellatio, cunnilingus, and buggery.

Sentencing in cases of that nature generally emphasize deterrence and denunciation. This occurred in the Sandercock decision. And it was echoed in the Manitoba Court of Appeal decision in R. v. Borkowsky and R. v. Broekaert. And if one took the time to review other cases involving forced sexual activity, you wouldn't have to look hard to see those words "deterrence" and "denunciation" as the main planks of the sentencing platform.

I have been left with another archetypical sexual assault in the authorities which have been given me. These are cases which involve sexual intercourse with a sleeping woman. I mention, as examples, the case of R. v. Wells, R. v. White, R. v. S.(J.S.) and more laterally R. v. Arcand, all of which resulted in periods of incarceration(Wells, 20 months, White, 26 months inclusive of time served, S.(J.S.), 30 months jail, and Arcand, two years less one day custody and two years probation).

Each case mentioned those two buzz words; deterrence and denunciation, which generally appears to have translated into jail. But not always. See the case of R. v. Killam, a decision of the Ontario Court of Appeal in 1999 in which the court, albeit reluctantly, did not interfere with the two

year less one day conditional sentence, or the case of R. White, (that's another White) in which the Court of Appeal overturned the sentence of nine months jail and replaced it with 18 months conditional sentence, or R. v. Nikkanen, a 1990 decision of the Ontario Court of Appeal which overturned a decision of 18 months incarceration plus probation and replaced it with a conditional sentence of 18 months.

What I want to emphasize is that no one has brought to me a case like this one. There was no archetypical case like this given to me. I'm not surprised because the facts of this case are unique and the law of conditional sentences then existing of course, no longer applies now.

Ms. Seesahai argues strongly and effectively that this is a major sexual assault case and I should take the three year penitentiary Sandercock starting point and add to it, based upon factors which she submits aggravate the matter.

She argues there is a lack of remorse and I tend to agree that I haven't heard much remorse expressed. She argues that there is a Victim Impact Statement which indicates that the complainant was hurt physically and emotionally. She argues that when the complainant was laid down at the side of the highway and expressed that she was uncomfortable, Mr. Rhodes pressed on. She says this was a rape in a remote area, when the complainant was vulnerable to the whims of Mr. Rhodes. She says that he was older and ought to have known better.

At bottom she says denunciation and deterrence are the most important considerations here. And she and Mr. Gray urge me to treat this as major sexual assault for which three years – three plus years incarceration is not only appropriate but mandated by the cases.

My conviction in this case was based upon the notion that the accused took no steps, once he got to the highway, to be sure that what was about to happen was an activity that was mutually desired. Some signals had been sent early, but they were not enough for the accused to conclude that the heightened sexual activity would be consensual, only that it was a possibility. He acted at the side of the road without any further inquiry. He took the lead and expected the complainant to follow. He was not entitled to the benefit of the honest, but reasonable belief defence because he did not take reasonable steps to verify the consent. Put another way, he was insensitive to what the complainant wanted and Section 273.2 of the Criminal Code mandated a finding of guilt. His lack of reasonable inquiry deemed a guilty mind whatever he was truly thinking.

Let me remind you what I said when I entered the conviction and why this case is of a different genre than those that counsel have given to me. You will recall that I spent some considerable time relating my findings leading up to the sexual activity at the side of the road. After saying that I would have put the honest, but mistaken belief defence to a jury had there been one, I went on to say this:

> I say this because the complainant herself testified that on the gravel road between the lake and highway she gave some indication of willingness to engage in sexual activity by returning the kisses of the accused.
>
> It must be acknowledged that the parties met in what can only be described as "inviting" circumstances. At 2:30 on a summer morning

two young women, one of which was dressed in a tube top without a bra and jeans and both of whom were made up and wore high heels in a parking lot outside a bar, made their intentions publically known that they wanted to party. Then the women, in particular S.M., made the suggestion that the group should go swimming, notwithstanding that not one of them had any bathing suit.

These facts could fairly conjure up, in the mind of the accused, that getting together with these women had potential that sexual activity lay ahead. Then to see Mr. Lederhous and S.M. "making out" at the stop at the Jonas Road could further heighten the anticipation in the mind of the accused that further sexual activity could well occur. And although the complainant had rebuffed his advances in the backseat of the car, her demonstrated willingness on the gravel road to hold onto him and kiss him and pretend to like him could surely leave an impression that the door was then not closed to further sexual activity. This is especially so since there is no evidence before the group got out of the car by the lake there were any threats or excessive advances made by the accused.

By the time he was walking hand in hand with the complainant up the gravel road to the highway, I find that the accused was not

> aware of the complainant's fear of him and that he honestly believed that the increased sexual activity was still a possibility. I do not accept that the accused had formed any intention at this time to impose his desires upon the complainant, since it would have made more sense to impose them in the privacy of the gravel road than in the more relative openness of the highway.

I did prefer the complainant's evidence over Mr. Rhodes evidence as to what happened at the side of the highway. But that describes the activity. It does not describe Mr. Jones (sic) mind. In effect, that doesn't matter because of Section 273.2.

I also said this:

> I conclude that although the accused was led by the circumstances to conclude that sex was in the air, he was insensitive to the fact the complainant was not a willing participant. It was fairly argued by the Crown that as required by Section 273.2(b), he did not take reasonable steps to verify consent.
>
> I accept the evidence of the complainant that when the accused laid the complainant down by the side of the road, he did not inquire whether she wished to continue. There was no similar inquiry after she complained about being hurt by his digital penetration; even

> in the evidence of the accused. Given that the complainant was a stranger to him and that he was alone in the middle of the night on a remote stretch of highway with a young woman who is smaller than he, a woman who is 16 years his junior and who he acknowledged shown signs of intoxication and who had rebuffed his advances earlier in the morning, forging on with the sexual activity on the side of the highway without further inquiry either before it began or midway through after she exhibited discomfort, does not satisfy the test of 273.2(b).
>
> Holding hands with the complainant, exchanging kisses with the complainant and walking arm and arm up the highway did not entitle the accused to engage in the more elevated sexual conduct without first further inquiry on his part. I do not accept that the accused asked the complainant at the side of the road for any permission to proceed. He simply moved further to the next level. And when his digital penetration hurt the complainant there was no further inquiry to ensure consent, but simply an escalation of the sex he had imagined when he left Thompson in the first place.

This is a case of misread signals and inconsiderate behaviour. There is a different quality to these facts than found in many cases of serious sexual assault. There were

signals given by the circumstances and indeed by the complainant, albeit the latter based upon self preservation, which ought not to be overlooked. This is not a case in which Mr. Rhodes' anticipation was groundless. However, its consummation without reasonable inquiry was not justified.

This however, is a different situation from sexual assaults where there is no perceived invitation or where an accused man takes an opportunity to satisfy himself upon a sleeping complainant. In those cases, as I have said, they are of a different quality.

So I'm faced with a man with no criminal record whatsoever, who appears to be industrious in his work and able to relate to others. But for this one instance, he does not live up to the designation as a criminal. The question is notwithstanding the quality of this offence and his unblemished record whether he must go to jail.

The comments in Arcand about the gravity of the – about gravity of the offence and responsibility of the offender are not challenged. But when talks of proportionality (similar sentences for similar offences), the court must compare apples and apples, not apples and oranges. Yes, there were common threads. There was sexual intercourse; there was cunillingus and digital penetration.

But here there were no threats knowingly given, there was no violence knowingly imposed. Mr. Rhodes, in his testimony, had said that he wasn't out there to hurt anyone. Even his sexual activity, bizarre as it was and as hurtful as it was to the complainant, cannot be said to be only self gratification. It had the characteristics of a clumsy Don Juan. I don't condone it, but it simply does not fit the archetypical cases cited.

Unlike the sleeping women cases, there was no inert woman giving no signals at all. There was some invitation however involuntary. I've read you the facts that I found. I don't criticize the complainant. She was a frightened young woman all alone in the presence of a large, perhaps loud, overbearing older man. But she did give signals that he read the wrong way and was not considerate enough to make sure of what they were saying.

There are a couple of paragraphs in Sandercock which say this, and they're paragraphs 29 and 30.

> Provocation of the offender by the victim is an obvious mitigating factor. More difficult to decide is whether, in a given case, there has been provocation. It is surely not provocation, for example, simply to be a woman, or to be attractive, or to be prettily attired. Sexual arousal is not the same thing as the arousal of a desire to seek sexual satisfaction by violence to another, and provocation of the first is not necessarily provocation of the second.
>
> Negligence of the victim as to his or own - or her own safety is generally not relevant. The blameworthiness of the offender is not in the least diminished because the victim imprudently provides the offender with an opportunity for crime, nor does it necessarily follow that such imprudence

> lessens the likely pain, outrage and indignity which then visits the victim.

The case uses the words provocation. Perhaps enticement is a better word. But even that is not really apt here. I'm sure that whatever signals there were that sex was in the air were unintentional. But that does not change the fact that they were there, more then just a manner of dress, more than the fact that she was a woman. And they are a relevant, mitigating factor.

I made reference during argument to paragraph 13 of the Arcand case. It said:

> The sentencing judge found that prior to passing out, the complainant had done nothing to encourage the offender to have sex with her.

If the notion of signals has no application in law, there was no need for the majority in that case to comment on it.

See also the Ontario Court of Appeal in the Killam case:

> She had, of course, not consented and had done nothing to suggest to the respondent that she was prepared to have sexual intercourse with him.

The signals given here, in this case, are at least relevant to the degree of moral blameworthiness of Mr. Rhodes.

So this case is different. Make no mistake Mr. Rhodes' failure to make inquiries warrants sanctions. Apart from anything else women deserve respect and consideration. And when strangers are involved, greater care must be exercised in showing that consideration because there is no track record of familiarity on which to gauge the consent. But in this case therefore, not only is deterrence and denunciation important, so also are the other criteria in Section 718, including:

1. Protection of society,
2. Rehabilitation, and
3. Promote a sense of responsibility in offenders and acknowledgment of the harm done to the victim and to the community.

Protection of society, I do not believe is advanced one iota by putting Mr. Rhodes in jail. The Pre-Sentence Report suggests that there are no psychological or antisocial patterns and Mr. Rhodes' history confirms that.

As to rehabilitation and promoting a sense of responsibility, a lengthy prison term, in my view, for non-thinking behaviour tends to stifle constructive change rather then encourage it.

The Pre-Sentence Report is favourable. Mr. Rhodes has no criminal record, has steady employment, a supportive girlfriend. There is no real suggestion of recidivism. By this conviction he is branded a sexual offender, at least in

the eyes of many members of society. And he has been living under this cloud for four and a half years.

I do not view either Sandercock or Arcand as particularly helpful where an accused is found guilty because he failed to measure up to a deemed intent. Mr. Coggan is right that the moral blameworthiness of Mr. Rhodes on this night, in those circumstances was not at the same level as the accused persons in either Sandercock or Arcand. Not all guilty people are morally culpable to the same level. This difference is not reflected in conviction. It can be reflected in sentencing.

If I were forced to utilize the Sandercock approach, the lesser level of moral culpability in the unique circumstances of this case is a material mitigating factor. However, I do not feel the Sandercock starting point should be applicable in this case because of the different fact situation, which I have earlier described.

I mention also the fact that Parliament has now determined that conditional sentences are not available for cases such as this anymore. However, when this offence was committed, conditional sentences were not only available, they were not infrequently utilized. Mr. Rhodes ought not to be prejudiced by the shifting sands of time, and I am able to draw upon a conditional sentence for this offence as one arrow in my sentencing quiver.

The real question is whether, in this case, it is appropriate to do so. Deterrence to Mr. Rhodes is not a factor. With his past and his Pre-Sentence Report, I see no basis for believing that he is at greater risk to do this again if he doesn't go to jail. He has been living with the system including the vagaries of placing a position before

the court. If he hasn't learned to be more respectful to women by this experience, he never will.

I also am of the view that general deterrence and denunciation can be found in a properly crafted conditional sentence. The Pre-Sentence Report demonstrates that Mr. Rhodes likes his freedom; to fish, to camp, to go out and visit. A conditional sentence which restricts those activities, in my mind, imposes jail like conditions that do impact on a person's quality of life.

I am therefore, prepared to impose a 24 month less one day conditional sentence. By my calculations that would end, assuming this matter ended today, in February, 2013.

The conditions – firstly, the mandatory conditions:

(1) Keep the peace and be of good behaviour.

(2) Report to a probation services supervisor on or before Friday, February 25th, 2011. That's a week today. And thereafter when and in the manner directed by that supervisor.

(3) Remain within Manitoba unless written permission, in advance, is given by that supervisor.

(4) Notify the supervisor, in advance, of any change of name, address or employment or occupation.

There are other conditions:

(1) For the first 12 months – I'm sorry, throughout the, you shall reside at 35 Hickory Avenue. And in addition to notification to probation – to your probation supervisor of any change, you will not change that address without his or her consent.

(2) For the first 12 months, you shall be obliged to stay at your residence, that's 35 Hickory Avenue, and not leave except for the following: to attend work for the City of Thompson. And that means you

are to go directly there and you are to come home directly from work. No stopping, no errands on the way there or back. - Another condition in this first 12 month period, to attend – actually, I'll come back to that.- For the first 12 month period there will be a period of four hours between 11:00 and 3:00 p.m. every Saturday or such other substitute four hour period satisfactory to your supervisor for the purpose of attending stores, etc. for the supply of food and items necessary to live.

(3) For the second 12 month less a day period, the curfew condition is extended such that you can go out from your home between the hours of 6:00 a.m. to 7:00 p.m. if you do not otherwise fit in the exemption for work that I mentioned earlier. In other words, you can – if you have a – if you have a work shift in the evening, the fact that your curfew is 6:00 a.m. to 7:00 doesn't stop you from doing that.

For the first six months or 12 months – actually, for the full – the rest of the conditions are for the full period. That's not quite right. I'll mention there's one that isn't.

(4) You will provide to your supervisor a list of your work schedules, in advance, on the first day of each month.

(5) You will attend any counselling sessions specified by your supervisor and that counselling could include any sex offender counselling.

(6) In the second 12 months less a day period, you will also be entitled to partake in any voluntary charitable activity that is approved by your probation supervisor.

(7) Throughout the whole of the period, you will answer the door or telephone of your residence in compliance with any curfew checks.

(8) I know that the Pre-Sentence Report says that you do not have any alcohol difficulties. I believe however, that much of the events of the night in 2006 were alcohol fuelled, at least in part. Because of that and because a conditional sentence is a substitute for a jail sentence where you would not legally obtain alcohol or drugs, I am imposing the condition that you do not possess or consume alcohol or non-prescription drugs throughout the whole of the conditional sentence period. That's two years. No drinking.

(9) Except for the comment that I will make in a few minutes, you shall not communicate or contact the complainant or S.M. during the whole two years less a day period. Nor should you attend the home or place of employment of the victim.

(10) There's also one last condition. Within 30 days from the expiration of any appeals from my decision in this case, you should ensure that a letter addressed to your victim is written by you, in your handwriting with a fulsome apology to her for your conduct. That letter should be delivered within the 30 day period to the Crown Attorney's Office in Thompson, in a sealed envelope, who can arrange that it be delivered to the victim. The

Crown is not entitled to open that letter before delivery to the victim. But if there is anything untoward in that letter, which is not consistent with a fulsome apology, no doubt that will be brought to my attention and will be treated as a breach of this conditional sentence. Understand?

Given the remedial nature of the sentence which I have imposed, I do not believe that a follow up period of probation is necessary.

I also make the following orders:

(1) A DNA order under Section 487.051(1).

(2) An order requiring Mr. Rhodes to comply with the Sexual Offender Information Registration Act under Section 490.012, the duration for which is 20 years.

(3) A Section 109(1)(a) mandatory weapons prohibition order.

Is there anything --

D. Gray: My Lord, just some questions about the conditional sentence order. I – I --

The Court: Yes.

D. Gray: Was it your intention to put an order that he have no weapons during the period of that time?

The Court: There is – he's – he's – there's a mandatory weapons prohibition order.

D. Gray: Yes, there is. It's just usual to put it as part of the conditional sentence order because obviously, if he's found with a weapon it makes it much easier if it's simply part of the conditions and – and it is a jail sentence.

The Court: Yes. I didn't put it in because of the mandatory order, but that's – for purpose of enforcement, I'm prepared to include that as a term --

D. Gray: Thank you.

The Court: -- of the conditional sentence.

D. Gray: There were two other conditions that I – we had asked and I – I just wanted to confirm that you'd turned your attention to them. One was the not attend licensed premises except for restaurant and the other was that he take an alcohol assessment. And there is one other exception.

The Court: I – I – I did consider both of those and I – I've determined – I didn't think --

D. Gray: That's fine.

The Court: -- that they were applicable here.

D. Gray: That's fine. And the last is in terms of the curfew, I had suggested that there should be an exception for medical emergencies.

The Court: I meant to say that. I'm sorry. And – and because I did mean – the exception will be for himself, for members of his family living in the same – well, for members of his immediate family and I'm going to add for Jacqueline Simpson if that should ever occur.

D. Gray: Lastly, the length of the order under Section 109, it's a minimum of ten years and a maximum of lifetime. I'm presuming ten years.

The Court: Twenty years.

D. Gray: Twenty years. Thank you. Is there anything else that I need to address?

S. Seesahai: Not from the Crown My Lord.

D. Coggan: No. Thank you My Lord.

(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIPT

I, SHANNON BECKER, certify that the foregoing pages of printed matter, numbered 1 to 87, are a true, accurate transcript of the proceedings recorded by a sound recording device approved by the Attorney-General and operated by a court clerk/monitor, and transcribed by me to the best of my skill, ability and understanding.

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