

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Neveu, 2005 NSPC 51

**Date:** 20051116

**Docket:** 1401222

**Registry:** Dartmouth

**Between:**

Her Majesty the Queen

v.

Gabriel Luc Claude Neveu

**Judge:** The Honourable Associate Chief Judge R. Brian Gibson

**Heard:** September 16, 2005, in Dartmouth, Nova Scotia

**Written decision:** November 16, 2005

**Charges:** That he on or about the 21<sup>st</sup> day of January, 2004, at or near Lake Charlotte, in the Halifax Regional Municipality, Province of Nova Scotia, did possess child pornography contrary to Section 163.1(4) of the *Criminal Code*.

**Counsel:** Craig Botterill, for the Crown  
Patrick Atherton, for the Defence

**By the Court:**

- [1] The accused, Gabriel Luc Claude Neveu, is before this Court charged with the offence of possessing child pornography at Lake Charlotte, Halifax County, Nova Scotia, on or about the 21<sup>st</sup> day of January, 2004, contrary to Section 163.1(4) of the *Criminal Code of Canada*.
  
- [2] The accused alleges that his Section 8 *Charter* rights were violated and seeks an order pursuant to the provisions of Section 24(2) of the *Charter* excluding from this trial all items seized by the police on or about January 21<sup>st</sup>, 2004. The items sought to be excluded as evidence were seized by the police pursuant to a search warrant authorization issued January 13<sup>th</sup>, 2004, by a Presiding Justice of the Peace.
  
- [3] The accused alleges that insufficient grounds were set out in the Information to Obtain to form a basis for the issuance of the search warrant authorization by the Presiding Justice of the Peace. The specific concern is whether the Information to Obtain established a “credibly-based probability” that the offence of possessing child pornography between May 9<sup>th</sup>, 1999 and January 9<sup>th</sup>, 2004, contrary to Section 163.1(4) as described therein had been

committed and that there was “evidence of it to be found in the place of the search”. [See **R. v. Morris** (1998), 134 C.C.C. (3d) 539. (N.S.C.A.) at p. 550].

- [4] The test that I am required to apply is set out in **R. v. Araujo** (2001) 149 C.C.C. (3d) 449 (S.C.C.) at para. 54:

“Again, the test is whether there was reliable *evidence that might reasonably be believed on the basis of which the authorization could have issued*, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge.”

- [5] This was the test applied in **R. v. Vienot** (1995), 144 N.S.R. (3d) 388 (N.S.C.A.) at para. 8 and in **R. v. Garofoli** (1998), 41 C.C.C. (3d) 97 (Ont. C.A.) at para. 119. The application of this test requires a review of the “whole of the material presented to the Justice”, (**Garofoli** at para. 62) or what has been described as the “totality of the circumstances”, **R. v. Debot** (1998), 52 C.C.C. (3d) 193 (S.C.C.) And **R. v. Plant** (R.S.) (1993) 84 C.C.C. (3d) 203 (S.C.C.).

- [6] The 54 page Information to Obtain disclosed that LandSlide Inc. of Dallas - Fort Worth, Texas, operated a website which provided a credit card

verification service and acted as an “electronic” gateway to websites offering child pornographic images. These images were downloaded by LandSlide subscribers on a pay for fee service. In the Fall of 1999, the Dallas police along with other agencies, executed a search warrant at the business premises of LandSlide Inc. which resulted in the seizure of a customer data base containing in excess of 200,000 subscribers. The data base was analysed by the Dallas police and the subscriber and credit card information was disseminated globally to various police agencies in various jurisdictions. The customer data base disclosed that there were in excess of 2,300 Canadian customers including approximately 61 customers who resided in the Province of Nova Scotia.

[7] On August 6, 2001, the two principals involved in the operation of LandSlide Inc. were sentenced in the United States to lengthy terms of imprisonment with respect to multiple count indictments involving the distribution, possession and conspiracy relating to child pornography offences contrary to Title 18, of the United States Code.

- [8] In April of 2003, the Royal Canadian Mounted Police in Nova Scotia commenced an investigation named Operation “HORIZON”, the primary focus of which has been the investigation of individuals in Nova Scotia suspected of possessing child pornographic images via the Internet. That investigation was based in part upon the information provided from the aforementioned LandSlide Inc. investigation.
- [9] The Information to Obtain disclosed a credibly based probability that the accused purchased via the internet through the website operated by LandSlide Inc. three separate 30 day periods of computer access to three different websites offering child pornographic images. The dates of the those purchase transactions were June 15<sup>th</sup>, 1999, June 24<sup>th</sup>, 1999, and July 31<sup>st</sup>, 1999. The purchase price for this access was \$24.95 U.S. for each 30 period of access to each website offering child pornographic images.
- [10] The Information to Obtain further disclosed a credibly based probability that the accused would have downloaded child pornographic images from those three websites aforesaid and stored them on his computer hard drive or

external storage devices such as floppy disks, Zip drives, CD roms or the like to be used in his own computer.

- [11] The most contentious aspect of the Information to Obtain is whether it disclosed a credibly based probability that evidence of the offence of possessing child pornography would still exist in the locations sought to be searched on January 13<sup>th</sup>, 2004. Those locations included the accused's residence, garage and outer buildings at Lake Charlotte, his motor vehicle and spaces controlled or used by the accused at his place of employment. The gap in time between June 15, 1999 to July 31, 1999 and January 13, 2004 to January 21, 2004 was approximately four years and seven months. Beyond the apparently purchased website access by the accused through LandSlide Inc. between June 15, 1999 and July 31, 1999, there was no further evidence of any other access by the accused to other websites containing child pornographic images or the acquisition of such images by the accused in some other manner.

- [12] The affiant, in support of his belief that evidence of the offence would still exist on January 13<sup>th</sup>, 2004, relied on the opinion and experience of

Detective Sergeant Harrison set out in part as follows at paragraph 59 of the

Information to Obtain:

- “a. That D/Sgt. HARRISON has examined approximately thirty-five computer systems and external storage devices that contained child pornography. He discovered that the person kept the images they liked. Images that are two to three years old are regularly found on seized computer systems or external storage devices.
- b. Persons wishing to delete any items from their computer do so by using the delete button. This does not permanently delete the item but rather “tells” the computer that this space can now be written over with new data. Police computer forensic evidence recovery specialists use software that allows items to be “undeleted” if this space has not been re-used. Therefore, the computer’s hard drives and other external storage devices can contain evidence that the user believed they deleted.
- c. Computer images can easily be saved, duplicated or printed onto external storage devices. This makes the images highly portable and easily hidden. Even if a person no longer owns a computer, they can still have their images and take them to other locations that have computers to view the images. This also allows the material to be obtained on one computer and transferred to another computer.

- d. Persons who purchase new computers after owning an older computer, will have their old data transferred to their new computer.
- e. Persons can collect a variety of child pornography on the Internet without having to purchase it. Child pornography is available for free through newsgroups, chat rooms, websites, file servers and through the exchange of E-mails. The danger to collectors is that law enforcement agencies have conducted successful undercover investigations in each of these areas.
- f. the law limits law enforcement agencies in the techniques they can use to conduct undercover investigations. In short, law enforcement cannot send pictures of child pornography or even offer pictures of child pornography on a website in order to entice customers to buy child pornography. Persons who purchase child pornography from a website, therefore, are likely to assume that they are not dealing with a law enforcement agency.
- g. Collectors of child pornography do so for sexual gratification. In order to fulfill this gratification they must have this material available to them. Once they have paid a fee to access child pornography, they can easily download the images and have them available for retrieval from their hard drive or external storage device. It is reasonable to assume that instead of paying a fee to continue to access child pornography on a regular basis, it is simpler and cheaper to download it to their systems. This also



decreases the opportunity for detection by law enforcement.

- h. Child pornography images are used as a form of currency. Persons who trade in child pornography will exchange images for new images, thus increasing their collections. Persons have also traded passwords to websites so that they can access more materials for free from websites. Persons are unlikely to delete valuable images that will assist in increasing the size of their collection.
- i. On the 1<sup>st</sup> day of May 2003, Cst. LETHBRIDGE was informed by Cst. Edward HUBBARD, hereinafter referred to as Cst. HUBBARD, that on the 30<sup>th</sup> day of April, 2003, Cpl. Brent ROSS informed Cst. HUBBARD that between the 12<sup>th</sup> day of June, 2001 and the 30<sup>th</sup> day of April, 2003 Manitoba I.C.E. Unit had executed 25 residential search warrants pertaining to the information received from Operation Landslide. He stated that 23 of 25 (or 92%) of those searches found child pornography that was directly linked to the website purchases stemming from the Landslide database. The remaining two had large amounts of adult, but not child, pornography.”

[13] I am satisfied that the Information to Obtain also provided a further basis to assess the weight of the aforesaid opinion evidence attributed to Detective Sergeant Harrison upon which the affiant clearly relied. The Information to

Obtain further disclosed the experience of Detective Sergeant Harrison that he was employed by the Winnipeg Police Service Exploration Unit and was involved in the Canadian investigations arising from the investigation of LandSlide Productions by the Dallas, Texas police department. The issuing Justice could have found the opinion evidence set out in paragraph 59 of the Information to Obtain to be deserving of credible weight.

- [14] Generally, beyond any opinion evidence or other grounds that may be relied upon, I conclude that the likelihood that offence related items will be found at any location sought to be searched by a peace officer is, in part, related to the nature of the items sought to be seized. Items that are consumable such as illegal controlled substances as defined by the *Controlled Drugs and Substances Act* or stolen property, acquired for sale, are likely not held for long periods of time. Therefore, in order to give rise to a credibly based probability that such items will be found, usually a reasonably close proximity is required between the time of the sought after search and the time, either of likely acquisition, or the time when such items were seen by an informer at the place to be searched. The longer the aforesaid time gap, the lower the probability that such items will be found. What might be

advanced as a probability, may only be a suspicion. A mere suspicion falls short of the right to be free from unreasonable search and seizure (See *Hunter v. Southam* (1984), 14 C.C.C. (3d) 97 (S.C.C.) and *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.)).

[15] Child pornographic images on the other hand, as disclosed in the Information to Obtain, are likely held for much longer periods of time by individuals who purchase them than the items mentioned above. In addition to relying on the opinion to that effect set out in the Information to Obtain herein, the issuing Justice could have also concluded, employing her common sense, that the retention of child pornographic images is likely more analogous to the lawful acquisition and collection of books, C.D.'s, D.V.D.'s, photographs, paintings and such items which offer the prospect of ongoing enjoyment thereby giving them their collectable nature. Collectible items are distinctively different than items which are consumable or acquired for quick resale.

[16] Sexual gratification likely underlies the motivation to purchase or acquire child pornographic images. Repeated sexual gratification is likely the form

of perverse enjoyment sought from the collection of child pornographic images. The significant cost, the risk associated with acquisition, the ease of storage and the ready ability to derive repeated sexual gratification from such images are likely some of the characteristics that contribute to the collectibility and likely retention of such images, acquired electronically, for considerable periods of time. The issuing Justice could have concluded that such considerable periods of time included a time period as long as the approximate 4 and one-half years after the likely acquisition by the accused of the child pornographic images in this case.

- [17] Corroborating such a possible conclusion by the issuing Justice, as well as the opinion provided by Detective Sergeant Harrison as set out in the Information to Obtain, were the actual experiences of law enforcement agencies in Manitoba where, as disclosed in the Information to Obtain, 23 of 25 residential search warrants between June 12<sup>th</sup>, 2001 and April 30<sup>th</sup>, 2003, arising from the same investigation of LandSlide Inc. in Dallas, Texas, revealed the continued possession of child pornography linked to website purchases stemming from the LandSlide data base. The other two searches revealed possession of adult pornographic images.

[18] The decision in *R. v. L.F.* [2002] O.J.No. 2604 (Ont.C.A.) has been advanced as authority against the aforesaid line of reasoning supporting a belief of continued possession long after the time of acquisition of child pornographic images. The decision in *R. v. L.F.* is distinguishable on the facts from this matter before me. In the *R. v. L.F.* case, a search warrant was issued to seize a “pedophile collection” in addition to two Polaroid photographs taken ten weeks earlier by the Appellant of a naked nine year old girl who was a family friend. The “pedophile collection” had been placed on the list of items sought to be seized solely on the strength of a psychiatrist’s opinion, “that if the Appellant were a pedophile, such people fuel their fantasies with ‘collateral materials’ such as child pornography, and rarely dispose of such items.” (paragraph 14, *R. v. L.F.*). However, because the psychiatrist had no contact with the Appellant, the trial judge found that the psychiatrist could not form an opinion that the Appellant was a pedophile. The Court of Appeal in *R. v. L.F.*, upheld the conclusion of the trial judge that absent an opinion that the Appellant was a pedophile, there was only a “suspicion” that the Appellant might possess a pedophile collection. Such suspicion was insufficient to constitute reasonable grounds

to believe that such a collection would be found in the Appellant's home.

The pornographic materials seized in the search were excluded in that case.

[19] Unlike the matter before me, there was no other basis in the *R. v. L.F.* case for a belief that the Appellant had acquired or possessed child pornographic material. The decision in *R. v. L.F.* was therefore very fact specific. The Court of Appeal in that case was not required to specifically consider whether grounds, similar to those before me, and before the issuing Justice, could have given rise to a credibly based probability that child pornographic materials continued to be in an individual's possession approximately 4 and one-half years after their likely acquisition.

[20] In conclusion, I find that the accused's Section 8 *Charter* rights were not violated as alleged.

Dated at Dartmouth, this 16<sup>th</sup> day of November, 2005.

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R. Brian Gibson  
Associate Chief Judge

