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), (2.1), (2.2), (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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
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> (a) any of the following offences;
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> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
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> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.
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> (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim

shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, 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.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 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.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. D.M., 2023 ONCA 599
DATE: 20230918
DOCKET: COA-22-CR-0437

Fairburn A.C.J.O., Simmons and Trotter JJ.A.

BETWEEN

His Majesty the King

Respondent

and

D.M.

Appellant

D.M., acting in person

Dan Stein, appearing as duty counsel

Frank Au, for the respondent

Heard: September 7, 2023

On appeal from the conviction entered by Justice Elaine Deluzio of the Ontario Court of Justice, dated January 21, 2022, and from the sentence imposed on February 18, 2022.

REASONS FOR DECISION

[1] The appellant pled guilty to two offences: (i) making child pornography pursuant to s. 163.1(2) of the *Criminal Code*, R.S.C. 1985, c. C-46; and (ii) making

arrangements to commit sexual offences against children pursuant to s. 172.2(1)(b) of the *Code*.

[2] The child pornography count involved the appellant discussing with others online that he was committing sexual crimes against his own children and his partner's child. He later told an undercover police officer that he would book a hotel room to take his children to so another person could have a sexual encounter with them. In the end, he did not book the room and denied ever having sexually interfered with his children.

[3] The crimes are undoubtedly very serious.

[4] The appellant appeals from both conviction and sentence.

[5] On July 5, 2023, we heard submissions on both matters.

[6] On the conviction appeal, the appellant argued that his guilty plea was not voluntary and unequivocal. We dismissed the conviction appeal on the same day it was heard with the following reasons:

> The appellant argues that his guilty plea was involuntary and equivocal. He says he was pressured into his plea. There is no evidence to support this suggestion. As for whether the plea was equivocal, the record demonstrates the care with which the trial judge dealt with this matter. Although there was some equivocation, the trial judge was careful to explore the matter and resolve it before proceeding. In the end, read in its entirety, the record supports an unequivocal guilty plea.
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> The conviction appeal is dismissed.

[7] The sentence appeal was also argued that day. For the first time, during the course of his submissions, the appellant raised his Indigeneity, something that, despite his having been represented by counsel at that point, was not addressed at the sentencing hearing before the trial judge. Therefore, on the consent of both parties, an order was made for a post-sentence report that specifically addressed *Gladue*-related matters. The sentence appeal was adjourned to September 7, 2023 to provide time to have the report prepared and considered. The panel remained seized of the matter.

[8] It does not appear that any steps were taken to comply with the court's order for the preparation of the post-sentence report. Instead, the court was provided with multiple institutional documents that address a broad range of topics, including the fact of the appellant's Indigeneity and his connection to his culture in the institutional setting.

[9] Despite the absence of the post-sentence report, the appellant asked that the appeal go ahead and that he and duty counsel be permitted to rely upon the documents filed. He did not wish to delay this matter any further, in part due to the fact that he is now parole eligible and will soon be transitioned to another setting.

[10] It is concerning that the Correctional Service of Canada did not comply with the court's prior order. If there had been confusion around the nature of the report ordered, it was the obligation of the Correctional Service of Canada to make

appropriate inquiries and seek clarification. To state the obvious, court orders are to be complied with.

[11] Even so, we accede to the appellant's request because, at this stage of the appellant's sentence, with him waiting to be transitioned out of Warkworth Institution, the matter must come to a conclusion.

[12] On October 25, 2021, the appellant pled guilty to sexual interference, arising from having had multiple sexual encounters with a 15-year-old girl. He was 29 years of age at the time of conviction. He was sentenced to two years plus a day, in addition to 140 days of pre-sentence custody.

[13] Although the sexual interference occurred after the offences that form the subject of this appeal, the appellant was charged with the sexual interference before the matters that bring him before this court. Therefore, when he appeared before the court on this matter, he was already serving his two-year sentence on the sexual interference.

[14] The trial judge noted that if the matters had been dealt with together (the two guilty pleas collapsed into a single hearing), the appellant likely would have received a global four-to-five-year sentence on everything. On that basis, she decided that an additional three-year sentence was appropriate, to run consecutive to the sentence that the appellant was already serving.

[15] In coming to this determination, the trial judge said that she was taking "into account what is the only mitigating feature, which is [the appellant's] relatively young age". He was 29 at the time of sentencing. She also said that there were "mostly aggravating features here" and that the sentence "hopefully will allow [the appellant] to take advantage of some treatment while he is in custody." The latter observation pertains to a poor psychological report that the appellant received, as well as his lengthy criminal record.

[16] With the assistance of duty counsel, the appellant advances two arguments on the sentence appeal, in the end asking that the sentence be decreased by one year.

[17] The first argument is that the sentencing judge erred by failing to take into account multiple mitigating factors when arriving at the three-year sentence.

[18] The respondent agrees that the trial judge only mentioned the appellant's youth when adverting to the mitigating factors in the case, but argues that this was a product of how the defence argued the matter at the sentencing hearing. Therefore, while there are other factors in mitigation, the trial judge was just being responsive to what defence counsel had focussed upon in his submissions.

[19] Respectfully, we do not agree. There were significant mitigating factors that should have informed what a fit sentence was in this case, not the least of which was the appellant's very early guilty plea. Indeed, he pled guilty before the victim,

or anyone else, had to testify and before a trial date was even set. There was also uncontested evidence that the appellant had been the subject of child sexual abuse at the hands of his mother's partner. We acknowledge that defence counsel accepted that the mitigating effect of the appellant's guilty plea was reduced because he attempted to minimize his role in the offences during the psychological assessment. Nonetheless, his early guilty plea remained a mitigating factor and neither it, nor his difficult background, were identified as mitigating factors in the sentencing reasons and do not appear to have formed any part of the reasoning process. To the contrary, and erroneously, the reasons suggest that the "only mitigating feature" was the appellant's fairly young age.

[20] The appellant's second argument is that the trial judge failed to take *Gladue* principles into account. While it is true that *Gladue* considerations formed no part of the sentencing reasons, the trial judge cannot be faulted for this fact. No one, most notably defence counsel, brought the appellant's Indigeneity to the trial judge's attention. In any event, the appellant says that we should take this into account now and adapt the sentence accordingly.

[21] While the respondent consents to the court looking at the information provided, it is said to be irrelevant to the sentence imposed. While the appellant is Indigenous and benefitting from the current programming available to him while in custody, the respondent argues that there is a disconnect between the appellant's Indigeneity and his offending. The appellant's Indigeneity operates through a

paternal line and had little to no impact on his life until he was well into adulthood. Indeed, he did not see his father from the time that he was a very young child until he found himself incarcerated in the same custodial institution with his father later in life. Therefore, the respondent argues, there is nothing in the appellant's Indigenous status that could "reasonably and justifiably impact on the sentence imposed": *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 311, at para. 72.

[22] The appellant counters that there need not be a direct causal link between one's Indigeneity and the offence committed: *Ipeelee*, at para. 83.

[23] That is true, there need not be a direct causal link.

[24] At the same time, we are left with too little information in this file to confidently make any factual findings. With that said, what we know for certain is that the appellant has wholly embraced his Indigenous identity, culture and traditions while in prison, all of which has been accommodated in various ways, including through counselling, ceremonies, and work with an elder. The records show that he now "regularly attends the Cultural Centre where he has meaningfully engaged with the staff" and that this is "positive" because he can assist other offenders now with "understanding their Indigenous Culture", something considered a "pro-social use of his time". By all accounts, he is doing well, having earned multiple certificates of completion, including from a Trauma Recovery Group and Growing Your Culture Group.

[25] In our view, this appeal must be granted. First, mitigating factors were not considered that should have been. Most particularly, the appellant's early guilty plea should have factored into the calculation of a fit sentence.

[26] As well, whether a *Gladue* report could have informed the fit sentence or not, the appellant's Indigenous status was left unidentified at trial, and we are now left without a *Gladue* or even quasi-*Gladue* report on appeal.

[27] Given the unusual circumstances of this case, the stage we are at, and the clear progress that the appellant has made in relation to connecting with his culture, combined with a full appreciation of the mitigating circumstances at work, we are prepared to reduce the sentence by six months.

[28] The conviction appeal is dismissed. Leave to appeal sentence is granted. The sentence appeal is allowed. The three year sentence is reduced to 30 months, which will run consecutive to the two years plus a day sentence imposed for the sexual interference conviction.

"Fairburn A.C.J.O."
"Janet Simmons J.A."
"Gary Trotter J.A."