Citation: *R.* v. *Cafferata*, 2009 YKTC 95

Date: 20090729
Docket: 07-00363
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

JOHN CAFFERATA

Appearances:
David McWhinnie — Counsel for Crown
André Roothman — Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): John Cafferata has entered a guilty plea to having committed the offence of possession of child pornography, contrary to s. 163.1(4) of the *Criminal Code of Canada.*

Admitted Facts

[2] On September 4, 2007, RCMP executed a search of Mr. Cafferata's residence and motor vehicle pursuant to a search warrant. They discovered approximately 200 pages of printed digital images of child pornography that had mainly been downloaded from the Internet. They also discovered some 17,000 images located on Mr. Cafferata's personal computer. Some of the 200 printed pages were duplicated in the 17,000.

[3] Most of these images depicted erotic posing, displaying the sexual organs or anal regions of persons under the age of 18 without explicit sexual activity. Many of the images also depicted children posing suggestively while wearing some manner of costume. A number of the images depicted explicit sexual activity between children, non-penetrative sexual activity between adults and children and, to a lesser degree, penetrative sexual activity between children and adults. These images contained no depictions of sexual sadism or bestiality. The children in the images ranged from toddler through pre-pubescent to mid-teens. Also located were short stories depicting sexual activity amongst children and between adults and children.

[4] While the bulk of the child pornography was downloaded in several transactions after January 2007, some material was downloaded and printed before that time, dating as far back as 2001. There was no evidence that Mr. Cafferata was involved in child-luring through his computer or otherwise, or that he was involved in the distribution of child pornography.

Election

[5] Crown counsel has proceeded by indictment; therefore, the minimum sentence is 45 days in jail. Mr. Cafferata has eight days of pre-trial custody. He consented to his detention on July 10th and is therefore entitled to a further 20 days credit at the usual rate of one point five to one, which recognizes the statutory reduction in sentence available to inmates serving sentences. This 28 days approximates 1.5 months.

[6] Crown counsel submits that the appropriate range of sentence is nine to 12 months followed by a period of probation. Defence counsel submits that the minimum

sentence of 45 days should be imposed, in addition to a period of probation.

Personal Circumstances of Mr. Cafferata

[7] A pre-sentence report was filed. Attached was a Risk Assessment Report and Psychological Examination prepared by forensic and legal psychologist, Craig Dempsey. Mr. Cafferata is 56 years old. He has lived in the community of Teslin, Yukon for the past 30 years. He is single and has no children. He had a good upbringing and maintains a positive relationship with his two brothers and his sister.

[8] Mr. Cafferata has been a helpful and active member of the Teslin community during his 30 years residing there. From 1986 until these charges were laid, Mr. Cafferata worked for the Teslin school. For the first nine years he worked as a part-time teaching assistant with special needs children, before becoming a remedial tutor. Much of his work was one-on-one, but classroom work was also a component of his employment. Mr. Cafferata volunteered considerable time in order to coach sports teams. On many occasions he took students on outside excursions around the Teslin area and on field trips within the Yukon. He sat on the Teslin Recreation Board for 15 years, was a member of the YSAA, a rural representative for school activities, was a member of several Yukon sports governing bodies, coached and participated in six Arctic Winter Games and coached in the Indigenous Games in 1997.

[9] One long-time friend of Mr. Cafferata and Teslin community member interviewed for the purpose of the pre-sentence report stated that Mr. Cafferata has gone over and above what could reasonably be expected of him in organizing and participating in activities for the youth of Teslin. He was known to give his time freely and to always be

there for these youth. Richard Burke, the school principal and Mr. Cafferata's supervisor for approximately nine years, states as follows:

> John was exceptionally good, quite outstanding, actually at his job. He was particularly good with sports as a coach with the kids. He often used his free time and gave it to the kids. He was always willing to go the extra mile, he was a real self-starter. He went beyond the call of duty. John played an important role in bringing out the self worth and self esteem of many of the students through sports. I had many parents tell me that very thing.

[10] Mr. Burke confirmed that he had at no time received any information or had any suspicion that Mr. Cafferata had acted in an inappropriate manner while performing his duties. There have otherwise been no complaints about Mr. Cafferata acting in an inappropriate manner in respect of any youth that he was responsible for.

[11] As a consequence of this charge, Mr. Cafferata was required to resign his employment. He has not consumed any alcohol for the past 22 months, although prior to that he admitted that in the general time period during which this offence has committed he had consumed more alcohol that usual. He admits to having been a frequent user of marihuana.

[12] There is some ambiguity with respect to Mr. Cafferata's interest in child pornography. He indicates that he first purchased access to the child pornographic website when under the influence of alcohol, although stating that he was only aware he had done so when he awoke in the morning. He subsequently admitted to having child pornographic material in his possession going as far back as 2001.

[13] He asserts that he has no interest in children, but it is apparent that he had

sufficient interest in child pornography to maintain possession of numerous images constituting child pornography. When asked about this in court at the sentencing hearing, Mr. Cafferata was quite adamant that his comments in the pre-sentence report about not being interested in child pornography related in particular to negate any suggestion that he would ever participate in any form of sexual act actually involving a child.

[14] Mr. Cafferata accepts responsibility for the offence of possessing child pornography. He states that the worst part of this ordeal has been the effect upon the community of Teslin and its individual members, particularly those First Nation individuals who have struggled with residential school issues. Quoting from the pre-sentence report:

> I wouldn't do anything to endanger the school because it is the safest place in the community. The sad thing is that I let the community down and re-opened the past. It brings back the bad memories ....

[15] One community representative stated that the community as a whole feels betrayed by Mr. Cafferata and that this charge has shattered the mentor status he once held, as he had previously been very highly thought of by the community.

[16] The Risk Assessment Report and Psychological Examination prepared by Mr. Dempsey indicates that there is no evidence that Mr. Cafferata suffers from any form of mental disorder, personality disorder or major mental illness. Mr. Cafferata was assessed as posing a low risk of committing any future acts of sexually abusive behaviour. This assessment was arrived at through use of the Risk for Sexual Violence Protocol ("RSVP"), which is a structured guide designed to assist professionals in

conducting sexual violence risk assessments. The RSVP provides a list of risk factors related to sexual violence recidivism. Mr. Cafferata possesses very few of the recognized risk factors as he has no history of sexual or general violence, has no criminal record, does not have beliefs that condone sexual offending and has no indications of sexual paraphilia, psychopathic personality features and unstable employment. Mr. Dempsey states that:

> The only relevant risk issues appear to [be] minimization of his illegal pornography use and his abuse of alcohol.

[17] During further sentencing submissions I raised the issue of the low risk assessment in light of the further admission that Mr. Cafferata has accessed and possessed child pornography going as far back as 2001. The pre-sentence report, which, to some extent, was relied upon by Mr. Dempsey as a source of information relating to Mr. Cafferata's psycho-social history, appears to place more emphasis on the recent accessing and possessing of child pornography than it does in relation to the materials going back to 2001.

[18] Crown counsel submits that I should consider the opinion of Mr. Dempsey in the Risk Assessment Report and Psychological Evaluation, that Mr. Cafferata constitutes a low risk to reoffend, carefully, in light of the longer period of time that Mr. Cafferata demonstrated an interest in child pornography than is clearly set out in the pre-sentence report. Crown counsel submits that I can come to my own conclusion as to the risk of reoffending Mr. Cafferata poses to society rather than relying on that set out in the Risk Assessment Report and Psychological Examination prepared by Mr. Dempsey of his being at a low risk.

[19] The author of the pre-sentence report, Shayne King, relied primarily on information provided to him by Mr. Cafferata, family and community members and Crown counsel's office. It is clear from the pre-sentence report that Mr. Cafferata was repeatedly questioned by Mr. King as to the nature of his interest in child pornography. To the extent that the pre-sentence report does not provide much in the way of detail regarding Mr. Cafferata's historical possession of child pornography, I can only safely assume that what is reported in the pre-sentence report constitutes the extent of the information provided to Mr. King.

[20] While Mr. Dempsey's report may be brief, even allowing for the fact that he specifically did not repeat the information provided in the pre-sentence report, I am reluctant to disregard or re-evaluate his conclusions. Mr. Dempsey is trained in the specific field in which he conducted his assessment and examination of Mr. Cafferata and proffered his opinion. I am not. I assume that Mr. Dempsey, as a qualified professional, obtained the information from the pre-sentence report and his interview with Mr. Cafferata that he considered to be necessary in order to provide a reliable report to the Court. Had Mr. Dempsey felt that more information was required, I expect that he would have requested it or noted it in the report.

[21] Further, Mr. Dempsey's report is not intended to be as comprehensive as a full-scale examination and assessment by a forensic psychiatrist specializing in sexual offending and offenders. It may be that in certain circumstances the services of such a forensic psychiatrist would be of assistance. In the end, I accept the opinion of Mr. Dempsey and consider Mr. Cafferata to be at a low risk of re-offending.

Authorities

[22] A number of authorities were filed to assist me with determining the appropriate sentence in this case. It is clear from these cases that the leading principles of sentencing individuals who have committed the offence of possession of child pornography are denunciation, and general and specific deterrence. In ***R.*** v. ***V.H.***, 2008 YKTC 21, Lilles T.C.J. cited from several cases that addressed the harm caused by the possession of child pornography. Although these excerpts are long, I believe that they are worth repeating:

> [11] … in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 28 [the Court] stated:
>
> > This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between *possession* of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences ...
>
> [12] The court went on to say at paragraph 94:
>
> > Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against

> publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.

[13] In *R. v. Stroempl* (1995), 105 C.C.C. (3d) 187 at page 191, the Ontario Court of Appeal stated:

> The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography - and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

[14] In *R. v. Steadman*, [2001] A.J. No. 1563, Justice Gallant said as follows at paragraphs 21 and 22:

> Child pornography promotes cognitive distortions. It fuels fantasies that incite offenders to offend. It is used for grooming and seducing victims. Children are abused in the production of child pornography. Child pornography is inherently harmful to children and society. That type of pornography by its very existence violates the dignity and rights of children. Harmful attitudes are reinforced by such pornography. Possession of child pornography reinforces the erroneous belief that sexual activity with children is acceptable. It fuels pedophiles' fantasies which constitutes

> the motivating force behind their sexually deviant behaviour.
>
> Our courts must send the message that the existence of these images which degrade and dehumanize little children, who are not appropriate sexual partners, will not be tolerated.

[15] A similar position was taken in *R. v. Fisher*, [2007] N.B.J. No. 129 at paragraph 16:

> Some may argue that dealing sharply with those who only possess child pornography does not deal with those who produce and distribute it. I disagree. The possession of such material has implicit in it the condoning of its production and distribution. If there were not end consumers of pornographic material involving children, there would be no purpose in its production. Sentences should be of sufficient deterrence to make the possession of this material not worth the risk. Given today's technology, although it may be much easier to access such pornography on the Internet, the risk of discovery is greater as well. Accessing this material leaves a trail that, as is the case here, can be retraced to its source. The presumed anonymity of these chat rooms and pornography sites is false. The police are now equipped and trained and motivated to follow these trails. People will be caught. Only if the result of being apprehended is sufficiently unpalatable will the end market be addressed and the reason for producing such material with its attendant irreparable harm done to children be removed.

These cases were all cited from paragraphs 11 to 15 of the ***V.H.*** case.

[23] In ***V.H.***, a 44-year-old male pled guilty to having in excess of 100 compact disks and 1,000 images and movies on his computer, the contents of which ranged from artistic images of children to children engaged in sexual acts with other children, finally

to depicting children in sexual acts with adults. There were images of rape and bestiality. These children appeared to be between the apparent age of three to 15 years old. The accused in this case minimized the seriousness of his actions and did not appear to understand the concerns underlying his offence. He was clearly an addict of child pornography and would spend up to nine hours at a time searching for child pornography and downloading it to his Internet.

[24] In determining the appropriate sentence, Lilles J. in paragraph 17 applied the criteria in ***R.*** v. ***Missions***, 2005 NSCA 82, to a charge of possession of child pornography contrary to s. 163.1(4). As per ***Missions***, child pornography falls into one of the following five categories, with each successive category being more serious than the previous one:

> (1) images depicting erotic posing with no sexual activity;
>
> (2) sexual activity between children, or solo masturbation by a child;
>
> (3) non-penetrative sexual activity between adults and children;
>
> (4) penetrative sexual activity between children and adults;
>
> (5) sadism or bestiality.

I note that there would appear to be a somewhat lesser category of photographs or video involving clothed or costumed children posing suggestively. On their own, perhaps, such pictures would not fall into the definition of child pornography, hence there is no categorization of them within the ***Missions'*** list. That said, when such pictures or videos are located in combination with child pornography that falls within the list, they certainly contribute to the overall context and moral blameworthiness of the

offender.

[25] A significant aggravating factor in the ***V.H.*** case was the fact that the pornographic material extended into the most serious category. Also aggravating was the extended period of time over which the pornographic material was collected, although the decision does not state what time that constituted. V.H.'s minimization of the motive for collecting the child pornography, his mischaracterization of himself as victim and his inability to appreciate the victimization of children were also aggravating. His alcohol and marihuana abuse were considered to be risk factors.

[26] Mitigating factors included V.H.'s dated and unrelated single criminal conviction, his cooperation with police at the time of the execution of the warrant and his guilty plea, which spared V.H.'s teenage daughter from testifying with respect to her role in the accidental discovery of the pornographic images on V.H.'s computer. Lilles T.C.J. stated that an appropriate sentence would be 12 months, but reduced it to 11 months in recognition of the guilty plea. Three years of probation followed.

[27] In ***R.*** v. ***Nowazek***, 2009 YKTC 51, Ruddy C.J.T.C. sentenced an offender for possession of child pornography, amongst other offences. Mr. Nowazek had been found in the possession of approximately 1,000 photo images and video clips on his computer's hard drive, as well as thousands of video clips and still shots on 40 computer disks. These images and video clips included babies through to teenagers portrayed in all the categories stated in ***Missions*** other than the most serious of sadism and bestiality. There was no evidence in this particular instance of child luring or distribution of child pornography. Mr. Nowazek's personal circumstances, both in

respect of his history of sexual offending against children and his high risk to reoffend, were aggravating factors in sentencing him to 24 months custody for the s. 163.4 offence, and thus the case is distinguishable from Mr. Cafferata's.

[28] However, of assistance in the present case is a comment by Ruddy C.J.T.C., after reviewing the cases filed by counsel highlighting the sentencing range for offences of the possession of child pornography, that:

> The cases depict a broad range of sentences from a low of six months to a high of 18 months. The majority, however, fall within the 10 to 12 month range for offenders with no related record.

[29] The cases from outside the Yukon include ***R.*** v. ***Sutherland,*** 2006 BCPC 133. Mr. Sutherland pled guilty to transmitting child pornography, contrary to s. 163.1(3). He admitted to having sent several hundred images of child pornography to others on his computer. He was also in possession of 100,000 images on his computer, of which 10,000 were analyzed. Many, but not all, of these 10,000 images were child pornography and depicted children engaged in sexual acts with adults. The pornographic material included the second most serious category of penetration. Mr. Sutherland was an active participant in searching for such material. He was 49 years old with no criminal record and entered a guilty plea as soon as possible. He was not diagnosed as a pedophile and there was no evidence to suggest he had ever been improperly involved with children. While remorseful, he was unable to explain why he was involved in the viewing, collecting and transmitting of hard-core child pornography.

[30] The sentencing judge considered the fact that the pornography was transmitted to be an aggravating factor in sentencing Mr. Sutherland to nine months custody plus

two years probation. At the time, there was no minimum punishment and a conditional sentence was a possibility, although the sentencing judge did not consider that a conditional sentence was consistent with the fundamental principles of sentencing in this case.

[31] In ***R.*** v. ***Jakobsen***, 2006 BCSC 379, a six-month sentence plus three years of probation was imposed upon a 54-year-old male for conviction of possessing child pornography. The pornographic material involved images of naked children engaged in sexual acts with adults and other children. Mr. Jakobsen had a prior conviction for sexually assaulting a five-year-old female neighbour, for which he received a nine-month conditional sentence order and three years probation. The sexual assault occurred during the same period of time covered by the charge of possession of child pornography. Mr. Jakobsen was assessed and found to have:

> … engaged in a pattern of denial with respect to his sexual assault conviction and with respect to his conduct underlying the conviction for possession of child pornography. He had demonstrated an unwillingness to accept responsibility for his offences. He blames others and provides excuses for his conduct. (Paragraph 13)

Mr. Jakobsen was considered to be at risk for further sexual offending.

[32] In ***R.*** v. ***Graham***, 2008 BCPC 59, a one-year jail sentence followed by three years of probation was imposed on a 32-year-old offender on guilty pleas to one charge of possession of child pornography and one of accessing child pornography. Approximately 10,000 images depicting children in sexual acts, including oral sex, intercourse and anal intercourse, were found on Mr. Graham's computer. A psychological assessment indicated that Mr. Graham had no shame or remorse and no

appreciable understanding of why child pornography is harmful or of its impact on victims. He was diagnosed as suffering from pedophilia and with having a personality disorder. He was addicted to crystal methamphetamine. He was considered to be a high risk to reoffend. He had no prior criminal record.

[33] In ***R.*** v. ***L.W.***, 2008 BCPC 281, a sentence of 60 days jail to be served intermittently was imposed on a 37-year-old offender on a guilty plea to possession of child pornography. L.W. was found in possession of approximately 26,000 images of child pornography. The images and video clips were primarily consistent with categories 2 and 3, as per ***Missions***, but there were a small number of images that fell within category 4 and, to a lesser extent, category 5. There was no evidence that L.W. had ever harmed or lured children. Crown counsel proceeded summarily; therefore, the sentence range was from a minimum of 14 days to a maximum of 18 months. L.W. was genuinely remorseful and had come to realize how devastating his actions were. He had suffered professional sanctions affecting his employment as a physiotherapist. He had a favourable pre-sentence report. A forensic psychiatric report indicated he did not suffer from any major mental illness, although he did meet the criteria for pedophilia. He was considered to be at a low risk to reoffend sexually in the future. Other than the charge for which he was being sentenced he was “of impeccable character and background.”

[34] In ***R.*** v. ***C.W.F.***, 2009 BCPC 85, a sentence of nine months imprisonment followed by three years of probation was imposed, following a guilty plea, on a 31-year-old offender on a charge of possession of child pornography. The possession was over the relatively brief period of two weeks. The child pornography consisted of 4 MPEG

videos, some of which represented child pornography at the worst end of the spectrum. C.W.F. had a prior criminal conviction approximately 12 years earlier for sexual assault on numerous occasions with his five to ten-year-old niece. C.W.F. was diagnosed as suffering from pedophilia and was considered to be a moderate to high risk to reoffend.

[35] In ***R.*** v. ***Proulx***, 2009 MBPC 13, a sentence of 90 days jail to be served intermittently, plus three years probation, was imposed on an offender found to be in possession of 2,466 images of child pornography covering categories 1 through 4 of ***Missions***. He had downloaded these images over just in excess of a two-year period of time. Mr. Proulx was diagnosed as suffering from pedophilia. He was remorseful and appeared to have a good insight into the nature of his problem. He was considered to pose a low risk of reoffending if he was properly treated. Mr. Proulx was open to receiving treatment and had already commenced doing so. He had no prior criminal record. Crown counsel had proceeded by way of summary conviction. Corrin P.C.J. considered numerous sentencing authorities and noted that the 15 cases filed by defence counsel resulted in sentences significantly less onerous than the 12 months incarceration sought by Crown counsel. In particular, six of the cases resulted in sentences of 60 days to six months served conditionally. He noted that "Every sentencing judge emphasized that the principles of general and specific deterrence must be reconciled with rehabilitation of the individual offenders."

[36] That said, Corrin P.C.J. considered the application of the case of ***R.*** v. ***Batshaw***, [2004] M.J. No. 249, Court of Appeal, where a 22-year-old first offender with 80 to 100 images of child pornography, considered to be at a low risk to reoffend, had his original sentence of a conditional discharge changed to a 15-month conditional sentence order

less three months for time on probation between the original sentence and the appeal. Corrin P.C.J. stated that he would have felt bound to order the same sentence for Mr. Proulx if a conditional sentence had still been available. However, as it was not, he chose the highest jail sentence possible that would still allow Mr. Proulx to continue to work and continue his community treatment. I note that there is obviously quite a difference between a sentence of 90 days intermittent and a 15-month conditional sentence order.

[37] In ***R.*** v. ***Faget***, 2004 BCCA 66, the Court of Appeal upheld a sentence of nine months imprisonment on a guilty plea to the possession of child pornography for the purpose of distribution or sale. Mr. Faget was 18 years old at the time he committed the offences. He had no criminal record. He was remorseful and empathetic to the situation of the children involved. He was diagnosed as having no indication of emotional difficulties or problems and was considered to be at a low risk to reoffend. His involvement in the possession of child pornography was linked not to personal interest in child pornography but was with a view to enhance the success of his lawful adult pornography website. The pornographic materials included category 4 material as per ***Missions*** and, in the words of the sentencing judge, contained "the most degrading display of child pornography that one could imagine."

[38] In ***R.*** v. ***Gauthier***, 2008 ABCA 39, a sentence of 12 months imprisonment and three years probation after a guilty plea to the offence of possession of child pornography was upheld on an appeal by the self-represented offender. Approximately 2,000 still images and 100 movies of child pornography depicting sexual activity, primarily within categories 1 to 4 of ***Missions***, was located, as well as one 15-minute

video depicting bondage and a series of photographs with a written narrative depicting the sexual assault of a four-year-old. Mr. Gauthier was 42 years old at the time of the offence and had seven prior unrelated criminal convictions. He had received a generally favourable pre-sentence and forensic assessment report which indicated a low risk of reoffending.

[39] And finally, the case of ***R.*** v. ***Pommer***, 2008 BCSC 737, involved guilty pleas, after a *voir dire* ruling that the seized items were admissible at trial, to possession as well as accessing child pornography. The accessing and possession of the child pornography took place over a four-year period. Fifty-six images of child pornography and 113 child pornography websites, which Mr. Pommer had purchased the right of access to, were located on his home computer, as well as hundreds more images and several videos of child pornography on his office computer, in addition to several separate videos. The child pornography ranged up to category 3 of ***Missions***. There was evidence of attempts by Mr. Pommer to delete evidence of his offending through several software programs. The Court considered Mr. Pommer's offending to be significant and having occurred over a lengthy period of time.

[40] Mr. Pommer, who was 39 years old, expressed remorse for his offending and had considerable evidence of support from friends, family and employers. A psychological assessment resulted in a diagnosis that he, amongst other issues, suffered from sexually compulsive conduct that resulted in his viewing legal pornography to manage his high anxiety. This led him to begin to view child pornography to "maintain the stimulation and dissociation that result." (Paragraph 39) He was not considered to be at risk of engaging in further illegal activities. Smith J.

considered the principles set out for sentencing offenders convicted in relation to child pornography charges, and in particular the leading principles of deterrence and denunciation, citing from ***Sharpe*** and ***Stroempl*** referred to earlier. He noted that the pre-2005 jurisprudence resulted in sentences ranging from an absolute discharge through to two years less one day where further aggravating factors were present, such as distribution or possession for the purpose of distribution, luring, a lack or refusal to understand the harm done by this type of offending, a prior criminal record and a negative psychological assessment on risk of reoffending. (Paragraph 50)

[41] Smith J. pointed to additional aggravating factors set out in ***R.*** v. ***Warn***, 2007 ONCJ 417, at paragraph 4, such as the size of the collection, the nature of the collection and whether the offender had purchased child pornography and contributed to the sexual victimization of children for profit as opposed to merely connecting it by free downloads from the internet. Smith J. noted certain aggravating factors that were present in Mr. Pommer's case but found that the cases provided by Crown counsel in seeking a sentence between 12 to 18 months were distinguishable, as they involved more egregious circumstances and more aggravating factors than in the case before him, such as a prior related criminal record of offending against children, an extraordinarily large collection of pornographic material exhibiting the highest level of depravity, a lack of remorse or understanding by the offender of the effects of his offending on the victim children and a professional opinion that the offender was at a high or higher risk of reoffending.

[42] Smith J. considered a number of mitigating factors including, but not limited to, compliance with a strict recognizance for over two years, family support, situational

aspect of the addiction to child pornography, ongoing therapeutic counselling and the devastating impact on Mr. Pommer's life and business. Smith J. did not consider the guilty plea to be a mitigating factor, coming after the *voir dire* ruling admitting into trial evidence making out the charges.

[43] In conclusion, a conditional sentence order of nine months was imposed, given that such a sentence was still available for the time in which these offences had been committed. There was no probation order.

Application to this case

[44] The aggravating factors of Mr. Cafferata's case are the following. The quantity of the collection of child pornography is large. The materials were collected over an approximately seven year period, although I accept that the bulk of them were collected within the last year prior to his arrest. Much of this material was purchased through websites who profit from the distribution of child pornography. On this point, I note the submission from defence counsel that prior to 2007, Mr. Cafferata did not subscribe to a child pornography website but obtained the materials through other means, such as non-subscription open websites. The Crown is not in a position to prove otherwise, so I accept this submission. And finally, the offences involve images up to category 4 of ***Missions***, although the majority would be located within the lower categories.

[45] I find the following factors to be mitigating. Mr. Cafferata has no prior criminal history and is otherwise of good character, with a long, extensive and unblemished record of community service. He is sorry for what he has done and appreciates the harm caused to the children involved in the creation of child pornography and in his

possession of it, as well as the harm done to the community of Teslin. He is considered to be a low risk to reoffend. He has lost his employment and his connections to the community that has been his home for many years and that he intends to continue residing in.

[46] I also consider Mr. Cafferata's guilty plea to be a mitigating factor. I recognize that it was proffered only after the evidence collected by the police was ruled admissible at trial. As such, it cannot be placed into the same category as an early guilty plea offered prior to the commencement of trial. There were no victims who were spared the difficulties often associated with testifying at trial. That said, the images of these children depicted in the pornographic material were not required to be adduced as evidence at a trial, hence a "cap" was put on their continued victimization in this process. The guilty plea also spared the time and expense associated with the continuation of the remainder of the trial. This is a lesser factor, but still must be considered.

[47] I am cognizant of the principles of sentencing set out in s. 718, 718.01, 718.1 and 718.2. I agree that the primary principles of sentencing in this case are denunciation and deterrence. The harm caused by those who possess child pornography, particularly when its purchase supports the industry that creates and distributes child pornography, is immeasurable in its impact on those children who are forced to participate in its creation. This is a crime whose victims are found in those who are the most vulnerable in society, in those whose lives should be protected and cherished for all the promise in them, not crushed and twisted in moral depravity.

[48] Even in those offences which unquestionably call for deterrence and denunciation to be at the forefront, nonetheless the rehabilitation of the offender cannot be lost sight of.

[49] Subsections 718.2(d) and (e) say:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

This is the principle of restraint and is always for consideration by the Court, even if the restraint still results in a period of incarceration.

[50] In determining an appropriate sentence I must consider the impact of Mr. Cafferata's offence on the community of Teslin. As one community member stated in the pre-sentence report, as mentioned to earlier, the community as a whole feels betrayed by Mr. Cafferata. He has shattered the mentor status he once held. The same individual expressed some concern about why Mr. Cafferata's matter did not proceed through the Teslin circuit court and why the community leaders are not involved. A decision was made at some point to swear the Information such that the offence was alleged to have occurred at or near Whitehorse, not at or near Teslin. The Cottage Lots subdivision where the child pornographic material was seized from Mr. Cafferata's residence is located approximately eight miles north of Teslin. I cannot say why the decision was made to proceed in Whitehorse on this matter rather than in Teslin. Regardless, there is no doubt that Mr. Cafferata was an influential and highly

regarded member of the Teslin community in that he intends to return to live there after he is released from custody.

[51] The principles of restorative justice require that a sentence be imposed that takes into account the impact of Mr. Cafferata's offence on the community of Teslin and allows the community a role in Mr. Cafferata's return to the community. Given Mr. Cafferata's position in the community prior to his being charged with this offence, this case may have been an appropriate one for the sentencing to have proceeded in a circle sentencing or similar format. When I say this, it is important to keep in mind that the real benefit of a circle sentencing or similar format is that it allows the community and individuals within the community to directly provide their input to the Court and to the offender during the sentencing hearing. It also provides the offender the opportunity to address the community directly. A further benefit is that the community is able to express its views on how the reintegration of the offender into this community can be facilitated and what role the community can have in this reintegration. That is not to say that this information cannot be provided in a traditional sentencing format; it just, practically speaking, can be more easily facilitated, at times, in the communities in that format, in particular when the sentencing takes place in Whitehorse and not the community where the offender resides.

[52] A sentencing hearing that proceeds by way of circle sentencing does not mean that an offender will receive a custodial sentence that is shorter than would have been the case in the formal sentencing hearing. In the end, a fit sentence must be imposed by the sentencing judge and all or portions of the final sentence may not differ. However, by being provided the opportunity to participate in a circle sentencing or

similar hearing, the community has a greater practical opportunity to express the position that the offender has put the community in and a greater opportunity to contribute information to the sentencing judge as to what role the community may be able to have after the sentence has been imposed. I do not know what the considerations were in this case and there may very well have been considerations beyond what I know that resulted in this. I am not stating this as a negative comment; it is simply to address what one member of the community raised in the pre-sentence report about this matter not proceeding in Teslin.

[53] While Mr. Cafferata's sentencing hearing proceeded in Whitehorse in the more usual court structure, the sentence I impose today must nonetheless recognize the very positive contribution Mr. Cafferata has made to the community of Teslin over the years, the fact that this relationship has been severed, the fact that Mr. Cafferata is going to be returning to the Teslin area to reside and, finally, that in order for there to be any restoration of Mr. Cafferata within the community of Teslin in any meaningful capacity, the community of Teslin must be provided the opportunity to participate in Mr. Cafferata's rehabilitative journey.

Range

[54] In determining the appropriate sentencing range for the offence of child pornography, consideration must be given to the fact that the *Code* provides for the Crown to elect to proceed by way of summary election or indictment. The sentence available if the Crown chooses to proceed summarily is a minimum of 14 days to a maximum of 18 months. If the decision is to proceed by indictable election, then the

sentencing ranges from a minimum of 45 days to a maximum of five years. Logically, therefore, if the circumstances of the offence and the offender are at or near the lower end of culpability, such as possession of only images depicting erotic posing with no sexual activity, by an offender with no prior criminal history and who is considered to be a low risk to reoffend, it is likely that a summary election would be made and a minimum sentence of 14 days custody available.

[55] As such, it cannot be said that the minimum sentence of 45 days custody on a Crown decision to proceed by indictable election is reserved for the most minimal or least morally blameworthy offence and offender. Therefore, a minimum of 45 days custody can be applied in circumstances where the offender possesses child pornography that falls into one of the higher category set out in ***Missions*** or where the offender may come before the Court with a criminal record or other negative factors. Notwithstanding the similarities that may exist between the offences and the offenders in the cases I have reviewed, each offender must be sentenced on a consideration of the circumstances of that offender, keeping in mind that similarly situated offenders should be given similar sentences.

[56] Mr. Cafferata's offence is very serious and the circumstances of the offence, while not the most aggravated possible, nonetheless, by the quantity and nature of the collection of child pornography and the time period in which he was in possession of child pornography, push it towards the more serious side of the equation. The circumstances of Mr. Cafferata, however, are generally very positive and, notwithstanding some concerns that arise due to the length of time he has been in possession of child pornography and his minimization of some aspects of his

possession of it, militate in favour of a sentence being on the lower end of the range of sentence available.

[57] It is clear that the impact on Mr. Cafferata of being charged with and convicted of this offence has been considerable and, given the small community of Teslin in which he will continue to reside and in which his offence is notorious, the impact will continue for the foreseeable future.

[58] On a balancing of the aggravating and mitigating factors in this case, after reviewing the cases, after consideration of the return of Mr. Cafferata to the community in which he has long resided and the need for community involvement and input in this process of reintegration, I consider this to be a case where the principles of denunciation and deterrence can be met by imposing a sentence of six months custody. After deducting one and one half months credit for time served to date on remand and on detention while awaiting sentence, the remaining sentence will be four and a half months.

[59] After his release from custody, Mr. Cafferata will be placed on a period of probation for two years. The terms of the probation order will be as follows, drawn largely from the ***V.H.*** case:

1. Keep the peace and be of good behaviour, and appear before the Court when required to do so by the Court;
2. Notify the Court or the probation officer in advance of any change of name or address, and promptly notify the Court or the probation officer of any change of employment or occupation;

3. Remain within the Yukon Territory unless you obtain written permission from your probation officer or the Court;
4. Report to a probation officer within two working days and thereafter when and in the manner directed by the probation officer;
5. Reside as approved by your probation officer and not change that residence without prior written permission of your probation officer;

Drawing from one of the recommendations in the pre-sentence report, there will be a term that you:

6. Meet with the village and executive council of the Village of Teslin and such other community leaders or organizations as you are directed to do by the probation officer;
7. Report to the Family Violence Prevention Unit to be assessed and attend and complete the Sexual Offender Risk Management Program as directed by your probation officer;
8. Take such psychological assessment, counselling and programming as directed by your probation officer;
9. Take such alcohol and/or drug assessment, counselling and programming as directed by your probation officer;
10. Take such other assessment, counselling and programming as directed by your probation officer;
11. Provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this

order;

12. Have no contact, direct or indirect, with persons under the age of 18 years except with the prior written permission of your probation officer or while in the company of persons previously approved in writing by your probation officer;

13. Not possess any computer, computer software or computer peripherals, such as a cell phone or any other devices capable of downloading pictures from the Internet and not acquire or maintain any Internet or e-mail account.

There will be a review of this term of the order within six months from the date of commencement of the order to see whether this term will continue in place or otherwise be amended. That will allow time for some assessment, some initial information to be received as to Mr. Cafferata's circumstances and what involvement the community has, and is to allow for some flexibility on that term if circumstances warrant it.

[60] In addition, I am making the following orders. Pursuant to s. 490.012 you will comply with the *Sex Offender Information Registration Act*. The order will be in Form 52 and require compliance for a period of ten years.

[61] Pursuant to s. 161(1), for a period of ten years:

(a) You are prohibited from 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, school ground, playground or community centre, except with the prior written permission of the probation officer or the Court;

(b) You are prohibited from 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, except with the prior written permission of the probation officer or the Court;

(c) You are prohibited from using a computer system within the meaning of s. 342.1(2) for the purpose of communicating with a person under the age of 16 years.

There will be no exception on that one.

[62] Although I am imposing these conditions, I recognize that the reintegration of Mr. Cafferata into the community of Teslin may require the exercise of discretion that allows for exceptions to be made. In this regard, input from the community leadership would not only be of great assistance but necessary. While Mr. Cafferata is on probation, the probation officer will be in a position to determine whether exceptions should be made. After the probation order expires, the Court can, on application, make such exceptions but will, of course, require input from the interested parties before doing so, including representatives of the community of Teslin.

[63] Pursuant to s. 487.051 there will be a mandatory DNA order.

[64] Pursuant to s. 164.2(1) the laptop computer containing the digital pornographic images, the images themselves and the printed materials seized by the RCMP shall be forfeited to the Crown, subject to arrangements being made to transfer family photographs and other related materials into the possession of Mr. Cafferata. Mr.

Cafferata will be responsible for all reasonable costs associated with this transfer of material.

[65] The victim fine surcharge will be waived.

[66] Is there anything further from either counsel?

[67] MR. MCWHINNIE: Madam Clerk has reminded us this afternoon that as part of Mr. Cafferata's release terms he was required to surrender his passport to the Court, which, we checked today; it's established that it is still a valid passport for some period of time. So it can be, upon the Court's order, returned to the defendant upon the expiry of the appeal period.

[68] THE COURT: You have no concerns in that regard, Mr. McWhinnie?

[69] MR. MCWHINNIE: No, you've provided an order that he's not allowed to leave the jurisdiction, but passports are useful for all sorts of things besides crossing borders.

[70] THE COURT: There will be an order that the passport be returned to Mr. Cafferata after the expiration of any appeal period.

[71] MR. MCWHINNIE: A couple of issues that you may want to turn your mind to, Your Honour. You put some qualification words in the s. 161 order to do with permission of the Court or, in one instance, permission of the probation officer.

[72] THE COURT: That is correct.

[73] MR. MCWHINNIE: I may be missing or overlooking something here, but

as I read the provisions in the *Code,* there isn't a built-in provision, particularly with respect to probation officers and to the extent that once the probation order expires, for the balance of the eight years there won't be an assigned probation office. That may have some odd and unintended consequences, and --

[74] THE COURT: I was looking at sub (3).

[75] MR. MCWHINNIE: Well, that was where I was going to go next, is --

[76] THE COURT: Okay.

[77] MR. MCWHINNIE: -- to the extent that Parliament has provided a review mechanism for any period during that time, is it something that should simply include the phrase, "subject to further order of this Court," so that the accused is essentially on notice that he can come back to court, and once the circumstances are figured out, the appropriate order can be made, as opposed to attempting to pre-make them or delegate the Court's authority to the probation officer. It strikes me that there are some mischiefs there that may be problematic.

[78] THE COURT: Well, certainly looking at the plain wording of s. 161(1) in making that, when I read that, it said "subject to conditions or exemptions that the court directs". Now, I had considered that this would be one of the conditions or exemptions and, yes, there is a delegation of authority in this jurisdiction. As far as I know, I am operating on the assumption that I can make this a condition and an exemption like I do standardly; I am going to say that I have the authority to do that and to delegate, to the extent necessary, the exercise of the discretion to the probation

officer on the terms that I have indicated, and I am doing so on the basis that probation officers in this jurisdiction of the Yukon Territory are, unlike often the case in southern jurisdictions, closer to the communities, close to the offenders and able to obtain suitable and necessary input, and they take the exercise of their discretion very seriously, in my experience. As such, I am prepared to leave the order as it stands, and certainly I had contemplated the expiration of the probation order and the fact that the only way that could be is the court and that would have to be on application to the court.

[79] MR. MCWHINNIE: I share Your Honour's confidence in the local probation services; that was a large aspect of another matter in another court this morning. But it is something that has to be addressed, in terms of if you intend to delegate, you need to say so.

[80] THE COURT: And, well, I am.

[81] MR. MCWHINNIE: You have said so.

[82] THE COURT: Yes.

[83] MR. MCWHINNIE: The other issue is the restoration of the exhibits. I understand Mr. Cafferata is concerned to get certain personal family photos off the computer and to bear the reasonable costs. The question that may arise is setting some sort of reasonable time-frame for that to occur in, if it can be done at all. I should indicate to the Court, I think I passed on to Mr. Cafferata's previous counsel, that some of the more recent technological conferences I've had on the subject suggest that there is great doubt as to whether it's even possible to be absolutely certain that restoring

such items to an individual from a hard drive that has been used for child pornography is even possible, but that is a technological issue that he may have to bear the cost for. But depending, because it's technologically difficult, it seems to me you may want to extend the usual time period. You normally have to deal with these things within 30 days of the expiry of the appeal period. You may want to specify a date at some reasonable period after Mr. Cafferata's period of imprisonment expires so that he can set about finding out what kinds of experts are going to be required and how it's going to be done and if it's going to be done. So you may want to, say, set something seven or eight months down the road, that if it isn't done by that time, the police can simply destroy the exhibits.

[84] THE COURT: Four months? Six months? The police are going to maintain possession of it without destroying it until that time. Is that sufficient?

[85] MR. ROOTHMAN: I would say six months after the --

[86] THE COURT: Release from prison.

[87] MR. ROOTHMAN: -- after he is released. That should give him adequate time. As I have pointed out to the Court in the past, I'm a technological idiot so I can't comment on what's possible and what's not possible. There is -- I mean there is one practical thing that came up in my mind, is who's going to deal with it? And, given the nature of what's on the drives, obviously it's not going to be practical for somebody as an expert representing Mr. Cafferata to access, so it would have to be done by somebody within the police service.

[88] THE COURT: I would think it would have to be within the -- well, I am not sure that -- the reality is, someone can figure out how it can be done, and if it is going to be a difficulty that seems insurmountable and needs the assistance of the Court in future, I am more than happy to assist. It may be something that discussions between Mr. McWhinnie and the RCMP, they can provide you information as exactly what it looks like it will entail. You can provide that to Mr. Cafferata and a decision on how to proceed can take place from there. But I will put a time of within six months from the time that Mr. Cafferata is released from custody.

[89] MR. MCWHINNIE: There are other exhibits that were never in Mr. Cafferata's possession. The expert report, for example, and things of that nature, which presumably would be available for destruction after a reasonable period after the appeal period expires.

[90] THE COURT: Right, that are in the possession of the RCMP --

[91] MR. MCWHINNIE: Yes.

[92] THE COURT: -- that were taken from Mr. Cafferata's house. Are there any of the other items that were seized from your client that he wishes to have back?

[93] MR. MCWHINNIE: I think a number were already returned, Your Honour.

[94] THE COURT: Okay. So all the remaining items are forfeit to the Crown.

[95] MR. MCWHINNIE: Subject to his application for release of personal photographs from the computer.

[96] THE COURT: Well, right, subject to that, of course. But all the remaining items outside of that will be forfeit to the Crown and, again, upon expiration of -- well, I am not sure the appeal period is necessary to deal with in this case.

[97] MR. MCWHINNIE: Well, I think Mr. Cafferata would want us to ensure that we hang on to the exhibits until the appeal period runs. So in the event that he launches an appeal from conviction, for example, we'd keep the exhibits.

[98] THE COURT: Yes, that is true, thank you. I had forgotten the route by which we had gotten here for the moment. Yes, so upon the expiration of the appeal period, and no appeal being filed.

[99] MR. MCWHINNIE: Count 2, if it hasn't already been stayed, should be.

[100] THE CLERK: Thank you.

[101] THE COURT: All right, I believe that concludes everything.

[102] MR. ROOTHMAN: Yes, there is nothing from me.

[103] THE COURT: I wish you the best, Mr. Cafferata.

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COZENS T.C.J.