
CANADA / JUDGMENT

R. v. T.R.J.

2015 BCSC 352

COURT

Supreme Court of British Columbia

DECIDED

11 February 2015

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2015 BCSC 352 R. v. T.R.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. T.R.J.,

2015 BCSC 352

Date: 20150211

Docket: 26575-2

Registry: Prince Rupert

Regina

v.

T.R.J.

Restriction on publication: Pursuant to s. 486.4(2) of the Criminal Code of Canada

Restricted Access

Before: The Honourable Mr. Justice Fitch

Oral Reasons for Sentence

Counsel for Crown:

Chris P. Beattie

Counsel for Defence:

Hollis Lucky

Place and Date of Trial:

Prince Rupert, B.C.

July 28-August 1;

November 24-26, 2014

Place and Date of Sentencing:

Prince Rupert, B.C.

February 11, 2015

- [1] THE COURT: T.R.J. is before me for sentencing, having been convicted, following a re-trial, of sexual interference in relation to his granddaughter, S.J., contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] Pursuant to s. 486.4 of the Criminal Code, there is a publication ban in place prohibiting disclosure of the victim's identity or any information that could disclose her identity. For this reason, I have determined to use initials throughout this oral judgment.
- [3] For the purposes of sentencing, I make the following factual findings respecting the offence.
- [4] The victim was between the ages of four and five when the offence was committed. The offender was one of her three primary caregivers. The victim lived with the offender, his wife, and her father at various residences in Prince Rupert during the period covered by the indictment - November 1, 2006, to March 17, 2008.
- [5] The victim's mother and father were separated, and she was in the custody of her father at all relevant times. The victim's father worked in Port Hardy on a two-week-on/two-week-off schedule. When the victim's father was away from Prince Rupert for work, the offender and his wife, the victim's paternal grandparents, were her primary caregivers.
- [6] Occasionally, the offender was left to babysit the victim. On repeated occasions when he was babysitting, and over a substantial period, he had her perform oral sex on him to ejaculation.
- [7] S.J. described the offence in a video-recorded statement given to the police on April 16, 2008. She was about three months short of her sixth birthday when the video-recorded statement was given. In brief, the victim told the police, both verbally and by reference to diagrams she prepared, that on what she confirmed to be "lots of times," her grandfather put his penis in her mouth. She said, "He always put it all the way'd in." She said this caused her to choke and that gross-tasting stuff came out.
- [8] When the video-recorded statement was given, the victim was too young to comprehend the sexual nature of the acts she described.

- [9] The accused told her in a stern tone of voice not to say anything to anyone about what was happening. She complied with his instructions. The offence only came to light in early 2008 after an incident in which the offender's wife came home and accused him of sexually touching the victim.
- [10] S.J. also testified at trial. She was then 12 years of age. She remembers her grandfather touching her but could not remember the number of occasions on which this occurred. She testified that the offender touched her mouth and face with what she now understands to be his "balls" and that the incidents were short in duration.
- [11] In terms of the offender's background, and the identification of custodial and community-based options available on sentencing, the Court has been greatly assisted by a detailed Gladue report prepared by an experienced and culturally knowledgeable report writer and by a thorough and helpful pre-sentence report.
- [12] Mr. J. is a 67-year-old registered status member of the Kitkatla Tribe of the Tsimshian First Nation. He lives in Kitkatla, a small and relatively isolated village on Dolphin Island, a ferry ride away from Prince Rupert. He has lived in Kitkatla for most of his life. The population of his community is less than 500. Mr. J. does not currently suffer from any physical or mental health ailments.
- [13] Mr. J. was adopted at birth by his aunt and uncle. His biological parents had three sons and seven daughters. As explained to the Gladue report writer by Kitkatla elders, familial adoptions of this sort were common practice in the early to mid-1900s and were designed to enable couples who were unable to conceive, or unable to conceive a male child, the opportunity to raise a newborn to fill that perceived void and continue on with that family's traditional names, rights, and songs.
- [14] Mr. J.'s adoptive parents were supportive and loving. He was not physically or sexually abused.
- [15] When Mr. J. was about five years of age, he moved to Hartley Bay to live with his adoptive mother's mother. The move was necessitated by his adoptive mother's struggle with leukemia and his adoptive father's relocation to the residential school in Alert Bay.
- [16] Mr. J. was about 15 years old when his adoptive mother passed away. It was only then that Mr. J. learned he had been adopted. I think it is fair to say that Mr. J. has spent a considerable portion of his life reconciling himself to this fact.
- [17] Having said this, he asserts in the report that he considers himself to have been fortunate to have had his aunt and uncle as his adoptive parents.
- [18] Mr. J. has a grade 7 education. He experienced early difficulties with reading, comprehension, and learning. As might be expected, there were few educational supports in place for him at the time. Accordingly, he left school partway through his grade 8 year.

- [19] Mr. J. has been married to M.J. for 43 years. The couple has four children: one boy (the victim's father) and three girls. From these children, they have 12 grandchildren ranging in age from four months to 21 years. Some of the grandchildren, including at least four female grandchildren, are 12 years of age or younger. Some of them live in Kitkatla.
- [20] Mr. J. began fishing with his adoptive father at an early age. By 17, he was operating a gillnetter of his own. After getting married, he worked with the Band office on carpentry and construction projects. In 1986, he secured work as a school custodian in both Prince Rupert and Kitkatla. He took early retirement from this job after 16 years. He was then 55 years of age.
- [21] After retiring from the school board, he managed the Band fish farm and worked at odd carpentry or construction-related jobs in Kitkatla. He now considers himself "officially" retired.
- [22] The offender and his wife live off their relatively small Canada Pension Plan benefits. They live in a trailer on the reserve and have no significant debts.
- [23] Like his adoptive parents, Mr. J. has always been very involved in religious, cultural, and traditional activities in his community. The offender's long-term commitment to his community in a variety of different capacities is noted in a reference letter provided by Reverend John Robertson who was appointed Vicar of Kitkatla in 1966 and has, since that time, endeavoured to keep in touch with community members, including the J. family.
- [24] Mr. J. is fluent in the Tsimshian language and is often called upon to speak at community gatherings. In 2008, Mr. J. began attending classes at the University of Northern British Columbia to obtain his certification as a Tsimshian language educator. He says that achievement of this educational goal was derailed by the laying of criminal charges in this matter.
- [25] Mr. J. advised the author of the Gladue report that he is next in line for hereditary chieftainship of the Raven Clan, a position currently held by his brother. It is one of Mr. J.'s abiding concerns that his conviction will stand as an impediment to the realization of this honour.
- [26] Timothy Innes, hereditary chief of the Raven Clan, appears to dispute the notion that Mr. J. is in line for a chieftainship name. He informed the pre-sentence report writer that there are other chiefs of the Raven Clan who are heads of their particular household.
- [27] Counsel for Mr. J. sought to clarify this point in his submissions and advised that while Mr. J. is not "next in line" for hereditary chieftainship of the Raven Clan, had he not been convicted of this offence, he would have been one of a small group of individuals who would have been eligible for consideration for this position.
- [28] I accept that Mr. J.'s status in his community and the future opportunities he may have enjoyed have very much been affected by his conviction.

- [29] Mr. J. has struggled with identity-related issues most of his life, arising at least in part from his adopted status.
- [30] In addition, both the offender and his wife were struggling with longstanding problems with alcohol abuse when the offence was committed. In 1997, Mr. J. received residential treatment for alcohol addiction. He said that he was a social drinker after this, but in his evidence at trial the offender acknowledged abusing alcohol in the period covered by the indictment. I am satisfied that alcohol likely played a role in the commission of this offence. To his credit, Mr. J. was eventually able to bring his substance abuse under control. He reports that he quit drinking altogether last year. His counsel advises that he has maintained his sobriety since that time.
- [31] While the offender was not abused as a child, he was brought up in isolated and challenging circumstances and experienced firsthand the impact officially sanctioned cultural assimilation policies had on his people.
- [32] The Gladue report writer states that the offender reported as directed to his bail supervisor as required and has not incurred any administrative breaches for noncompliance with the terms of his undertaking. This is not entirely correct. After being released on bail pending appeal following his first conviction, the offender breached his recognizance of bail by attending the house where the victim lived in Prince Rupert. The victim was not present. I am advised that when the breach occurred, Mr. J. was in Prince Rupert in the company of another adult and attended the residence at which the victim resided to deliver a bowl of soup to his wife. The behaviour would not have been a breach of the offender's bail pending trial as he was then only prohibited from visiting the victim's residence when she was physically present. His conduct on this occasion was, however, a breach of the terms of his bail pending appeal which required him to refrain from attending at the victim's residence regardless of whether she was present. While I would not go so far as to say the breach was a technical one, this additional background serves to put in context the circumstances surrounding the incident. Mr. J. was arrested as a consequence of his behaviour on this occasion but eventually re-released on a recognizance with an additional term that he not travel to Prince Rupert without the permission of his bail supervisor. On August 12, 2013, he pleaded guilty to the offence of breaching his recognizance. A conditional discharge was imposed with six months' probation.
- [33] The offender was also convicted in 1987 under the Unemployment Insurance Act and given a one-year probationary term. The conviction is dated and not at all relevant to the imposition of sentence in this case.
- [34] Mr. J. has now been subject to bail conditions for almost seven years. I accept that the terms of his undertaking and recognizance pending his appeal have impaired his ability to interact with his other grandchildren in a fully normal way, including by having private time with them. Having said that, the bail terms were necessary and appropriate given the circumstances of the offence.

- [35] Mr. J. enjoys the continuing support of his wife and three daughters.
- [36] The offender's son, the victim's father, understandably has a somewhat different take on the situation than that which has been expressed by his siblings. He expressed frustration with his father's refusal to accept responsibility for his actions and the fact that he is supported in this position by other family members. The victim's father also expressed concerns that both he and the victim have been marginalized within the family unit as a result of the oppositional dynamic that has arisen. He continues to assert his love for his father but wants him to publicly acknowledge what he did to the victim, get the help that he needs, and thereby enable the family to begin healing.
- [37] The offender advised the report writer that he disagrees with the finding of the Court and intends appealing his conviction. He is, of course, entitled to do so, and his continuing assertions of innocence do not, in any way, aggravate his moral culpability or justify an increase in penalty. The offender's position is, however, relevant to my assessment of his rehabilitative prospects.
- [38] On the sentencing hearing, Mr. J.'s counsel advised that he no longer intends to appeal his conviction and that he will accept and abide by whatever sentence the Court determines to impose. While he has not expressly acknowledged his responsibility for the offence, his counsel suggests that Mr. J.'s current position may be reflective of his first steps towards acceptance of responsibility and rehabilitation.
- [39] In addressing the Court prior to the imposition of sentence, Mr. J. apologized to the families affected by this proceeding and pledged to cooperate with whatever sentence is imposed, move on with his life, and make himself a better person.
- [40] As is apparent, there are a number of aggravating factors associated with the commission of this offence. The conduct was repeated, occurred over a fairly significant period of time, and was highly invasive of the complainant's privacy, bodily integrity, and security interests. Mr. J. was in a position of trust in relation to the complainant. He was one of the complainant's primary caregivers when the offence occurred. The complainant was very young when the offence was committed. The offence has had a serious and ongoing impact on the victim. The offender knew, when the offence was committed, that she was looking to him for protection and guidance. He seriously abused the trust she placed in him. He must have known that his conduct and efforts to keep her silent about what was happening would cause her long-term emotional distress.
- [41] As noted in *R. v. R.E.L.*, 2010 BCCA 493 at para. 10, the harm to young children that results from sexual assaults is well known. Such assaults not only violate a child's physical integrity but erode the child's ability to develop emotional trust, and create the sort of profound and long-lasting consequences documented in the victim impact statement before me in this case.

- [42] The victim impact statement was prepared for the first sentencing proceeding and was based on a phone interview with the victim's mother. It has not been updated for this proceeding.
- [43] The victim's mother advised that after the sexual abuse, the victim did not like her body, did not like herself, and began regressing in her behaviours. She had difficulty falling asleep at night and was experiencing bad dreams. In addition, she was wetting herself at night and in the day. It is also reported in the victim impact statement that the victim's father had to quit his out-of-town job to look after the victim and her brother as extended family support was no longer available to him.
- [44] The victim received counselling assistance through the North Coast Transition Society's sexual abuse intervention program. It is my understanding that she continues to receive counselling assistance to this day. The counsellor who worked with the victim between February 2010 and July 2012 reported that the victim was struggling in school, having difficulty falling asleep at night, and was shy with an almost inaudible voice. She was experiencing anger fits and was noted by her father to drift off into her own world. The goal of counselling is to assist the victim in regaining her self-esteem and confidence, and address the behaviours she exhibited after the offence.
- [45] I have no doubt that many of the behaviours the victim displayed are attributable to the offence committed against her. At the same time, it must be noted that following the victim's disclosure, she was relocated to Calgary to live with her mother. She was, for good and understandable reasons, uprooted from her community, school, friends, and extended family support, and put in an entirely different environment. She was also introduced to her mother's new partner. All in all, the 18-month period following the victim's disclosure can fairly be characterized as a chaotic period in her life, and it is likely her troubling behaviours are, in part, attributable to these changes as well. But even accepting that the victim's behavioural issues are, in part, related to the changes in her life around this time, those changes were necessitated by the disclosure and are attributable to the offence.
- [46] The age of the complainant when the offence was committed and the abuse of trust inherent in the manner of its commission are statutorily recognized aggravating circumstances that must be taken into account pursuant to s. 718.2(a) of the Code.
- [47] There are also some mitigating circumstances. As mentioned earlier, Mr. J. has no prior criminal record. Apart from this offence, he has been a contributing and law-abiding member of the community. Reverend Robertson, who was informed of the circumstances of the offence, commented that he was astounded by the allegations and felt they were totally out of character for the offender. Although not a mitigating circumstance per se, it is also to Mr. J.'s credit that he sought to address his addiction problems even before the offence came to light. The offender's abstinence from alcohol is a factor which informs the Court's assessment of future risk.

- [48] When the offence was committed, sexual interference was punishable by a maximum term of imprisonment of 10 years, and a minimum term of imprisonment of 45 days. As the offence carries with it a mandatory minimum punishment on conviction, it is common ground that Mr. J. is not eligible for a conditional sentence of imprisonment.
- [49] The Crown submits that a term of imprisonment of between three and six years is appropriate in this case. Crown counsel has put before me a variety of cases justifying its proposed range. In addition, the Crown seeks a number of ancillary orders, many of which are not opposed.
- [50] Counsel for Mr. J. submits that the applicable range of sentence for similar offences committed by similar offenders is between two years less one day and four years' incarceration. He, too, put forward a number of authorities justifying the proposed range. In addition, he reminded me, by reference to *R. v. Ipeelee*, [2012] 1 S.C.R. 433, 2012 SCC 13, that s. 718.2(e) of the Code is a remedial provision designed to ameliorate the serious problem of overrepresentation of aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to restorative justice approaches to sentencing.
- [51] The fundamental purpose of sentencing in all cases is to contribute to respect for the law and maintenance of a just, peaceful, and safe society by imposing just sanctions that have the objectives of denouncing unlawful conduct, deterring the offender and other persons from committing offences, separating offenders from society where necessary, rehabilitating offenders, providing reparations for harm done to victims, and promoting a sense of responsibility in offenders and an acknowledgement of the harm they have caused.
- [52] The fundamental principle governing all sentencing proceedings is the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [53] The exercise of discretion in sentencing will be shaped by a sentencing judge's application of the proportionality principle and an assessment of how the objectives of sentencing and the various aggravating and mitigating circumstances that exist in a particular case should be factored into the sentencing calculus. While sentencing is a case-specific and highly individualized process, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in like circumstances. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. Finally, all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. As counsel for Mr. J. emphasized in his submissions, this provision is applicable to this case.
- [54] General deterrence and denunciation loom large in a case of this kind. Indeed, given the age of the complainant and the conduct underlying the conviction, the Code requires that primary consideration be given to these two sentencing objectives: s. 718.01.

- [55] Those in positions of familial trust who violate the sexual integrity and emotional security of children under their care can expect to be dealt with severely by the courts. These offences are all too prevalent. All sexual assaults are serious, but when offences of this kind are committed in relation to children, they are committed in relation to a class of individuals who are vulnerable and in need of the protection of the courts.
- [56] Having said that, each and every sentence must be the product of individualized consideration and must have, as one of its goals, the achievement of rehabilitative ends where the achievement of those ends are a realistic possibility. Rehabilitation is a possibility in this case, and an important end goal, but it will not easily be achieved. The offender is heavily invested in his version of events. Maintaining his status in the community and in his family's eyes may well require adhering to this version of events at the cost of missing opportunities for meaningful treatment intervention. The offender is also well supported in his version of events by his daughters and by his wife who, it will be recalled, initially confronted the offender with the accusation of sexual abuse.
- [57] At the same time, the offence in the case at bar occurred in a closely defined context, and with appropriate terms in place, it is my assessment that the risk of reoffending is low.
- [58] The history of this matter provides further important contextual background in terms of fashioning a fit disposition. As noted earlier, this is a retrial. Mr. J. was convicted following a trial in 2012. I am informed that a sentence of 18 months' imprisonment to be followed by a lengthy term of probation was imposed on that occasion. I have been provided with the reasons for judgment underlying the first conviction of Mr. J., but I have not been provided with a transcript of the reasons for sentence from the first trial.
- [59] It is a principle of law, accepted in this province, that a sentencing judge should not impose a more onerous sentence on an offender following conviction on a retrial than that which was imposed at the first trial, provided that the evidentiary foundation upon which sentence is being imposed has not meaningfully changed and that the prior sentence was not manifestly inadequate. To do otherwise would not only undermine consistency in sentencing, it would tend to undermine the public's perception of consistency and fairness in the sentencing process. In addition, it would tend to foster in an offender a sense of injustice at having been dealt with more harshly the second time around on what amounts to the same set of facts. This principle is discussed in some detail in *R. v. L.B.*, [1997] O.J. No. 3042, 116 C.C.C. (3d) 481 (C.A.). Similar policy considerations have been expressed by British Columbia courts: see *R. v. Ko* (1979), 50 C.C.C. (2d) 430 (B.C.C.A.) at p. 438, and *R. v. Eng*, 2000 BCCA 31 at paras. 5 and 8.
- [60] As neither counsel raised this issue in their sentencing briefs, I raised it during the sentencing hearing and invited their submissions on this point. Having reviewed the reasons for judgment delivered following the first trial, I am satisfied that the factual foundation upon which sentence is now being imposed is similar to the foundation that existed when sentence was first imposed in 2012. The same principles of sentencing apply.

The offender's prospects for rehabilitation are no more guarded now than they were when sentence was imposed following the first trial. The only thing that has changed since the first trial is that Mr. J. has been subject to bail conditions for an additional two and a half years.

- [61] If I was sentencing Mr. J. for the first time, I might have been inclined to impose a penitentiary term towards the bottom end of the range proposed by the Crown. The offender's moral culpability is very high, and the need to impose a sentence that gives proper expression to the predominant considerations of general deterrence and denunciation is pressing.
- [62] Having said this, I cannot say that a sentence which consists of a custodial term at the top end of the provincial range followed by a three-year probation order that achieves supervision of the offender's conduct for a total period of five years is an inadequate penalty or an unreasonable way of approaching this matter.
- [63] I note, as well, that Ford Mountain Correctional Centre offers a well-established sex offender treatment program for individuals subject to a provincial term sentence.
- [64] There are no treatment or restorative justice programs suitable for the offender in his small community. Following any custodial disposition imposed, Mr. J. would, however, be considered for a sex offender maintenance program in Prince Rupert, although it is possible he would have to wait until such time as a sufficient number of participants for the maintenance program were identified in that community.
- [65] In applying the above-noted principle to the circumstances of this case, I note that the Crown determined not to appeal the sentence originally imposed. In my view, it is also appropriate for me to have regard to the fact that counsel for the offender acknowledged in his submissions before me that the appropriate range of sentence in this case starts at two years less one day imprisonment. Counsel for Mr. J. did not resile from this position on the sentencing hearing. That submission effectively concedes that an 18-month custodial term is outside the generally applicable range. I agree. In my view, any lesser penalty than the maximum provincial term would be inadequate in the circumstances of this case.
- [66] In order to give effect to the principles expressed in cases like *Ko* and *Eng*, I do not think it is appropriate for me, given that the factual foundation governing this sentencing proceeding is similar to that which existed at the time of the first trial, to impose a sentence that is substantially longer than the sentence originally imposed. At the same time, I do not consider those principles to oblige this Court to impose a sentence the defence concedes falls below the generally applicable range on the facts I have found.
- [67] Weighing all of the considerations as best I can, I have determined that a sentence of two years less one day incarceration should be imposed, to be followed by a lengthy term of probation.

[68] The offender served one month in pre-trial custody. The Crown concedes he should, as a result, be given credit for 45 days attributable to pre-trial custody. Accordingly, the sentence I impose is two years less one day incarceration, minus 45 days credited to the offender and attributable to the period of pre-trial custody.

[69] I should add that the sentence imposed in this case is unlikely to stand as a helpful precedent in future cases. It is responsive to a unique set of circumstances that include:

1. the length of time Mr. J. has been subject to bail conditions;
2. the fact that he will, by this sentence, necessarily be removed from his community, cultural context, and family supports;
3. the fact that he will, as a consequence, experience the harshness of incarceration to a greater extent than many other offenders;
4. the fact that some measure of deterrence and denunciation flows from being shamed and stigmatized as a sex offender in the very small community in which he lives;
5. the length of the original sentence and the similar factual context in which it was imposed; and
6. the position of counsel on this sentencing proceeding.

[70] Even with these considerations in mind, I am of the view that a sentence of two years less one day incarceration is at the bottom of the applicable range for an offence involving, as this one does, repeated sexual offending and a gross breach of trust in relation to a young child.

[71] Please stand, Mr. J.

[72] For the offence of sexual interference, I sentence you to two years less one day incarceration, less the 45 days credited to you for pre-trial custody.

[73] Please be seated while I address the ancillary orders sought by the Crown and the terms of your probation order that will come into force on your release from custody.

[74] Pursuant to s. 743.21 of the Code, I order that during the period of your incarceration, you have no contact, directly or indirectly, with S.J. Failure to comply with this term is itself a criminal offence.

[75] Following the completion of your term of incarceration, you will be subject to a three-year period of probation. During the currency of the probation order, you will be subject to the following compulsory terms set out in s. 732.1 of the Code:

1. You will keep the peace and be of good behaviour;
2. You will appear before the court when required to do so by the court; and

3. You will notify your probation officer in advance of any change of name and/or telephone number, and any change in your occupational status.

[76] In addition, you will be subject to the following additional terms of probation:

1. You will, within 72 hours of the completion of your custodial sentence, report in person to a probation officer at 132 - 1st Avenue West in Prince Rupert, and thereafter as and when directed by your probation officer. After first reporting in person to the probation officer, further reporting may include reporting by telephone at the discretion of your probation officer;
2. You will reside at a residence approved of by your probation officer and not change that address without the prior written consent of your probation officer;
3. You will have no contact, directly or indirectly, with S.J.;
4. You will not be found within a four-block radius of any residence, school, or workplace known by you to be occupied or attended by S.J.;
5. You will not be found in the company of any person under the age of 16 years unless in the company of another adult who is approved of by your probation officer, who has not ingested any intoxicants, and who is aware of the existence of this term and of the fact that you have been convicted of sexual interference in relation to a child. The manner in which such approval may be obtained will be at the discretion of your probation officer. For the purposes of this term, the offender's wife, M.J., shall not be approved as an accompanying adult;
6. You will attend, participate in, and complete any program, treatment, or counselling as may be directed by your probation officer including, but not limited to, programs and counselling for sexual offenders;
7. You will, at the discretion of your supervising probation officer, attend any program offered by Prince Rupert Aboriginal Community Services Society; and
8. You will refrain from consuming alcohol and possessing or ingesting any controlled substance as defined under the Controlled Drugs and Substances Act, S.C. 1996, c. 19, except as may be prescribed for you by a licensed medical practitioner or dentist.

[77] I am required by legislation to inform you that there is a mechanism set out in the Criminal Code whereby you, your probation officer, or the prosecutor may apply to change the optional conditions of your probation order. I would ask Mr. Lucky to review these provisions with you before you leave here today.

- [78] Mr. J., you have been convicted of a primary designated offence. The Crown seeks an order under s. 487.051(2) of the Code authorizing the taking of bodily samples from you suitable for analysis and storage in the DNA databank. Your counsel does not suggest that the impact of such an order on you would be grossly disproportionate to the public interests served by it. I am, therefore, required to make the order in this case, and I do so.
- [79] You have also been convicted of a designated offence as defined in s. 490.011(1)(a) and (c.1) of the Code. I am obliged to make, and do make, an order in Form 52 requiring you to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10, for the period specified in s. 490.013(2)(b), specifically, 20 years. In accordance with s. 490.018 of the Code, I direct that the order, when prepared, be read to you, a copy of it given to you, and that you be informed at that time of the provisions of s. 490.018(1)(c).
- [80] The Crown seeks a firearms and weapons prohibition order under s. 109 of the Code. The order is mandatory if the offence committed in this case can properly be characterized as one in which violence against a person was used. I am satisfied that such an order is mandatory in this case. Accordingly, Mr. J. will be prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance. That order will be for a period of 10 years. In addition, Mr. J. shall not possess any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, or prohibited ammunition for life.
- [81] The Crown also seeks orders under s. 161(1)(a), (b), and (c) of the Code obliging the offender to:
- (a) refrain from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground, or community centre;
 - (b) refrain from seeking, obtaining, or continuing any employment or becoming or being a volunteer in any capacity that involves being in a position of trust or authority towards a person under the age of 16 years; and
 - (c) refrain from having contact, including communication by any means, with a person who is under the age of 16 years unless supervised by a person the court considers appropriate.
- [82] The Court is obliged to give consideration to the making of the orders contemplated under s. 161 in this case, but they are not mandatory.
- [83] Counsel for Mr. J. takes no position in relation to the imposition of an order under s. 161(1)(b) but opposes the making of orders under s. 161(1)(a) and (c) as being unnecessary and unwarranted in the circumstances of this case.
- [84] I agree with the position of Mr. J.'s counsel on this point. First, the terms of the probation order provide, in essence, the public protection contemplated by s. 161(1)(a) for a period of three years. Second, I do not consider that Mr. J.'s risk of reoffending extends to the general

public. There is no evidence in his 67 years that Mr. J. has ever engaged in any other behaviour that would make an order under this provision necessary. As noted earlier, his offending behaviour occurred in a well-defined familial context. In all the circumstances, and giving s. 161(1)(a) a generous interpretation consistent with the protection of children in our community, I am unable to conclude that there is any substantial risk to the public in this case that is not otherwise addressed by the sentence I have imposed.

- [85] With respect to s. 161(1)(c), I do not think the evidence justifies such an order. The probation order prohibits Mr. J. from having unsupervised contact with individuals under the age of 16 years. Again, it is my view that this term provides adequate protection to the public. Imposing the order the Crown seeks would prevent the offender from contacting some of his grandchildren in the only way he can, i.e., by telephone or electronic means, having regard to the isolation that will continue to characterize his post-custodial living condition. Indeed, such a term may impede rather than advance the goal of his rehabilitation.
- [86] I am, however, prepared to make an order under s. 161(1)(b) prohibiting the offender from seeking, obtaining, or continuing any employment, remunerated or otherwise, or becoming or being a volunteer in any capacity that involves being in a position of trust or authority towards a person under the age of 16 years. I make that order for a period of 10 years.
- [87] As the offence was committed before the Increasing Offenders' Accountability for Victims Act, S.C. 2013, c. 11, came into force on October 24, 2013, I retain the discretion in this case to waive payment of the victim surcharge. In light of Mr. J.'s financial circumstances and his current obligations to his family, it is appropriate to do so. The victim surcharge is waived.
- [88] Counsel, do any issues arise from these reasons, or have I failed to address some obligatory matter?
- [89] MR. LUCKY: No, thank you, My Lord.
- [90] THE COURT: Thank you, Mr. Lucky.
- [91] MR. BEATTIE: No, thank you, My Lord.
- [92] THE COURT: Thank you, Mr. Beattie. Thank you both for your assistance with this case. We will adjourn.

"FITCH J."

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