
CANADA / JUDGMENT

R. v. Jones

2017 BCSC 2349

COURT

Supreme Court of British Columbia

DECIDED

10 November 2017

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2017 BCSC 2349 R. v. Jones

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Jones,

2017 BCSC 2349

Date: 20171110

Docket: 26907

Registry: Vancouver

Regina

v.

Timmie Joel Jones

Restriction on Publication: Pursuant to s. 486.4(2) of the Criminal Code, R.S.C. 1985, c. C-46.

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Sentence for the

Dangerous Offender Application

Counsel for the Crown:

Trevor J. Cockfield

Counsel for the Accused:

Joseph J. Saulnier

Place and Dates of Hearing:

Vancouver, B.C.

October 23-27 and 30, 2017

Place and Date of Judgment:

Vancouver, B.C.

November 10, 2017

Introduction

- [1] The Crown submits that Mr. Jones is a dangerous offender as a pedophile. Mr. Jones does not dispute that. If I accept the Crown's submission, and find Mr. Jones to be a dangerous offender, the central issue will be whether he should receive an indeterminate sentence or instead, as the defence requests, a determinate sentence with a long-term supervision order.

Background

- [2] On October 24, 2016, Mr. Jones pleaded guilty, and was convicted, of the following "serious personal injury offence", as that term is defined in s. 752 of the Criminal Code of Canada, R.S.C. 1985, c. C-46 (the "Code"):

At or near Sechelt, in the Province of British Columbia, between the 1st day of April 2013 and the 12th day of January, 2015, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of [G.], a person under the age of sixteen years, contrary to Section 151 of the Criminal Code.

- [3] That conviction is what is termed the index offence for the purposes of these reasons.

- [4] Mr. Jones has a history of similar offences.

- [5] On December 16, 2016, I granted the Crown's unopposed application for an order that Mr. Jones be assessed pursuant to s. 752.1 of the Criminal Code to assist in determining whether he ought to be found a dangerous offender under s. 753 of the Code, or a long-term offender under s. 753.1. Pursuant to that order, the Crown filed in this hearing a dangerous offender assessment by Dr. Patrick Bartel, a psychologist. His report is dated March 2, 2017.

The Position of the Crown

- [6] As seen above, the Crown's position is that Mr. Jones be found a dangerous offender and receive an indeterminate sentence. The Crown asks in the alternative that, as a dangerous offender, he receive a determinate sentence of seven to nine years with long-term supervision for 10 years. The Crown also seeks ancillary orders which the defence does not oppose. I will address those orders toward the end of these reasons.

The Position of the Defence

- [7] As I noted earlier, Mr. Jones is not opposing a finding that he is a dangerous offender. Accepting that designation, he submits that he should receive a determinate sentence of six to seven years, followed by a long-term supervision order of 10 years.

The Criminal Code provisions and related case authority concerning the dangerous offender designation and the sentencing options

- [8] The criteria for finding someone to be a dangerous offender are found in s. 753(1) of the Code:

753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
 - (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
 - (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
 - (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

- [9] The Crown relies on s. 753(1)(a)(i) and (ii). Regarding paragraph (a)(i), the Crown submits there is a likelihood of Mr. Jones causing injury or inflicting severe psychological damage. That likelihood is to be distinguished from only a substantial risk of Mr. Jones re-offending, which would be required for concluding he was a long-term offender under s. 753.1 of the Code.
- [10] To introduce the case for the Crown, Mr. Cockfield observed that the protection of the public is the primary purpose underlying dangerous offender orders, citing *R. v. Johnson*, 2003 SCC 46 at para. 19. However, the dangerous offender provisions in the Code do not eliminate the application of the general sentencing regime found in ss. 718 to 718.2 of the Code. Instead, the dangerous offender provisions form a part of the sentencing regime overall: see *Johnson* at para. 21, and *R. v. Boutilier*, 2016 BCCA 235 at para. 55.
- [11] Subsections (4) and (4.1) of s. 753 provide that:

Sentence for dangerous offender

- (4) If the court finds an offender to be a dangerous offender, it shall
- (a) impose a sentence of detention in a penitentiary for an indeterminate period;
 - (b) impose a sentence for the offence for which the offender has been convicted -- which must be a minimum punishment of imprisonment for a term of two years -- and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
 - (c) impose a sentence for the offence for which the offender has been convicted.

Sentence of indeterminate detention

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

- [12] It follows that if a court finds someone to be a dangerous offender, an indeterminate sentence must follow, unless the court is satisfied there is a reasonable expectation that a lesser sentence will adequately protect the public. The Crown does not bear a burden of proof on that point. Instead, the court is to ask itself whether there is a reasonable expectation that a lesser sentence will be adequate: see *R. v. Wormell*, 2005 BCCA 328 at para. 30-35. (The absence of a burden of proof on the Crown is unaffected by the amendment to "reasonable expectation" from "reasonable possibility" in the legislation. The latter phrase was in the legislation when it was being considered in *Wormell*.)

- [13] The amendment to "reasonable expectation", however, does impose a higher standard. An expectation is a belief that something will happen, rather than merely the possibility that it will: see *R. v. D.J.S.*, 2015 BCCA 111 at para. 30. So for Mr. Jones to succeed under subsection (4.1), I need to believe that something less than an indeterminate sentence will adequately protect the public against Mr. Jones re-offending. See also *R. v. Tom*, 2017 BCSC 452 at para. 262, adopting what Fitch J., as he then was, said in an earlier case.
- [14] In his helpful analysis, Mr. Cockfield for the Crown took me through the elements needed for a dangerous offender finding under s. 752 and s. 753.
- [15] First, Mr. Jones, under the index offence, was convicted of a "serious personal injury offence" within the meaning of s. 752 of the Code: see *R. v. Webster*, 2011 ONSC 2502 at para. 20; *R. v. Evans*, [2008] O.J. No. 3649 (Ont.S.C.) at para. 106; *R. v. T.J.W.*, 2014 ONSC 5543; and *R. v. T.L.P.*, 2017 BCSC 1868 at para. 51 and following.
- [16] In support of the submission that Mr. Jones constitutes a threat to the safety or physical or mental well-being of other persons, the Crown relied upon *R. v. Walsh*, 2017 BCCA 195 at para. 44 and *R. v. Dow*, 1999 BCCA 177 at paras. 24 and 25.
- [17] Focusing on s. 753(1)(a)(i), and the requirement for a likelihood of causing injury to other persons or inflicting severe psychological damage on other persons through failure to restrain his or her behaviour, Mr. Cockfield relied upon *R. v. Stuckless*, [1998] O.J. No. 3177 (C.A.) at pp. 13-14; *R. v. T.J.W.*, 2014 ONSC 5543 at para. 142; and *R. v. C.G.D.*, 2009 BCSC 404 at para. 51. In its alternative submission, that Mr. Jones is a dangerous offender based on subsection (1)(a)(ii), and the requirement there for showing persistent aggressive behaviour, the Crown cited *R. v. Tom*, 2017 BCSC 452 at para. 238.
- [18] From his submissions addressing the law and the related evidence, Mr. Cockfield has satisfied me beyond a reasonable doubt that Mr. Jones is a dangerous offender under s. 753(1)(a)(i) and (ii). If, as between the Crown and the defence, Mr. Jones's status as a dangerous offender was in issue, I would at this stage set out my analysis of the case law cited above and the related evidence. However, given the position of the defence in not contesting the dangerous offender designation, and given my own conclusion expressed above, that Mr. Jones is a dangerous offender, I will postpone until later in these reasons the examination of that evidence, which is relevant not only to the dangerous offender finding, but also to the issue of whether Mr. Jones should receive an indeterminate sentence.

Mr. Jones's Past Offences

- [19] Mr. Jones is now 58. He was born in Bracebridge, Ontario, and grew up in nearby Gravenhurst, Ontario, a rural area in the Muskoka Region.

- [20] From 1978 to 1982, he committed offences which are not centrally important in this hearing. In 1978, he was convicted for driving with more than 80 milligrams of alcohol in his blood, and for public mischief. In 1979, he was convicted of possessing narcotics, and for theft under \$200. In 1982, he was convicted for possessing a prohibited weapon, and for possessing a narcotic.
- [21] Mr. Jones's crimes, which are directly relevant in this hearing, began in 1984 when he was 25. In that year, he was convicted in Bracebridge for two counts of sexual assault. The victims were his eight-year-old niece and his 10-year-old nephew. In relation to those offences, the admissions of fact before me say only that for a period of one month, Jones fondled and performed oral sex with his victims. He was sentenced to six months on each charge concurrently, with probation for three years.
- [22] Sometime after he was released from prison for the convictions in 1984, Mr. Jones contacted the father of the niece and nephew he had sexually assaulted in 1984. The father was in a new relationship and by then had two stepdaughters. In 1987, Mr. Jones was convicted, in St. Catherine's, Ontario, of sexual assault against the two stepdaughters. The admissions of fact say that Mr. Jones was convicted of one offence, but that there were two victims. The two girls were eight and 14. Mr. Jones fondled the eight-year-old's vagina. While watching a movie with the 14-year-old, he put his hand down her pants and fondled and digitally penetrated her vagina. He was sentenced to a prison term of 18 months.
- [23] In 1989, Mr. Jones was convicted in Hamilton, Ontario, on two counts of sexual assault. He sexually assaulted the nine-year-old daughter of a friend. For the first of those two sexual assault convictions, Mr. Jones was sentenced to two years less a day, and probation for two years. For the second conviction, he was sentenced to two years less a day concurrently.
- [24] More is known about the facts giving rise to a conviction in 2001, for sexual interference, and about the facts resulting in the index offence and the related conviction in 2016.
- [25] The conviction in 2001 for sexual interference was in Surrey, British Columbia. Jones was living there in a basement suite with his then wife. The victim, a five-year-old girl, lived and played with other children in the neighbourhood. Jones befriended her. In time, she went to the suite. She did that for some months. Mr. Jones' wife was not present. Mr. Jones tickled the girl and massaged her. The admissions of fact before me say that the victim, while alone in the suite, I presume with Mr. Jones present, touched herself sexually, that . Mr. Jones asked her if she wanted him to do that, and that he masturbated her and had her masturbate herself. One time, he performed oral sex on her. In his reasons for sentence pronounced in Surrey, B.C., on September 27, 2001, the judge said in the course of his reasons:
- [Mr. Jones] has sexually assaulted and abused a number of children, male and female, aged between five and fourteen. The accused was diagnosed many years ago as a pedophile and that diagnosis is confirmed today in the reports before the Court.

- [26] The reports the judge was referring to included one by Dr. Karen Whittemore dated July 25, 2001. Dr. Whittemore also testified in this hearing, and I will address her evidence later in these reasons. The judge in 2001 sentenced Mr. Jones to five years in prison for sexual interference and prohibited Jones from attending a public park or public swimming area where children under 14 attend, and from attending a daycare centre, school playground, or community centre. He was also prohibited from having employment or volunteering in a position of trust or authority for children under 14. Mr. Jones served all of the five-year sentence. After his release in 2006, there is no evidence of him re-offending before the events giving rise to the index offence occurred.
- [27] The admitted facts giving rise to the conviction in 2016 for the index offence of touching for a sexual purpose include the following:
- 1) G., the victim, was born on February 28, 2007. She is now 10.
 - 2) B. is G.'s father. D. is B.'s sister and G.'s aunt. S. is D.'s daughter, and is now 16.
 - 3) D., G.'s aunt, and Mr. Jones have known each other for approximately nine years. They have been roommates but have never been in a romantic relationship.
 - 4) From April to June 2013, Mr. Jones, D., and her daughter S., lived in the upstairs suite of a residence in Sechelt, B.C. B. and his daughter G. lived in the downstairs suite.
 - 5) In June of 2013, B. and G. moved next door.
 - 6) In December of 2013, Mr. Jones, D., and her daughter S. moved to another residence in Sechelt.
 - 7) That residence is a three-level house. D. and S. resided in the two upper floors and Mr. Jones resided in the basement. The house was shared but Mr. Jones had a living room and bed in one large room in the basement on his own.
 - 8) Over time, Mr. Jones engaged in tickling and play fighting with S. and G., and other children who visited his residence.
 - 9) At some point, G. told her father she did not want to continue to go to Mr. Jones's residence for visits.
 - 10) During the tickling and play fighting, Mr. Jones touched G.'s vagina and bottom. The touching occurred between three and 12 times. On at least one of those occasions, Mr. Jones touched G.'s vagina under her clothing, but otherwise the touching occurred over the clothing.

Dr. Whittemore

- [28] I referred above to Dr. Karen Whittemore, who testified at Mr. Jones's 2001 sentencing hearing, and testified again before me. She was qualified in this hearing as a witness able to give her opinion as a clinical psychologist with specialization in forensic psychology. More

particularly, she was qualified to give opinion evidence on the testing, diagnosis and treatment of psychological conditions, and concerning the risk factors and risk levels for convicted offenders. Dr. Whittemore was not asked in this hearing to update her opinion as contained in her report to the Provincial Court judge in 2001. Instead, she was asked only to address her 2001 report.

- [29] Dr. Whittemore interviewed Mr. Jones for three hours on July 17, 2001, and for one hour on July 18, 2001. She also considered the results of psychological testing on Mr. Jones conducted on July 18, 2001. In addition, she reviewed Mr. Jones's by-then voluminous file. Mr. Jones was 42 in 2001.
- [30] Mr. Jones told Dr. Whittemore of his long history of sexually abusing children. He described numerous incidents of sexual assault in addition to, and similar to, those for which he had been convicted. These incidents began when Jones himself was only six or eight. They continued intermittently through his childhood and teens. The following passage is from Dr. Whittemore's report after her review of Mr. Jones's sexual history:

A consideration of the above factors suggests that Mr. Jones presents a high risk for future sexual violence. However, his risk is related to those factors discussed above. If he is able to gain insight into his offending and his own risk factors, gain some emotional understanding of the impact on his victims, accept responsibility for his offending, abstain from the use of alcohol, and cooperate with supervision his risk will be reduced. To the degree that he is unable to achieve this level of functioning his risk will be increased. Given the severity of the difficulties he is experiencing, his minimization and entrenched attitudes and beliefs, and his past failed treatment attempts, his prognosis in treatment remains guarded.

- [31] That passage was not challenged in the cross-examination of Dr. Whittemore before me, but I stress that the passage quoted was her view as of 2001, not 2017. She has not spoken with Mr. Jones since 2001.
- [32] With respect to Mr. Jones's age, Dr. Whittemore in cross-examination acknowledged that there is normally a diminishing risk of re-offending for sexual offences with the offender's increasing age. She said that diminishment typically begins when a male offender is in his 50s, and has generally gone markedly down by the time he is in his 70s.

Mr. Jones's Time in Custody, 2001-2006

- [33] Mr. Jones was detained for his full five-year determinate sentence following his conviction in 2001. A Vancouver parole office supervisor, Mr. Ramtin Sadafi, testified that a prisoner serving a determinate sentence can apply for parole after serving one-third of the sentence, and that so-called mandatory statutory release is to occur after two-thirds of the sentence has been served. He said that only 1% of prisoners are detained for the full term of their sentence, to what is called the warrant expiry date.

- [34] Mr. Cockfield for the Crown reviewed with the Court the records of Mr. Jones for his time in custody from September 2001 to September 2006, and they show the following.
- [35] In late 2001, he began attending the intensive sex offender program. His attendance continued into early 2002. The objectives of the program were to have him develop skills for recognizing deviant patterns of behaviour, foster understanding of deviant behaviour, accept responsibility for sexual offending, request treatment, demonstrate motivation for changing, and commit to a full-time treatment program.
- [36] I was shown the parole board's reasons for keeping Mr. Jones in prison in 2004. The board concluded that if he was released at that time, he would be likely to commit a sexual offence involving a child before the expiration of the sentence he was then serving. The board noted that Mr. Jones was refusing to participate in his correctional treatment and that he had been suspended from the National Sex Offender Maintenance Program. He continued at that time to minimize his offending, and to blame others for his criminal actions. Psychological information in his file supported the conclusion that he posed a high risk for recidivism. He had recently refused to attend an interview with a psychologist in order to complete an updated assessment of his risk. He was found to have made few gains and it was found that his risk was likely unmanageable through a conditional release at that time.
- [37] I was then directed to a correctional plan progress report dated April 26, 2006. Mr. Jones was judged at that time to have what was called low reintegration potential and low motivation. The 2006 report said in part:

It is the opinion of the present author that, Mr. Jones, despite participating in correctional treatment programs, has made little progress toward mitigating his dynamic [i.e., changeable] risks to reoffend. Both his static [i.e., historical] and dynamic risks to reoffend are rated high and he is a diagnosed pedophile. His psychological and program reports indicate he minimizes his sexual offences, externally focuses blame for his sexual offences, and exaggerates his ability to control his sexually-deviant thoughts and behaviours. He also has a strong sense of entitlement. Since receiving his detention order, he has refused to participate in any further correctional treatment. This refusal to address his contributing factors, after being denied statutory release, suggests his participation in programs may have been motivated by his desire to be released to the community, rather than a desire to change his behaviour. The CMT [those monitoring Mr. Jones] believe Mr. Jones continues to present a significant risk to public safety and therefore cannot recommend lifting his detention order. There are also victim concerns in this case.

Dr. Patrick Bartel

- [38] Dr. Bartel presented his dangerous offender assessment in his report dated March 2, 2017.

[39] Dr. Bartel was qualified to testify in the fields of clinical and forensic psychology and, more particularly, to give his opinions about the testing, diagnosis, and treatment of psychological conditions, and the risk factors and risk levels for convicted offenders. He interviewed Mr. Jones for two and a half hours on February 8, 2017. He had first reviewed the voluminous records which by then had been compiled recording Mr. Jones's convictions, incarcerations, and treatments.

[40] The Bartel report is 27 pages. I include below what I believe are some of its key findings. After that, I will address the Bartel evidence as it was canvassed in the cross-examination by Mr. Saulnier for Mr. Jones.

[41] Dr. Bartel summarized what Mr. Jones described as his modus operandi:

He states that his modus operandi typically involved meeting and befriending children, playing with them, talking them into going somewhere secluded and then talking them into the sexual abuse . . . He states that his victims were both male and female children. He states that with some of the victims the abuse occurred only once and would stop if the child[ren] didn't want to continue or do it any more. He states that with some children, the abuse occurred regularly for periods of years.

[42] That description does in fact apply to most of Mr. Jones's pedophilic assaults over the years. He always befriended the children sometime before the sexual assaults began. The children were usually children of Mr. Jones's friends or relatives.

[43] Under the heading of "Diagnostic conclusions", Dr. Bartel wrote in part:

Diagnostically, Mr. Jones meets the criteria for a pedophilic paraphilia which describes a pattern of recurrent intense, sexually arousing fantasies, sexual urges or behaviours involving sexual activity with prepubescent children (generally age 13 years or younger). Furthermore, Mr. Jones's pedophilic interest involves both male and female children ranging in age from pre-school years through to early adolescence. Also of note, Mr. Jones's sexual interest is somewhat of a Nonexclusive Type in that he also has some level of sexual interest . . . towards female adults. By his reporting, however, pedophilic interest is clearly his primary sexual orientation.

With regard to personality, there is no evidence of personality disorder, including antisocial personality disorder (i.e., personality features most commonly associated with criminality and recidivism). He has some history of non-sex offence criminality as a youth and young adult. More recently, however, he has led a largely prosocial lifestyle characterized by gainful employment and an absence of criminality and irresponsibility (the index and previous offences being an exception).

[44] To assess the risk Mr. Jones poses, two of the testing methods Dr. Bartel employed are called the Static-2002R and the Risk for Sexual Violence Protocol or RSVP. He found both of those tests to have application, but he gave considerably greater weight to the RSVP test.

[45] To quote from his report:

The Static-2002R is a 14-item scale that was designed to assess the long-term potential for sexual recidivism among adult male . . . offenders. It follows an actuarial model that attaches specific statistical weighting to different variables in order to maximize prediction of future sexual offending. Research has shown that the Static-2002R has good predictive validity for predicting sexual recidivism and moderate predictive validity to predict general violence or criminality. ... Assuming that if Mr. Jones were to be released into the community his risk rating for sexual offending would be in the Moderate to High category as set forth by Static-2002R criteria. According to data made available, 31.2% of individuals with a sex[ual] offence conviction who had the same score as Mr. Jones went on to reoffend sexually within a five-year period.

- [46] Dr. Bartel explained that the 31.2% is not measuring the likelihood of Mr. Jones himself re-offending. Instead, it is intended to mean that 31.2% of such individuals reoffend and 68.8% do not.
- [47] Dr. Bartel opined that while it has predictive potential, the Static-2002R test is limited as a clinical tool for a number of reasons which he listed. When he described it as an actuarial model, he meant that it measures only static or historical factors which he considered "make it an overly limited tool and methodology."
- [48] Dr. Bartel relied more on the Risk for Sexual Violence Protocol or RSVP test for determining Mr. Jones's risk for sexually re-offending. The following risk factors in the RSVP test, as applied to Mr. Jones, were found to be present: chronicity of sexual violence (the persistence and frequency of sexual violence being a factor associated with recidivism); diversity of sexual violence, which refers to both the nature of the sexual violence and the range of victim selection; psychological coercion in sexual violence; having attitudes that condone sexual violence; problems with stress or coping; problems resulting from his own childhood abuse; sexual deviance; problems with intimate relationships; problems with non-intimate relationships; problems with treatment; and problems with supervision.
- [49] Dr. Bartel concluded his risk assessment as follows:

Based on my review of the various risk factors, I believe that Mr. Jones is at high risk for future sexual offending directly against people. He has a history of multiple child and/or adolescent victims across his lifespan, entrenched deviant sexual arousal (i.e., pedophilia) and has multiple risk factors present. It is somewhat positive that Mr. Jones' sexual offending behaviours have apparently lessened in frequency when compared with self-reported offending behaviours in his adolescence and young adulthood. He reportedly went approximately seven years in the community before he began reoffending. This represents the longest period in the community without offending and suggests some increased ability to manage his risk and behaviours. This is likely due to victims being more informed about sexual abuse and disclosure and informing parents/authorities early in his offence cycle/pattern (something Mr. Jones is aware and wary of). Additional factors in his decreased rate of offending are lower sex drive and limited access to victims. On the nature of [the] risk, I believe that his high risk pertains to both male and female children ranging in age from preschool to young adolescent with whom he has an on-going

relationship such as a familiar neighbour or family friend. Familiarity allows Mr. Jones to groom the victim and create circumstances for [re-]offending to occur. He is, in my opinion, low risk for offences against stranger children. This is because he has no known history of offending against children he does not know. It is somewhat positive that Mr. Jones was able to go approximately seven years without reoffending. This, despite apparently having potential access to victims such as his friend's daughter and other children in the neighbourhood. This suggests some degree of impulse control. That he offended again as part of the index offence, however, indicates continued high risk. My opinion is that he would be at risk for fondling/oral sex types of offending rather than more serious penetration types of offending or sexual offending where violence is used. Given his entrenched pedophilia, he is also low risk for sexual offending against adults. Although not formally or comprehensively addressed here, Mr. Jones is also at low risk for nonsexual violence. This appraisal is made based primarily on an absence of violent offending in his past.

[50] The next part of Dr. Bartel's report was entitled "Dangerousness and long-term offender issues". Under this heading, Dr. Bartel included:

He reports significantly lower sexual interest and drive over the past decade. It is important to note, however, that his most recent sexual offending occurred during a period of time that he endorsed low sex drive and interest, both in general and towards children. Furthermore, Mr. Jones's sexual deviance is possibly as much related to emotional and social intimacy as it is to sexual attraction.

[51] This is what Dr. Bartel said about age:

Similarly, with Mr. Jones' advancing age, there is the possibility that his risk will lower on the basis of age and related lowering of sexual drive and functioning that typically accompanies this. Research demonstrates that risk for extra-familial child sexual offending decreases sharply with age, particularly after the age of fifty years. Despite this, a small number of people in their 50s, 60s and 70s, continue to sexually offend. Again, Mr. Jones' recent sexually offending (i.e., at the approximate age of 53) suggests that the lowering of sexual drive that occurs with age may not be as critical [a] factor in his offending and risk. Thus, despite his age, I would estimate that Mr. Jones risk will remain high for the foreseeable future (i.e., over the following ten years at least).

Based on the above assumptions, it is unrealistic to conclude that Mr. Jones will be able to manage or learn to manage his risk to an acceptable level independently. Despite this, I do believe that there are many external actions and contingencies that could be put in place to optimally control and manage his risk in the community at an acceptable level. The onus, however, would be on criminal justice and mental health professionals to ensure conditions are put in place and maintained in such a way to ensure he is complying and not placing himself at risk. Legal sanctions and prohibitions will have somewhat of a deterrent effect on him. The ongoing involvement of the criminal justice system will be beneficial to maintaining this deterrent effect and will be necessary to adequately manage his risk.

[52] Quoting further from the Bartel report:

Mr. Jones does have clear pedophilic interest and related behaviours and is at high long-term risk for future sexual recidivism specifically involving pubescent and prepubescent females and males. He has tended to seek out and groom children and young adolescents and is at risk of offending against those children he has on-going relationships with. His risk will only be managed by preventing him having on-going contact or establishing relationships with children. This is best done through a broad ranging court-ordered prohibitions and very close supervision and monitoring. Treatment will likely be ineffective at this time.

[53] In the course of being cross-examined, Dr. Bartel repeated his view that treatment for Mr. Jones is not likely to be effective. He expressed skepticism about Mr. Jones's view that he requires treatment to address the sexual abuse he suffered himself as a child. Dr. Bartel acknowledged that Mr. Jones told him more about his past than he had told others who examined him previously. He acknowledged in turn that successful treatment is more likely if the patient admits his past wrongs and no longer minimizes them. On that basis, Dr. Bartel conceded that the prospects for successful treatment are thereby improved. However, I have concluded from his evidence as a whole that Dr. Bartel remains skeptical that treatment can be relied upon for Mr. Jones.

[54] On the question of age, Dr. Bartel acknowledged in cross-examination that the literature supports the conclusion that the risk of pedophilia declines in the general population increasingly in one's fifties through one's seventies. There tends in that passage of time to be less sex drive and less sexual function, as well as less exposure to children.

[55] Toward the end of his cross-examination of Dr. Bartel, counsel for Mr. Jones put several propositions to Dr. Bartel framed as a series of ifs: if he received a long-term sentence order, and if he did not breach the conditions placed upon him, and if he did not breach the provisions of a s. 161 order, and if he learned how to control himself, etc. Dr. Bartel was asked:

Q Okay, these are all prospects, these are all hopes. If we put that together, I suggest to you, Doctor, there is a reasonable expectation that if Mr. Jones were given a federal sentence and able to do all this for 10 years on LTSO, by the end of that his risk would be reduced?

To which Dr. Bartel answered "yes".

[56] I allowed the question to be answered over the objection of the Crown that the question called for an answer to the ultimate issue. In defending the question, counsel for Mr. Jones pointed out, correctly in my view, that he did not ask Dr. Bartel whether there is a reasonable expectation that the public would be adequately protected, but only that the risk would be reduced. Thus to the extent an answer by an expert witness addressing the ultimate issue may be inadmissible, that problem did not arise here, in my view. The question avoided the ultimate issue.

- [57] In re-examination, the Crown asked a question of Dr. Bartel to emphasize, in any event, that Dr. Bartel's agreement that risk would be reduced was dependent upon Mr. Jones not breaching the conditions placed upon him in a long-term supervision order, not breaching the conditions placed upon him by a s. 161 order, learning the way to control himself, and obtaining community support. Dr. Bartel agreed. The point of re-examination, of course, was to stress that even a reasonable expectation for reduced risk is contingent on a number of future events occurring.
- [58] Dr. Bartel accepted in cross-examination that monitoring of Mr. Jones need not be "24/7" because he is not predatory against children who are strangers. Instead, he befriends children over time, usually children of adults Mr. Jones knows, and his offending occurs when the children are either at Mr. Jones's residence or when Mr. Jones is at the residence of the children's parents.

The Sentence

- [59] Based on the evidence and the Crown's legal submissions, I found earlier in these reasons that Mr. Jones is a dangerous offender. Turning to finding the appropriate sentence for this dangerous offender, there is a tension inherent in the application of s. 753(4.1) of the Code.
- [60] On one hand, the offender has been found a dangerous offender under s. 753(1), with all that entails, combined with subsection (4.1) containing the presumption that an indeterminate sentence shall therefore be imposed.
- [61] On the other hand, the present constitutional validity of s. 753(1) rests on the fact that subsection (4.1) gives the court a residual discretion not to impose an indeterminate sentence provided the circumstances set out in the subsection are present: see *R. v. Boutilier*, 2016 BCCA 235. Furthermore, as noted early in these reasons, the application of s. 753 does not serve to eliminate the principles of sentencing in ss. 718 to 718.2 of the Code. As the Court of Appeal said in *Boutilier*, at para. 55:

The assessment of the offender's present risk for causing future harm is separated from the exercise of discretion in the imposition of the appropriate sentence. At that stage, ss. 753(4) and (4.1) provide for proportionate responses to the management of the offender's risk of future harm through one of three sentencing options. The exercise of discretion must be guided by the principles of sentencing in ss. 718 to 718.2 of the Code. The most relevant of those provisions are ss. 718.2(d) and (e), which have the joint effect of mandating consideration that "a less restrictive sanction would attain the same sentencing objectives that a more restrictive sanction seeks to attain." (See *Johnson* at para. 28).

[62] Given the earlier finding that Mr. Jones is a dangerous offender, the issue remaining now is to decide whether, pursuant to subsection (4.1), I am satisfied from the evidence that there is a reasonable expectation that a lesser measure than an indeterminate sentence will adequately protect the public. In particular, is there a reasonable expectation that a determinate sentence with long-term supervision will provide adequate protection.

[63] I have concluded that a determinate sentence of eight years and a long-term supervision order of 10 years are appropriate. I find there is a reasonable expectation of that sentence adequately protecting the public against a serious personal injury offence by Mr. Jones. It is a sentence which, in my view, offers substantially more than just a reasonable possibility of adequate public protection, although of course it cannot guarantee adequate public protection. A guarantee would require Mr. Jones's detention forever, with the other sentencing principles spoken of in the quotation above from Boutilier being cast aside. A sentence of eight years also expresses denunciation and deterrence, in addition to public protection.

[64] I quote here from near the end of Dr. Bartel's report:

Regardless of the deterrent effect of criminal sentencing, the more important means of controlling and limiting his risk [referring to Mr. Jones] in the community will be through a well thought-out and feasible risk management plan. Limiting access to potential victims in the community will be paramount and the primary factor that determines whether he goes on [to] commit further offences or not. Thus, I would surmise that Mr. Jones's risk could be substantially lowered with the provision of close supervision and monitoring combined with broad restrictions that prevent him from attending unsupervised any function or setting where children are likely to be found including such places as malls, parks, and family gatherings. To ensure this, were he to be released into the community, he would require supportive housing where he can be regularly monitored and engage in daily check-ins so as to ensure he is not establishing relationships/contacts with children or parents of children. Over the long term, he should be prohibited from having any unsupervised or even supervised direct access to children. Exceptions to the latter provision could be made if he were to be in the company of an approved and responsible monitor or person present. This person(s) should be fully aware of Mr. Jones's offence history, the conditions of his release, and whatever relapse or risk management plan is in place.

[65] The risk Mr. Jones presents is that he will sexually assault a child he knows at a residence familiar to him. The children he has assaulted in the past have been well known to him. He has assaulted them by sexually touching or fondling them as he did in 2013 and 2014, resulting in his 2016 conviction for the index offence. He has no history, and does not present a risk, of offending against a child who is a stranger. I noted that because Mr. Jones's modus operandi is relevant for assessing and controlling his risk. When he is on long-term supervision, Mr. Jones will be subject to all the mandatory terms found in s. 161 of the Corrections and Conditional Release Regulations. Significantly, as a result of amendments to s. 161 in 2014, the court can order as part of a s. 161 order, and I so order now, pursuant to s.

161(1)(c), that Mr. Jones will not have any contact with children, directly or indirectly, when not under the direct supervision of an adult who is aware of his circumstances, for the rest of his life. The evidence of Mr. Sadafi, the parole office supervisor, included the range of punishments Mr. Jones can receive for breaching a long-term supervision order, including a s. 161 order. If the breach is significant, as it would be if Mr. Jones had contact with children as described above, the court could convert the long-term supervision order into an indeterminate sentence.

- [66] The evidence, particularly Dr. Bartel's testimony, was not encouraging with respect to Mr. Jones benefiting from future treatment. He will, however, receive treatment again when he is in prison, and I am told the treatment programs have been significantly improved since he was treated following his conviction in 2001. Given Dr. Bartel's pessimism on this front, however, I do not place great weight on treatment leading to substantial improvement. Instead, based on the evidence, I believe the risk of Mr. Jones re-offending will more likely be controlled through supervision during the term of the long-term supervision order, and his fear of having to return to prison with an indeterminate sentence if he fails to comply with the numerous orders that will be in place.
- [67] Earlier in these reasons is reference to the evidence of Dr. Whittemore and Dr. Bartel about the declining sexual urge for most people, beginning in their 50s, extending into their 70s. Mr. Jones is now 58. Before the index offence, for which the facts took place in 2013 and 2014, there is no evidence of any sexual offending by Mr. Jones for seven years, from the time of his release in 2006. Dr. Bartel acknowledged that the seven-year hiatus is attributable in part to Mr. Jones's age. Mr. Jones now has 49 months' total credit toward his eight-year sentence as a result of time served already. Because he is a dangerous offender, he is likely to serve all of the 47 months which are now remaining in his eight-year sentence.
- [68] He will therefore be 62 when his long-term supervision order begins, and 72 when it ends. In my view, Mr. Jones's age is a factor to be taken into account in assessing whether his risk of re-offending can be properly managed. It is a factor which assists me in concluding there is a reasonable expectation the public will be adequately protected by the sentence I am imposing.
- [69] Further, I grant the following orders the Crown requested and which are not opposed. These are in addition to the order I made above pursuant to s. 161(1)(c) of the Corrections and Conditional Release Regulations which the Crown had also requested.
- [70] There will be a DNA order under s. 487.051 of the Code; a sex offender registration order under s. 490.012, with a related order that Mr. Jones report for the rest of his life; a s. 109 firearms order for the rest of Mr. Jones's life; an order under s. 760 that psychiatric and psychological reports be released to Correctional Services; and, under s. 161 of the Corrections and Conditional Release Regulations, orders under s. 161(1)(a), (b), and (c). (I addressed (c) earlier, and simply repeat the reference to it here for completeness.)

[71] I thank counsel for their helpful submissions.

"MACINTOSH J."

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Prepared on 26 October 2026 · Esheria