WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. J.N., 2013 ONCA 251
DATE: 20130423
DOCKET: C52395

Laskin, Blair and Hoy JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

J.N.

Appellant

J.N., acting in person

Howard L. Krongold, as duty counsel

Frank Au, for the respondent

Heard: June 13, 2012

On appeal from the conviction entered on March 9, 2010 and the sentence imposed on June 11, 2010 by Justice John A. Desotti of the Superior Court of Justice, sitting without a jury.

By the Court:

A. INTRODUCTION

[1] The appellant was convicted of sexual assault, sexual interference and invitation to sexual touching for the prolonged abuse of his stepdaughter. His trial lawyer requested a *Gladue* report before sentencing, but none was provided because Aboriginal Legal Services could not confirm the appellant's Aboriginal identity. The appellant was sentenced to seven years in prison less two years' credit for pre-trial custody, for a total of five years.

[2] The appellant appeals his conviction and sentence. We see no reviewable error in the trial judge's reasons on conviction. He properly applied the principles in *R. v. W.D*. He accepted the complainant's evidence, and gave reasons for doing so. Indeed, the complainant's evidence was confirmed in several respects by her mother. The trial judge rejected the appellant's evidence, which he found "vague and evasive." The conviction appeal is dismissed.

[3] On the sentence appeal the appellant seeks to file fresh evidence in the form of a *Gladue* report which, he submits, justifies a reduction in his sentence. The Crown concedes that the fresh evidence should be admitted but maintains that the original sentence is appropriate notwithstanding *Gladue*.

[4] As we will explain, we are not persuaded that the fresh evidence affects the fitness of the appellant's sentence for three reasons.

[5] First, while the Crown accepts that the appellant is Aboriginal for the purpose of s. 718(2)(e) of the *Criminal Code*, in our view, his claim to the benefit of *Gladue* is weak.

[6] Second, and related, the *Gladue* report is both general and speculative on the degree to which the appellant's Aboriginal background may have contributed to his criminality.

[7] Third, and most importantly, this is one of those cases where the crimes were so serious, and the aggravating factors so compelling, that the appellant's ancestry makes little or no difference to the appropriate length of the sentence.

B. BACKGROUND

(a) The offences

[8] This is a historical sexual assault case. The appellant lived in a common law relationship with the complainant's mother in Sarnia, Ontario. The complainant testified, and the trial judge accepted, that the appellant began sexually abusing her when she was six or seven years old. The abuse occurred three or four times a week and consisted of the appellant touching and penetrating the complainant's vagina with his fingers. There was also one incident of sexual intercourse. The abuse persisted until the complainant was fourteen years old, when the appellant was charged with assaulting the complainant's mother. The complainant did not report the abuse to the police at that time because she did not feel emotionally strong enough.

[9] The appellant testified and claimed to have no recollection of the events the complainant described. He also denied having a drinking problem despite abundant evidence to the contrary.

[10] The trial judge found that the appellant either had memory problems or was "purposely evasive" about the events the complainant described. He also found that the appellant "was and is heavily addicted to alcohol", which clouded his memory of undisputed events. By contrast, the trial judge found the complainant's evidence "detailed, descriptive and emotionally charged". He convicted the appellant on all counts.

(b) The request for a *Gladue* report

[11] Immediately following the trial judge's verdict, the appellant's lawyer told the court: "[B]ased on what [the appellant] told me … he does have some native issues and the alcoholism at the very least is something that I think a *Gladue* report would be merited here." The trial judge agreed and scheduled the sentencing hearing to allow adequate time for preparation of the report.

(c) The sentencing hearing

(1) The absent *Gladue* report

[12] When the parties reappeared for sentencing, counsel for the appellant advised the court that Aboriginal Legal Services did not complete a *Gladue*report "on the basis that they couldn't confirm [his] Aboriginal identity." The mater was not discussed further and counsel proceeded to make their submissions.

(2) Counsel's submissions

[13] The appellant's lawyer acknowledged that his client was in a position of trust toward the complainant, that he had shown no remorse for his actions, and that he had a long criminal record. On the other side of the ledger he noted that none of the appellant's previous convictions were for sexual offences and that he had a drinking problem, though the appellant continued to deny it. Counsel suggested that the "ballpark" range for sentence was between three and four years to eight and ten years.

[14] The Crown submitted that given the nature of the offences, the age of the complainant, the prolonged pattern of abuse, the breach of trust, and the impact of the abuse on the complainant, a sentence in the range of seven years was appropriate.

(3) The pre-sentence report

[15] The pre-sentence report stated that the appellant was born in San Diego, California in 1959. His parents divorced when he was a child. He

moved to Ontario in 1972 when his mother married a Canadian man. The appellant reported that his mother was “part Aboriginal” and that while his Aboriginal ancestry is an important part of his background, he is not affiliated with any local reservation and does not have Aboriginal status in Canada. A *Gladue*caseworker advised that she was “unable to confirm” the appellant’s Aboriginal ancestry for sentencing purposes.

[16] The appellant reported that he had a “good” childhood with no history of physical, emotional or sexual abuse. His mother was often a victim of domestic violence but he denied ever witnessing it. He also denied that his mother had any history of alcohol or drug addiction.

[17] The appellant graduated from high school in Sarnia and then completed a six-month course in auto mechanics. He denied ever having been suspended or expelled from school but stated that he fought with other children and was sent out of class occasionally.

[18] The appellant denied having a drinking problem, despite having been fined on 24 occasions between 2006 and 2009 for alcohol-related offences.

[19] The author of the pre-sentence report gave the following assessment:

> Prior to his detention, the subject was unemployed and in receipt of social services. Probation and police records document a pattern of alcohol and drug abuse, domestic violence and non-compliance dating back to 1981.
>
> The subject’s response to community supervision has been poor, and he has continued to re-offend within the community. He has consistently failed to attend counselling to address substance abuse or anger management. Although he has indicated that he would attend counselling if required as a condition of probation upon sentencing, he has denied any sexual offending behaviour and does not feel that he requires counselling.

(4) The reasons for sentence

[20] The sentencing judge held that the principles of denunciation and deterrence were paramount. Ultimately he sentenced the appellant to seven years on each of the four counts, to be served concurrently. He explained:

> Seven years is from my perspective the low end of this range. Seven to ten years is where I was at. The Crown sought seven years, I am prepared to accept that. I just want to indicate that this is a horror crime. The last person that anyone should be abusing in a position of trust is their child, step-child or not.

[21] The sentencing judge referenced decisions of this court on the appropriate sentencing range for sexual offences involving breaches of trust, and continued:

> This conduct is to be expected, by any court, to be denounced and by any court to be deterred. So beyond the pale that it violates a community's sensibilities. And for that reason it has to mete justice, the penalty has to be meted out in the most serious manner. As I said, seven to ten was the range I had and the Crown chose at the low end of that range.

C. THE APPEAL

(a) The s. 684 appointment and the search for information

[22] The appellant filed a notice of appeal of his conviction and sentence. Legal Aid was refused and the matter came before this court on the inmate list, with Ms. Jill Presser acting as duty counsel. In November 2010, the court appointed Ms. Presser counsel under s. 684 of the *Criminal Code* for the limited purpose of "investigating whether the appellant is Aboriginal for *Gladue* purposes and if so preparing the necessary fresh evidence for the sentence appeal."

[23] Ms. Presser had a hard time obtaining information about the appellant's Aboriginal background beyond his self-reporting that his mother "always" told him he had ancestors from the Cherokee and Apache tribes. He also noted that his stepfather is a "full Native American" and his half-sisters are half-Native, but the appellant was unable to point Ms. Presser to family members who could provide more information. The appellant signed a waiver authorizing Aboriginal Legal Services to share any information it had obtained prior to sentencing, but none was forthcoming.

[24] Not content to let the matter rest, Ms. Presser hired a private investigator who was able to locate two of the appellant's relatives, a sister and an uncle. The sister said she believed that one or both of the appellant's parents may have been at least partially Aboriginal but she

could not provide more concrete information. Similarly, the uncle said he believed the appellant might have some Aboriginal ancestry but he did not know for sure.

[25] In August 2011, Ms. Presser brought an application on the appellant's behalf seeking an order for a *Gladue* report. She submitted that the appellant met the criteria for recognition as a non-status Indian as set out by the Supreme Court in *R. v. Powley*, 2003 SCC 43 (CanLII), [2003] 2 S.C.R. 207: (1) self-identification as Aboriginal, where the self-identification is not of recent origin; (2) evidence of an ancestral connection to an Aboriginal community; and (3) evidence of acceptance by the modern Aboriginal community. This last criterion was satisfied in part through the report of an elder at the Bath Institution who attested to the appellant's participation in an Aboriginal healing plan.

[26] The application was allowed and the court ordered that a *Gladue* report be produced.

(b) The fresh evidence

(1) Authorship of the *Gladue* report

[27] Despite her best efforts, Ms. Presser could not find someone to prepare the *Gladue* report and so she and her associate, Ms. Lucy Saunders, did it themselves. Ms. Saunders explained in her affidavit accompanying the report:

> Unfortunately, it is not within the mandate of Aboriginal Legal Services to prepare *Gladue* reports for inmates in the Kingston area. Ms. Presser and I conducted extensive investigations to find a *Gladue* writer to assist with the preparation of the report. We contacted a number of organizations including the John Howard Society, Katarokwi Native Friendship Centre, the Ontario Federation of Indian Friendship Centres, the United Chiefs in Counsel of Manitoan, the Thunder Bay Native Friendship Centre, N'Amerind Friendship Centre and Kingston Probation. We ultimately concluded that there was no organization or individual able to produce a *Gladue* report for an inmate in the Kingston area. [The appellant] was unwilling to waive his *Gladue* rights or his statutory rights under s. 718.2(e) of the *Criminal Code*. Consequently, Ms. Presser and I drafted and

> produced a *Gladue* report…. Neither Ms. Presser nor I have experience as *Gladue* writers, and we are not of Aboriginal ancestry. However, for guidance we consulted extensive resources including precedent *Gladue* Reports drafted by ALS, journal articles, and a *Gladue* primer published by the Legal Services Society of British Columbia. We [researched] the resources available to [the appellant] in the community as an Aboriginal person with substance abuse issues. In addition, I conducted interviews with [the appellant] at Bath Institution, as well as the Aboriginal Liaison Officers and Elder at the penitentiary.

(2) Content and conclusions of the *Gladue* report

[28] The background information in the *Gladue* report mirrored the information in the pre-sentence report that was before the sentencing judge. It noted that the appellant had a "good" childhood with no history of physical, emotional or sexual abuse and that his mother had no history of addiction. The appellant reported that he did not feel poor because he always had a roof over his head and enough food on the table. He appreciated his mother and felt she "did real good". Although he was teased in school "because he was Aboriginal and American", he made a couple of good friends, both of whom were members of the Chippewa tribe.

[29] The report went on to note that the appellant has been unable to maintain regular employment, primarily because of substance abuse issues. He has lost touch with all three of his long-term girlfriends and had not seen his only child, an adult daughter, since his incarceration in 2009.

[30] Regarding the appellant's Aboriginal ancestry, the report stated that he was raised "not knowing much about his heritage" and that he felt "deeply disappointed" by this disconnection. He "regained a connection" while at the Bath Institution, where he has been "extremely active" in the Aboriginal community.

[31] The report discussed the role the appellant's Aboriginal background may have had in bringing him before the court:

> [S]ubstance abuse and the effects of community fragmentation, resulting in his and his family's estrangement from the Aboriginal community, have impacted on [the appellant's] criminality.

…

> While [the appellant's] estrangement from the Aboriginal community means that he has not been effected [*sic*] as greatly by the cultural differences between Aboriginal and non-Aboriginal peoples, he does appear to have experienced racism to a certain degree, reporting that lack of acceptance of his Aboriginal ancestry caused some conflict at school. Moreover, such dislocation from the Aboriginal community is in itself an expression of colonialism and has been held by our Superior Court in *R. v. Prevost* to be a relevant factor for consideration….

[32] The report recommended that the appellant's sentence should be reduced from seven years to two years less a day, plus three years' probation. Not coincidentally, this would spare him from being deported back to the United States: non-citizens who are sentenced to prison terms over two years are automatically marked for deportation to their countries of origin upon release.

[33] The report also recommended that the appellant should be required to abstain from alcohol and continue to receive counselling for substance abuse, and participate "in such Aboriginal community activities, rituals and education as recommended and approved" by a probation officer.

(c) Counsel's submissions on appeal

[34] At the appeal hearing in Kingston, duty counsel submitted that the sentencing judge erred by failing to obtain information about the appellant's Aboriginal status before making his decision. Although the Crown did not concede this point, counsel agreed that this court should admit the fresh evidence. The real controversy was over what weight to give to the *Gladue* report in assessing the fitness of the appellant's sentence.

[35] Duty counsel submitted that the conclusions in the *Gladue* report support a reduction in the appellant's sentence because, as he eloquently put it, "the rehabilitative and restorative objectives of *Gladue* are not exhausted" in this case. He pointed out that alcoholism is clearly a major contributor to the appellant's criminality, and that the balance of his criminal record is for minor offences.

[36] Duty counsel fairly conceded that a seven year sentence was "certainly" in the appropriate range for the prolonged abuse of the

appellant's stepdaughter and that the sentence recommended in the *Gladue* report was insufficient. Nevertheless, duty counsel submitted that this court should reduce the sentence in recognition that the appellant's current regrettable state is attributable – at least to some extent – to his Aboriginal background.

[37] The Crown submitted that given the seriousness of the offences, a seven year sentence is still appropriate notwithstanding *Gladue*. Counsel noted that the appellant's background did not fit the "classic" *Gladue* pattern. Rather, his was a story of disconnection and reconnection to his Aboriginal heritage. Counsel submitted that the appellant's disconnection from the Aboriginal community before his incarceration effectively neutralized the impact of systemic discrimination on him. At the same time, his reconnection since joining the Aboriginal community at the Bath Institution has given him a sense of belonging that he did not have before.

[38] The Crown suggested that if this court is inclined to adjust the appellant's sentence, any reduction should not exceed one year. He also noted that the appellant faces deportation regardless of the outcome of the sentence appeal, because the immigration consequences of his conviction have already been triggered. Moreover, counsel submitted that although deportation can be relevant to sentencing considerations, it cannot be used to take a sentence out of the appropriate range.

D. ANALYSIS

[39] As stated at the outset, we are not persuaded that the fresh evidence affects the fitness of the appellant's sentence. We, therefore, dismiss the sentence appeal.

[40] As a threshold matter we observe that although it may be unusual for counsel acting under a s. 684 appointment to prepare a *Gladue* report, this was an unusual case. In our view Ms. Presser and Ms. Saunders acted entirely appropriately in preparing the *Gladue* report and we commend them for their work.

(a) Did the sentencing judge err by failing to inquire into the appellant's Aboriginal background?

[41] In Ontario, the law requires that a *Gladue* analysis be performed in *all* cases involving an Aboriginal offender: *R. v. Kakekagamick* (2006), 2006 CanLII 28549 (ON CA), 81 O.R. (3d) 664 (C.A.), at para. 38 (emphasis in original). See also *R. v. Jensen* (2005), 2005 CanLII 7649 (ON CA), 74 O.R. (3d) 561 (C.A.), at para. 27.

[42] In *R. v. Wells*, 2000 SCC 10 (CanLII), [2000] 1 S.C.R. 207, the Supreme Court clarified the scope of a sentencing judge's duty following *Gladue*, at para. 55:

> [I]t was never the Court's intention, in setting out the appropriate methodology for this assessment, to transform the role of the sentencing judge into that of a board of inquiry. It must be remembered that in the reasons in *Gladue*, this affirmative obligation to make inquiries beyond the information contained in the pre-sentence report was limited to "appropriate circumstances", and where such inquiries were "practicable" (para. 84). The application of s. 718.2(e) requires a practical inquiry, not an impractical one. *As with any other factual finding made by a court of first instance, the sentencing judge's assessment of whether further inquiries are either appropriate or practicable is accorded deference at the appellate level.*[Emphasis added.]

See also *R. v. Pelletier*, 2012 ONCA 566 (CanLII), 295 O.A.C. 200, at para. 140.

[43] In this case, the sentencing judge had been told that Aboriginal Legal Services could not confirm the appellant's ancestry, and the appellant himself was unable to provide any further information. In these circumstances we are reluctant to second-guess the sentencing judge's decision not to pursue the matter further. As noted above, the Crown has consented to the admission of the *Gladue* report as fresh evidence. The real controversy is over the weight to be given to the *Gladue* report.

(b) Does the fresh evidence affect the fitness of the appellant's sentence?

[44] In our view the *Gladue* report should be given little weight and does not affect the fitness of the appellant's sentence for three reasons.

[45] First, although the Crown has conceded that the appellant is Aboriginal for *Gladue* purposes, it is not at all clear to us that this is correct. As we have explained, the appellant was born in San Diego and moved to Canada as a young teenager. Taking the evidence of his Aboriginal roots at its highest, it appears the appellant had some Cherokee and Apache ancestors. Both of these tribes are indigenous to the American south and are, so far as we can tell, distinct both from modern-day indigenous

Canadian Aboriginal tribes and from other Native American tribes that straddle the U.S.-Canadian border.

[46] As the Supreme Court explained in the *Gladue* decision itself, Aboriginal heritage is relevant to sentencing to account for "the unique systemic and background factors which may have played a part in bringing the particular aboriginal offender before the courts" (at para. 66). While one can generalize about the impact of colonialism on all Aboriginal peoples, *Gladue* is expressly intended to redress the consequences of colonialism in Canada – and particularly the devastating legacy of residential schools. Thus, we are sceptical that *Gladue* is applicable to an American-born offender who traces his Aboriginal ancestry to tribes indigenous to the United States.

[47] Second, however, even assuming for the sake of argument that *Gladue* applies, the evidence that the appellant's Aboriginal ancestry may have played a part in his criminality is weak. In coming to this conclusion, we are mindful of this court's direction in *R. v. Collins*, 2011 ONCA 182 (CanLII), 104 O.R. (3d) 241, at paras. 32-33, that an Aboriginal offender does not bear the burden of establishing a direct causal link between the systemic and background factors and the commission of the offence. *Gladue* simply requires that the sentencing judge take those systemic and background factors into account in shaping an appropriate sentence.

[48] In this case, the evidence suggests that the appellant's Aboriginal background played a minor role in bringing him before the court. By his own account, the appellant had a "good" childhood. He was cared for by a loving mother and did not suffer abuse. He had a solid academic attendance record and graduated high school, even going on to learn a trade. There is no evidence of a family history of addiction or sexual abuse. To the extent that the appellant reports having been bullied at school, it was because he was "Aboriginal *and American*" (emphasis added). In short, there is nothing other than the appellant's own evidence to suggest that his sense of dislocation from his Aboriginal heritage contributed to his criminal behaviour.

[49] We acknowledge that in *R. v. Prevost*, 2008 CanLII 46920 (ONSC), at para. 47, Ducharme J. observed that assimilation itself is relevant to the *Gladue* analysis as part of the "broader historical reality" experienced by Canada's Aboriginal peoples. In that case, there was evidence that the Metis offender's parents had actively discouraged him from identifying as Aboriginal because of his father's own experience with discrimination. There is no comparable evidence in this case.

[50] The most compelling evidence in the *Gladue* report about the appellant's Aboriginal identity relates to his embrace of Aboriginal culture and traditions while in prison. Both the elder and the Aboriginal liaison officers at the Bath Institution report that the appellant has become a very active member of the Aboriginal community there. Through regular group ceremonies and one-on-one counselling, the appellant has gradually started to work through his history of addiction and physical abuse and is starting to feel "like a more complete person", though he "acknowledges that he needs to undertake further healing activities." In our view, this evidence suggests that a lengthy penitentiary term is facilitating the appellant's rehabilitation, not frustrating it.

[51] Finally, and most significantly, this is simply one of those cases where the crimes were so heinous, and the aggravating factors were so compelling, that the appellant's Aboriginal status should not affect the length of the sentence imposed.

[52] In *Gladue* the Supreme Court instructed, at paras. 79-80:

> Generally, the more violent and serious the offence the more likely as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.
>
> As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?

[53] This court underscored the point in *Kakekagamick*, at paras. 34 and 36:

> [I]t is not a mitigating factor on sentencing simply to be an Aboriginal offender…. Nor is being an Aboriginal offender … a "get out of jail free" card.
>
> …
>
> [W]hile s. 718.2(e) requires a different methodology for assessing a fit sentence for an Aboriginal offender; it does not necessarily mandate a different result. The subsection does

> not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. [Citation omitted.]

[54] The appellant sexually abused his stepdaughter starting when she was six or seven years old. The abuse continued, week after week, year after year, until another act of violence – the appellant's assault on the victim's mother – finally brought it to an end.

[55] In *R. v. D.D.* (2002), 2002 CanLII 44915 (ON CA), 58 O.R. (3d) 788, at para. 44, this court described a fit sentence for this sort of crime: "[A]s a general rule, when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent basis over substantial periods of time, they can expect to receive mid to upper single digit penitentiary terms."

[56] Applying this principle, there is no doubt that a seven-year sentence was appropriate in this case.

E. CONCLUSION

[57] Both the conviction and sentence appeal are dismissed.

Released: Apr 23, 2013
"JL"

"John Laskin J.A."
"R.A. Blair J.A."
"Alexandra Hoy J.A."