IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *White*, 2008 YKSC 34 Date: 20080509
Docket: S.C. No. 07-01511
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

JOHN CARTER WHITE

Publication of information that could disclose the identity of the complainant, witness or justice system participant has been prohibited by court order pursuant to section 486.4 and 486.5 of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:
Noel Sinclair and David McWhinnie Counsel for the Crown
Gordon Coffin Counsel for the Defence

REASONS FOR SENTENCE

INTRODUCTION

[1] GOWER J. (Oral): This is the sentencing of John Carter White for an offence of sexual assault on C.K., contrary to s. 271 of the *Criminal Code.* Mr. White was found guilty following his trial by judge and jury. Sentencing was adjourned to allow for the preparation of a pre-sentence report. At the commencement of the sentencing hearing on April 3, 2008, Mr. White entered a guilty plea to an outstanding charge under s. 145(5.1) of the *Code* and admitted to consuming alcohol on November 22, 2007, in breach of the terms of his release on the sexual assault charge. Given the rather

extensive submissions from counsel, I reserved my reasons for sentence to this date and remanded the offender into custody in the interim.

CIRCUMSTANCES OF THE OFFENCE

[2] Pursuant to s. 724(2) of the *Criminal Code*, it is open to me to find any relevant fact disclosed by the evidence at the trial to be proven. Based on that evidence, I find that the victim began drinking with a friend, F.L., in Whitehorse during the evening of March 15, 2007. The two young women went to a couple of drinking establishments and eventually ended up at the Lizards Lounge around 9:00 p.m. The victim stayed at that bar until about 2:00 a.m., during which time she was talking with friends, dancing, and continuing to drink. She knew the offender, as the two of them were attending a course together at Yukon College. At one point during the evening, the victim was dancing with the offender at the lounge.

[3] After the bar closed, the victim was standing outside, smoking a cigarette and talking with F.L. and other patrons, including the offender. This was some time after 2:00 a.m. The victim conceded that, by that point, she was “pretty intoxicated”. F.L. noticed the offender holding the victim from behind and that they were “kind of close”. F.L. engaged the offender in conversation because there was some discussion about the victim returning with him to the Yukon College, to continue drinking beer. F.L. was concerned because of the victim’s state of intoxication. The offender told F.L. that the victim would be “okay” with him and that he could be trusted. The victim was not objecting to being held by the offender.

[4] The victim got into a truck with the offender and one or two others and was driven to the adult dorm residence at the Yukon College, where the offender had a room. The victim's aunt, V.O., also had a room in the dorm. The victim intended to attend classes at the College the following morning.

[5] The victim went with the offender to his room, where she had something more to drink, but could not say for sure whether it was alcohol. Consequently, I am unable to find beyond a reasonable doubt that the offender supplied her with alcohol in his room. The victim then remembered being on the offender's bed with the offender and the two of them were talking about college matters. At one point, the victim brought up the fact that she had been sexually assaulted in her hometown of [S.H.]. About that time, the victim said she began blacking out and coming to. She remembered kissing the offender while on the bed and was not upset by that. Eventually, she became tired and said that she wanted to lie down and sleep, but was concerned about getting up for school in the morning. She told the offender that she wanted to sleep on her own side of the bed. The offender said that was okay and told her not to worry. The victim lay down and went to sleep. She was wearing her pants at the time and the offender had a shirt and pants on.

[6] The victim woke up with the offender on top of her. Her pants and underwear had been removed. The offender was not wearing pants or underwear and was trying to force sexual intercourse with the victim. She said "no" and "I don't want to" three or four times. The offender kept trying to put his penis inside her vagina. She was on her back on the bed and the offender was on top of her. The victim is just under five feet tall and weighs 115 pounds. The offender is five feet five inches tall and weighed about

220 pounds. After about ten minutes, the offender stopped attempting intercourse. The victim then waited for him to fall asleep, which he did after a further ten minutes or so. She got up, grabbed her clothing, and went upstairs to her aunt's room.

[7] During the sexual assault, the victim felt pain in her vaginal area. She was later observed to have an abrasion in her perineal area, about one quarter inch in diameter, where the skin had been broken.

[8] The offender is an admitted cocaine addict and an alcoholic. During the evening of March 15th, he smoked some crack cocaine and attended at various drinking establishments before ending up at the Lizards Lounge, where he continued to drink shooters and beer. The offender acknowledged that when the victim said she had to get up in the morning, he assured her that he was not interested in having sex with her.

[9] After the sexual assault, the victim suffered from severe embarrassment, to the point where she felt unable to continue her studies at Yukon College. She eventually moved back to her home community of [S.H.]. She did not make a Victim Impact Statement.

CIRCUMSTANCES OF THE OFFENDER

[10] The offender is a 39-year-old First Nations male, raised primarily in Whitehorse. At a young age, he was adopted out of his family, as he was apprehended by Family and Children's Services. Circumstances in his adoptive family were dysfunctional. His sister was sexually abused by the father of the family and the offender witnessed that abuse. The offender was also subjected to mental and physical abuse. He left home at the age of 14, which was the same time that he dropped out of high school. He does

not have an extensive work history, but was attending Yukon College at the time of the offence and working towards obtaining his G.E.D., which was a significant goal for him, as he suffers from dyslexia. He has a 16 year old daughter, who resides with her mother. He is currently about $27,000.00 in arrears for outstanding child support. He claims to be a recovering alcoholic and drug addict and, as I said earlier, he admitted to breaching the terms of his release on the sexual assault charge by consuming alcohol on November 22, 2007. He has a criminal record for a total of ten offences. His most recent convictions were in 2000 and include an aggravated assault, for which he received a sentence of time served.

[11] He informed the author of the pre-sentence report that he does not accept responsibility for the sexual assault and that he is going to appeal the guilty verdict. He was also noted to have "expressed a fair amount of anger" at having been charged with the offence. He denied responsibility for much of his criminal record. His mother informed the author of the pre-sentence report that the offender "can be at times untruthful" and that she has confronted him on a number of occasions regarding his honesty. The author also noted that the offender had provided him with information which at times was "a bit misleading".

[12] Related to this last point, it was telling to me that the offender told Dr. Kropp, the psychologist who assisted in the preparation of the pre-sentence report, that he did not believe he had been sexually abused as a child. This was completely contradictory to what he had said in his testimony at the trial. Defence counsel tried to explain this by saying that the offender did not confide in Dr. Kropp about the sexual abuse because he was a stranger and did not know him sufficiently well, but that the offender has indeed

confirmed with defence counsel that the sexual abuse did occur. However, at the sentencing hearing, I reminded defence counsel that the offender made this disclosure, during his cross-examination, to the twelve members of the jury who were also strangers to Mr. White. The contradiction here would seem bizarre, and yet it is sadly consistent with the other references to Mr. White's dishonesty.

[13] The offender was assessed for risk of re-offending. His score, based on the "Level of Service/Case Management Inventory" risk assessment, placed him in the "high range", indicative of a 73% probability of re-offending, for general and violent offences, which risk would become elevated if he becomes engaged in drinking or using drugs.

[14] Dr. Kropp's report was included as part of the pre-sentence report. At page 4, Dr. Kropp stated:

> "Addressing Mr. White's risk to re-offend is problematic, given his stance that he is innocent of the sexual assault. It is therefore difficult to comment on his level of insight and motivation for the offence. Assuming that he is guilty, denial is a risk factor inasmuch as it is related to poor treatment prognosis and drop out from treatment. Other risk factors in this case include his past violence and use of a weapon, extreme substance abuse, and a generally antisocial and unstable lifestyle. On the other hand, it appears that the sexual assault was opportunistic, there is no documented history of prior sexual offences, and Mr. White appears to be motivated to improve his life generally. Given that Mr. White is not able to discuss the offence, my best guess is that he represents a moderate risk for future sexual violence, especially under similar circumstances where substance abuse is involved." (my emphasis)

Dr. Kropp went on to recommend sex offender treatment, as well as drug and alcohol treatment and restrictions on the use of such substances.

[15] Mr. White provided four letters of reference. The first, dated January 1, 2008, is from Keith Kelly, who confirmed that Mr. White has been volunteering his time with the Elks Lodge in Whitehorse, helping out with such things as bingos. The second letter is from Don Evans, which confirms that Mr. White has been a tenant of Mr. Evans and has been helpful, quiet, and respectful to him and his wife. He described Mr. White as a "model tenant". The third is from Nora Peters, of the Yukon Learn Society, who confirmed that Mr. White had been discussing his education plans with her and has been very helpful to that organization. The fourth and final letter is from Ken Hodgins, of the Kwanlin Dun First Nation, who says that he has known Mr. White since the summer of 2006. He confirmed that he has been working with Mr. White to pursue his high school equivalency and post secondary education. He describes him as being "very resilient and committed to his goals".

[16] Just before delivering these reasons, defence counsel applied to have Barbara Evans testify at this sentencing hearing on Mr. White's behalf. She is the wife of Don Evans and has known Mr. White as tenant since September of 2007. She described him as a sober person and one who is working very hard to look forward in his life. She also said that he was very pleasant and helpful and was involved in doing his studies and volunteering at the Elks Lodge.

AGGRAVATING CIRCUMSTANCES:

[17] The aggravating circumstances in this case are as follows:

1. There is an element of breach of trust on these facts, which is something that I must take into account pursuant to s. 718.2(a)(iii) of the *Criminal Code*. The offender and the victim were known to each other. When the

offender and the victim were outside the Lizards Lounge after it closed, there was discussion between them about the victim going up to his apartment at the Yukon College. The victim's friend, F.L., was specifically concerned about that prospect because of the victim's state of intoxication and the fact that she was unfamiliar with the offender. F.L. specifically asked the offender whether she could trust him and he responded affirmatively. Further, there was discussion between the victim and the offender prior to the sexual assault where the victim specifically indicated that she was concerned about waking up for school the next morning and wanted to sleep on her own side of the bed. The offender responded "yeah, don't worry about it" or words to that effect. The offender himself acknowledged that they talked about the possibility of the two of them having sex, but that the victim was menstruating at the time and he assured her that he was not interested in sexual activity. On these facts, it is open to me to infer that it was due to the offender's assurances that he would not act inappropriately that the victim decided to fall asleep on his bed. He breached that trust by attempting to have sexual intercourse with her while she was asleep.

2. Even apart from the breach of trust element, it is aggravating that the offender took advantage of the victim while she was sleeping and, at least initially, unable to consent or resist.

3. The offender did not stop immediately upon the victim awaking and telling him that she did not want to have sex with him. Rather, he continued on for approximately ten minutes, attempting to penetrate her.
4. The offender caused an injury to the victim's perineal area, which was still painful when the victim was examined by a physician in the morning of March 16, 2007. While I would categorize the Crown's repeated description of this injury as a "wound" as somewhat inflammatory, it is clear that the offender did cause a break in the skin of the victim's perineal region, which caused her pain and discomfort.
5. The offender has a criminal record, which although dated, includes ten convictions, one of which is a related offence of violence, being aggravated assault.
6. The offender's risk assessment is high for general and violent offences and moderate for future sexual violence.
7. The offender has a serious alcohol and drug addiction problem and yet, according to Dr. Kropp, he refuses to seek treatment, believing that these addictions can be controlled through his own efforts. I say this is aggravating because alcohol and drugs played a role in this offence and it seems highly unlikely that the offender will successfully recover from his addictions without additional outside supports. Further, if he continues to abuse those substances, his risk of re-offending will increase.

Defence counsel submitted that the offender contacted Alcohol and Drug Services a day or two before the sentencing hearing to fill out an application for a treatment

programme. The offender also claims to have attended Alcoholics Anonymous meetings while he has been on release for these charges. Given the references to the offender's dishonesty and misleading conduct in the pre-sentence report, I have great difficulty accepting the offender's statements in that regard at face value. Certainly, there is no corroboration of his Alcoholics Anonymous attendance in the pre-sentence report and even if the offender did contact Alcohol and Drug Services, as he claims, it is very late in the day for him to have done so. This reflects badly on the sincerity of his willingness to undertake treatment or counselling for his addictions problems.

MITIGATING CIRCUMSTANCES

[18] The Crown says there are no mitigating factors. I would not go that far. While it is not mitigating by or in itself, I take into account that Mr. White is an aboriginal offender pursuant to s. 718.2(e) of the *Criminal Code*. Although there is little specific evidence on the point, the fact that he was apprehended from his biological mother by Family and Children's Services at a young age may well have been due, in part, to the types of systemic problems which, unfortunately, are all too common in our aboriginal communities. I am thinking here of circumstances such as alcohol abuse, poverty, hardship, and lack of education and opportunity. In addition, the offender told Dr. Kropp that he had been apprehended because his mother had "health problems" and "the government thought they could do better". In any event, it is very clear that Mr. White's upbringing was plagued by abuse and dysfunctionality and that he was essentially on his own from the age of 14. I take that as a mitigating circumstance.

[19] Second, it is to Mr. White's credit that he was, at the time of the offence, attempting to upgrade his education at Yukon College, notwithstanding his apparently

severe dyslexia and other possible learning disabilities which were referred to in Dr. Kropp's report.

[20] Third, according to the letters of support filed by Mr. White, and Barbara White's testimony this morning, he has been able to impress others with his helpfulness and his volunteer work in particular. He has been described as a good worker and a model tenant. Therefore, in certain contexts, presumably while Mr. White remains clean and sober, he can be a contributing member of society.

NEUTRAL CIRCUMSTANCES

[21] The fact that there was no proof of penetration beyond a reasonable doubt is a neutral factor. Nevertheless, the attempt at penile penetration over a relatively protracted period of time and the resulting injury are sufficient to make this a serious sexual assault. In *R.* v. *G.W.S.*, 2004 YKTC 5, Lilles C.J., at para. 20, spoke of the profound effects on a woman's well-being which can result from a sexual assault even where intercourse is incomplete:

> "… Typical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. …"

[22] Further, I view Mr. White's absence of remorse and his denial of responsibility as a neutral factor. He is not to be penalized for exercising his constitutional right to a trial.

[23] I also treat the age disparity between the offender, age 37, and the victim, age 21, as a neutral factor. Crown counsel urged that it was aggravating that the offender had a greater level of maturity and should be viewed as a "grown man" who, as a more

experienced person, should have known better than to take advantage of the victim, who was a “young” 21 year old. I do not accept that submission. Rather, I agree with defence counsel that a person’s age is not necessarily conclusive of how mature the person is. Further, there was very little evidence as to the victim’s life experience. Lastly, to the extent that there was more evidence about the offender’s life experience, that does not translate into an aggravating factor in this case.

[24] Mr. White testified that, despite consuming both cocaine and alcohol earlier in the evening, he was not significantly intoxicated when he arrived back at his dorm room with the victim. The Crown therefore suggested that it was aggravating that the relatively sober offender took advantage of the very intoxicated victim. However, I doubt this portrayal. On the night in question, the offender admitted to having a pint of beer at the 98 Hotel at about 6:30 p.m.; he then purchased and smoked four twenty dollar pieces of crack cocaine; he returned to the 98 Hotel where he had a beer; he then made a tour of various bars in Whitehorse, having a beer in one or two of those locations, and at the Lizards Lounge, he acknowledged consuming about four more drinks, including one at last call. It was also clear that the victim and her friend, F.L., and the group they were with, including Mr. White, were all drinking and partying that night. I am therefore unable to accept the Crown’s proposition on this point.

[25] Finally, the Crown tried to suggest that it was aggravating that the sex in this instance was unprotected. In my view, there is inconclusive evidence on that point and I give it no weight one way or the other.

STATISTICAL INFORMATION

[26] At this sentencing hearing, Crown counsel filed some statistical information on the frequency of sexual assault in the three northern Territories and how those offences are dealt with by the courts. That information was not objected to by defence counsel. According to these statistics, in 2006, the rate of sexual assault under s. 271 of the *Criminal Code* in the Yukon was 2.5 times higher than the national rate across Canada. In the Northwest Territories, for the same year, the rate was 5.5 times higher than the national average.

[27] As well, for 2005 and 2006, the average custodial sentence length for indictable sexual assaults in Canada was 14 months, which was an increase from the average sentence length of 12.3 months in 1995 and 1996.

[28] In comparing British Columbia with the three northern Territories, for the year 2005/2006, it is interesting to note that the Yukon had the highest average period of incarceration of 20.6 months, or about 1.7 years. For the same period, the shortest average length of incarceration was reported by the Northwest Territories at 13.86 months.

POSITIONS OF COUNSEL

[29] The Crown seeks a jail term of three to four years for Mr. White, in addition to the usual orders for DNA samples, a ten year firearms prohibition, and a 20 year order respecting the sex offender registry. Crown counsel also submitted that this was a timely opportunity for this Court to reconsider and restate the principles of sentencing on serious sexual assault cases, and he emphasized the need for clarification on the sentencing guidelines for “passed out” or unconscious victims who have been subjected

to non-consensual sexual intercourse. Crown counsel says that he is not seeking to change the law, but rather to clarify it and to obtain further guidance on the appropriate range of sentence, keeping in mind the statistical evidence and the frequency of sexual assault in the North generally, and in the Yukon in particular.

[30] Defence counsel responds that there is no lack of clarity in the law regarding sentencing for sexual assaults in the Yukon. He reminds me that the case law is replete with comments on the need for individualization in the sentencing process and that it would be a step backward to move away from the idea of flexibility on sentencing. He further says that the circumstances of this case should not demand a penitentiary sentence. He suggests a range of twelve months up to two years less a day for the sexual assault, perhaps 30 days for the breach of undertaking, and a conditional sentence for both.

YUKON AUTHORITIES

[31] Any examination of the range of sentence in the Yukon Territory for indictable sexual assault should probably begin with the decision in *R.* v. G.*C.S.*, [1998] Y.J. No. 77. In that case, the Yukon Court of Appeal heard from an appellant who had been sentenced by a Yukon Territorial Court judge to a term of imprisonment of two years less a day, plus two years probation and a s. 100 firearms prohibition of ten years.

[32] G.C.S. had pled guilty to one count of sexual assault. He was about 18 years of age at the time of the offence. He encountered the 16-year-old victim in a bedroom in her grandmother's home, where she normally resided. The victim had been drinking alcohol to excess and was either passed out, or in a very deep sleep. The appellant

lowered his trousers and was in the act of forcing sexual intercourse upon her while she was unconscious and unaware of what was happening. The victim's uncle entered the bedroom and interrupted what was taking place.

[33] The offender had been drinking heavily and was on probation at the time of the offence. He had a criminal record, both as a juvenile and as an adult, and it included a conviction for common assault. He was described as having been raised in a dysfunctional family and being placed in foster homes on various occasions during his early life. He ceased going to school in Grade 8 and had no substantial work history. He had an alcohol abuse problem. He expressed some remorse for his sexual assault and had spent about 4½ months in pre-sentence custody.

[34] The Court of Appeal considered a total of eight sentencing authorities, filed by counsel, in which it said the circumstances were "reasonably similar" to the circumstances of the sexual assault by G.C.S. All those authorities were decisions of either the Yukon Territorial Court, the Yukon Supreme Court, or the Yukon Court of Appeal. Counsel for the appellant asserted that, based on the authorities, the range in the Yukon Territory for this type of sexual assault was between 12 months and two years less a day, plus a period of probation. That submission was not controverted by counsel for the Crown. At para. 10, Hinds J.A. referred to this as "the accepted range of sentence". Taking into consideration that the offender had spent 4½ months in custody, Hinds J.A. concluded, at para. 11, that the sentence of two years less a day imposed by the Territorial Court Judge was a "substantial and marked departure from sentences customarily imposed in the Yukon Territory for similar offences of sexual assault committed by similar offenders". In the result, the Yukon Court of Appeal concluded

that a fit sentence would have been 16 months imprisonment, plus two years probation, and a ten year s. 100 firearms prohibition. I pause here to note that if the offender had notionally been given credit of two for one for his pre-sentence custody, which was commonly the case at the time of that decision, then the effective jail sentence imposed in that case would have been approximately 25 months, or just over two years.

[35] One of the cases considered by the Yukon Court of Appeal in *G.C.S.* was *R.* v. *Close*, [1992] Y.J. No. 61 (S.C.). In that case, the 23 year old offender and his friends were partying in a hotel room and had consumed large quantities of alcohol. The victim and her boyfriend had sexual intercourse while alone in the hotel room and fell asleep on their bed. The victim later woke up to find the offender on top of her, having sexual intercourse. The offender was a 23 year old aboriginal person, single, with no dependents, and a Grade 9 education. He lived a predominantly traditional lifestyle, with hunting and fishing as his major source of food. His employment tended to be seasonal. He was noted to have a developing alcohol problem. He also had a criminal record. He had been in pre-sentence custody for seven months. He pled guilty to the offence and was given credit for sparing the victim from the trauma of testifying. The Yukon Court of Appeal said that the sentence of 15 months imposed by the deputy judge of the Yukon Supreme Court was “a fitting one within the range of sentences for offences of this nature”.

[36] Once again, if the offender in *Close* had notionally received the then usual two for one credit for his pre-sentence custody, then his effective jail sentence would have been approximately 29 months, or 2.4 years.

[37] One case not considered by the Yukon Court of Appeal in *G.C.S.* was *R.* v. *Smarch*, [1991] Y.J. No. 168 (S.C.). Smarch was sentenced by Borins J., an Alberta based deputy judge of the Yukon Supreme Court, for sexual assault after being found guilty by a jury. The facts were that the victim was asleep in her tent near the shore of Teslin Lake and was woken at about three o'clock in the morning by the offender, who had placed a pillow over her face and was engaged in having sexual intercourse with her. The victim struggled and the intercourse lasted for about five minutes, after which the offender left the tent for a brief period of time. He then returned and placed his hand over the victim's mouth and told her not to tell anybody what had happened.

[38] The offender was 34 years of age and had a Grade 12 education. He had been employed continuously as a carpenter on a seasonal basis and was politically active with his First Nation. He had been in a common law relationship for about 5½ years and had a six year old son. He had a conviction for assaultive behaviour about a year prior to the offence. He was described as having led a rather "exemplary life" prior to this offence and was of previous good character.

[39] In imposing a jail term of three years, Borins J. made the following comments:

> "An offence of this nature, sexual assault consisting of sexual intercourse, is one of the most serious kinds of sexual assault. One can conceive of nothing more extreme and invasive of the privacy of a woman than to have a man force himself upon her and have sexual intercourse with her without her consent.
>
> …
>
> The Court must consider whether an exemplary sentence is required to make it very clear to members of the community that society will not tolerate conduct of this nature. This principle has been expressed in another way. It is said that with respect to offences of this nature, which are offences of significant gravity, the

> Court must act in such a way as to reflect the abhorrence and disgust of society in respect to conduct of this nature."

[40] Borins J. then went on to state that it has been the practice of the Yukon Supreme Court to apply the principles contained in the decision of the Alberta Court of Appeal in *R.* v. *Sandercock* (1985), 40 Alta. L.R. (2d) 265, and opined that, accordingly, the appropriate range of sentence for the case was 2½ to four years incarceration.

[41] I will speak more about *Sandercock* below, but I think it is interesting to note that *Smarch* was not among the sentencing authorities considered by the Yukon Court of Appeal in *G.C.S.* Given that in *G.C.S.* the accepted range of sentence was found to be 12 to 24 months, and not 2½ to four years, it would seem to call into question whether the Yukon Supreme Court was in fact routinely applying *Sandercock* as Borins J. suggested. Indeed, I have been unable to locate another case in this Court which expressly followed *Sandercock*.

[42] In terms of how *G.C.S.* has been applied in subsequent sentencings, in *R.* v. *Desjarlais*, 2004 YKSC 13, I sentenced an offender who pled guilty to a charge of sexual assault in Pelly Crossing. As the offender had consented to being committed to stand trial at his preliminary inquiry, the victim had never been required to give evidence. The offender was 49 years of age. The victim was 26 and the daughter of the offender's common law partner at the time. The offender and the victim had been drinking together in their home during the day. At one point, the offender took the victim into a bedroom, threw her on the bed, choked her, and periodically used his other hand to cover her mouth. He managed to pull the victim's pants down to her ankles and then tried to get himself erect, but without success. The victim continued to fight and was

uncertain whether penetration occurred. At that point, the victim's aunt entered the home and saw the offender on top of the victim, with his pants pulled down.

[43] The offender had what I described as a horrific criminal record, including convictions for sexual assault and sexual assault with a weapon. On the other hand, I noted that things seemed to be going well for the offender in the community until the day of the offence. On that day, he had been informed that his father had died and he dealt with his grief by becoming intoxicated. He had been in pre-sentence custody for about five months.

[44] At para. 20, I, like the Yukon Court of Appeal in *G.C.S.,* observed that the case law which had been filed by the Crown generally ranged from one to two years, for cases of sexual assault without overt violence, usually involving unconscious victims and offenders with relatively minor records. However, I also noted that the range moved upwards to more serious penalties of five to six years and even seven years, in cases where offenders had proceeded to trial and had not received the mitigation of a guilty plea, where they had significant criminal records and where there were other aggravating circumstances.

[45] Counsel in *Desjarlais* made a joint submission for a jail term of 30 months, which I accepted. However, if the offender had notionally been given two for one credit for his five months in pre-sentence custody, that would have resulted in an effective sentence of approximately 40 months, or 3 1/3 years. Even if his pre-sentence custody were credited at a lesser rate of 1.5 to 1, the effective jail sentence would have been 37.5 months, or just over three years.

[46] In *R.* v. *Boya*, 2006 YKCA 15, the offender was found guilty of two counts of sexual assault following a trial. The offences occurred at the home of the offender's sister, where a number of other people were also staying, including the two victims. During the night, the offender, who was extremely intoxicated, sexually assaulted his 14 year old niece, who was also extremely intoxicated, by climbing on the couch where she was sleeping and pulling her pants down. At that time, he was interrupted by his sister's partner. However, later that same evening, the offender sexually assaulted the second victim, who awoke to find him on her bed, fondling her breasts. The offender had a "very extensive criminal record, including 12 prior assault convictions". He was on probation when the offences were committed. He was a chronic alcoholic. He was sentenced at trial to 21 months in jail on each count of sexual assault, to be served concurrently, less eight months credit for his time spent in pre-sentence custody. He was also placed on two years probation. At para. 14, the Yukon Court of Appeal acknowledged the case of *R.* v. *G.C.S.,* as part of the submissions of the offender's counsel, but without any additional comment on the range of sexual assaults in the Yukon. The sentence appeal was dismissed.

[47] *R.* v. *Johnny*, [1989] Y.J. No. 58 (S.C.), was another decision of this Court which was not considered by the Yukon Court of Appeal in *G.C.S.* There, Maddison J. convicted the offender of sexual assault following a trial by judge alone. (Unfortunately, the report of that case filed by the Crown only includes the reasons for the guilty verdict. However, the headnote also includes a synopsis of the reasons for sentence.) The victim in that case had been drinking at several different taverns over the course of the evening and went to a truck to sleep it off. She was woken by the offender, who had

climbed into her truck and told her to take her pants off and cover her face. The victim complied, fearing injury by the offender. The offender then had sexual intercourse with the victim. The offender had instructed a friend to keep an eye out for the victim's former boyfriend, while he was committing the sexual assault. The offender was 32 years old and had a criminal record of 40 prior convictions, including one for rape. Maddison J. imposed a sentence of 4½ years imprisonment, plus a five year firearms prohibition order.

[48] Defence counsel referred to *R.* v. *Silverfox*, Supreme Court No. 9000744, June 4, 1999. In that case, the offender had been convicted following a trial by judge alone. He was at a drinking party in a small Yukon community, where several people, including the victim, had passed out. He had sexual intercourse with the victim while she was sleeping or passed out. The victim and offender were distantly related and had known each other all their lives. The victim had been significantly and negatively impacted by the offence. The offender was 48 years of age and of aboriginal background. He had a happy childhood and a Grade 10 education. By the age of 20, he was completely deaf. He had a serious alcohol problem, but was interested in undergoing treatment. Since the offence, he had moved to Whitehorse and was living in housing supplied by Social Services. He had been working sporadically at the "Challenge" programme and arrangements were being made for him to attend alcohol and drug treatment. It appears that he had an unrelated and dated criminal record. It is noteworthy that the sentencing judge found that he was not a danger to the public. The Court imposed a conditional sentence of twelve months.

[49] Defence counsel also cited *R.* v. *D.K.J.*, 1999 YTSC 18. In that case, the offender was found guilty of sexual assault following a trial, but apparently admitted his guilt shortly before sentencing. The age of the offender was not specified, but the victim was 13 years old. The offender fondled her breasts, performed cunnilingus, and engaged in two acts of sexual intercourse. The offender had a criminal record, including a previous conviction for robbery. It was aggravating that the offender was in a position of trust, but mitigating that the offender had recently admitted his guilt and accepted responsibility for the offence. He had a serious drug dependency. Deputy Judge Vickers imposed a conditional sentence of two years less a day.

[50] In his submissions, defence counsel also referred to *R.* v. *Mease,* [1999] Y.J. No. 80, *R.* v. *Reszitnyk*, 1999 BCCA 384, and *R.* v. *White*, 2000 BCCA 516, however in my view all of these cases can be distinguished on their facts from the one at bar. *Mease* was a case involving oral sexual acts which occurred about 30 years prior, and the offender had no criminal record; *Reszitnyk* was an offender with a minor record who had been obeying his conditional sentence order, had abstained from alcohol and drugs, and had found gainful employment; and *White* involved “unique circumstances” relating to the offender’s rehabilitation.

[51] In addition to the cases already mentioned, I have reviewed the following cases from the Yukon Territorial Court, most of which involve an offender having non-consensual intercourse with a sleeping or unconscious victim:

R. v. *C.D.B.,* [1997] Y.J. No. 152 (T.C.)
R. v. *Carruthers*, [1999] Y.J. No. 91 (T.C.)
R. v. *Smith,* 2003 YKTC 70
R. v. *F.M*., 2000 YKTC 61
R. v. *Netro*, 2003 YKTC 80

R. v. *Snowshoe*, 2001 YKTC 41
R. v. *Stewart*, 2003 YKTC 48
R. v. *James*, 2001 YKTC 29
R. v. *Johns*, [1998] Y.J. No. 81 (T.C.)
R. v. *Tom*, [1991] Y.J. No. 156 (T.C.)
R. v. *Smarch*, [1997] Y.J. No. 91 (T.C.)
R. v. *J.W.S*., 2005 YKTC 8
R. v. *G.S.S*., 2004 YKTC 5
R. v. *F.R.L*., [1999] Y.J. No. 94 (T.C.)

[52] In six of those cases, jail terms of 12 months plus probation were imposed. In two cases, there were 14 month jail terms plus probation. Another two cases involved 16 month jail terms plus probation. Three involved jail terms of two years less a day, one was a two year penitentiary sentence, and one was a 30 month jail sentence.

AUTHORITIES FROM THE NORTHWEST TERRITORIES

[53] Crown counsel pointed to a few sentencing decisions from the Northwest Territories as being potentially instructive in determining the appropriate range for this type of sexual assault in the Yukon. That prompted me to have a closer look at a number of other sentencing cases from the Supreme Court of the Northwest Territories to get a better sense of the range for serious sexual assaults in our neighbouring jurisdiction to the east.

[54] One particular case referred to by the Crown was *R.* v. *Kendi*, [1990] N.W.T.J. No. 9 (S.C.). There, the 52 year old offender pled guilty to a sexual assault on a 24 year old victim. Both of them were drinking throughout the day at residences in Aklavik and became intoxicated. The victim passed out at the last residence which she visited. The offender removed her pants and underwear while she was passed out and had sexual intercourse with her.

[55] In sentencing *Kendi*, Richard J. referred to *Sandercock*, cited above, and discussed its establishment of a sentencing policy for the Alberta courts known as the "starting point approach". This approach consists of categorizing crimes in difficult cases, setting a starting sentencing for each difficult case, and then refining that sentence to the specific circumstances of the actual case.

[56] In particular, *Sandercock* established a 'category' of sexual assault which it labelled as "major sexual assault". This was described as a sexual assault where a person "by violence or threat of violence forces an adult victim to submit to sexual activity of a sort or intensity that a reasonable person would know beforehand that the victim would likely suffer lasting emotional or psychological injury whether or not critical injury occurs". The court clarified that "[t]he injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two". The Court went on to establish three years as the starting sentence for a major sexual assault, assuming a mature accused of previous good character with no criminal record and where the attack was not planned and premeditated. Under this sentencing approach, courts are then to refine the three year starting sentence up or down based on the presence or absence of aggravating or mitigating circumstances.

[57] In applying *Sandercock* to the case before him, Richard J. stated that the facts in *Kendi* were typical of many cases coming before the courts in the Territory in recent years, involving a non-consensual act of sexual intercourse with an intoxicated, unconscious woman. While he said that it was difficult to characterize such crimes as being within the category of "major sexual assault", as defined in *Sandercock*, because of the absence of violence or threats of violence, other than the inherent violence in a

non-consensual act of sexual intercourse, he suggested that the *Kendi*-type fact scenario was perhaps a related or sub-category to the one of major sexual assault, if not sufficiently prevalent to justify being labelled as a category of its own. In the end, he opined that the starting point for offences such as the one before him should be at least two, if not three, years.

[58] On the facts before him, Richard J. noted that the offender had led a virtually crime free life, had been gainfully employed on a regular basis, pled guilty to the offence, and was genuinely remorseful. In the circumstances, he imposed a jail sentence of 20 months.

[59] Following *Kendi*, other judges in the Supreme Court of the Northwest Territories have made use of a *Sandercock* or starting point approach for sentencing for sexual offences. One notable case is *R.* v. *Soldat*, [1996] N.W.T.J. No. 122. Here, Schuler J. was dealing with an offender who had pled guilty to a sexual assault on a victim sleeping at his house. The victim and the offender were acquaintances and the offender was heavily intoxicated at the time.

[60] Defence counsel in that case had made a submission, based upon the comments of Richard J. in *Kendi*, that where the victim is asleep, passed out, or unconscious, the offender need use no force apart from that required for the act of intercourse itself, and therefore the offence could not be categorized as a major sexual assault, according to *Sandercock*.

[61] Schuler J. disagreed with that submission insofar as it suggested that *Kendi* somehow created a “less serious sub-category of sexual assault”. In her view, at para.

13, *Kendi* simply created “a different category or sub-category”. She then quoted from the Supreme Court of Canada decision in *R.* v. *McCraw,* [1991] 3 S.C.R. 72, which recognized that rape “under any circumstance” must constitute a profound interference with a woman’s physical integrity and denies a woman the right to exercise freedom of choice as to her partner for sexual relations. Analyzed from that point of view, at para. 16, Schuler J. held that there was “no distinction between a case involving a sleeping or unconscious victim than a case involving a conscious victim”. It is the “contemptuous disregard for the feelings and personal integrity of a victim which was said in *Sandercock* to be the key to a major sexual assault. That disregard is a feature of sexual assault, whether the victim knows what is happening to her at the time it is happening or does not find out until later”. Nor, in Schuler J.’s view, was there any logical basis upon which to assert that the level of assumed psychological harm was any less when the victim was asleep or unconscious.

[62] At para. 19, after acknowledging the two to three year range for the starting point in *Kendi*, Schuler J. said “Clearly, the sentencing practice of this Court at this time, some six years later, is to use a three year starting point”, which is then adjusted for aggravating and mitigating circumstances. She imposed a jail sentence of 2½ years.

[63] The mitigating circumstances implicitly and explicitly recognized by Schuler J. in *Soldat* included the fact that the offender and his common law wife had nine children living at home; that he had certification as a journeyman boiler mechanic; that he had steady employment, subject to a suspension for alcoholism; that he was not normally a violent man when sober; that he had the support of his wife and children; that he

surrendered himself into custody after the offence and later entered a guilty plea; and that he had spent 3½ months in pre-sentence custody.

[64] A two to three-year starting point has subsequently been used in several cases in the Northwest Territories: *R.* v. *Lafferty*, [1993] N.W.T.J. No. 51 (S.C.); *R.* v. *Kimiksana*, [1998] N.W.T.J. No. 133 (S.C.); *R.* v. *N.D.*, 2001 NWTSC 86; *R.* v. *B.A.M.*, 2004 NWTSC 74; and *R.* v. *Bird*, 2005 NWTSC 67.

OTHER APPELLATE AUTHORITIES

[65] Despite the observation that this particular 'type' of sex assault is particularly prevalent in the North (see, for example, *Bird* and *Kendi*), there are appellate authorities from other jurisdictions that consider appropriate sentences in roughly analogous situations. I will briefly examine some potentially instructive authorities from western Canada.

[66] In *R.* v. *Shalley*, 2005 MBCA 150, the Manitoba Court of Appeal reviewed a case involving an offender and a victim who had both been drinking at a house party. When the victim passed out, Shalley had sexual intercourse with her. He was a first offender, who had pled guilty after a preliminary inquiry. At para. 15, the Court relied on N.W.T. precedent to note that the appropriate range of sentence for sexual assault "involving non-consensual intercourse with a woman asleep or unconscious, assuming an offender of previous good character who pleads guilty and expresses remorse, is two to three years imprisonment". The Court of Appeal held that an appropriate sentence in that case was two years less a day.

[67] A similar approach can be seen in *R.* v. *J.S.S.*, 2001 MBCA 144 and *R.* v. *S.S.L.*, [1996] M.J. No. 298 (C.A.). It is interesting to note, however, that in *S.S.L.,* despite the fact that the Manitoba Court of Appeal followed the starting point approach to sentencing, it commented that the difficulty with that approach in cases of sexual assault is that the offence covers such a wide range of misconduct and that the use of the same starting point for all cases does not always reflect the true gravity of the offence. Further, the Court held, at para. 5:

> "The three-year starting point for major sexual assaults does not mean that a three-year sentence should be the norm. The sentencing judge must still consider the circumstances of the offence and the offender. Mitigating circumstances merit a downward adjustment while aggravating circumstances merit the reverse. Rightly or wrongly, the task of adjusting the three-year starting point to fit the circumstances of a case has proved troublesome for judges – including panels of this Court – and resulted in what some might see as divergent sentences for similar conduct." (my emphasis)

[68] Alberta and Saskatchewan courts, like Manitoba, have generally looked to the *Sandercock* two- to three- year starting point approach when considering a sentence for sexual assault in the circumstances being discussed (see, for example *R. v. Law,* 2007 ABCA 203, *R. v. Banda* 2000 SKCA 92, *R. v. Brittain* 2001 SKCA 125, *R.* v. *M.J.H.*, 2004 SKCA 171).

[69] In comparison, British Columbia and Ontario courts have been less willing to embrace a starting point approach, although they generally recognize that, often lengthy, jail time is the appropriate disposition in such cases (see *R. v. Gauthier,* [1996] B.C.J. No. 1469 (C.A.), *R.* v. *Goodliffe*, 2005 BCCA 426, and *R.* v. *H.H.*, [2002] O.J. No. 1509 (C.A.), *R.* v. *J.R.*, 2008 ONCA 200).

[70] The Supreme Court of Canada has also given some, albeit limited, consideration to an appropriate sentence in circumstances where an unconscious victim is sexually assaulted by a drunken offender. In *R.* v. *Wells*, 2000 SCC 10, on appeal from Alberta, the offender had been found guilty of sexual assault by a jury. He had attended a house party at the home of the 18 year old aboriginal victim, who was either asleep or unconscious from the effects of alcohol in her own bedroom when she was sexually assaulted by the offender. There was medical evidence of vaginal abrasions, but no evidence of penetration. While the victim had no memory of the assault, she suffered hurt and humiliation when she learned of the event the next morning.

[71] The sentencing judge had characterized the offender's actions as a "major" or "near major sexual assault", as per *Sandercock*. He took into account that there was no evidence of planning or deliberation, and no gratuitous violence. The offender had two prior convictions for assault and there was no evidence of remorse. However, the pre-sentence report was generally favourable and recommended a conditional sentence. The offender had completed the 28 day alcohol treatment programme and was assessed as posing no threat to the community, as long as he abstained from alcohol use. He was of an aboriginal background.

[72] Taking all those factors into account, the trial judge held that "the necessary elements of deterrence and denunciation would be lacking" if the offender were granted a conditional sentence. Rather, he sentenced the offender to 20 months in jail.

[73] In reviewing this disposition, the Supreme Court of Canada considered the conditional sentencing provisions of the *Criminal Code* in the context of aboriginal

offenders, noting its previous decisions in *R.* v. *Gladue,* [1999] 1 S.C.R. 688, and *R*. v. *Proulx* 2000 SCC 5, amongst others.

[74] At para. 44, Iacobucci J., speaking for the Court, said that s. 718.2(e) of the *Criminal Code* does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. Further, that it would generally be the case, as a practical matter, that particularly violent and serious offences would result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders. Accordingly, it was open to the trial judge to give primacy to the principles of denunciation and deterrence, on the basis that the offence was a serious one. The sentence appeal was dismissed.

STARTING POINT VS. RANGE?

[75] Given the reliance of Crown counsel on N.W.T. and Alberta cases that use *Sandercock* and/or *Kendi* to support a two or three-year 'starting point', I would like to turn to the question of whether this Court should adopt such a starting point approach for sentencing of "major sexual assaults". Indeed, such an approach was initially urged on the Court by Crown counsel.

[76] First, although still recognized as good law, *Sandercock* has not gone unchallenged. In R. v. *McDonnell*, [1997] 1 S.C.R. 948, Sopinka J., speaking for the majority of the Supreme Court of Canada, criticized the creation of the category of "major sexual assault", stating at para. 33 that:

> "…there is no legal basis for the judicial creation of a category of offence within a statutory offence for the purposes of sentencing. As has been true since *Frey v. Fedoruk,* 1950 CanLII 1 (S.C.C.), [1950] S.C.R. 517, it is not for judges to create criminal offences,

> but rather for the legislature to enact such offences. By creating a species of sexual assault known as a "major sexual assault", and by basing sentencing decisions on such a categorization, the Alberta Court of Appeal has effectively created an offence, at least for the purposes of sentencing, contrary to the spirit if not the letter of *Frey."*

On the other hand, Sopinka J. did not disagree with McLachlin J., as she then was in dissent, that appellate courts may set starting-point sentences as "guides" to lower courts (para. 43).

[77] Quite recently, in *R.* v. *Law*, *supra,* the Alberta Court of Appeal itself contextually re-assessed its earlier decision in *Sandercock*. It recognized, at para. 23, that although *McDonnell* questioned the practice of 'categorizing offences', it did expressly allow that starting points may serve as guides to the lower courts. Insofar as the guidance offered by *Sandercock* "constitutes an "approach" and not a "minimum"", it is still a valuable sentencing precedent. At para. 56, the Court stated:

> "All trial judges have to start their sentencing reasoning somewhere. If there were no notional tariffs, ranges, or starting points, in other words, if there were no rationally designed judicial approaches to reflect common perspectives on values and to serve recognized penalogical purposes – then there would be no rational manner for the Courts to effectuate the will of Parliament."

[78] The British Columbia Court of Appeal seems to take a somewhat different approach than Alberta. In *R.* v. *Bernier*, 2003 BCCA 134. Prowse J.A. (concurring in the result) paid particular attention to the Supreme Court of Canada decision in *R.* v. *M.(C.A.)*, [1996] 1 S.C.R. 500, and rejected the idea of an overly rigid approach to sentencing. At para. 67 of her decision, she quotes Chief Justice Lamer as follows:

> "… It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. … Sentencing is an inherently individualized process, and the search for a single

> appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred …".

[79] However, this is not to say that the Court should not provide guidance, and to this end Prowse J.A. also quotes *R.* v. *Stone*, [1999] 2 S.C.R. 290, where the Supreme Court held that it is a function of appellate courts to minimize disparity of sentences in cases involving similar offences and similar offenders. In assessing the appropriate middle ground that lies between these two objectives, at para. 74, Prowse J.A. stated that ranges are, although useful, "imperfect" for a number of reasons:

> "…Counsel may not provide the Court with all relevant authorities; some of the authorities provided may reflect offences or offenders that are not truly similar; the authorities may be dated, or from jurisdictions where the particular crime is a greater or lesser problem; the authorities may define the relevant crime too broadly, or too narrowly; and the authority may simply be anomalous. Because of these imperfections, and more importantly, <u>because sentencing is an inherently subjective and individual process, ranges suggested by this Court are simply that — suggestions. They are not guidelines, not rules. They are not, nor could they be, mandatory minimum and maximum sentences which demand compliance by trial judges</u>." (my emphasis)

[80] Newbury J.A., in that same case (also concurring in the result), at para. 96, agreed that discussions about range are often inexact or confusing and that it would be more useful to focus on the application of the now-codified principles of sentencing [ss. 718 to 718.2 of the *Criminal* Code] to each case. In particular, she suggested, at para. 105:

> "With respect to the matter of ranges, they are general guidelines, not hard and fast categories. They do not preclude lesser or

> greater sentences, if the circumstances or applicable principles in the particular case warrant. The Supreme Court of Canada has in effect said this on many occasions … I find it useful to regard a range simply as a continuum within which cases may be placed, depending on their facts and their relationship to the principles of sentencing. …" (my emphasis)

[81] It is interesting to note that in *R.* v. *Proulx, supra*, at paras. 87 and 88, Lamer C.J.C. commented about the use of starting points, albeit in the context of determining the proper use of conditional sentences:

> "… In my view, the risks posed by starting points, in the form of offence-specific presumptions in favour of incarceration, outweigh their benefits. Starting points are most useful in circumstances where there is the potential for a large disparity between sentences imposed for a particular crime because the range of sentence set out in the Code is particularly broad …
>
> …
>
> By creating offence-specific starting points, there is a risk that these starting points will evolve into de facto minimum sentences of imprisonment. …" (my emphasis)

[82] Pursuant to s. 718.2(b) of the *Criminal Code*, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. In other words, it is desirable to minimize the disparity of sentences in cases which are similar in fact. The cases which I have looked at from the Northwest Territories and from appellate courts across the country involve factual similarities. I understand this uniformity principle to be the one driving the Crown to invite me to clarify the law in the Yukon on the range of sentencing for non-consensual sexual intercourse involving sleeping or unconscious victims. However, I am also mindful of the Supreme Court of Canada's comments in *R.* v. *M. (C.A.),* that sentencing is an inherently individualized process and that the sentences for a particular offence can be

expected to vary to some degree across various communities and regions in this country.

[83] I also respectfully agree with Lamer C.J.C. in *Proulx* that the risk of using a starting point approach outweighs the benefit. First of all, there is the danger referred to in *McDonnell* that a court will create a category of sexual assault, "major" or otherwise, which has not been legislated by Parliament. Secondly, if a sentencing court finds that a particular set of circumstances falls within a particular pre-determined category, then there may be a tendency to look to the starting point as the "*de facto* minimum" sentence of imprisonment for that offence. By way of elaboration, *Sandercock* concluded that the starting point for a major sexual assault should be three years, assuming a mature accused with previous good character and no criminal record. While the theory of that approach is that the sentence may be increased or decreased depending on the presence of aggravating or mitigating circumstances, it is often difficult to imagine or find additional mitigating circumstances beyond those assumed in *Sandercock*. Mitigation might be found in situations where there was a relatively young offender, where there was a prompt acceptance of responsibility, an apology, and the like. However, based on my review of the authorities, the presence of aggravating circumstances, such as a criminal record, are frequently more common than countervailing mitigating circumstances and, according to the *Sandercock* approach, that could lead to a sentence above the starting point.

[84] I prefer the approach of Newbury J.A. in *Bernier* - to view the range as a "continuum" within which cases may be placed, depending on their facts and their relationship to the principles of sentencing. At one end of the continuum would be the

truly serious offences with particularly egregious circumstances. The other extreme would be those offences where there are significant mitigating circumstances and in the middle would be the more typical cases where there are a mixture of aggravating and mitigating circumstances. Even so, I also agree with the comments of Southin J.A. in *Bernier,* at para. 42:

> "A "range" does not preclude on grounds of deterrence or denunciation or the gravity of the particular offence a sentence different from that "range". Nor does a "range" preclude a lesser sentence if some special circumstances warrant such a course … The "range" is not conclusive."

[85] Having said that, and based upon a relatively thorough review of the authorities, I would suggest, with great respect, that the time has come to assess whether the range of sentences for non-consensual sexual intercourse in the Yukon continues to be that set out in *R.* v. *G.C.S*. First of all, that case is now ten years old. Second, the case was limited to an examination of only eight sentencing authorities. A significant number of cases since *G.C.S.* have exceeded the upper end of that range of two years less a day. In reassessing this range, I wish to emphasize that I have only had regard to the jurisprudence in the Yukon, albeit with some insight provided from the N.W.T. and southern appellate courts. Further, I see my role here as involving a review and observation of what I understand the range to be – not to "set" a new range of sentence. With those caveats, it is my view that the current range in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, which is admittedly a very broad description of a type of sexual assault, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months, at the higher end.

[86] I note that the upper end of this range is slightly lower than the upper end of the range for similar circumstances in sentences imposed in the Northwest Territories and elsewhere in western Canada. However, that is a matter for consideration by our Court of Appeal and not one for this Court to pass judgment on.

[87] Further, as noted in *Bernier*, I am not suggesting this range is conclusive. Greater or lesser sentences will be justified where circumstances warrant. This range is only suggested as a shorthand way of describing what the courts in Yukon have done in previous cases where the offence and the offender were similar to those in the case at bar.

APPLICATION OF THE RANGE TO THIS CASE

[88] Where then to place Mr. White on the continuum? In making this determination, I have taken into account the purposes and principles of sentencing in ss. 718 to 718.2 of the *Criminal Code.* Defence counsel seeks a conditional sentence. Obviously, pursuant to s. 742.1(a) of the *Criminal Code*, that is only possible if I am initially prepared to consider a sentence of less than two years. However, I conclude that, in these circumstances, the paramount principles are denunciation and deterrence and they call out for a penitentiary term on the offence of sexual assault. Therefore, a conditional sentence is not an option. Given the several aggravating circumstances I have noted and the relatively few mitigating ones, that term will be a period of 26 months. Since the offender has been in custody on remand since April 3, 2008 to date, a period of 37 days, he will be credited at the rate of one and a half to one for a total of about 56 days, or just under two months. Therefore, I order that the remainder of the sentence to be served on the sexual assault offence will be 24 months, or two years.

For the breach of undertaking offence, he will serve a consecutive jail term of 30 days. In addition, I order the offender to provide DNA samples pursuant to s. 487.051 of the *Criminal Code*; I make the Sex Offender Registry Order for a period of 20 years, pursuant to s. 490.013; and I prohibit the offender from possessing any firearms for a period of 10 years, pursuant to s. 109(2). The victim of crime surcharge is waived.

[89] Now, counsel, have I omitted or misstated anything inadvertently?

[90] MR. MCWHINNIE: Can I just have a moment to check the s. 109 prohibition, My Lord. My recollection is that it begins immediately and expires, according to the terms of that, 10 years after release; but I want to double check that. Yes, under s. 109(2)(a) it deals with the term; it begins on the day the order is made, which is (i) of the revision and (ii) ends; not earlier then 10 years after the release from imprisonment. So it is an order that starts today and ends 10 years after his release. I think that is the requirement of the section.

[91] THE COURT: All right, are you asking anything further of me in that regard?

[92] MR. MCWHINNIE: Well, I think you said 10 years simplicter, My Lord, and that would start immediately and end 10 years from today as opposed to his period of imprisonment plus 10 years, which is what is intended by the section.

[93] THE COURT: Sorry, I am confused. What are you asking me to do, Mr. McWhinnie?

[94] MR. MCWHINNIE: Just to clarify for the record that the order that you have made expires 10 years after his release from imprisonment.

[95] THE COURT: All right, so ordered.

[96] MR. MCWHINNIE: Thank you.

[97] THE COURT: Mr. Coffin, anything?

[98] MR. COFFIN: No, My Lord. I have nothing, thank you.

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GOWER J.