

Citation: *R. v. Nowazek*, 2009 YKTC 51

Date: 20090507
Docket: 07-00364A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

BRIAN GEORGE NOWAZEK

Appearances:
David McWhinnie
Michael Reynolds

Appearing for Crown
Appearing for Defence

REASONS FOR SENTENCING

[1] RUDDY C.T.C.J. (Oral): Brian George Nowazek has entered guilty pleas to a single count of possession of child pornography contrary to s. 163.1(4) and to a number of firearms offences, including unlicensed possession of firearms contrary to s. 91(1), unlicensed possession of prohibited weapons contrary to s. 91(2), along with three counts of improperly storing firearms, including one prohibited firearm, contrary to s. 86(2).

[2] Mr. Nowazek comes before the Court as a result of a much publicized international investigation conducted by the U.S. Department of Homeland Security into

child pornography internet sites.

[3] Mr. Nowazek came to the attention of Homeland Security as one of over 1,500 applicants to various fee-driven child pornography websites identified by means of an electronic intercept order. Homeland Security forwarded the information obtained to the RCMP National Child Exploitation Coordination Centre in Ottawa who in turn contacted RCMP investigators in Whitehorse who commenced an investigation with respect to Mr. Nowazek. A search warrant was obtained on August 28, 2007 and executed on September 4, 2007.

[4] The search of Mr. Nowazek's residence resulted in the seizure of his computer hard drive and over 120 DVD disks, each containing pornographic material, including child pornography. The hard drive housed approximately 1,000 photo images and video clips constituting child pornography and of the 120 DVD discs seized 40 contained photo images and video clips of child pornography numbered in the thousands. Duplication of images and video clips on both the hard drive and the DVDs was such that a precise number of images and video clips could not be obtained without considerable work and unwarranted exposure of investigators to the offensive material.

[5] The nature of the child pornography is described as involving children ranging in age from babies to teenagers depicted in a wide range of child pornography including erotic posing, displaying the sexual organs or anal regions of children without explicit sexual activity; explicit sexual activity between children; non-penetrative sexual activity between adults and children; and penetrative sexual activity between adults and children. No depictions of sexual sadism or bestiality were noted to be present. There

was no evidence that Mr. Nowazek was involved in child luring or distribution of child pornography.

[6] The remaining counts to which Mr. Nowazek has entered guilty pleas came to light as a result of the police executing the search warrant on Mr. Nowazek's residence. At that time the police discovered Mr. Nowazek to be in possession of six rifles and one shotgun, along with two prohibited semi-automatic weapons, without having the required licences to possess them. One of the rifles was improperly stored with seven rounds in the magazine, though none in the chamber. Another rifle was in a bedroom closet and was not locked or secured in the manner required by the regulations, and one of the prohibited semi-automatic weapons was stored in an unlocked case under a bed and not locked or secured in the manner required by the regulations.

[7] In determining an appropriate sentence I have had the benefit of a pre-sentence report as well as detailed submissions from counsel outlining Mr. Nowazek's background and current circumstances. In assessing the information provided I note that there are several contradictions between information provided and conclusions drawn in the pre-sentence report and information provided by Mr. Nowazek's counsel. These relate mainly to issues of historical employment and previous access to treatment within an institutional setting from which the author of the pre-sentence report drew certain conclusions about Mr. Nowazek being potentially misleading in his dealings with the author.

[8] Absent admissions or the calling of evidence I am of the view that I must give Mr. Nowazek the benefit of the doubt in these areas, though I would also note that I am not

of the view that any of these disputed areas or the combination thereof would materially change the appropriate outcome of the sentencing proceedings.

[9] Mr. Nowazek, through his counsel, conceded that he is at high risk to reoffend and in need of specialized treatment.

[10] Mr. Nowazek comes before the Court with a prior criminal record both in Canada and the U.S. In Canada Mr. Nowazek has dated convictions for causing a disturbance in 1966 and for assault in 1985. Of considerably greater concern, in 1992 Mr. Nowazek was sentenced to a period of ten years in jail in Arizona with respect to one charge of attempting to commit molestation of a child and two charges of solicitation of sexual conduct with a minor.

[11] I also accept from the pre-sentence report that Mr. Nowazek tends to minimize his behaviour with respect to these prior related offences, asserting that he was set up by others, including federal agents.

[12] The pre-sentence report references reports from Arizona indicating that Mr. Nowazek is a diagnosed pedophile. Counsel for Mr. Nowazek suggests that there are conflicting assessments, some of which diagnose Mr. Nowazek as a pedophile and others which conclude that he is not a pedophile. Unfortunately, I have not had the opportunity to view and consider any psychiatric or psychological reports which may have been completed in the past and there have been no assessments completed with respect to the matters before me. Accordingly, the information before me is equivocal on the issue of pedophilia. This does not, however, change the fact that Mr. Nowazek is at high risk to reoffend and presents as a significant risk to the safety of the community,

particularly to children, if left untreated and unsupervised.

[13] Mr. Nowazek is now 60 years of age. There is absolutely nothing in his background that would serve to explain either his criminal history or the current offences. He is one of six children raised in an apparently supportive and loving family in Flin Flon, Manitoba. By and large his siblings are well-educated and successful individuals. Mr. Nowazek himself holds a Bachelor's degree in macro-economics and political science from the University of Winnipeg, and has future plans of pursuing a Master's degree in economics. He is also an accomplished gunsmith and has been gainfully employed in a number of fields including as an economic researcher and as a gunsmith.

[14] While estranged from most of his siblings and his daughter from a previous relationship as a result of his offences, Mr. Nowazek retains the support of his elderly mother and his sister, Eleanor, who has filed a letter of support on his behalf indicating that, despite her abhorrence for the offences committed by her brother, she is willing to provide support, residency and supervision for Mr. Nowazek.

[15] Mr. Nowazek is at a loss to explain his own behaviour but indicates, through his counsel, that accessing pornography, including child pornography, is a compulsion that he cannot control. This compulsion is complicated by an apparent drinking problem.

[16] The pre-sentence report indicates that he consumed on average eight to ten beers per day and stated that most of the pornography was downloaded while drinking. To his credit he did agree with the author of the pre-sentence report that he may have given himself permission to consume alcohol to engage in the use of child pornography.

[17] Mr. Nowazek, while minimizing his past offending behaviour and being seemingly unable to explain and understand his more recent behaviour, does nonetheless appear to recognize that he has a significant problem. I am advised by his counsel that he has made contact with Craig Dempsey with a view to participating in the Sex Offender Treatment Program upon his release.

[18] In terms of disposition, Crown is suggesting a sentence of 24 months on the possession of child pornography and an additional six to 12 months on the firearms offences, for a total sentence of 30 to 36 months, less credit for remand, to be followed by three years of probation on strict conditions.

[19] Counsel for Mr. Nowazek suggested a sentence of time served as appropriate on all of the circumstances, to be followed by a three year probation order. It should be noted that Mr. Nowazek has been in remand since September 5, 2007, for a total of 21 months in pre-trial custody.

[20] In support of their respective positions counsel have filed a number of cases highlighting the sentencing range for offences of possession of child pornography. As is not unusual, none of the cases is directly on point factually, but they do provide some guidance with respect to the general range of sentences for possession of child pornography. 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.

[21] The cases also highlight the seriousness of the offence and its impact on society and, in particular, its devastating impact on the most vulnerable in our society, our

children.

[22] In *R. v. Sharpe*, [2001] S.C.J. 3, the Supreme Court of Canada noted:

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.

[23] Similarly in *R. v. Stroempl*, 1995 CanLII 2283, the Ontario Court of Appeal observed:

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.

[24] There is little doubt, upon review of the case law and, indeed, upon consideration of the very nature of the offence itself, that deterrence and denunciation must be the dominant sentencing principles. In applying these principles to the appropriate range of sentences for cases of this nature, I must recognize both the mitigating and aggravating factors specific to this case.

[25] In mitigation, Mr. Nowazek is entitled to credit for his guilty pleas which have saved the state considerable time and expense, and have avoided the further victimization of those children depicted that would necessarily have been required by the filing and viewing of those images and videos by yet more individuals in the context of a trial.

[26] Additional mitigating factors include the fact that Mr. Nowazek has demonstrated some limited insight into his offending behaviour by recognizing that he has a serious problem and by making preliminary efforts to pursue treatment, that he has the support of his sister, including potential residency and supervision, that he has suffered the loss of friends and the abhorrence of the community and, with respect to the firearms offences, that he will lose all of his firearms and in particular the two prohibited weapons as a result of these offences, resulting in a significant financial loss. I am advised that the two prohibited weapons seized are commemorative Thompson semi-automatic machine guns valued at roughly \$16,500 each which Mr. Nowazek had purchased as part of his retirement plan.

[27] The predominant aggravating factor in this case is Mr. Nowazek's related criminal history, including three convictions for sexual offences involving children. This related history of sexual offending against children significantly elevates the seriousness of his being in possession of child pornography well beyond that of many of the offenders in the cases filed and referred to by counsel. From this disturbing pattern of behaviour one can only conclude that Mr. Nowazek poses a threat to public safety and, in particular, the safety of children.

[28] Additional aggravating factors include the fact that Mr. Nowazek's extensive collection of child pornography, numbered in the thousands, involved children as young as infants and included images in all but the most serious of the levels of child pornography categorized by the English Court of Appeal in *R. v. Oliver*, with only depictions of bestiality and sadism being absent.

[29] Considering all of these factors, I am satisfied that an appropriate sentence would be 24 months on the possession of child pornography with an additional seven months on the firearms offences to be followed by a three year probation order.

[30] As noted, Mr. Nowazek has spent 21 months in pre-trial custody. With the normal credit of one and a half to one, Mr. Nowazek is entitled to 31 and a half months credit for remand such that his custodial sentence will necessarily be one of time served once credit for remand has been applied.

[31] In the course of submissions, counsel for Mr. Nowazek asked that I consider increasing the credit ratio for the time that Mr. Nowazek spent on remand. While it is not necessary for me to address this issue as the appropriate sentence falls below the amount of time served when credited at the normal rate, I nonetheless feel that it is appropriate to address this submission, given the contentious nature of extra credit for time spent in pre-trial custody.

[32] Counsel for Mr. Nowazek suggests that I may want to consider allowing credit for remand at a rate of two to one, citing increased hardship as a result of Mr. Nowazek's age and threats to his safety, which appear to have been related to the nature of his charges.

[33] A custody report from Whitehorse Correctional Centre indicates that Mr. Nowazek had access to many of the activities, programming and events offered to other inmates but threats to his safety resulted in his being moved, the report suggests at his own request, to the more confining NCB cell unit, restricting his contact with other inmates and requiring that all visits take place behind glass.

[34] In considering the issue of credit for remand I note that the purpose of additional credit is intended to compensate for inequities to an accused flowing from their remand status which they would not have experienced as a serving prisoner. The normal credit of one and a half to one, for instance, is intended to compensate for the fact that time in remand is not subject to statutory remission in the manner of a prison sentence such that a prisoner sentenced to time served, having spent six months in pre-trial custody, will have served more time than an individual sentenced to serve six months in jail at the first instance.

[35] To increase credit from one and a half to one to two to one, I would need to be satisfied that Mr. Nowazek was further disadvantaged by virtue of his remand status. The hardships described appear to flow primarily from the nature of Mr. Nowazek's charges and his age. There is nothing before me to suggest that his remand status was a contributing factor or that his circumstances as a serving prisoner would have been in any way different. Thus I am not satisfied that credit beyond the normal credit of one and a half to one would have been warranted in these circumstances in any event. However, I am satisfied that the normal credit of one and a half to one is appropriate.

[36] In applying the normal credit for remand on the offences before me, the formal

sentences should read as follows: On the offence of possession of child pornography, one day deemed served by his attendance in court today and I would ask that his record reflect that he is being credited for 24 months in pre-trial custody.

[37] On the offence of possessing firearms without the requisite licence, one day deemed served by his attendance in court today and his record should reflect credit for 30 days in pre-trial custody.

[38] On the offence of possessing prohibited weapons without the requisite licence, one day deemed served and his record should reflect 60 days in pre-trial custody.

[39] On the offence of unsafe storage relating to the rifle improperly stored in the closet, one day deemed served and his record should reflect 30 days in pre-trial custody.

[40] On the offence of unsafe storage relating to the prohibited firearm improperly stored under the bed, one day deemed served and his record should reflect 30 days in pre-trial custody.

[41] On the offence of unsafe storage relating to the loaded firearm, albeit without actual ammunition in the chamber, one day deemed served and his record should reflect 60 days in pre-trial custody.

[42] The probationary term of three years will attach to all counts and will include the following conditions. Mr. Nowazek, it will include the statutory conditions, and those are conditions I am required to include in each and every probation order. They are:

1. That you keep the peace and be of good behaviour and appear before the

Court when required to do so by the Court;

2. That you notify the probation officer in advance of any change of name or address and promptly notify the probation officer of any change of employment or occupation;

In addition to the statutory terms, I will include the following:

3. That you remain within the Yukon Territory unless you obtain written permission from your probation officer;
4. That you report to a probation officer immediately and thereafter when and in the manner directed by the probation officer;

You will need to attend at Probation Services today.

[43] There was some discussion about the "reside" clause and whether I should specify that it is with your sister. That appears to be the logical placement at this point. However, I would prefer to leave that as something that can be monitored by the probation officer. So the condition will read:

5. That you are to reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer.

[44] There was also some question that you had with respect to curfew. There is quite a restrictive curfew of 7:00 p.m. to 7:00 a.m. that is suggested. Counsel for Mr. Nowazek referred to other cases in which the curfew was 10:00 p.m. I am satisfied there needs to be some strict supervision but I am satisfied that it is appropriate that the curfew condition be staggered. So I am going to have it read as follows:

6. That for the first six months you abide by a curfew by remaining within your place of residence between the hours of 7:00 p.m. and 7:00 a.m. daily except with the prior written permission of your probation officer. For the next six months it will be 8:00 p.m. to 7:00 a.m. For the second year it will be 9:00 p.m. to 7:00 a.m. and for the final year it will be 10:00 p.m. to 7:00 a.m., all except with the prior written permission of your probation officer.

If there are appropriate activities for you to be at, you can get permission to be outside of your curfew but get the permission first.

7. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition.

Given the connection of the use of alcohol in the most serious of the offences before me:

8. You will be required to abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner.
9. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol.
10. You are to take such alcohol and/or drug assessment, counselling or programming as directed by your probation officer.

11. You are to make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts.
12. You are to report to the Family Violence Prevention Unit to be assessed and attend and complete the Sexual Offender Risk Management Treatment program or equivalent sex offender treatment as directed by your probation officer.
13. You are to take such psychological assessment, counselling and programming as directed by your probation officer.
14. You are to take such other assessment, counselling and programming as directed by your probation officer and you are to 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.
15. You are to have no contact, direct or indirect, with persons under the age of 16 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.
16. You are not to possess any computer, computer software or computer peripherals such as a cell phone or any other devices capable of downloading pictures from the internet.
17. You will not acquire, use or maintain any internet or e-mail account.
18. You are to allow access to the probation officer to your home to ensure

your compliance with the conditions of this order.

19. You are prohibited from the possession, purchase or viewing of any pornographic materials.

[45] With respect to the suggested condition 17, which is the attendance at places that may well be normally frequented by children, it is my preference to make a stand-alone order pursuant to s. 161 for a period of ten years. For a period of ten years 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 expected to be present, or a daycare centre, school ground, playground or community centre. You will also be 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. You are prohibited from using a computer system within the meaning of ss. 342.1(2) for the purpose of communicating with a person under the age of 16 years.

[46] In addition to the probation order there are a number of additional orders sought by the Crown which are either mandatory and/or are not opposed by Mr. Nowazek, which I conclude are appropriate on the circumstances of this case.

[47] Accordingly, Mr. Nowazek, you will provide such samples of your blood as are necessary for the purpose of DNA testing and banking.

[48] You will comply with the provisions of the *Sex Offender Information Registration Act* for a period of ten years.

[49] You will be prohibited from having in your possession any firearm, ammunition, prohibited weapon or explosive substance for a period of ten years. And while I believe forfeiture of any of the firearms owned by Mr. Nowazek would follow the prohibition order pursuant to s. 117, to avoid any confusion, I will make an express order that all firearms and prohibited weapons seized in this investigation and enumerated in the Information are hereby forfeit to the Crown.

[50] Pursuant to s. 164.2, any computer hardware, software or any other computer materials, including the DVD disks, are hereby forfeit to the Crown.

[51] Finally, given Mr. Nowazek's current financial circumstances resulting from his lengthy stay in custody, I am prepared to waive the victim fine surcharges in all of the circumstances.

[52] Is there anything we have missed?

[53] MR. MCWHINNIE: Nothing. Your Honour, a couple of housekeeping matters. Madam Clerk will see that as a result of the amendments to the indictment -- the Information, there are some undealt with charges and those should be stayed. They've been rolled up into the other counts.

[54] THE COURT: Thank you.

[55] MR. MCWHINNIE: Secondly, I'm not sure I heard you, I was distracted momentarily. With respect to the forfeiture of the firearms, was it simply forfeited to the Crown?

[56] THE COURT: Yes.

[57] MR. MCWHINNIE: All right. Some courts prefer to say forfeit to the Crown for destruction which is actually not technically correct, and I missed whether you did or didn't say it.

[58] THE COURT: No, I simply said forfeit to the Crown.

[59] MR. MCWHINNIE: Thank you. Some of these items are such that while the normal process is destruction there may be some historical or other value that could warrant a different disposition.

[60] THE COURT: I will leave that to the Crown to deal with --

[61] MR. MCWHINNIE: Thank you, Your Honour.

[62] THE COURT: -- according to the circumstances and the law.

[63] MR. MCWHINNIE: Those are, I think, the matters for now.

[64] THE COURT: Anything further? Thank you.

RUDDY C.T.C.J.