R. v Way, 2016 ONSC 5052 (CanLII)

Date: 2016-08-08
Docket: CR-15-50000129-0000
Citation: R. v Way, 2016 ONSC 5052 (CanLII), <http://canlii.ca/t/gsw01>, retrieved on 2017-11-23

CITATION: R. v. Way, 2016 ONSC 5052
COURT FILE NO.: CR-15-50000129-0000
DATE: 20160808

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	))	
HER MAJESTY THE QUEEN	))	*Jill Cameron and Jennifer Strasberg* for t
	))	he Crown
– and –	))	
	))	
BRIAN WAY	)	*Pharah Bacchus* for Brian Way
	)	

HEARD: December 8, 9 and 17, 2015 an d January 29, April 5, May 30 to June 4 a nd July 18, 2016

THORBURN J.

REASONS FOR SENTENCE

1. OVERVIEW

[1] This case involves three sets of charges: those that pertain to Mr. Way's home collection of child pornography (counts 1 through 7), those that pertain to child pornography films he sold through his business (counts 8 through 14), and possession of proceeds of crime from the business (count 12).

[2] Early in the proceeding, Mr. Way pleaded guilty to possession of the child pornography found at his home and making some of those pornographic images on his home computer available to an undercover police officer on six different occasions.

[3] Mr. Way elected trial by judge alone in respect of the charges relating to the business collection (counts 8 through 15). He was found guilty of those charges which consist of making, possessing for the purpose of publication, advertising for the purpose of distributing, selling,

distributing, exporting, importing, and possessing money made from selling child pornography (proceeds of crime).

[4] After judgment was rendered and at the conclusion of sentencing submissions on January 29, 2016, Mr. Way wrote a handwritten letter to the Court outlining allegations of abuse at the hands of a court officer and several correctional service officers at the Metro West Detention Centre. After consulting with his counsel, he brought an Application to have the charges against him stayed or his sentence reduced on the grounds that his section 7 *Charter* rights to life liberty and security of the person were violated. Mr. Way takes the position that to allow the convictions to stand would bring the administration of justice into disrepute and in the alternative, in view of the abuse by persons in authority, his sentence should be reduced.

[5] The parties agreed that the Crown be permitted to investigate the allegations and adduce further evidence to respond to the allegations and that a hearing be conducted in respect of these allegations of abuse.

[6] Mr. Way does not suggest he made any inculpatory statement as a result of the alleged abuse. The fairness of the trial is therefore not in question.

[7] For the reasons that follow, Mr. Way is to receive a global sentence of 10 years' incarceration which will be reduced by 6 months to reflect the abusive behaviour of those in authority. He is to pay a fine in the amount of $20,000 within three years failing which he will spend an additional 6 months in custody. Mr. Way's sentence will reflect the time already served in custody at the rate of 1.5:1 as agreed by the parties.

2. THE POSITIONS OF THE PARTIES

[8] The parties agree that Mr. Way should receive,

a) one sentence in respect of the offences relating to possession and distribution of his home collection,

b) one sentence in respect of the movies distributed, sold, imported and exported to third parties by companies operated by Mr. Way, and

c) one sentence in respect of proceeds of crime resulting from the sale of the child pornography films which sentence should be concurrent to the sentence in respect of the business of selling child pornography films.

[9] Crown counsel seeks a seven year penitentiary term for possession and making available child pornography in respect of the home collection. The Crown seeks a consecutive sentence of seven years for the various charges relating to the child pornography Mr. Way sold to others. The Crown seeks a third concurrent sentence of three years for proceeds made from selling child pornography. After consideration of the totality principle, the Crown suggests that a global sentence of fourteen years is appropriate.

[10] In addition, the Crown seeks a forfeiture order in the amount of $800,000 which the Crown asserts reflects the total gross sales generated from sale of the 57 films from 2007 to the time of Mr. Way's arrest in 2011. In the event that the amount to be forfeited is not available, a fine can be imposed. Since it is clear that Mr. Way does not have $800,000 to be forfeited, the Crown seeks a fine in that amount and if Mr. Way does not pay it within the time prescribed by the Court, the Crown seeks an additional period of incarceration of 3 years.

[11] Defence counsel suggests that a global sentence of 6 to 8 years' incarceration is appropriate. The sentence for the home collection of child pornography warrants a sentence of five years. The sale of the 57 child pornography films warrants an additional sentence of one to

two years in view of the agreed fact that these films are on the very low end of child pornography as there is no sexual touching or sexual acts portrayed in any of the films. The sentence for proceeds of crime resulting from the sale of child pornography films should be a concurrent sentence of one year. Defence counsel submits there should be no forfeiture order.[1]

[12] The parties agree that Mr. Way should be subject to a weapons prohibition, a DNA order, a sexual offender information registration order (SOIRA), and an order to prevent him from attending places likely to be frequented by children.

3. THE PROCESS TO BE FOLLOWED TO DETERMINE SENTENCE

[13] In order to determine the appropriate sentence, the court must,

i. consider the general principles of sentencing;

ii. review and consider Mr. Way's background and personal circumstances;

iii. consider the circumstances of the three groups of offences Mr. Way committed, compare and contrast them to the circumstances in cases involving similar offences committed by similar offenders, and impose an overall sentence that is just and fair;

iv. decide whether a forfeiture order or fine should be granted and if so, in what amount and how long Mr. Way should be given to pay the amount ordered;

v. determine whether Mr. Way was subject to cruel and unusual punishment by a court officer and or correctional services officers such that his sentence should be stayed or reduced; and

vi. deduct the time Mr. Way has already spent in pre-sentence custody, and determine the remaining sentence.

4. APPLYING THE PROCESS TO DETERMINE THE APPROPRIATE SENTENCE

I. GENERAL PRINCIPLES OF SENTENCING

[14] As set out in section 718 of the *Criminal Code*, the sanctions to be imposed for crimes must meet one or more of the following six objectives:

a) denounce unlawful conduct;

b) deter the offender and others from committing offences;

c) separate offenders from society where necessary;

d) assist in the rehabilitation of offenders;

e) provide reparations for harm done to victims or to the community; and

f) promote a sense of responsibility in offenders, and acknowledge the harm done to victims and to the community.

[15] Society must protect the most vulnerable members of our community by sending a message that children need to be protected from the harmful effects of child sexual abuse and exploitation. (*R. v. Sharpe* 2001 SCC 2 (CanLII), [2001] 1 SCR 45, para 122). With widespread Internet distribution of child pornography, children are more easily and more frequently re-

victimized as the images of their abuse are readily accessible to a much wider number of people than ever before.

[16] Denunciation and deterrence are therefore of primary importance in cases involving child pornography. (*R. v. Sharpe*, (2001), 2001 SCC 2 (CanLII), 150 C.C.C. (3d) 321, (S.C.C.), at para. 158 and *R. v. Stroempl* (1995), 1995 CanLII 2283 (ON CA), 105 C.C.C. (3d) 187 (Ont. C.A.)).

[17] The sentence must also be proportionate to the seriousness of the offence and the degree of responsibility of the offender. The court must be guided by similar sentences that have been imposed on similar offenders who committed similar crimes. It is important to review similar cases so that the process of arriving at a sentence is and is seen to be, fair and just, transparent and consistent with legal authority.

II. THE CIRCUMSTANCES OF THIS OFFENDER

[18] Mr. Way had a tumultuous upbringing. His father was an alcoholic who was violent to his mother and she left him. His father is now deceased. Mr. Way moved 25 times by the time he was 21 years old.

[19] His mother is 67 years old and lived in the United States until recently. She herself was the victim of a violent alcoholic father. Mr. Way was raised by his mother and grandmother. Mr. Way is estranged from his only sibling and was never close with him.

[20] Mr. Way's mother married several times and one of her husbands (the one she was with when Mr. Way was 6 to 12 years old) physically abused her and Mr. Way.

[21] Mr. Way completed Grade 12. At the age of 17 he did a co-op placement at a radio station. At age 18 he obtained a position as an associate producer and master control officer.

[22] He worked for Rogers for ten years and was involved in producing local shows and sports events. At the end he was making about $45,000 a year, worked eighteen hour days and loved his work. He worked at City TV, CBC and CTV as well as other news and media companies. He was successful in his line of work.

[23] In 2005, Mr. Way chose to become self-employed. He sold foreign "coming of age" films (that were legal to sell). He began to direct eBay traffic to his website. Some of the films he sold were nudist movies. They were feature films that were also sold elsewhere.

[24] Mr. Way started his own production company in 2006 which continued until the time of his arrest in 2011. His production company sold over 800 films. They included "coming of age", nudist, adult pornography and the 57 child pornography films that are the subject of this proceeding.

[25] Mr. Way never married. He has had five female sexual partners and two male sexual partners but the latter were "just sex".

[26] There is no evidence that Mr. Way has ever had a sexual encounter with a minor.

[27] Mr. Way says his first female sexual partner cheated on him and he was devastated by what happened as he was "totally in love" with her. Nine or ten years later he met another woman. They both lost interest after a while. Mr. Way has not been in a serious relationship since that time.

[28] Mr. Way has had some difficulty with alcohol. In or about 2009, he began to consume up to ten drinks of alcohol per day. His heaviest use was the night before his arrest. He also had

difficulty falling asleep and has experienced panic attacks.

[29] He was exposed to erotica at the age of nine when he found a magazine at a construction site. He began to look at what he called, "hard core erotica" at the age of fourteen. More recently Mr. Way preferred child pornography and viewing males 18 to 25 years of age.

[30] Mr. Way was examined by Dr. Klassen, a forensic psychiatrist. Dr. Klassen interviewed Mr. Way and others, he viewed a sample of the home collection and the child pornography films sold, read my Reasons for Judgment, the testimony of police witnesses and considered other documents listed in his report.

[31] Dr. Klassen stated that, "Mr. Way's phallometric testing suggested his principal interest is in pubescent (approximately 12-14 year old) males". He concluded that Mr. Way has "a sexual preference for pubescent or prepubescent children. The test stimuli regarding individuals are approximately 12 to 14 years old."

[32] He went on to say that, "these individuals are typically at low risk of recidivism. I cannot make a positive finding that Mr. Way's risk of recidivism should be understood differently."

III. DETERMINING AN APPROPRIATE SENTENCE FOR THESE OFFENCES

A. The Home Collection

[33] Mr. Way pleaded guilty at an early stage of the proceeding to possession of child pornography at his home and making some of those pornographic images on his home computer available to others. There is a maximum penalty of five years for possession of child pornography. There is a maximum penalty of ten years and a mandatory minimum sentence of one year for making child pornography available.

[34] Mr. Way's home collection includes approximately 250,000 images of which 187,001 are unique images, and approximately 10,000 videos, of which 8,747 are unique images.

[35] Many of the images in the home collection are graphic, disturbing and sometimes violent depictions of children ranging in age from toddlers to adolescents. They are involved in sex acts. Mr. Way does not dispute that he was in possession of this material found on his home computer. Some images were found on a shared drive and he allowed an undercover officer to share images on six different occasions. (Hence the seven counts on the indictment).

[36] The mitigating factors regarding the home collection are that:

a) Mr. Way has no previous criminal record;
b) he pleaded guilty to the home collection at an early stage of the proceeding;
c) he was always employed prior to starting this business in 2006;
d) he agrees that he needs counselling and has asked to get counselling; and
e) he demonstrated genuine remorse regarding the home material;

> i. During the trial in this proceeding (Transcript March 11, 2015 pgs. 38 and 39) Mr. Way said, "My sexual desire for prepubescent boys is my shame…being in custody has made me realize that I am ready to deal with that and get the counselling I need."
>
> ii. During the trial in this proceeding (Transcript March 12 p. 103-104), he said, "I didn't lift a finger to help any of the children in the home collection… I did not know the children. … I do not know why I had so much. I need counselling to figure this stuff out."

He repeated his shame and need for counselling in a letter he wrote and read into the record at his sentencing hearing.

[37] The aggravating factors in respect of the home collection include,

a) the vast quantity of material seized;
b) the very disturbing nature of the material (as described later in these reasons); and
c) the length of time Mr. Way had been collecting this material and thus, the time he had to consider what he was doing.

[38] It is clear that denunciation and deterrence are of primary importance though the possibility of rehabilitation must not be ignored.

[39] The parties provided me with a vast array of cases.

[40] I have spent more time analyzing the cases of *R. v. Allen*, [2012] B.C.J., 99 W.C.B. (2d) 628 and *R. v. Adams* (2012) O.C.J. (unreported) because both counsel submit they are closest to the facts in this case.

[41] The Crown asserted that the low water mark for possession and making child pornography available to others is one year. In fact, as pointed out by Nordheimer J. in the *Donnelly* case, "There are recent decisions where sentences for possession and making available have been six months (*R. v. Dumoulin*, [2013] O.J. No. 3477 (O.C.J.); eight months (*R. v. Hughes*, [2014] O.J. No. 2263 (O.C.J.)); and twelve months (*R. v. Wright*, 2012 ONCJ 577 (CanLII), [2012] O.J. No. 4328 (O.C.J.)."

[42] It is agreed that the high water mark is approximately five years. In *R. v. Stupnikoff*, [2013] S.J. No. 175 (Prov. Ct.), the accused received a sentence of five years for possession and making child pornography available. In that case, Mr. Stupnikoff not only had a large personal collection of child pornography that he shared with others, he had a prior conviction for possession of child pornography and had no understanding of the harm caused to the children that arose from his conduct.

[43] In *R. v. Pattison*, 2012 SKQB 330 (CanLII), [2012] S.J. No. 546 (Q.B.) the offender received a sentence of five years and seven months. Mr. Pattison pleaded guilty to fifty counts of making available or producing child pornography, two counts of possession and one count of accessing. The child pornography involved very young children being sexually assaulted by adult males. Some of the children were tied up. Mr. Pattison had shared a large number of pieces of child pornography with others. There was evidence that Mr. Pattison was himself very interested in engaging in sex with young children.

[44] In *R. v. Allen* [2012] B.C.J., 99 W.C.B. (2d) 628, the offender was sentenced to 18 months for the sexual assault on a minor, and two years consecutive for possession for the purpose of distribution of child pornography.

[45] Mr. Allen was a 53 year old man with no criminal record. He was intelligent and had been a police officer and then obtained a law degree. At the time of his arrest he was on a disability pension as he had significant health issues.

[46] Mr. Allen admitted he was sexually attracted to young boys. He maintained his six-year addiction to crystal methamphetamine, which he says replaced his addiction to morphine for his myriad medical problems, led to the offences before the court. Mr. Allen claimed he was free from crystal meth for over three months at the time of sentencing. He had the benefit of extensive counselling to address his substance abuse issues and had completed a Detox program.

[47] Mr. Allen entered guilty pleas to possession for the purpose of distribution or sale of child pornography from December 1, 2009 to May 5, 2010 (although the accused admitted he had been collecting child pornography for six years) and sexual assault of a 14 year old boy.

[48] Mr. Allen had an online user name, "Fetchdick". Mr. Allen shared his extensive collection of child pornography on a peer-to-peer website. Mr. Allen communicated online with an undercover officer. He told the officer he had "lots to share". He provided the undercover officer with 6,700 child pornography images. Many of the images portrayed very young children, including infants, involved in sexual acts with adult males. Some were described as “sexually-explicit torture of infants and young children.”

[49] Police found over 840,000 images on Mr. Allen's computer. Forensic analysis was not complete at the time of sentencing but, of over 200,000 images viewed by police, (representing only 20% of the images on the computer), about 27,000 were of young children under the age of five, and met the definition of child pornography. Some of these may be duplicate images. Police categorized 70-75% of the images and videos as at the extreme end of child pornography. At least one of the videos was described as, “the worst the experienced detective has ever seen”.

[50] “The images and videos depict infants and young children, male and female, some bound with duct tape or wire, some with crude, sexually-explicit words written on their tiny bodies, being orally, vaginally and anally penetrated by adult male penises, and in one video a male defecates and urinates on a bound, crying baby and then anally penetrates the baby.”

[51] Mr. Allen admitted he collected pornography for six years, but was only charged with possession for a five-month period. He blamed the disinhibiting effects of crystal methamphetamine for influencing his interest in child pornography. Mr. Allen had a sophisticated system of collecting, storing and trading images and gave advice to others about how to do so and how to delete files.

[52] Mr. Allen and his friend, both of whom were HIV positive, picked up a 14 year old boy. A naked Mr. Allen greeted him and the boy was given amyl nitrate or "poppers". The boy performed fellatio on Mr. Allen while his friend anally penetrated him. Mr. Allen put his penis in the boy’s mouth without a condom. Later, Mr. Allen bragged on a chat line that he and his buddy, "tag-teamed a sexy 14-year-old total virgin; popped his cherry; blew their HIV-tainted loads into his sweet, fresh boyhole".

[53] Mr. Allen's computer also contained child pornography in the form of written material, including: chats on peer-to-peer sites; a sexually-explicit advertisement for young children on 25 ways to have fun in the summer; and a pedophile's handbook.

[54] In chats Mr. Allen described himself as "pozzing"; that is, someone with HIV who, through unprotected sex, was actively trying for the past 20 years to infect as many unsuspecting men as possible, particularly bisexual men who would then spread HIV to female victims. He described an obsession for sexual activity with very young children, particularly boys five to seven years old as an ideal partner, and suggested he would like a boy sex slave who he would rape and torture for days. He talked of making his own “kiddie porn” because he never seemed to find "stuff brutal enough". He chatted about contact with a young British boy who he had encouraged to perform sexual acts in front of a webcam for Mr. Allen's enjoyment.

[55] Mr. Allen’s risk level to reoffend was classified at moderate and would be higher if he were to abuse substances again.

[56] On appeal (2012 BCCA 377 (CanLII), 293 C.C.C. (3d) 455), Allen’s sentence was increased to a total sentence of six years’ imprisonment: three years for possession of the child pornography for the purpose of distribution and three years consecutive for the sexual assault. The court noted that the offending conduct was “at the extreme end” and cited the

communications in which Allen reveled in the details of the horror he perpetrated against child victims and encouraged others to do so.

[57] The Court of Appeal mistakenly found that, "Forensic analysis turned up 880,000 sexually explicit images and videos of children, online chat conversation histories and written child pornography". It is not clear to what extent this error affected its determination as to the increase in the sentence.

[58] In *R. v. Adams* (2012) O.C.J. (unreported), a 48 year old first time offender who pleaded guilty to possession of child pornography, making child pornography available and accessing child pornography received a sentence of 53 months (or four years and five months). There were 192,327 images of children found on his computer, of which 73,213 were found to be child pornography, 52,267 child nudity and 54,099 were "child other". In addition he possessed 677 videos containing child pornography.

[59] The court held that, "the sheer volume and variety of images, the means by which they were collected and the timeframe over which they were amassed combined to support the inference that he had a persistent need to accumulate this heinous material."

[60] The material was made available to others.

[61] Mr. Adams was diagnosed as a pedophile. He did not make the child pornography nor did he act out and molest a child.

[62] In *R. v. Treleaven* (2006) 2006 ABPC 99 (CanLII), 75 W.C.B. (2d) 313 (Alberta Provincial Court), the administrator of a child pornography chat room was found guilty of distributing child pornography. The files comprised about 20 gigabytes of material and portrayed children, some as young as toddlers, being molested.

[63] The 49 year old offender had a dated criminal record for gross indecency and indecent assault on a female child and pleaded guilty to this offence. He received a sentence of 3 1/2 years.

[64] In *R. v. L.B*. [2010] 90 W.C.B. (2d) 334 (O.C.J.), a 45 year old first offender who pleaded guilty to one count of possession of child pornography, one count of distributing pornography and one count of making child pornography was sentenced to five years' imprisonment. The collection included 35,000 unique child pornography images, 110,000 images of nude children, and 485 videos of child pornography. He shared those images with others in an online chat room. He made images of two young girls he was entrusted to care for. He placed a penis very close to the mouth of one of the sleeping children.

[65] In *R. v. Theobald* [2013] O.J. No. 6149 (O.C.J.), a 33 year old first offender who pleaded guilty to possession and making child pornography available, received a 3 ½ year sentence. The court held that the collection was, "a massive morass of misery with tens of thousands of images and hours of exploitation horror. … It is difficult to imagine a more monstrous collection. The acts that were perpetrated upon the children were denigrating and painful, and engaged a complete sick range of paraphilia and fixation. The written material…is inflammatory in nature, and if not openly insightful to abuse of children, certainly makes the abuse of children something to be desired."

[66] The collection was highly organized and files were stored for ten years on multiple hard drives, CDs and DVDs.

[67] After considering these cases, especially the *Allen* and *Adams* decisions which are closest to the circumstances of this case, and having considered the circumstances of this offender and these offences, I find that the appropriate sentence is 5 years for the collection of child

pornography found at Mr. Way's home and making some of those pornographic images available to an undercover police officer. I have arrived at this conclusion bearing in mind the vast and disturbing collection in Mr. Way's home and other aggravating factors, but bearing in mind the mitigating factors including the fact that he has no prior criminal record, expressed remorse and pleaded guilty at an early stage.

[68] Mr. Way's home collection includes 187,001 unique images and 8,747 unique videos. Those images could be of interest only to persons who are deeply disturbed. Moreover, the collection was collected over many years, giving Mr. Way ample time to reflect on the deeply disturbing collection that he was amassing.

[69] Unlike the situation in the *Allen* and *L.B*. cases, there is no evidence that Mr. Way molested children.

[70] Mr. Way has expressed his shame and remorse. He indicated his interest in obtaining counselling.

[71] I am cognizant of the particular importance of denunciation and deterrence in cases where those who are most vulnerable fall prey to those with deviant predilections.

[72] As noted above, the Crown suggests the *Allen* and *Adams* are closest on their facts to this one. The facts in *Adams* are similar but the facts in *Allen* are much more disturbing than the facts in the case before me. In *Allen* (a) the offender did not accept responsibility but rather blamed his predicament on drugs he was taking at the time, (b) he not only collected a vast and disturbing collection of child pornography, he molested a young boy while infected with HIV (c) he went on internet chats bragging about the assault to others, (d) he counselled others on how to assault young boys, and (e) he was found to be at moderate to high risk to reoffend. Allen received a 6 year sentence for his offences.

[73] I hope and believe this sentence of 5 years will serve to deter and strongly denounce Mr. Way's conduct and those who might otherwise collect images that are so deeply disturbing and hurtful to vulnerable children and instead, recognize this as the perversion that it is and seek help.

B. The Business

[74] Several companies operated by Mr. Way, made and sold the films under the names Azov films, 4p5p.com, Tiny Sumo Entertainment Inc., BaikalFilms.com, BoyJoy and MovieBizz.com.

[75] The businesses sold over 800 films and photo images relating to some of those films. The films sold by the businesses include commercially available films, "coming of age" films, adult pornography films, and approximately 300 films that Mr. Way characterized as nudist films.

[76] Fifty seven films and related photographs were found by me to be child pornography. Mr. Way conceded at trial that he was legally responsible for the content of those films.

[77] The films involved boys who looked to be between 10 to 18 years of age. They were often nude while carrying on various activities. There were no sex acts depicted in any of the films.

[78] The boys often perform an activity or go on an outing. They disrobe and do an activity or activities while all of them are nude. Sometimes these are outdoor activities like swimming, running through the woods, chopping wood or exploring on the beach. At other times the activities are indoors in saunas, showers, swimming pools or blow up pools or in a small sparsely furnished apartment used for many activities such as getting dressed in costumes, eating, play fighting and sitting on a couch. A significant portion of each film includes the boys naked.

Sometimes there is an interview with the boys at the end of the movie. In some cases, members have access to accompanying pictures.

[79] The child pornography films include scenes where the boys pull off one another's underwear, fight with one another, and put creams on one another. There are close up photo shots of the naked boys and the camera is often placed below the boys' waistlines and at other odd angles to best depict the images of genitals. The focus is sometimes prolonged for several seconds. The films are not sophisticated or well made, and have little or no artistic merit.

[80] Mr. Way paid three producers, Andrei Ivanov, Igor Rusanov and Markus Roth, to create original footage. The films were shot in the Ukraine, Romania and elsewhere. Several boys appeared repeatedly in different films. At the time the producers were providing footage, Mr. Way knew that one of the producers was a convicted pedophile and that he was spending prolonged periods alone with one of the boys.

[81] Mr. Way knew this boy was used by Roth to induce others to participate in the films.

[82] Mr. Way hired an editor to edit the raw footage, add title pages, a trailer, a brief synopsis of nudism, copyright notices and sometimes music and subtitles. The films were then offered for sale on the website. Photographic images were sometimes sold separately or offered to members. Trailers were placed on the company website to entice potential customers into purchasing these films. Each film was categorized.

[83] Mr. Way engaged legal counsel to advise him and put notices on his website to say that all of his films were legal.

[84] Purchasers could order a film online to be shipped or downloaded from the company's website, or both. Further, there was a special section on the website that could be accessed by purchasers who registered as "members". This special section contained pictures and biographical information on the boys who were featured in the films.

[85] The 57 child pornography films were sold from 2007 until Mr. Way's arrest in 2011. As time went on, Mr. Way sought more and more nudity from the film producers as he noted they sold well. He blocked some law enforcement sites. Until the time of his arrest in May of 2011, these films were for sale in ninety-two different countries. Sales increased over time and gross sales for the 52 month period were $946, 391.25.

[86] A couple of the boys that appeared in the films went on to star in adult pornography films sold by these companies.

[87] In 2006, Mr. Way was ordered to attend a police station. He was told that one of the films police had seized crossed the line and that the others were close to the line (of being illegal). All of the films except one were returned to him and he continued to sell them. Those films are not the subject of these convictions.

[88] I will now review some of the sentences imposed on offenders for similar offences. I note however that there is no case that really resembles this one: first, because of the nature of the nude images and second, because of the volume of sales.

[89] In R. v. *Bauer* [2002] O.J. No. 1135, an accused was sentenced to four years for production, possession and distribution of child pornography including a conviction for sexual assault and possession of proceeds of crime. Mr. Bauer was involved with a number of underage girls, photographing them and displaying their photographs on the internet. He had sexual relations with some of them. Mr. Bauer was a 23 year old male who created a pornographic website business featuring girls aged 14 to 18 that was promoted as featuring private schoolgirls. He operated a number of websites and promoted them with taglines like, "Attention pedophiles

… the only link you'll ever need for your twisted sexual preference." Not only did he photograph the girls, he provided them with drugs and alcohol and with some regularity engaged in sexual activity including intercourse. Victims asked him several times to remove their images and he refused.

[90] In *R. v. Donnelly* 2014 ONSC 6472 (CanLII), [2014] 322 C.R.R. (2d) 56 (S.C.J.), Mr. Donnelly was the film editor for Mr. Way. He worked for Azov films for 18 months before his arrest. He was sentenced to 21 months' imprisonment to be served conditionally in the community. He was a 30 year old man with no criminal record. Mr. Donnelly played a much more minor role in Azov films.

[91] In *R. v. Karlenzig* 2013 SKPC 48 (CanLII), [2013] 415 Sask. R. 262 (S.P.C.), a 57 year old customer of Mr. Way's companies who purchased 875 pieces of child pornography and spent $2700 on the material was sentenced to 12 months' imprisonment followed by three years' probation. He was also subject to a forfeiture order. He pleaded guilty to the offence and expressed remorse. On the other hand he had been collecting for years.

[92] In *R .v. RLM* [2013] O.J. No. 2001, a customer who purchased more than 100,000 photographs and 1900 movies who breached his recognizance once was sentenced to 15 months' imprisonment followed by three years' probation. He was found to have spent hundreds of dollars on the films. He was also subject to a forfeiture order.

[93] I will now consider the effect of this business on the boys who played roles in the films.

Impact upon the Victims

[94] Forty four boys were in the cast biographies and thirty three played recurring roles. The Crown advised that none of the boys wished to speak with them to provide victim impact statements. An article attesting to the impact on the boys and their parents appeared in the Toronto Star. The reporter did not wish to testify and neither party sought to require him to testify.

[95] After some discussion, it was agreed that the court could take into account that some boys felt disgraced when they realized the films were sold around the world, some suffered anxiety and agitation, lack of drive and some felt their lives had changed forever.

[96] It is clear that this business resulted in psychological harm to young boys entering or in their adolescent years.

Conclusion as to Sentence for the Business

[97] The aggravating factors in this case are:

a) the number of child pornography films Mr. Way made (57),

b) the time during which Mr. Way was engaged in producing these films for sale to the public (4 years),

c) the wide dissemination of the material which was offered for sale in 92 countries and the number of sales,

d) the large number of boys involved (44) and the harm inflicted on them,

e) the fact that Mr. Way knew one of the film producers was a pedophile who was recruiting young boys for the films, and

f) at least one of the boys was groomed to appear in adult pornography movies when he reached the age of eighteen.

[98] The mitigating factors include:

a) the Crown concession that the portrayal of the boys in the films and accompanying photographs is at the low end of the spectrum for child pornography as there are no sexual acts performed,

b) Mr. Way's unfortunate tumultuous upbringing;

c) the fact that Mr. Way has no prior criminal record;

d) Dr. Klassen's conclusions that, "these individuals [including Mr. Way] are typically at low risk of recidivism. I cannot make a positive finding that Mr. Way's risk of recidivism should be understood differently"; and

e) Mr. Way's expression of remorse at trial and on sentencing.

[99] Having considered the above circumstances of this offender, the circumstances of these offences including the aggravating and mitigating circumstances and the effect on these many young victims, the cases referred to me by the Crown (none having been submitted by Defence counsel on this issue), the importance of denunciation and deterrence and the possibility of rehabilitation, I find that the appropriate sentence for theses offences is 6 years. This sentence is consecutive to the 5 year sentence for possessing and making child pornography available.

IV. PROCEEDS OF CRIME AND FORFEITURE OF PROCEEDS OF CRIME

Defining Proceeds of Crime

[100] In section 462.3 of the *Criminal Code*, "proceeds of crime" is defined as:

> any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of
>
> (a) the commission in Canada of a designated offence, or
>
> (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

The Objectives of Legislation Regarding Proceeds of Crime and Forfeiture of Proceeds

[101] Part XII.2 of the *Criminal Code* contains the proceeds of crime provisions and forfeiture and or fines. It was enacted in 1989 in response to Canada's acceptance of the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,* Can. T.S. 1990, No. 42.

[102] The Honourable Ray Hnatyshyn (Minister of Justice when the bill was introduced), said that traffickers had been insufficiently deterred by traditional sentencing methods. Canada therefore had to adopt methods by which it could deprive offenders of the profits of their crimes and take away any motivation to pursue their criminal activities. The primary method is forfeiture. (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-61*, Issue No. 1, November 5, 1987, at p. 1:8).

[103] The Supreme Court of Canada in *Laroche* noted that the articulated purpose of Part XII.2 was to "neutralize criminal organizations by taking the proceeds of their illegal activities away from them." This would ensure that criminals could not finish their sentence and thereafter,

profit from their criminal activities. (*Quebec (AG) v. Laroche*, 2002 SCC 72 (CanLII), [2002] SCJ No 74.)

[104] It was intended to recognize "that some crime is big business, and that massive profits, both direct and indirect, can be made from criminal activity." [Emphasis added] (*Wilson v. Canada* (1993), 1993 CanLII 8665 (ON CA), 15 O.R. (3d) 645 (Ont. C.A.) at 649; *R. v. Lavigne*, 2006 SCC 10 (CanLII), [2006] 1 S.C.R. 392 at para. 10.)

[105] The forfeiture inquiry goes beyond the sentencing process for individual offenders and provides a legal mechanism to ensure that not only is the criminal act punished by imposing a criminal sentence but that the offender is not able to enjoy the fruits of his crime once he has been released. *(R. v. Craig*, 2009 SCC 23 (CanLII), [2009] 1 S.C.R. 762, at para. 40 and *R v. Lavigne*, 2006 SCC 10 (CanLII), [2006] 1 S.C.R. 392, at paras. 9 and 10.)

Sentence for Possession of Proceeds of Crime

[106] Mr. Way received a benefit from the sale of the 57 child pornography film titles and accompanying photographs.

[107] I agree with the Crown therefore, that Mr. Way should receive a sentence of 3 years for the offence of being in possession of proceeds of crime.

[108] As agreed by the parties, this sentence is concurrent to the 6 year sentence for the offences relating to the business. This sentence is consecutive to the 5 year sentence for the home collection and the six year sentence for the business collection.

Defining Forfeiture

[109] Forfeiture is defined in the Oxford dictionary as, “the loss or giving up of something as a penalty for wrongdoing”.

[110] In addition to a custodial sentence for the crime of possession of the proceeds of crime under s. 354 of the *Code,* Section 462.37 (1) of the *Criminal Code* provides that,

> **…** where an offender is convicted, … of a designated offence and the court imposing sentence on the offender… is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited.
>
> …
>
> (3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property.

[111] As such, pursuant to section 462.37 of the *Criminal Code*, property determined by the court to be proceeds of crime is subject to forfeiture or, if that is no longer possible, the payment of a fine instead.

The Issues to be addressed on a Request for Forfeiture

[112] The issues to be addressed on this forfeiture application are:

i. What are the proceeds of Mr. Way's crime?

ii. What sums have already been recovered?

iii. If the proceeds of crime are no longer available, should a fine be imposed and if so, for how much? How much time should be allowed to pay the fine?

iv. If the fine is not paid within the prescribed time, what term of imprisonment is to be imposed?

Analysis of the Issues

[113] In my Reasons for Judgment at paragraphs 85 to 87, I determined that Mr. Way's possession and sale of child pornography are designated offences. He sold child pornography through Azov films, he was "paid from money earned as a result of selling films" both legal and illegal and was "thereby in receipt of proceeds of crime".

The First Issue: What are the proceeds of Mr. Way's crime?

[114] Proceeds of crime is defined as the property, benefit or advantage obtained directly or indirectly as a result of the commission in Canada of a designated offence.

[115] The Crown must satisfy the court on a balance of probabilities that the property, benefit or advantage sought to be forfeited "is proceeds of crime and that the designated offence was committed in relation to that property". Forfeiture may apply to the original property or property acquired in exchange for or by conversion of the original property. (*R. v. Dwyer* at (*supra*) para 21 and *R v. Lavigne* para 13.)

[116] Valuation of the proceeds of crime to be forfeited is an exercise of the sentencing judge's discretion on the basis of the available evidence.

[117] It is not sufficient for the Crown to point to the amount of the fraud, the fact that the offender directed the offence, and show the amount recovered, to conclude that the offender necessarily possessed, controlled or benefitted from the fruits of that fraud. There must be evidence that the offender is or was in possession of, exercised control over, or benefitted from the amounts that are the subject of the forfeiture order. (*R. v. Dwyer*, 2013 ONCA 34 (CanLII) and *R. v. Piccinini*, 2015 ONCA 446 (CanLII) at paras 10 and 14.)

[118] In *Dwyer* the appellant approached her sister to help her refinance the family home. She convinced her sister to let her use her name on the mortgage application. Over the next few weeks, the appellant presented various false documents, some of which were the subject of the using-forged-documents charges, to a representative of the Royal Bank of Canada to obtain the mortgage. The bank gave a mortgage for $663,750. These funds were paid into the trust account of the appellant's lawyer. When the bank learned of the fraud it was able to recover over $400,000 from various sources. The trial judge found that the appellant's sister was an innocent dupe.

[119] At paragraphs 23 and 24, Rosenberg J.A. for the Court held that,

> I accept that the Crown proved that the designated offence of fraud was committed [by the offender] in relation to the entire $633,750. The difficulty is that the Crown failed to prove that the entire amount was originally in the possession or under the control of the appellant.
>
> In my view, an order for a fine in lieu of forfeiture can be made under s. 462.37(3) only where the offender has possession or control of the property in question or at

> least had possession of the property at some point. This conclusion flows from the use of the phrase "any property of an offender" in s. 462.37(3) and the definition of "property" in s. 2. Such an interpretation is consistent with the objectives of s. 462.37, which are to deprive offenders of the proceeds of crime and ensure that they do not benefit from those proceeds: see *R. v. Appleby*, 2009 NLCA, 242 C.C.C. (3d) 229, at paras. 26, 32-33. Those objectives would not be furthered by making orders in relation to property that was never in the possession of the offender, over which the offender never had control and from which the offender did not benefit: see also *R. v. Mackenzie*, [2002] O.J. No. 2512 (C.J.). (Emphasis added)
>
> In her reasons, the trial judge stated: "I believe that the defendant still has much of that money"; and "She has blatantly avoided the issue of where the $207,700 is now and I conclude, as a result of that, that they are in her possession." The trial judge did not, however, identify any of the evidence upon which those findings were based and, in my view, that finding is not supported by the evidence. In argument before this court, Crown counsel could point to only one item in the record that showed the appellant had control of the missing funds. … [T]his document and the other supporting documents, such as cheques, only account for $436,756.38. There is no explanation for the remaining funds and thus no evidence that the appellant ever had control of the missing funds. Crown counsel at trial conceded in her submissions that it was difficult to trace the funds. … At its highest the evidence shows that the appellant had control of $10,700 more than the Bank recovered. I would therefore allow the Crown appeal only to the extent of ordering that the appellant pay a fine of $10,700. (Emphasis added)

[120] In *R. v. Piccinini*, 2015 ONCA 446 (CanLII), the Court reviewed a request for a forfeiture order where the appellant was the "main boss" of an organization that involved a telephone scam that targeted elderly individuals in the United States. The appellant orchestrated the fraud, provided the list of prospective victims, paid a weekly commission to the co-accused who made the phone calls, and directed where the funds were to be transferred. The total amount of the fraud was never determined but for the purposes of the guilty plea was established as $900,000. Approximately $45,000 was seized from the appellant at the time of the arrest. The Court upheld a $500,000 forfeiture order because the appellant,

> … was admittedly in control of the criminal organization that perpetrated the fraud in question, the evidence supported that he exercised control over the funds provided by the victims, which were the proceeds of the fraud. … The appellant clearly controlled the funds from when they left each victim until they were received.
>
> In addition to the appellant's control over the proceeds of the fraud, the appellant's lifestyle, finances and expenses supported the finding that he had control over the funds. He had no other source of income; he funded the operating expenses of the criminal organization; he paid employees a small percentage of the gross proceeds; and he provided no explanation of what happened to the funds.
>
> We therefore agree with the Crown that the evidence supported the sentencing judge's finding that the appellant controlled the full amount that the offences grossed. (Emphasis added)

[121] The court in *R. v. Siddiqi*, 2015 ONCA 374 (CanLII) held that:

> The evidence … showed that the loan proceeds flowed into the bank accounts of two companies controlled by Mr. Siddiqi.

> The loan proceeds were proceeds of crime. Mr. Siddiqi had possession and control of loan proceeds in excess of the amount which he was fined. He put most of those funds beyond reach by transferring them out of the country to a third party. That third party was not a co-conspirator before the court. The trial judge did not need to find that Mr. Siddiqi personally benefitted from the funds he transferred to the third party, on a dollar-for-dollar basis, to impose a fine in lieu of forfeiture that included the amount of the transferred funds.

[122] Because Mr. Siddiqi took the money and transferred it beyond the reach of the court by sending it out of the country to someone else, the court imposed a fine in excess of the amount Mr. Siddiqi had in his actual possession.

[123] Similarly, in *R. v. Lavigne* (*supra*) the Supreme Court imposed a fine of $150,000 on an offender who had, "received the proceeds of his crime and had squandered part of them…. He [the trial judge] determined the value of the proceeds of crime to be $150,000."

[124] In this case, the Crown had the financial records for Azov films.

[125] The Crown introduced evidence from Officer Ross to support its claim for forfeiture.

[126] Officer Ross used a software program belonging to Azov films, to calculate the total sale revenue for the 57 films determined to be child pornography from 2007 to 2011 (when Mr. Way was arrested on these charges). Officer Ross testified that 33,947 films were ordered over four and one third years for a total of $946,391.25 in sales.

[127] No such data was prepared for the business as a whole. It is therefore not clear whether Mr. Way sold more of the 57 films than the other legal films sold through Azov films.

[128] Officer Ross testified that he did not know whether the Azov films' administrator used the software field appropriately, whether account and or membership discounts taken at check-out were applied at the time of sale. He suggested that the amount should be reduced to $800,000 to take these factors into account.

[129] For the reasons that follow, I agree that Mr. Way obtained a financial benefit or advantage as a result of his criminal conduct and was thereby in receipt of proceeds of crime.

[130] However, I do not agree that the amount of the forfeiture order should be $800,000 because this does not reflect the benefit or advantage Mr. Way received from his crime. Nor does it represent the amount he took under his actual control.

[131] Mr. Way incorporated Azov films. Azov sold over 800 film titles of which 57 were illegal films.

[132] Unlike the *Piccinini* case, all relevant documentation about Mr. Way's business enterprise was made available. The yearly tax returns reporting the revenues and expenses of Azov films were produced and there is no suggestion that these are not accurate.

[133] The Crown does not dispute Mr. Way's assertion that revenue from the sale of all films, both legal and illegal, came into and was put back into Azov films and used to pay its employees, independent contractors, rental premises and taxes.

[134] The only benefit of any kind Mr. Way received from Azov films was his salary of approximately $65,000 per year for the years 2007 through May 1, 2011 (as he was arrested on May 1st.)

[135] Unlike the offenders in the *Lavigne* and *Siddiqi* cases, Mr. Way lived a modest life: he rented a condominium, leased a vehicle and had no significant assets. There is no evidence that

monies belonging to Azov films or Mr. Way were spent (beyond the salary he was paid), hidden or transferred to third parties. There is also no evidence that he travelled, or owned any property anywhere or transferred money to third parties to put it beyond the reach of the courts.

[136] As the court noted in *Dwyer*, the fact he was the person most directly involved in the criminal acts is not determinative. In the *Dwyer* case, the offender obtained a mortgage for $663,000, the funds were put into her lawyer's account and she "blatantly avoided the issue of where $207,700 is now". As in the *Dwyer* case, the Crown was unable to prove on a balance of probabilities that he was in actual possession and control such that he benefitted from the funds, although unlike Dwyer, the Crown had the benefit of full disclosure.

[137] Mr. Way's cumulative gross salary for the four year and four month period was $287,666. 57 of the 800 films (i.e. 1/16th) of the total film titles sold by Azov films were child pornography. 1/16th of Mr. Way's total salary over the entire period of his time with Azov films is $17,979.13.

[138] Although the Crown had the financial records for Azov films and has the onus to establish on a balance of probabilities, the amount to be forfeited, it adduced no evidence to show that the 57 films at issue generated more sales than the other films sold by Azov films.

[139] However, Mr. Way testified and his email exchanges show that he included more close up nude footage that I determined was child pornography, because he noted they sold well. Moreover, based on the evidence at trial, Mr. Way seemed to spend more time and effort developing, selling and distributing the 57 child pornography films than on the legal films he sold through Azov films. I find therefore that there is some evidence to justify an increase of the apportionment of his salary to the illegal films. It is impossible to accurately quantify this amount. I have estimated however that the amount of $17,979.13 should be increased by 50% to reflect these facts.

[140] The amount of the forfeiture is therefore increased to $26,000.

[141] I believe this figure meets the stated objectives of the legislation for the following reasons:

a) it meets or exceeds the fruits of Mr. Way's crime resulting from the sale of the 57 film titles determined by me to be child pornography. (This is in addition to the lengthy criminal sentence that Mr. Way will serve);

b) any financial benefit Mr. Way received from engaging in this serious criminal conduct has thereby been removed; and

c) he will therefore be prevented from finishing his sentence and thereafter, profiting from his criminal activities.

The Second Issue: Proceeds of Crime already Recovered by the Crown

[142] The value of proceeds of crime already seized by the Crown must be deducted from the amount that would otherwise be forfeited. (*R. v. Dwyer* (supra)).

[143] In *R v. Hoyles*, [1997] N.J. No. 265 (Nfld. C.A.) the Newfoundland Court of Appeal rejected the Crown's argument that amounts seized should not be deducted from the total amount of the forfeiture. The court held that it would be contrary to the intent and meaning of the proceeds of crime provisions that any order under s. 462.37 could result in an amount being ordered for recovery that actually exceeded the proceeds of crime.

[144] In this case, all of the assets in Mr. Way's condominium and those of Azov films have been seized. The Crown has provided no evidence as to the value of those assets.

[145] Because there has been no quantification by the Crown and the Defence provided no estimate of the value of the assets already seized, I reduce the amount to be forfeited by $6,000.

The Third Issue: Payment of Fine in Lieu of Forfeiture

[146] Where property has been spent by the offender, cannot be located, has been transferred to a third party or has been commingled with other property such that it cannot be divided without difficulty, a court may order the offender to pay a fine in lieu of forfeiture. The fine takes the place of forfeiture and the value of the fine must therefore be equal to the amount that would otherwise have been forfeited. (*R. v. Lavigne* at para 35 and Peter German, *Proceeds of Crime and Money Laundering* (Toronto: Carswell, 2012), at pp. 9-17.) The offender is required to put forth an "honest and reasonable effort to pay fines imposed" as part of a penalty for violating the criminal law. *(R v. Le (supra).*)

[147] The court cannot take ability to pay into account in determining the amount of the fine to be imposed because this would run counter to Parliament's intention to focus on depriving an offender of the proceeds. The rationale provide by Deschamps J. in *Lavigne* is as follows:

> If the offender no longer has the money, it will often be because he or she has spent it. If the fact that the money has been spent is a ground for being exempted from the order, would this not incite offenders to quickly squander the proceeds of crime? This result would undoubtedly run counter to the intended purpose which is to deprive the offenders and criminal organizations of the proceeds of their crimes.
>
> …
>
> The fact that an offender no longer has enough money must not therefore serve as a way to avoid a fine."

(R v. Lavigne, at paras. 30 and 32; *R v. Grant*, MBQB 135, 2007 MBQB 135 (CanLII), 216 Man. R. (2d) 219, at para. 102.)

[148] The determination of the appropriate time within which to pay the fine is based on the offender's particular circumstances. (*R v. Lavigne*, at para. 53.)

[149] It is agreed that the proceeds of crime are no longer in Mr. Way's possession and everything he owns has been seized. A fine should therefore be imposed in the same amount as the amount that would otherwise be subject to a forfeiture order, that is, $20,000.

[150] In view of the quantum of the fine, and the fact that Way has no assets, Mr. Way is to be given three years after his release from custody to pay the fine.

The Fourth Issue: The Penalty to be imposed if the Fine is not paid within the Allotted Time

[151] In accordance with the provision in section 462.37(4) of the *Criminal Code,* if Mr. Way cannot pay the fine amount within three years of the date of his release from custody, he will be in default. If he is in default, he shall receive a term of imprisonment of six months as the amount of the fine does not exceed twenty thousand dollars. This term of imprisonment shall be consecutive to all other sentences.

Conclusion

[152] A fine in the amount of $20,000 is imposed as Mr. Way has no proceeds to forfeit. If he fails to pay the fine within 3 years of his release from custody, he will receive an additional sentence of six months.

[153] This meets the stated objectives of the legislators and the interpretation of the legislation as articulated by the courts that an offender should not be permitted to keep the fruits of his crime or profit from it.

[154] Mr. Way has already received a 6 year sentence for selling the child pornography films and a 3 year sentence for possession of the proceeds of those crimes.

[155] As a result of the forfeiture order, he will be required to disgorge the benefit he received and will not be able to enjoy any fruits of his crime by deriving a financial benefit from the commission of these crimes.

[156] The Crown bears the onus of establishing the amount to be forfeited. The Crown provided the gross sale revenue of the child pornography films.

[157] This is not the benefit or advantage received by Mr. Way.

[158] The only remuneration he received was his yearly salary of approximately $65,000 per year.

[159] Rather, the sum of $26,000 reflects the amount of that salary that he received from his criminal activity. There is no evidence of funds anywhere else.

[160] All assets of Azov films and Mr. Way have been seized but the value of those assets has not been quantified. As such, the amount of the forfeiture is reduced by $6,000.

[161] Because Mr. Way has nothing to forfeit, a fine in the amount of $20,000 is imposed payable within three years of his release failing which an additional sentence of six months will be imposed as provided for in the legislation.

5. ALLEGATIONS OF CRUEL AND UNUSUAL PUNISHMENT ON THE PART OF PERSONS IN AUTHORITY

[162] Mr. Way claims his section 7 Charter right to security of the person was violated and he was subjected to cruel and unusual punishment by people in authority at the Finch Avenue courthouse and the Toronto West Detention Centre and his charges should therefore be stayed or his sentence reduced. In October 2013 he was moved to other institutions and the abuse stopped.

[163] Mr. Way suggests he did not lodge a complaint as he did not want things to get worse and did not want to draw attention to himself. He said he may have told his lawyers but his then lawyer denied being told of any abuse.

[164] Mr. Way was called to testify during the Application for a Stay of Proceedings of his co-accused, Mr. Donnelly. At that time he told the court that he was regularly subjected to verbal abuse. He was not asked and did not say he had been tripped by a court officer at the Finch Avenue courthouse. Mr. Donnelly claimed he was tripped by a court officer in May of 2011 when he was brought in with Mr. Way.

[165] The Crown suggests these claims are fabricated, that the task has been rendered much more difficult because Mr. Way took so long to raise these complaints, and that he has tailored his complaints to match those of his co-accused. (In fact his co-accused raised many different complaints but the two that are the same are the allegations of verbal abuse and of tripping.)

A. Allegations Regarding the Court Officer

[166] Mr. Way claims a court officer at the Finch Avenue Court House whose name he believes was Mendez suggested he be put in "with the regulars".

[167] Mr. Way acknowledged that when he was brought to the Finch Avenue courthouse, he was preparing himself to go to jail, there was a lot of yelling, he was trying to make sure he knew where his belongings were, he needed to use the washroom, and there were "so many things going on it was hard to take everything in".

[168] Craig Cuddy, the supervisor on duty on the day Mr. Way was first brought to the courthouse, did not hear anyone say Mr. Way should be "put in with the regulars". Officer Cuddy's note written at the time states that:

> On May 6, after receiving information from the Metro West Detention Centre I reclassified Mr. Way as P4 for prisoner safety. According to the note to file written at the time, Mr. Way "would be housed in isolation due to the nature of his charges and increasing concern for his safety". Prisoner Way is charged with many counts of making, distributing and selling child pornography, SUPRVR CUDDY contacted the WDC and spoke to Captain BARTOLO who confirmed that he will be housed in isolation and also advised that Mr. Way's parents had advised that WDC of suicidal tendencies. Supervisor Cuddy reclassified WAY from P2 to P4 Status to be housed in isolation for prisoner safety.

This information is wrong as it was Mr. Donnelly's parents who contacted the institution to say that he had suicidal tendencies.

[169] On the basis of the evidence of Supervisor Cuddy and Court Officer Mendez, and the evidence from Mr. Way that he was brought in with as many as eight other accused in a line and he was extremely agitated and upset, I am not satisfied that if the comment "put him in with the regulars" was made, it referred to Mr. Way.

[170] Mr. Way also claims Court Officer Mendez called him names such as "sick fuck" (or something similar thereto), "diddler", and "the filmmaker", told him he had spit in his drink, and put his foot out and tripped Mr. Way on May 2, 2011, on his way to or from court.

[171] Mr. Way's co-accused, Mr. Donnelly also claimed he had been subjected to derogatory comments and tripped by a court officer at the Finch Avenue court house. Nordheimer J. accepted that Mr. Donnelly had been subjected to verbal insults at the Finch Avenue courthouse and tripped by a court officer. He said,

> I have no doubt that the applicant was subjected to derogatory comments during the course of the time that he was being moved … to the Finch Avenue courthouse and then while held in that courthouse. … *Mr. Way gave evidence that he was also subject to such comments during this period of time.* There is a measure of corroboration to be found in Mr. Way's evidence as to what the applicant says happened. … (Emphasis added.)
>
> … I accept that [this] occurred.

[172] At Mr. Donnelly's sentencing hearing, Mr. Way was not asked whether he too had been tripped.

[173] Supervisor Cuddy swore that all areas of the courthouse are monitored by video surveillance cameras except for strip search areas. Supervisor Cuddy stated that although

supervisors monitor pat down searches, as many as eight prisoners might be searched at once and they might not therefore see everything that happens. However, the fact that an officer knows his actions are being recorded is a strong disincentive to behave badly. The tapes are reviewed regularly by supervisors but are later overwritten. None of those tapes are now available.

[174] Court Officer Mendez, filed an affidavit denying all of the assertions made by Mr. Way. He notes that he worked in the zone of the courthouse that Mr. Way attended only three times. Mr. Way acknowledged that Officer Mendez was wearing a badge that identified him.

[175] According to the records, Court Officer Mendez was the morning cell manager on May 2 and the morning booker on May 5. Both Mr. Way and Mr. Donnelly were at the court house on those days. Officer Cuddy says it is rare for a cell manager or booker to escort prisoners.

[176] Supervisor Cuddy acknowledged that upon receiving this complainant about Officer Mendez he could have reviewed his personnel file to see if there were other complainants about him but had not done so.

[177] The Crown suggests that Mr. Way's version of events should not be preferred as Defence counsel could have called court officer Mendez to cross examine him in respect of any of his assertions but chose not to. The rule in *Brown and Dunn* is that where a party seeks to impeach a witness, he ought to be given the opportunity to explain his position. That is not true however, where the points upon which he is impeached (as in this case) are so clear that it is not necessary to waste time putting the questions to him as he has addressed them all and denied them.

[178] Mr. Way's claim that he was verbally abused and taunted at the Finch Avenue courthouse was first made during Mr. Donnelly's sentencing proceeding several years ago. Mr. Donnelly made the same claim. Mr. Donnelly was at the same court house with Mr. Way on May 2 and 5, 2011. Their evidence as to these verbal taunts was accepted by Nordheimer J.

[179] Court Officer Mendez gave a blanket uncorroborated denial of any wrongdoing. I agree with the comments of Nordheimer J. that although the Crown elected to call no court officers at the hearing before him,

> …the guards … undoubtedly would say that they have no specific recollection of the applicant and would almost certainly offer general denials of improper conduct. While I do have the records of the detention facility, if improper conduct occurred, of course, it is not going to be laid out in the records. In addition, there are no surveillance videos in these specific areas of the facility to review.

[180] It is unfortunate that records of the video monitoring are not kept so that they can be reviewed in cases such as this.

[181] Because Mr. Way's claim is echoed by Mr. Donnelly, Mr. Way made the allegation at Mr. Donnelly's hearing years ago, and in view of the fact that there is no evidence other than Officer Mendez' blanket denial to refute the allegation, I accept on a balance of probabilities, that Mr. Way was subjected to verbal taunts by Court Officer Mendez at the Finch Avenue courthouse.

[182] Moreover, Supervisor Cuddy admitted that the courthouse received incorrect information from the transporting officers and mistakenly believed Mr. Way was suicidal and therefore put him in isolation.

[183] Mr. Way also claims Court Officer Mendez tried to trip him though another Court Officer held him up, threw his shoes on the floor after searching him striking his feet, and touched

his testicles while searching up and down his legs enough to make him wince.

[184] Mr. Way acknowledged that he was highly agitated upon arriving at the facility and concerned that he would be harmed by guards and there were "so many things going on it was hard to take everything in".

[185] On the evidence before me, I believe that, while Mr. Way believed the court officer tried to trip him, threw his shoes on his feet and touched his testicles, I am not satisfied that he did so deliberately. Instead I find any such touching was likely accidental.

[186] This belief is based on the fact that Mr. Way was highly agitated, and that court officers know that interactions between court officers and inmates are taped (albeit those tapes are no longer available) and they would therefore be less likely to do such things.

Allegations regarding Correctional Services Officers at the Metro West Detention Centre

[187] Mr. Way claims six correctional service officers verbally and or physically assaulted him at the Metro West Detention Centre.

[188] Four of the six correctional officers against whom accusations have been made (Nelson Cardoza, Miles Roy, Ian MacIver, and Michael Schutz) swore affidavits claiming they had no memory of any interactions with Mr. Way. A fifth, Correctional Officer Singh, is terminally ill and has therefore not been contacted. The sixth court officer, Roger McArthur, no longer works for Correctional Services as he has retired. He has not been contacted at the address given for his pension benefits.

[189] Mr. Way's uncontradicted evidence is that none of the correctional service officers wore badges and it is therefore difficult to identify them.

[190] Sergeant Michael MacLennan worked in the Security Manager's Office in the Toronto West Detention Centre while Mr. Way was there. In his affidavit and during his testimony he described the process for booking and housing inmates. Mr. Way was placed in Special Needs/Special Handling. Most of the hallways had no cameras. Mr. Way was checked every 20 minutes and Sergeant MacLennan produced the log books that contained the observations made regarding Mr. Way and his condition. Sergeant MacLennan acknowledged that the log book entries were often not signed, meals were often not noted, which was contrary to procedure.

[191] Mr. Way had three professional visits between May 2 and May 20, 2011. His legal counsel was never told of any difficulties experienced by Mr. Way at the institution.

Mendoza's Actions

[192] Mr. Way claims what while he was in the booking area at the Metro West Detention Centre, Correctional Service Officer Mendoza asked him who his next of kin was and, before he answered, said "Nobody loves you?"

[193] There was no Officer Mendoza working at the time but there was a Sergeant Neil Cardoza. Sergeant Cardoza does not match the physical description of Officer Mendoza given by Mr. Way. Sergeant Cardoza does not recall any interaction with Mr. Way. Sergeant MacLennan advised that there is no video equipment in the booking area.

[194] There are several officers in the booking area at one time.

[195] I am not satisfied on the evidence before me that Sergeant Cardoza (who does not match the description of the person Mr. Way describes) said "Nobody loves you?"

Singh's Actions

[196] Mr. Way claims that while in the booking office (where there are no cameras) after he failed to answer a question put to him, Officer Singh said to the other officer, "I don't think he knows where he is" and put his finger on his chin. It was not enough to hurt him. On Mr. Way's own evidence, he was not paying attention so this was a way to secure his attention. I find therefore that this was not improper behaviour on the part of Correctional Officer Singh.

[197] After Mr. Way was strip searched, Officer Singh was carrying a pillow case that contained underclothing and toiletries. Mr. Way was cleared by the metal detector, and then moved near the general population holding cell. Officer Singh threw the pillowcase on the ground and told Mr. Way to pick it up. Mr. Way says that as he bent to pick it up, he was punched, kicked and spat on by inmates through the bars of the nearby cell. He admitted on cross examination that no one was holding him against the cell and that as soon as he felt anything, he moved to the side.

[198] Mr. Way was later examined by a nurse who asked him if he was injured. Mr. Way looked at Mr Singh who replied, "Are you fucking kidding me?" Mr. Way replied to the nurse, "I don't know." The nurse's notes read as follows: "appears fine, makes good eye contact, answers questions appropriately, denies being suicidal, denies any current medical, physical, psychological needs." She made no note of any physical injuries or complaints.

[199] Mr. Way claims, "I recall a psychiatrist came to see me and I told him I thought the guards wanted to kill me and I was afraid to leave my cell." On May 12, 2011 he was seen by a psychiatrist, Dr. Ben Aron who noted that Mr Way, "was coping with segregation, appetite ok, good eye contact, speech normal coherent lucid normal in rate and form, affect claim no thoughts of harming himself." Constable Blackadar swore that Mr. Way did indicate to her that he was afraid of the guards and thought one wanted to hurt him.

[200] Mr. Way admits he "likely came into contact" with Officer Singh again without incident.

[201] Officer Singh is not available as he is terminally ill.

[202] Sergeant MacLennan advised that after booking, a complete strip search is conducted to ensure there are no forbidden items on his person. After the search is concluded, the prisoner puts on an orange jumpsuit and is given a pillow case that contains toiletries, underwear, socks and a Tshirt. Sergeant MacLennan testified that the practice was that pillow cases were put on the floor and inmates were told to pick them up off the floor.

[203] He estimates that the bars of the cells are between 10 to 12 centimetres wide and that an adult male could put his foot through the bars.

[204] On the basis of the evidence available, including evidence from Sergeant MacLennan that pillows are left on the ground by correctional service officers to be picked up by an inmate, I accept that the pillow was put on the ground and that nearby inmates may have tried to kick or punch through the bars. I do not accept that Mr. Way sustained any physical injuries as any contact with inmates behind bars with a man who could move away would have been fleeting. Moreover, very soon thereafter he was examined by the nurse whose notes indicate that he "appeared fine".

[205] However, no reason was given for putting the pillow case on the floor rather than handing it to Mr. Way. While I do not conclude that Officer Singh engaged in abusive behaviour, his action in placing the pillow case on the floor near other inmates was taken without proper consideration for Mr. Way's hygiene or safety.

Ian MacIver and Miles Roy

[206] Correctional Services Officer “Smiles” told Mr. Way to put up his hands and twirl. Sergeant MacLennan testified that correctional services officers Miles Roy has a nickname “Smiles.” Mr Way paused and did not obey as this was an odd request. Officer Roy then added “like a ballet dancer” and he twirled one full rotation.

[207] Mr. Way also claims he was in Medical Segregation by himself in a cell with no mattress, no blanket, no pillow and no running water. He was completely naked. A nurse asked him if he was alright. He asked for his clothes back and Officer Roy said no by shaking his head. The nurse then left leaving him naked.

[208] Mr. Way says he did not eat for a couple of days.

[209] On the second day he was seen by a doctor. Thereafter he was given his underwear back but no other articles of clothing. Mr. Way said that after his first court appearance he was taken back to a different segregation cell again with no mattress, blanket or pillow and no toilet paper.

[210] Mr. Way claims Officer MacIver said “we all got kids…You’re gonna’ be raped and killed in prison.” When he put his hand on his chin, Officer MacIver said “Get your fucking hand down” and he did. Officer Roy saw all of this and did nothing.

[211] Sergeant MacLennan advised that while Mr. Way was in his cell, he was observed at 20 minute intervals and notes were made of what was observed. The log books were produced. Sergeant MacLennan admitted that an inmate could be left for short periods in his underwear while clothing was being checked but that a prisoner would never be left naked in a cell for extended periods. Upon reviewing the log books, Sergeant MacLennan acknowledged that correctional service officers were supposed to sign the forms but many were not signed. They were also supposed to list the meals which was often not done.

[212] It is clear on the evidence that the log books do not contain complete information as they should.

[213] I accept that the correctional officers took longer than necessary to return Mr. Way’s clothing and I believe his statement that he was subjected to verbal taunts. However, I do not believe he was left naked for days whilst being seen by a doctor, a nurse and others. Moreover, to the extent that the cell was missing running water or toilet paper, Mr. Way admits he did not draw this to the attention of the correctional facility or anyone else and as such, they may well not have been aware of the problem.

Michael Schutz

[214] Mr. Way claims one of the correctional service officers stood outside the door while he met with Constable Blackadar about his charges. He then escorted him back to his cell and asked him what the meeting was about and whether they were talking about him. Mr. Way says he then strip searched him in front of a female guard. Mr. Way says he made eye contact with the female guard and therefore knew she saw him naked.

[215] Correctional Officer Schutz is a 6’5”, 400 pound male with a shaved head who matches the physical description of the person Mr. Way says made him strip naked in his cell with a female officer present and intimidated him. Correctional Officer Schutz has no recollection of Mr Way.

[216] Sergeant MacLennan testified that two officers must be present during any strip search, one as the primary officer and one as backup. A female guard made serve as backup. The walls for the strip search are about 4 and ½ feet high so it is possible that the female guard could see Mr. Way but not his body below the waist.

[217] I find Sergeant MacLennan's explanation is a credible one. I also accept that Mr. Way may have been taken aback at seeing a female officer and wrongly concluded that she could see his naked body as he could see her.

Roger McArthur

[218] Mr. Way claims that during his last night on segregation, a Captain came into his cell and told him to strip. He did not remove his underwear. The Captain came within inches of his face and punched him on the side of his face and chin. He thinks the officer's name was Roger.

[219] Sergeant MacLennan swore in his affidavit that, from the description given by Mr. Way, he believes the Captain described by Mr. Way is Roger McArthur. Sergeant MacLennan further swore that Officer McArthur is no longer working for the Ministry of Correctional services and that "attempts have been made to locate him with no success". On cross-examination Sergeant MacLennan advised that Officer McArthur's address for pension purposes is in the file but no inquiries were made of him to respond to this very serious allegation. No reason was given for the failure to contact him.

[220] The Crown made the point that it is difficult to respond to allegations made years after the fact. While this is true, there are steps that could and should have been taken to contact Sergeant McArthur to respond to this very serious allegation.

[221] On the basis of Mr. Way's clear allegation, for which there is no response from Sergeant MacArthur, I find that Mr. Way was struck by Sergeant McArthur.

Effect on Mr. Way

[222] Mr. Way claims he became depressed but was afraid to tell anyone, he did not avail himself of yard or other programs because he feared for his safety, and stopped eating and drinking until he began feeling pain in his sides.

[223] Mr. Way claims he sometimes wakes up with cold sweats and he gets very anxious whenever he hears keys rattling or a guard call his name. This, despite that fact that he has been in two other institutions (Niagara and the Toronto East Detention Centre) where he says he has not been subjected to any abusive behaviour.

[224] While I do not doubt that the verbal taunts are disturbing and highly inappropriate for professionals working in correctional service, and this happened several times, and he was struck and was mistakenly put in segregation, the records suggest that Mr. Way missed very few meals and his psychiatrist at the Metro West Detention Centre found him to be engaged. Dr. Ben Aron, the first psychiatrist who saw Mr. Way noted that he, "was coping with segregation, appetite ok, good eye contact, speech normal coherent lucid normal in rate and form, affect claim no thoughts of harming himself." I also note that Mr. Way himself has testified that these charges and the harm that he has caused to the children who performed in these child pornography films have contributed greatly to his stress.

Remedy

[225] The verbal and physical abuse Mr. Way suffered while in custody is in violation of his section 7 *Charter* right to life, liberty and security of the person. His failure to immediately make an issue of it does not excuse the behaviour of staff at the detention facility. Moreover, at least as far as the verbal taunts are concerned, Mr. Way was asked about and gave evidence of the verbal taunts years ago during Mr. Donnelly's Stay Application.

[226] The fact that Mr. Way is in custody does not give those responsible for handling him the right to subject him to physical and or verbal abuse simply because they are offended by the

nature of offences. The requirement that all prisoners must be treated humanely and with common decency is a longstanding principle or our domestic and international law.

[227] The question is what is an appropriate remedy?

[228] In order to obtain a stay, Mr. Way must demonstrate that the prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome and no other remedy is reasonably capable of removing that prejudice. A stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued. (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 at para. 75.)

[229] There is a third residual category where the state conduct is such that its continuation in the future would offend society's sense of justice. “The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings.” (*Canada (Minister of Citizenship and Immigration) v. Tobiass* 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391.)

[230] Balancing the seriousness of the offence and society’s interest in upholding a conviction, the integrity of the justice system, and the nature and gravity of the violation of Mr. Way’s rights, I am not satisfied that a stay should be imposed.

[231] Mr. Way concedes that trial fairness issues are not at play. He also acknowledges that there is another possible remedy; that of a sentence reduction.

[232] There is a strong societal interest in having a determination on the merits especially in serious cases such as this. Child pornography preys on our youngest most vulnerable citizens; those most in need of protection.

[233] The conduct of some officers in this case was offensive and reflects badly on the administration of justice. I would hope and expect that this behaviour will be addressed.

[234] However, what occurred was not a calculated or prolonged technique developed by these officers to secure evidence nor was it a systematic breach including the denial of Mr. Way’s rights to counsel. It is not so serious as to require a stay of the proceeding to adequately reflect society’s condemnation of the behaviour.

[235] The remedy of reduction in sentence was approved in a case involving more serious abuse on the part of authorities: that of *R. v. Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1 S.C.R. 206.

[236] For these reasons, and in view of the effect on Mr. Way, I find that the verbal taunts, the punch on the side of Mr. Way’s face by Sergeant McArthur coupled with the fact that the pillow case he was to sleep on was thrown on the ground, taken together, warrant a reduction in his sentence of six months.

6. DEDUCTION FOR TIME SPENT IN PRE-SENTENCE CUSTODY

[237] Mr. Way has been incarcerated since his arrest on May 2, 2011. From that date to August 8, 2016 is 5 years 3 months 8 days. On a 1.5:1 basis this amounts to 7 years 10 months (or 95 months).

[238] The parties agree that given the conditions for offenders in presentence custody and lack of programming, Mr. Way should be attributed pre-sentence time at the rate of 1:5 to 1. Moreover, the uncontested evidence is that while he was serving pre-sentence time at the West Detention Centre, contrary to the procedures to be followed, the nature of these offences was

communicated by certain guards to some inmates. As a result, he spent considerable time in isolation.

7. CONCLUSION

[239] As noted above, I have taken into account the general principles of sentencing, Mr. Way's circumstances, the nature of the offences he committed, the sentences imposed in similar cases to similar offenders, and the principle that the overall sentence must be just and fair.

[240] The appropriate sentence for possession and distribution of child pornography is 5 years' incarceration. The sentence for selling, distributing, importing and exporting the type of child pornography films and accompanying photographs in this case is 6 years' incarceration. The conviction for possession of the proceeds of crime is a sentence of 3 years concurrent to the conviction for selling, distributing, importing and exporting child pornography.

[241] After taking into account the totality principle, that the total sentence must be fair and just, the global sentence is 10 years' incarceration.

[242] The nature and extent of the pornography collected by Mr. Way in his home causes me grave concern. I also recognize that general deterrence is a primary concern in cases of this nature. However, the possibility of rehabilitation must not be ignored, he has no previous record, he pleaded guilty at an early stage to these charges and he has acknowledged his egregious conduct and the need for treatment. I also note that while his home collection was both vast and disturbing there is no evidence that he ever assaulted a child.

[243] The images in child pornography films and photographs that were offered for sale, distributed imported and exported through Azov films are at the low end of child pornography as they do not show any explicit sexual acts among the boys.

[244] However, there is evidence that Mr. Way knowingly encouraged pedophiles to spend time with the young boys in the film in order to get footage for his films. There is also evidence he knew the boys were being groomed as, in the case of one boy, Mr. Way approached him shortly after his 18th birthday to request that he star in an adult pornography film for him. He sent emails to others seeking more nudity from the film producers as he noted they sold well. He also blocked some law enforcement sites. There were approximately 30 to 44 boys involved in these films, the films were made over a four and one half year period and the nature of the films became more sexually explicit with time.

[245] I strongly recommend that his sentence be served in a facility where he has access to psychological and/or psychiatric help. Counsel agree and I recommend that if possible he be sent to OCI for the remainder of his sentence.

[246] In addition to the 10 year global sentence, Mr. Way is subject to a fine in the amount of $20,000 and will receive an additional sentence of 6 months in prison if he fails to pay that amount within the three years he has been given to pay it upon his release.

[247] His sentence is reduced by 6 months as a result of the several instances of verbal abuse and one instance of physical assault, and other inappropriate behaviour as outlined above.

[248] I also note that he has served the equivalent of 7 years and 10 months in custody.

[249] Having pleaded guilty to a primary designated offence, I make the following ancillary orders requested by the Crown, no objection being made counsel for Mr. Way:

i. pursuant to section 490.012 of the *Criminal Code*, Mr. Way must register himself as a sex offender pursuant to the requirements of the *Sex Offender*

Information Registration Act for life;

ii. pursuant to section 487.051(b) of the *Criminal Code*, Mr. Way must provide a sample of his DNA for forensic analysis;

iii. Mr. Way has already forfeited to the Crown all equipment, disks and other inventory found at his home and business (as per the list provided to me) as evidence of crime;

iv. pursuant to section 161 of the *Criminal Code*, Mr. Way is forbidden from going into a public park or public swim area where children under 16 are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or community centre; seeking, obtaining or continuing any employment, or becoming a volunteer in a capacity, that involves being in a position of trust or authority over children under the age of 16; or using a computer (pursuant to subsection 342.1(2)) to communicate with a person under 16. This provision is to remain in force for 10 years after Mr. Way's release;

v. pursuant to section 109 of the *Criminal Code*, Mr. Way is forbidden from owning a firearm for life; and

vi. these ancillary orders are to apply to all counts.

[250] If any of the above conditions are breached, the breach may result in a fine or imprisonment or both.

[251] Upon his release Mr. Way is to be placed on probation for 3 years and required to submit to the terms set out in the probation order including the requirement that he attend counselling as and when ordered by his probation officer.

Thorburn J.

Released: August 8, 2016

CITATION: R. v. Way, 2016 ONSC 5052
COURT FILE NO.: CR-15-50000129-0000
DATE: 20160808

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

BRIAN WAY

REASONS FOR SENTENCE

Thorburn J.

Released: August 8, 2016

[1] Defence counsel who attended the lengthy trial was appointed to the Bench shortly before the sentencing hearing and counsel for the Defence at the sentencing hearing did not have the benefit of attending the trial.