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E-File No.: ECP13BARWELLK
Appeal No.: _____

IN THE PROVINCIAL COURT OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

HER MAJESTY THE QUEEN

v.

KRISTOPHER DAVID BARWELL

Accused

PROCEEDINGS

Edmonton, Alberta
October 24, 2013

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1 Proceedings taken in the Provincial Court of Alberta, Law Courts, Edmonton, Alberta

2

3 October 24, 2013 Morning session

4

5 The Honourable Provincial Court
6 Judge Bridges of Alberta

7

8 C. Lim For the Crown

9 D. Knisely For the Accused

10 J. Lavasseur Court Clerk

11 L. Marion Court Clerk

12

13

14 **Discussion**

15

16 THE COURT: Good morning.

17

18 MR. LIM: For the record, it's Christian Lim appearing for
19 the provincial Crown prosecutor's office, and of course my friend, Mr. Knisely, and I
20 appear on the matter of Barwell.

21

22 THE COURT: Right.

23

24 MR. LIM: This is for sentencing. The Crown would like
25 to confirm that this Honourable Court has received a copy of the forensic assessment?

26

27 THE COURT: That is correct.

28

29 MR. LIM: And I don't know if my friend has any
30 difficulty in having that entered as an exhibit?

31

32 MR. KNISELY: No, I do not.

33

34 THE COURT: Sure. All right. If you have a copy, Madam
35 Clerk, we will mark that one as our next exhibit, and we've got an agreed statement of
36 facts as S-1, the photos that are S-2, and the record is S-3, so this will be S-4.

37

38 **EXHIBIT S-4 - Alberta Health Services Report, Dated July 15, 2013**

39

40 **Submissions by Mr. Lim (Admissibility)**

41

1 MR. LIM:

Your Honour, before we get to sentencing, the Crown needs to inform this Honourable Court that there are, I believe, four victim impact statements filed, and it's my understanding that the individuals who wrote them include Isabelle Gibbons (phonetic). She has asked me to read that out. She is the foster, if you want to call it, of the -- now of the dog now known as Kaden, formerly known as Zeus, and the caregiver for such dog.

7
8 As well, Your Honour, there is apparently victim impact statements from Steve Scott and Yvonne Scott. These are two witnesses and neighbours to the accused in respect to the dog Kaden, formerly known as Zeus.

11
12 And finally, there is a victim impact statement which is, I guess, penned or written by Ms. Shawna Randolph on behalf of the Edmonton Humane Society, who dealt with the animal, of course, when it came in after -- in respect to the various injuries.

15
16 It's my understanding my friend is opposed to the victim impact statements being entered in. It's the Crown's position that in fact these statements are actually in compliance with the *Criminal Code*; and that, more importantly, they actually represent of course, in fact, the voice for the voiceless, in this case a voice for Kaden or Zeus, and this is analogous to any complainant or victim where the victim, for whatever reason, may not be able to speak, such as a child, or for maybe an adult who just simply do not want to communicate as to what happened here, but they actually have firsthand observations of this particular animal, in this case Kaden, and so therefore in my opinion should be allowed to give the victim impact statement -- of course pending that it follows, what they're putting into the victim impact statements follows the sentencing provision of the *Criminal Code* with respect to victim impact statements. But they certainly are parties close enough that they would be entitled to file such victim impact statements.

28
29 And the Court will note that even in respect to the witnesses or neighbours, that it is common or certain allowable under the legislation to allow witnesses who may have been affected by what they observed, to give victim impact statements, so it is my position that they are admissible.

33
34 THE COURT:

All right. There have been cases like this in the past, and so I expect that Courts have considered this question in the past and that there may be some decisions that would be helpful in this regard. Do you have a case that says that people who have observed certain things about an animal's treatment can file a victim impact statement?

39
40 MR. LIM:

I didn't realize, Your Honour, that this was going to be a problem until I found out today, and of course we just found out the victim

1 impact statements, formally which ones are being filed, so I don't have that. We can
2 certainly look at them. I do know that on other animal protection files, both the criminal
3 and under the *Animal Protection Act*, we've certainly had people read out victim impact
4 statements on behalf of the animal, including witnesses.

5
6 THE COURT: Well, your friend may have come cases --

7
8 MR. LIM: Certainly.

9
10 THE COURT: -- but before I ask you to respond, Mr. Knisely,
11 we have not dealt yet with the pre-sentence report which was dated October 21st, 2013. I
12 have received a copy of it. Is it the intention of the parties to have that marked?

13
14 MR. LIM: I --

15
16 MR. KNISELY: It would be my intention.

17
18 MR. LIM: Yes.

19
20 THE COURT: Right. That will become our next exhibit which
21 is S-5, the PSR.

22
23 **EXHIBIT S-5 - Pre-Sentence Report**

24
25 THE COURT: All right. Go back, then, to the question of
26 victim impact statements.

27
28 **Submissions by Mr. Knisely (Admissibility)**

29
30 MR. KNISELY: First of all, these statements were filed with the
31 Court or not filed with the Court --

32
33 THE COURT: No, I have not seen any --

34
35 MR. KNISELY: -- I'm not aware of -- this is --

36
37 THE COURT: -- and I follow the practice of not looking at
38 these things until the defence has had a chance to express concerns such as you are now
39 advancing.

40
41 MR. KNISELY: Right. And I was not aware of the existence of

1 these statements until this morning, so I don't have cases. I haven't researched the area.
2 I'm going on the black-and-white writing of the statute to take exception that these
3 individuals, although certainly well meaning and concerned, don't qualify under Section
4 722 of the *Criminal Code* as victims.

5
6 THE COURT: Now, I would like you to read it out slowly
7 since I do not have a copy of it in front of me.

8
9 MR. KNISELY: All right. Section 722(4), Definition of Victim
10 is the caption, and I'll quote verbatim: (as read)

11
12 Means a person who whom harm was done or who suffered
13 physical or emotional loss as a result of the commission of the
14 offence.

15
16 That's subsection (a). There is a subsection (b) referring to: (as read)

17
18 Where the person described in paragraph (a) is dead, ill, or
19 otherwise incapable of making a statement referred to in
20 subsection (1), includes the spouse or common-law partner or any
21 relative of that person, anyone who in law or, in fact, the custody
22 of that person, or is responsible for the care or support of that
23 person or any dependent of that person.

24
25 That clearly refers to a person, that entire section.

26
27 But my concerns with respect to defining any of these individuals as a victim of the
28 offence creates a category of parties that would open up to just about anyone who was
29 affected by the events that occurred and wishes to come forward and make a statement.
30 If it becomes too broad, we run the risk of creating a political circus. There's a lot of
31 media attention in these cases, and it is an ideal place for somebody to make their point
32 of view known, if that is the definition of "victim."

33
34 So I submit, without having the benefit of case law to support my proposition at this
35 point, that none of these individuals, although again well meaning and no doubt upset by
36 what happened, do not qualify as victims as statutorily defined.

37
38 THE COURT: Now, it looks to me like you have a copy of the
39 *Tremear's Criminal Code*?

40
41 MR. KNISELY: Right.

1
2 THE COURT: That is annotated with cases?

3
4 MR. KNISELY: Yes.

5
6 THE COURT: Is there anything with respect to subsection (4)
7 that there is a note indicating some authority?

8
9 MR. KNISELY: Mostly the cases -- in fact, all the cases cited
10 here -- refer to what can be in the statements rather than who can make them. I know
11 that there is case law on this issue. Mr. Justice Watson when he was on the Court of
12 Queen's Bench wrote a lengthy decision that impacted this -- I don't have the name at
13 hand, but I know it exists -- and I'm sure there may be other cases referring to the
14 application of this section, and it may be something we should have a look at.

15
16 **Submissions by Mr. Lim (Admissibility)**

17
18 MR. LIM: Your Honour, I'll reply to my friend's
19 comments. Certainly we can look at for the case law. I note I have a version, of course,
20 of the *Martin's Annotated Annual Criminal Code*. In reference to the victim impact
21 statement and what my friend is arguing with respect to 4, it says: (as read)

22
23 A victim includes both the direct recipient of the harm and the
24 victim who is directly affected in an emotional or physical way
25 including members of the direct family.

26
27 And it gives a case of *R v. Duffus*, D-U-F-F-U-S, [2000] Ontario case, further elaborated
28 in the *McDonough*, which is a 2006 case, M-C-D-O-N-O-U-G-H: (as read)

29
30 Where information is not available from the enumerate list of
31 victims, others may seek leave of the Court to file statements.
32 The statements that are almost exclusively attributed to the victim,
33 criticism of offender, comments amounting to offender bashing,
34 assertions of the facts and such,

35
36 and it goes on listing those who are not allowed to be part of the statement, victim impact
37 statement.

38
39 Your Honour, using --

40
41 THE COURT: Can I just have the name and the citation on

1 that case, please.

2

3 MR. LIM:

McDonough is M-C-D-O-N-O-U-G-H, [2006]

4 209 C.C.C. (3d) 547.

5

6 And, Your Honour, it's the Crown submission would be this is a situation where a person
7 or victim, in this case a victim, is incapacitated or not alive. We have often in a homicide
8 case where, of course, family members, friends, witnesses can give victim impact
9 statements. Clearly someone needs to be a voice for the victim or the complainant. The
10 Crown is respectfully submitting here, like in a homicide case here, it appears that the
11 caregivers, which would be the Edmonton Humane Society and Ms. Gibbons, who is now
12 the owner and of course taking care of the foster -- I should say parent -- of this dog, are
13 clearly in position.

14

15 Likewise, Your Honour, in homicide files, for example, it's not uncommon that witnesses
16 to the offence would give a victim, or could give a victim impact statement.

17

18 Now, I don't have case law on that. I've just seen that by pure, what I've seen, of
19 course, in the Court system, Q.B., Queen's Bench --

20

21 THE COURT:

No. That sounds to be consistent with the
22 definition that Mr. Knisely just read out of "person" -- or "victim," pardon me. What we
23 are really asking about right now and thinking about is what is a "person"? Just on the
24 face of it, that seems to be a human being, not a dog.

25

26 Now, there is also an *Interpretation Act*, and it probably defines what a "person" is, and I
27 suspect that means not only a human being, but also a corporation. However, it may be a
28 broader meaning than just a person or a corporation, so it looks like we need to take a
29 look at that.

30

31 I think we have got the morning to deal with this matter, and it is an important point that
32 has been raised, and I am not prepared to just make a quick decision on it because as I
33 started by mentioning, it seems to me this kind of situation has arisen in the past, and
34 surely somebody has addressed it.

35

36 **Submissions by Mr. Knisely (Admissibility)**

37

38 MR. KNISELY:

We have to be careful that, because it's a
39 delicate area in any case, that where somebody doesn't object to the statement going in
40 doesn't mean it's necessarily admissible in law. Having been in this position on other
41 cases on different occasions, you simply will consent sometimes, depending on the

1 circumstances. So I'm sure my learned friend is correct, they have been read in and have
2 been used before, but it doesn't necessarily mean that they're admissible.

3

4 I'd also ask the Court to look at subsection (2), where it says these statements would be
5 filed with the Court. Apparently, these ones are not.

6

7 MR. LIM: They are filed with the Court, actually.

8

9 MR. KNISELY: Oh, they are filed? I understood that they
10 weren't.

11

12 THE COURT: Typically they are on Madam Clerk's file, but I
13 do not take a look at them until I have heard from counsel.

14

15 MR. KNISELY: Right.

16

17 THE COURT: As to whether there is an issue. It seems to
18 me -- first, do we have the morning?

19

20 MR. KNISELY: Yes, I understand we do.

21

22 THE COURT: All right. Then I think we should adjourn for a
23 few minutes, and I will go take a look for some authority, and counsel could have a look
24 as well.

25

26 MR. KNISELY: I should indicate I do not have the afternoon. I
27 only have the morning. I have a trial matter this afternoon.

28

29 MR. LIM: Same with myself, Your Honour.

30

31 THE COURT: Right. Well, I am prepared to go into the lunch
32 hour if we have to. I want this to be thoroughly considered. I am going to adjourn for,
33 what, 20 minutes? Are you going to be using the facilities within the building?

34

35 MR. KNISELY: I will be using my electronic connections.

36

37 THE COURT: Okay. Is 20 minutes enough?

38

39 MR. KNISELY: Should be.

40

41 THE COURT: All right. What I will do is I will have Madam

1 Clerk give me a call when you are ready.

2

3 MR. LIM: Thank you, Your Honour.

4

5 THE COURT: It may a little longer than 20 minutes, but --
6 sure. Okay.

7

8 (ADJOURNMENT)

9

10 MR. LIM: My friend just stepped outside, if I may step
11 out and bring him back in?

12

13 THE COURT: Yes, please.

14

15 MR. LIM: Thank you.

16

17 THE COURT: All right. Have counsel found anything that is
18 helpful in --

19

20 MR. KNISELY: Your Honour --

21

22 THE COURT: -- respect of the issue we have got here?

23

24 **Submissions by Mr. Knisely (Admissibility)**

25

26 MR. KNISELY: My staff was able to locate two cases. One is a
27 Nova Scotia Provincial Court decision called *R v. Perot* (phonetic), and another decision,
28 *R v. Wicker*, a decision of the Court of Queen's Bench of Alberta. Neither of one of them
29 are particularly appropriate to the case here in facts. And certainly the *Wicker* case
30 there's not a lot of the discussion about the legal implication of this section anyway. On
31 Westlaw, I was able to locate 76 Alberta decisions that relate to this section. There just
32 isn't enough time to go through those to find out what principles are at play, whether
33 that's a complete survey.

34

35 So I'm in a position where I think this matter should be adjourned to do the proper
36 research so that I can present with confidence my position.

37

38 THE COURT: I have -- with the help of our trusty librarians --
39 found a Nova Scotia case *R v. Bailey*, and it's not very authoritative. It was one dealing
40 with a provincial statute in Nova Scotia, the *Animal Cruelty Prevention Act*, and the
41 arguments were made very similar to Crown and defence arguments here with respect to

1 whether victim impact statements could be made or received in evidence. The Court
2 concluded at paragraph 63 that since the provincial *Animal Cruelty Prevention Act* had its
3 own regime of sentencing, this, in the view of the Court, excluded the provisions of the
4 *Criminal Code* dealing with the issue of punishment on offences on summary conviction.

5
6 In other words, just as here in Alberta, where provincial statutes borrow the provisions of
7 the *Criminal Code* for procedure and for sentencing, if they have their own regime, then
8 you look to the provincial statute rather than incorporating the *Criminal Code*.

9
10 The Court concluded that in my view, it would be permissible to file such a statement,
11 being a victim impact statement. It would not be permissible to file such a statement for
12 the Court's consideration.

13
14 Additionally, it would seem to me even if it did apply that the definition of "victim"
15 contained in Section 722 of the *Criminal Code* could not, in this circumstance, be
16 extended to the degree requested by the Crown attorney. The Court in that case was not
17 prepared to see the victim impact statements admitted.

18
19 Now, I am just going to make available what is available to me right now, and then we
20 will consider whether we should be adjourning this, because I am basically not in favour
21 of putting matters over, but I am going to hear further from counsel. Our clerks obtained
22 a copy of the *Interpretation Act* -- which is the federal one, because we are dealing with a
23 *Criminal Code* offence, which is a federal act -- and the *Interpretation Act* defined
24 "person" to be: (as read)

25
26 A person or any word or expression descriptive of a person
27 includes the corporation.

28
29 So it could be a little clearer as to exactly what " person" means there.

30
31 Under Words and Phrases Judicially Considered, the synopsis which arises from Section
32 24 of the *BNA Act* back in 1867, plus the *Edwards* case against the Attorney General
33 Canada from 1928 said, and I quote: (as read)

34
35 The word "persons" connotes human beings, the criminal and the
36 insane equally with the good and the wise citizen, the minor as
37 well as the adult. Standing alone at prima facie includes women.

38
39
40 I will also add that I checked the Webster's Third International Dictionary, and it
41 describes a person as being a human being.

1
2 One of the other counsel have given me the *Munroe* case, and I had a quick look through
3 that. What we see at paragraph 23 and 24 is that the victim impact statements were
4 actually admitted and were considered in those paragraphs. What I do not see in this
5 *Munroe* decision, which is the Ontario Court of Justice, is any consideration of whether
6 such statements can be admitted in evidence in respect of the definition of "victim" under
7 Section 722(4).

8
9 In other words, as Mr. Knisely quite properly said, there are times when evidence is put
10 in to the Court record by agreement between counsel, and that is all right, even if it may
11 not necessarily be admissible pursuant to the terms of the *Criminal Code*. However, when
12 there is an objection to the admission of that evidence, then the matter has to be
13 considered in the context of the *Criminal Code* and the proper interpretation of its
14 wording.

15
16 That is where I am right now. I do not want to cut off counsel in terms of finding
17 additional authority on this point, but everything that I have had a look at this morning
18 points in the direction of where I reacted originally, namely, that a person is a human
19 being; therefore, that does not include a dog as part of the definition of "person," which in
20 turn goes back to the question of the definition of a "victim."

21
22 That is my preliminary research on this point. Mr. Knisely, do you really think there is
23 any prospect of finding anything that is going to be contrary to the material that I have
24 and you have this morning?

25
26 MR. KNISELY: I don't know.

27
28 THE COURT: I guess that is fair.

29
30 MR. KNISELY: I don't know. That's the problem.

31
32 THE COURT: All right. Mr. Lim?

33
34 **Submissions by Mr. Lim (Admissibility)**

35
36 MR. LIM: Your Honour, I guess looking at the *Code* and
37 the cases that you provided -- well, first of all, I think the Nova Scotia, with respect to
38 this Honourable Court, has little, if any, relevance to this particular situation. That deals
39 with a provincial legislation, clearly (INDISCERNIBLE) looking at someone's system,
40 their TSO, it doesn't really apply here. We're talking about the *Criminal Code*, so I don't
41 think that's, unfortunately, particularly helpful in defining a person.

1
2 I do need to point out to this Court here that the word "victim" often includes a reference,
3 in people or human being can include the people who are witness or around the
4 circumstances, which would entitle the four individuals that have filed the victim impact
5 statements to give their statements as how it affected them and those people around them.
6

7 I would also suggest to this Honourable Court here is that the Crown accepts that animals
8 are not human beings. They are not human beings. They are mammals still, but
9 nevertheless, Your Honour, and I don't want to downplay or be disrespectful to animals,
10 but if you're considering them in a -- and I hate to use the term property -- but it can be a
11 property offence -- i.e., possession of stolen property or stolen property -- where a victim
12 can be many, again, quite flexible as to what a victim is, where they can talk about how
13 damage -- and again, I don't want to belittle animals -- or the damage, in this case the
14 hurt, to an animal, affected them and affected a property; i.e., they can talk about how the
15 car didn't work, how much it cost to repair the car and such.
16

17 It really sounds very unfortunate that we have, you know, that I have to argue the analogy
18 in respect to that here, I mean, but the way the law is, and law of course can't take all the
19 nuances of every single thing here, too, but if you accepted the animal is a thing, an
20 object, then certainly it can be affected; in other words, it can be stolen. It can be
21 damaged, like in mischief. Then certainly the witnesses or the people can talk about how
22 it's affected them and how it's affected their property or the item, the mischief item or the
23 item that's been damaged.
24

25 Again, it's really unfortunate wording, I'd suggest to this Court, that we have to kind of
26 argue that in respect to a living creature; but nevertheless, when you look at the law here
27 wording that the (INDISCERNIBLE) the word "victim," unfortunately, we can use the
28 word "human being." Well, we can look at the victim in the broader sense in respect to a
29 piece of property or such that has been committed a crime upon, essentially equivalent to,
30 such as mischief or damage or hurting, Your Honour, so I mean, I guess that's something
31 to look at --
32

33 THE COURT:

I understand what you are saying there, but to
34 the point of the defence's request for an adjournment to consider whether there is some
35 cases that support the position he is taking on this application, what is the Crown's
36 position?
37

38 MR. LIM:

Well, the Crown will, obviously we want to be
39 fair to the accused, so I can't really fight that, Your Honour, and we've only been given a
40 brief time here, the both of us, to look this up. I've looked up, I brought the *Munroe* case,
41 I know I have the *Munroe* case already presented to you. I looked at the *Wicker* case as

1 well, which basically talks about how victim impact statements can be used but really
2 doesn't really talk about how they came to that conclusion that they were allowed,
3 permissible.

4
5 THE COURT: Right.

6
7 MR. LIM: So, I mean, I would say I can't really argue
8 against it, Your Honour, in the name of justice and fairness. Obviously the Crown's
9 position we still really would like to go, proceed with this. This has been delayed, and I
10 appreciate my friend -- I was unavailable earlier on, but this matter, there are people, not
11 so much justice stake holders, but people who have been affected by what's happened
12 here were in Court today. They followed this case, and of course we would like to move
13 that along, too, as well for them and for just the members of the public, that this is a
14 public interest to get this matter dealt with; although, of course, we want it done very
15 fairly to the accused and ensure that his rights are assured as well. But this matter has
16 been in the system for a while.

17
18 THE COURT: Exactly, since July of last year.

19
20 MR. LIM: Right.

21
22 THE COURT: I am concerned about that. It really comes
23 down to this: Is the Crown opposed to an adjournment to look further into this matter, or
24 is the Crown not taking any position at all?

25
26 MR. LIM: I'm not -- I can't say I'm opposed that, yes, I
27 believe that we may -- we have to look into this, Your Honour, even though that we like
28 to move this ahead, because otherwise I'm looking at appeal grounds if we don't give this
29 opportunity, I think, for all of us, so I think we have to do our diligence to look further
30 into this. It's unfortunate for sure, and I'm certainly speaking on behalf of the people
31 here, I think, yes, that we would like to move this ahead, but it is what it is.

32
33 The other, I mean, but I think we have to deal first of all with the victim impact
34 statement, because the other option is, too, that the Crown can call these as witnesses in
35 the sentencing hearing, but I think you still have to do -- put --

36
37 THE COURT: Well, they would still be the victims, and I
38 would have to consider that. However, the annotation from the *Criminal Code*, and I have
39 not followed up on it, hint at the idea that there could be evidence at a sentencing hearing
40 that might include victims, even though their evidence is not filed as a formal victim
41 impact statement.

1
2 MR. LIM: Well, the Crown will argue that it can be
3 entered as, for sentencing hearing as to they're witnesses as to the treatment and care of
4 the animal.

5
6 THE COURT: Right. Part of my difficulty, and I am going to
7 share with you, is that I am going away at the end of the month, and I will not be back
8 until the 20th of January, so this also is making me reluctant to put this matter over.
9 Now, if we can get did dealt with before the end of the month, well, then that is a
10 different thing.

11
12 MR. LIM: I'm not sure what this Court's schedule is and
13 my friend's schedule is.

14
15 MR. KNISELY: I'm in Court every day next week, Your
16 Honour, on one matter or another.

17
18 THE COURT: Well, there is the week after.

19
20 MR. LIM: Well, let's see --

21
22 THE COURT: Maybe I am forgetting about where we are in
23 the month.

24
25 MR. LIM: Next week is the last week in October, Sir.

26
27 MR. KNISELY: I'm booked all next week, and I have some
28 time in the week following on the 6th and the 7th, but only for a half a day.

29
30 THE COURT: Right. Well, I will not be here at that time.

31
32 **Ruling (Admissibility)**

33
34 THE COURT: All right. What Mr. Lim has mentioned is
35 important, mainly fairness to counsel. I have had a chance to look at this issue with less
36 than the full time that one sometimes would want to set aside to consider these issues.
37 However, I am satisfied that the interpretation of this provision of the *Criminal Code* is
38 going to be clear, and that we are not going to find any cases that are contrary to the ones
39 that I have referred to in argument a few minutes ago, and that really comes down to this:
40 If parties agree that victim impact statements can go in, then they can be received by the
41 Court and considered as part of the evidence.

1
2 Where there is an objection, as there was here, then the Section 722(4) of the *Criminal*
3 *Code*, in my view, is quite clear. It provides that a victim is a person -- and it refers to
4 "person" three times, as I counted them -- and pursuant to the *Interpretation Act* that I
5 referred to, cases that I have referred to, a dog is not a person as provided in that section,
6 and therefore the dog is not a defined victim under that provision of the *Criminal Code*.

7
8 Can I double check with counsel that we are dealing here with a guilty plea on one Count
9 under Section 445.1(1)(a) of the *Criminal Code*, namely, willfully causing -- being the
10 owner -- or willfully permitting to be caused unnecessary pain, suffering, or injury to an
11 animal?

12
13 MR. KNISELY: That's correct.

14
15 THE COURT: All right. I have looked --

16
17 MR. LIM: Actually, 445.1(a) is willfully kills, wound,
18 maim, or injure an animal.

19
20 THE COURT: All right. I will put my question another way.
21 We are dealing with Count Number 1, right, or are we dealing with Count Number 3?

22
23 THE COURT CLERK: I believe it's actually Count 1.

24
25 MR. LIM: Count 1, yes.

26
27 THE COURT: Count 1. All right.

28
29 MR. LIM: Without lawful excuse to kill, maim, wound,
30 poison, or injure a dog.

31
32 THE COURT: Right.

33
34 MR. LIM: That's kept for a lawful purpose.

35
36 THE COURT: Okay. I have checked the annotations to the
37 *Criminal Code* and parliament has not provided for any enlarged scope of a definition of
38 "victim," as they could have done with respect to both Counts Number 1, 2, or 3 -- and of
39 course I am just dealing with Count Number 1 in the Section 455(1) -- so parliament did
40 not provide for people who see the suffering that is caused to an animal to make a victim
41 impact statement by providing these definitions of cruelty which are set out there. They

1 could have added in a portion to provide for people impacted by the suffering that an
2 animal has caused, but they did not do so.

3
4 I am not of the view that I am in the position to expand the definition where parliament
5 has chosen not to do so. My conclusion, therefore, is for all of these reason, that I cannot
6 hear these victim impact statements. They will remain on the Court file. I will not be
7 looking at them, but they are available if this matter is appealed to another Court, and that
8 other Court may come to different conclusion, but I do not see any basis for expanding
9 the definition of "victim" under Section 722(4) of the *Code*.

10
11 That concludes that matter, and we will now move on with the rest of the sentencing.

12
13 MR. LIM: Your Honour, can I just ask -- I appreciate you
14 making a decision here -- but for at least the Crown to look into further cases and the fact
15 that I'm still stuck with the situation here, is that the way I understand the law is that the
16 victim can still include the civilians who observed things as well, that they could still be
17 victims themselves and give victim impact statements. That's the problem I'm left in.

18
19 In the alternative, I can, I don't know, suggest a sentencing hearing. I'm not trying to be
20 difficult, I'm just, my understanding is still, like, people, for example, who may not be
21 directly the victim in a homicide or, as I said, in a case of a material item, that they're
22 still victims, so would they not be able to then give victim impact statements with respect
23 to how it affected them in respect to --

24
25 THE COURT: All of this turns on the definition of "person."
26 There is no doubt that the definition of "victim" includes other people other than the
27 person who has immediately suffered the harm, where that person is dead or unable to
28 testify. Then there seems to be a little larger discretion in the Court where as the
29 annotations in *Martin's* indicate, other persons can apply to be -- to be heard on this
30 matter. It all coming back to whether a person has suffered harm. The evidence here is
31 that a dog has suffered harm, and I have a lot of the sympathy for the people who want to
32 provide victim impact statements, but my duty is to exclude evidence which is not
33 admissible, in this case in a sentencing hearing, and that is why I have excluded it.

34
35 MR. LIM: If the animal is considered property --

36
37 THE COURT: Anyway, I am not going to re-debate this,
38 Mr. Lim. Are you ready to proceed with this sentencing or not?

39
40 MR. LIM: Fair enough, Sir. I'd just ask for an
41 adjournment because I would like -- I think it's a serious issue as to --

1
2 THE COURT: Okay. Your request for an adjournment is
3 denied.

4
5 MR. LIM: All right. I am prepared to go ahead with
6 sentencing, if that's the case.

7
8 THE COURT: Okay.

9
10 Submissions by Mr. Lim (Sentence)

11
12 MR. LIM: Your Honour, you have before you a charge
13 under Section 445(1)(a) of the *Criminal Code of Canada* in respect to the accused
14 wounding, killing, maiming, or injuring an animal -- in this case, a dog known as Zeus
15 who is now known as Kaden. You have the agreed statement of facts, Exhibit 1, S-1, for
16 sentencing purposes, Your Honour. I understand that you have the pre-sentence report, the
17 forensic assessment, as well photographs of the dog now known as Kaden. You should
18 also have, of course, the criminal record of the accused as well as, Your Honour, attached
19 to the agreed statement of facts is the Dr. Anthea Smith, her summary of the injuries to
20 this dog Kaden.

21
22 The Crown's position, I will state right up front for sentencing, Your Honour, is a period
23 of incarceration, actual gaol time, 20 to 24 months incarceration. It's required for
24 deterrence and denunciation. A conditional sentence order does not appear to be
25 appropriate, especially in this jurisdiction, considering the propensity and the issues that's
26 we've had with respect to animal abuse.

27
28 Pursuant to Section 447.1 of the *Criminal Code*, considering the factors in this particular
29 file that this was not only just a horrific beating of this animal, not to mention
30 diminishing his life by not providing food and medical care and water, or certainly
31 limiting him, that we would be seeking a lifetime pet prohibition, Your Honour.
32 Generally, that's worded something to the effect that the accused shall not own, possess,
33 or control any pet, including but not limited to dogs, cats, ferrets, and rodents.

34
35 Your Honour, in commencing sentencing consideration, Your Honour, the Crown needs to
36 take a balanced and fair approach --

37
38 THE COURT: I think that section is 447.1 --

39
40 MR. LIM: Yes.

41

1 THE COURT:

-- right?

2

3 MR. LIM:

That's what I said, Sir, sorry.

4

5 THE COURT:

Right.

6

7 MR. LIM:

Your Honour, before I go into the mitigating, aggravating factors, I can explain to the Court that I'm not seeking the sections of the *Criminal Code* 44 -- between 447, allowed for in respect to financial compensation for organizations or people dealing with the animal in respect to the medical care and providing the necessities for life. I understand from the people dealing with the animals -- that would be the Edmonton Humane Society as well as the new owner and foster parent, if you want to say, of this dog Kaden, Ms. Isabelle Gibbons -- they agree that the focus should be on deterrence and denunciation, so they are not seeking compensation. But as you'll note, Your Honour, there's some discussions that will be over \$10,000 easily in respect to the care and medical care for this animal, but for the fact it's been donated, including by doctors, veterinarians, who have basically volunteered their services to provide care for this animal, as well as the foster parent with respect to this animal.

20

To be balanced in respect to Mr. Barwell's situation here is we have a guilty plea, Your Honour, and certainly that's something to consider. It prevents family members from having to testify, which would always be difficult, Your Honour.

24

Of course, on the other hand here, too -- granted we all comprehend how it might be difficult for family members to testify against one of their own -- that's also another, shall we say, aggravating or concerning factor because it's very difficult, obviously, not only obtain convictions, but obtain evidence obviously due to the familial and heart strings that are attached, and emotions that tie to such witnesses.

30

Of course we have his youthfulness. A relatively limited adult criminal record and his somewhat confessions to the Edmonton Police Service.

33

On the other side, the aggravating factors here, Your Honour, is we have a situation here which I could only describe as -- and not to be flimflam, but the word we -- essentially torture. Your Honour, in the, if we look in the *English Oxford Dictionary*, I just want to refer to what "torture" actually means: (as read)

38

Torture: The infliction of excruciating pain as practiced by cruel tyrants, savages, brigands, et cetera, in hatred or revenge, or as a means of extortion;

41

1
2 an instrument or means of torture, severe or excruciating pain or
3 suffering of body or mind anguish, agony, torment.
4

5 In this particular case, Your Honour, we have a situation here where we have a dog, a
6 young dog about four months old -- a puppy, to be blunt, Your Honour -- that was
7 suffered not only from dehydration, but lack of eating, or lack of ability to eat, so he was
8 basically malnourished, Your Honour, and suffered, as you can tell by Dr. Anthea's
9 report, that he was still having difficulty eating because of the malnourishment and lack of
10 strength. That is one way that he's been tortured. This is obviously over a period of
11 time. It wasn't just simply a one-day thing here, and that's something to consider as well.
12

13 But we also have in this particular situation here an individual who subjected a puppy to
14 various abuses, physical abuse. We know from the evidence, or from the agreed
15 statement of facts both family members and the neighbours, the Scotts, both witnessed
16 this animal being abused, specifically being hit and having his weight, the accused putting
17 his weight on the dog around the neck, Your Honour.
18

19 He was also inflicted with, as you know, injuries that included as a result him being on a
20 short tether, Your Honour. So this dog was a puppy, a growing puppy, was limited by
21 about a four-foot range of movement, and of course, as we know by Dr. Anthea Smith's
22 report, this led to injuries around the neck.
23

24 This dog was also in essence tortured or, should we say, not given life-needing medical
25 treatment. This is an animal that was clearly, to any person who was carrying for an
26 animal or just being around, needed medical attention. As you may recall, Sir, there were
27 problems with infections, not only a blood infection -- which, granted, in fairness to
28 Mr. Barwell, may be hard for him to identify -- but clearly on the prima facie, just
29 looking at this dog here, there were maggots growing out of wounds, including around the
30 neck and around the facial area. We have the teeth that were chipped or bashed in, Your
31 Honour, clearly, and as well we have infections of the eye, in respect to the eyes and with
32 respect to the hearing. There were obvious wounds, Your Honour. This dog was
33 obviously limping, until finally it couldn't move when the brother of the accused
34 eventually feeling sorry for the dog brought dog in for medical treatment.
35

36 That shows you not only complete disregard for the medical attention and care of this dog
37 here, but obviously to the point of the effect of the actual pain of this particular dog.
38

39 This dog, although, Your Honour, when I say that in fairness to the accused, did survive,
40 I think the Court needs to be a balanced approach, this dog actually suffered. In some
41 ways it may sound very cruel to say this, but Kaden might have been better off

1 euthanized or allowed to sleep so that he wouldn't have to go through all that pain as we
2 tried to rehabilitate it. Yes, it is to Kaden's credit -- not to the accused's credit -- that
3 he's a fighting type of dog, hence his name has now been changed "Fighter" or Kaden.
4 However, Your Honour, obviously it was to the work of the Edmonton Humane Society
5 and Ms. Gibbons, Isabelle Gibbons, who took over the dog, as well as most importantly
6 the veterinarians who donated their services and time to actually assist this animal, who
7 had to, as I understand, take over 30 medications in order to get this dog to somewhat
8 mobile and able to cope.

9
10 We know by the injuries -- in particular the femoral bones that were smashed that this
11 dog -- although seems to be doing the best it can to walk, will always have a limp and
12 always have issues with arthritis and such, and that's something to consider. This is like
13 what akin -- again, I use the word "akin," because it is not a human being -- to an
14 aggravated assault for an animal, obviously, will have serious effects, not only if for his
15 pain and suffering -- which I would suggest, Your Honour, is something that is
16 aggravating -- but we have a situation where there are permanent injuries that are not only
17 physical, but as we can trust and assume, also emotionally, and that's something the Court
18 must consider.

19
20 We must also consider that this is a position of trust. In the case of Kaden -- or then
21 Zeus -- he was a puppy adopted or taken in by this individual here. People would assume
22 and would hope that one should be safe at their home, and one should also assume that
23 the owner, the caregiver of such a puppy, could trust its owner to be fed, to get proper
24 medical care, get proper water, and not be abused. This individual --

25
26 THE COURT:

I will stop you there just for a moment, please.

27 Madam Clerk, could I have the Information, please? Thank you, go ahead.

28
29 MR. LIM:

The injuries to Kaden are not just only sort of
30 horrific, because the amount of them or the fact that there have been many, should we
31 say, breakages in the bones and many cuts and wounds and maggots growing out of it --
32 that may seem dramatic -- what is significant is that this animal actually suffered over a
33 period of time and will continue to suffer.

34
35 Your Honour, it should be noted that a position of trust, of course, is an aggravating
36 factor. And the fact that we also must consider that this is a vulnerable, helpless living
37 creature. In other words, Your Honour, this individual here is like almost, again, akin to
38 the child -- I appreciate we know it's not a human being -- but this animal is dependent
39 upon the accused, upon the owner, to actually provide for him the necessities of life. Not
40 only the necessities of life, but in this case here that it should have been assumed that the
41 so-called more sophisticated, as the human beings are, should we say the most

1 sophisticated beast, more caring, more humane beast, would have some kind of basic
2 compassion towards a smaller, vulnerable, and unable to speak or, in this case, at one
3 point was unable to walk for itself.
4

5 That is what's supposedly sets apart humanity or humans from lower beasts, so the people
6 who do not have the mental culpability or capabilities of human beings setting us apart
7 from dogs, but that was not shown here.
8

9 Now, in respect to sentencing, the Crown cannot deny that there was not a lot of case
10 law, and that it's not always -- not to be binding, because there's a lot of cases -- there's
11 the Provincial Court decisions and for other jurisdictions perhaps, but they're not
12 necessarily binding -- and that's something that we've, that I cannot deny. My friend has
13 provided a case. I don't know if he's already provided it, and I provided some direction
14 for the Court in respect to how sentencing, I suggest, should be looked at in this particular
15 case and have been looked at in other animal abuse and cruelty cases under the *Criminal*
16 *Code of Canada*.
17

18 THE COURT: Just while you are on that, are you planning to
19 review these cases with me?
20

21 MR. LIM: Yes.
22

23 THE COURT: Okay, go ahead.
24

25 MR. LIM: You, of course, also have a pre-sentence report
26 and forensic assessment, Your Honour, in respect to looking at how to proceed in respect
27 to the decision here. And obviously I can make brief comments in respect of both, Your
28 Honour. To be clear, this individual has had some challenges in, respect to his family
29 background especially, and particularly his substance abuse seems to be a major issue.
30 This is not uncommon with a lot of people who go through the justice system. It seems
31 pretty prevalent, Your Honour, that some of the key things to look at here is obviously
32 the issue of whether or not he's going to be at risk to re-offend. It does say that he'd be
33 a high risk to re-offend especially in respect if we don't control the issue of alcohol and
34 substance abuse.
35

36 One of the major things that comes out of the both reports, of course, is the stability of
37 the home, that the home is not the best environment for him, his current home at the
38 (INDISCERNIBLE) residence, that he shouldn't be there. It appears that he had moved
39 into a better home situation but at least the time of the writing of the forensic assessment,
40 that relationship with that woman had ended, so he longer has that. And at least the time
41 that report being written, he was back in the family home. So those are certainly things

1 this are considered when we look at rehabilitation and the opportunities of how to deal
2 with this particular individual in respect to sentencing.

3
4 But the Crown's position is that it's clearly a situation here where we're looking at gaol
5 time, and the real issue is how much gaol time. Not a conditional sentence order, not a
6 fine, not a suspended sentence here, but really this is an issue about how much time in
7 gaol should this accused serve.

8
9 To start off my submissions looking at law, these are unreported case. I provided you a
10 summary of all the animal cruelty cases pursuant to the *Criminal Code* since August 2010
11 when the Crown created, the prosecutor's office had the animal protection portfolio
12 created.

13
14 Your Honour, when we go through the decisions here starting with *R v. Cardinal*, in this
15 case here, it was after, shall we say, a domestic spat, the accused picks up a bag or
16 container with two very small dogs that were Chihuahuas, and he throws them against the
17 wall, and the dogs scamper away. There were no injuries at all. There was yipping and
18 yelping. The accused had an unrelated record. The Court gave 15 actual days
19 incarceration because it felt it was a senseless attack on vulnerable victims.

20
21 THE COURT: All right. It does not say on your summary of
22 this case whether it was a case pursuant to Section 445(1) which we are dealing with, or
23 whether it had been 445.1(1)?

24
25 MR. LIM: And it was the latter. It was unnecessary pain
26 and suffering on that one. I can let the Court know it's unnecessary pain and suffering in
27 the matter of *Cardinal*.

28
29 THE COURT: Okay. Would you mention these as you go
30 along --

31
32 MR. LIM: Certainly.

33
34 THE COURT: -- because there are some differences.

35
36 MR. LIM: In the matter of *Dudar* (phonetic), it was also
37 unnecessary pain and suffering, but again, Your Honour, these, I would say, are therefore
38 more akin to an assault and not assault causing bodily injury, using the human terms.

39
40 This case here, the Honourable Judge Anderson on the facts, decided on the facts where a
41 police officer had noted an accused was walking his dog in city here was seen yanking on

1 the chain three times around the neck and then taking the leash and essentially whipping
2 the body of the dog three or four more times. There were no physical injuries in this
3 particular case. The dog whimpered, whined, and walked off with its tail behind its leg as
4 noted by the police officer. There were absolutely no injuries. The Court rendered a
5 sentence of 90 days incarceration, though he had no previous related record. And the
6 Court found that it was a defenceless creature, vulnerable, and real gaol sentence was
7 required for deterrence.

8
9 In the (INDISCERNIBLE), we all again have -- this is what -- unnecessary pain and
10 suffering where a guilty plea was entered. In this particular case, the accused was seen to
11 be under some kind of intoxicant. She attacked a 17-year-old dog that she did not know,
12 so there was not a trust situation, this one here, or have any association with. The owner
13 tried to step in to protect the dog, which appeared to be a random attack. The accused
14 had unrelated record, and she received a 90-day sentence, despite essentially no injuries to
15 the dog. Again, a message required for deterrence, and extreme vulnerability of animals
16 is noted.

17
18 In the matter of *Loyer* (phonetic), this is actually in respect to wounding, maiming, or
19 injuring an animal. This decision the Court was dealing with an aboriginal offender. The
20 accused had finished a domestic fight with his wife. He was mad and leaving the family
21 residence when he took the family cat and threw it out the window, breaking its leg. The
22 accused came before the Court with absolutely no criminal record, and *Gladue* was
23 considered in that case is my understanding, Your Honour. A conditional sentence order
24 was considered by Judge Matchett, but he concluded deterrence was required, and ordered
25 a 90-day sentence, although he did say it could be served intermittently, Your Honour.

26
27 I would suggest to you that case is not nearly to the extent of the case that we have at
28 Bar, Your Honour, with respect to injury or the time -- that was a one-time thing here, a
29 reactionary behaviour, which I do not condone, but certainly is not to be -- moral
30 blameworthiness that we have that case and this particular case.

31
32 In the case of *St. Laurent* (phonetic), we have a situation, another situation where the
33 conviction was based upon a guilty plea to wounding, maiming, or injuring an animal. In
34 this particular case, the accused for whatever reason of anger, sprayed a dog with bleach
35 with in its eyes. It actually required treatment to flush out the irritants out of the eye. He
36 had to be anesthetized to get the actual bleach out of his eyes and get treatment. In
37 rendering its decision, the Court ordered a period of incarceration of three months gaol
38 and probation. It considered the vulnerability of the dog and deemed that it actually -- a
39 gaol sentence was required, despite another accused with essentially a very limited
40 criminal record that was unrelated.

41

1 In the matter of *Charles Bull* -- this is an aboriginal offender, Your Honour. This was in
2 the Court of Queen's Bench -- the accused had unrelated criminal record. He was given
3 six months incarceration for -- and again this is for wounding, maiming, or injuring an
4 animal -- for bashing a bottle over a dog's head that required stitches because of multiple
5 cuts, and he got six months gaol for that.

6
7 Your Honour, the matter of *R v. Chalmers* (phonetic), the accused pled guilty to numerous
8 charges midway through a trial. He pled guilty to one count of wounding, maiming, or
9 killing an animal. I should point out in that case there were two cats, so one cat he threw
10 up against a wall a few times and broke its skull. Another cat, he got mad because the
11 cat was supposedly on the granite or an island in the kitchen. He was upset because
12 that's usually where food is served. He took the cat and flung it across about 15 or 16
13 feet, is my recollection, into the living room, smashing it against the wall and breaking its
14 legs. So those were two cats that received injuries.

15
16 The Court -- despite in that one, I remember, had an extremely favourable pre-sentence
17 report, it was a very favourable employment, he had children, and he had taken various
18 things to deal with his drug abuse -- the Court imposed a sentence of nine months actual
19 incarceration. It looked at there at a conditional sentence order, but concluded that
20 deterrence and denunciation required actual gaol time -- I'll provide quotes in just a
21 second in this particular case, Your Honour -- but that one there, essentially a conditional
22 sentence order was thoroughly canvassed. Despite a very limited criminal record and an
23 excellent pre-sentence report, the Court gave a nine-month sentence strictly to deal with
24 the deterrence and denunciation on that matter. There were other charges, Your Honour. I
25 need to be fair on particular case here, but they were dealt with and given separate
26 sentences, so in some way they're -- (INDISCERNIBLE) what the benefit of the totality
27 principle, as you can appreciate in such a situation.

28
29 So those are the Edmonton cases, Your Honour. They certainly suggest the direction that
30 we've been heading towards in respect to sentencing on animal cruelty.

31
32 There is a more recent decision, the last decision, which would be just about a month ago
33 is the *Chailier* matter, C-H-A-I-L-L-E-R. It's not on the list, Sir. It's unreported. This
34 matter here was in respect to wounding, maiming, or killing an animal. This was a matter
35 that was handled by the Honourable Judge Lefever. I need to let the Court know that it's
36 my understanding that the accused is seeking leave to appeal that decision within the
37 Court of Appeal, so you need to be aware of that.

38
39 In the *Chailier* decision, the facts, though, nevertheless, Your Honour, were a situation
40 here where a dog was, essentially, the family pet, had its throat slit, and then it was
41 disemboweled and pictures were taken and sent to a girl that he was trying to impress.

1 He then committed a mischief on the family house and then broke and entered into two
2 houses -- sorry, to a house and then to a school -- and also damaged some other cars
3 along the way after killing the animal.
4

5 Just on the animal killing alone, the Court gave a sentence of 16 months actual gaol time,
6 because he felt it required deterrence and denunciation was necessary. Now, that one
7 there, I have to admit that one, there was a pre-sentence report that was not favourable,
8 Your Honour, and so as I said before, that decision is, I understand, being seeking leave
9 to appeal.
10

11 There were other charges. The other charges, I can inform you the Court separated the
12 sentences, so there was 16 months, Sir, for the killing of the dog, and there was 10
13 months to be spread between the two break and enters and mischief charge, and -- I'm
14 sorry, as an officer of the Court, I left out the fact that he also had a breach of
15 recognizance order or probation order, Sir, where he was outside of his curfew, and he
16 received one month consecutive -- so the number of total sentence was 26 months, but 16
17 months specifically for the killing of the animal, and the 10 months for the other charges
18 were consecutive to the 16 months.
19

20 THE COURT:

Was there a discussion of the totality principle?

21 In other words, was the 16 month a reduced amount because of the totality principle?
22

23 MR. LIM:

24 The Court had to consider that. They said they
25 considered that, because obviously there was those charges, and he considered them. What
26 had happened was, Your Honour, my friend, my learned friend in that particular matter
27 there argued -- the Crown sought sentence in around the 27 -month range for all the
28 charges including 18 months, settling to 24 months for the actual killing of the animal.
29 My friend in there, Ms. Wood, argued that she agreed that 12 months would be
30 appropriate and that it would concurrent, but it would be 12 months for killing the dog,
31 then everything, because she felt it was the same incidents, would be just concurrent, but
32 the Court disagreed that it wasn't concurrent, that she was willing to accept that the dog,
33 for killing the dog, there alone was 12 months.

34 The Crown would like to state here in the matter of *Chailier*, and remember I did say that
35 they are appealing that decision -- and I understand it's not just the dog, the sentence on
36 killing the dog, it's the entire sentence, they are seeking leave for that -- but I do want to
37 point out that just because in this particular case Kaden survived, we should not think that
38 this is any, this is not a horrific crime. The fact that this animal basically probably
39 suffered longer because he wasn't put out of his misery is something that the Court needs
40 to consider. And unlike in the case of *Chailier*, which was -- and again, while I'm
41 certainly not advocating or condoning that kind of behavior -- the slitting of the throat

1 relatively was quick in putting the dog's life out, so it didn't suffer too long. Again, I'm
2 not, certainly not condoning that. But in the case at Bar here, here we have suffering
3 over a period of time as noted by Dr. Anthea Smith by the -- clearly by the injury, one
4 can just logically see that, and the fact that we know the dog still has a limp, that's pretty
5 clear that -- are some examples that this was not a minimal or transient kind of situation.

6
7 As I finished off with the *Chailler* matter here, perhaps I would just like to -- sorry, Your
8 Honour, I think I actually have copies.

9
10 THE COURT: Take your time.

11
12 MR. LIM: I have copies of transcripts from the *Chalmers*
13 and the *Chailler* matter, which I will refer to.

14
15 THE COURT: Yes, please.

16
17 MR. LIM: First of all, with respect to the *Chailler* matter,
18 I have a copy of the August 26th, 2013, proceedings. I'm referring to page 6, Your
19 Honour, in respect to the Court's decision. This will be the Honourable -- and again, I
20 already stated, so I want to be fair -- that there is an appeal made on this, but I still think
21 it's fair where the direction the Court is heading. On page 6, and I would suggest line 11:
22 (as read)

23
24 Offences of animal cruelty are seen in a far more serious light
25 today than they were in previous years. This is due to our better
26 understanding of how cruelty to animal (INDISCERNIBLE) with
27 more chilling possible adult behaviors.

28
29 The last -- line 19: (as read)

30
31 Having considered the authorities that were submitted, it is clear
32 that general and specific denunciation and deterrence are the
33 overarching sentencing principles, and the sentences for acts of
34 animal cruelty have been increasing, reflecting the change to this
35 legislation made by parliament.

36
37 THE COURT: Just to support that point, because I do not
38 think it is going to be in doubt, similar comments were made in the cases that were made
39 available.

40
41 MR. LIM: I'm actually going to go into that too, if that

1 assists the Court. Sorry, Sir.

2
3 THE COURT: Yes, So those are comments that are based on
4 at least one, if not two, of the cases that are before me today.

5
6 MR. LIM: I can inform the Court the matter -- just so that
7 the Court knows where I'm going with this -- on the matter of *Chalmers* and *Chailier*, I
8 have referred to the *Munroe* case, the *Connors*, and the *Rodgers*, case, which in a
9 nutshell, I think -- and the Court doesn't have to necessarily agree -- but I understand it's
10 basically saying since 2008, since the changes in legislation, parliament is basically saying
11 this loud and clear, that they are putting to the *Criminal Code of Canada* that the
12 legislation is they've upped the maximum sentence to five years incarceration if the
13 Crown proceeds by indictment on this particular charge, because they realize the serious
14 nature of this, and the sentence should be reflected in that. And that's what they're, those
15 three decisions, if I have to just sum in a nutshell, really focuses on, and that's what I
16 dealt with -- before with Honourable Judge Lefever in the matter of *Chailier*, as well as
17 the in the case of *Chalmers*, is that there certainly is a deference and that the -- that
18 society that parliament is entrenched in its own legislation that we need to consider the
19 serious nature, and that it is a very serious offence against animals, and it shouldn't be
20 taken lightly.

21
22 Your Honour, with respect to my submissions and referring to the cases that I've provided
23 you, I provided you with the *Connors* case as well as the *Rodgers* case, and I would
24 suggest to you that the focus of them, again, is on deterrence and denunciation.

25
26 If we turn to the *Connors* case on page 11, Your Honour, that's the page 11 of the
27 *Connors* matter, and we turn to page -- paragraph 51: (as read)

28
29 To fulfill parliament's intention in making these more serious
30 offences requires in this case that a longer period of incarceration
31 be imposed and the majority of cases decided prior to the
32 amendments. However, this case is also to be distinguished from
33 *R v. Munroe*, where the events occurred after the amendments and
34 the offender received a one-year sentence. In that case, the
35 offender perpetrated extended multiple acts of varying forms of
36 torture on two animals over many months.

37
38 Your Honour, further more, if you turn to the *Rodgers* case, on page 5, and turn to
39 paragraph 25 -- that's *Rodgers*, page 5, paragraph 25 -- and look at what the Court said
40 there: (as read)

41

1 In increasing the penalties, parliament did conclude that the
2 previous maximums were wholly inadequate and fail to represent
3 the prevailing view in society as to the seriousness of these
4 offences. To fulfill parliament's intention in making these more
5 serious offences, requires in this case that a longer period of
6 incarceration be imposed than the majority cases decided prior to
7 the amendments.

8
9 It then goes on the bottom there, Sir, and refers to the case of *R v. White*, on the bottom
10 of page 5 there it says: (as read)

11
12 It has been held that an increase in a statutory maximum is a clear
13 indication to sentencing courts of the seriousness with which the
14 criminal conduct addressed by the changes is viewed by
15 contemporary society.

16
17 So I'm suggesting to this Honourable Court when you read this, it should be clear that we
18 are seeing the direction of the Courts in handling animal cruelties, and looking at the
19 matter in here, situation here, is that there are to be certainly considered in more serious
20 nature than before 2008, and that should be reflected in the sentences.

21
22 Now, the Crown was suggesting, Your Honour, you will note, that every -- I tried every
23 single case that I know of here in Edmonton since 2010 or the end of 2010, every single
24 case has been gaol time even with no injuries, not a conditional sentence order. So it's
25 very clear that the courts realizing the prevalence of such offences in our community here
26 in Edmonton, but the approach has been taken at least here locally.

27
28 Now, I appreciate that's it's not binding, it's in the provincial Court of Alberta here in
29 Edmonton have been all periods of incarceration. Yes, there were one or two cases of an
30 intermittent sentence, but nevertheless were actual periods of incarceration, which is why
31 when I logically look at this and, say, look at the plain map or on paper here, you're
32 really looking at a situation here as while the Court can always look at a conditional
33 sentence order following *Proulx*, you're really, when you look at it here and look at the
34 case law here, the prevalence is deterrence and denunciation. And we know that
35 sometimes, as the Court of Appeal has suggested, you really just need to give gaol time,
36 because you need to separate the behavior from society where a conditional sentence
37 order, even with finely crafted terms, does not deal with that or is sufficient.

38
39 I note, Your Honour, in respect to the *Rodgers*, decision on page 10, you look at the
40 decision, paragraph 76, it says: (as read)

41

1 After citing the Ontario Court of Appeal decision in *R v. Power*,
2 the Court upheld a 90-day sentence under the old legislation for
3 torturing and killing a cat, and the B.C. Provincial Court decision
4 of *R v. Connors* --

5
6 which is found in the Crown's brief and which I have already referred to, he found, as I
7 have indicated, (as read)

8
9 -- that the seven-month sentence for a first time offender, with the
10 accused's otherwise impeccable antecedents, recognizes the
11 change in the appropriate range of sentence brought about by the
12 April 17th, 2008, legislative reforms.

13
14 And finally, Your Honour, in referring to *Rodgers*, on page 11 of this case on paragraph
15 86, it says: (as read)

16
17 The *Criminal Code* makes it clear, the willful infliction of
18 unnecessary pain and suffering on animals violates one of the
19 basic tenants of our society and is deserving of punishment. It is
20 also conduct that most members of our society find repugnant and
21 morally reprehensible.

22
23 I believe, Your Honour, that applies to in this case, in this situation here.

24
25 Your Honour, I suppose that there is a tendency for some people to say, Well, these are
26 just animals. There's not real people, so what's the big deal here? But I think it's clear
27 that parliament and the public are saying what this is a concern, and that these animals do
28 have rights, and we need to protect them because they are vulnerable.

29
30 I note, Your Honour, if we look at the sentencing provisions of 718, looking at
31 sentencing, we want a fair sentence and that deals with the actual facts and allegations,
32 that things we are to look at including to denounce unlawful conduct, and I'm going to
33 suggest to this Honourable Court that there's no question that this is a major factor here
34 in its paramountcy, that it's to deter the offender. I agree, Your Honour, in this particular
35 case here, Your Honour, it's certainly from the pre-sentence report -- sorry, the forensic
36 assessment -- there's some concerns he will re-offend or at high risk to re-offend, Your
37 Honour, especially with the alcohol and substance abuse, so there is a concern about this.
38 But I'm going to say point blank the real concern the Crown has here is for general
39 deterrence of such behavior.

40
41 This here is we have a vulnerable animal that was actually upon the mercy of the accused.

1 He decided to basically whether or not this animal was going to need, get medical care
2 and how he treated it. We appreciate, Your Honour, in dealing in humanity and looking
3 at the pre-sentence report about some of the challenges that Mr. Barwell had in his life, or
4 has in his life. However, Your Honour, Mr. Barwell had several opportunities, as being
5 sort of the superior beast compared to the animals, to realize that, Oh, he needs to step
6 away or walk away or get help for this animal.

7
8 Remember we have at least on two occasions here, members who are here today, the
9 Scotts, who tried to intervene on behalf of this animal here. Right there and then after
10 being spoken to, one would hope that he would trigger that he should be treating this
11 animal. He also has family members.

12
13 But even if he didn't have the Scotts, even if he didn't have the Barwell family members,
14 isn't there just a basic tendency of humanity and basic common logic in one's mind, a
15 moral blameworthiness, that he would have realized that this animal was, being a puppy,
16 let alone a dog, was going to be relying upon him for such essentials as water and food?
17 Was going to be relying for proper care and trusting that he was going to get proper care?
18 And shouldn't it certainly be due to such physical abuse that there was concern by several
19 members of the public as well as the family members?

20
21 I guess we can appreciate, Your Honour, that sometimes it is a challenging circumstance,
22 as we recall from the facts, and we admit sometimes the dog -- well, the dog was being a
23 dog, Your Honour, let's just be point blank here -- yes, it defecated and urinated
24 sometimes in the house. Although I note that the house is actually his parents', he took it
25 out on the dog, but that wasn't just one time, as we know by the injuries, Your Honour.
26 This animal really suffered over a period of time here, and that's why even though some
27 people may say, well, usually death should require a higher sentence if you kill an animal
28 here, it is a very serious offence that was on going here. It was basically death almost
29 continue on day after day, because of the pain and because of the suffering that continued
30 on.

31
32 I'm going to suggest, Your Honour, and looking at this particular situation here, that a
33 conditional order is not appropriate. One of the things here you look at, Would this
34 offend the principles of sentencing set out in Section 718? And I would suggest, Your
35 Honour, this particular case, because of the pure cruelty that occurred over a period of
36 time, that would offend to people's sense of justice here. And that as, a point I'm going
37 to suggest to you in these decisions, *Chalmers* and such, are, would suggest that because
38 of the serious nature, not to mention there is, as we know, a correlation with animal abuse
39 with also abuse on people, that it requires an actual period of incarceration.

40
41 Perhaps it might be of assistance to somewhat going through the *Chalmers* decision to get

1 an idea how the Court came to a conclusion in respect to sentencing, Your Honour.
2 Sorry, Your Honour?

3
4 THE COURT: You want to quickly resume the facts, since I
5 have read this case in the past?

6
7 MR. LIM: Yes. The *Chalmers* decision, as you -- I did
8 actually state the facts here, but this is the one where the two cats were thrown -- one was
9 thrown against the wall --

10
11 THE COURT: Oh, okay.

12
13 MR. LIM: This is the case -- so I should clarify, Your
14 Honour, that's the case here. So the one cat was thrown against the wall three times
15 and --

16
17 THE COURT: Sure. I have got *Chalmers* summary there, and
18 you have read it in.

19
20 MR. LIM: Yes. And again, the Court went through the
21 legislation and noted, of course, that it was a very positive -- and if you go to page 4, it
22 says, line 17: (as read)

23
24 I give him credit for a very positive pre-sentence report.

25
26 And yet at the very end, Your Honour, you'll note that he still got a period of
27 incarceration.

28
29 The Court, on page 4, line 29: (as read)

30
31 Thank you. I respect that. Nonetheless, I'm driving, in my view,
32 by status authority to interfere to your recovery to this extent. The
33 Crown has sought 9 to 12 months incarceration, followed by 15
34 months probation, and that is because of the aggravating factor of
35 two cats and the unspeakable pain, for whatever reason, you
36 inflicted only these two animals, which the people would want me
37 to tell you was so unacceptable that I should do something of
38 some significance.

39
40 And then he goes on, Sir. It says: (as read)

41

1 I am afraid I must sentence you to some time in custody. Stand
2 up, please. I think I accept your remorse. I think it is honest.
3 You had been in a bad place. I don't know if you have mental
4 issues that need to be dealt with or other issues that need to be
5 dealt with. I am inclined to the lower end of the Crown's
6 recommendation, and I sentence you to nine months in gaol.
7

8 Your Honour. And, you know, it was actual period of incarceration.
9

10 Now, if you go through the rest of the decisions from page 2, 3, and 4, you'll see that the
11 Court, Judge Stevens-Guilles, goes through what it is, what the Court is to look at in
12 respect to a conditional sentence order. He starts off with looking at the proposition, as
13 you know, with serious offenders -- and he realizes that an animal is not considered a
14 person, so you can't say it's a personal crime. He agrees that conditional sentence order
15 should be looked at, but on the bottom of page 3, line 30, he says: (as read)
16

17 The key piece of that in a case such as this is, would not offend
18 the principles of sentencing set out in Section 718, and one of
19 those, and what this is all about and true, is that one of the
20 principles is deterrence, and the other principle of great note here
21 is denunciation, but general deterrence. And you only send people
22 to gaol, in my view, if they can be proved to be dangerous to the
23 public. If you do not, I do not accept that this is the case here, or
24 that a message has to go forward, which I think is the case here,
25 to people to contemplate committing the same offence or care less
26 whether they do or not, but the consequences are going to be
27 unacceptable, and they are going to include incarceration.
28

29 Your Honour, even if this Court feels for some reason that this individual, Mr. Barwell, is
30 not a threat to the public or to other animals, I'm going to suggest that following the
31 decision here by the Honourable Judge Stevens-Guilles, that we may need to make a point
32 to the general public, a message to go forward, that you cannot abuse a vulnerable animal.
33 It is an offence, and it needs to be taken seriously.
34

35 Your Honour, this particular case here, we would not really have much of a case if it
36 were not for people willing to stand up for this dog known as Kaden. Kaden, of course,
37 cannot open the door to leave, could not make a telephone call, could not communicate to
38 anyone as to what was happening or what was going on. It was only because of the
39 Scotts, the two neighbours, as well as the family members eventually doing something
40 and taking the dog to the Edmonton Humane Society. That shows just how vulnerable
41 our victim -- and again, I'm using the "victim" in the general sense, not in the legal sense

1 according to *Criminal Code* of Canada -- but victim, or what we really have here is that
2 they are dependent, and that's something that needs to be seriously considered.

3
4 You have pictures of the injuries. You have the medical report, Your Honour. This is
5 probably Edmonton's worst ever case, at least in the recent years, of animal abuse. That's
6 something that needs to be considered here.

7
8 We've been looking at these decisions, Your Honour -- and again I said, there not exactly
9 on point, you must admit -- however, clearly the case of *Chalmers* is not nearly as bad as
10 this situation here where they received nine months actual incarceration. You see the
11 other cases here where we have no injuries, sometimes a dude having a bad day or
12 fighting with their wife in a spousal situation, and they got gaol time here.

13
14 So I'm really suggesting to the Court, although you can look at a conditional sentence
15 order, as it's appropriate if it's under two years, you'll see the logical deduction is that
16 you're really looking at how much gaol time, actual incarceration.

17
18 *Chalmers* got nine months, as I said. Ms. Wood -- although the case is being appealed in
19 respect to the 16-month sentence in *Chailer* said, Well, it's at least 12 months. I'm
20 saying this case is worse certainly than the *Chailer* where the dog -- again, not condoning
21 it -- was put out of its misery quickly. This is a situation where this animal here is going
22 to have to live with the consequences caused by Mr. Barwell.

23
24 I accept the fact that there's a guilty plea and just like in *Chalmers*, the person was very
25 sorry in that here too, and I could tell in the tone of the Court that they were very
26 (INDISCERNIBLE) gaol here, but it needs to be a deterrence factor here.

27
28 Now we're looking at how long. I'm suggesting, Your Honour, 20 to 24 months,
29 recognizing the serious nature of this here, the length of time, and the vulnerability of this
30 particular animal here. This is not a situation that just happened once. And the fact that
31 this individual, Mr. Barwell, was given, shall we say, the opportunities, being the more
32 sophisticated, if you want to call it, as well as the superior being to make a decision to
33 stop. Unfortunately he didn't despite having people literally, physically even, trying to
34 get him to stop the abuse. It continued on.

35
36 I'm also suggesting, Your Honour, here while we hate -- and I'm speaking to my
37 superiors in my office -- we do not like using the word "torture" just using it at random,
38 but unfortunately it does fit the situation here. And I'm saying that because where else
39 would you have a situation where not only do you have abuse, physical abuse, of hitting
40 this animal needlessly so many times on the back end or the front end or right on the
41 neck of the dog -- which of course is a life area. When I say a "life area," we know the

1 vulnerable areas are the neck, and we have evidence from Mr. Scott of clearly him putting
2 his weight and force and stepping or doing some type of motion, physical motion, onto
3 that poor dog, Your Honour. Those are the things that need to be considered why
4 deterrence need to be a factor here.

5
6 But you don't just have the physical abuse here, you also have, as seen by the evidence of
7 Dr. Smith, the veterinarian, this animal suffered from lack of food and a lack of water.

8
9 Then we have the fact that there was the obvious injuries, including wounds with
10 maggots. That would also require deterrence and also showing the sign that he's not
11 getting the medical attention that he needed. Not to mention it was very clear he had
12 problems with his eyes and with his hearing.

13
14 I've given credit, Your Honour, that he may not have known about the internal issue --
15 although one can perhaps logically deduce, as the owner, a caregiver of the animal that he
16 should have known that if you're not feeding him properly, the animal properly, and not
17 giving proper water, that it's going to be vulnerable to other issues in respect to its health.

18
19 This animal, let's make no mistake, Your Honour, suffered. And certainly I'm not trying
20 to overstate this, Your Honour, but something needing to be done and something needs to
21 be said, and the sentence immediates to reflect deterrence and denunciation.

22
23 I would suggest to you that the case law here fairly in Edmonton and clearly as by the
24 Courts and as announced by here the legislation and the changes, require a period of
25 incarceration, and a sizable one, which I suggest -- there's no magic number, certainly,
26 Your Honour -- but 20 to 24 months would be reasonable in this case, especially in light
27 of the other cases which are not nearly comparable, but I present to this Court to what is
28 happening to the dog known as Kaden.

29
30 Those are my respectful submissions, Your Honour, and I would make those submissions
31 also in light of the prohibition should be a lifetime considering the absolutely horrific [sic]
32 and abhorrent behavior that has been suggested in the agreed statement of facts.

33
34 THE COURT: I need a few comments from you with respect
35 to the range of sentence you are suggesting. I have double checked the Information, and
36 the Crown has proceeded by indictment, which is the most serious form of procedure.

37
38 MR. LIM: Correct.

39
40 THE COURT: The defence has pled guilty and chosen
41 Provincial Court to have this matter heard, but the fact that you have proceeded by

1 indictment means that the maximum sentence is five years imprisonment, so I keep that in
2 mind.

3
4 I look at the cases, and you have given me the summary of a number of cases here. A
5 number of those cases have a 90-day sentence -- and as you are saying, they are less
6 serious, particularly, they are situations where there is one incident normally that has led
7 to the particular charge.

8
9 Now, in *Chalmers*, it was more serious because there were two cats involved, and the
10 skull was crushed on one of the cats, and the leg was broken on the other when it was
11 thrown against the wall, so we understand how much more aggravating those
12 circumstances are than the first ones that we were talking about. The sentence was nine
13 months there.

14
15 When I look at some of the other cases, *Rodgers*, out of the Ontario Court of Justice, it
16 was eight months less time served; in *Munroe*, it was 12 months; in *Connors*, it was five
17 months; and finally the case which you mentioned by our Deputy Chief Judge Lefever --

18
19 MR. LIM: *Chailer.*

20
21 THE COURT: -- *Chailer*, was one where there was 16
22 months, and that may have been lower because of the totality principle, because of the --

23
24 MR. LIM: Right.

25
26 THE COURT: -- breaking and enterings that were involved.
27 On the other hand, it is subject to appeal.

28
29 None of the cases that you have actually put before me get to the range that you have
30 suggested, namely, 20 to 24 months. So I am wondering how did you get to 20 or 24
31 months?

32
33 MR. LIM: It's no magical formula, certainly, Your
34 Honour, I would respectfully submit. *Chailer*, which I understand is being appealed, or
35 rather, the decision is up for appeal, was 16 month. The Crown felt -- and I'm looking at
36 the facts there -- it was certainly significantly worse than that one, and we sought there, I
37 believe, 18 to 24 months on that one here, so we have essentially upped it two months to
38 20 to 24 months in the range, Your Honour.

39
40 Noting that certainly here in Alberta, it's even noted by the Honourable Judge Lefever in
41 that, so even if it's appealed for decision, he's noting that the sentences have been going

1 up considerably, and especially after since the parliament has changed in 2008. And here
2 in Edmonton, he's noted -- I don't know if I can find it for you, but it's mentioned in the
3 *Chailler* decision, and even in *Chalmers* I think it's suggested too -- that the sentence
4 have been getting higher, Your Honour, and that's how I'm basing it upon here too.

5
6 I'm looking upon also what society, the moral blameworthiness of the situation here too,
7 based upon the period in time and such. That's how -- as I said, it's not a magic number
8 here, but certainly it should be a higher number than I would suggest the situation in
9 *Chailler*, and it's certainly far more significant and serious and violent than programs the
10 matter in *Chalmers*. *Chalmers*, unfortunately the situation was -- again, I'm not condoning
11 it -- where he was mad because the cats were both basically misbehaving. So I'm not
12 certainly suggesting that that makes it right, but it was a quick, you know, he acted out
13 here. Here we have over a period of time, and where he was even given a chance to stop
14 because other people intervened, family members and a member of the public, and yet he
15 still continued to do that. Whereas that one there a one time thing, and they realized it
16 was wrong, and he -- I believe he actually even paid for the medical care of those cats
17 right away. That's not the case here at all.

18
19 We think the punishment needs fit the crime, and we're suggesting -- again, it's not a
20 magic number -- but looking at the seriousness, it should be a large number, and the
21 numbers have certainly be going up here in Alberta because these are, with *Munroe*, some
22 of the older cases, in 2010, as you can tell, they're getting gaol time. We have not had a
23 situation where we have not gotten gaol, even though there were no injuries in some of
24 those cases to the animals. We've always gotten a period of incarceration. In fact, the
25 decision in, Judge Anderson's decision, which is the *Dudar* matter, I believe, that one
26 there, the Crown was originally agreeing to 15 days in gaol to match the first sentence in
27 *Cardinal* because there was no injuries, and the Court said no. Deterrence and
28 denunciation are factor, serious because the vulnerability of the animal -- not exact quote,
29 sorry, Your Honour -- and change the sentence to 90 days. That was a joint submission
30 for 15 days, and it went up to 90 days.

31
32 That's my explanation, Your Honour, with respect to the sizable sentence.

33
34 THE COURT:

Thank you. Does anyone need a break?

35
36 MR. KNISELY:

I'm not sure what to do at this point, Your
37 Honour. I have a trial starting at 1:30. I don't even have my file here for that matter. I
38 thought I would have a chance to go back to the office in order to do that. I'm going to
39 have to make arrangements, so perhaps a break would be appropriate here.

40
41 THE COURT:

Of course. If one of my colleagues is involved

1 in this other trial, I will be glad to speak to them about this.

2
3 MR. KNISELY: It's in Courtroom 355, so I don't know who
4 would be involved until it's assigned.

5
6 THE COURT: Okay. Well, I will speak to the assigning
7 Judge, then, about your difficulty. We will take an adjournment for, what, five minutes,
8 seven minutes?

9
10 MR. KNISELY: Sure.

11
12 THE COURT: I will be just out back.

13
14 (ADJOURNMENT)

15
16 **Submissions by Mr. Knisely (Sentence)**

17
18 MR. KNISELY: Thank you, Your Honour. I provided some
19 documents to Madam Clerk, and one of them is a letter from the employer of
20 Mr. Barwell. I'd ask that be marked as Exhibit S-6 on these proceedings.

21
22 MR. LIM: That's fine, Your Honour.

23
24 THE COURT: Yes. The letter from Roof-EX becomes Exhibit
25 6, S-6.

26
27 **EXHIBIT S-6 - Letter from Roof-EX**

28
29 MR. KNISELY: I've also provided Madam Clerk with a copy of
30 *R v. Proulx*, P-R-O-U-L-X, [2000] Supreme Court of Canada case, page 5, as well as a
31 decision of *R v. Piasentin* [2008] A.B.P.C. 164. I gave copies of all these documents to
32 my friend first thing this morning before Court began.

33
34 With respect to the letter of reference, only the first name is referred to in that letter,
35 "Chris." I phoned and contacted the owner and the author of this letter to confirm that he
36 was referring to Chris Barwell, and that is the case. He further went on to communicate
37 that Mr. Barwell is either the best or the second-best employee he's had over the
38 three-odd years that he has been running his business and dealing with a variety of
39 different employees, so he rates Mr. Barwell very high on the list reliability and
40 performance capabilities. In fact, he depends on him to a great extent. He is aware that
41 Mr. Barwell is facing criminal charges, and that's why he wrote the letter. I confirmed

1 that with him as well.
2

3 Now, Section 718.1 of the *Criminal Code* deals with the issue of proportionality.
4 Proportionality is the balancing of a couple of different factors. One is the gravity of the
5 offence, and the other is the moral blameworthiness of the offender in order to derive a fit
6 and appropriate disposition of any matter, including this one.
7

8 It's conceded that the offence that is before the Court is a serious matter. My learned
9 friend has described in great detail the effects of my client's actions, so there's no need to
10 go through that again. It's well recorded, and it's been well referred to, and I concede
11 that that is a serious offence that has been committed.
12

13 At the time that the offence was committed by Mr. Barwell, he was a mentally disordered
14 individual. He had been, not long before coming into possession of the dog, involved in a
15 motor vehicle accident. He was on painkillers. He was recovering with a broken arm and
16 other injuries. He was being prescribed medication for his depressive disorder, but the
17 medication was in flux, which is a difficult time for patients, because it's hard to measure
18 the correct dosage. He was also abusing drugs and alcohol. So during this period of time,
19 he was not the individual that I suggest is before the Court today.
20

21 He has come to grips with the mental disorder, and he's receiving proper medical
22 treatment for that, and his condition is far better and much more improved than 2011,
23 when this offence was committed. He has stopped taking substances of, abusing
24 substances for, he tells me, a long period of time, although he also admits that he has had
25 a relapse at one point. He is determined to stop abusing substances. He indicates to me
26 that if he is given the direction of this Court to abstain and seek counselling, that he
27 would do that. He feels that sometimes he needs stern direction, but he will respond.
28

29 The pre-sentence report indicates on balance that this individual is suitable candidate for
30 community supervision. The history with his family is well noted in the pre-sentence
31 report and in the FACS report. The pre-sentence report indicates that that situation has
32 actually improved considerably, although the plan for Mr. Barwell is to live with a friend
33 of his once all these matters have concluded one way or the other.
34

35 So I would suggest that on the basis of 718.1, although the offence is serious, the moral
36 blameworthiness of this offender is lower down in the scale, given the challenges that he
37 was dealing with and the health concerns that he had.
38

39 My friend has noted that we're learning to deal with cases of abuse of animals and how to
40 best sentence those offences. I submit we should be working as well on how to sentence
41 mentally disordered offenders with the same kind of interest.

1
2 Now, with respect to the risk of offending that is contained in paragraph 16 of the FACS
3 report, the analyst notes that many factors he, Mr. Barwell, is a low risk to be re-offend.
4 He becomes a high risk to re-offend when he is abusing alcohol or drugs. When he is not
5 abusing alcohol or drugs, he reverts to a low risk to re-offend, such that the direction of
6 the Court can lessen the risk to the community in the sentence that is imposed. The Court
7 can take an active role in this.

8
9 I would agree that the aggravating factors here are the very nature of the abuse, that it
10 was visited upon a vulnerable animal, that it was on more than one occasion, and to that,
11 I might add that it didn't stop until somebody actually intervened to make it stop is
12 similarly an aggravating factor.

13
14 Mitigating factors, however, is the youth of this young man. He would have been around
15 20 years or 19 years of age at the time. He has a modest record, most of this is
16 youth-related offences. He has one adult offence, as I understand it, which is a breach of
17 recognizance. He has pled guilty to the offence. And beyond that, he expressed in fair
18 detail his remorse for the harm that he caused the dog, the affront that he created for the
19 neighbours, and essentially for his actions in this particular matter. So I would suggest
20 that there is a guilty plea and there's genuine remorse expressed by this individual.
21 That's a mitigating factor.

22
23 The Court can look at the public stigma that has attached to this matter. It's well known.
24 He has received threats to his well-being as a result.

25
26 He's employed. He is receptive to counselling. And in every respect, Your Honour, he
27 has taken great steps to rehabilitate himself over the course of this file.

28
29 Now, a brief comment about the case law that my friend has cited. I would agree with
30 the Court that the cases provided by my friend and his submissions on sentence are
31 remotely connected. In other words, his submission for the appropriate sentence is grossly
32 excessive compared to the cases he has provided, with the one exception possibly being
33 the *Chailier* case. And in that case, we have the evidence that there were other crimes,
34 break and enter included; that the animal was harmed as a result of extortion, that he was
35 extorting something from his girlfriend, and in the result, he took this animal's life; and
36 the evidence that he had abused other animals in the past. So the facts are somewhat
37 more aggravated in that particular case, in my respectful submission.

38
39 And in all cases that have been referred to the Court, in almost all cases, we should bear
40 in mind the *R v. Arcand* decision of our Court of Appeal, in which memoranda of
41 judgement are not to be given weight in terms of precedent because of the fact that they

1 are summaries, they are Pharisees, they are not clearly annunciated principles of law.
2 What we have here is a number of summarized decisions -- which no doubt that it's
3 accurate what you're looking at; however, we don't know what else is involved in these
4 cases -- and so I would submit that the Court should bear that in mind.

5
6 The fact that there is only one case where a conditional sentence order obtained that is
7 before the Court, and that's *Piasentin*, may have something to do with the submissions
8 that counsel made or various other factors. It's not necessarily evidentiary of the fact that
9 a conditional sentence order is not an appropriate sentencing option here.

10
11 Now, I would caution about *Piasentin*. There is a lot of distinction in that case compared
12 to this case; for example, this is a summary conviction matter in *Piasentin*. It's not on all
13 on all fours, but a conditional sentence order does result, and that's a decision of Judge
14 Brown of the Provincial Court of Alberta based in Calgary.

15
16 Of more concern is the *Proulx* decision and the principles it provides with respect to
17 conditional sentence orders, and I'm going to go through about a dozen of these principles
18 and identify the paragraphs that the Court can locate them at in the course of the decision
19 that I've provided: (as read)

20
21 The conditional sentence order is punitive sanction capable of
22 achieving the objectives of denunciation and deterrence.

23
24 That's at paragraph 22, and this is what my friend is seeking here, a sentence of
25 denunciation and deterrence. A conditional sentence order can provide that.

26
27 (as read)

28
29 While a sentence -- a suspended sentence with probation is
30 primarily a rehabilitative tool, a conditional sentence is both
31 punitive and rehabilitative.

32
33 That's at paragraph 23.

34
35 (as read)

36
37 A conditional sentence may be as onerous as a gaol term where
38 the offender is forced to take responsibility for his actions and
39 make reparations to both the victim and the community all the
40 while living in the community under strict controls.

41

1 That's at paragraph 41.

2
3 (as read)

4
5 A conditional sentence order is not subject to parole
6 considerations.

7
8 Paragraph 42.

9
10 (as read)

11
12 Therefore the length of the sentence is the length of the sentence.

13
14 A conditional sentence, evenly with stringent conditions is usually
15 more lenient than a gaol term,

16
17 that's at paragraph 44,

18
19 but once it's determined that an offender eligible for conditional
20 sentence order --

21
22 In other words, the three prerequisites as they're often referred to: No minimum period of
23 imprisonment, suspended sentence where probation is not appropriate, and the sentence
24 that would be imposed is less than two years,

25
26 -- the Court must give serious consideration to a conditional
27 sentence order.

28
29 That's at paragraph 90.

30
31 (as read)

32
33 Once getting to that point, the conditional sentence must be
34 consistent with the fundamental purpose and principles of
35 sentencing found in Section 718, 718.2,

36
37 Paragraphs 46 through 47.

38
39 A conditional sentence is available to all offences in which the
40 statutory prerequisites apply,

41

1 Paragraph 79.

2
3 A conditional sentence can provide a significant amount of
4 denunciation --

5
6 that's at paragraph 102,

7
8 -- and while incarceration may provide more deterrence than a
9 conditional sentence, the Courts should not place too much weight
10 on deterrence because the empirical evidence supporting the notion
11 that gaol is more of a deterrent is uncertain.

12
13 And finally: (as read)

14
15 A conditional sentence can provide significant deterrence if
16 sufficiently punitive sanctions are imposed,

17
18 at paragraph 107.

19
20 So I would suggest that in this particular case, the only way a period of probation would
21 at all be appropriate is if it was containing a condition of 90 days incarceration, which we
22 would seek to have served on an intermittent basis. However, the cases do seem to
23 indicate that the 90-day sentence would appear to be a light one. I would say it's still in
24 the range of permissible sentences, but for a sentence of more than 90 days, somewhere
25 between that and a year, which would seem to comply with some cases that have been
26 provided to the Court, I would suggest a two-years-less-a-day conditional sentence order
27 would be more appropriate in this particular case.

28
29 Again, I refer to the fact that we're dealing with not only the gravity of the offence but
30 also the moral blameworthiness of the offender. And also the other requirements of
31 Section 718, that want the Court to look at gaol as a last resort, only when necessary.

32
33 Although Mr. Barwell has no present intention to acquire another pet, and certainly an
34 order of this Court would be forthcoming regardless of whatever sentence is imposed. I
35 would suggest a lifetime ban is quite excessive for a young man of 21 years of age who
36 has shown signs of rehabilitation.

37
38 THE COURT:

I noticed in *R v. Munroe*, it was 25 years. I

39 take it you're suggesting less than that?

40
41 MR. KNISELY:

Well, yes. I don't know what would be an

1 appropriate length of time, to be honest with you. I don't know where to look to find
2 that. It seems to be an impressionistic kind of response. But it would seem to me that
3 something that would permit this young man at some point in time, when he's more
4 mature and had the benefit of counselling and so forth that, you know, he might end up
5 with a partner who wants to have a pet. So the ban should bear in mind at some point in
6 time he may be suitable to look after one.

7

8 Those are my submissions, Your Honour.

9

10 THE COURT: All right. The last point, I just want to check
11 that there is no prehearing custody as a credit here.

12

13 MR. KNISELY: No, there's not.

14

15 THE COURT: All right. Thank you.

16

17 **Submissions by Mr. Lim (Sentence)**

18

19 MR. LIM: Your Honour, if I could just reply briefly to my
20 friend's comments.

21

22 First of all, the main, seem to be, thrust of the argument is that a conditional sentence is
23 to be considered. The Crown doesn't disagree that it meets the test of *Proulx* to consider
24 it. However, considering the specific, I believe, the decisions and *Chailier* and in more
25 importantly and probably in *Chalmers*, you can see that paramount -- and even the cases
26 of *Munroe*, *Rodgers*, and *Connors*, deterrence and denunciation have overridden that,
27 especially since the changes in legislation.

28

29 I note the decision in *Piasentin* and my friend is correct, it is a summary case. What is
30 significant, though, Your Honour, which unfortunately gives it little assistance to this
31 Court, it's pre-2008 legislation, because you'll note the offence date was in 2007, and this
32 is sentence in 2008, so unfortunately, it doesn't capture what parliament has intended and
33 put into the legislation since then and nor does it reflect what's been going on -- granted
34 not by beyond this Court, but nevertheless persuasive, I would suggest, that there are
35 Provincial Court decisions where the sentences are getting higher. Even with *Chailier*
36 being, seeking leave for an appeal, you still have the *Chalmers* decision that looks at a
37 CSO and said despite a guy with glowing record, who had problems ironically sounds like
38 similar mental health problems as the accused -- a lot of the these files on these here,
39 they're aboriginal issues or mental health issues -- they still were getting periods of
40 incarcerations. On those other ones where *Chalmers* got nine months, all those other
41 ones, but not three months and six months, certainly didn't -- had similar situations --

1 certainly had very similar situations of mental health issues or substance abuse and family
2 backgrounds and in many of those cases, like *Bull* and such, where there's a six month
3 sentence, and there was again at one time bottle hit over the head of a dog, that person
4 there still got six months actual incarceration, even though they also had *Gladue* or
5 aboriginal factors, which I do not believe are consideration here.

6
7 So really while the Court should always look at a CSO in these circumstances, looking at
8 the cases in that here and looking at the legislation intentions, this does not appear to be a
9 pretty clear of a situation where a CSO is appropriate. Really, the question is how much
10 over 12 months considering in *Chailier* which was the -- if can accept what the defence
11 counsel is arguing there, 12 months -- you can look at it it's really over, the question is
12 how much over 12 months is appropriate here in this particular case of actual
13 incarceration?

14
15 One of the things that also of a concern when you look at *Proulx* and look at the
16 pre-sentence report and FACS is, you know, does he have the environment also for him to
17 do well on a conditional sentence order? And as I said not only is it not in the realm -- I
18 think part of the problem is, as you may recall, there was some issues about him
19 complying with some Court orders and such, and that even the points of the forensic
20 assessment that he should not be, have permanent or temporary supervision of any
21 children or animals, shows that there is a concern to the public, Your Honour, that if he's
22 in the community, so -- and the also the other issue was about a home. Certainly he was
23 not to go to his home base. My friend says that he can stay at his friend. We have no
24 background at all about his friend, or like, the former residence he lived in his girlfriend,
25 who allowed him to stay there. We have no -- and then after they ended, of course he
26 went back home -- we have no information as to whether or not that's going to be a
27 positive environment for him, in respect to the substance abuse in particular, whether or
28 not it's a good environment for him on a conditional sentence order here.

29
30 I'm suggesting that we shouldn't be putting the public at risk on some kind of gamble
31 here, especially when it's clear that deterrence and denunciation has been paramount in
32 other decisions where the violence and the effect on the animal has not been as great or
33 severe and not over a period of time. I think that's what it needs to, when we talk about
34 fairness in sentencing and finding something that in proportionality here, we need to
35 remember those other decisions, still, Your Honour, such as *Chalmers* and them, where
36 they already received lengthy periods of incarceration, and this is clearly worse.

37
38 **Submissions by Mr. Knisely (Sentence)**

39
40 MR. KNISELY:

One final point, Your Honour. I would note --

41

1 THE COURT: Yes, please.

2
3 MR. KNISELY: -- in 2008 parliament changed the maximum
4 penalties. They did not exclude this section from consideration for a conditional sentence
5 order, like they have in so many other sections of the *Criminal Code*.

6
7 THE COURT: All right. Mr. Barwell, would you come
8 forward, please. This is your opportunity to make a statement. You do not have to do so,
9 but I have a duty to indicate to you that you have an opportunity to make a statement, so
10 this would be the time to make it if you wish to do so.

11
12 MR. KNISELY: We had this discussion before Court. He has
13 trouble communicating, expressing himself, and he asked me to make all his submissions
14 for him. I think I've done that.

15
16 THE COURT: All right. Thank you. Have a seat, please.

17
18 **Sentence**

19
20 THE COURT: This afternoon I am dealing with sentencing
21 with respect to the first count of an Information, and that count alleges that the accused
22 between the 24th day of July 2012, and the 11th day of August, 2012, both dates
23 inclusive, at or near Edmonton, Alberta, did willfully and without lawful excuse kill,
24 maim, wound, poison, or injure a dog that was kept for a lawful purpose, contrary to
25 Section 445(1)(a) of the *Criminal Code*. Of course, we know that he did not kill the dog,
26 but he did maim and wound it and injured the dog, and that is what I am dealing with this
27 afternoon.

28
29 The circumstances of the abuse of this dog are sickening, as set out in the agreed
30 statement of facts and the photos that have been marked as Exhibit S-2. The facts are set
31 out at length in the agreed statement of facts. I will not reread them into the record.
32 They form part of these reasons for judgement.

33
34 I must go over the aggravating and mitigating circumstances here. First on the mitigating
35 side, there is a guilty plea at a fairly early stage in these proceedings.

36
37 Second, there is quite a positive pre-sentence report. The FACS report is positive with
38 respect to some aspects of the accused's life, but it is guarded, as the psychiatrist noted
39 that there is a high risk of re-offending unless his addiction problem is successfully
40 addressed.

41

1 Third, and quite important here, are mental health issues. I am satisfied that, as
2 Mr. Knisely had mentioned, he was somewhat mentally disoriented and disordered at the
3 time of this offence. He was on painkillers for injuries he had suffered earlier.
4

5 Fourth, he had a good work record as is set out in Exhibit S-6. This is for a fairly short
6 period of time, but I am satisfied that the letter is correct that the defendant is a good
7 worker from the time of his employment.
8

9 Another important factor is the fifth one. The defendant was 19 years of age at the time
10 of this offence, which of course had many aspects, so he was quite youthful at the time.
11

12 Sixth, I accept his statement of remorse with respect to the circumstances of this offence.
13

14 There's reference to his abuse of alcohol. This is not an aggravating or a mitigating
15 circumstance. It does, however, affect the possible sentence.
16

17 The Crown has said that this is a case of torture for this animal, and I certainly
18 acknowledge that what would be consistent with the usual term of the term "torture." I
19 would prefer to use the word "cruelty" because "torture" has a very specific meaning in
20 the *Criminal Code*, and the section I am dealing with is, at least one that talks in terms of
21 some of its commentary as relating to cruelty, so I prefer to use that term.
22

23 The cruelty here involved a prolonged period of abuse of this dog. It was not an
24 impulsive act, but rather, a situation of ongoing abuse. The consequences of cruelty were
25 very severe, as we see from the terms of the agreed statement of facts and the photos that
26 were marked as Exhibit S-2. Indeed, as it was mentioned in the agreed statement of facts,
27 there was consideration to putting down the dog, but through kind support of members of
28 our community, the dog seems to have been making a reasonably good recovery.
29

30 The second aggravating circumstance here is that the accused has a conviction for an
31 assault with a weapon back in September of 2009, and he has also got a breach of a
32 recognizance that was in, at least was dealt with at a sentencing in December of 2012. I
33 note that a fine was imposed at the time, so that I am considering that it is at the less
34 serious end of the scale of things.
35

36 Third, there is no question that the accused was in a breach of trust in relation to his own
37 dog, which is a vulnerable animal.
38

39 There have been a number of comments about the willful infliction of unnecessary pain
40 and suffering on animals, and that's a fourth factor here. They have been made out in
41 argument, and so I will not repeat them since they are fairly obvious.

1
2 Fifth, the Crown has proceeded by indictment, so the maximum sentence here is not more
3 than five years.
4

5 The sixth aggravating factor is that our psychiatrist, Dr. Vandarmus Selar (phonetic)
6 indicated in the FACS report that he ought not to be going back with his family. I do
7 note that he is considering moving back with his family, and that causes me some
8 concern. At the same time, perhaps on the mitigating side -- which reduces the
9 importance of the home situation -- I do see family members here who are supportive, and
10 so I am bearing that in mind.
11

12 MR. LIM: Your Honour, there are no family members here
13 for the accused.
14

15 THE COURT: All right. I thought that the people at the back
16 of the courtroom here were family members.
17

18 MR. LIM: No.
19

20 THE COURT: Okay. Thanks very much for mentioning that,
21 so that is not a mitigating circumstance.
22

23 MR. KNISELY: Since it was raised I should indicate --
24

25 THE COURT: Yes.
26

27 MR. KNISELY: -- his family has to work today. That is why
28 they are not here. They couldn't be here because of work-related commitments.
29

30 THE COURT: All right. I am not going to draw any
31 inferences from the presence or absence of family members here. Clearly the accused
32 thinks that he has some support from his family. I am certainly bearing in mind that our
33 psychiatrist is of the view that he ought not to be living with his family, and I also note
34 the defence submission that he would be able to stay with a friend.
35

36 Finally, I am in distant agreement with Mr. Knisely that the moral blameworthiness of
37 this offence is not that high. I would consider that moral blameworthiness to be high. I
38 do realize, however, as I mentioned earlier, that he had some injuries and was on
39 medication at the time and had some mental health issues, so these will all detract, to
40 some extent, from what is otherwise very serious moral blameworthiness.
41

1 I have commented during argument on the cases which for the most part involved
2 sentences in the lower end of the range when it related to a single instance of maltreating
3 an animal. There are some decisions which approach the sentence that's proposed by the
4 Crown, and that is by our Deputy Chief Judge Lefever in the *Chailier* case. I note as he
5 has fairly admitted that is subject to an appeal, so I have to be aware of that.

6
7 When I considered the situation as a result of the submissions by the Crown, it seemed to
8 me that the appropriate sentence would be 17 months. However, Mr. Knisely has quite
9 properly outlined some mitigating circumstances here that were not as clear from the
10 material in the pre-sentence report and the FACS assessment.

11
12 Accordingly, I am of the view that in all of these circumstances, considering the cases and
13 the strong aggravating circumstances which must be balanced against the strong mitigating
14 circumstances that an appropriate sentence would be 14 months of imprisonment here.

15
16 Now, Mr. Knisely is quite correct that a conditional sentence order is not precluded by the
17 authorities that I must consider, namely, first, the fact that there is no minimum sentence;
18 and second, that the appropriate sentence here is certainly less than two years. Really I
19 have to consider what the Supreme Court of Canada had to say in *R v. Proulx*. The third
20 was the safety of the community and the question of whether or not it would be
21 endangered by the offender serving the sentence in the community. Finally, any
22 conditional sentence would still have to be consistent with the fundamental principles of
23 sentencing set out in Section 718 of our *Criminal Code*.

24
25 I must tell you that in my view, a conditional sentence would not be appropriate in the
26 circumstances of this case. I say that for several reasons. While there are some strong
27 mitigating circumstances here, our FACS report indicates that Mr. Barwell is at a high
28 risk of re-offending, and that it is important to put that in the words that were used. On
29 page 18 of the report, our doctor says, and I quote: (as read)

30
31 It is the writer's opinion that his risk of re-offence remains high at
32 the present time, and that he will require significant levels of
33 support to manage this level of risk in the community.

34
35 Our Supreme Court of Canada went on to discuss two factors that related to the safety of
36 the community. First, the risk of the offender re-offending, and I've quoted from our
37 psychiatrist on that point. I am also aware, as Mr. Knisely has mentioned, that if the
38 accused gets his addiction issues under control that he will be lowered in terms of his
39 risk.

40
41 However, I am not satisfied that he has addressed those addiction issues successfully,

1 because he has relapsed as indicated in the FACS assessment. At the same time, I think
2 there is hope that he will be able to come to grips with his addictions problems and that
3 he has been making some efforts to do so which I keep in mind.
4

5 The second factor here is his record, which includes an assault with a weapon -- which
6 was, as I admit, in youth Court back in 2009.
7

8 The third is a small factor, namely, that he was sentenced for a breach of recognizance in
9 December of 2012. That raises some concerns about his compliance with the terms of a
10 conditional sentence order.
11

12 Finally, I have to look at the gravity of the damage which would ensue in the event of a
13 re-offence. Given his propensity to violence shown in the past, together with the
14 circumstances of this offence, in my view, the gravity of the damage he could cause if he
15 is in a circumstance where he can re-offend is quite serious.
16

17 For those reasons, I do not think that a conditional sentence order is appropriate.
18

19 You will stand, Mr. Barwell. I sentence you to 14 months of imprisonment from today.
20 In addition, I am imposing a two-year probation order from the date of your release, and I
21 am going to ask counsel to address the terms of that order, but I am certainly looking at
22 the provisions that were set out by our psychiatrist in the report, and those are on pages
23 18 and 19. It may be that one or another of those circumstances is not appropriate, but I
24 would like counsel to spend a few minutes taking a look at those terms.
25

26 I am going to make an order prohibiting the accused from owning any animal under
27 Section 447.1 of the *Criminal Code*, and this ban will be for a period of 15 years.
28

29 There will be no financial compensation order under Section 447 of the *Criminal Code*.
30 None was requested.
31

32 I will waive the victim surcharge in view of his circumstances of being incarcerated.
33

34 Is there anything what I have not covered?
35

36 MR. LIM:

37 Your Honour, in respect to the prohibition
38 order, I can tell you that this jurisdiction does not have any documents made up as of
39 yet. I actually prepared one yesterday because we had a file, but I just made it up, so I
40 believe there's a copy downstairs on the traffic side that might assist the Court. Because
41 this is like a driving prohibition. We need someone to make sure that he acknowledge it.
I am therefore asking on the record that you read out the prohibition to get him to

1 acknowledge it on the record today, and then hopefully they'll be able to locate the actual
2 prohibition wording. So I've prepared a document for this -- for the Courts to use --

3
4 THE COURT: Have you shown it to your friend?

5
6 MR. LIM: I don't have it here right now. We were
7 working on it last night.

8
9 THE COURT: Okay. I do not mind reading it out, but I have
10 directed that there be this prohibition, and unless there is some terms that are uncertain. . .

11
12 MR. LIM: I just need the accused to admit that he is
13 aware that for 15 years, that the accused shall not own or possess or control any pet for
14 the 15-year prohibition. That's what I need him to admit on the record, Sir.

15
16 THE COURT: Do you admit that, Mr. Barwell.

17
18 THE ACCUSED: Yes, Your Honour.

19
20 THE COURT: All right. I do not think I have to read it out.

21
22 MR. LIM: Thank you. No. To assist the Court, though,
23 and to Madam Clerk, there is a document that the Traffic Court side will have that will
24 assist. It's an actual document which the accused can sign, and it gives him a copy of the
25 actual prohibition, like a driving prohibition --

26
27 THE COURT: All right.

28
29 MR. LIM: -- so that he actually has it.

30
31 THE COURT: I will direct that he sign that order forthwith,
32 which may be in the next couple of days, depending on when --

33
34 MR. LIM: Certainly, Sir.

35
36 THE COURT: -- that is made available to him.

37
38 MR. KNISELY: With respect to conditions the Court has
39 referred to only page 18, I would suggest that Condition Number 2 is unnecessary, in light
40 of the prohibition of owning any pets. Number 3 is simply inappropriate, and I would ask
41 that those two be excluded from any probation order.

1
2 The other conditions seem to be appropriate and the usual kind of conditions that you
3 would find in a case like this.
4

5 THE COURT: All right. I am directing that the probation
6 order have the usual mandatory conditions and also the terms that are set out in
7 paragraphs 1, 4, 5, 6, 7, and 8 of the FACS report, which is Exhibit S-4.
8

9 MR. LIM: Would the Court consider, as we are trying to
10 make this rehabilitative, to assist Mr. Barwell into being a legal and productive individual
11 in society, consider an abstaining clause and testing clause with respect to alcohol and
12 non-prescribed drugs, and perhaps which is often done for something that is rehabilitative
13 in assessing treatment, specifically the clauses in anger management obviously and
14 substance abuse, which is sort of covered in some of those that you've mentioned, but that
15 he would have to then have to, you know, provide such, or waive such information to
16 allow for such assessment treatment and then provide evidence of completing such
17 treatment and programs if required to do so. So some of them are covered in those terms,
18 but just for clarification, when you look at the standard forms, Number 12, you'll see that
19 there is psychiatric and psychological, which is very helpful, according to probations
20 office, to allow to get a full picture of the accused. In this case here, clearly substance
21 abuse has been mentioned in both the pre-sentence report and the forensic assessment, so
22 that should obviously be looked at.
23

24 I am suggesting what the Court -- what's in the both reports and what's been even said by
25 my friend, is that an abstaining clause seems to be extremely helpful to keep this man
26 law-abiding and to live a, shall we say, a productive and positive lifestyle.
27

28 So I am suggesting the testing clause and the abstaining clause will be very relevant and,
29 not so much on a punitive nature, but assisting him be the best that he can be, so to
30 speak.
31

32 THE COURT: I am going to include the take whatever
33 assessment, counselling, and treatment is directed, including alcohol or drug abuse, and
34 you will provide a report to your probation officer, if requested, in writing that you have
35 actually completed that report. Do you understand that? All right.
36

37 You will sign a waiver of information to your probation officer to allow that information
38 to be collected.
39

40 Now, what about the term of abstinence?
41

- 1 MR. KNISELY: It's one of the conditions that's in the report.
2 The psychiatrist refers to that in condition --
3
- 4 MR. LIM: Yes. It is --
5
- 6 MR. KNISELY: So if the probation order incorporates these
7 conditions, then it will be in there.
8
- 9 THE COURT: I am just looking for that.
10
- 11 MR. KNISELY: It's in paragraph 5 --
12
- 13 THE COURT: 5?
14
- 15 MR. KNISELY: Yes.
16
- 17 THE COURT: Right. Okay, so I am going to leave that in.
18 Anything else we have not dealt with?
19
- 20 MR. LIM: No, Your Honour.
21
- 22 THE COURT CLERK: Counts 2 and 3.
23
- 24 MR. LIM: They're to be withdrawn.
25
- 26 Your Honour, I know there are various media members here, too, just for administrative, I
27 have no comments in respect to any of the exhibits being released. I'll leave it up to my
28 friend. I'll just make that comment. I just have noticed there seems to be quite a few
29 media members here. Those are exhibits before the Court.
30
- 31 THE COURT: Any comment by the defence with respect to
32 the exhibits before the Court?
33
- 34 MR. KNISELY: Yes, they are public documents.
35
- 36 THE COURT: I agree. They will be made available to the
37 press upon request by Madam Clerk. Finally for the members of the community who
38 have been here and have shown an interest in this matter, thank you very much for your
39 attendance and your support for the unfortunate dog in this situation. Thank you.
40
- 41 Okay, Madam Clerk, I am returning the agreed statement of facts, and I think that is the

1 last one.
2
3 THE COURT CLERK: The conditional (INDISCERNIBLE) probation
4 order (INDISCERNIBLE).
5
6 THE COURT: Yes, I have. I will just sign it approving the
7 terms of that order --
8
9 THE COURT CLERK: Thank you, Sir.
10
11 THE COURT: -- which including reference to the terms of the
12 FACS assessment.
13
14 MR. LIM: If it assists, Madam Clerk, I believe the lady's
15 name is Aileen from the traffic side -- I forget her last name -- and she will have a copy
16 on her computer of an order which will probably simplify things for this --
17
18 THE COURT CLERK: Thank you.
19
20 MR. LIM: For you. I'm sorry I don't have it. We just
21 drafted it literally last night.
22
23 THE COURT CLERK: Okay.
24
25 MR. LIM: Thank you.
26
27 THE COURT CLERK: And (INDISCERNIBLE).
28
29 THE COURT: All right. I will go back and see I am signing
30 anything else. You may receive something further too.
31

33 PROCEEDINGS CONCLUDED

34
35
36
37
38
39
40
41

1 **Certificate of Record**

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I, Lily Marion, certify that this recording is the record made of the evidence in the proceedings in the Provincial Court, held in Courtroom 359, at Edmonton, Alberta, on the 24th day of October, 2013, and that I, Lily Marion and Jennifer Lavasseur were the Court Officials in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

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I, J. Aube, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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ToC Pages:	1
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