Citation: R v JM, 2026 MBCA 6
Date: 20260121

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

***B E T W E E N**:*

HIS MAJESTY THE KING	)	***S. B. Simmonds, K.C.*** *and* ***C. J. Suderman*** *for the Appellant*
Respondent	)	
	)	***R. N. Malaviya, K.C.***
- and -	)	*for the Respondent*
	)	
J. M.	)	*Appeal heard:* ***April 4, 2025***
(Accused) Appellant	)	
	)	*Judgment delivered:* ***January 21, 2026***

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On appeal from *R v JM*, 2024 MBPC 10 [*JM*]

PFUETZNER JA

[1] The key legal issue on this appeal is the test for admission of fresh evidence of an offender's Indigenous status and circumstances on a sentence appeal. As will be seen, the test from *Palmer v The Queen*, 1979 CanLII 8 (SCC) [*Palmer*], applies, as it does to all motions to admit fresh evidence on appeal.

[2] In the present case, the sentencing judge was not advised of the accused's Métis background. Indeed, the evidence before her was that he is "Caucasian". As I will explain, the proffered fresh evidence of the accused's heritage does not meet the *Palmer* test for admission.

[3] Moreover, I am not persuaded that the sentencing judge made any error in principle that had an impact on the sentence, nor is the seven-year sentence for sexual interference in relation to the accused's adolescent daughter (the victim) demonstrably unfit.

[4] For the reasons that follow, I would grant leave to appeal sentence, dismiss the motion to admit fresh evidence and dismiss the appeal.

Background

[5] The sentencing hearing proceeded by way of an agreed statement of facts. At the time of the incidents, the accused was living with his wife and their two children, one of whom was the victim. She was the oldest child. The incidents took place five times when the victim was between the ages of twelve and fifteen. They involved two occasions of digital penetration. The others involved sexual touching and the accused using the victim's hand to rub his penis. The incidents ended when the victim disclosed what was happening to a friend's mother.

[6] The accused was arrested in August 2021. In October 2021, he commenced sessions with Dr. Lawrence Ellerby (Dr. Ellerby). He attended thirty-five sessions with Dr. Ellerby, who prepared a treatment progress report (the Ellerby report) that was filed at the sentencing hearing. The accused acknowledged that, at the time of his offending, he was looking to get his

sexual needs met in a way that minimized risk and rejection. He also offered other reasons for his behaviour. Dr. Ellerby advocated against the accused being incarcerated.

[7] The victim's impact statement described the significant effect of the crime on her, including hospitalizations for attempts to kill herself, inability to form relationships, trust issues, shame, disgust and wanting to change her body, as well as other impacts.

Proceedings Before the Sentencing Judge

[8] The accused was sentenced on January 25, 2024.

[9] In her reasons, the sentencing judge began by outlining the circumstances of the offence and the five incidents described in the agreed statement of facts. She noted that, at the time of sentencing, the accused was forty-six years old with no prior criminal record, had a lengthy stable work history and had filed a number of supportive letters from family members and co-workers.

[10] The sentencing judge acknowledged the significant impact of the offence on the victim, describing it as "life-altering" (*JM* at para 12). She wrote that the victim "described feeling 'trapped and unsafe' in her own home" (*ibid*), was afraid of her father and "would often stay awake all night for fear that he would come into her room and abuse her while she was asleep" (*ibid*). The victim "became overwhelmed by her emotions which caused her to engage in self-harm and attempts to end her life. She had to go to the hospital on more than one occasion when she was harming herself" (*ibid*). In addition, the victim "was too terrified to disclose what was happening to her,

worried that no one would believe her and about the impact on her family" (*ibid*).

[11] The sentencing judge considered the Ellerby report, which noted that the accused initially struggled to engage in treatment in any meaningful way. However, "[t]o his credit, the accused continued to attend sessions and eventually began to open up" (*ibid* at para 15). The accused disclosed to Dr. Ellerby "that he had been sexually abused as a child by two older male cousins" (*ibid*) and that he "experienced some bullying and teasing by other students" around the age of fourteen. As outlined in the Ellerby report, prior to the incidents comprising the offence, the accused began to develop distorted beliefs and perceptions relating to the victim. He wrote that (*ibid* at para 17):

> [The accused] experienced a change in his marriage, noting a decrease in their level of sexual activity and him perceiving his wife to be less interested in him, less connected in their relationship, and believing he was being rejected and was not wanted, needed or desired . . . He began to distort his perceptions of [the victim] who was physically maturing and whose body he noticed and saw developing. He saw [the victim] as a means of meeting his . . . needs.

[12] The accused indicated to Dr. Ellerby that his justifications at the time of the incidents included believing that "sexual contact with [the victim] seemed less wrong and hurtful than having an affair" (*ibid* at para 19) and that "[a]fter the first incident [he] began to think [the victim] want[ed] [him] sexually" (*ibid*).

[13] The Ellerby report indicates that the accused ultimately gained significant insight into his offending, "recognizing his history of unhealthy

sexual behaviours and use of sex for coping". The Ellerby report noted that the accused has "a lifelong history/pattern of using pornography as a primary coping strategy (to escape, avoid and to meet sexual and non-sexual needs)", developed "sexual compulsive behaviours as [a] teenager and adult", in particular, "[e]xcessive use of pornography and masturbation" and that "he ha[d] evidenced a marked investment in cognitive avoidance (not facing, talking about or taking action to solve emotionally based problems)".

[14] The Ellerby report concluded that the accused became "very aware that as the adult he engaged in a remarkable breach of trust and abuse of [the victim]", experienced "a marked degree of regret and remorse" and was "living with a significant level of guilt and shame for his actions and their impact on [the victim] and his family." The accused was assessed as "a Below Average Risk for being charged or convicted of another sexual offence" using the Static-99R assessment tool.

[15] At the sentencing hearing, the Crown sought a sentence of seven years. The accused suggested a range of sentence between a conditional sentence order and a two-to-four-year penitentiary sentence.

[16] The sentencing judge instructed herself regarding the principles of sentencing with particular focus on *R v Friesen*, 2020 SCC 9 [*Friesen*]. She noted that, prior to *Friesen*, this Court, in *R v Sidwell (KA)*, 2015 MBCA 56, had set a starting point sentence of four to five years for a "major sexual assault" (at para 49) on a child by a person in a position of trust. However, she correctly indicated that, since *Friesen*, and in accordance with the Supreme Court of Canada's direction, sentences for sexual offences against children have increased.

[17] Turning to the aggravating and mitigating factors, the sentencing judge referred to the following statutorily aggravating factors—that there was abuse of a person under the age of eighteen (see *Criminal Code*, RSC 1985, c C-46, s 718.2(a)(ii.1) [the *Code*]), that the offender abused a position of trust (see *ibid*, s 718.2(a)(iii)) and that the offence had a significant impact on the victim, considering her age and other personal circumstances (see *ibid*, s 718.2(a)(iii.1)).

[18] The Crown submitted that section 718.04 of the *Code* should apply and that the sentencing judge should "find that the offence involved abuse of a person who is vulnerable because of personal circumstances, including because the person is Aboriginal and female" (*JM* at para 33). The sentencing judge rejected this proposition, finding that the section did not apply based on the information that she had before her.

[19] In addition, the sentencing judge discussed additional aggravating factors, including that the victim was sexually abused "for more than three years and on at least five occasions", that the accused "did not stop until she disclosed, and he was confronted" (*ibid* at para 36), the young age of the victim when the abuse began and the degree of physical interference, noting that it caused pain and injury on one occasion.

[20] The sentencing judge then turned to consider "a number of mitigating factors" (*ibid* at para 40), including that the accused "entered a guilty plea" (*ibid* at para 40(1)) and was "genuinely remorseful for what he ha[d] done" (*ibid*). In addition, the accused had no prior criminal record, had strong support in the community and had "undertaken significant

rehabilitative efforts since his arrest" (*ibid* at para 40(4)). She accepted that the accused was a low risk to reoffend.

[21] In assessing the accused's moral blameworthiness, the sentencing judge found it to be "extremely high" (*ibid* at para 42) and that his post-offence therapy, while mitigating, did not reduce his moral blameworthiness in a significant way.

[22] She concluded that "nothing short of a lengthy penitentiary sentence" (*ibid* at para 45) would satisfy the sentencing principles she had set out, including those articulated by the Supreme Court in *Friesen*. Accordingly, she sentenced the accused to seven years in custody.

Grounds of Appeal

[23] On February 20, 2024, the accused filed a notice of application for leave to appeal and to appeal the sentence, asserting that the sentencing judge erred by (1) "imposing a sentence that was overly harsh", (2) "failing to adequately apply the principle of parity and impos[ing] a sentence that was demonstrably unfit", and (3) failing to "properly consider the scope and nature of the [accused]'s rehabilitation".

[24] A hearing date of November 8, 2024 was set for the appeal. Prior to that date, the accused sought and was granted an adjournment in order to have a *Gladue* report (see *R v Gladue*, 1999 CanLII 679 SCC [*Gladue*]), completed and to file a motion for the introduction of fresh evidence on the appeal.

[25] The proposed fresh evidence consists of an affidavit of a legal assistant from the office of counsel for the accused attaching the following exhibits: a copy of the accused's Manitoba Métis Federation card issued on February 12, 2020; a Program Performance Report from Stony Mountain Institution; an Elder Review Report from Stony Mountain Institution; and a *Gladue* report written by Quinn Saretsky (Ms. Saretsky) (the *Gladue* report), together with the curriculum vitae of Ms. Saretsky.

Positions of the Parties

[26] In his factum, the accused argues that the sentencing judge failed to consider the cases he had filed where lower sentences were imposed in respect of more egregious facts and that if she had considered those cases, she would not have imposed the sentence she did. He asserts that, based on the jurisprudence, similar cases attract sentences ranging from four to six years. In his case, however, he suggests that a conditional sentence be imposed.

[27] He further suggests that the sentencing judge erred when considering the mitigating factor of the rehabilitative steps he had taken. He cites *Friesen* to the effect that "remorse gains added significance when [added to] insight" (at para 165).

[28] Finally, the accused submits that the fresh evidence is admissible, as it "could have affected the custodial sentence imposed" on him.

[29] The Crown argues that the sentencing judge acknowledged the mitigating factors, including the accused's rehabilitative process. However, she found the accused's moral culpability to be high. The Crown asserts that it is not the role of an appellate court to re-weigh the relevant factors. It

submits that the cases referred to by the accused did not involve offences as serious as the facts in this case and that *Friesen* dictates higher sentences for child sexual offences. It maintains that the sentence is within the range imposed against offenders who groom and then repeatedly sexually violate their own child. Fundamentally, the Crown argues that the sentencing judge "considered all of the factors the [accused] is raising on this appeal. No error in her approach has been identified – only disagreement. The sentence imposed is well within the acceptable range."

[30] As for the motion to admit fresh evidence, the Crown notes that it consented to the adjournment of the first hearing date of the appeal, as it recognized that the accused was entitled to the preparation of a *Gladue* report to assess whether the sentencing judge was deprived of background information that could have had an impact on the sentence she imposed.

[31] However, the Crown submits that the fresh evidence is not admissible, as "it would not have changed the outcome" of the sentencing hearing. It argues that, at best, the fresh evidence provides context to the issues described by Dr. Ellerby but that it would not have impacted the determination that the sentencing judge had to make regarding the seriousness of the offence, the accused's moral culpability and the paramountcy of the sentencing principles of denunciation and deterrence.

Analysis

[32] In my view, the primary issue on the appeal is the admissibility of the fresh evidence of the accused's Métis heritage. However, I will begin by briefly considering the accused's original grounds of appeal.

[33] In the absence of the fresh evidence, I would not give effect to the accused's arguments. There is no merit to the suggestion that the sentence imposed for this serious violation of the victim's security and sexual integrity breaches the principle of parity. The other cases cited by the accused are either distinguishable or reflect sentences similar to what was imposed in the present case.

[34] The sentencing judge reasonably weighed the accused's efforts towards rehabilitation, which, because of the nature of the offence, cannot take precedence over denunciation and deterrence. The ultimate seven-year sentence resulted from a careful balancing of the relevant sentencing principles, the aggravating and mitigating factors and the proper application of the guidance from the Supreme Court on sentencing for sexual offences against children. As was stated in *Friesen*, the "message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances" (at para 114).

[35] Moreover, significant deference on appeal is owed to the decision of sentencing judges (see *R v IM*, 2025 SCC 23 at para 183; *R v Houle*, 2016 MBCA 121 at para 11). In my view, the sentencing judge made no error in principle that impacted the sentence, nor is the sentence demonstrably unfit.

Motion to Admit Fresh Evidence

[36] I turn now to the accused's motion for the admission of fresh evidence. If the fresh evidence is admitted, this Court "must again consider its probative value as well as the probative value of all the other evidence in order to determine whether the sentence imposed by the [sentencing] judge

was 'demonstrably unfit'" (*R v Lévesque*, 2000 SCC 47 at para 24 [*Lévesque*]).

The Law

[37] Section 683(1) of the *Code* provides that fresh evidence may be admitted on appeal "in the interests of justice". The leading case setting out the factors to be considered on a motion for the admission of fresh evidence is *Palmer*. After reviewing the existing jurisprudence, the Court stated (*ibid* at 775):

> From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen.*
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> [footnote omitted]

[38] The Court noted that fresh evidence should not be admitted "as a matter of course" (*Palmer* at 775), but only where "[s]pecial grounds [are] shown to justify the exercise of this power by the appellate court" (*ibid* at 775-76).

[39] It is settled law that the *Palmer* criteria apply in sentencing cases. For example, in *Lévesque*, Gonthier J, writing for the majority of the Supreme Court, stated that "[a]lthough the rules concerning sources and types of evidence are more flexible in respect of sentence, the criteria for admitting fresh evidence on appeal are the same, regardless of whether the appeal relates to a verdict or a sentence" (at para 16) and "the overriding consideration must be the interests of justice" (at para 17). Indeed, the majority stated, "it is my belief that the criteria stated by this Court in *Palmer* already call for a relaxed and flexible application and could hardly be relaxed any further" (*Lévesque* at para 18).

[40] It is notable that *Lévesque* was decided after *Gladue*, which, as I will explain, involved a motion to admit fresh evidence of the offender's Indigenous status on a sentence appeal. *Gladue* is not mentioned in *Lévesque*. Interestingly, neither *Gladue* nor the subsequent decision in *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*] cite *Palmer*, though *Gladue* does refer to "fresh evidence which is relevant and admissible on sentencing" (at para 85) rather than *all* fresh evidence—presumably a tacit reference to the *Palmer* criteria.

[41] The Supreme Court recently considered the *Palmer* criteria in the family law context in *Barendregt v Grebliunas*, 2022 SCC 22 [*Barendregt*]. The majority confirmed that "[t]he overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence" (*ibid* at para 3).

[42] The majority noted that "[t]he *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice" (*Barendregt* at para 31). They observed that: "The test strikes a balance

between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings" (*ibid* at para 32). They concluded "that the *Palmer* test applies to all evidence tendered on appeal for the purpose of reviewing the decision below" (*Barendregt* at para 34).

[43] A key point made in *Barendregt* is that the latter three *Palmer* criteria are mandatory prerequisites for the admission of any kind of fresh evidence. Justice Karakatsanis wrote (*Barendregt* at para 44):

> The last three *Palmer* criteria require courts to only admit evidence on appeal when it is relevant, credible, and could have affected the result at trial. Unlike the first criterion, which focuses on the *conduct* of the party, these three criteria focus on the *evidence* adduced. And unlike due diligence, the latter three criteria are "conditions precedent" — evidence that falls short of them cannot be admitted on appeal: *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 14
>
> [emphasis in original]

[44] Resolution of the present appeal requires this Court to grapple with the following question: Is *Gladue* information raised for the first time on appeal always admissible? As I will explain, in my view the answer is no.

[45] The argument in favour of this proposition is that it is mandatory for a sentencing court to consider the circumstances of an Indigenous offender (see the *Code*, s 718.2(e)) and that any failure to do so is an error in principle that "could reasonably . . . be expected to have affected the result" (*Palmer* at 775) in every case. This position appears to have gained traction in some provinces, with appellate courts admitting *Gladue* information on appeal but

then dismissing the appeal either on the basis that the fresh evidence would not have affected the result or that the sentence was not demonstrably unfit.

[46] For example, in *R v Monckton*, 2017 ONCA 450 [*Monckton*], the offender's Indigenous status was not disclosed to his trial counsel or the author of his pre-sentence report and therefore was not brought to the sentencing judge's attention. The offender did not bring a fresh evidence motion but simply included an affidavit from his father in his appeal book. Justice Trotter (writing for the Court) stated (*ibid* at para 109):

> The failure of the appellant to inform his counsel of his Aboriginal heritage remains a mystery. Nevertheless, given the importance of the values embodied in s. 718.2(e) of the *Criminal Code*, as recognized in many cases, most notably *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, this is an appropriate case to admit the fresh evidence and to consider it in reviewing the fitness of the sentence imposed.

[47] Ultimately, however, Trotter JA concluded that "[i]n the materials placed before us, there is no information *from* the appellant, or *about* the appellant, that lifts his life circumstances and Aboriginal status from the general to the specific. This new information does not impact on the sentence that was imposed. The sentence imposed was fit" (*Monckton* at para 117) [emphasis in original]. Thus, while leave to appeal sentence was granted, the appeal was dismissed.

[48] See also *R v Nercessian*, 2022 ONCA 704 [*Nercessian*], where the Court stated: "While we would admit the fresh evidence, absent any error in principle it does not affect the result" (at para 10); *R v Mercier*, 2023 ONCA 98; *R v McNeil*, 2020 ONCA 595; and *R v Wolfleg*, 2018 ABCA 222 [*Wolfleg*], where the Court suggested that the admission of a *Gladue* report as

fresh evidence ought not to be governed by "strict adherence to the *Palmer* criteria" (*Wolfleg* at para 90).

[49] In my respectful view, it is very difficult to reconcile the reasoning in cases like *Monckton* and *Wolfleg* with the direction from the Supreme Court in *Lévesque* and *Barendregt* that the *Palmer* criteria apply in sentence appeals and that evidence falling short of the latter three criteria cannot be admitted on appeal.

[50] It is important to recall that the *Gladue* case itself, which was decided after *Palmer*, involved proposed fresh evidence regarding the accused's Indigenous circumstances on a sentence appeal. The fresh evidence was not admitted and the sentence appeal was dismissed. The Supreme Court noted that appellate courts have a duty to consider fresh evidence related to an offender's Indigenous circumstances that "is relevant and admissible" (*Gladue* at para 85), clearly indicating that not all such fresh evidence will be relevant or admissible. The Supreme Court dismissed the appeal, finding the sentence to be "not unreasonable" (*ibid* at para 96).

[51] The idea that not all *Gladue* evidence will impact the ultimate sentence was confirmed in *Ipeelee*, where the Court stated: "Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence" (at para 83). However, it remains the case "that sentencing judges have a *duty* to apply s. 718.2(*e*)" (*ibid* at para 85) [emphasis in original].

[52] In the absence of a clear signal from the Supreme Court that the *Palmer* criteria are to be modified on a motion to admit *Gladue* evidence as

fresh evidence on appeal, in my view the criteria should be applied in the same manner as they would be in respect of any other type of fresh evidence proffered on a sentence appeal.

[53] Accordingly, I prefer the reasoning of such cases as *R v Violette*, 2013 BCCA 31 [*Violette*] and *R v Hamer*, 2021 BCCA 297 [*Hamer*]. In *Hamer*, the Court stated that "[w]here the fresh evidence would not affect the outcome, then, in my view, the evidence should not be admitted" (at para 110). Moreover, Bennett JA wrote (*ibid* at para 119):

> In my view, the application of the *Gladue* principles in this case would not have affected the result, and therefore the evidence does not meet the fourth criteria in the *Palmer* test. There is nothing in the *Gladue* report that would ameliorate the circumstances or shed light on Mr. Hamer's moral blameworthiness for the very serious offences he faced. Nor do the treatment options that may be available to him as an Indigenous person assist in assessing whether he would benefit from treatment. The evidence is that the programs are available, nothing more.

[54] As stated in *Lévesque*, for fresh evidence to be admitted on a sentence appeal, the evidence must be "such that it could, when taken with the other evidence adduced at trial, be expected to have affected the result. Accordingly, the probative value of the fresh evidence must, to some degree, be reviewed by a court of appeal when it is determining the admissibility of the fresh evidence" (*ibid* at para 24) [underlining in original] in order to assess whether it could have impacted the result of the sentencing hearing.

Decision on Motion to Admit Fresh Evidence

[55] I now turn to apply these principles to the present case.

[56] In the *Gladue* report, Ms. Saretsky identifies the accused's father's side of the family as Ukrainian and his mother's side as Métis. His great, great, great, great grandmother was identified as a Saulteaux woman who married a French settler. His great, great, great grandfather married a Métis woman. It is not known whether any of his ancestors attended residential or day schools. He is described as being "of mixed Métis ancestry". The accused was raised in a rural farming community on the outskirts of Winnipeg.

[57] The *Gladue* report provides the following comments on the accused's "*Gladue* Factors": he suffered "multiple instances of sexual abuse . . . between the ages of 8 and 12 years old from older male cousins . . . from his mother's family"; the accused "denied any experiences of physical abuse from his parents as a child"; "he experienced emotional and spiritual abuse while he attended both elementary and high school" and, as a result, "experienced and internalized racism throughout his educational experience"; "although [the accused] was entirely isolated from Métis culture and identity, . . . he still internalized the prejudice and derogation perpetuated in school and broader public discourse at the time"; "he was entirely disconnected from the Métis community, heritage, history, and culture for most of his life[,] [a]lthough [the accused] is a recognized citizen with the Manitoba Métis Federation"; and while "he was always aware of his Métis heritage", he was "taught that it was something to keep hidden".

[58] Other than the fact of the accused's Métis heritage and his experiences and internalization of racism, the remaining *Gladue* factors mentioned above were taken by Ms. Saretsky from the Ellerby report, which was before the sentencing judge.

[59] I now turn to the criteria from *Palmer*. I have significant concerns that the accused failed to exercise due diligence in bringing this information before the Court in a timely manner. No real excuse is offered as to why the accused did not disclose his Métis status earlier. His counsel argued at the appeal that perhaps it was a symptom of the shame and repression of his heritage that he had experienced since childhood. I do not find this argument particularly persuasive in light of the fact that the accused was sufficiently reconciled with his heritage to have taken out membership in the Manitoba Métis Federation well before the events leading to his arrest. In any event, I would not deny the motion based solely on due diligence concerns.

[60] As for the second and third *Palmer* criteria, there is no question that the fresh evidence is relevant to sentencing and is credible.

[61] The fourth *Palmer* criterion is where the motion falters. In my view, the fresh evidence could not have had an impact on the sentence. The *Gladue* report and the other information proffered gives very limited additional insight regarding the accused that was not already before the sentencing judge in the Ellerby report. The sentencing judge was already aware of the accused's sexual victimization as a child, bullying and repression of emotions. In my view, the fact of the accused's Métis heritage and his continued engagement with rehabilitative efforts while in custody have no mitigating effect on the moral blameworthiness attached to his decision to repeatedly sexually abuse the victim.

[62] Moreover, the fresh evidence shows that the victim is also Métis. This means that the statutorily aggravating factor in section 718.04 of the *Code* indeed applies, contrary to the finding of the sentencing judge.

However, the sentencing judge had already correctly identified that denunciation and deterrence were the primary sentencing principles at play. As this Court stated in *R v Bunn*, 2022 MBCA 34 at para 110 [*Bunn*]:

> [S]ection 718.04 mandates sentencing courts to give primary consideration to the objectives of denunciation and deterrence in circumstances where the victim is vulnerable because of personal circumstances—including because the person is Aboriginal and female. It is not intended to diminish *Gladue* principles.

[63] To summarize, any failure to consider the accused's *Gladue* factors was not an error in principle on the part of the sentencing judge, as the only information she had regarding his cultural background was that he was Caucasian. Even if it were an error in principle, it had no impact on the sentence, as I have explained. Finally, in my view, the sentence is not demonstrably unfit even when considered in light of the fresh evidence.

[64] In closing, I express my hope that guidance will be forthcoming from the Supreme Court on the issue of the admission of *Gladue* information as fresh evidence on appeal when the offender's Indigenous status was not known at sentencing.

Conclusion

[65] I would dismiss the motion to admit fresh evidence on the basis that the fourth *Palmer* criterion is not met. While I would grant leave to appeal sentence, I would dismiss the appeal.

Pfuetzner JA

I agree: leMaistre JA

BEARD JA (dissenting)

[66] I agree with my colleague, Pfuetzner JA, that a key legal feature on this appeal is the admissibility of the fresh evidence of the accused's Indigenous status. I also agree that the *Palmer* test applies to determine the admissibility of that evidence. I also generally agree with her summary of the background facts. Where we differ is in the application of the *Palmer* test and the impact of the fresh evidence.

[67] The fresh evidence in this case includes proof of the accused's Indigenous (Métis) status and three reports, all prepared after the sentencing, being a Performance Report from Stony Mountain Institution dated September 17, 2024 (the Performance Report), an Elder Review Report from Stony Mountain Institution dated April 22, 2024 (the Elder Report), and a *Gladue* Report dated January 29, 2025 (the *Gladue* report).

[68] The *Gladue* report relating to the accused's Indigenous background raises issues regarding the application of section 718.2(e) as it relates to Indigenous offenders, the determination of moral blameworthiness and, ultimately, to the accused's sentence.

I. ADMISSIBIITY OF THE FRESH EVIDENCE

The First Criterion of the Palmer Test

[69] My colleague has concerns that the accused has not met the first *Palmer* criterion, being that he could not, by exercising due diligence, have adduced the *Gladue* report at the sentence hearing.

[70] The due diligence criterion contains a proviso that it will not be applied as strictly in criminal cases as in civil cases. Justice McIntyre, writing for the Court in *Palmer*, explained this criterion by adopting Ritchie J's reasoning in *McMartin v The Queen*, 1964 CanLII 43 (SCC). From that decision, McIntyre J noted that, while the rules to introduce new evidence should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence be admitted as a matter of course. He then stated (*Palmer* at 776):

> . . . . [Ritchie J] considered that special grounds existed because of the nature of the evidence sought to be adduced and he considered that it should not be refused admission because of any supposed lack of diligence in procuring the evidence for trial.

Application to the Facts—The First Palmer Criterion

[71] In my view, there are two reasons not to refuse to admit the fresh evidence in this case on this basis. First, as explained later in this decision, the *Gladue* report states that the accused was taught from a very early age not to talk about his Indigenous heritage due to the racist comments and perspectives of the non-Indigenous side of his family, his teachers, other students and the non-Indigenous community in which he lived. This explains why he did not raise the issue. This learned behaviour of keeping secrets is also a significant aspect of Dr. Ellerby's findings.

[72] Second, the courts have emphasized that it is of fundamental importance for courts to consider and give effect to an accused's experiences as an Indigenous offender, making the fresh evidence establishing the accused's Indigenous heritage and the *Gladue* report important evidence. In

my view, like in *McMartin*, due to the nature of this evidence, it should not be refused admission on this basis.

The Fourth Palmer Criterion

[73] The fourth *Palmer* criterion requires the court to determine whether the evidence is "such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result" (*ibid* at 775) of the trial or, in this case, the sentence (see *R v Lacasse*, 2015 SCC 64 at para 116).

[74] In *Lacasse*, the fresh evidence consisted of two convictions for breaches of undertakings that were imposed after the accused was sentenced but before the hearing in the Court of Appeal (see *Lacasse c R*, 2014 QCCA 1061 at para 19). The Court of Appeal refused to admit the evidence, finding that it did not satisfy the fourth criterion in *Palmer* because it was unlikely to influence the outcome.

[75] Justice Wagner, for the majority in *Lacasse*, held that the Court of Appeal erred in refusing to admit the fresh evidence. After noting that this kind of evidence would have been admissible as part of a pre-sentence report at the sentencing hearing (see *ibid* at para 119), he explained the application of the fourth criterion as follows (*ibid* at para 120):

> . . . . [T]he evidence of the two breaches of recognizances could have affected the weight given to the favourable presentence report and could therefore have affected the final sentencing decision. In particular, the Court of Appeal might have reached a different conclusion if it had admitted that evidence, which would have helped it in assessing the fitness of the sentence that had been imposed at trial.

[76] In *R v Hotomani*, 2020 BCCA 64, the Court admitted fresh evidence of the accused's Indigenous status where that status had not been disclosed to the sentencing judge. The sentencing judge had recognized the accused's unremitting alcoholism as a mitigating factor. Following the same method of analysis as in *Lacasse*, the Court applied the fourth criterion as follows (*Hotomani* at para 4):

> . . . . The information contained in the *Gladue* letter is significant in understanding the causes of [the accused's] criminal history and his prospects of rehabilitation. The fact that [the accused's] alcohol addiction (and his difficulty in addressing that addiction) resulted from the extensive personal and intergenerational trauma that he has suffered is relevant and mitigating in a proper understanding of his history of offending: *R v Ipeelee*, 2012 SCC 13 at paras. 72-74).

[77] In the more recent unanimous decision in *R v Sheppard*, 2025 SCC 29, Wagner CJC, for the Court, explained the fourth criterion as requiring that the evidence, if admitted, "must reasonably be capable of having changed the result of the decision" (at para 115). In *Barendregt*, this criterion was stated as requiring evidence that "might, taken with the other evidence adduced, have affected the result" (at para 64).

[78] The fourth criterion, as interpreted by the Supreme Court in these recent decisions, does not require that the fresh evidence would have affected the outcome, but only that it could reasonably be capable of changing the outcome. Clearly, evidence that would affect the outcome would also meet the lower standard of could reasonably be capable of changing the outcome, but the reverse is not true. Evidence that could reasonably be capable of

affecting the outcome meets the fourth criterion even if, in the end, it would not have affected the outcome.

[79] My colleague states that she prefers the reasoning in *Hamer* and *Violette*, pointing out that in *Hamer*, the Court stated that "[w]here the fresh evidence would not affect the outcome, then, in my view, the evidence should not be admitted" (at para 110).

[80] In those cases, the Courts found that, while the proposed evidence disclosed that the accused was of Indigenous heritage, Mr. Hamer only found out about it later in life, perhaps in his teens, and Mr. Violette only found out after his sentencing. In *Hamer*, the Court stated that, assuming that the accused had Indigenous roots, "there [was] nothing that spell[ed] out the circumstances that would have affected his criminality" (at para 114) and, as a result, there was "nothing in the *Gladue* report that would ameliorate the circumstances or shed light on Mr. Hamer's moral blameworthiness" (*Hamer* at para 119). In *Violette*, the Court found (at para 8):

> . . . . There is no material before the court which would suggest that he has suffered deprivation because of Aboriginal heritage, nor is there connection between this circumstance and his culpability, or anything to suggest the sentencing objectives should be influenced by this newly discovered factor. It simply cannot be said, in my view, that the evidence sought to be adduced could have a bearing upon the sentence imposed for these offences.

[81] These decisions are a reflection of their facts, being that the proposed evidence did not disclose any tie or connection between the evidence of Indigenous heritage and the accused's circumstances or those of the offences. As I explain below, in my view, that is not the case in the present

matter. The proposed evidence in the present matter clearly establishes a direct connection between the accused's Indigenous heritage and the offence, so the reasoning and outcomes in those cases are not applicable in this case.

[82] Further, in *Hamer*, the Court applied the test of whether the fresh evidence would affect the outcome, rather than determining whether it could reasonably be capable of affecting the outcome, which, in my view, was an error. Thus, I cannot agree with my colleague that the reasoning in those cases is of assistance in the application of the fourth criterion in this matter.

Application to the Facts—The Fourth Palmer Criterion

[83] The *Gladue* report would have been admissible at the sentencing hearing because it had a bearing on the accused's moral blameworthiness. As explained below, the accused's moral blameworthiness factored heavily into the sentencing judge's analysis and the sentence that she imposed. After reviewing the evidence, the applicable sentencing principles and the aggravating and mitigating principles, she concluded that "[w]hile the post-offence therapy is a mitigating factor, when I consider the extent to which it impacts the accused's moral blameworthiness, I find that it does not reduce it in a significant way" (*JM* at para 41) and "[t]he accused's moral blameworthiness is extremely high" (*ibid* at para 42).

[84] The information in the *Gladue* report in this case ties the effects of the accused's Indigenous heritage to his moral blameworthiness and to his offending, and establishes that the accused's experiences, growing up as an Indigenous person, are directly connected to his offending. It also supplements and explains the findings and conclusions in the Ellerby report and ties them to the accused's Indigenous heritage. For the reasons set out

below, I am of the view that the evidence related to this accused's Indigenous heritage, if admitted and considered with the other evidence, is reasonably capable of changing the weight given to the accused's level of moral blameworthiness and the final decision on his sentence. For this reason, I would admit it for consideration in this appeal.

II. LEGAL PRINCIPLES

The Gladue Principles

[85] *Gladue* was the Supreme Court's first opportunity to interpret and apply section 718.2(e) as it relates to Indigenous offenders. The unanimous Court held that the section imposes a statutory duty on judges to consider the unique situation of Indigenous offenders (see *Gladue* at paras 34, 82, 88). The Court stated that "[w]hat s. 718.2(e) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender" (*ibid* at para 33).

[86] In *R v Kakekagamick*, 2006 CanLII 28549 (ONCA), the Court found that the sentencing judge erred by making only passing reference to the accused's Indigenous background and gave no consideration to whether further inquiries should be made. It stated that "[d]eference is accorded the scope and sufficiency of the inquiry required by s. 718.2(e) and *Gladue*, not to an absence of one" (*Kakekagamick* at para 51). It concluded that it was an error justifying appellate intervention for a sentencing judge to fail to properly and adequately conduct the inquiry set out in *Gladue* (see *Kakekagamick* at para 56).

[87] In its 2012 decision in *Ipeelee*, LeBel J, for the Court on issues related to the application of general sentencing principles to Indigenous offenders, confirmed the principles in *Gladue* and stated that "application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and failure to do so constitutes an error justifying appellate intervention" (*Ipeelee* at para 87).

[88] Justice LeBel responded to the criticism that the circumstances of Indigenous offenders are not unique but are shared by many non-Indigenous offenders by noting that their circumstances are unique in terms of how they got to a place of poverty and social marginalization, which is tied to the history of colonialism (see *ibid* at para 77).

[89] In *R v Parranto*, 2021 SCC 46, the Court stated that "[t]here can be no sound proportionality analysis in the case of an Aboriginal offender without considering the impact of the offender's Aboriginal heritage on his moral culpability" (at para 50).

[90] The principles in *Gladue* and *Ipeelee* were recently confirmed in *R v Hilbach*, 2023 SCC 3, wherein Martin J, for the majority, stated (at paras 39, 42, 44):

> . . . . The principles relating to the consideration of *Gladue* reports are settled: these considerations must be applied in all cases where they are relevant, including where the offence charged is serious. Sentencing judges must consider the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts and the types of sentencing procedures and sanctions which may be appropriate in the circumstances for that offender (*Ipeelee*, at paras. 59-60).

> . . . . The failure to consider *Gladue* factors is an error that can lead to a finding that a sentence is unfit (*Ipeelee*, at paras. 86-87). Hence, where an offender is Indigenous, like [the accused], a court will necessarily need to take into account *Gladue* principles in order to fix a sentence that is fit and proportionate at the first stage.
>
> . . . . *Gladue's* framework for applying s. 718.2(e) has been a core part of Canada's sentencing principles since 1999. The methodology called for under s. 718.2(e), as well as the norms it embodies, are well-established components of our sentencing jurisprudence, as much as parity and proportionality.

(See, also, *R v JW*, 2025 SCC 16 at para 44.)

[91] In *Friesen*, Wagner CJC held that a court must apply *Gladue* principles "even in extremely grave cases of sexual violence against children" (*Friesen* at para 92). He went on to find that, while Parliament has stated that deterrence and denunciation are to have priority over other objectives, "the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality" (*Friesen* at para 104).

[92] In *Gladue*, Cory and Iacobucci JJ stated that, even in the case of a serious offence, the length of a term of imprisonment must be considered, and it may be less for an Indigenous offender than for another offender (see para 79).

[93] In *Ipeelee*, LeBel J addressed the connection that an accused must establish between Indigenous background factors and the commission of the current offence to have those factors considered. He explained that there is no requirement that an accused establish a direct causal link between their

circumstances and the offending; rather, these circumstances provide context to determine an appropriate sentence, so they must be tied in some way to the offender and the offence (see *ibid* at paras 81-83).

[94] The present case is somewhat unusual, in that the sentencing judge could not have taken the accused's Indigenous heritage into account because she was not advised that he was Indigenous, so it would arguably be unfair to say that she erred. While this has been the subject of comment in similar cases, I have not been referred to any jurisprudence in which a motion to adduce *Gladue* evidence on appeal was dismissed on that basis. (See, for example, *R v Barter*, 2024 NLCA 40 at para 52; *Nercessian* at paras 14-16; *Hotomani* at paras 2-4; *R v Fraser*, 2016 ONCA 745 at para 20; *Tremblay c R*, 2010 QCCA 2072 at paras 11, 19.)

[95] The jurisprudence is clear that the principles of sentencing require that a sentencing judge take into account *Gladue* principles for all Indigenous accused and that the failure to do so is an error in principle.

Effect of an Error in Principle at Sentencing

[96] While many decisions state that the failure to apply *Gladue* principles properly or at all is an error that justifies appellate intervention, that conclusion must be read in conjunction with the decision in *Lacasse* regarding the effect of an error in principle or law.

[97] While the dissenting judges in *Lacasse* were of the view that any error in principle would open the door to appellate intervention, the majority concluded otherwise. Justice Wagner, for the majority, concluded that an error in principle would "justify appellate intervention only where it

appear[ed] from the trial judge's decision that such an error had an impact on the sentence" (at para 44; see also *JW* at para 51).

[98] In *Lacasse*, Wagner J provided examples that demonstrate how to determine whether there has been an impact on sentence. In *Gavin c R*, 2009 QCCA 1, the sentencing judge stated that lack of remorse was an aggravating factor. The Quebec Court of Appeal found that to be an error in principle, but it also found that it was a secondary factor that was only incidental to the trial judge's decision and had no real effect on the sentence (see *Lacasse* at para 45; *Gavin* at para 35). Justice Wagner noted, with approval, the same reasoning in *Sidhu c R*, 2009 QCCA 2441, in which the Court found that the error was not determinative and had no effect on the sentence (see *Lacasse* at para 46; *Sidhu* at para 24). In both of those cases, that error did not lead the Court to re-sentence the accused, notwithstanding the error in principle.

[99] In *Monckton*, the Court admitted fresh evidence as to the accused's Indigenous heritage. In considering the evidence, it found that it was vague and "merely provided . . . general information from the [accused]'s father about his son's interest in his heritage" (at para 114). The Court concluded that there was "no information *from* . . . or *about* [the accused] that lift[ed] his life circumstances and Aboriginal status from the general to the specific" (at para 117) [emphasis in original]. In other words, the *Gladue* circumstances were not tied to the accused or to the offence, so they did not have an impact on the sentence that was imposed.

[100] In *Hotomani*, the Court considered the accused's traumatic upbringing in a First Nation community, which led him to drinking to cope with his trauma. Even though the sentencing judge was aware of "his

unremitting alcoholism" that "certainly ha[d] caused him to act in a criminogenic manner through most of his adult life" (at para 12, citing with approval the trial decision at para 16), the Court concluded that the *Gladue* information had an impact on the sentence because it had a bearing on the accused's moral culpability. It stated (*Hotomani* at para 17):

> . . . . This Court is, of course, required to take judicial notice of the intergenerational trauma suffered in our Indigenous communities. Here, [the accused's] own experiences play an explanatory role in his commission of these offences and his long criminal record. These circumstances warrant the conclusion that [the accused's] moral culpability is less than the judge was in a position to appreciate or give effect to.

Remedy

[101] The remedy that applies where an appellate court finds that a sentence was tainted by an error in principle that had an impact on the sentence was clarified in *Friesen*, as follows (at para 27):

> . . . . [A]n appellate court must perform its own sentencing analysis to determine a fit sentence (*Lacasse*, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.

[102] This is qualified in that the appellate court is to "defer to the sentencing judge's findings of fact or identification of aggravating and

mitigating factors, to the extent that they are not affected by the error in principle" (*Friesen* at para 28).

Moral Blameworthiness

[103] In *R v M (CA)*, 1996 CanLII 230 (SCC), Lamer CJC, for the Court, stated that "[i]t is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender" (at para 40). Moral blameworthiness is reflected in the fundamental principle of sentencing in section 718.1 as "the degree of responsibility of the offender."

[104] On the application of sentencing principles to Indigenous offenders, LeBel J, for the Court on this point, explained that "systemic and background factors [of Indigenous offenders] may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" (*Ipeelee* at para 73). He adopted Iacobucci J's statement from *R v Wells*, 2000 SCC 10 at para 38, describing these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (*Ipeelee* at para 73) [underlining in original], and he concludes "that their constrained circumstances may diminish their moral culpability" (*ibid*).

[105] This was confirmed in *Friesen*, wherein Wagner CJC stated that "[t]he systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness" (*ibid* at para 92, citing with approval *Ipeelee* at para 74).

[106] In *Gladue*, Cory and Iacobucci JJ explained that "the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors" (at para 77), which would include overt racism and family and community breakdown. (See Benjamin A Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Indigenous Law Centre, University of Saskatchewan, 2021) at 174-76, online (pdf): indigenouslaw.usask.ca/documents/publications/the-gladue-principles_ralston.pdf.)

III. THE ELLERBY REPORT

[107] Dr. Ellerby provided a detailed and in-depth report of the accused's participation and progress in individual psychotherapy, including his opinion as to the accused's psychological functioning, the factors relevant to understanding his offending behaviour and the level of his risk of recidivism. In that report, he stated that the accused reported having been sexually abused as a child, and he explained the negative effects that that had on the accused's emotional and cognitive development and thought processes. These aspects of the report were not challenged by the Crown.

[108] In *Friesen*, the Supreme Court dealt at some length with the effects of sexual abuse on children, stating that "[t]he likely result of the sexual assault would be 'shame, embarrassment, unresolved anger, a reduced ability to trust others and fear'" (at para 57) and that "[s]exual violence can interfere with children's self-fulfillment and healthy and autonomous development to adulthood precisely because children are still developing" (at para 58).

[109] The Court goes on to note that "[t]he ripple effects can cause children to experience damage to their other social relationships" and make

them "reluctant to join new communities, meet new people, make friends in school, or participate in school activities" (*ibid* at para 61). Finally, the Court stated that "children who are victims of sexual violence may be more likely to engage in sexual violence against children themselves when they reach adulthood" (*ibid* at para 64) and that this fuels "a cycle of sexual violence that results in the proliferation and normalization of the violence in a given community" (*ibid*).

[110] The effects of childhood sexual abuse were prominent in the accused's development from childhood to adulthood, as explained by Dr. Ellerby, and they mirror those referenced in *Friesen.* Dr. Ellerby explained the harm occasioned to the accused as follows:

> . . . . [The accused] also demonstrated problematic responding on the sexual concern scale, which is indicative of experiencing sexual distress and dysfunction. This includes feelings of sexual anxiety, negative thoughts and feelings during sex, sexual problems in relationships, sexual conflicts and shame related to sexual activities or experiences. This is consistent with his history of having been sexually abused as a child, his early development of using sex as an unhealthy style of coping, early exposure to and experiences with pornography that resulted in a lifelong history/pattern of using pornography as a primary coping strategy (to escape, avoid and to meet sexual and non-sexual needs) and his sexual offending behaviour.

[111] Dr. Ellerby concluded as follows regarding the cause of the accused's offending behaviour:

> . . . . In considering the primary factors contributing to [the accused's] offending behaviour, it is my opinion that his unaddressed experiences of sexual abuse resulted in the formulation of maladaptive avoidant coping styles, distortions in perceptions and identity disruption that are consistent with trauma

> symptomatology (e.g., his marked insecurity and low sense of self-worth, emotional neediness, fear of rejection and being viewed as inadequate, desire for attachment and connection, oversensitivity and tendency to personalize and perceive criticism or rejection).

[112] The accused had 35 therapy sessions with Dr. Ellerby over a period of approximately 20 months up to the preparation of the report, and he continued with that therapy up to the date of sentencing. Dr. Ellerby addressed how difficult it had been for the accused to engage in the therapeutic process, which he characterized as "slow and arduous", even though he was motivated from the beginning and committed and willing to participate in the process in order to understand why he had abused his daughter. He credited the accused with "showing up, trying, and struggling through sessions persistent in his efforts and attempts to make some headway" until he was able to "explor[e] his childhood abuse and his offending behaviour against [his daughter]."

[113] Dr. Ellerby explained that the accused had spent a lifetime "keeping [his own experiences of trauma and abuse] secret, avoiding, minimizing the impact of and holding distorted and unrealistic perceptions about [them]", including that those early inappropriate sexual experiences were his fault. He was only able to make headway after he began to discuss, explore and address his own developmental history and avoidance and negative sense of self.

[114] While all of this information was available to the sentencing judge, and despite her review of some parts of the Ellerby report, she made only passing reference to the accused having been sexually abused as a child, but made no mention of the effect on the accused of that abuse or how it factored

into his emotional and psychological development and, ultimately, into his offending behaviour and his moral blameworthiness.

[115] Dr. Ellerby concluded that the accused was a very low risk to reoffend for sexual offences and that, from a treatment and risk management perspective, there would be no benefit to a custodial sentence. He stated that the most appropriate therapy intervention would be in the community.

IV. THE GLADUE REPORT

[116] The *Gladue* report provides further important insight into the accused's childhood and development as it was affected by his Indigenous heritage and the aftermath of colonialism. It explains and confirms Dr. Ellerby's findings that the accused suffered high levels of anxiety, depression, lack of regard for himself, a sense of shame and unworthiness, hopelessness about the future and a lack of confidence in his capacity to face his issues and make changes. The *Gladue* report also explains the systemic racism that became embedded in institutions like schools, the justice system and health care institutions and was experienced by the accused, leading to feelings of shame.

[117] The *Gladue* report discloses that the accused's mother is Métis and his father is Caucasian. The accused grew up with his parents and one sister in a small non-Indigenous community outside of Winnipeg, where prejudice against Indigenous people was prominent.

[118] The *Gladue* report states that the accused and his sister "experienced and internalized racism throughout [their] educational experience" and "[the accused] would often overhear the racist comments and perspectives of his

teachers and classmates which impacted him emotionally and spiritually". The accused reported that his father's family "would often shame them for speaking about being Métis", so he, his sister and his mother "all carried shame due to the racism that was and is directed towards Indigenous peoples and communities."

[119] According to the *Gladue* report, "[the accused] was always aware of his Métis heritage", but "his maternal family was reluctant or hesitant to discuss their family history" and he was taught to "keep [it] hidden". It concludes that the accused's "experience with colonization had detrimental impacts on his emotional, mental, and spiritual health."

[120] The *Gladue* report also states that the accused was significantly affected by the sexual abuse that he suffered between the ages of eight and twelve years at the hands of older male cousins from the Métis side of his family, which contributed to his maladaptive coping strategies.

[121] The *Gladue* report explains that, due to a lack of understanding about his own feelings, needs and emotions, rooted in the sexual abuse and the rejections that he experienced as a youth and teenager, the accused developed distorted beliefs and efforts to meet those needs. It confirms that the accused and his collaterals have all "noted a significant and marked shift in his overall sense of self and wellbeing since he has had access to cultural support and ceremonies".

[122] Finally, the *Gladue* report concurs with Dr. Ellerby's conclusion that the accused is an appropriate candidate for a community sentence.

[123] While an Indigenous accused is not required to establish a direct causal link between their circumstances as an Indigenous offender and the offending, in my view, that link is established in this case. The overt racism, learned behaviour of hiding his heritage and feelings, and family abuse that he suffered are all connected to his Indigenous heritage, which led to his distorted thinking and, ultimately, to the sexual abuse. Even if this is not a direct, causal link, there is clearly a significant tie to the offence and the offender.

V. EVIDENCE OF POST-SENTENCE REHABILITATION

[124] The Performance Report and the Elder Report relate to the accused's continued progress in treatment post-sentence, which is relevant to re-sentencing the accused. This Court found, in *R v KNDW*, 2020 MBCA 52, that, at the stage of re-sentencing, "the fresh evidence relating to the accused's post-sentencing rehabilitative efforts is relevant and meets the *Palmer* criteria" (at para 16) and, further, that it would be in the interests of justice that it be admitted. (See *Barendregt* at para 71.) In my view, these two reports would be admissible to address the re-sentencing of the accused.

VI. ANALYSIS

[125] As stated at paragraph 95 herein, in my view, the jurisprudence is clear that it is an error in principle to fail to consider an accused's Indigenous heritage as a factor in sentencing an accused. In this case, the sentencing judge was not made aware that the accused was Indigenous, so that information did not factor into the sentence that was imposed. That notwithstanding, the failure to factor the *Gladue* principles and an accused's experiences as an Indigenous offender into the sentencing process is still an error in principle.

[126] The *Gladue* report and the Ellerby report, together, show how the accused's experiences growing up as an Indigenous person and experiencing racism within his family, his school and his community caused him to learn from a young age to repress his Indigenous heritage and his emotions. Further, he experienced sexual abuse at the hands of his Indigenous cousins which, according to Dr. Ellerby, was the primary factor in the formation of his "maladaptive avoidant coping styles, distortions in perceptions and identity disruption" that led to his offending behaviour.

[127] Thus, the evidence of the accused's Indigenous heritage and experiences as an Indigenous person was relevant and important to determining the degree of the accused's moral blameworthiness and, as such, was important evidence in determining a fit sentence for this offender. Further, that evidence would have been admissible at sentencing, and the fact that the sentencing judge did not have it had an important impact on the sentence.

[128] For this reason, the sentence is not entitled to deference, and the accused is to be sentenced afresh (see *Friesen* at para 27, as set out at para 101 herein).

VII. RE-SENTENCING THE ACCUSED

[129] The sentencing judge summarized the principles of sentencing in child sexual abuse cases. Counsel have not suggested that she erred in that regard, and I take no issue with it. There is no doubt that, in *Friesen*, the Supreme Court reset the length of sentences for sexual offences involving children, explaining and emphasizing the deep and long-term harmful effects

of sexual abuse on children (see paras 56-58, 60-61; see also paras 108-09 herein).

[130] Regarding sentencing post-*Friesen*, the Court stated that proportionality for sexual offences that acknowledges both the gravity of the offence and the degree of responsibility of the offender would frequently require substantial sentences (see para 114). This was explained as follows in *Friesen* at para 114, citing with approval Moldaver JA in *R v D (D)*, 2002 CanLII 44915 at para 33 (ONCA):

> . . . . "[J]udges must retain the flexibility needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33). Nonetheless, it is incumbent on us to provide an overall message that is clear (*D. (D.*), at paras. 34 and 45). That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances.

[131] Dealing with the facts as found by the sentencing judge, I accept her factual findings regarding the circumstances of the offence and the impact on the victim. I also acknowledge her finding as to the very serious nature of this offence, and I take no issue with her findings as to the aggravating and mitigating factors, other than as they relate to the accused's moral blameworthiness and rehabilitation.

[132] In my view, there are three significant problems with the sentencing judge's analysis of the accused's moral blameworthiness.

[133] First, the sentencing judge did not address the mitigating aspects of the Ellerby report. While her references from that report are correct as far as

they go, she limits herself to those parts that set out the accused's problematic thought processes that led to his offending behaviour, which she found to be aggravating. She completely omits any reference to the significant parts of that report that are mitigating, in that they explain the cause of those thought processes. As noted earlier, Dr. Ellerby found that "[the accused's] unaddressed experiences of sexual abuse [as a child] resulted in the formulation of maladaptive avoidant coping styles, distortions in perceptions and identity disruption".

[134] While a judge is not required to address every piece of evidence, they are required to address the important evidence. In my view, the sentencing judge failed to do that, resulting in an error in the assessment of the accused's moral blameworthiness, which is an important element of proportionality (see *Friesen* at para 26).

[135] Second, in my view, the sentencing judge erred in her analysis of moral blameworthiness, which analysis was as follows (*JM* at para 41):

> . . . . While the post-offence therapy is a mitigating factor, when I consider the extent to which it impacts the accused's moral blameworthiness, I find that it does not reduce it in a significant way. The time to reach out for help was when the accused first started thinking that sexually abusing his own child was a better alternative to having an extra-marital affair with an adult in order to satisfy his sexual needs.

[136] The statement that the accused should have reached out before committing the offence, although superficially attractive, completely misses the meaning and purpose of rehabilitation, which is to restore someone to health or normal life after a defining event. Because rehabilitation arises after something has occurred, it is not correct to effectively dismiss it on the basis

that it should have occurred before the triggering event. Following the sentencing judge's reasoning, rehabilitation could never reduce moral blameworthiness, which is not the law (see *Friesen* at para 92, as set out at para 91 herein).

[137] This analysis is also unreasonable in light of Dr. Ellerby's conclusions. Dr. Ellerby's finding was that the accused's maladaptive thought processes, which are explained at paragraphs 110-11 herein, began as a young child experiencing four years of familial child sexual abuse. The long-term repression of those events became a roadblock that made it extremely difficult for him to understand or address the resulting emotional and psychological problems that he suffered. In my view, it was unreasonable to find that the accused's failure to act, given the long-term and deep repression of his psychological and emotional problems and dysfunctional thinking, reduced the significance of his rehabilitation as it related to those events and to his moral blameworthiness.

[138] Third, the analysis of moral blameworthiness is affected by the failure to take into consideration the accused's Indigenous heritage and the effect that it had on his moral blameworthiness, as explained earlier.

[139] As stated in *JW*, an error in principle includes erroneous consideration of a mitigating factor, in this case, moral blameworthiness (see para 51). For the reasons set out above, in my view, the conclusions in the sentencing judge's reasons regarding moral blameworthiness and rehabilitation were impacted by the failure to take into account the effects of the accused's Indigenous heritage. As a result, this Court is not required to defer to the findings on moral blameworthiness.

[140] In summary, there are three circumstances that, in my view, lead to a meaningful reduction in the accused's moral blameworthiness. First is the fact that the accused's problematic thought process, which led to his offending behaviour, was the result of the sexual abuse that he suffered during his childhood, leading to the deep and lasting problems that he suffered at the time of the offence that caused his offending behaviour. Second is the fact that the accused's offending behaviour is tied to his Indigenous heritage, both in terms of the racism that he suffered throughout his childhood and the familial sexual abuse. Both of these led to him repressing his thoughts and emotions, which made it difficult for him to recognize his maladaptive thought processes or to obtain treatment, as explained by Dr. Ellerby. Third is the accused's remarkable commitment to lifestyle change, long-term treatment and rehabilitation to address his dysfunctional thinking. Dr. Ellerby explained the change that occurred prior to sentencing, and the fresh evidence explains how that commitment has continued following the sentencing.

[141] Because there was no evidence at the sentence hearing that either the accused or the victim was Indigenous, there was no consideration of the application of section 718.04 of the *Criminal Code* in determining a fit sentence. That provision states:

> **Objectives — offence against vulnerable person**
> **718.04** When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary
>
> **Objectifs — infraction à l'égard d'une personne vulnerable**
> **718.04** Le tribunal qui impose une peine pour une infraction qui constitue un mauvais traitement à l'égard d'une personne vulnérable en raison de sa situation personnelle, notamment en raison du fait

consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.	qu'elle est une personne autochtone de sexe féminin, accorde une attention particulière aux objectifs de dénonciation et de dissuasion de l'agissement à l'origine de l'infraction.

[142] When both the victim and the accused are Indigenous, the application of this provision as it relates to section 718.2(e) is complicated and raises questions as to how each is to be weighed. This Court analyzed this issue in *Bunn* and concluded as follows (at para 110):

> In summary, section 718.04 mandates sentencing courts to give primary consideration to the objectives of denunciation and deterrence in circumstances where the victim is vulnerable because of personal circumstances—including because the person is Aboriginal and female. It is not intended to diminish *Gladue* principles. The application of *Gladue* principles will not necessarily result in a lesser sentence, but they may, depending on the circumstances. Nonetheless, the principles of denunciation and deterrence often mandate a harsher sentence in the interest of the protection of the public.

[143] In my view, when the accused's moral blameworthiness is assessed correctly, as set out above, and balanced with (i) section 718.04 and the fact that the victim is Indigenous; and (ii) the very serious circumstances of the offence and its effect on the victim, as found by the sentencing judge, I am of the view that a mid-single-digit penitentiary sentence of five and one-half years' incarceration is a fit sentence for this offence and this offender.

[144] While these reasons may appear to focus solely on the circumstances of the accused to the exclusion of the victim and the offence, that is because

this decision is responding to the issues on appeal. As far as the re-sentencing, these reasons must be read together with the findings in the sentencing judge's reasons regarding the nature of the offence and the impact on the victim, which are not at issue.

VIII. CONCLUSION

[145] For these reasons, I respectfully disagree with my colleague's conclusion that the appeal should be dismissed. I would grant leave to the accused to appeal the sentence, allow the accused's motion to admit fresh evidence and admit that evidence. I would also set aside the sentence of seven years' incarceration and impose a sentence of five and one-half years' incarceration.

Beard JA