*R v Havioyak,* 2023 NWTSC 24 S-1-CR-2022-000104

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HIS MAJESTY THE KING**

**-v-**

**HARVEY HAVIOYAK**

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**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**

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**APPEARANCES:**

M. Fane: Counsel for the Crown

P. Harte: Counsel for the Defence

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

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

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

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

 **Facts**

 The facts of the offences are detailed in an extensive agreed statement of facts marked as Exhibit S-1 at the sentencing hearing. I do not propose to repeat all of the facts contained in that document. In 2021, Harvey Havioyak lived in Hay River, Northwest Territories. Between April and August 2021, Mr. Havioyak made available child sex abuse material, and on August 9, 2021, he possessed over 350 images and seven videos of child sex abuse material.

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

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

 The RCMP executed a search warrant on August 9, 2021, at Mr. Havioyak’s residence. A cell phone was observed during the search on Mr. Havioyak’s bed and visible on the screen was a list of terms, including “pedophilia, child porn,”. Mr. Havioyak was placed under arrest and provided with his *Charter* rights and police caution.

 Mr. Havioyak subsequently cooperated with police. He told them where the images were located on the phone and provided the password to the phone so that it could be unlocked. He also provided a statement to the police in which he admitted downloading and viewing child pornography. He also admitted sharing child pornography with other anonymous users on the internet.

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

 Harvey Havioyak uploaded 62 images and three videos. Of this, there were 12 visually different images and two visually different videos. Forensic analysis of Mr. Havioyak’s cell phone revealed 286 images and seven videos of accessible child pornography with an additional 76 inaccessible images of child pornography. Of the accessible images, there were 30 visually distinct images.

 Inaccessible images usually result from things being deleted from the phone or the device that is being used. The inaccessible images remain on the device and can be recovered by those with the technical expertise to do so, but for most users they remain inaccessible.

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

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

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

 Mr. Havioyak was arrested again on February 23, 2022, and provided a statement to the police. Again, he was very cooperative with the police. He admitted accessing child pornography, transmitting and receiving child pornography with other users of chat groups and taking measures to evade detection.

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

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

 I want to be clear about the limited use of this incident as part of the sentencing process. This is something admitted by Mr. Havioyak in his statement to the RCMP and through his acceptance of the agreed statement of facts. However, Mr. Havioyak has not been charged or convicted of this offence, and there is much that is not known about this alleged incident. What I think can be said about this incident is that it reflects the risk that Mr. Havioyak might pose to a child that he might have access to and I will have more to say about that later in this decision.

**Personal Circumstances**

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

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

 In considering section 718.2(e), I also take judicial notice of the broad systemic and background factors affecting Aboriginal people generally such as the history of colonialism, residential schools, and other things and those things continue to affect the lives of Aboriginal people.

 I also have the benefit of a pre-sentence report which details Mr. Havioyak’s background and his personal circumstances. The pre-sentence report is thorough and complete. Mr. Havioyak and his family were cooperative in the preparation of the pre-sentence report. It is apparent that Mr. Havioyak’s parents and sister are very concerned about him and are troubled by these offences.

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

 Mr. Havioyak’s parents left Kugluktuk when he was a child because of concerns with their children being bullied and the prevalence of drugs in the community. The move to Hay River was a positive one with Mr. Havioyak and his siblings doing better in that community and making friends.

 Mr. Havioyak was 18 years old when these offences occurred. He is 20 years old now and has no criminal record. He has been on release for approximately 15 months. There have been no issues. While he has been on release, he has been compliant with his conditions.

 Mr. Havioyak attended school and was in grade 10 when he stopped attending because of the COVID-19 pandemic. The move to online classes was not something that worked for Mr. Havioyak, and he did not ultimately participate. When classes resumed in person, he did not return to school. Before quitting school, he had some issues with learning. Mr. Havioyak attributes his problems in school to his insomnia and being tired.

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

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

 The main bright spot for Mr. Havioyak appears to be his employment where he reportedly does well and appears to be motivated to work. He helps out his family financially and it appears to have brought him a measure of happiness.

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

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

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

 While at one point it was recommended he take medication and he did so for a period of time, Mr. Havioyak has not continued taking the medication.

 Another report, Exhibit S-5, is the psychological evaluation of Irene Miller which was completed on November 24, 2022. Ms. Miller noted that Mr. Havioyak had dissociative tendencies and scored high on the depression scale, reporting feelings of hopelessness, helplessness and sadness. He has also experienced suicidal ideation but is not currently suicidal.

 Mr. Havioyak is also restless and impulsive, which can result in him engaging in reckless behaviour. He has high generalized anxiety and experiences social anxiety. He is egocentric and unlikely to understand how his behaviour affects others. And I want to quote directly from page 4 of Ms. Miller’s report:

The combination of depression, anxiety, social detachment, dissociative tendencies, and other factors, specifically cognitive limitations and early childhood trauma mentioned in previous assessments cause significant difficulties with Harvey’s executive functioning. He struggles with concentration. His thinking is often unclear, and his decision making is compromised.

In terms of rehabilitation, it is of concern that Ms. Miller’s report notes that Mr. Havioyak is not currently interested in understanding himself or working on coping strategies. Ms. Miller’s report was completed in November 2022, so Mr. Havioyak’s attitude may have changed in the period between then and the sentencing hearing.

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

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

 The impression of Mr. Havioyak is of someone who is very alone even amongst his family. In reviewing the pre-sentence report and hearing Mr. Havioyak testify, it appears he lacks insight to the offences he has committed. I am not sure that Mr. Havioyak has insight into the issues he faces and how he needs to change and whether he is actually interested in changing.

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

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

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

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

**Sentencing Principles**

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

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

 Section 718.01 of the *Criminal Code* was enacted to make it clear that denunciation and deterrence must be the primary consideration when sentencing an offender for any offence that involves the abuse of a child. Sexual offences against children have long been considered serious, and the primary sentencing principles have been deterrence and denunciation. But the increase of maximum sentences for offences against children shows that Parliament intended for these offences to be punished more harshly and reflect the increased recognition of the gravity of these offences.

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

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

 Since *Morelli* in 2010, the prevalence of child pornography in Canada has only increased. The proliferation of child pornography means that the sexual violence against children has also increased because these are real children who are victims to the horrors inflicted upon them by the predatory acts of adults.

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

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

 Child pornography is not only readily accessible, but it is also easy to find like-minded individuals through private chat rooms and to facilitate the exchange and dissemination of child sex abuse material. Through these online communities, the risk of normalizing of child sexual abuse is vastly increased.

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

**Mitigating Factors**

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

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

**Aggravating Factors**

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

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

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

**Sentence**

 There are a number of ancillary orders that the Crown is seeking, some of which are mandatory.

 These offences are designated offences pursuant to section 490.012 of the *Criminal Code*. There will be a *SOIRA* order requiring Mr. Havioyak to comply with the registration requirements of the *Sex Offender Information Registration Act*. The duration of that order is mandated for a period of 20 years.

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

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

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

 These orders are also punitive in nature, and a 20-year order is lengthy and raises some concerns. But I also do not have anything before me in terms of a risk assessment, so I need to ensure that the safety of children is promoted while ensuring that I consider Mr. Havioyak’s circumstances. The terms of the order that have been proposed strike a balance between these considerations.

 So Mr. Havioyak will be required to -- he is prohibited from attending a daycare centre, schoolground, playground or community centre except while in the presence of an adult over the age of 19 years who is aware of his convictions. He is prohibited from seeking, obtaining or continuing any employment whether or not the employment is remunerated or becoming a volunteer in a capacity that involves being in a position of trust or authority towards a person under the age of 16 years.

 He is prohibited from having any contact, including communications by any means, with a person who is under the age of 16 unless under the supervision of an adult over the age of 19 who is aware of his convictions. He is prohibited from using the internet or other digital network to access any content that violates the law.

 While using the internet, he shall not delete his browser history. He is to provide any internet connected device and any password used to lock the device to a peace officer upon their request in order for them to monitor the compliance with this order.

 The duration of the order will be for 15 years from the date of Mr. Havioyak’s release from imprisonment.

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

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

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

 The defence has raised concerns about Mr. Havioyak’s prospect in a federal penitentiary. Those may be valid concerns, but I do not have any evidence specific to any risk that might be posed to Mr. Havioyak. Sending a northern offender, particularly a youthful one, to a southern penitentiary is always a concern for any offender, but the availability of federal programming for Mr. Havioyak is important for his rehabilitation.

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

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

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

M. FANE: No, Your Honour. Thank you.

THE COURT: Mr. Harte?

P. HARTE: No, Your Honour. Thank you.

THE COURT: Okay. And I am just going to take a look at the forfeiture order a little more closely. All right. So this order can go as submitted. So the Crown’s application for the forfeiture and return will be granted. Mr. Clerk, here are the terms of the section 161 order that were submitted by the Crown. All right. Thank you.

THE CLERK: All rise.

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

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

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

Veritext Legal Solutions, Canada

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