SUPREME COURT OF NOVA SCOTIA
Citation: *R.* v. *S.R.L.*, 2023 NSSC 86

Date: 20230308
Docket: Hfx. No. 391393
Registry: Halifax

Between:

His Majesty the King

v.

S. R. L.

Restriction on Publication: s. 486 *Criminal Code*

DECISION

Judge: The Honourable Justice John A. Keith

Heard: February 16, 2023, in Halifax, Nova Scotia

Counsel: Lauren Lindsay, for the Provincial Crown
Brian Warcop, for the Defendant

By the Court:

BACKGROUND

[1] On June 28, 2012, S. R. L. pleaded guilty to sexually molesting his step-daughter for over 6 years, when she was between 12 and 18 years old. On January 28, 2013, Leblanc, J. sentenced S. R. L. to 6 ½ years imprisonment. Leblanc, J. also imposed an order under section 161(1) of the *Criminal Code*. The section 161(1) order prohibited S.R.L. from:

> (a) attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or community centre; or
>
> (b) seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of fourteen years; or
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> (c) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of fourteen years; or
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> For a period of 14-years beginning on the later of (a) the date on which the Order is made; and (b) where the offender is sentenced to a term of imprisonment, the date on which the offender is released from imprisonment for the offence, including release on parole, mandatory supervision or statutory release.

(the "**Order**")

[2] S.R.L. now applies under section 161(3) of the *Criminal Code* to vary that Order so that the first subparagraph (a) above would prohibit S.R.L. from:

> attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or community centre, <u>except in the company of [D.A.M.]</u>.

(proposed amendment underlined)

[3] The proposed supervisor (D.A.M.) is S.R.L.'s spouse. By way of background:

1. After serving more than 2 years in prison without incident, S.R.L. was granted partial parole on February 10, 2015 and then full parole in August, 2015;

2. In March 2017, S.R.L. met D. A. M. while both served as leaders in an organization called Celebrate Recovery. They became romantically involved and were married on February 21, 2020;

3. On August 7, 2021, their biological son, L.L., was born. L.L. is now 1.5 years old and is attending daycare;

4. S.R.L. states that he wants to become more engaged in L.L.'s activities outside the home. In an Affidavit sworn November 9, 2022, and among other things, S.R.L. says that he seeks to amend the original prohibition order so he:

    a. "may attend family activities with his son. For example, playing in a park or attending a beach to name just a few";

    b. can "continue to develop a strong bond with [his] son ….[and] continue to build [his] family relationships." He notes that the current prohibition order limits these goals.

THE LAW

[4] In order to properly assess a request to vary a prohibition order under section 161(3), it is useful to first consider the principles which guide issuing an order under section 161(1) in the first place.

[5] Where an offender is convicted of certain crimes (including sexual assault)[1] against children under the age of 16, section 161(1) of the *Criminal Code* requires the sentencing judge to consider making an order prohibiting the offender from certain activities. In 2013, when S.R.L. was sentenced, section 161(1) contemplated orders prohibiting the offender from:

> (a) 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) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

[1] The complete list of offences which trigger a potential order under section 161 are enumerated in section 161(1.1) of the *Criminal Code*.

> (c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or
>
> (d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

[6] In this case, Justice Leblanc properly incorporated all of the most restrictive conditions available under section 161(1) at that time[2] for a period of 14 years.

[7] Section 161(3) confers a discretion upon the Court to subsequently vary an order under section 161(1). It states that the Court:

> ... may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.

[8] To understand the discretion to vary in section 163(3), it is helpful to begin with a review of the discretion which applies when the original prohibition order is issued under section 161(1) because many of the governing principles which apply to an order under section 161(1) will equally influence any variation of that order under section 161(3).

[9] *R v J. (K.R.),* 2016 SCC 31 *(“**J.(K.R.)**”*) is the leading decision for section 161(1) prohibition orders. However, the subsequent Supreme Court of Canada decision in *R* v *Friesen*, 2020 SCC 9 (“***Friesen***”) influences the section 161 analysis because:

1. Both custodial sentences and prohibition orders under section 161 all form part of the sexual offender’s sentence (*R* v *SCW*, 2020 BCCA 377 at paragraphs 26 – 30); and
2. Although *Friesen* did not specifically address section 161 of the *Criminal Code*,[3] it highlighted important principles which must

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[2] Section 161(1) was subsequently amended to add a further term which would potentially prohibit an offender from “being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order” (section 161(1)(a.i). As a result, this particular prohibition was not included in the section 161(1) order.

[3] *Friesen*’s primary focus was on custodial sentences – not section 161 orders. At paragraph 98 of *Friesen*, the Court referred to an attached Appendix in support of the broader proposition that Parliament has consistently

generally inform the sentencing a person convicted of sexual crimes against children.

[10] In *R* v *Williams*, 2020 BCCA 286 ("***Williams***"), *R* v *R.J.H.*, 2021 BCCA 54 ("***R.J.H.***")), and *R* v *SCW*, 2020 BCCA 377 ("***SCW***"), the British Columbia Court of Appeal considered the impact of *Friesen* when crafting prohibition orders issued under section 161. In doing so, these decisions synthesize the principles enunciated in *Friesen* with the Supreme Court of Canada's earlier decision in *J.(K.R.).* In my view, the main conclusions may be summarized as follows:

1. Both *Friesen* and *J.(K.R.)* remain dedicated to the same pressing, protective function: protecting children from the scourge of sexual violence. In *J.(K.R.)*, the Supreme Court of Canada wrote that section 161 is committed to an "overarching protective function: to shield children from sexual violence" (at paragraph 44. See also paragraph 66). Similarly, in *Friesen*, the Court wrote that "Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Criminal Code*. Our society is committed to protecting children and ensuring their rights and interests are respected…..Protecting children from becoming victims of sexual offences is thus vital in a free and democratic society" (at paragraph 42);
2. Section 161(1) orders may be (and often are) time limited Section 161(2) states that the prohibition order begins **on the later of** the date of the order and "the date on which the offender is released from imprisonment" (emphasis added). Thus, section 161 prohibition orders also account for the reality that sexual offenders will eventually be released into the community;
3. Upon release into the community, the primary threat to the overarching goal of protecting from sexual violence is the risk of recidivism (i.e. the risk that a convicted sexual offender may continue to prey upon children. See *J.(K.R.)* at paragraphs 75, 84, 88 and 94). Thus, prohibition orders made under section 161:
    a. "…must be carefully tailored to the circumstances of the offender and the nature and risk that offender poses to children upon release into the community." (*R.J.H.* at paragraph 18

required increased sentences for persons who commit sexual offences against children. Section 161 is referenced in that Appendix.

confirming the same conclusion reached by the Supreme Court of Canada in *J.(K.R.)* at paragraph 47. See also *Williams* at paragraph 71);

b. Represent a "reasonable attempt to minimize the risk." (*J.(K.R.)* at paragraph 48. See also paragraph 69).

4. *Friesen* amplifies the goals and concerns set out in *J.(K.R.)*. Both *Friesen* and *J.(K.R.)* are committed to the same overriding protective function. However, *Friesen* adds a detailed, comprehensive analysis of the profound wrongfulness of sexual crimes against children and the acute damage caused by these crimes. In *Friesen*, the Court reviewed the cruel and lasting harm inflicted upon those children who are sexually abused and how that damage has numerous dimensions, goes beyond the primary victim to infect the community at large, and radiates through time (at paragraphs 50 -86). From that perspective, the Court must remain increasingly vigilant and circumspect when assessing the risk of recidivism in the context of section 161 prohibition orders. "The higher the offender's risk to reoffend, the more the court needs to emphasize this sentencing objective to protect vulnerable children from wrongful exploitation and harm" (*Friesen* at paragraph 123).

5. *Friesen* mandates an "upward departure" from prior jurisprudence when determining an appropriate custodial sentence (at paragraph 107). As such, the Supreme Court of Canada indicated that sentencing caselaw which pre-dates *Friesen* will be of limited value (at paragraphs 107 – 114). Similarly, *R.J.H.* confirmed that "reliance on precedents that pre-date *Friesen* may be of limited assistance to sentencing judges and appellate courts" when crafting section 161 prohibition orders (at paragraphs 20 – 21. See also *Williams* at paragraphs 72 and 78.)

6. *Friesen* was more specifically focussed on the custodial component of sentences for sexual offenders.[4] Denunciation and deterrence were identified as the key priorities when determining that component of a sexual offender's sentence. Imprisonment safeguards children and

[4] In *Friesen*, ultimately the Court concluded that "Parliament has determined that sexual violence against children should be punished more severely" (at paragraph 116). As such, "upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence" and "sexual offences against children should generally be punished more severely than sexual offences against adults" (at paragraph 107). In these circumstances, the Supreme Court of Canada concluded, custodial sentences in the mid-single digits or higher are "normal" (at paragraph 114).

honours the overarching protective function by clearly expressing society's abhorrence for the crime (achieving denunciation) and separating the offender from society (achieving deterrence). However, even when considering a custodial sentence, *Friesen* recognized that other factors beyond denunciation and deterrence may be relevant. It wrote:

> …while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (**including rehabilitation** and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality.
>
> [at paragraph 104, emphasis added]

7. The context within which a section 161 prohibition order is determined is somewhat different from determining a custodial sentence under *Friesen*. Again, when considering prohibition orders under section 161, the Court will often look into the future and consider that point in time when a sexual offender will be released into the community. This contextual difference shifts the nature of the underlying risks and, in turn, alters how the underlying principles are applied. When considering the terms under which a sexual offender might be released into the community after serving a prison sentence, denunciation will still be a concern but the goals of deterrence and rehabilitation become increasingly important considerations. The process will want to consider and minimize any risks that may arise when an offender begins to re-engage with the community at large.

8. Breaking down the goals of deterrence and rehabilitation a bit further:

   a. With respect to deterrence, the Court will very clearly seek to guard against the risk of recidivism once the offender re-engages with the community at large. Under section 161(1), deterrence can be achieved by imposing appropriate restrictions on how a sexual offender interacts with society upon release. For example, a released sexual offender may be prohibited from having any contact whatsoever with any person who is under 16 years old (section 161(1)(c));

   b. With respect to rehabilitation, as indicated above, the Supreme Court of Canada in *Friesen* did not ignore rehabilitation as a secondary consideration when imposing a custodial

sentence. Importantly, *Friesen* also alluded to the fact that rehabilitation emerges as an increasingly pressing sentencing goal when considering the offender's eventual release because rehabilitation "offers long term protection" (see paragraph 124 of *Friesen* quoting from paragraph 56 of *R* v *Gladue* [1999] 1 SCR 688). Thus, *Friesen* also noted that "efforts at rehabilitation must begin with such treatment or programming as is available within prison" (at paragraph 124). In this case, Leblanc, J's original sentencing decision echoes these same concerns when he wrote that S.R.L. "still require[d] significant treatment to eliminate, at the very least, the risk of re-offending" and that S.R.L.'s ability to somehow reconcile with the damage caused would be "dependent on the success of [his] treatment" (at pages 48 and 52 of the transcribed decision).

9. The ultimate importance of rehabilitation grows when the original prohibition order is time limited.[5] Here, for example, the Crown and defence agreed that S.R.L.'s original section 161(1) prohibition order would expire 14 years after S.R.L. was released on parole. Subject to the Crown applying to vary the original order and extend this 14-year deadline[6], S.R.L. will be released from any conditions at the end of that time period. Again, the key point is that when section 161(1) orders contemplate the possibility of the offender's release back into the community, rehabilitation becomes of increasing significance in the section 161 analysis.

[11] With these basic principles in mind, I turn to section 161(3). Under section 161(3), either the Crown or the offender may seek to vary the original prohibition order issued under section 161(1). The following two preliminary comments are germane as they bear upon the analysis generally:

1. The party seeking to vary the prohibition order bears the evidentiary burden of proving the variation is justified in the circumstances;

[5] Under section 161(2), a prohibition order may be for life but is often restricted in time.

[6] I note that it is usually the offender who applies under section 161(3) to relax the terms of the original prohibition order. However, section 161(3) is broader in scope and clearly contemplates that either the offender or the prosecutor may apply for a variation. Thus, a prosecutor may equally apply to require more restrictive conditions (including, potentially, an extension of any existing time limits) if the offender's behaviour reveals a change suggesting that such a variation is desirable.

2. In addition, any assessment as to whether a prohibition order should be varied under section 161(3) must remain focussed upon the same broad issues that inform section 161 generally. More specifically, the Court's perspective is informed by:

   a. The concern discussed above that sexual offences against children inflict profound damage on victims and the community at large;

   b. The overarching protective need to protect children from sexual violence; and

   c. The risk of recidivism particularly given that an application under section 161(3) is premised on the understanding that sexual offenders will be released from custody.

[12] As to the specific statutory wording, a prohibition order may be varied under section 161(3) "…if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed". This language confirms that a variation under section 161(3) must address two key considerations:

1. whether circumstances have changed after the original prohibition order was imposed;
2. whether any such changes make it desirable to vary the prohibition order.

(See *R* v *Mansour*, 2018 BCPC 250 at paragraph 27). These statutory requirements existed before *Friesen* was decided and are unchanged.

[13] As to the first statutory issue (i.e. whether the offender's circumstances have changed from the prohibition order was issued or when "the conditions were prescribed"), the relevant factors include, but are not limited to:

1. Disciplinary history while incarcerated or, if applicable, during any period of release within the community;
2. Past efforts at treatment or programming – again bearing in mind the Supreme Court of Canada's caution in *Friesen* that, "efforts at rehabilitation must begin with such treatment or programming as is available within prison" (at paragraph 24). The availability of any reports from experts or relevant governmental officials may assist in this inquiry; and

3. Current circumstances including living arrangements, personal relationships or employment.

[14] At this stage, the Court simply seeks to identify the nature of the change which precipitated the variation request. I repeat and emphasize that question of whether any such change makes the proposed variation "desirable" occurs at the next stage of the analysis and that determination is arguably more complicated and critical.

[15] As to the second statutory issue (whether the changed circumstances make the proposed variation "desirable"), S.R.L. is currently prohibited from attending the following locations:

1. a public park or public swimming area where person under the age of 14 years are present or can reasonably be expected to be present; or
2. a daycare centre, school ground, playground or community centre.

[16] S.R.L. applies under section 161(3) to vary the order so he can attend all of these locations if accompanied by his spouse, D.A.M.

[17] When a sexual offender seeks to vary a prohibition to allow supervised attendance at locations where it is reasonable to expect that children will be present, in my view the relevant factors to be balanced and weighed include, but are not limited to:

1. The quality of the proposed plan supporting the requested variation including details regarding the duration, frequency and extent of any proposed or potential contact with children. On this, and in accordance with section 161(3), the Court will consider whether the proposed variation is appropriate or "desirable" **because of** the changes identified at the first stage of the analysis. There must be a connection between any identified change in circumstance and the proposed variation. On this, I also note the statement in *J.(K.R.)* that section 161 orders be tailored to suit the circumstances of the offender (*R.J.H.* at paragraph 18 and *J.(K.R.)* at paragraph 47);
2. The extent to which the applicant demonstrates that the proposed variation is appropriate or desirable having regard to the goals of denunciation, deterrence and rehabilitation. The relevant factors will including, without limitation:
   a. The degree to which the offender accepts responsibility, and demonstrates remorse, for the crimes;

b. Whether the offender participated in any treatment or programming and, if so, whether it achieved the intended outcomes;

c. Whether the offender demonstrates a sustained ability to engage in healthy relationships and, more specifically, the extent to which the proposed variation will improve deterrence and rehabilitation prospects by fostering those relationships. Pausing here, I note that the fact that an offender's lifestyle might improve is relevant only if it also demonstrably advances the sentencing goals articulated above - including deterrence and rehabilitation. The Court approaches proposed variations to a prohibition order based on the risks, goals, and principles which are articulated in (and consistent with) *Friesen* and *J.(K.R.)* – not from the perspective of the offender's preferred outcomes; and

d. The timing of the application given the offender's progress and perhaps the amount of time remaining under the prohibition order.

The availability of any reports from experts or relevant governmental officials may assist.

3. With respect to the proposed supervisor, the overarching need to protect children from sexual violence and the related goal of deterrence is particularly relevant. In terms of specifics, the Court should consider:

a. The character and qualifications of any proposed supervisor; and

b. The relationship between the proposed supervisor and the offender; and

The proposed supervisor's ability and willingness to detect and report any problems.

(See *R. v S.C.W.,* 2020 BCCA 377 generally and paragraph 56 in particular).

ANALYSIS

[18] The circumstances have changed since S.R.L.'s original prohibition order was imposed. In particular:

1. S.R.L. served his custodial sentence, partial parole and then full parole with a clean disciplinary record;
2. While in prison, S.R.L. enrolled in and successfully completed all of the sexual offender programs and treatments made available to him;
3. After his release on parole and continuing to date, S.R.L. voluntarily engages in ongoing course work and programming so that the progress he has made is reinforced, not lost. S.R.L. now leads other groups of men seeking to address and possibly atone for past crimes;
4. Most importantly for the purposes of this application, S.R.L. and D.A.M. are married and have a young son, L.L.. S.R.L. seeks to become more engaged in helping to raise his son outside the home.

[19] As to whether these changes make the proposed variation desirable under section 161(3):

1. The proposed variation or plan would allow S.R.L. to attend all of the locations identified in the original prohibition order so long as he is accompanied by D.A.M. The underlying rationale relates to their son, L.L. and S.R.L.'s desire to be more engaged with his son outside of the home. In my view, there is a very clear connection between the identified change in circumstances and the proposed variation. At the same time, it is less clear why S.R.L. requires broader access to all of the identified locations (e.g. parks, public swimming areas, beaches, community centres etc.) particularly given that L.L. is only 1.5 years old and currently is attending daycare;
2. S.R.L. candidly acknowledges his crimes and expresses sincere remorse. During his oral testimony, S.R.L. emotionally described the palpable shame, grief and guilt he feels for the sexual violence he inflicted upon his step-daughter for years. He does not seek to shift blame away from himself or somehow rationalize his wrongdoing. I am satisfied that S.R.L. has a genuine capacity for honest self-reflection and an unflinching evaluation of his crimes. These are positive developments towards rehabilitation. At the same time, whatever feelings continue to haunt S.R.L. do not compare with the emotional

trauma, physical pain and lasting damage he inflicted upon his step-daughter. The facts behind S.R.L's prolonged abuse of his step-daughter are devastating and inexpressibly sad. To the extent the prohibition order reflects the denunciatory impact of these crimes, it should not be easily diminished. Moreover, the nature and extent of S.R.L.'s crimes reveal a problematic capacity for manipulative, abusive behaviour. In terms of deterrence and the risk of recidivism, these are serious issues to be taken into account;

3. At sentencing, Leblanc, J. reviewed the Comprehensive Forensic Sexual Behaviour Pre-Sentence Assessment regarding S.R.L. dated November 5, 2012 and authored by the psychologist Dr. Angela Connors (the "**Connors' Report**"). At the time, Dr. Connors' concluded that S.R.L. presented a moderate risk to re-offend. The persons at highest risk were non-biological pubescent females although predatory risk to strangers in the community was not predicted, given S.R.L.'s profile. Dr. Connors also recommended:

   a. Specialized treatment for sexual offenders at the moderate level of intensity, as is available in the federal penitentiary system;

   b. That S.R.L. have no direct or indirect contact with children under the age of 16 years unless directly supervised by a responsible adult over age 25 who is approved by a supervisory officer and who is aware of S.R.L.'s offense situation (exceptions only as dictated by family court regarding biological children); and

   c. That S.R. L. not adopt a position of authority with a person under age 16 years; not enter into another stepparent role; and not work for, or volunteer with, organizations that hire or provide services to children or adolescents.

4. In accordance with the recommendations contained in the Connors' Report, S.R.L. successfully completed all available programming and treatment while in federal prison. Beyond that, the evidence suggests that S.R.L. continues to regularly take courses to reinforce the progress he has made to date. In fact, he now leads groups of men seeking to address their own issues of sexual deviancy. This is a strong factor weighing in favour of S.R.L.'s rehabilitative prospects and the proposed variation;

5. I am compelled to say that S.R.L. bears the evidentiary burden in bringing this application and there were issues on this front. The only sworn evidence before me is from S.R.L. and D.A.M.. While I do not suggest that S.R.L. can only fully neutralize the impact of Connors' Report by incurring the cost of a new report, evidence from unrelated third parties as to S.R.L.'s current circumstances would have assisted;
6. In my view, S.R.L. has begun to demonstrate a sustained ability to engage in healthy relationships. I refer specifically to the affidavit and oral evidence of D.A.M.. D.A.M. provided, in my view, truthful evidence confirming her awareness of S.R.L.'s past crimes and a genuine, positive assessment of S.R.L.'s current relationship and interactions with her and their son, L.L.. Her evidence on this issue weighs in favour of the proposed variation and I am satisfied that a variation which would allow S.R.L. greater involvement in raising his son would advance the goal of rehabilitation;
7. As to the timing of this application and in addition to the matters discussed above, I note that S.R.L. was granted partial parole of February 10, 2015. He has been under the terms of the original prohibition order for more than 8 years without a breach. He has 4 years left before the terms of the prohibition order expire entirely. In my view, in the circumstances, a gradual and appropriate relaxation of the terms allows for the opportunity to acknowledge and encourage S.R.L.'s rehabilitative progress – as opposed to simply awaiting a full release after 14 years without any such opportunity;
8. Also on the issue of timing, I also note the L.L. is still a toddler and his involvement in activities outside the home is limited;
9. As to D.A.M. as a supervisor, and to state the obvious, she is S.R.L.'s spouse. D.A.M. testified that she appreciates the seriousness and importance of her obligations and is fully prepared, for example, to immediately contact the authorities if she perceives any signs that S.R.L. is relapsing towards sexual deviancy. D.A.M. presents as an extremely pleasant, honest and honourable person. At the same time, the potential for a conflict of interest is apparent.

[20] Overall, having weighed all of the factors, I am prepared to vary the prohibition order but not to the extent requested by S.R.L. Consistent with *Friesen* and *J.(K.R.)*, I am of the view that a more gradual and circumspect approach is

warranted given the priority around deterrence and the overarching protective function to protect children from sexual violence.

[21] The order will be varied to allow S.R.L. to attend the following locations **conditional upon his son L.L. always being present and also conditional upon S.R.L. and L.L. being accompanied at all times by D.A.M.**:

1. Any daycare in which his son in enrolled;
2. A playground; and
3. A public park where persons under the age of 14 years are present.

[22] In making this Order, I also note that it aligns with the recommendations contained in the Connors' Report particularly in terms of ensuring S.R.L. does not have unsupervised contact with persons under the age of 16 and also ensuring that S.R.L. does not adopt a position of authority around anyone under the age of 16.

[23] All other conditions in the current prohibition order will remain in place.

[24] This determination is without prejudice to S.R.L. bringing a further application in the future should his condition and circumstances changes such that a further variation is desirable.

[25] I ask that S.R.L.'s counsel prepare the requisite variation order for review by Crown counsel and, subsequently, for review and approval by the Court.

Keith, J.