

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HIS MAJESTY THE KING

-v-

HARVEY HAVIOYAK

**Transcript of the Decision held before the Honourable Chief
Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest
Territories, on the 28th day of June, 2023**

APPEARANCES:

M. Fane:	Counsel for the Crown
P. Harte:	Counsel for the Defence

Charges under s. 163.1(3) and 163.1(4) of the *Criminal Code*

INDEX

PAGE

RULINGS, REASONS

Reasons for decision	1
Decision	22
Forfeiture order	22

1 THE COURT: Okay. Thank you. Harvey Haviyok has
2 entered guilty pleas to two offences. First, that he did
3 transmit, make available or distribute child pornography
4 contrary to section 163.1(3) of the *Criminal Code* and
5 second, that he possessed child pornography contrary
6 to section 163.1(4) of the *Criminal Code*.

7 Today, it is my responsibility to sentence
8 Mr. Haviyok for these offences. The maximum
9 sentence for the make available charge is 14 years
10 imprisonment. For the possession charge the
11 maximum sentence is 10 years imprisonment. For both
12 offences, there is a mandatory minimum sentence of
13 one year imprisonment.

14 While both Crown and defence agree that
15 Mr. Haviyok should be sentenced to a period of
16 imprisonment in excess of the mandatory minimum,
17 they do not agree on what the sentence should be.
18 The Crown is seeking a penitentiary sentence of four
19 years imprisonment. The defence is seeking a
20 territorial sentence of two years less a day followed by
21 three years of probation.

22 **Facts**

23 The facts of the offences are detailed in
24 an extensive agreed statement of facts marked as
25 Exhibit S-1 at the sentencing hearing. I do not propose
26 to repeat all of the facts contained in that document. In
27 2021, Harvey Haviyok lived in Hay River, Northwest

1 Territories. Between April and August 2021, Mr.
2 Havioyak made available child sex abuse material, and
3 on August 9, 2021, he possessed over 350 images and
4 seven videos of child sex abuse material.

5 On June 25, 2021, a website operator
6 reported an upload made on June 9, 2021, to the
7 National Centre for Missing and Exploited Children.
8 This upload was thought to contain child sex abuse
9 material. The user's IP address was identified in this
10 report. The IP address identified Hay River, Northwest
11 Territories as the approximate location of the upload.

12 The report was forwarded to the
13 Yellowknife RCMP's Internet Child Exploitation Unit.
14 Investigation confirmed that the upload was child sex
15 abuse material, that is, child pornography, and that the
16 IP address associated with the upload was an address
17 in Hay River where Harvey Havioyak resided with his
18 family.

19 The RCMP executed a search warrant on
20 August 9, 2021, at Mr. Havioyak's residence. A cell
21 phone was observed during the search on
22 Mr. Havioyak's bed and visible on the screen was a list
23 of terms, including "pedophilia, child porn,". Mr.
24 Havioyak was placed under arrest and provided with
25 his *Charter* rights and police caution.

26 Mr. Havioyak subsequently cooperated
27 with police. He told them where the images were

1 located on the phone and provided the password to the
2 phone so that it could be unlocked. He also provided a
3 statement to the police in which he admitted
4 downloading and viewing child pornography. He also
5 admitted sharing child pornography with other
6 anonymous users on the internet.

7 Mr. Haviyak claimed he accessed child
8 pornography due to boredom and depression. He was
9 initially released without charges while the matter was
10 further investigated. Additional investigation revealed
11 that between April 22, 2021, and August 9, 2021,
12 Harvey Haviyak accessed and made child
13 pornography available through several internet
14 services, including Instagram, Snapchat, Facebook and
15 Pinterest.

16 Harvey Haviyak uploaded 62 images
17 and three videos. Of this, there were 12 visually
18 different images and two visually different videos.
19 Forensic analysis of Mr. Haviyak's cell phone revealed
20 286 images and seven videos of accessible child
21 pornography with an additional 76 inaccessible images
22 of child pornography. Of the accessible images, there
23 were 30 visually distinct images.

24 Inaccessible images usually result from
25 things being deleted from the phone or the device that
26 is being used. The inaccessible images remain on the
27 device and can be recovered by those with the

1 technical expertise to do so, but for most users they
2 remain inaccessible.

3 The images were predominantly of
4 prepubescent children between the approximate ages
5 of three to 12 years old. The content of the images
6 varied from erotic poses with exposed genitalia, vaginal
7 and anal intercourse with adult males, fellatio with adult
8 males, masturbation, digital penetration and ejaculation
9 onto children.

10 Following the sentencing hearing, I
11 viewed a representative sample of the images and
12 videos which were located on Mr. Haviyak's cell
13 phones that were determined to meet the definition of
14 child pornography. The images and videos do not
15 need describing. They depict children as young as
16 toddlers up to perhaps teenagers being sexually
17 abused. They are graphic and disturbing images and
18 videos. The descriptions of the sexual abuse contained
19 in the appendices of the agreed statement of facts
20 cannot adequately convey the horror of what these
21 children are being subjected to.

22 Investigation also revealed an explicit text
23 conversation between Mr. Haviyak and another
24 unknown person on August 6, 2021, on Snapchat when
25 Mr. Haviyak shared child sex abuse material with that
26 person and positively commented on the image.

27 Mr. Haviyak was arrested again on

1 February 23, 2022, and provided a statement to the
2 police. Again, he was very cooperative with the police.
3 He admitted accessing child pornography, transmitting
4 and receiving child pornography with other users of
5 chat groups and taking measures to evade detection.

6 He also admitted that he is addicted to
7 child pornography and pornography in general and that
8 he is sexually attracted to children. This is something
9 that Mr. Haviyak endorsed when he testified at the
10 sentencing hearing. He has not sought to minimize his
11 activities or explain them away now that we have
12 reached the sentencing phase.

13 The agreed statement of facts also refers
14 to an incident which Mr. Haviyak admitted to the police
15 of a sexual assault of a sleeping child. It is unclear
16 when this would have happened, but it is something he
17 related to the police and claimed that it occurred
18 because he was dissatisfied with child pornography.
19 Mr. Haviyak has not been charged with this offence.
20 The police did investigate the allegation but did not lay
21 charges as the alleged victim and her mother denied
22 that the incident had taken place.

23 I want to be clear about the limited use of
24 this incident as part of the sentencing process. This is
25 something admitted by Mr. Haviyak in his statement to
26 the RCMP and through his acceptance of the agreed
27 statement of facts. However, Mr. Haviyak has not

1 been charged or convicted of this offence, and there is
2 much that is not known about this alleged incident.
3 What I think can be said about this incident is that it
4 reflects the risk that Mr. Haviyak might pose to a child
5 that he might have access to and I will have more to
6 say about that later in this decision.

7 **Personal Circumstances**

8 Turning to Mr. Haviyak's personal
9 circumstances, Mr. Haviyak is of Inuit descent whose
10 family is originally from Kugluktuk, Nunavut. This
11 requires me to consider section 718.2(e) of the *Criminal*
12 *Code* and in imposing sentence, to consider all
13 available sanctions other than imprisonment that are
14 reasonable in the circumstances and to pay particular
15 attention to the circumstances of Aboriginal offenders.

16 The Supreme Court of Canada has given
17 direction to trial courts in the interpretation of this
18 section in the cases of *Gladue* and *Ipeelee*. I have
19 considered the principles set out in those cases and the
20 requirement to consider the unique systemic or
21 background factors which may have played a part in
22 bringing an Aboriginal offender before the Courts and
23 the types of sentencing procedures and sanctions
24 which may be appropriate in the circumstances
25 because of an offender's Aboriginal background.

26 In considering section 718.2(e), I also
27 take judicial notice of the broad systemic and

1 background factors affecting Aboriginal people
2 generally such as the history of colonialism, residential
3 schools, and other things and those things continue to
4 affect the lives of Aboriginal people.

5 I also have the benefit of a pre-sentence
6 report which details Mr. Haviyak's background and his
7 personal circumstances. The pre-sentence report is
8 thorough and complete. Mr. Haviyak and his family
9 were cooperative in the preparation of the pre-sentence
10 report. It is apparent that Mr. Haviyak's parents and
11 sister are very concerned about him and are troubled
12 by these offences.

13 Mr. Haviyak has lived most of his life in
14 the Northwest Territories and since he was six has lived
15 in Hay River. He resides at his home with his parents,
16 two sisters and his sister's two children. Mr. Haviyak
17 as an Inuit person does not feel connected to his Inuit
18 culture and does not speak his language. He was not
19 raised with a real connection to traditional Inuit life.

20 Mr. Haviyak's parents left Kugluktuk
21 when he was a child because of concerns with their
22 children being bullied and the prevalence of drugs in
23 the community. The move to Hay River was a positive
24 one with Mr. Haviyak and his siblings doing better in
25 that community and making friends.

26 Mr. Haviyak was 18 years old when
27 these offences occurred. He is 20 years old now and

1 has no criminal record. He has been on release for
2 approximately 15 months. There have been no issues.
3 While he has been on release, he has been compliant
4 with his conditions.

5 Mr. Havioyak attended school and was in
6 grade 10 when he stopped attending because of the
7 COVID-19 pandemic. The move to online classes was
8 not something that worked for Mr. Havioyak, and he did
9 not ultimately participate. When classes resumed in
10 person, he did not return to school. Before quitting
11 school, he had some issues with learning.

12 Mr. Havioyak attributes his problems in school to his
13 insomnia and being tired.

14 Over this period of time, Mr. Havioyak's
15 parents and siblings struggled to connect with him. He
16 spent a lot of time in his room. Mr. Havioyak suffered
17 from insomnia and depression and became isolated in
18 his room, on the internet day and night.

19 Mr. Havioyak's most common emotion he
20 says is sadness. This seems to be something that he
21 just accepts as an unchangeable fact like the sun rising
22 every morning, telling the writer of the pre-sentence
23 report, "everyone is like that; that's just life,". It seems
24 to be a joyless existence.

25 The main bright spot for Mr. Havioyak
26 appears to be his employment where he reportedly
27 does well and appears to be motivated to work. He

1 helps out his family financially and it appears to have
2 brought him a measure of happiness.

3 As part of the sentencing, two
4 psychological reports were entered into evidence. The
5 first, Exhibit S-4, is the assessment report of Merrill
6 Dean completed on August 22, 2022. Ms. Dean
7 completed a cognitive assessment of Mr. Havioyak and
8 administered a number of tests to determine
9 Mr. Havioyak's level of cognitive functioning.

10 The testing revealed that Mr. Havioyak
11 was in the low- to low-average range in a number of
12 areas of cognitive functioning. Also of concern were
13 the issues that were reported with Mr. Havioyak's
14 mental health, social isolation and struggles with
15 learning. It has been reported that he has heard voices
16 in his head in the past. This occurred while he
17 attended high school, and Mr. Havioyak was on
18 medication for a period of time before he quit taking the
19 medication.

20 Ms. Dean's recommendation was that
21 further exploration was needed to determine whether
22 Mr. Havioyak has a personality disorder or a condition
23 like schizophrenia. It is obviously of concern if
24 Mr. Havioyak has an undiagnosed mental illness. If he
25 can benefit from treatment, then it is important that his
26 condition be diagnosed and a treatment regimen
27 prescribed and followed.

1 Miller's report notes that Mr. Havioyak is not currently
2 interested in understanding himself or working on
3 coping strategies. Ms. Miller's report was completed in
4 November 2022, so Mr. Havioyak's attitude may have
5 changed in the period between then and the sentencing
6 hearing.

7 In his testimony last week, Mr. Havioyak
8 endorsed wanting to engage in counselling and has
9 taken some limited steps to engage in that. It is hard to
10 gauge Mr. Havioyak's motivation and commitment to
11 seeking help and participating in counselling. He
12 appears, to an extent, to be indifferent to the
13 consequences of his actions, even telling the writer of
14 the pre-sentence report that he knows he should care
15 but he does not.

16 This reticence to discuss the offences or
17 the issues affecting him also extends to his family. His
18 parents and his sister report that he does not talk to
19 them about his feelings or the offences. Given the
20 nature of the offences, it would not be surprising if
21 Mr. Havioyak did not want to discuss them with his
22 family, but this seems to extend beyond that.

23 The impression of Mr. Havioyak is of
24 someone who is very alone even amongst his family.
25 In reviewing the pre-sentence report and hearing
26 Mr. Havioyak testify, it appears he lacks insight to the
27 offences he has committed. I am not sure that

1 Mr. Havioyak has insight into the issues he faces and
2 how he needs to change and whether he is actually
3 interested in changing.

4 Mr. Havioyak says that he is addicted to
5 pornography and child pornography and that he does
6 not want it in his life anymore. It is not so easy to deal
7 with an addiction; it cannot just be willed away. It
8 requires work and effort over a lengthy period of time.
9 Mr. Havioyak is young, so he has that time but he also
10 has a lot of challenges to face, and it will not be easy.

11 He also acknowledged that he is sexually
12 attracted to children. None of the reports I have read
13 have dealt specifically with the sexual aspects of these
14 offences, specifically with Mr. Havioyak's interest in
15 child pornography and sexual attraction to children.
16 And I do not have any evidence regarding
17 Mr. Havioyak's risk to reoffend or things like the
18 treatability of his condition.

19 But I do not think it is a stretch to say that
20 something like a sexual attraction cannot easily be
21 changed, if it can be changed at all. Mr. Havioyak is a
22 20-year-old man and he may have a tough future
23 ahead of him. After considering all of this, it is
24 imperative that Mr. Havioyak engage in intensive
25 treatment and counselling to address these issues. It is
26 necessary for Mr. Havioyak's personal rehabilitation
27 and to manage any risk he might present to the

1 community and, specifically, children.

2 This is not a remote or unrealistic
3 possibility because Mr. Havioyak currently lives in the
4 same residence as two of his sisters and they each
5 have a small child. Mr. Havioyak has also admitted to
6 previously sexually assaulting a sleeping child. While I
7 do not have a risk assessment, I conclude that there is
8 a real risk if Mr. Havioyak is around children and there
9 is a critical need to ensure the protection of children.

10 **Sentencing Principles**

11 Turning to the sentencing principles, the
12 Crown has filed a book of authorities which provided a
13 valuable overview of sentencing decisions in child
14 pornography cases. I do not intend to review the cases
15 in this decision and the defence helpfully provided a
16 summary of key elements of each of the cases.

17 Within the case law there is a distinction
18 in the sentences which occurred when Parliament
19 increased the maximum penalties for these offences
20 and introduced and eventually increased the maximum
21 mandatory minimum sentences that must be imposed.
22 As well, there is an increasing emphasis, as reflected in
23 *R v Friesen*, 2020 SCC 9, on the importance of
24 prioritizing denunciation and deterrence for offences
25 that involve children.

26 Section 718.01 of the *Criminal Code* was
27 enacted to make it clear that denunciation and

1 deterrence must be the primary consideration when
2 sentencing an offender for any offence that involves the
3 abuse of a child. Sexual offences against children have
4 long been considered serious, and the primary
5 sentencing principles have been deterrence and
6 denunciation. But the increase of maximum sentences
7 for offences against children shows that Parliament
8 intended for these offences to be punished more
9 harshly and reflect the increased recognition of the
10 gravity of these offences.

11 The internet, social media and the
12 ubiquitous cell phone have changed our lives forever.
13 As Justice Deschamps in dissent in *R v Morelli*, 2010
14 SCC 8 stated at paragraph 114:

15 Internet and computer technologies have
16 brought about tremendous changes in our lives.
17 They facilitate the communication of information
18 and the exchange of material of all kinds and
19 forms, with both legal and illegal content, and in
20 infinite quantities. No one can be unaware
21 today that these technologies have accelerated
22 the proliferation of child pornography because
23 they make it easier to produce, distribute and
24 access material in partial anonymity. [Citation
25 omitted].

26 Since *Morelli* in 2010, the prevalence of
27 child pornography in Canada has only

1 increased. The proliferation of child
2 pornography means that the sexual violence
3 against children has also increased because
4 these are real children who are victims to the
5 horrors inflicted upon them by the predatory acts
6 of adults.

7 Improvements in social media and the
8 prevalence of social media designed for young people
9 means that new forms of sexual violence against
10 children are enabled and there are new ways to access
11 and abuse children. The increase in demand for child
12 pornography means that the production of child
13 pornography also increases. Without a demand for this
14 type of material, there would be no corresponding need
15 to produce and distribute it.

16 Through their online activities, people like
17 Mr. Havioyak directly contribute to the sexual abuse of
18 children. The internet makes it is easy to find some
19 obscure bit of trivia, to google your friends or
20 coworkers, and unfortunately, to find child pornography.
21 Child pornography is readily accessible and does not
22 require sophisticated knowledge of computers or the
23 internet to find, as demonstrated by Mr. Havioyak.

24 Child pornography is not only readily
25 accessible, but it is also easy to find like-minded
26 individuals through private chat rooms and to facilitate
27 the exchange and dissemination of child sex abuse

1 material. Through these online communities, the risk of
2 normalizing of child sexual abuse is vastly increased.

3 Added to this is that the internet is
4 forever. These images and videos are practically
5 impossible to remove from the internet and each time
6 they are accessed or shared, the child victims depicted
7 in them are revictimized. They live their lives knowing
8 that the images and videos of their abuse remain out
9 there and accessible and could be viewed by anyone at
10 any time.

11 **Mitigating Factors**

12 Turning to the mitigating factors,
13 Mr. Havioyak is a young man. He is 20 years old now,
14 and he was 18 years old at the time of the offences.
15 He has no criminal record and reportedly has not been
16 someone who has been difficult to deal with or a
17 troublemaker. He reported regularly while on release
18 and has been employed, working regularly and
19 contributing financially to his family. There are a lot of
20 positive things to be said about Mr. Havioyak, and I
21 think it is important that he remember that.

22 Mr. Havioyak has entered a guilty plea
23 and has done so at an early opportunity. He fully
24 cooperated with the police, volunteered information
25 about how to access his phone, admitted his activities
26 and explained to them how he had done so.

27

1 **Aggravating Factors**

2 Turning to the aggravating factors, this
3 case involved the possession of 30 distinct images and
4 seven videos of child pornography and the uploading of
5 12 distinct images and two videos by Mr. Havioyak. In
6 terms of a collection, it is not extensive in comparison to
7 some of the cases that have been provided. But what
8 it contained was children as young as two or three
9 years old being subjected to serious sexual abuse.
10 These are images and videos of real children, young
11 children being horrifically sexually abused.

12 There is also the sharing of the child
13 sexual abuse material by Mr. Havioyak. He actively
14 sought out chat rooms and used social media apps to
15 engage others interested in child pornography. He
16 engaged in discussions with others and positively
17 commented on the images, and he transmitted and
18 received child sexual abuse materials.

19 His actions contributed to the active
20 fostering of this online community, and they also
21 normalize these depraved activities with others in those
22 groups. His actions create a demand for child sexual
23 abuse materials and contribute further to the spread of
24 this material.

25 **Sentence**

26 There are a number of ancillary orders
27 that the Crown is seeking, some of which are

1 mandatory.

2 These offences are designated offences
3 pursuant to section 490.012 of the *Criminal Code*.

4 There will be a *SOIRA* order requiring Mr. Havioyak to
5 comply with the registration requirements of the *Sex*
6 *Offender Information Registration Act*. The duration of
7 that order is mandated for a period of 20 years.

8 These offences are also primary
9 designated offences pursuant to section 487.051 of the
10 *Criminal Code*, and it is mandatory that Mr. Havioyak's
11 DNA be taken for inclusion in the DNA databank, so
12 there will be a DNA order.

13 The Crown is also seeking a prohibition
14 order pursuant to section 161 of the *Criminal Code* to
15 prohibit Mr. Havioyak from attending certain places
16 where persons under 16 years of age might be, from
17 employment or volunteering at certain places where
18 those persons might be and engaging in other
19 activities. The Crown has provided draft terms for this
20 order, which I have reviewed.

21 I agree that a section 161 order is
22 necessary. Section 161 permits the Court to restrict
23 Mr. Havioyak's activities for a period up to life. In this
24 case the Crown is seeking a 20-year order. It is
25 important when making these orders to ensure that
26 they are tailored to the specific offender and to consider
27 the nature and the risk to reoffend.

1 connected device and any password used to lock the
2 device to a peace officer upon their request in order for
3 them to monitor the compliance with this order.

4 The duration of the order will be for 15
5 years from the date of Mr. Havioyak's release from
6 imprisonment.

7 Taking into account the circumstances
8 and the applicable sentencing principles, including
9 Mr. Havioyak's Indigenous background, I am satisfied
10 that an appropriate sentence is one that is closer to the
11 sentence proposed by the Crown. The defence has
12 proposed a shorter sentence of two years less a day to
13 be followed by three years of probation.

14 While a lengthy period of probation is
15 likely necessary for Mr. Havioyak's rehabilitation and
16 reintegration into the community, I think it is important
17 for Mr. Havioyak's rehabilitation that he have
18 meaningful access to sexual offender treatment and
19 counselling as soon as possible. Reintegration into the
20 community can also successfully occur through the
21 parole system.

22 Another factor is that from my review of
23 the pre-sentence report, there are no sexual offender
24 programs in the territorial correctional system and
25 certainly none that would be targeted specifically to
26 Mr. Havioyak's issues.

27 The defence has raised concerns about

1 Mr. Havioyak's prospect in a federal penitentiary.
2 Those may be valid concerns, but I do not have any
3 evidence specific to any risk that might be posed to
4 Mr. Havioyak. Sending a northern offender, particularly
5 a youthful one, to a southern penitentiary is always a
6 concern for any offender, but the availability of federal
7 programming for Mr. Havioyak is important for his
8 rehabilitation.

9 I am very concerned for Mr. Havioyak
10 and for his future, and I hope that he is able to get the
11 help that he needs. It is also important for the
12 principles of denunciation and deterrence and to
13 demonstrate the gravity of these offences and the
14 protection of the public that Mr. Havioyak be
15 incarcerated for a significant period of time.

16 Can you please stand up, Mr. Havioyak.
17 For the offence of making available child pornography, I
18 impose a period of incarceration of three years and six
19 months. For the offence of possessing child
20 pornography, I sentence you to a period of three years
21 incarceration, to be served concurrently. You may sit
22 down.

23 Counsel, I want to thank you for your
24 work on this case and your submissions. They were
25 very helpful to me in coming to this difficult decision. Is
26 there anything I have overlooked other than the
27 forfeiture order, Mr. Fane?

1 M. FANE: No, Your Honour. Thank you.
2 THE COURT: Mr. Harte?
3 P. HARTE: No, Your Honour. Thank you.
4 THE COURT: Okay. And I am just going to take a look
5 at the forfeiture order a little more closely. All right. So
6 this order can go as submitted. So the Crown's
7 application for the forfeiture and return will be granted.
8 Mr. Clerk, here are the terms of the section 161 order
9 that were submitted by the Crown. All right. Thank
10 you.
11 THE CLERK: All rise.

12
13 **(PROCEEDINGS CONCLUDED)**
14
15
16
17
18
19
20
21
22
23
24
25
26
27

1 **CERTIFICATE OF TRANSCRIPT**

2 Veritext Legal Solutions, Canada, the undersigned, hereby
3 certify that the foregoing pages are a complete and accurate
4 transcript of the proceedings transcribed from the audio
5 recording to the best of our skill and ability. Judicial
6 amendments have been applied to this transcript.

7

8

9 Dated at the City of Toronto, in the Province of Ontario, this
10 19th day of July, 2023.

11

12

13 *Veritext Legal Solutions, Canada*

14

15 _____
Veritext Legal Solutions, Canada

16