

CANADA / JUDGMENT

R. v. Kavanagh

2020 BCSC 2070

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2020 BCSC 2070 R. v. Kavanagh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kavanagh,

2020 BCSC 2070

Date: 20201218

Docket: 27368

Registry: Vancouver

Regina

v.

Charles Michael Kavanagh

Before: The Honourable Madam Justice Murray

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Reasons for Judgment on Dangerous Offender Application

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Place and Date of Hearing:

Vancouver, B.C.

April 1-5, 8-11, 15,16, May 6, October 8-10, 15-18, November 4-7, 2019 and August 25-27, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 18, 2020

Table of Contents

INTRODUCTION. 3

THE STATUTORY SCHEME. 3

Dangerous Offender: The Designation Stage. 3

Dangerous Offender: The Penalty Stage. 4

BACKGROUND. 5

Criminal Record. 7

June 25, 1978- Indecent Assault on Male (1st Sexual offence) 7

March 9, 1980- Indecent Assault on Male (2nd Sexual offence) 8

July 7, 1980- Impaired Driving/ Refusing to Provide a Breath Sample. 10

May 6, 1981- Assault 10

June 26, 1981- Indecent Assault on Male (3rd Sexual offence) 11

May 29, 1982- Breach of Probation. 12

October 1 and 11, 1982- Breach of Probation x 2. 12

June 21, 1983- Breach of Probation x 3. 12

May 3, 1983- Sexual Assault of M.W. (4th Sexual offence) 12

June 12 and June 17, 1987- Impaired driving x 2. 14

October 31, 1987- Sexual Assault of B.F. (5th Sexual offence) 14

September 1, 1998 to August 31, 2001- Sexual Assault of J.R. and J.M. (6th & 7th Sexual offences)
17

The Predicate Offences. 28

ISSUES. 34

ISSUE 1: SHOULD MR. KAVANAGH BE DESIGNATED A DANGEROUS OFFENDER?. 34

ISSUE 2: WHAT IS THE APPROPRIATE SENTENCE?. 36

Position of the Crown. 37

Position of Mr. Kavanagh. 38

Current Risk Assessment 40

Available Treatment and Monitoring. 44

DISCUSSION. 46

CONCLUSION. 48

INTRODUCTION

- [1] On June 8, 2018 I found Mr. Kavanagh guilty of sexually touching W.M. a person under 16 years of age, trafficking in cannabis and crystal meth and breaching a recognizance by contacting W.M. My reasons for judgment are indexed at 2018 BCSC 1118.
- [2] On this sentencing hearing, the Crown seeks an order designating Mr. Kavanagh a dangerous offender ("DO") under s. 753(1)(a) of the Criminal Code, R.S.C. 1985, c. 46 and the imposition of an indeterminate sentence for the sexual touching conviction. In addition, the Crown seeks fixed periods of incarceration on the other charges.
- [3] Mr. Kavanagh concedes that he meets the criteria for a dangerous offender designation. Given Mr. Kavanagh's admission, the thrust of this decision will be focussed on the issue of what the appropriate sentence is.

THE STATUTORY SCHEME

- [4] The aim of the dangerous offender provisions is to protect society against offenders who "constitute a threat to the lives, safety or physical or mental well-being of other persons". There are two stages to a dangerous offender hearing: designation and penalty. The designation stage is concerned with the assessment of the future risk posed by the offender, while the penalty stage is concerned with imposing a sentence appropriate to manage the established threat: *R. v. Boutilier*, 2017 SCC 64 [Boutilier], at para. 31.
- [5] The sexual touching offence that Mr. Kavanagh is convicted of is a primary designated offence and constitutes a serious personal injury offence under s. 752 of the Criminal Code, a prerequisite for a dangerous offender finding under s. 753(1).

Dangerous Offender: The Designation Stage

[6] Section 753(1) of the Criminal Code sets out four criteria under which an offender can be found to be a dangerous offender. The Crown is proceeding under ss. 753(1)(a)(i) and (ii), which read as follows:

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, 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,
- (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

[7] These subsections are disjunctive. The Crown need only prove one.

[8] The designation stage involves the prospective assessment of risk in which the court considers past behaviour and future treatment prospects. The court shall find the offender to be a dangerous offender only if satisfied that all elements of one of the subsections is proved beyond a reasonable doubt.

[9] Treatability comes into consideration in both the designation stage and the penalty stage. At the designation stage treatability informs the decision regarding the threat posed by the offender while at the penalty stage it assists in determining of the appropriate sentence to manage this threat: Boutilier, at para. 45.

Dangerous Offender: The Penalty Stage

[10] The sentencing options for a DO are outlined in s. 753(4) and (4.1):

- (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 of 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.

(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.

- [11] A DO hearing is part of the sentencing process and the principles of sentencing as set out in ss. 718 through 718.2 apply. However in a DO proceeding, protection of the public is the paramount consideration. Under s. 753(4), the sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the statutory scheme which is to protect the public from the risk the offender poses: Boutilier, at para. 60.
- [12] Under s. 753(4.1) the court must impose a sentence of indeterminate detention unless it is satisfied there is a reasonable expectation that a lesser measure under ss. (4)(b) or (c) will adequately protect the public. A "reasonable expectation" is "a confident belief, for good and sufficient reasons to be derived from the quality and cogency of the evidence heard on the application": R. v. Walsh, 2011 BCSC 1911, at para. 291, rev'd on other grounds 2017 BCCA 195.
- [13] Section 753(4.1) does not impose an onus or presumption, rather it provides guidance on how the sentencing judge can exercise their discretion in accordance with the applicable objectives and principles of sentencing: Boutilier, at paras. 69-71.

BACKGROUND

- [14] Mr. Kavanagh is 62, born April 29, 1958. By all accounts the family was well provided for both emotionally and financially. Mr. Kavanagh's four siblings are successful, contributing members of society. No one in the family other than Mr. Kavanagh has had trouble with the law.
- [15] Mr. Kavanagh started exhibiting behavioural problems when he was very young. In kindergarten he was aggressive toward his peers. When he was about 12 he came into conflict with the law. At home he often became violent and exhibited an explosive temper. He tried to commit suicide by overdosing on pills on at least two occasions as a teen. In an effort to try to curb his behaviour Mr. Kavanagh's parents put him in Vancouver College, a private school.

- [16] In 1969 Mr. Kavanagh was admitted to hospital for anger and behaviour problems. In that same year he was referred to child psychiatrist, Dr. A.N. McTaggart. In 1973 he was back in the hospital for impulsivity, hyperactivity, stealing money from his father and behaving violently. He was prescribed anti-psychotic medications. During his hospital stay he was noted to be manipulative and hostile.
- [17] In the fall of 1973 when he was 15 Mr. Kavanagh threatened his sister with a knife. At Dr. McTaggart's suggestion Mr. Kavanagh was admitted as an inpatient to the Maples Adolescent Treatment Centre ("the Maples"), a facility for children with behaviour problems. His behaviour was reported as unmotivated, inconsistent and potentially negative. In March 1974 he was discharged as an inpatient but continued to attend the Maples as an outpatient. That was short-lived. He was discharged from the program in mid-May 1974 after he committed a series of criminal offences, thefts and break and enters (B&Es) with other youth from the program. The staff at the Maples concluded that their strategies had not worked for Mr. Kavanagh.
- [18] In a report to "juvenile" court around this time, Dr. McTaggart noted that Mr. Kavanagh had been complaining "sporadically of some difficulties in his sexual adjustment" and that he had been sexually assaulting young males in the community.
- [19] Years later when being interviewed for a pre-sentence report ("PSR"), Mr. Kavanagh reported that he was sexually assaulted by an older student when he arrived at Vancouver College. Mr. Kavanagh repeated that claim several times over the years with conflicting detail.
- [20] Mr. Kavanagh returned to public school in grade 10. In some reports he is said to have dropped out of school in grade 10, in others grade 11. He eventually completed grade 12 equivalency in 1980. He has completed two years of university courses while in custody.
- [21] Mr. Kavanagh has worked since he was 16 years old. It appears from his history that he has never had trouble getting jobs.

Criminal Record

- [22] Mr. Kavanagh has a lengthy and serious criminal record, a copy of which is attached as Appendix "A" to these reasons. In this history I will detail only the most relevant.
- [23] As a youth Mr. Kavanagh was convicted three times: in September 1973 of assault, in October 1973 of B&E and in May 1974 of two counts of B&E and two counts of possession of stolen property.
- [24] In May 1977 Mr. Kavanagh received his first adult conviction for B&E and was placed on probation for two years. In October 1977 he was convicted of B&E, theft under, possession of marihuana and impaired driving and was sentenced to a total of nine months incarceration plus two years probation. While on that probation, he continued to commit further offences.
- [25] In November 1977 he was sentenced to 12 months for another B&E.

June 25, 1978- Indecent Assault on Male (1st Sexual offence)

- [26] On June 25, 1978 Mr. Kavanagh, then 20, was arrested and charged with indecent assault of a 13-year-old male- his first charge for a sexual offence. He was on probation at the time.
- [27] Mr. Kavanagh telephoned a 13-year-old boy that he knew and accused him of "ratting him out" to the police for dealing drugs. He told the boy to meet him at a newspaper shack. The boy agreed. The young boy's mother followed. When she saw that her son was upset she went to get help. On her return she found her son laying on his back naked in the grass near the newspaper shack. Mr. Kavanagh was on top of him straddling his legs. Mr. Kavanagh had his shirt off and his pants and underwear pushed down. When Mr. Kavanagh saw the boy's mother he left. Mr. Kavanagh later told police that he could not recall the incident as he was under the influence of alcohol.
- [28] On July 4, 1978 Mr. Kavanagh plead guilty and was remanded in custody to sentencing on July 31, 1978. A few days before sentencing Mr. Kavanagh escaped from the Lower Mainland Correctional Centre. He was arrested in Ontario about three weeks later. In September 1978 Mr. Kavanagh was sentenced to 21 months for the indecent assault and three months concurrent for escaping lawful custody.
- [29] During this period of incarceration Mr. Kavanagh was transferred to the Regional Psychiatric Centre ("RPC") in Abbotsford. He received both individual counselling and group therapy but was reported to be not amenable to treatment. The report writer noted that Mr. Kavanagh did not have insight into his issues and lacked motivation to change. A psychologist at RPC assessed him as having a personality disorder, alcoholism and drug abuse.
- [30] Mr. Kavanagh was released from jail on November 24, 1979. He breached the terms of his release by failing to report to his probation officer and failing to attend counselling.

March 9, 1980- Indecent Assault on Male (2nd Sexual offence)

- [31] Just over three months after his release, on March 9, 1980, Mr. Kavanagh, then 21, approached a 13-year-old boy who was waiting at a bus stop. It was 2:00 a.m. The young boy had snuck out of his house to get a Slurpee at the 7-11. He was on his way home. Mr. Kavanagh would not let the young boy board the bus. Instead he led him to a vacant field. Mr. Kavanagh was intoxicated. He offered the boy a beer. Though the boy said no, Mr. Kavanagh gave him one anyway. When the boy tried to leave Mr. Kavanagh became aggressive and threatening. Mr. Kavanagh led the young boy to a nearby vacant house. Mr. Kavanagh broke into the house. He told the boy to take off his clothes and lie on the ground. Mr. Kavanagh told the youngster that he would not be hurt if he cooperated. When the boy refused Mr. Kavanagh started to unzip the boy's jacket. The young boy was able to free himself. He ran to a nearby home. Mr. Kavanagh chased after him and attempted to drag him away. The boy hung onto a post and started screaming. Mr. Kavanagh produced a screwdriver and threatened to stab the boy. A neighbour heard the screams and came out to

see what was happening. Mr. Kavanagh pretended to be a concerned citizen who also heard the screaming. When he was arrested, Mr. Kavanagh again told police that he could not recall anything as he was under the influence of alcohol.

- [32] In 1980 while on bail for this offence, Mr. Kavanagh was assessed by Dr. Allen Posthuma who opined that he had severe character disorder with a high level of agitation, alienation and self-destructive behaviour.
- [33] In the PSR prepared for his sentencing in provincial court, a probation officer wrote that Mr. Kavanagh had been abusing both alcohol and drugs. He had attended an alcohol treatment centre and was prescribed Antabuse. Mr. Kavanagh reported to the probation officer that he was consuming alcohol and valium at the time of the offence. The writer notes that Mr. Kavanagh was seeking help for "the underlying emotional problems which trigger these attacks" and that he was going for assessment and counselling through the Burnaby Mental Health Clinic and getting alcohol and drug counselling.
- [34] Dr. Posthuma again assessed Mr. Kavanagh on May 6, 1980. In his report for sentencing Dr. Posthuma opined that Mr. Kavanagh was suffering from disturbed personality and that his problems would get worse if he was incarcerated again.
- [35] On July 29, 1980 Mr. Kavanagh was sentenced to three months in jail and 18 months probation for attempted indecent assault on a male. The sentence was focussed on rehabilitation. Mr. Kavanagh told the court that he was motivated to change. The lengthy period of probation included conditions that Mr. Kavanagh take counselling including psychiatric counselling, not consume alcohol, follow the Antabuse program and abide by a curfew.

July 7, 1980- Impaired Driving/ Refusing to Provide a Breath Sample

- [36] While he was on bail for the March 9, 1980 indecent assault, Mr. Kavanagh was charged with impaired driving and refusing to provide a breath sample. On August 25, 1980 he was fined a total of \$500.

May 6, 1981- Assault

- [37] In about March/April 1981, Mr. Kavanagh became involved in the Navy League, a group for boys and girls between the ages of nine and 12. Mr. Kavanagh's father was very involved in the organization. On May 6, 1981, while on probation, Mr. Kavanagh, 23, called a 12-year-old boy who was a cadet. Mr. Kavanagh was an adult leader.
- [38] Mr. Kavanagh asked the young boy to get together with him to discuss the Navy League. Mr. Kavanagh met the young boy at a corner store and took him back to his house. Mr. Kavanagh was drinking beer. He told the boy about his time in prison and said he was a member of the Satan's Choice biker gang. He took the boy to his bedroom and told him to take his jacket off, then his shirt. When the boy refused and tried to leave Mr. Kavanagh grabbed his shirt,

ripping it and scratching the boy's neck. Mr. Kavanagh told the young boy that if he left it would be the end for everyone. The boy was able to escape and ran home. He reported being very afraid of Mr. Kavanagh.

- [39] As with past offences, Mr. Kavanagh told police that he had been drinking and had no memory of the events.
- [40] Of note, despite his stated motivation to change about nine months earlier when he was placed on the rehabilitative probation, Mr. Kavanagh's ten treatment sessions with Dr. Posthuma had no deterrent effect. In addition, shortly after sentencing, Mr. Kavanagh stopped taking Antabuse and was drinking contrary to his probation order.
- [41] On October 2, 1980 Mr. Kavanagh was convicted of assault and sentenced to three months in jail and 30 months probation. Again the sentence was geared toward Mr. Kavanagh's rehabilitation. Conditions of his probation included taking Antabuse and refraining from the consumption of alcohol and non-prescription drugs.

June 26, 1981- Indecent Assault on Male (3rd Sexual offence)

- [42] On June 26, 1981 Mr. Kavanagh, was charged with indecently assaulting another young boy. He was still on the rehabilitative probation that was imposed for his second sexual offence when he committed his third sexual offence.
- [43] The victim of this offence was 15. He had had an interview for a cleaning job at a Vancouver restaurant with a Mr. Tsang earlier in the day and was told that he would be contacted later. That night at around 9:00 p.m. Mr. Kavanagh, a cook at the restaurant, called the boy's home and asked his father to bring the boy into work that night. The boy was not home so Mr. Kavanagh, who identified himself as "Mike", said he would call back later. Mr. Kavanagh called back at 10:30 p.m. and again spoke to the boy's dad, who agreed to bring him into work. When the boy arrived at the restaurant Mr. Kavanagh told him that he was in charge. Mr. Kavanagh had been drinking. He told the boy to come with him. He hailed a cab and took the boy to a hotel. He booked a room, bought two cases of beer and snuck the boy into the hotel through the back. In the room Mr. Kavanagh gave the boy a beer. He had one too. Mr. Kavanagh told the boy that he was bi-sexual and ordered him to take off his clothes. The boy refused. Mr. Kavanagh made the boy lie down on the bed and sat on the boy's chest holding him down with his arms over his head. When the boy refused to open his legs Mr. Kavanagh threatened to kill him and put his hands around the boy's throat. The boy continued to struggle so Mr. Kavanagh put him in a headlock while he sexually assaulted him. The boy escaped when Mr. Kavanagh fell asleep. The police found Mr. Kavanagh passed out on the bed.

- [44] On November 3, 1981 Mr. Kavanagh was sentenced to 60 days in jail and the maximum period of probation, three years. Conditions of his probation included abstaining from the use of non-prescription drugs and taking counselling with Dr. Posthuma or Dr. Wydra or a psychiatrist.

May 29, 1982- Breach of Probation

- [45] On May 29, 1982 Mr. Kavanagh's probation officer submitted a breach for failing to attend counselling with Dr. Posthuma. In the comments section the experienced probation officer wrote "exhibiting classic signs of breakdown, may assault again at any time". On October 2, 1982 Mr. Kavanagh was sentenced to three months jail plus three months probation.

October 1 and 11, 1982- Breach of Probation x 2

- [46] On October 1 and 11, 1982 Mr. Kavanagh was charged with breaching his probation by drinking. On March 8, 1983 he was sentenced to a total of six months in jail.

June 21, 1983- Breach of Probation x 3

- [47] On June 21, 1983 Mr. Kavanagh was sentenced to a total of six months for three more breaches of probation.

May 3, 1983- Sexual Assault of M.W. (4th Sexual offence)

- [48] On May 3, 1983 Mr. Kavanagh, 25, sexually assaulted M.W., a 15-year-old boy. Mr. Kavanagh was on probation for indecent assault at the time of this offence.
- [49] M.W. and his friend had snuck into a newly-constructed home to have a cigarette. While in the house the boys were confronted by Mr. Kavanagh, who was drunk, and a friend. Mr. Kavanagh asked his friend to take M.W.'s friend downstairs. Mr. Kavanagh ordered M.W. to take his clothes off. He told the boy that he was going to lose his virginity. The boy took off all his clothes except his underwear. Mr. Kavanagh took his shirt off and pulled his pants down. He told the boy to spread his legs. He then laid on top of the boy and was kissing his neck. M.W.'s friend then came into the room with his dog to try to help M.W. He called out that he would release his dog on Mr. Kavanagh who responded that he would kill the dog. Mr. Kavanagh then got back on top of M.W., dug his thumb into his throat and said that if he did not comply, he would stab him. M.W.'s friend said that he was going to call the cops and left. Mr. Kavanagh then told M.W. to get dressed and led him out to a field where he offered him beer and marihuana. The boy was able to escape and ran off. When police arrested Mr. Kavanagh sometime later they noted that he was "vulgar, indifferent and unconcerned".

- [50] On July 13, 1983 Mr. Kavanagh pled guilty and was sentenced to three years, his first federal period of incarceration. In passing sentence Mr. Justice MacKinnon in B.C. County Court, as it then was, remarked that protection of the public was an important factor but so was rehabilitation and warned Mr. Kavanagh that if he did not "come to grips with his problems he may well spend the balance of his life in jail".
- [51] Mr. Kavanagh served this sentence at Mountain Institution and did not participate in any sex offender treatment.
- [52] In March 1984, Mr. Kavanagh was assessed for the parole board by Dr. Wydra. In her report she noted the following about Mr. Kavanagh:

In all ways other than his deviant sexual preferences, (he) is an ordinary and normal young man. He is quite intelligent, fairly socially skilled, accessible and shows good judgement and insight in, again, every way other than in the sexual arena There are no problems with (his) cognitive reactions to his crimes. That is, he is fully cognizant of the repercussions (sic) of his behaviour on his victim and also the consequences of his behaviour to himself.

- [53] Dr. Wydra concluded that Mr. Kavanagh had two main problems: deviant sexual preference and alcoholism and that he needed extensive treatment if he was going to remain crime-free. She strongly recommended that he continue counselling when released.
- [54] On July 12, 1985 Mr. Kavanagh was released from custody on mandatory supervision. Within the first month he missed two meetings with his psychologist. Less than a month later, he was arrested for a new offence and for breaching a condition of his release by consuming alcohol that he not consume alcohol.
- [55] In October 1987 Mr. Kavanagh was arrested on his fifth sexual offence and detained in custody.

June 12 and June 17, 1987- Impaired driving x 2

- [56] On June 12 and 17, 1987 Mr. Kavanagh was convicted of impaired driving. He was sentenced to 14 days on both charges to be served intermittently.

October 31, 1987- Sexual Assault of B.F. (5th Sexual offence)

- [57] On October 31, 1987, Mr. Kavanagh, then 29, sexually assaulted a 14-year-old boy, B.F. Mr. Kavanagh had befriended B.F.'s 16-year-old brother and visited the family home frequently to see him. He came to meet B.F. through his brother. The boys lived with their mother who was on her own. B.F. had a learning disability.
- [58] On the night of the incident Mr. Kavanagh had been at the boys' house watching a movie. He was drinking. At about 1:00 a.m. he invited the brothers to go to the government dock in Steveston with him. The older brother went for a short time but then left, leaving B.F. alone with Mr. Kavanagh. Mr. Kavanagh broke into the fishing boat he was working on at the time. He took young B.F. into the bunk area and ordered him to take his clothes off. When the boy

refused Mr. Kavanagh demanded that he do so. He used a threatening tone of voice. The boy at this point was trapped in the hold of the boat. Mr. Kavanagh was blocking the only way out. Scared, B.F. complied. Mr. Kavanagh took off his clothes then pushed the boy onto his back. Mr. Kavanagh laid on top of B.F. and began humping and rubbing his penis on the boy's pelvis and kissing him. The young boy told him not to. Mr. Kavanagh eventually ejaculated and passed out. B.F. was able to escape and ran home crying.

- [59] Mr. Kavanagh pled guilty. On April 15, 1988 he was sentenced in to five years after taking into account five and a half months dead time. The sentencing judge had the benefit of thorough PSR from an experienced probation officer and a psychiatric report from forensic psychiatrist, Dr. Derek Eaves. He also had a letter from Mr. Kavanagh's father who expressed support for his son.
- [60] Dr. Eaves diagnosed Mr. Kavanagh as suffering from antisocial personality disorder and alcohol abuse. He noted that Mr. Kavanagh had not followed through with treatment in the past and that he had expressed uncertainty about treatment at the time of the assessment. However, Dr. Eaves saw Mr. Kavanagh's "good academic potential" as a glimmer of hope for his rehabilitation.
- [61] To the writer of the PSR Mr. Kavanagh reported that when he was 12 he had been sexually assaulted 35 to 50 times by an older boy, 16 or 17 years old, while at Vancouver College. He said that the acts included fondling, masturbation, and oral sex. There was no attempt at anal intercourse. He also reported that when he was jailed at Oakalla when he was 17 or 18 he was pressured once by some "heavies" to perform oral sex.
- [62] Mr. Kavanagh's counsel submitted that Mr. Kavanagh had not received proper treatment to date. The court in response noted that Mr. Kavanagh had not been receptive to treatment. In the PSR the probation officer addressed Mr. Kavanagh's failure to engage in counselling as follows:

He has failed to respond positively to probation supervision in the community in that he has failed to abide by conditions of probation and has not followed his probation officer's instruction with respect to involvement in treatment. He was at age 15 admitted to the Maples, an intensive treatment program for emotionally disturbed young people but made negligible progress.

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He states that although he has always been under the influence of alcohol when criminal incidents have occurred he does not use alcohol as an excuse for action.

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He explains his reluctance to involve himself in treatment by saying that he found the experience to be humiliating in that he was required to undergo plethysmograph testing.

[63] The sentencing hearing was comprehensive. Of note, a victim impact from the victim's mother was filed. In his remarks on sentencing the judge read parts of it aloud:

There is a statement from the victim's mother indicating, among other things, that the child has changed drastically since the attack. He is moody, withdrawn and his grades have dropped. He is overeating, he has put on 15 pounds. He picks fights with his brother

The mother says that therapy is indicated but her son is unwilling to cooperate at this time and doesn't want to talk about it She said he is not the boy he was. Obviously this has had a deep emotionally disturbing effect on the victim.

[64] Of further note, in the PSR, Mr. Kavanagh is quoted as saying that he "feels sick" about the damage he may have done to his victims. These are noteworthy as Mr. Kavanagh now claims a renewed realization of the harm he inflicted on his victims.

[65] In December 1990 Dr. Joseph Noone, a clinical psychiatrist, assessed Mr. Kavanagh while in custody. In the interview Mr. Kavanagh's version of being sexually assaulted at Vancouver College differed from what he said to the writer of the PSR. He said that he had been sexually assaulted by two older males who used threats and knives. The forceful sexual abuse included attempted anal intercourse. He said that the older offenders took photos of him which they threatened to reveal if he told anyone.

[66] During his incarceration Mr. Kavanagh was transferred from Mountain Prison to the Regional Psychiatric Centre ("RPC") from January 9, 1990 to May 29, 1990. In the discharge summary the two treating psychiatrists stated that on admittance Mr. Kavanagh showed interest in taking part in the treatment program, but once there he challenged the authority of people and did not like what the facilitators had to say about him. Mr. Kavanagh withdrew from the program after about four months because of conflict with another offender. Facilitators commented that Mr. Kavanagh "is a difficult candidate to treat unless he shows sincere in depth motivation to take part in the intensity of the treatment program". Mr. Kavanagh was told that he was welcome to return for treatment.

[67] During this period of incarceration Mr. Kavanagh completed life skills and substance abuse programming, and he became involved in a peer-facilitated self-help group for sex offenders known as the Phoenix program at Mountain Institution. He was training to be a leader. Plus, he saw psychologist Jerry Cyr every six to eight weeks at Mountain. The administrator of the substance abuse program was of the view that Mr. Kavanagh had made good progress and that his prognosis was good. Mr. Kavanagh was held until warrant expiry in April 1993 primarily because he had not taken any sex offender programming.

[68] He was arrested on his sixth and seventh sexual offences in December 2002.

September 1, 1998 to August 31, 2001- Sexual Assault of J.R. and J.M. (6th & 7th Sexual offences)

- [69] When he was released from jail in April 1993, Mr. Kavanagh moved to Saltspring Island for a "new start". He was steadily employed fishing for several years. When he lost that job he started his own landscaping business, then worked as a cook at a marine pub. Mr. Kavanagh met J.M. and J.R., both 14 years old, at Centennial Park on Saltspring Island--a local hangout for teenagers. Mr. Kavanagh frequently showed up for teen gatherings. Over time Mr. Kavanagh started befriending J.M. who was then in grade nine, stood 4'11" and weighed about 80 pounds. Mr. Kavanagh asked him personal questions about himself and his home life. He learned that J.M.'s relationship with his parents was strained and that J.M. did not spend much time at home. At some point Mr. Kavanagh asked J.M. if there was anything he would not do to make money. Thinking Mr. Kavanagh meant selling drugs, J.M. answered no. On Halloween 1998, J.M. saw Mr. Kavanagh at a party. Mr. Kavanagh again asked him if he would like to make money. Again, thinking that he meant selling drugs, J.M. said yes. Mr. Kavanagh took J.M. to his residence. There Mr. Kavanagh undressed J.M. and himself. He laid on top of J.M., and humped him until he ejaculated. Mr. Kavanagh then got up and threw \$60 at the young boy. Embarrassed, ashamed and already feeling unpopular, J.M. did not tell anyone. He was afraid people would think he was a "fag".
- [70] About two weeks later Mr. Kavanagh found J.M. at the park and invited him to his house for a party. There Mr. Kavanagh put on a pornographic movie and fondled the boy then performed oral sex on him. Mr. Kavanagh showed J.M. a gun and gave him cigarettes. That began a period of just over a year during which Mr. Kavanagh sexually assaulted J.M. 20 to 30 times. The acts primarily involved Mr. Kavanagh performing oral sex on J.M. but on one occasion Mr. Kavanagh performed anal sex on him.
- [71] Mr. Kavanagh preyed on J.M.'s vulnerability, threatened him, caused him to fear him and fed him drugs, including crystal meth.
- [72] After some time J.M. told a female friend about Mr. Kavanagh abusing him. When Mr. Kavanagh found out, he held a gun to J.M.'s head and threatened that if he told anyone else he would kill J.M.
- [73] The second victim, J.R. was the friend of Mr. Kavanagh's friend's son. Over two and a half years Mr. Kavanagh sexually assaulted J.R. between 300 to 500 times. Mr. Kavanagh was 41 to 43 years of age; J.R. 14 to 16. The acts usually involved oral sex that Mr. Kavanagh performed on J.R. Mr. Kavanagh preyed on J.R.'s vulnerability. He introduced the young boy to crystal meth. Thereafter he coerced him by supplying him with crystal meth as well as cocaine, marihuana, ecstasy and mushrooms. Once J.R. became highly addicted to the drugs, Mr. Kavanagh threatened to cut him off his supply if he did not cooperate with the sex acts. Throughout this period J.R. became socially isolated, estranged from his family and friends. J.R. had problems with his father who was a paramedic on the oil rigs and worked one month on and one month off. For some period, J.R. stayed with Mr. Kavanagh only when the

father was away, but as his problems with his father increased, he moved in with Mr. Kavanagh. In fact, when Mr. Kavanagh moved to Victoria to get another "fresh start", the boy moved with him.

- [74] On at least one occasion Mr. Kavanagh gave both J.M. and J.R. crystal meth, laid them side by side and performed oral sex on both of them.
- [75] Mr. Kavanagh pled guilty to sexually assaulting both boys and was sentenced on September 24, 2003 in Supreme Court. Both of the victims were in court during the sentencing hearing and according to reports, were visibly emotional. The impact of Mr. Kavanagh's acts on the boys was made clear by the Crown and J.R. himself. J.R. told the sentencing judge that he suffered an arrestment in his mental and emotional development, but that he was trying to put his life together and recover from his drug addiction. J.M. declined to address the court. As the judge noted in her remarks on sentence, the impact on J.R. and J.M. was profound and long-term.
- [76] At sentencing Mr. Kavanagh claimed to have gained insight into his offending. He told the court that he now recognised that he has a problem and he intended to do something about it. He apologized to the victims. Mr. Kavanagh was sentenced to 10 years imprisonment, taking into account two years dead time.
- [77] Of note, Mr. Kavanagh pled guilty with a joint submission of a 10 year sentence to avoid a potential dangerous offender application being made by the Crown. This is significant as he was aware that if he reoffended he would likely be facing DO proceedings.
- [78] J.R. testified on this DO hearing, as did his uncle. Although in 2003 J.R. told the sentencing judge that he was trying to put his life together it is clear that he has been unable to do so. J.R. continues to suffer terribly. He drew a downward spiral to express the impact that Mr. Kavanagh's actions had on him. He said that he was still terrified of Mr. Kavanagh. He struggles with his sexual identity. He is drawn to high- risk sexual behaviours. As a result, he contracted HIV and will be on medication for the rest of his life. He has attempted suicide more than once and has ended up in the psych ward. He has trouble with men in authority. He has "low to non-existent" self-confidence. He lives in "immense pain and discomfort" every day. Almost 20 years later the impact is still so great that J.R. was unable to finish reading his victim impact statement. He broke down.
- [79] J.R.'s uncle too could barely finish reading his victim impact statement. He told this court how the impact on J.R. has destroyed the whole family- J.R.'s parents, his grandparents, his siblings, uncles, cousins. As he stated, "Charles Kavanagh's actions have been like throwing a rock into a still pond, from the epicentre destructive waves move outward beyond the eye's reach." That Mr. Kavanagh has shattered the lives of J.R. and his family is an understatement.
- [80] As I have eluded to, it is of note that Mr. Kavanagh claims that hearing J.R.'s testimony was the first time he understood the impact that his behaviour had had on his victims.

- [81] Although Mr. Kavanagh pled guilty to sexually assaulting the two boys, in his initial interview on intake to the Regional Reception Assessment Centre to begin his 10 year sentence, he stated that all acts were consensual. He gave the boys money or drugs after each incident and they sold marihuana for him. He told interviewers that the boys were between 14 and 16 during the period of the sexual incidents and could therefore legally consent. He felt that he had done nothing wrong legally. Nor did Mr. Kavanagh have any remorse for his victims, reporting that they were not harmed and that they did not complain until he would not let them use his car.
- [82] During this period of incarceration Mr. Kavanagh took and completed sexual offender programming as recommended. It is the first time in all of his periods of incarceration that he has done so. He took a high intensity sex offender program as well as a moderate intensity substance abuse program.
- [83] In 2005 Mr. Kavanagh successfully completed the Reasoning and Rehabilitation treatment program, a cognitive behavioural program ("CBT") focussed on areas including self-control and identifying and managing risk factors. The program was run in groups and consists of 37 two-hour sessions. The program was designed to teach offenders how to monitor their risk factors and manage their behaviour. Mr. Kavanagh was reported to have done well, with his participation in class marked as above average. The facilitator commented that Mr. Kavanagh understood the concepts of recognizing risky situations and returning to pro-social behaviour. Mr. Kavanagh understood how risky thinking was part of his life and he had formulated a relapse prevention plan. According to the facilitator, Mr. Kavanagh was committed to change and motivated to achieve his goals. In order to do so Mr. Kavanagh was committed to self-monitoring by keeping a log. He understood that in order to change he had to remain substance-free. Mr. Kavanagh was encouraged to self-monitor and to ask for help when needed.
- [84] In early 2005 Mr. Kavanagh stabbed another inmate at Mountain Institution with a hobby knife. He told Dr. Lamba, a well-respected forensic psychiatrist, in a December 2009 interview that he did so because the other inmate called him names. According to Dr. Lamba, Mr. Kavanagh recounted the stabbing with much self-righteousness and without any regret.
- [85] Mr. Kavanagh was transferred to Kent Institution as a result of the incident and was placed in segregation. On February 9, 2005 he slashed himself in the abdomen, causing what was called by healthcare "four very superficial lacerations". Mr. Kavanagh later told a psychologist that he did this to get out of segregation and to be sent to the regional treatment centre.
- [86] In September 2009 Mr. Kavanagh started the Odyssey High Intensity Sex Offender Program, a custodial based CBT program for high-risk sex offenders. The program ran from September to April 2010, four days a week. There was a maximum of 16 offenders in a group. Each group was facilitated by Eric McKechnie, an employee of CSC and Dr. Todd Willoughby,

a psychologist. There were daily group meetings and weekly individual meetings. There were regular homework assignments, the primary focus of which was for the offenders to have created a relapse prevention plan by the end of the program.

[87] According to Mr. McKechnie, who testified on this DO hearing, Mr. Kavanagh not only successfully completed the program, he was one of the strongest participants. Mr. Kavanagh was fully committed to the program and made significant strides. Both facilitators were satisfied that Mr. Kavanagh understood the concepts and could apply them to his own life. In addition, they were convinced that Mr. Kavanagh was motivated to do so as he told them that "if I don't get my shit together I'm spending the rest of my life here". In Mr. Kavanagh's program performance report dated April 29, 2010, Mr. McKechnie wrote that Mr. Kavanagh "did extremely well in the program. There is no need for him to redo another high intensity sex offender treatment program but recommended that he take a primer as well as the sex offender maintenance program." He wrote further that Mr. Kavanagh's self-management plan is "comprehensive and realistic". It "addressed all of his identified risk factors and his interventions, if consistently applied should be sufficient for addressing those risk factors".

[88] Mr. Kavanagh's self-management plan included the following:

- 1) Open, honest communication with community supports
- 2) Positive self-talk - challenging thinking errors
- 3) Avoid criminal/drug subcultures
- 4) Ask for help
- 5) Don't do drugs
- 6) Avoid certain places where teens are
- 7) Self-report associating with male teens to community support
- 8) Tell them to leave the residence or leave teen at the location or area
- 9) Physically remove self from situation

[89] The self-management plan was a crucial aspect of the Odyssey program. Mr. McKechnie testified that it is predicated on the idea that offenders will not be under supervision for the rest of their lives and will be on their own dealing with risk factors in the community. Every offender was tasked with examining their own risky behaviours and their own plans to manage that behaviour as it progressed, in a reasonable and realistic way. Mr. Kavanagh's plan was detailed and addressed all of his risk factors. His interventions were appropriate. Facilitators had no concerns with the quality of his plan. Mr. McKechnie testified that Mr. Kavanagh's list of strategies was comprehensive, and even included the most extreme strategy of being returned to prison if he was not able to manage his risk.

- [90] In late 2009/early 2010 Dr. Lamba assessed Mr. Kavanagh for the National Parole Board. Dr. Lamba reviewed Mr. Kavanagh's history of sexual offending and his corrections file and he interviewed Mr. Kavanagh on December 22, 2009 while Mr. Kavanagh was in the Odyssey program.
- [91] About the sexual assaults of the two boys on Saltspring, Mr. Kavanagh told Dr. Lamba that he used cocaine in every sexual encounter as "it was part of the grooming". Mr. Kavanagh reported that one of the boys lived with him and said that he considered that he was involved in a relationship with his victim.
- [92] Mr. Kavanagh spoke openly to Dr. Lamba about his grooming process. Dr. Lamba wrote the following regarding what Mr. Kavanagh said his process was with J.M.:

Even having said how his views were now changed, Mr. Kavanagh kept using the term 'interacting' for his sexual acts against his victims, in our interview. When asked if this meant interacting sexually, he stated, "well, perception of being a friend, while manipulating for sexual gratification ... you know how it is ... my second time I assaulted him, I jumped into him, asked him if he wanted to make money and he said 'no', and I said 40 dollars in half an hour, this was more than the 25 dollars the first time ... I would try the consent ... I wasn't ever going to force someone to do what they didn't want to do". When asked if he indeed had ever forced any of his victims, he stated that for his first five victims (the convictions prior to 1988), he had been drinking alcohol in all his offences and had been physically threatening, intimidating towards his victims, even threatening one of them with a knife. He went on to explain further the difference between his pre-1988 offences and the index offence. He stated that he had once paid 60 dollars for anal intercourse with the first victim in the index offence, and that "I wouldn't force anyone to do what they didn't want to- my attitude was everyone has a price and it was a matter of finding what that price would be. My mind set was incredibly irrational ... if an individual consented for money, there was no victim ... irrational with respect to what I was doing and who I was doing it to ... it was akin to going to the street worker and offering money for this act ... it's not where I sit at this point".

- [93] And with J.R.:

He stated that in his grooming of the second victim, he found that the victim was more likely to respond to his request for sexual encounters with cocaine rather than with money or marijuana. This young boy was the friend of his friend's son- someone he knew. He had needed someone to house sit his place for a month, when he was off to Camosun College for an apprenticeship. He acknowledged that both victims were 'marginalized' - the first needed money and the second one had been kicked out of his house and was living in tents. Mr. Kavanagh stated that he took advantage of his situation and offered him housing, food, money in return for house-sitting, and then also took advantage of him at 'the drug level'. He stated, "I knew that he would like crack cocaine if I provided it, he would more likely comply for sex". Cocaine became part of the sexual experience and was present in each and every sexual encounter he had with this victim. He reported that both would smoke it; he only as a token or in a social gesture for the first few

moments and then he would be more focused on gratifying himself sexually, while the victim continued use of crack cocaine.

[94] After a thorough assessment, Dr. Lamba reached these conclusions about Mr. Kavanagh:

- 1) He does not suffer from a "traditional major mental disorder such as mood disorder or psychosis";
- 2) He is an entrenched, prolific homosexual hebephile, which is the primary factor in his risk of reoffending;
- 3) He "maintains a high level of psychological defences with regard to his sexual offending and reoffending";
- 4) He minimizes and justifies his offending and he denies his condition of deviant sexual arousal pattern;
- 5) He has a history of failing to complete psychological sex offender treatment programs;
- 6) He has a poor record for complying with community supervision, noting that successful community supervision requires an offender to be open, honest and disclosive;
- 7) He has a substantial history of alcohol and drug abuse. He needs to be substance free in order to diminish his risk;
- 8) He has a high sex drive which would need to be addressed with medication to which he is opposed; and
- 9) If Mr. Kavanagh was sexually victimized as a child that can be dealt with in counselling but it has no correlation to sexual reoffending.

[95] Manageability depends on many factors including the offender's current level of risk, his past response to treatment, his ability to self-manage, his past compliance with community supervision and his level of deviance. Overall, Dr. Lamba concluded that Mr. Kavanagh posed a high to very high risk of sexually reoffending that could not at that time be managed in the community.

[96] Mr. Kavanagh completed the Sex Offender Maintenance Program in 2010. In a report written at the end of the program Mr. Gresham reported that Mr. Kavanagh's participation was above average. Mr. Gresham testified that throughout the program Mr. Kavanagh remained very motivated and committed to change and that he had a high degree of insight into his offending in that he identified more risk factors than most offenders.

[97] In March 2012 Mr. Kavanagh was assessed by psychologist, Dr. Marion Eals, for his one-chance statutory release application. Like others, Dr. Eals believed that Mr. Kavanagh was being open and forthright during her interview with him. She assessed him at a moderate risk to reoffend sexually. That is the only time Mr. Kavanagh has been assessed to be anything less than a high risk of reoffending. In recommending that he be released, Dr. Eals wrote:

It appears that Mr. Kavanagh has made the necessary changes in his thinking, attitudes and emotional responses such that he is capable of appropriate self-monitoring and behavioural control. He appears to be highly motivated to not reoffend and become a normal member of the community. His motivation stems in part from his desire to never again commit another criminal offence and risk being declared a dangerous offender. His motivation also seems to stem from a sincere desire to not harm another young victim. Mr. Kavanagh seems to understand that his past sexual offences have caused harm and his expressions of empathy for his past victims seem genuine.

[98] Within a month of this report and while he was awaiting word on early release, on April 14, 2012 a correctional officer observed Mr. Kavanagh engaged in a sex act with a slight, young looking 18-year-old inmate. They stopped when approached by the correctional officer and the young inmate got dressed. When confronted by his institutional parole officer Mr. Kavanagh became angry and denied having sexual contact with this young inmate. He then stated that he had not done anything illegal. The young inmate reported that the sex act was done in exchange for cigarettes. This was never confirmed.

[99] As a result of this incident Mr. Kavanagh was transferred out of Mountain Institution to Matsqui, his case management team withdrew support for his early release and the community residential facility that he was going to live in was no longer willing to accept him. In July 2012 Mr. Kavanagh admitted the sex act to the Parole Board. In reaching their decision to detain Mr. Kavanagh, the Parole Board wrote:

You were able to describe triggers for your sexual offending and identify strategies to manage your risk. Your responses to the Board's questions suggested you have some understanding about the reasons for your offending, its impact on your victims and how to manage your risk.

What is less clear is why you were reportedly unable to see the connection between a sexual relationship with another inmate and your risk. You told the Board you had a sexual relationship for about two weeks, but did not log your thoughts, emotions or behaviour partly because you thought the sexual activity might not be permissible and partly because you were protecting your partner's privacy. The Board did not find your explanation credible given information provided by your parole officer that sexual protection aids are freely distributed within the institution. Your comment that you perceived your partner as an adult has concerning implications for your ability to manage your risk in a less structured setting where you would have access to children

In spite of your apparent willingness to manage your risk and work cooperatively with your CMP, you associated with younger inmates contrary to the advice of your parole officer, and you ultimately had a sexual relationship with a young male very near the age of your victim pool. While you indicated you did not recognize the connection to your crime cycle, you made deliberate efforts to keep the relationship secret, including lying about your actions when confronted. Given your willingness to be non-disclosive and deceitful, the Board is satisfied that your risk cannot be managed in the community. Your open and honest communication with members of your CMP is essential to managing your risk in the community and was the basis of the support you had for a release.

[Emphasis added.]

- [100] I emphasised the above as keeping logs and being honest and disclosive are all essential for risk management. Mr. Kavanagh was well aware of that through the programs.
- [101] Mr. Kavanagh was detained until warrant expiry. On December 16, 2013 Mr. Kavanagh, then 55, was released from prison having served the full 10 year, three month sentence for two counts of sexual assault.
- [102] As he was believed to still pose a risk, Mr. Kavanagh was placed on a s. 810.1 recognizance for two years with stringent conditions, including that he report to a probation officer as directed, reside where approved by the probation officer, attend counselling as directed by the probation officer, to not have contact with anyone under the age of 16 and to not possess or consume alcohol or drugs. In addition to being supervised by a probation officer, Mr. Kavanagh was monitored by the Vancouver Police Department ("VPD") High Risk Offender Unit ("HROU"), the mandate of which is to monitor high risk offenders and support their successful reintegration into the community.
- [103] Mr. Kavanagh settled into life outside prison quite quickly. He was not accepted into community housing but was able to find a residence that was approved of by his probation officer. He consistently attended the sex offender maintenance group and actively participated. He attended Circles of Support and Accountability ("COSA"), a volunteer group that works with sex offenders in the community. COSA volunteers and their clients are generally very open with each other. Clients are expected to share details about their risk factors and self-management tools; details that they might not feel comfortable sharing with others. He had the support of his sister and her husband. He was working and attending church. He reported regularly to Jan Klinka, a senior probation officer with 30 years' experience and saw a number of different police officers in the HROU. Both Ms. Klinka and the members of the HROU believed Mr. Kavanagh was doing well.
- [104] In September 2014 Ms. Klinka, accepting Mr. Kavanagh's word that he was doing well, reduced his reporting requirement to bi-weekly. In November 2014 Mr. Kavanagh told Ms. Klinka that he was confident that he had changed his ways.

[105] On April 27, 2015 Mr. Kavanagh spent an hour with Ms. Klinka. Afterward she made the following note:

it appears that he is in a good mindset in terms of his past deviant behaviour and how he can keep himself in check if 'unwanted attractions' present themselves. Good support around him and a COSA member is always a call away.

[106] Within days of this meeting Mr. Kavanagh started reaching out on social media to W.M. the victim of the predicate offence.

The Predicate Offences

[107] The circumstances of the predicate offence are fully outlined in my reasons for judgment. I will provide a brief summary here. In doing so I will borrow from my reasons for judgment. While similar to his usual pattern, Mr. Kavanagh's propensity to manipulate and deceive others increased.

[108] In May 2015, Mr. Kavanagh befriended 14-year-old W.M. W.M. was troubled. He was addicted to crystal meth, had stopped going to school and was getting into trouble with the law. His relationship with his family was suffering. In fact, he had been put into foster care shortly before Mr. Kavanagh befriended him. W.M.'s drug use continued in care. He was moved from foster home to foster home as he repeatedly broke the rules.

[109] Mr. Kavanagh learned of W.M. through a mutual "friend", a young man named Mike, a drug dealer who Mr. Kavanagh got his crystal meth from. On May 4, 2015 Mr. Kavanagh began by reaching out to W.M. on Facebook. They had never met. Mr. Kavanagh sent message after message. On May 8, 2015 Mr. Kavanagh set up an in-person meeting with the young boy. That meeting was the beginning of what became an almost 15 month period of grooming. Mr. Kavanagh slyly inserted himself into every aspect of W.M.'s life. He immediately asked W.M. to call him "uncle". He referred to him and W.M. as "family". He provided W.M. with crystal meth and marihuana and often used the drugs with him. He gave W.M. money. He had W.M. trafficking drugs for him. This all in the face of knowing firstly that W.M. was struggling with drug addiction, and secondly that he was on court orders forbidding him from possessing or using drugs. He snuck W.M. into his boarding house despite the rule that people under the age of 19 were prohibited. He got W.M. a job in construction at the same place he was working at.

[110] There were a few times over this extended grooming period that W.M. broke away from Mr. Kavanagh and stopped communicating with him. This was generally when W.M. was in jail (for breach) or at a residential program to try to address his drug addiction. During these periods Mr. Kavanagh messaged W.M. repeatedly.

[111] He manipulated everyone around W.M. that were trying to help him. To a social worker and police officers, he said he was W.M.'s uncle. He said the same to the manager of his boarding house when he was found to have a shirtless, underage W.M. in his room.

- [112] When W.M. was staying with his family over Christmas holidays 2015 on a break from a residential addiction program, W.M.'s father G.M. noticed correspondence from Mr. Kavanagh on W.M.'s Facebook page. Wondering what an older man wanted with his young son, G.M. contacted Mr. Kavanagh. Mr. Kavanagh told W.M.'s father that he was an outreach worker, that he had known W.M. for about a year and that he was helping W.M. with his drug addiction. G.M., desperate to help his son, provided Mr. Kavanagh with intimate information about W.M. including troubles he was having with the family. G.M. also sent him some photos of W.M. at Christmas. This was during a period that W.M. had broken communication with him.
- [113] On March 23, 2016 W.M. was released from a six month residential treatment program and placed in a new foster home, the home of H.T. Mr. Kavanagh contacted W.M. immediately. This began the period when Mr. Kavanagh almost killed W.M. with drugs.
- [114] It started the night of March 24, 2016. That night W.M. told H.T. that he was having dinner with his father. He was not. He was with Mr. Kavanagh. When W.M. did not return to the house by curfew, H.T. called G.M. who said that he had not seen W.M. H.T. then saw a motorcycle pull up to his house. Mr. Kavanagh was driving and W.M. was on the back. Mr. Kavanagh introduced himself as "Mike", W.M.'s outreach worker. Suspicious, H.T. asked Mr. Kavanagh for identification. Mr. Kavanagh took off. When H.T. talked to W.M. he could see that he was high - wide-eyed, sweating, and fidgety.
- [115] After the phone call from H.T., G.M. had come to the area to look for W.M. and also saw Mr. Kavanagh drop W.M. off. G.M. talked to Mr. Kavanagh - this was their first in-person meeting. Mr. Kavanagh told G.M. that he was making sure that W.M. got home for curfew. G.M. asked why W.M. was high. Mr. Kavanagh explained that W.M. had spent a long time in rehab and he wanted to give him a break so they had smoked joints and drank some beer. G.M. said he could not do that as W.M. was in treatment and asked Mr. Kavanagh not to do that again.
- [116] The next day H.T. found drug paraphernalia in W.M.'s room. That night W.M. was again dropped off by Mr. Kavanagh on his motorcycle. Again W.M. was pale and sweaty. He was high. H.T. decided that W.M. could not stay in his home. As a result the next day W.M. was returned to a residential program.
- [117] W.M. was released May 9, 2016 and returned almost immediately to using drugs with Mr. Kavanagh and selling drugs for him. Mr. Kavanagh got W.M. a job on his construction site. Mr. Kavanagh assured W.M.'s father, with whom he maintained contact, that W.M. would be provided the appropriate safety training. He also assured G.M. that W.M. was clean and better now. That was far from the truth. W.M. was not doing well at that time - at all. He was using crystal meth given to him by, and often smoked with, Mr. Kavanagh and he was constantly breaching his court orders. He only worked at the jobsite for a few weeks - five or six shifts in total.

- [118] On June 10, 2016, W.M. was arrested on various breach allegations. He was released on June 13, 2016 to a youth detox centre with a number of conditions, one of them being that he not have any contact with Mr. Kavanagh.
- [119] By June 17, 2016 W.M. went AWOL from youth detox.
- [120] Footage from the CCTV camera at the front door of Mr. Kavanagh's boarding house shows that W.M. entered the building on a number of occasions between June 20 and June 22, 2016. On June 22, 2016 W.M. and Mr. Kavanagh can be seen entering the building at approximately 3:10 a.m. W.M. can be seen exiting the building alone at 4:57 a.m.
- [121] Police went to Mr. Kavanagh's room on a number of occasions looking for W.M. On June 21, 2016 Mr. Kavanagh angrily refused to answer the door.
- [122] On June 22, 2016 W.M. was obviously high when he attended a meeting with his youth worker, Mr. Louie.
- [123] On June 27, 2016 W.M. was arrested on outstanding warrants and kept in custody. On July 15, 2016, after pleading guilty to another breach charge, W.M. was released to a new foster home with a number of conditions including a no contact with Mr. Kavanagh.
- [124] On July 16, 2016, W.M.'s new foster parent T.P. greeted W.M. on his arrival at the house, W.M. left the house at 5:00 p.m. and returned high at about 9:35 p.m.
- [125] On July 18, 2016, T.P. took W.M. out for lunch then left him at a medical appointment. W.M. returned to T.P.'s home at 9:45 p.m. extremely high. Yankee 10, a VPD unit operated by a police officer and a youth worker, stopped by T.P.'s house to do a curfew check. After the curfew check W.M. left the house and returned 15 minutes later.
- [126] The next day, July 19, 2016, W.M. left the house at 1:00 p.m. and came back later that evening in bad shape. T.P. had a discussion with him about Mr. Kavanagh and W.M. gave him Mr. Kavanagh's phone number. T.P. checked the call logs on the phone that was used by the youth living in the house and saw that Mr. Kavanagh's number had been called seven to ten times. At this point W.M. no longer had a cell phone so he and Mr. Kavanagh were in contact through the house phone.
- [127] That night Yankee 10 stopped by again to conduct another curfew check. They noted W.M. to be different than the day before. He was spaced out and less alert although he was able to converse. Youth worker, Mr. De Beck, noted a fresh needle mark on W.M.'s arm. It was a small pinprick in the inside elbow crease with fresh blood in and around it.
- [128] On July 20, 2016, W.M. failed to attend his appointment with his youth worker. When he returned to the T.P. home he was in the worst shape T.P. had seen him; so bad that T.P. feared for his well-being. Detective O'Buck, a youth police officer that knew W.M., stopped by that evening. She had never seen W.M. in such bad shape.

- [129] On July 21, 2016, W.M.'s youth worker Mr. Louie went to the T.P. home to see W.M. W.M. was in terrible shape - he had bloodshot eyes and slurred speech and he could not hold a conversation which was unusual for W.M. W.M. told Mr. Louie that he had used acid. He had in fact been smoking crystal meth. Mr. Louie had been supervising W.M. since May 2015 and had never been this concerned about W.M. W.M. was spiralling out of control.
- [130] W.M. went out that day and did not return to the house. Sometime after W.M.'s 10:00 p.m. curfew, Mr. Kavanagh was stopped by police on his motorcycle seven blocks from the T.P. residence. He was alone but had a second helmet attached to his bike. He denied having been with W.M. that night.
- [131] W.M. was arrested when he returned to the T.P. residence the next day and was held in custody until August 25, 2016. He was then taken directly to a youth program.
- [132] According to W.M., during the time he was staying with T.P. he was using crystal meth that Mr. Kavanagh gave to him. He often used it with Mr. Kavanagh. He would call Mr. Kavanagh from the house phone at the T.P. home and Mr. Kavanagh would meet him in the back alley where they would smoke meth together.
- [133] Sometime during his stay at the T.P. residence, W.M. says that Mr. Kavanagh performed oral sex on him.
- [134] On the day of the incident W.M. went to Mr. Kavanagh's boarding room in the morning. He and Mr. Kavanagh smoked a lot of meth and got high. Mr. Kavanagh asked W.M. if he had ever had a blowjob. W.M. said not from a male. Mr. Kavanagh told W.M. that it would be "better" using a needle. W.M. believed that "it" meant oral sex. W.M. then passed out. When he came to he had a blue rubber band wrapped around his arm and a needle, the kind used to inject drugs, in his arm right below the elbow crease. His shorts were on the ground and his underwear was pushed down past his knees. Mr. Kavanagh was lying next to him on the bed fully clothed. He appeared to be sleeping. W.M. ripped the band off his arm, removed the needle from his arm, got dressed and left.
- [135] W.M. continued to meet with Mr. Kavanagh after that because he wanted drugs.
- [136] According to T.P., a reformed drug addict himself and an experienced foster parent to high-risk youth many of who suffer with drug issues, if W.M. was not arrested in July he would have died.
- [137] Mr. Kavanagh accepts the facts as outlined above and in my reasons for judgment at trial. He admits that he groomed W.M. over an extended period of time, in breach of his recognizance, by inducing W.M. by among other things, providing W.M. drugs and a place to use the drugs.

[138] In a victim impact statement filed on the DO hearing, W.M.'s father writes of the devastation wreaked on W.M. and the family by Mr. Kavanagh. And he pleads for help for his son: "(W.M.) needs help. Please get him the help he need's (sic). Before it's too late. I beg this of the sysym (sic) "

ISSUES

[139] The issues to be decided on this sentencing hearing are as follows:

- 1) Should Mr. Kavanagh be designated a dangerous offender; and
- 2) If so, what is the appropriate sentence?

[140] I will discuss the issues in turn.

ISSUE 1: SHOULD MR. KAVANAGH BE DESIGNATED A DANGEROUS OFFENDER?

[141] Mr. Kavanagh concedes that the Crown has proven beyond a reasonable doubt the requisite elements for a finding that he is a dangerous offender pursuant to s. 753(1)(a). More specifically, Mr. Kavanagh admits that the Crown has proven a pattern of repetitive behaviour and a future likelihood that he will inflict severe psychological damage on others through the failure to control his behaviour in the future (s.753.1(1)(a)(i)) and agrees that he should be designated a dangerous offender. I concur.

[142] In order to establish the prescribed "pattern of repetitive behaviour" under s. 753(1)(a)(i), the Crown must prove beyond a reasonable doubt each of the following elements:

1. a pattern of repetitive behaviour;
2. the predicate offence must form part of the pattern;
3. the pattern must show a failure by the offender to restrain his behaviour in the past; and
4. the pattern must show a likelihood of death, injury or severe psychological damage to other persons through failure to restrain his behaviour in the future.

(R. v. Pike, 2010 BCCA 401 at para. 26.)

[143] Mr. Kavanagh's criminal behaviour spans almost five decades.

[144] As can be seen from the history above, there is a clear pattern to Mr. Kavanagh's sexual offending. Since 1978 he has been convicted of sexually assaulting nine young boys ranging in age between 12 and 16 years. All of the boys were vulnerable which made them perfect victims. He started his sexual offending by using force and fear. As he became more sophisticated he progressed to targeting particularly vulnerable boys, luring them into spending time with him and grooming them over an extensive period of time. He provided them with alcohol and drugs and preyed upon their addictions, loneliness and in most cases isolation from their families. In each case he threatened the boys, overtly or subtly. He concealed what he was doing from others, often with lies. He then sexually assaulted

the boys. Some hundreds of times, others less; W.M., once.

[145] It is an understatement to say that all of Mr. Kavanagh's victims have suffered severe psychological damage.

[146] Mr. Kavanagh has repeated this pattern of aggressive behaviour unrestrained by counselling, community supports and various forms of supervision. He has shown himself to be a master manipulator, fixated on his goal of having sex with the boys, completely indifferent to the devastation he was causing the boys and their families.

[147] Mr. Kavanagh has been diagnosed as having an entrenched sexual deviancy disorder, hebephilia, which is an attraction to post-pubescent and early year teenage males. In forensic psychiatrist Dr. Kulwant Riar's opinion, Mr. Kavanagh poses a high risk to reoffend sexually. Dr. Riar set out the basis for his opinion as follows:

.The basis for my risk assessment is his entrenched sexual attraction towards pre-pubescent and early year teenage males and his inability to have any control of his sexual urges, which he has demonstrated over the years by getting involved with various young victims, some of them led him to incur charges and convictions. The other elements which are significant in his risk assessment are his alcohol and drug use, as well as his personality profile, where he has a sense of grandiosity, lack of empathy, being callous, irresponsible and self-centered. Even after attending various programs and facing long consequences of his wrongdoing in the past, he is not able to curb, mitigate or stop his behaviours, even with his advancing age.

[148] There is no doubt, based on the evidence that I heard at trial and in this hearing, that Mr. Kavanagh poses a high risk of harmful recidivism and that his conduct is intractable. It follows that I am satisfied that Mr. Kavanagh is a dangerous offender.

[149] What then is the appropriate sentence?

ISSUE 2: WHAT IS THE APPROPRIATE SENTENCE?

[150] In order to determine the fittest sentence, this Court must "conduct a thorough inquiry" into the possibility of controlling the offender's risk: Boutilier, at paras. 68, 76. An offender's moral culpability, the seriousness of the offence and mitigating factors are each part of the sentencing process under the dangerous offender scheme: Boutilier, at para. 63. Each of these considerations is relevant to deciding whether or not a lesser sentence would sufficiently protect the public: Boutilier at para. 63.

[151] Treatability, meaning the offender's amenability to treatment and the likelihood of success, comes into play into this analysis. As stated by the Ontario Court of Appeal in R. v. G.L., 2007 ONCA 548 at para. 42:

... The determination of whether an offender's risk can be reduced to an "acceptable" level requires consideration of all factors, including treatability that can bring about sufficient risk reduction to ensure protection of the public. This does not require a showing that an offender will be "cured" through treatment or that his or her rehabilitation may be assured. What it does require, however, is proof that the nature and severity of an offender's identified risk can be sufficiently contained in the community, a non-custodial setting, so as to protect the public.

[152] The offender's past history, treatment record and diagnoses may all shed light on the offender's attitude and treatability: *R. v. R.B.*, 2011 ONCA 328.

[153] In *R. v. Bragg*, 2015 BCCA 498, at para. 55, our Court of Appeal identified the three elements of treatability required to achieve the treatment goal of protecting the public by reducing the risk of recidivism to an acceptable level:

- 1) there must be evidence of treatability that is more than an expression of hope;
- 2) the evidence must indicate that the offender can be treated within a definite period of time; and
- 3) the evidence of treatability must be specific to that offender.

[154] Put another way, in order to impose a fixed sentence with a long term supervision order ("LTSO"), this court must be satisfied that there is a reasonable possibility that Mr. Kavanagh would make sufficient progress within the period of incarceration to take advantage of the mechanisms of supervision that will be provided on his release in order to control his risk in the community: *R. v. Johnson*, 2008 BCCA 149 [Johnson], at para. 78.

[155] A sentencing judge cannot be satisfied that there is a reasonable possibility of controlling an offender's identified risk unless there is evidence that the means to do so are in fact available: *R. v. Trevor*, 2010 BCCA 331, at para. 35.

Position of the Crown

[156] As stated at the outset, the Crown is seeking an indeterminate sentence. The Crown submits that there is no evidence that Mr. Kavanagh will be treated within a fixed time to allow for his risk to be managed in the community. Mr. Kavanagh's current prospects for successful future treatment are at best a speculative possibility. If this Court imposes an indeterminate sentence for the sexual interference, the Crown submits that a total sentence of six years for trafficking and breach would be appropriate. These sentences would automatically run concurrent to the indeterminate sentence.

- [157] Alternatively, if the Court does not find that an indeterminate sentence is appropriate, the Crown seeks a total fixed sentence of 16 years plus a LTSO of 10 years to follow. The Crown calculates that sentence as follows: 12 years for the offence of sexual interference, four years for the offences of trafficking (concurrent to each other and consecutive to the sexual interference), and two years for the offence of breach (concurrent to the trafficking and consecutive to the sexual interference).
- [158] Mr. Kavanagh has been in custody on these charges since his arrest on April 5, 2017. The Crown submits that he is entitled to credit for dead time at time and a half.

Position of Mr. Kavanagh

- [159] Mr. Kavanagh argues that the appropriate sentence is a determinate sentence with a LTSO to follow pursuant to sections 753(4)(b) and (c). Specifically, he submits that the appropriate sentence is a fixed sentence of 16 years with a 10 year LTSO (the Crown's alternate position).
- [160] The rationale for this sentence is that if Mr. Kavanagh serves the entire sentence (which has been the pattern) he will be 78 years of age when he is released into the community. At that advanced age Mr. Kavanagh would be less of a risk as the experts have testified that aging in some circumstances reduces the intensity of an offender's deviance.
- [161] Mr. Kavanagh submits that a LTSO with the following conditions would then be sufficient to manage his risk in the community:
- 1) Not to consume, purchase or possess drugs other than prescribed medication taken as prescribed and over the counter drugs taken as recommended by the manufacturer.
 - 2) Not to consume, purchase or possess alcohol.
 - 3) Not to be in the presence of any children under the age of 18 unless you are accompanied by a responsible adult who knows your criminal history, and has been previously approved in writing by your parole supervisor.
 - 4) Not to be in, near, or around places where children under the age of 18 are likely to congregate such as elementary and secondary schools, parks, swimming pools and recreational centres unless accompanied by an adult previously approved in writing by your parole supervisor.
 - 5) Immediately report all intimate sexual and non sexual relationships and friendships with females and males that have guardianship and/or access to children under the age of 18 to your parole supervisor.
 - 6) Reside at a Community Correctional Centre ("CCC") or a Community Residential Facility ("CRF") approved by the Correctional Service of Canada, until the warrant expiry date.

- 7) Not to be outside the CRF/CCC unless you are accompanied by a responsible adult who knows your criminal history, and has been previously approved in writing by your parole supervisor.
- [162] Mr. Kavanagh submits that if the court feels it necessary, perhaps a condition for electronic monitoring could be useful when he is first released to the community, but he says it is not necessary.
- [163] He has further expressed a willingness to take testosterone reducing drugs if that is what is required to reduce his risk.
- [164] Mr. Kavanagh expresses that the DO proceedings have given him a new, "more developed" insight into his offending. He says that J.R.'s victim impact testimony had a great impact on him and caused him to have "renewed shame and remorse" for having committed these offences. It also drove home to him the "enormous risk to which he exposed W.M."
- [165] As noted throughout these reasons, this is not the first time that Mr. Kavanagh was made aware of the impact he has had on the victims and their families. Victim impact was addressed at every sentencing hearing. In fact J.R. himself told the court how Mr. Kavanagh had affected him at the sentencing in 2003. Plus, the destruction he caused has been addressed continually in counselling over the decades. And Mr. Kavanagh has expressed his remorse for the hurt he has caused at virtually every sentencing hearing.

Current Risk Assessment

- [166] Dr. Mark Bodnarchuk, a forensic psychologist, was appointed the court expert. He assessed Mr. Kavanagh and authored a report to the Court pursuant to s. 752.1. He also testified at the DO hearing. It was readily apparent to counsel and the court that Dr. Bodnarchuk was ill-qualified to proffer an opinion in this case. He has no meaningful experience dealing with sex offenders and as a psychologist, has no expertise with medication. The lack of expertise was so glaring that during the examination regarding Dr. Bodnarchuk's qualifications the Crown sought and was granted an adjournment to retain another expert. When we reconvened, the Crown led Dr. Bodnarchuk in direct. I found Dr. Bodnarchuk's evidence to be lacking and unreliable. As I indicated to defence counsel at the outset of the cross examination of Dr. Bodnarchuk, I place no weight on his evidence. Accordingly, Dr. Bodnarchuk's report and evidence form no part of my decision making process.
- [167] Further, to ensure that unreliable opinion does not form a permanent part of Mr. Kavanagh's record, on August 26, 2020 at the behest of the defence, and the consent of the Crown, I made the following orders:
- 1) That Dr. Bodnarchuk's report and testimony not be provided to the Correctional Service of Canada under any s. 760 order that this Court makes; and

- 2) That the report and testimony of Dr. Bodnarchuk in the court file be sealed and that the DARS recordings of his evidence not be accessed or transcribed without further order of this court.
- [168] The Crown relies on the evidence of Dr. Kulwant Riar. Although Dr. Riar is not an independent court appointed expert, his evidence was most helpful. Mr. Kavanagh accepts Dr. Riar's assistance as helpful. This was demonstrated by the fact that partway through Dr. Riar's evidence Mr. Kavanagh requested an adjournment so he could be interviewed by Dr. Riar for the purpose of his opinion. It was further demonstrated by the fact that Mr. Kavanagh chose not to call his own expert to counter Dr. Riar's opinion.
- [169] Dr. Riar diagnosed Mr. Kavanagh with several disorders:
- a. attention deficit and hyperactivity disorder (ADHD);
 - b. antisocial personality disorder;
 - c. substance abuse disorder, alcohol and drugs;
 - d. psychopathic traits; and
 - e. entrenched sexually deviant disorder, specifically hebephilia.
- [170] Dr. Riar says that Mr. Kavanagh's substance abuse disorder is in "forced remission" due to his incarceration (although it is widely known that drugs are available inside correctional institutions). Nonetheless, Dr. Riar is of the opinion that given his history, Mr. Kavanagh will start drinking and/or using drugs again if released.
- [171] Psychopathic traits include manipulative, lack of guilt or remorse, callousness, lack of empathy, irresponsibility and failure to accept responsibility for one's own actions. A person who has traits of either antisocial personality or psychopathy can be difficult to treat and manage meaningfully.
- [172] Entrenched sexual deviancies are firmly established and will not change. They cannot be cured; only managed and monitored.
- [173] Dr. Riar completed three actuarial risk assessment instruments to assess Mr. Kavanagh's risk: the Psychopathy Checklist (PCL-R), the Violence Risk Appraisal Guide (VRAG) and the Static - 2002. Applying the results of these tools to his clinical judgment, Dr. Riar concluded that Mr. Kavanagh was a high risk to reoffend sexually in the future. The factors that led him to this conclusion include the following:
- 1) Mr. Kavanagh's criminal versatility generally correlates to a higher risk or reoffending.
 - 2) The fact that he started offending at a very young age correlates to a worse prognosis.

- 3) The large number of sexual offences over so many years and despite multiple interventions suggests that Mr. Kavanagh's deviant sexual interest is very entrenched and that he has not learned anything that has allowed him to control his deviance.
 - 4) Mr. Kavanagh's past behaviour while on supervision is troubling. He led his supervisors to believe that he was doing well when he was not. This "impression management" makes it very hard to manage him. Supervisors can not rely on Mr. Kavanagh to accurately self-report.
 - 5) Lengthy jail terms and the threat of same do not deter him.
 - 6) He does well in custody but that changes once he is in the community.
 - 7) Although for many years Mr. Kavanagh did not engage in sex offender programming, he did in the last few years of his last period of incarceration. He reportedly did very well. He identified his risk factors and formulated a risk management plan that was insightful and detailed. His facilitators believed that he benefitted from the program and would be able to apply his skills to real life. It is not a "good thing" that he fails to do so.
 - 8) The fact that Mr. Kavanagh continually and repeatedly cannot or will not apply his learned skills and prosocial behaviour in custody to the community does not bode well for his eventual rehabilitation.
- [174] The chances that further treatment will attenuate Mr. Kavanagh's risk is "dismal" but he should still be given the chance, as Dr. Riar believes that there is always the possibility that people will change.
- [175] Dr. Riar noted that Mr. Kavanagh has not tried medication to reduce his sex drive or deviancy and said that that should be explored in the future with him. According to Dr. Riar, "the medication can add another layer of safety net in managing his risk but by itself will not be enough to contain his behaviour." Dr. Riar noted, as did Dr. Lamba, that these drugs have many side effects including depression, breast growth, testicular shrinkage, and weight gain. It can also cause headaches and sleep disturbance. A lot of people stop taking the drugs because of the side effects. In addition, people taking the drugs must be monitored by a doctor regularly and must be disclosive about their sexual urges and fantasies. In Dr. Riar's opinion it is difficult to predict if Mr. Kavanagh would stay on the medication. Even if he did, the medication alone is not enough to manage his risk in the community.
- [176] Dr. Riar also talked about the impact of aging. Although aging does reduce sex drive Dr. Riar is not of the opinion that that will reduce Mr. Kavanagh's risk. In Dr. Riar's opinion, because of his offending pattern, Mr. Kavanagh could still offend even if he had erectile dysfunction.
- [177] Dr. Riar concluded that even with aging and medication, Mr. Kavanagh remains a high risk of reoffending sexually.

- [178] Dr. Lamba reached similar conclusions. He testified that it is not possible to change a deviant pattern of sexual arousal. The most effective way of reducing it is through self-management or self-control. Medication and aging may supplement self-management. Regarding testosterone-reducing medication, Dr. Lamba testified that it does not work for everyone, however with some people it has a positive effect. Of course the danger is that it only works if it is taken. In Dr. Lamba's experience most people stop taking it after a few months as the side effects are so significant. When Dr. Lamba asked Mr. Kavanagh about taking the medication in 2009, Mr. Kavanagh said, "I would question its relevance." Regarding the impact of aging on reducing the intensity of Mr. Kavanagh's arousal pattern, Dr. Lamba testified that it is generally accepted that the risk of recidivism may decrease with advancing age. However everyone is different and in general the effect of aging is less pronounced on people that offend against children. Dr. Lamba was unable to say what impact the medication or aging would have on Mr. Kavanagh's risk of reoffending sexually.
- [179] In Dr. Riar's opinion, the only way Mr. Kavanagh's risk could be managed in the community is with "hand on shoulder" monitoring, 24/7. He points to the high level of supervision that Mr. Kavanagh was on in his last period in the community. It was not enough to either deter him or keep him under control.

Available Treatment and Monitoring

- [180] In 2010, soon after Mr. Kavanagh completed the Odyssey program for sex offenders, Correctional Service Canada ("CSC") changed their programming. There is no longer different programming available to address different issues such sex offender and substance abuse programming as Mr. Kavanagh had the benefit of. Now all that is available in federal institutions across the country is the Integrated Correctional Program Model ("ICPM"). At the beginning of their sentence the offender is put into one of three groups: sex offenders, Aboriginal offenders and the remainder, a catch-all group. The offender does a 10 session primer and then is placed in core programming, either medium intensity programming (50 sessions) or high intensity (100 sessions). Once the offender completes the core program, they are moved into a 12 session maintenance program. An offender can only take the primer and core programming once during their sentence but can take the maintenance program as many times as required.
- [181] Once an offender is released into the community they are put into a community maintenance program that involves about 20 group sessions and four individual sessions. In some cases the facilitator might offer six to 12 more sessions to an offender if required.
- [182] ICPM is based in CBT and is led by corrections staff. It does not involve any psychotherapy.
- [183] If the parole board releases an offender into the community, it decides the conditions of release. Conditions may include residency, reporting, counselling, no alcohol and drugs. The monitoring available in the community is the same as it was on Mr. Kavanagh's other releases. There are a small number of parole officers that supervise high risk sexual

offenders. Parole officers decide how often offenders are to meet with them. Meetings are usually 15 to 20 minutes long. The parole officer relies heavily on the offender's self-reporting. According to Sharon Plumpton, a federal parole officer who testified on the DO hearing, it is extremely difficult to supervise and monitor an offender that is skilled at deception.

- [184] Residency requirements are to either halfway houses (CRFs) or CCCs. CRFs are operated for the parole board but are independently owned by contracted private societies like the Salvation Army or the John Howard Society. CRFs decide which offenders they will take. Most CRFs will not take high risk sex offenders.
- [185] CCCs are owned and staffed by CSC employees. There are five CCC's across Canada. CCCs do not refuse to take offenders but they are often full. The CCC in Vancouver, Harbour Lights, houses 70 offenders. If there is no room in a CCC the PO will direct an offender to find their own accommodation. This is what happened to Mr. Kavanagh when he was released in December 2014.
- [186] The staff are CRFs and CCCs are not correctional officers. They do not police the residents. Offenders are not required to meet or interact with house staff other than at a monthly meeting. Both CRFs and CCCs have curfews. Offenders must sign in and out of the house. Some staff may try to note if an offender looks high but there is no guarantee that that will happen.
- [187] An offender on a LTSO can generally only have a residency requirement for a maximum of one year. In exceptional cases that can be extended a year.
- [188] Once an offender is released into the community, self-management skills are crucial as most of the time the offender is unsupervised. There is no ability to monitor an offender 24/7. It is crucial that offenders are honest and disclosive. If an offender does not share when risk factors arise, there is no ability to implement intervention.

DISCUSSION

- [189] Mr. Kavanagh has demonstrated a persistent pattern of targeting vulnerable young boys. He engages in a patient grooming process which involves inserting himself into every aspect of the boy's life. He uses drugs, coercion and threats to gain "cooperation" for sex. He makes the boys dependant on him; he is their lifeline to a limitless drug supply. He manipulates people that care about the young boys into believing that he is helping them when he is doing the opposite.
- [190] He is a very dangerous man. He has shattered the lives of many young boys. He either has no sincere insight into the damage he has caused or he does not care. I am not sure which. But it does not matter. What matters is that he has destroyed the young male targets of his sexual attraction over and over again. This pattern has spanned over 4 decades. As stated by Drs. Lamba and Riar, Mr. Kavanagh is an entrenched, prolific homosexual hebephile.

- [191] He has been in and out of counselling since he was 10/11 years of age. He has "successfully" completed CBT designed to teach him how to change his behaviour. He has been offered sexual offender counselling. Repeatedly. The threat of longer periods of incarceration did not deter him. Nor did the knowledge that he would be facing a dangerous offender hearing if he reoffended.
- [192] He is incorrigible. Again and again he has told doctors and courts that he is sorry, that he understands his offending cycle, that he is aware of his risk factors and that he is motivated to change. At this hearing, Mr. Kavanagh claims to have "renewed" insight into his offending, claims "renewed" remorse for his victims and says that he wants to change so he does not hurt anyone else. While I have no doubt that he is sincere in those expressions right now as he awaits sentence, this court cannot have any confidence that these "renewed" insights will have any lasting effect on his behaviour. Mr. Kavanagh has said the same things before at his sentencings and on assessments for release. His words have been repeatedly proved to be hollow with devastating consequences.
- [193] I acknowledge that Mr. Kavanagh has worked hard on addressing his issues since being incarcerated on April 5, 2017 for this offence. These efforts include:
- 1) staying away from substances;
 - 2) meeting regularly with the addictions counsellor, the jail chaplains, the Concurrent Disorders Counsellor and others;
 - 3) meeting monthly with the mental health nurse;
 - 4) completing the BC Adult Graduation Diploma program with honours;
 - 5) doing bible study programs;
 - 6) completing various modules in the Essential Skills to Success program, for substance use, healthy relationships and socialization;
 - 7) working on various cognitive behavioural workbooks; and
 - 8) journaling his thoughts and emotions daily and logging his sexual thoughts and feelings.
- [194] Mr. Kavanagh has been given countless opportunities to learn the tools required to manage his risk. During his last period of incarceration he engaged in high intensity sex offender and substance abuse programs, reportedly wholeheartedly, and excelled. He has followed the lessons- for a time. Most significantly he has kept journals and logs- for a time. Mr. Kavanagh has been provided much more than the usual support in the community. He has seen countless counsellors, psychologists and psychiatrists. He has been steadily employed and has the support of his sister and her husband - both of which are considered protective factors that reduce risk.

[195] Nothing has worked. He applies learned skills only until they get in the way of him satisfying his needs. Quite simply, Mr. Kavanagh has shown over and over that for him, success in custody does not translate into success in the community.

CONCLUSION

[196] This Court can not have any confidence that Mr. Kavanagh can be safely released to the community at any fixed period of time. Applying the test enunciated by the Court of Appeal in Johnson, there is no evidence upon which I can be satisfied that there is a reasonable possibility that Mr. Kavanagh will make sufficient progress within a fixed sentence to take advantage of the supervision mechanisms provided on his release in order to control his risk in the community. In my view, given his history and entrenched pattern of behaviour, there is not even the faint hope of same.

[197] I have considered all of the evidence including the reports of Drs. Lamba and Riar, the psychiatric and psychological reports prepared over the decades, the reports prepared for the parole board, the reports regarding the counselling and programming offered and given to Mr. Kavanagh and the circumstances of the offences. I have considered the treatment available and the monitoring available in the community.

[198] I find the following facts about the last period of offending significant:

- 1) For most of his cycle of grooming W.M., Mr. Kavanagh was on the s. 810.1 recognizance. He was being monitored by an experienced probation officer, the VPD HROU and the manager of his residence. He was also meeting with COSA, going to church and spending time with his supportive sister and brother-in-law. During the whole of the period, W.M. was under the watch or supervision of probation officers, social workers, foster parents, police officers and his father. Not only did the fact that there were so many "eyes on" the two of them not deter Mr. Kavanagh, he was able to deceive most of them.
- 2) Mr. Kavanagh knew that he would be facing a possible DO application if he was charged with another sexual assault offence. That did not deter him in the least. Other than sneaking him into the boarding house, Mr. Kavanagh did not even try to hide his involvement with W.M. He was most brazen in his actions.
- 3) At some point after his release from custody in 2014 and prior to meeting W.M., Mr. Kavanagh made a "conscious decision" to use crystal meth again despite knowing the role that it plays in his offending cycle. He told Dr. Riar that when he made this decision he realized that it "was not a good thing to do". He was using with "Mike" the young man that he learned of W.M. through. He very quickly became a heavy user.
- 4) Mr. Kavanagh did not report his drug use to his probation officer, HROU or COSA. He told Dr. Riar that he did not see them as help and he did not want to get breached and have his probation extended. Again, this shows a complete failure to apply what he learned because it did not suit his purposes.

- 5) Mr. Kavanagh masturbated several times a night, watching gay porn and fantasizing about W.M. He reported to Dr. Riar that he knew he should not be doing that. Yet he did nothing to address this high risk factor.
 - 6) There were many times that W.M. broke away from Mr. Kavanagh but Mr. Kavanagh would not let him go. He was singularly fixated on having sex with W.M. Even having sexual relations with more age appropriate consenting partners did not interfere with this pursuit.
 - 7) Even though he had been told at sentencing hearing after sentencing hearing of the devastating impact he was having on his victims and their families, Mr. Kavanagh persisted, coldly indifferent to the harm he was causing.
- [199] It is clear from the above that none of the tools Mr. Kavanagh gained in the programs were utilized. None of his community supports were turned to. Instead, Mr. Kavanagh let his sexual deviancies prevail. He targeted another vulnerable young boy and started his offending process all over again. The offence cycle was very similar to the others but more sophisticated. The grooming process was lengthy. Mr. Kavanagh manipulated W.M. and all those around him. He deceived the people that were trying to help W.M. by telling them that W.M. was doing well. In reality he was killing him with drugs. All to serve his own sexual deviancies. Without any care about W.M. or his family. At no time over that lengthy grooming process did Mr. Kavanagh catch himself and hearken back to the training that he apparently did so well in. And notably, none of the measures like monitoring and supervision that were intended to protect the public kept him in check.
- [200] The plan that Mr. Kavanagh presents for a LTSO involves virtually the same conditions that he had on this probation. They did not work this time or the time before or the time before that. At this point there is absolutely no realistic possibility that they would be effective now or at any time in the future. The impact of aging and medication, if Mr. Kavanagh took medication, are unknowns. Nothing more than mere hope. According to Drs. Riar and Lamba, they are not a solution by themselves.
- [201] I agree with the Crown that there is no evidence that Mr. Kavanagh will make advances in the course of a determinate sentence such that his risk will be reduced. And there is no reasonable likelihood that his risk can be managed in the community. Neither is there evidence that the supervision methods necessary to manage his risk are either reasonable or available.
- [202] Mr. Kavanagh, you have had over four decades to work on your issues. Nothing has changed. You are a very dangerous man. You have shattered so many lives. All to satisfy your sexual deviancies. No more. The public must be protected from you.
- [203] On count 1, the sexual interference charge I sentence you to an indeterminate sentence.
- [204] On the trafficking charges, counts 2 and 3, I sentence you to six years on each count.

[205] On the breach charge, count 4, I sentence you to two years. The sentences on counts 2, 3, and 4 will run concurrent to each other and concurrent to the indeterminate sentence.

[206] Be aware Mr. Kavanagh, that an indefinite sentence is not a perpetual sentence. You will be eligible for periodic reviews of your parole eligibility in accordance with s. 761 of the Criminal Code. Success at those reviews is entirely in your hands.

[207] In addition, I make the following ancillary orders:

- 1) a mandatory firearms prohibition pursuant to s.109(1) for life;
- 2) a mandatory order pursuant to s. 760 that a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the court with respect to the reasons for the finding, together with a transcript of the trial of the offender, be forwarded to the Correctional Service of Canada. The reports and testimony of Dr. Bodnarchuk are of course excluded from this order pursuant to my order of August 26, 2020;
- 3) an order pursuant to s. 490.012(1) requiring you to comply with the terms of the Sexual Offender Information Registration Act for life; and
- 4) an order pursuant to s. 487.051(1) authorizing the taking of samples of your bodily substances that are reasonably required for the purpose of forensic DNA analysis.

[208] Finally, because of the seriousness of this offence and your high degree of moral blameworthiness, I order that you pay a victim fine surcharge, pursuant to s.737 in the amount of \$600. That is \$200 for the sexual interference offence and \$200 for each of the drug offences. I make this order fully aware that you will be incarcerated indefinitely. You will have income. You have a good track record of being employed in jail. I have no doubt that that will continue. The money can be taken from your institutional account each month. It will be paid at the rate of \$20 per month. I am not satisfied that that amount monthly will cause you undue hardship.

"C.A. Murray, J."

The Honourable Madam Justice Murray

APPENDIX "A"

Conviction Date

Offence

Sentence

1974-11-18

Richmond, BC

- (1) Possession of Stolen Property

Offence Date: 1974-May-13

- (2) Break & Enter

Offence Date: 1974-May-13

- (1) 5 months probation

- (2) 5 months probation

1977-06-09

Richmond, BC

- (1) BE & Theft

Offence Date: 1977-Apr-25

- (2) BE & Theft

Offence Date: 1977-Apr-27

- (1) Suspended Sentence, 2 years probation

- (2) Suspended Sentence, 2 years probation

1977-10-13

Richmond, BC

- (1) Theft Under \$200

Offence Date: 1977-Sept-08

- (2) Drive with More than 80 mgs of Alcohol in Blood

Offence Date: 1977-Oct-04

- (3) BE & Theft

Offence Date: 1977-Oct-03

- (1) 1 month jail

- (2) 10 days jail consecutive

- (3) 9 months jail & 2 years probation

1977-10-21

Delta, BC

- (1) Possession of Narcotic

Offence Date: 1977-Jun-17

14 days jail concurrent with sentence serving

1977-11-01

Vancouver, BC

(1) BE & Theft

Offence Date: Between 1977-Oct-02 and 1977-Oct-05

12 months jail concurrent with sentence serving

1978-09-25

Richmond, BC

(1) Indecent Assault on Male

Offence Date: 1978-Jun-25

(2) Prowl by Night

Offence Date: 1978-Apr-16

(3) Escape Lawful Custody

Offence Date: 1978-Jul-28

(1) 18 months jail

(2) 3 months jail concurrent

(3) 3 months jail consecutive

1980-07-29

Richmond, BC

(1) Drive while Disqualified

Offence Date: 1979-Dec-27

(2) Indecent Assault on a Male

Offence Date: 1980-Mar-09

(1) \$100 I-D 10 days

(2) 3 months jail & 18 months probation

1980-08-25

New Westminster, BC

(1) Drive While Ability Impaired

Offence Date: 1980-Jul-08

(2) Refuse to Provide Breath Sample

Offence Date: 1980-Jul-08

(1) \$400 I-D 14 days jail

(2) \$100 I-D 14 days jail consecutive

1981-10-02

Richmond, BC

(1) Common Assault

Offence Date: 1981-Mar-06

3 months jail & 30 months probation

1981-10-30

Vancouver, BC

(1) Indecent Assault on a Male

Offence Date: Between

1981-Jun-24 and 1981-Jun-

26

60 days jail consecutive to sentence serving & probation 3 years

1982-07-15

Vancouver, BC

(1) Fail to comply with Probation Order

Offence Date: 1982-May-29

1 day jail

1983-06-21

Richmond, BC

(1) Fail to comply with Probation Order

Offence Date: 1982-Oct-01

(2) Fail to comply with Probation Order (2 charges)

(3) Fail to comply with Probation Order

Offence Date: 1982-Oct-11

(1) 4 months jail

(2) \$100 I-D and 10 days jail on each charge consecutive

(3) 2 months jail consecutive

1983-07-13

Vancouver, BC

(1) Sexual Assault

Offence Date: 1983-May-03

3 years jail

1987-06-12

North Vancouver, BC

(1) Care or Control with more than 80 mgs of Alcohol in Blood

Offence Date: 1987-Feb-19

14 days jail, intermittent & 1 year driving prohibition

1987-06-17

North Vancouver, BC

(1) Drive with more than 80 mgs of Alcohol in Blood

Offence Date: 1987-Apr-19

14 days jail intermittent & 1 year driving prohibition

1988-04-15

Richmond, BC

(1) Sexual Assault

Offence Date: 1987-Oct-31

5 years jail

2000-04-11

Salt Spring, BC

(1) Produce a Schedule II Substance

Offence Date: 1999-Jun-22

\$1000 fine

2002-01-07

Victoria, BC

(1) Possession of Property Obtained by Crime under \$5000 s.355(B) CC

Offence Date: 2001-May-14

\$250 fine

2003-09-24

Victoria, BC

(1) Sexual Assault

Offence Date: Between 1999-Mar-01 and 2001-Aug-31

(2) Sexual Assault

Offence Date: Between 1998-Oct-01 and 1999-Dec-31

(1) 8 years jail

(two year time served plus 6 years jail)

(2) 4 years jail consecutive & mandatory prohibition order s. 109 CC

2006-02-01

Chilliwack, BC

(1) Assault

s. 266 CC

Offence Date: 2005-Jan-16

3 months jail consecutive to sentence serving

2018-06-08

Vancouver, BC

(1) Sexual Interference

s. 151 CC

Offence Date: Between 2016-Jul-16 and 2016-Jul-19

(2) Trafficking a Schedule II Substance

Offence Date: Between 2015-May-01 and 2016-Jul-31

(3) Trafficking a Schedule I Substance

Offence Date: Between 2015-May-01 and 2016-Jul-31

(4) Breach of Recognizance

s. 810.1 CC

Offence Date: Between 2015-May-01 and 2015-Dec-16

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