

W A R N I N G

The court hearing this matter directs that the following notice be attached to the file:

Non-publication and non-broadcast orders in this proceeding have been issued under s.486.4(1) (Sexual Offences) of the *Criminal Code*.

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Lund*, 2016 ONCJ 858
DATE: October 19, 2016
COURT FILE No.: Barrie 14-6001-01

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

SHAYNE LUND

DANGEROUS OFFENDER APPLICATION

Mr. Indy Kandola counsel for the Crown
Mr. Eginhart Ehlers counsel for Mr. Lund

KENKEL J.:

Introduction

[1] On September 12, 2013 a 15 year old girl walked into the Orillia Detachment of the Ontario Provincial Police and told them she'd been engaged in sexual activity with 22 year old Shayne Lund. She'd been with Lund only three weeks, but during that limited time he'd not only had sex with the underage girl but made child pornography of their sex acts, encouraged her to film her 9 year old sister nude, encouraged her to babysit even younger children so he could gain sexual access to them, and asked her to teach her 9 year old sister to perform sexual acts upon him. He'd also sent her sexual images involving animals. Their brief relationship was recorded in every detail by the text messages and images they exchanged.

[2] Mr. Lund was arrested the next day. At the time of his arrest police seized five cellphones, a laptop computer and a GoPro camera which had been installed pointing at his bed. They found female extra small children's underwear in his vehicle along with a bottle of lubricant and a sleeping bag. Forensic analysis of his de-

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vices and further investigation revealed a nightmare – Mr. Lund had been committing sexual offences against young girls, children and animals for almost a decade.

[3] After a detailed investigation by Barrie Police and the OPP, Mr. Lund was charged with sexual offences against 14 victims ranging in age from 2 years old to adulthood. At the time of his arrest Mr. Lund had active plans to rape infants, abduct and rape young children, rape a friend’s mother and sexually violate animals.

[4] Mr. Lund was charged with 129 adult counts and 88 counts under the *Youth Criminal Justice Act* (YCJA).¹ He pled guilty to 35 of the adult charges. The Crown withdrew the youth charges and proved a number of disputed facts arising from those allegations in a *Gardiner*² hearing. Two women who were involved with Lund and aided him in committing sexual offences against children and animals pleaded guilty in related proceedings and were given determinate sentences followed by Long Term Offender (LTO)³ supervision.

[5] The Crown submits that Mr. Lund meets the statutory criteria and must be declared a Dangerous Offender.

[6] The defence submits that Mr. Lund does not meet the Dangerous Offender criteria. While the defence agrees protection of the public is paramount, they submit that the evidence at best meets the criteria for a finding that the accused is a Long Term Offender under s. 753.1(1). A definite sentence followed by long term supervision would be the least restrictive sentence that would accomplish that goal.

The Issues in This Application

[7] Both parties agree that the offences before the court meet both s. 752 definitions⁴ of “serious personal injury offence” (SPIO). The following issues remain:

- Designation - Having met the s. 752(a)⁵ SPIO criteria, whether the Crown has proved that Mr. Lund constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing the criteria set out in s.753(1)(a)(i)-(iii).
- Designation - Having met the s. 752(b)⁶ SPIO criteria, whether the Crown has proved that by his conduct in these offences and other acts, Mr. Lund has shown a failure to control his sexual impulses and a likelihood of causing injury, pain, or other evil to other persons through failure in the future to control his sexual impulses

Agreed and Proven Facts of the Offences

[8] Mr. Lund pleaded guilty to 35 counts:

- Bestiality s. 160

- Compel to Commit Bestiality s. 160(2)
- Voyeurism s. 162(1)
- Making Child Pornography s. 163.1(2) x 4
- Make Available Child Pornography s. 163.1(3) x 4
- Possession of Child Pornography s. 163.1(4) x 3
- By Telecommunication Agreed to Commit Sexual Assault on a Person Under 16 years s. 172.2(1)(b) x 7
- Communicate with Person Under 16 to Facilitate Bestiality s. 172.2(1)(b)
- Sexual Assault s. 271 x 6
- Counsel to Make Child Pornography s. 464(a)
- Counsel to Commit Bestiality s. 464(a) x 2
- Conspire to Administer a Noxious Substance s. 465(1)(c) x 2
- Conspire to Make Child Pornography s. 465(1)(c)
- Conspire to Commit Sexual Assault s. 465(1)(c)

[9] Mr. Lund was found guilty on each count based upon his admission of the facts set out in the 233 page Agreed Statement of Fact. The Crown applied to prove further facts that were previously the subject of youth court charges as relevant to these proceedings. In that hearing further facts proved beyond a reasonable doubt included:

- Lund placed his penis in a 4 year old child's mouth
- He digitally penetrated a child
- He raped a 12 year old girl when he was 14
- He grabbed the buttocks of a 12 year old girl
- He forced anal intercourse upon a girl who had consented only to intercourse
- He sexually assaulted girlfriends by compelling intercourse
- He assaulted and choked two girlfriends

- He molested and attempted penetration of a 5 year old girl while she was swimming. He persisted despite the child's struggles and screams.

[10] In addition to the admitted and proved facts there's an important circumstance – the extensive record of text and other digital messages that provide a very detailed record of Mr. Lund's thoughts and actions in the later years to the point of his arrest. The messages record many of his offences through narrative and photographs. They show the planning involved in the offences, his plans for future offences, his manipulation of others to achieve his desires and thoughts about his actions and their impact on others. It's unusual that a sex offender engages so many others in assisting him with his offences, but in this case he created through digital media a comprehensive record of that period.

[11] It's beyond the scope of these reasons to summarize all of the facts of the offences Mr. Lund committed over the 9 years prior to his arrest. The Agreed Statement of Fact, the evidence heard and the reasons in the *Gardiner* hearing provide a complete record. The *Gardiner* facts are very briefly summarized above. The following outline lists some of the circumstances of the remaining 35 offences.

[12] The circumstances include:

- Sexually assaulting and conspiring to sexually assault 14 female victims, ranging in age from 2 years to adulthood
- Secret filming of sexual acts with young teens and young women then distributing those images and videos to others
- Forced sexual intercourse with a 15 year old girl
- Forced anal sex upon a 14 year old girl
- Instructing girls under 16 to have sexual activity with animals, receiving photos of those acts, and instructing girls to get access to animals for his gratification
- Counselling young women to take child pornographic photos of children as young as 2 years old
- Making child pornographic images by taking photos of young children including photos of the 4 year old daughter of a friend. He digitally penetrated that same child.
- Planning sexual offences against 2 year old girls with women who had access to those girls as babysitters or relatives
- Counselling young women to assist him in gaining access to young children for sexual purposes

- A detailed sexually explicit plan to drug and rape a particular 5 year old girl he had access to through a girlfriend and had sexually assaulted in other ways
- A detailed sexually explicit plan to drug and rape a 12 year old girl with the assistance of her sister
- A detailed and sexually explicit plan to drug and rape the mother of one of his girlfriends including a plan to test the drug effects on the girlfriend first beforehand.
- Mr. Lund's stated desire in text messages to go into a girl's bathroom and abduct a young girl for sexual purposes
- An admission that he has a "really bad youth fetish" and that he himself thinks he's, "sick in the head"
- Photographs Lund took of himself masturbating onto the panties of a 4 year old girl he had molested. In accompanying text messages he claims that the girl was teasing him sexually and he stated he would rape her if he got the chance.
- Distributing a child molestation chart which shows drawings of naked girls from infancy to adulthood. Commentary underneath each image shows predatory strategy in relation to each age, from "I will make you feel like a woman" to the pre-teen, "it's our secret, don't tell anyone" to the young elementary age girl, and "who cares, no one will know, Perfect Fit!!!" for the infant.
- A plan to have children with one of his girlfriends, then to have sex with those children
- Violence including rape and choking towards some girls who questioned him or did not comply with his wishes

[13] The admitted and proved facts show that from the age of 14 to arrest at 22, Mr. Lund was engaged in sexual predatory behaviour towards infants, young children, adolescents, older teens, women and animals. The large volume of text messages show him to be one dimensional – obsessed entirely with his own deviant sexual fantasies and adept at manipulating and controlling others to assist him in gratification. He showed little or no regard for the young women who for some reason competed with each other for his attention.

The Psychiatric and Psychological Evidence

[14] Dr. Scott Woodside was qualified on consent to give opinion evidence in the areas of forensic psychiatry relevant to the court-ordered assessment. He's the head

of the Sex Behaviours unit at the Centre for Addiction and Mental Health (CAMH) in Toronto. He's very experienced in this area having done over 110 DO and LTO assessments to date. His testimony was detailed and well explained in terms that were accessible to everyone in the courtroom. He was helpful to both counsel and patient with clarification questions from the bench. He was appropriately conservative in drawing conclusions and he pointed out where there were studies or other evidence which might contradict or cast doubt on his approach or deductions. Most importantly, Dr. Woodside was plainly well aware of the boundaries of his expertise and of the boundaries and limits to this area of science and conveyed appropriate cautions in his testimony.

[15] Dr. Woodside's report and his testimony incorporate the psychological assessment of Dr. Ainslie Hearn and a report from Social Worker Mr. Aaron Stearn.

[16] Mr. Lund cooperated with the assessment process including taking phalometric testing.

[17] Dr. Woodside found it was difficult to get Mr. Lund to acknowledge that he has a sexual interest in children. When asked what he would like to change about himself, the first thing Mr. Lund thought of was temper, and not raising his voice when he's angry. Dr. Woodside had to prompt him to acknowledge his sexual interest in children. Once he acknowledged that interest he attempted to minimize it by explaining he was oversexed and in high school numerous people have child porn on their phones and devices. He avoided talking about the circumstances of his many child sexual offences, preferring to discuss what he saw as more normal behaviours. Dr. Woodside explained that sex offenders often work hard to deceive others and themselves so denial and minimization are common.

[18] Dr. Woodside discussed treatment options with Mr. Lund. He expressed reluctance about taking potent sex-drive reducing medication but did not refuse, asking for more information. On the day of the hearing Mr. Lund asked to meet with Dr. Woodside. During that conversation, with further information about side effects and how the medication reduces risk, he told the doctor he would agree to it. Dr. Woodside noted that virtually every person in Mr. Lund's situation eventually says they will take sex-drive reducing medication as they are explicitly told it increases their chances of eventual release.

[19] Mr. Lund was assessed using a Static 99R actuarial instrument used to review risk factors. The instrument assesses static (unchangeable) factors that have been empirically shown to correlate with sexual offence recidivism. Mr. Lund's score on that instrument showed a "moderate to high" risk of committing further sexual offences.

[20] The PCL-R is an actuarial instrument developed in Canada that is used to assess psychopathy. An inventory of traits and behaviours are reviewed along with the subject's file records and history. Mr. Lund's score on that instrument shows that

he's within the average range for offenders who are incarcerated. The PCL-R is a diagnostic tool and not a risk assessment tool.

[21] Based on the PCL-R results and the rest of the evidence, Dr. Woodside diagnosed Mr. Lund as having an Anti-Social Personality Disorder (ASPD) with Narcissistic traits. Some 70 to 80% of persons incarcerated meet the criteria for ASPD so that's common among that cohort. There's evidence of Mr. Lund's narcissism in the circumstances of the offences and the record of text messages showing Lund's constant singular focus on his own gratification with others simply used as a means to an end. He lacks any sense of empathy or responsibility which results in his inability to restrain his own behavior. Dr. Woodside determined his level of empathy at 3 or 4 on a scale of 10 which is low.

[22] The lack of a prior criminal record is not as significant as one might think in this context. Dr. Woodside deals only with high risk pedophiles and sex offenders in his practice, but even among that group 60-70% have no criminal history at the time of their arrest. Even among the larger group at the clinic with less serious sexual offences at least 70% have not committed prior criminal offences.

[23] The Sex Offender Risk Appraisal Guide (SORAG) is an actuarial instrument designed to predict violent sexual recidivism. Dr. Woodside noted the limits of that test and why they place less weight on the results. Mr. Lund scored in the 71st percentile so significantly above the average for the subject population of sex offenders. That finding would equate with high risk.

[24] Dr. Woodside reasonably explained why he placed weight on phallometric testing results as a predictor of risk despite one study which showed that it added nothing to the Static 99 results. Phallometric testing showed a specificity level of 95% which is the gold standard for diagnostic tests. In phallometric testing Mr. Lund was a strong positive for pedophilia and hebephilia. That increases risk. Phallometric testing was found in a very large study to be one of the best predictors for the risk of further offending but the test doesn't quantify that risk.

[25] Mr. Lund candidly acknowledged to Dr. Woodside that he has a sexual interest in children. Even while in custody he admitted his interest was ongoing and that he'd masturbated to thoughts of children. These admissions showed some level of insight on Mr. Lund's part, although he continued to try to minimize the time that he'd had that interest. He also continued to deny direct contact with children despite his text messages and the other evidence to the contrary and was careful otherwise to admit only that which was confirmed in the digital records.

[26] Dr. Woodside explained that pedophilia is not curable. It's a lifelong condition that cannot be cured but can in some cases be managed. Assessing the possibility of compliance and success with treatment is difficult in Mr. Lund's case because there is no past record of treatment or compliance with other criminal sanctions. Mr. Lund has a work history but he's typically worked in jobs for short times

before being terminated or quitting so there's little evidence of following structure in that context. Mr. Lund showed similar problems with structure in the school setting. On the other side, while sporadic, Mr. Lund generally worked and did not make his living from other criminal activity. School and work history are of limited assistance on the issue of recidivism.

[27] Two factors here separate Mr. Lund from other pedophiles:

- Enlisting the involvement of two others which is “very very unusual”
- Plans to drug and rape children which is unusual and more dangerous

[28] These added factors increase risk in a way that's not captured by the actuarial assessment instruments. It's also important to note that his deviant behaviour was escalating to the point of arrest.

[29] Dr. Woodside acknowledged the limits to risk assessment even within the structures used here. Actuarial instruments place persons in the right category 70 to 80% of the time which is valid but not perfect. He agreed that what someone has done in the past gives you a pretty good indication of what they're capable of in the future. Risk assessment gives some measure of the likelihood of a person to re-offend, but cannot address the severity or imminence of the future offence.

[30] If he were to be released, Dr. Woodside explained that it's essential Mr. Lund never have contact with persons under the age of 18 for the rest of his life. It's essential that he take full treatment including sex-drive reducing medication until his risk is assessed as reduced at a much older age. Generally risk for pedophiles does not begin to significantly decline until after age 45. Supervision of these conditions throughout is also essential because if he were to discontinue treatment or breach other necessary conditions of his release the risk he would pose would simply be too high to permit him to remain in the community.

[31] It's not true that pedophilic offenders are the worst at treatment. Those offenders typically have pro-social traits such as employment and relationships with others. That's part of the reason they're able to gain access to children. They are unlike rapists who are more like other criminal offenders. Often the only offences pedophiles commit are their sexual crimes. Mr. Lund is more anti-social than the typical pedophilic offender and that's a predictor of a poorer outcome but not as bad as a psychopathic person who would be highly likely to re-offend within months of release.

[32] Despite the millions of dollars spent in treating sex offenders, there is not good evidence to date that treatment works. One major study showed no effect overall for treatment. Less rigorous studies showed modest effects reducing recidivism up to 30%. Anecdotally, Dr. Woodside's Sexual Behaviours program at CAMH has shown a period of success with approximately 100 offenders taking treatment

including a strong sex-drive reducing medication. Only one member of that group re-offended where they would have expected 30. Dr. Woodside cautioned that his experience at CAMH cannot be compared to a proper study and at best shows the need for more inquiry on the point. There are no studies he's aware of looking at the treatment of Zoophilia.

[33] As there's no record in relation to past treatment, Dr. Woodside said he's neutral about whether Mr. Lund would be likely to comply. Mr. Lund's likelihood of future compliance after the end of an LTO order cannot be predicted by the present data. Given his age, Mr. Lund would remain in the highest risk age range (18-45) for decades with only gradually declining risk after that. An LTO provides only a limited period of supervision which is less helpful, particularly for a younger offender. Dr. Woodside conceded the "sad truth" is that most sex offenders discontinue treatment immediately upon the expiration of parole or probation conditions. The vast majority of his clients simply discontinue treatment upon the expiry of court orders despite the success his program has had in preventing further offences. Even while taking treatment there are known ways for offenders to defeat the sex-drive reducing medication which Dr. Woodside has identified as an essential component of the program. Persons who have successfully complied with treatment are typically more pro-social than Mr. Lund. They are at a lower risk to reoffend from the outset.

[34] When compared with other persons in prison, Mr. Lund presents a moderate to high risk of committing a violent offence if released and a moderate risk to commit a sexual offence if released. When compared to the general population Mr. Lund's risk profile would be extremely high. The risk profile speaks to the likelihood of being charged and convicted which might not correlate well with the true rate of sexual re-offending as many of those offences are known to go unreported. One study found that less than 10% of sexual offences were reported to police and less than 1% resulted in conviction with a higher percentage resulting in a plea to an alternate or reduced charge.

Evidence from Corrections Canada

[35] Mr. Chow is an institutional Parole Officer and has worked in corrections for 14 years. He explained that even Dangerous Offenders serving an indeterminate sentence are periodically considered for release. Release options include parole to a Federal residential facility. A correctional plan for an inmate is developed as part of the intake process.

[36] Corrections finds it difficult to supervise parole conditions prohibiting contact with persons under 18 for offenders in the community. They often must rely on others such as employers or family members. Corrections cannot force someone to take medication but if that's made a condition of parole they can suspend the parole for the failure to comply with that condition. Direct contact twice per week is considered intensive supervision and that would apply to the first 90 days of parole at least.

[37] Mr. Chow agreed that there is significant supervision to a Long Term Offender (LTO) order as well. There are a number of differences between the LTO and the DO, the most important being that at 10 years the LTO supervision ends. Supervision tools include urinalysis to determine whether the offender is complying with terms.

Victim Impact Statements

[38] Some of Mr. Lund's victims chose to make their victim impact statements directly to the court while others chose to submit theirs in writing. The impact of Mr. Lund's offences on young women, children, babies and animals has been (significant). He's destroyed his victims' sense of trust, confidence and self-worth. He's torn apart families. Continuing anxiety, nightmares, depression, weight loss, post-traumatic stress, and troubles with school and work were common themes. Most of the victims require ongoing counselling and many require medication.

[39] The victim impact evidence shows the severity of the risk Mr. Lund poses to the community. He has ruined the lives of many vulnerable young victims and the damage will take much time and effort to repair.

Dangerous Offender – The Legal Test

[40] Dangerous offender proceedings are part of the sentencing process and are guided by the purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.⁷ Evidentiary rules in sentencing proceedings apply.⁸ The overall goal of Part XXIV proceedings is to protect the public.⁹

[41] Section 753(1) of the *Criminal Code* directs that a court must find an offender to be a dangerous offender¹⁰ if it is satisfied:

- a) That the offence involved is a serious personal injury offence and the offender constitutes a threat to the life, safety, physical or mental well-being of other persons on the basis of evidence establishing:
 - i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
 - ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

- iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
- b) That the offence involved is a serious personal injury offence and the offender by his conduct in any sexual matter including that involved in the offence has shown a failure to control his sexual impulses such that there's a likelihood of causing injury, pain or other evil to others through failure in the future to control his sexual impulses.

[42] Intractability is no longer a necessary element.¹¹ The Crown must prove the offender meets the criteria for designation beyond a reasonable doubt.¹²

[43] If the Crown proves that the offender is a dangerous offender, the court must impose a sentence of detention in the penitentiary for an indeterminate period unless it is satisfied by evidence adduced at the hearing that there is a reasonable expectation that a lesser measure will adequately protect the public from the risk of murder or a serious personal injury offence.¹³ Section 753(4) provides two other sentencing options: a sentence of not less than two years and an order that the offender be subject to long-term supervision for not more than 10 years or a determinate sentence without long-term supervision. Neither party bears a legal burden of proof to show that a lesser sentence would adequately protect the public.¹⁴

[44] The Dangerous Offender provisions including the 2008 amendments have survived constitutional challenge.¹⁵

Section 753(1)(a)(i)-(iii) – Repetitive/Aggressive/Brutal behaviour

[45] The Crown submits that Mr. Lund meets the Dangerous Offender criteria in s. 753(1)(a). They say the evidence shows beyond a reasonable doubt that he constitutes a threat to the life, safety, physical or mental well-being of others on the basis of evidence establishing i) a pattern of repetitive behaviour showing a failure to restrain his or her behaviour and a likelihood of causing death, injury or severe psychological damage to others in the future by failing to restrain his behaviour, and ii) a pattern of aggressive behaviour with indifference as to the effects and consequences of those actions.¹⁶

“A pattern of repetitive or aggressive behaviour on the part of an offender within s. 753(1)(a)(i)(ii) is not a strict similar-fact-based analysis but rather an inquiry as to whether it has been established that the scrutinized conduct contains sufficient of the same elements of unrestrained dangerous conduct to be able to predict the offender will likely offend in a similar fashion in the future.”¹⁷

[46] The defence notes that Mr. Lund has no prior criminal record. The evidence shows that his condition is not curable but is manageable through psychiatric and

pharmaceutical intervention. Mr. Lund has taken responsibility for the adult offences by his plea of guilty and is willing to comply with treatment. While his conduct engages the s. 753(a) criteria, for a first offender at a young age the court must consider his prospects for treatment and the reduction of risk in that context.

Section 753(1)(b) – Future Risk of Sexual Offences

[47] The Crown submits that Mr. Lund's offences also meet the criteria for designation in s. 753(1)(b). His conduct in committing these sexual offences shows a repeated failure to control his sexual impulses such that there's a likelihood of causing injury, pain, or other evil to others through failure in the future to control his sexual impulses.

[48] The defence makes the same submission on this test – that the present apparent risk must be considered in the context of future treatment.

Dangerous Offender - Designation

[49] The evidence as a whole proves beyond a reasonable doubt that Mr. Lund meets multiple statutory tests for designation as a dangerous offender. I find he presents a moderate to high risk to cause injury, pain and other harm to others in the future through failure to control his sexual impulses. Such future behaviour is likely, subject only to the possibility that the accused might be controlled through lifelong psychiatric and chemical treatment and that he might be amenable to such control.

[50] The Crown has proved that Mr. Lund constitutes a threat to the life, safety or physical or mental well-being of other persons as shown by a pattern of repetitive behaviour from his early teens to early 20s in which he showed a complete inability to restrain his rapidly escalating deviant behaviour which resulted in injury and severe, lasting, psychological harm to more than a dozen victims. His violent conduct and plans to abduct and sexually assault children plainly carried the risk of death to a child. There is also the related pattern of persistent aggressive behaviour by the accused which is accompanied by the running commentary of his digital messages showing a complete disregard for others and an indifference to the reasonably foreseeable consequences of his behaviour.

[51] I find that the Crown has proved that Mr. Lund was convicted of a serious personal injury offence described in s. 752(b) and by his conduct in these offences and, in the further facts proved, showed a complete inability to control his sexual impulses even when they led to actions he knew were illegal. His conduct resulted in pain and severe psychological harm to others. The facts of the offences and other conduct, the psychiatric and psychological evidence, and the accused's own candid statements in text messages all show that Mr. Lund has no ability to control these impulses.

[52] Both ss. 753(1)(a) and (b) criteria require an assessment of the ability of the offender to restrain his behaviour in the future. To the point of arrest Mr. Lund

showed no ability to restrain his dangerous impulses and no desire to do so. Defence submissions as to designation focus on the insight that Mr. Lund has gained after arrest and his potential for future treatment.

[53] At the designation stage, courts have considered the potential for treatment as a limited factor at best.¹⁸ The British Columbia Court of Appeal recently reviewed the issue¹⁹ and noted that the criteria for designating an offender as dangerous have remained largely unchanged in each of the regime’s three iterations and have never included the future treatability of the offender.²⁰ While the offender’s personal circumstances are relevant at both the designation and penalty stages, the purpose of the designation stage is to identify risk of harm. Consideration of treatability at this stage is necessarily limited because it is based on the offender’s past conduct and present circumstances.²¹ Where an elevated risk of harm is found, examining the accused’s future treatment prospects, “would not ensure the protection of the public because the ability to manage the offender’s risk of harm would have to be assumed in the absence of the implementation and monitoring of the proposed treatment” and before any benefits of treatment could be assessed.²² Treatment prospects are better addressed at the sentencing stage where a proposed treatment plan can be effectively implemented and monitored through various sentencing options.²³

[54] All of the evidence to this point shows that Mr. Lund is a significant and likely risk to reoffend in the future. He’s been unable to restrain his behaviours and his conduct has become increasingly more dangerous over time. He’s had no interest in change even when he realized his actions were illegal and could cause harm to children and infants. His offences have resulted in severe psychological harm to his young and vulnerable victims. His conduct and the extensive record of text messages show that to this point his sexual behaviours have been his single focus in life.

[55] To reduce this significant risk of further dangerous predatory behaviour would require a complete and lifelong reversal in behaviour and conduct on the part of Mr. Lund. Mr. Lund’s pedophilia, his narcissism and anti-social personality are all lifelong conditions that can be managed only through continuous compliance with treatment including sex-drive reducing medication. On the evidence as a whole I find such a risk reduction very unlikely for the following reasons:

- Mr. Lund through his conduct and text commentary showed no ability to control his behaviours and no interest in doing so in the years prior to his arrest.
- Mr. Lund’s school and workplace history shows trouble with authority and an inability to complete commitments. He didn’t finish high school and although he’s been employed he’s repeatedly left his jobs or been fired. There’s nothing in his school or work background which would support the assertion that he’s capable of a lifelong commitment to treatment.
- The statement by his mother to the psychologist strongly confirms Dr.

Woodside's diagnosis of narcissism. Mr. Lund has an explosive temper at times when he doesn't get his way. He's entirely self-focused and holds a high opinion of himself. According to his mother he's manipulative and, "a fabulous liar", comments that are confirmed by the extensive text message record and the other evidence in this hearing. Mr. Lund's history of manipulation and deceit casts real doubt on his present stated intention to commit to lifelong treatment.

- Mr. Lund is more anti-social than the typical pedophile. His conduct was more aggressive and dangerous even at his young age. Dr. Woodside explained that his anti-social traits predict poorer outcomes in relation to treatment.
- Even with the threat of a Dangerous Offender application, Mr. Lund continued to pleasure himself while incarcerated while thinking of young children showing an ongoing inability to change even when removed from proximity to children or sexual stimuli.
- The wide range of Mr. Lund's sexual deviance going well beyond pedophilia presents more obstacles to treatment.
- There's little evidence that counselling treatment without medication would have any effect on Mr. Lund's future behaviour. There's anecdotal but reliable evidence that treatment including medication could decrease Mr. Lund's deviant behaviours. Mr. Lund initially expressed reluctance to take sex-drive reducing medication as part of treatment which is understandable given that his sexual behaviours to this point had been the focus of his life. While Mr. Lund's acceptance of such a treatment condition in the last moments prior to this hearing might still be genuine, the evidence shows that most pedophile sexual offenders discontinue treatment once they are no longer restricted by court order. Based on present evidence, even if Mr. Lund complied with a treatment condition as part of an LTO as submitted by the defence, it's highly likely that Mr. Lund would be part of that strong majority who cease treatment when that order expires, leaving the community at significant risk. There's no evidence that supports the defence assertion that he might be one of the rare individuals who would continue a treatment commitment on his own.

[56] Treatment as a means of reducing the present medium to high risk of future serious offences plays a limited role in the designation assessment. In any event, consideration of treatment potential in this case does not assist Mr. Lund. Based on present evidence, his very limited prospects for treatment do not reduce the significant risk he poses to the community. The Crown has proved that Mr. Lund is a threat to the life, safety, physical and mental well-being of children and others and that he's likely to cause injury, pain and psychological harm in the future by failing to control his sexual impulses.

[57] I find that the Crown has proved beyond a reasonable doubt that Mr. Lund meets the dangerousness criteria in section 753 (1) and accordingly I must find him to be a Dangerous Offender.

Conclusion

[58] Mr. Lund is designated a Dangerous Offender.

Released: October 19, 2016

Justice Joseph F. Kenkel

¹ *Youth Criminal Justice Act* SC 2002 c.1

² *R. v. Gardiner*, [1982] S.C.J. No. 71 and s. 724(3)(e) of the *Criminal Code*

³ The Long Term Offender designation as created in 1997. See s. 753.1(1) of the *Criminal Code*.

⁴ s. 752 “serious personal injury offence” (a) and (b)

⁵ s. 752 SPIO (a) Violence/Conduct where sentence may be 10 years or more

⁶ s. 752 SPIO (b) Sexual Assault

⁷ *R. v. Johnson*, [2003] S.C.J. No. 45 at para. 23

⁸ *R. v. Ziegler*, [2012] B.C.J. No. 1755 (CA) at para. 7 *leave refused* [2014] S.C.C.A. No. 491

⁹ *R. v. Steele*, [2014] S.C.J. No. 61 at paras. 27,.29

¹⁰ Discretion not to designate was removed in the 2008 amendments.

¹¹ *R. v. Szostak* 2014 ONCA 15 *leave refused* [2014] S.C.C.A. No. 300

¹² *R. v. F.E.D.*, [2007] O.J. No. 1278 (CA) at para. 52 *leave refused* [2007] S.C.C.A. No. 568

¹³ *Criminal Code* s. 753(4.1)

¹⁴ *R. v. F.E.D.* at paras. 53-55

¹⁵ *R. v. Boutilier* 2016 BCCA 235, *R. v. Wong* 2016 ONSC 2984, *R. v. Simpson-Fry* 2016 ONCJ 532

¹⁶ *Criminal Code* s. 753(1)(a)(i)(ii)

¹⁷ *R. v. D.B.*, [2015] O.J. No. 5138 (SCJ) at para. 188

¹⁸ See: *R. v. Wong*, [2016] O.J. No. 3803 (SCJ) at para. 61

¹⁹ *R. v. Boutilier* at paras. 60-70

²⁰ *R. v. Boutilier* at para. 53

²¹ *R. v. Boutilier* at para. 62

²² *R. v. Boutilier* at para. 63

²³ *R. v. Boutilier* at para. 63