IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***Z. M. Jones***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***N. M. Cutler***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
WAYNE DANIEL RENNIE	)	***January 17, 2017***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***April 28, 2017***

MONNIN JA

[1] The accused seeks leave to appeal and appeals a sentence of 30 months' incarceration less seven months' credit for pre-sentence time in custody, imposed following pleas of guilty to charges of mischief, assault peace officer with a weapon and flight from police.

[2] The accused appeals his sentence on the basis of one issue only; namely, that the sentence is demonstrably unfit due to the sentencing judge's failure to accept that the *Gladue* principles applied to his case (see *R v Gladue*, [1999] 1 SCR 688). The accused argues that, because the sentencing judge failed to properly consider how *Gladue* factors applied to him, he imposed an unfit sentence. He argues that instead of the 30-month penitentiary term that was imposed, the sentencing judge should have

imposed a provincial jail term of two years less one day.

[3] For the reasons that follow, I would grant leave to appeal but dismiss the appeal.

[4] The facts that brought about the laying of the charges against the accused were set out by counsel for the Crown at the sentencing hearing:

> MR. TURNER: Your Honour, on the 20th of July, 2015 at 8:45 a.m., [the accused] was issued a provincial offence notice for distracted driving. He had been seen driving with a small handheld electronic device near Emily Street and Notre Dame Avenue. At that time [the accused] was driving a 5-Ton truck owned by his employer, a courier company.
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> The ticket was issued by a female constable and the officer indicated that [the accused] was very upset and said to the officer as she was walking away from him: Now you'll see what I have to do.
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> At around 11:15 a.m. [the accused] was seen driving this same 5-Ton cube van and positioned the vehicle to reverse into five cruiser cars that were parked on Princess Street outside the Public Safety Building. The rear metal bumper of the cube van struck the passenger side doors of the unoccupied police cars moving them in position.
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> . . .
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> Manitoba Public Insurance has since repaired all the five police vehicles so they were not write-offs as they initially suspected, Your Honour. The total cost was for all five vehicles combined, $66,269.
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> Several civilians and a bus driver saw this occur and gave statements to the police giving various details about the vehicle and the driver involved. One witness describes the van driver as being very happy with a big smile on his face as he pulled away.
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> There were a least two videos of the accused as he left the scene

in the cube van, one of which would -- was obtained by Global TV, the other actually showing the last two cruiser cars being struck by the metal step at the rear of the cube van.

Nearby officers outside City Hall received first notice of the crime and got there quickly enough to see the truck striking the police cars.

The 5-Ton cube van then drove through Winnipeg westward resulting in police pursuit with several vehicles through Winnipeg with lights and sirens activated.

When the van reached Headingley, Manitoba near the Blumberg Trail a cruiser responding to the incident containing Constable Fiebelkorn and Trinidad approached the van in the opposite direction at about 12:17 [p.m.] The vehicle turned toward police who had to steer away to avoid a head-on collision.

The pursuit continued on Highway Number 1 west for another hour reaching speeds of 110 kilometres per hour followed by several units for both RCMP and Winnipeg Police Service. [The accused] drove this van off the road in at least two occasions, driving into oncoming eastbound traffic. When travelling in the wrong direction several vehicles were observed swerving to avoid the truck travelling in the opposite direction.

Police made numerous attempts to block off the truck and made several attempts to use spike belts and stop sticks to try and disable the vehicle. But [the accused] was able to avoid them and continued driving.

The van was finally stopped at five kilometres west of the city of Portage la Prairie on the number 1 highway near the bridge of -- for the Portage diversion in the R.M. of Portage la Prairie.

After a third attempt to avoid a stop stick [the accused] drove the van into the ditch but ended up sideways across the eastbound oncoming traffic.

Police vehicles from Portage la Prairie and Headingley RCMP and Winnipeg Police were able then to block in the van stopping it from moving.

> Once stopped Mr. Rennie was arrested. On arrest he refused to respond to right to counsel, caution and notice of arrest. [The accused] was taken back to the Public Safety Building upon arrest and given right to counsel.
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> Once at the Public Safety Building [the accused] gave a video statement in which he admitted striking the five cruiser cars with his work van, indicating his frustration at getting the ticket as the reason for his behaviour. [The accused] admitted he knew police were in pursuit and he was trying to provoke police by his manner of driving; his goal being to drive until he ran out of gas thinking police would run out of gas first.

[5] The accused was 24 years of age at the time of the offences, born in Winnipeg to a Métis father and a mother of unknown ethnic background. He was first apprehended by Child and Family Services from his mother's care when he was six months old and placed in foster care with the Rennies, a Caucasian family. Two attempts were made to reunify him with his birth mother. Both attempts were unsuccessful and he was returned to live with the Rennies permanently. They adopted him when he was three and one-half years old. Mrs. Rennie was aware that the accused's birth mother had abused Ritalin and possibly other substances when she was pregnant with him and believed the accused had FASD. However, there was never any formal diagnosis with respect to that condition. He was diagnosed with cognitive limitations and learning disabilities and required additional supports to finish high school. He was bullied and picked on by other children while attending school and developed a pattern of behaviour where he would tolerate mistreatment for an extended period of time and then blow up out of proportion to a particular situation. He also struggled with alcohol abuse beginning in his teens as well as a gambling addiction.

[6] Notwithstanding the fact that the accused waived the preparation

of a formal *Gladue* report, he asserts that his counsel placed before the sentencing judge the systemic and background factors that contributed to the accused being disadvantaged due to being an Aboriginal person of Métis background.

[7] In dealing with the applicability of the *Gladue* principles to the case before him, the sentencing judge stated:

> So in terms of [the accused]'s personal circumstances I accept for sentencing purposes that he has some intellectual deficits and I approach that on the basis that his moral culpability is lessened to some degree. I do not accept on the information before me that this relates back to Gladue factors. In considering the Gladue considerations [the accused] in my view has not been materially disadvantaged in the way that is described in any of the leading cases dealing with Aboriginal offenders. Quite the opposite, [the accused] although his birth mother was unable to parent resulting in [the accused] coming in to care and later being adopted by a different family, by all accounts the family life that he experienced growing up was a very caring family and in fact his family is here today in court in support of [the accused]. And that, in my view, is not a consideration that would in any way impact on his degree of responsibility, that being the Gladue considerations and disadvantaged circumstances. I do accept that he has some intellectual deficit and that is an appropriate consideration to some degree. So when I say I do not accept the Gladue submissions that are made, I specifically, I'm not approaching this on the basis that [the accused] suffers from fetal alcohol spectrum disorder. He has not been diagnosed with that. It is speculation, it may very well be true, that information is not before me and it would in my view be inappropriate to rely on that as a consideration for sentencing purposes although as I've said several times, I do approach the matter on the basis that he has some intellectual deficit which he now recognizes.

[8] The accused relies on *R v Kreko*, 2016 ONCA 367, in which that Court found that the sentencing judge's conclusion in that case, that the

accused's Aboriginal heritage was irrelevant to his sentencing, was an error. Pardu JA set out the personal circumstances of the accused in this fashion (at paras 4, 8-9, 12):

> The appellant's mother, who was Aboriginal, was only 15 years old when he was born on August 18, 1989. She could not adequately care for him, and the appellant was placed in foster care because of concerns about her lifestyle. Around the time of his first birthday, the appellant was placed for adoption with a non-Aboriginal couple.
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> The appellant grew up not knowing he was adopted. He assumed that his heritage was Finnish and French, like his adoptive parents, but he was often challenged by other kids on this point, who suggested he had other ancestry.
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> When the appellant was between 16 and 18 years old, his adoptive father told him of the adoption. This came as a shock to him, and the realization of the loss of both his adoptive mother and his birth mother led to feelings of abandonment, resentment, and a sense that he was unwanted.
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> The appellant has struggled with his identity and his adoption. However, he has now found his birth mother, and has successfully completed a number of rehabilitative Aboriginal programs. He has embraced his Aboriginal heritage.

[9] The position of the Crown and the accused in *Kreko* were set out as follows (at paras 13-14):

> At the sentencing hearing, the Crown submitted that the appellant's Aboriginal heritage was irrelevant to the appropriate sentence. In the Crown's view, the appellant had been raised by his adoptive parents, had only recently learned of his Aboriginal heritage, and had not faced any of the systemic disadvantages or impediments experienced by other Aboriginals. The Crown therefore submitted that there was no connection at all between the appellant's Aboriginal background and his offences.

> The defence submitted that the appellant's background was relevant to his moral blameworthiness, and that there were unique systemic and background factors which had played a role in the offences before the court. The defence submitted that the appellant had an identity crisis when he learned of his adoption and his Aboriginal heritage, which coincided with his involvement in the criminal justice system. The defence further submitted that the appellant's own dislocation was characteristic of the systemic disadvantage experienced by persons of Aboriginal heritage.

[10] The sentencing judge's reasons for sentence in *Kreko* are summarized as follows (at para 15):

> The sentencing judge gave no weight to the appellant's Aboriginal background when he considered the length of the sentence to be imposed:
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> > Although a direct, causal link is not required, there is no such tie in this case. Mr. Kreko may very well suffer and feel abandoned by his adoptive mother and his biological mother. I can sympathize with him in this, even as his father was doing his best to raise his son to be well-educated, involved in sports, supported in music and recording, and pro-social. There was nothing tied to his Aboriginal genetic heritage, let alone considerations in *Gladue* and *Ipeelee* [*R v Ipeelee*, 2012 SCC 13], that led the accused, Mr. Kreko, to the negative side of hip-hop, including its fascination with guns. Perhaps, as the *Gladue* report suggests implicitly, his desire to drive a Jaguar like a big shot, not turn in his drug associates, and possess a gun on behalf of a criminal associate, relates to a need to belong. These things relate to gang culture and do not relate to his Aboriginal background.
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> [emphasis in original]

[11] In allowing the appeal, the Court provided as follows (at paras 21, 24, 27):

The jurisprudence makes it clear that no causal link is required. In *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, the Supreme Court held that it was an error to require an Aboriginal offender to establish a causal link between his or her background factors and the commission of the offence(s) in question before he or she is entitled to have those factors considered by the sentencing judge. The court suggested, at para. 82, that requiring a causal connection demonstrated "an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples", and also imposed an evidentiary burden on the offender that was not intended by *Gladue*.

In the present case, the appellant's dislocation and loss of identity can be traced to systemic disadvantage and impoverishment extending back to his great-grandparents. This was relevant to his moral blameworthiness for the offences. The intervener has referred to some studies suggesting that adoptions of Aboriginal children by non-Aboriginal parents have a significantly higher failure rate than other adoptions. The appellant's Aboriginal heritage was unquestionably part of the context underlying the offences. The sentencing judge erred by failing to consider the intergenerational, systemic factors that were part of the appellant's background, and which bore on his moral blameworthiness, and by seeking instead to establish a causal link between his Aboriginal heritage and the offences.

According to the Supreme Court in *Ipeelee*, at para. 87, failure to consider the unique circumstances of Aboriginal offenders, when required, is an error justifying appellate intervention:

> The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender ... and a failure to do so constitutes an error justifying appellate intervention.
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> [emphasis added]

[12] In the case at bar, the Crown, in support of its position that the sentencing judge did not err in finding that the accused was not disadvantaged, relies on the Alberta Court of Appeal decision in *R v Laboucane*, 2016 ABCA 176. The Court initially sets out what it was attempting to achieve in its reasons (at paras 4-5):

> Our broader aim is to provide helpful guidance to the Alberta bench and bar when considering *Gladue* principles and the interrelationship of *Gladue* principles with other sentencing principles and objectives set out in the *Criminal Code.*
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> In furtherance of this aim, we urge front line judges, when sentencing Aboriginal offenders, to be ever mindful of two fundamental and inter-related obligations: the first obligation is to carefully consider *Gladue* factors in all Aboriginal sentencing cases unless the offender expressly waives the right to have *Gladue* factors considered: ***Ipeelee*** at para 60; the second obligation is to provide transparent and understandable reasons — amenable to appellate review — as to whether, and how, identified *Gladue* factors impacted the creation of a just sanction for that particular offence and that particular offender.

[13] The positions of the Crown and the accused in that case were set out as follows (at paras 18-19, 21):

> On appeal, appellant's counsel submitted that the sentencing judge disregarded the *Gladue* report, as reflected in these comments: "I carefully reviewed the 30 page *Gladue* report. In my view, there are no meaningful *Gladue* factors to be considered in sentencing. Mr. (Laboucane) has an Aboriginal heritage and however there, in my view, are no significant *Gladue* factors for the purposes of sentencing."
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> Appellant's counsel asserted that the report was relevant and the sentencing judge had a duty to consider it, particularly because the appellant is an Aboriginal man with a connection to the Métis

> community, who has an Aboriginal name, whose struggles in school had to do, in part, with feelings of being the only Aboriginal kid at the high school, and who witnessed incidents of domestic violence against a half-sibling.
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> Crown counsel contends that ***Ipeelee*** does not mandate that identified *Gladue* factors will have a particular impact, namely a reduction, on a sentence for a particular offence. Rather, paras 83 and 86 of ***Ipeelee*** provide that while a direct connection between *Gladue* factors and the offence need not be proven, *Gladue* factors must still be tied in some way to the particular offender and offence, in a manner that bears on the culpability of the offender and the sentencing principles that ought to be actualized. Crown counsel acknowledges that although the sentencing judge could have used better terminology in the sentencing decision, it is clear on the record that having reviewed the *Gladue* and pre-sentence reports, the sentencing judge found no intergenerational, systemic or background factors that bore upon this particular offender or his particular criminal conduct.

[14] The Court then considered the personal circumstances of the accused. It wrote (at para 40):

> The report reveals that he experienced a "good and normal" childhood, free from familial substance abuse and domestic violence; his family followed "mainstream practices" and his father (the only indigenous parent) was not raised in the Métis culture; rather, he was raised on and worked the family farm. Laboucane describes his mother and father as "good parents" who were "hard-working people" and he never witnessed domestic violence or alcoholism in his childhood home. Laboucane and his family did not participate in indigenous culture. None of this offender's relatives attended residential schools. His parents are described as "drinking normally", business owners who recently semi-retired.

[15] The Court then goes on to distinguish *Kreko* in the following terms (at paras 65-68):

In our view, the recent decision of the Ontario Court of Appeal in ***R. v. Kreko***, 2016 ONCA 367 does not provide a basis to amend the appellant's sentence, although it may be seen to lend some support to the appellant's submissions on this appeal.

Kreko is readily distinguishable because there the Court found a measurable connection between the dislocation and loss of identity of the Aboriginal offender and "systemic disadvantage and impoverishment extending back to his great-grandparents." (para 24)

But, we feel compelled to say more about the position adopted in ***Kreko***. With great respect to that appellate court, we are concerned that the decision in ***Kreko*** expands the level of generality of the basis upon which s 718.2(e) of the *Code* must be applied — almost to a level of pure ethnicity. Under a probing analysis, the concept which they say still links the proportionality principle required by s 718.1 of the *Code* to the restraint principle embodied in s 718.2(e), is at such a level of abstraction as to lose focus on the overall balance struck by these respective *Criminal Code* provisions. De-linking in any way the actual facts of any case from the objectives and principles of this special part of the *Criminal Code* (s 718.2(e)) puts at risk the overall purpose of the part, as reflected in the prefatory words of s 718 of the *Code*. This de-linking could have unintended consequences.

In our view, the approach taken in ***Kreko*** runs perilously close to creating an obligation of sentencing courts to somehow deploy s 718.2(e) in mitigation of specific *cases*, without the circumstances in those cases making the basis of such deployment an actual "factor" relevant to sentencing.

[16] The Court then concludes (at para 70):

We are not persuaded that it was Parliament's intention to impose on sentencing courts a virtually standardless quest for a case-specific balance of broader social concerns (expressed in s 718.2(e) of the *Criminal Code*) with the pre-eminent principle of proportionality (set out in s 718.1), without the former having any materiality to the latter. Nor could it have been intended that

> appeal courts delve into the conundrum of whether a proper balance was struck in a given case, without regard to the traditional prescription of relevance embedded in s 718.1 of the *Criminal Code*, and devoid of any means to assess palpable and overriding error of fact on an alleged nexus to the case. We do not read para 83 of ***Ipeelee*** to say otherwise. See para 63, point 4.

[17] Before directly addressing the issue that is before us on this appeal, I remain cognizant that in considering the merits of the appeal I must also be guided by what the Supreme Court of Canada stated in *R v Lacasse*, 2015 SCC 64 (at paras 11-12):

> This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. Since they have, *inter alia*, the advantage of having heard and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.
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> In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of

> trial courts. With respect, I am of the opinion that the Court of Appeal was wrong in this case to reduce the sentence imposed by the trial judge by basing its intervention on the fact that he had departed from the established sentencing range.

[18] A close reading of what the sentencing judge said leads me to conclude that he was not as dismissive in the consideration of the *Gladue* factors as counsel for the accused has attempted to make him out to be and certainly what he said is not as negative as what was expressed by the sentencing judge in *Kreko.* Although the sentencing judge indicated that he was not accepting the *Gladue* submissions that were made, he also made the finding that "[the accused] in my view has not been materially disadvantaged in the way that is described in any of the leading cases dealing with Aboriginal offenders."

[19] The comments of the sentencing judge are not as categorical in dealing with the *Gladue* factors as those of the sentencing judge in *Kreko* and accordingly, in my view, what the Ontario Court of Appeal stated in that case has a somewhat limited application in the case before us.

[20] A sentencing judge cannot simply ignore the fact that an offender has an Aboriginal background, but on the other hand, she or he is not bound to find that such a background will automatically lead to a conclusion that the offender has been disadvantaged because of that background. On that basis I am not prepared to state categorically that what was stated in *Laboucane* is erroneous. While the facts of this case do not require a conclusive analysis, in my view, the state of the law with respect to the application of *Gladue* to sentencing is somewhere between the statements found in both *Kreko* and *Laboucane.* A sentencing judge must consider the

Gladue principles when dealing with an Aboriginal offender, but there will be instances, as in the case before us, where little weight is to be attributed to those principles because of the facts surrounding the offender in question.

[21] In the case at bar, the sentencing judge possibly could have phrased his comments in a fashion that was less subject to a negative interpretation, but I have not been convinced that he out-and-out rejected the consideration of *Gladue* factors and, therefore, was not in error. Even if I am wrong in my analysis of this issue, I still remain unconvinced that there existed "a measurable connection between the dislocation and loss of identity" of this accused and "systemic disadvantage and impoverishment" extending back to his birth (see *Laboucane* at para 66).

[22] However, I must state that, had I found that the sentencing judge had declined to consider the applicability of *Gladue* to this accused, I still would have found, based on *Lacasse*, that the sentence he imposed was fit and proper.

[23] I make one last comment. While ultimately the sentencing judge must assess whether further inquiries are appropriate or practical, in situations such as this, where counsel provides scant information and elects not to have a *Gladue* report prepared regarding an accused's Aboriginal heritage, it becomes more difficult for him or her to later claim that the sentencing judge failed to properly consider those issues.

Monnin JA

I agree: Cameron JA

I agree: leMaistre JA