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The Application of Gladue to Bail: Problems, Challenges, and Potential

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THE APPLICATION OF *GLADUE* TO BAIL: PROBLEMS, CHALLENGES AND POTENTIAL

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ABSTRACT

This paper argues that the principles articulated by the Supreme Court of Canada in *R. v. Gladue* and re-iterated in *R. v. Ipeelee* are being interpreted and implemented at the bail phase in a manner that exacerbates, rather than ameliorates the systemic failures of the criminal justice system in its dealings with Aboriginal people. Aboriginal people are grossly over-represented in Canadian prisons including those being detained in remand custody. It is now settled that the principles expressed in *Gladue* are applicable outside of the context of sentencing and in many jurisdictions have been found to be applicable to judicial interim release proceedings. Reviewing the existing bail jurisprudence involving Aboriginal accused persons, I uncover the ways that *Gladue* is being applied and misapplied. I also consider how the current crisis in the bail system in Canada disproportionately impacts Aboriginal people and how judicial consideration of *Gladue* and bail has not alleviated this crisis. The paper concludes with a proposal for a more robust framework for the interpretation of *Gladue* in judicial interim release proceedings.

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TABLE OF CONTENTS

CHAPTER ONE - INTRODUCTION

For six Aboriginal and racialized young people, it started out as a regular New Year's Eve. Like so many other Torontonians, they gathered in downtown Toronto with plans for a big exciting evening of partying and celebration. They met up and decided to smoke pot. Looking for a somewhat private place to do so, they entered an unlocked door into a construction site. Unbeknownst to them, their entry set off an alarm and the police were alerted and arrived at the scene. All six were arrested. They were all charged with violating s. 348(a) of the *Criminal Code*, break and enter with the intent to commit an indictable offence. This offence carries a maximum penalty of 10 years imprisonment.

Instead of being released from the scene with promises to appear in court, all of them were held in custody pending a bail hearing. They all appeared in Weekend and Statutory Holiday ("WASH") court for the purpose of a bail hearing but none were released at that time. They were then remanded to the regular bail stream. One was detained after a contested show cause hearing due to his criminal record. One received Aboriginal diversion for the charges meaning that his charges were stayed upon his agreement to meet with a Community Council who would work with him to decide what would be done as a result of his behaviour. A number of the young persons pleaded guilty at the earliest opportunity to the lesser included offence of mischief. All of the young persons spent a number of days in remand custody before their charges were dealt with in one way or another.

An Aboriginal woman with no criminal record was charged with a domestic assault against her (non-Aboriginal) male partner and was arrested and held for a bail hearing. She had a small child. She was in an abusive relationship and there was evidence that her partner had been abusive towards her in the past. Unfortunately, the woman had no surety available to bail

her out and the Crown contested her release on her own recognizance. She waited almost a week in custody for her bail hearing to be reached and was eventually released on a recognizance with numerous conditions. One of the conditions, typical in this type of situation, was that she not have any contact with her partner "except through a mutually agreed upon third party for the purpose of arranging contact with the child" or "through a family court order". Approximately two weeks after her release, she had still not been able to see her child; her abusive partner would not agree to any third party to arrange contact and she had also not been able to obtain a family court order.

An Aboriginal woman was arrested on a weekend for failing to comply with a term of her probation. She was on an 18 month probation order that was expired at the time of her arrest, which included a term that she attend counseling and provide proof of counseling to her probation officer. She attended counseling and otherwise abided by all of the terms of her lengthy probation order. This was quite an achievement as the woman was homeless and suffered with longstanding substance abuse issues. The alleged breach was that she had not provided her probation officer with adequate proof that she had indeed attended counseling. When the woman appeared in WASH court, she was remanded without her consent, straight to *Gladue* court[1] which sits on Thursdays[2] meaning she spent at least five days in custody with no possibility of anything happening with her charges during that dead time. The day she appeared for *Gladue* court, a lawyer was able to confirm she had attended counseling. This was done with one phone call. With this verbal confirmation, the Crown Attorney withdrew the charge.

[1] Following the Supreme Court decision in *R. v. Gladue*, (1999), 133 C.C.C. (3d) 385 (S.C.C.), in some jurisdictions, courthouses created specialized court sittings dedicated solely to adjudicating bail hearings and sentencing proceedings for Aboriginal accused/offenders. In Toronto,"*Gladue*" courts sit only once or twice per week.

[2] At the College Park courthouse, *Gladue* court sits every Thursday.

It is stories like these[3] that have inspired me to embark on an examination of the many issues and systemic barriers faced by Aboriginal people trying to access bail. The three stories relayed above are people that I have come across in my time as a duty counsel lawyer working at the College Park courthouse in downtown Toronto. These three encounters illuminate many of the current problems generally in the arrest, detention, and bail process for persons accused of committing criminal offences but they also highlight how these problems may be operating to have very particular and disproportionate consequences for First Nations, Metis, and Inuit accused persons including systemic bias in policing and in the criminal justice system.

Aboriginal people are grossly over-represented in Canadian prisons[4]. As an attempt to remedy this, section 718.2(e)[5] of the *Criminal Code* was enacted in 1996 requiring all sentencing courts to consider incarceration as a last resort penal option for all offenders, "with particular attention to the circumstances of Aboriginal offenders." In *R. v. Gladue*[6] the Supreme Court of Canada interpreted s.718.2(e) as a remedial provision and provided that courts *must* take judicial notice of the "background and systemic factors" relating to Aboriginal people which may have contributed to bringing the particular offender before the courts.[7]

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[3] All three stories are real clients that I have encountered in my role as Duty Counsel at the College Park Courthouse in downtown Toronto. Any identifying details have been omitted to protect the identity of the clients. I did not necessarily represent the above clients.

[4] For a review of Aboriginal over-representation in Canadian prisons, see Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013) at pp. 11-15.

[5] The full text of all legislation referred to can be found in the Appendix.

[6] [1999] 1 S.C.R. 688. Throughout this paper, I use "*Gladue*" to refer to this initial case and its progeny including the more recent Supreme Court of Canada case *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433. When I refer to the specifics of the case, I refer to the style of cause, *R. v. Gladue*.

[7] See also *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 60, where the court re-iterated the principles initially articulated in *Gladue*, referring to these background factors as the "history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide…".

It is now settled that the principles expressed in *Gladue* are applicable outside of the context of sentencing and in many jurisdictions have been found to be applicable to judicial interim release proceedings. The earliest reported case to find *Gladue* applicable to bail is from British Columbia in *R. v. Wesley*.[8] In Ontario, the earliest case to decide this was *R. v. Pittawanakwat*[9]. The only appellate authority specifically affirming the applicability of *Gladue* to bail is a very brief ruling penned by Winkler C.J.O. in *R. v. Robinson*.[10] However, it has been affirmed that judges are to apply *Gladue* whenever an Aboriginal person's liberty is at stake.[11] Most provinces have followed suit.[12] The only case I have found which finds that *Gladue* is explicitly not applicable to bail is from New Brunswick in *R. v. Sacobie*[13] and in Manitoba, *Gladue* is essentially inapplicable, having very little impact at the bail phase.[14] Unfortunately, courts appear to be struggling with how *Gladue*, a sentencing decision, should be applied to bail hearings and there is no fulsome appellate guidance on this issue. The bail process, including policing and time spent in pre-trial custody, is therefore a fertile site for exploring how *Gladue* can be applicable, and in exploring the ways that judicial interim release may have disproportionately negative consequences for Aboriginal men and women in Canada.

Examining *Gladue* and judicial interim release is important for a number of reasons. Firstly, the number of adults in remand custody now outnumbers those who are in custody

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[8] 2002 BCPC 717, [2002] B.C.J. No. 3401.
[9] 2003 CanLII 12645 (ONSC).
[10] 2009 ONCA 205 (In Chambers).
[11] *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534 and *United States v. Leonard*, 2012 ONCA 622, affirmed in *R. v. Anderson*, 2014 SCC 41.
[12] In Alberta, see *R. v. P.(D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86; in Saskatchewan, see *R. v. Daniels*, 2012 SKPC 189; in the eastern provinces, see: *R. v. Rich*, 2009 NLTD 69, [2009] N.J. No. 117; and in the Yukon, see: *R. v. Magill*, 2013 YKTC 8, [2013] Y.J. No. 127.
[13] [2001] N.B.J. No. 51 (Q.B.).
[14] See: http://www.winnipegfreepress.com/local/native-bail-reform-urged-226420671.html. See also Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at p.76.

serving sentences and Aboriginal people are over-represented within the remand prison population. As of 2008/2009, Aboriginal adults comprised 21% of the total number of adults in remand custody although Aboriginal people only comprised 3% of the total adult Canadian population.[15] Secondly, bias within the criminal justice system including the bail process, exists in a manner that discriminates against Aboriginal people. As noted by the Supreme Court of Canada in *R. v. Gladue*, institutional bias has resulted in more Aboriginal people being denied bail.[16] Lastly, whether or not the decision in *Gladue* can assist in alleviating the many barriers to bail faced by Aboriginal people, it is important that courts are interpreting it in a manner which does not further exacerbate the already existing entrenched marginalization within the criminal justice system. My research will aim to answer the following question:

> In what ways have the courts considered the principles as articulated in *R. v. Gladue* in the context of judicial interim release?

In general terms, it has been noted that in many areas in Canada, the law of bail is not being applied properly resulting in protracted time spent in pre-trial custody for presumptively innocent accused persons.[17] There has been no scholarly attention paid to how this crisis may be impacting Aboriginal people. In light of the decision in *Gladue*, it is surprising that no fulsome examination of Aboriginal people and the bail process has been undertaken. I hope to uncover how *Gladue* is being considered at multiple stages of judicial interim release. These stages include: arrest, adjournments, time spent in remand custody either waiting for a bail hearing, or after being detained post-bail hearing, the conditions of release and the form of release if bail is

[15] Porter and Calverley, "Trends in the Use of Remand in Canada" (Juristat: May 17, 2011). Recent statistics relating to whether Aboriginal women outnumber Aboriginal men in remand populations are unavailable. However, as of 2003/2004 Aboriginal women represented 23% of adult females in remand custody, up from 14% in 1995-1996: Jodi-Anne Brzozowski et al., *Victimization and Offending Among the Aboriginal Population in Canada*, 26 Stat. Can. 1, 28 (2006) cited in Toni Williams, "Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada" (2007) 55 Clev.St. L. Rev. 269 at 280 in footnotes 54-55.

[16] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.), at para. 65.

[17] Specific scholars will be discussed *infra*, in the literature review section of this paper.

granted. For example, the over-reliance on sureties, the imposition of onerous conditions of release, and the time spent in pre-trial custody all may have a disproportionately negative effect on Aboriginal people, including an impact on over-incarceration rates.

The causes of Aboriginal over-incarceration are complex and multi-faceted and the remedies for high incarceration rates extend far beyond the court's interpretation and application of *Gladue* and its progeny. The ongoing process of colonization, the lack of recognition of Indigenous sovereignty, and modes of de-colonization are issues that must be addressed in order to begin to unravel the over-criminalization of Aboriginal people in Canada. However, exploring how the criminal law is being applied to Aboriginal people can provide insight into the ways in which Aboriginal people are criminalized through the bail process and may also point to ways that this can be alleviated.

This paper will argue that the principles articulated in *R. v. Gladue* and re-iterated in *R. v. Ipeelee* are being interpreted and implemented at the bail phase in a manner that exacerbates, rather than ameliorates the systemic failures of the criminal justice system in its dealings with Aboriginal people. In the first chapter, I will explore the systemic factors impacting Aboriginal people which lead to the genesis of s.718.2(e) and the decision in *R. v. Gladue*. The scholarship relating to the impact of *Gladue* in terms of alleviating systemic problems with the incarceration of Aboriginal people in Canada will also be discussed. In the second chapter, I will provide an overview of the law of bail and the scholarly debates surrounding the current problems in the operation of the bail system in Canada. In chapter three I will examine how the courts are interpreting *Gladue* principles in the context of judicial interim release. I will argue that the courts are treating bail hearings involving Aboriginal accused persons as sentencing proceedings in a manner that erodes the *Charter* protected right to the presumption of innocence. I will also

demonstrate that examinations into the systemic issues faced by individual accused persons, which have become a hallmark of *Gladue* at the sentencing phase, are wholly inappropriate in judicial interim release proceedings. Chapter four will illuminate the ways that *Gladue* has not operated to alleviate the systemic failures of the bail system for Aboriginal accused. I will demonstrate that *Gladue* has not prevented the over-incarceration of Aboriginal people in remand custody. In fact, Aboriginal people are subjected to overly stringent forms of release often resulting in protracted time in pre-trial custody because of systemic discrimination in the operation of bail. In a broad sense, this chapter examines the ways that *Gladue* is not being applied in a manner that acknowledges the systemic bias against Aboriginal people in the bail system thus exacerbating existing inequalities. Chapter five will outline the systemic factors that bail courts should be considering in the application of *Gladue* to the bail process for Aboriginal accused. These factors are as follows: policing, the use and over-use of sureties, conditions attaching to release orders, evidentiary issues, the impact of pre-trial custody, and gender.

In the final chapter, I will discuss the potential for *Gladue* to have a meaningful impact on the process of judicial interim release. I will propose a more robust framework for the application of *Gladue* to bail proceedings.

Methodology

My research question is solely focused on how courts are interpreting and applying the *Gladue* regime in the context of judicial interim release. As such, analyzing case law was my primary method of collecting information. I conducted searches for bail cases dealing with Aboriginal accused on various online legal search databases including: canlii; quicklaw; westlaw; and criminal spectrum. I also searched for cases in printed reporters including: Criminal Reports; Canadian Criminal Cases; and Weekly Criminal Bulletins. I did not include

cases involving bail pending appeal or bail pending sentence as different statutory provisions and legal principles are applicable. I also excluded bail cases involving Aboriginal youth for the same reasons. Attention needs to be paid to Aboriginal youth and bail, particularly Aboriginal female young people. The statistics relating to the over-incarceration of Aboriginal youth in remand are alarming and there is evidence that these youth are being treated by the bail system in a discriminatory manner,[18] However, it is beyond the scope of this paper to examine Aboriginal youth due to the differing applicable statutory regimes.

I collected a total of twenty-five cases and I believe I have been exhaustive and have found all reported bail cases where the accused is Aboriginal. These cases are comprised of bail decisions at the provincial court level, bail reviews, first instance bail hearings at the Superior Court level, and bail decisions at the appellate level. I only searched for cases after 2002 as this was the first year that a court found *Gladue* to be applicable to bail hearings.[19]

I did not undertake a quantitative analysis of the case law. Rather I read the cases in a purposive manner. In my review of the case law, I wanted to get a sense of how colonization is dealt with, particularly the courts understanding of colonialism and "systemic factors" and how Aboriginal men and women may be disproportionately impacted by the bail process. By colonialism, I adopt the definition espoused by Aboriginal scholar Patricia Monture as follows:

> Colonialism is very easily understood. It is the belief in the superiority of certain ways, values, and beliefs *over* the ways, values, and beliefs of other peoples. Colonialism is the legacy that the so-called discovery of the Americas has left to the peoples who are indigenous to these territories. Colonialism is the

[18] See Donna Calverley, Adam Cotter and Ed Halla, "Youth Custody and Community Services in Canada, 2008/2009", (Juristat: Statistics Canada, online: http://www.statcan.gc.ca/pub/85-002-x/2010001/article/11147-eng.htm#a14, accessed April 20th).
[19] See: *R. v. Wesley*, 2002 BCPC 717.

> theory of power, while oppression is the result of the lived experience of colonialism.[20]

I did not conduct interviews, court observations, surveys, or focus groups, or utilize research involving any human participants. I wanted to understand how the courts have treated and analyzed systemic factors facing Aboriginal people in order to understand the systemic problems with the application and implementation of *Gladue* in the context of judicial interim release. As recently iterated by the Supreme Court, it is judges who are responsible for the application of *Gladue*[21] and as such, understanding the ways that judges understand and are implementing the regime is perhaps most practical via reading case law. Although I am not explicitly drawing on my own reflections on working with Aboriginal clients as duty counsel, this work is heavily informed by, and intertwined with my own experience representing Aboriginal clients.

As I read the case law that I collected I considered the following broad questions:

1) Having regard to criminal law principles, how does s.718.2(e), a sentencing provision, apply in judicial interim release where the presumption of innocence is a central tenet?

2) How do courts interpret the "systemic and background" factors as mandated by *Gladue*?

3) How is colonization discussed and considered?

[20] Patricia Monture, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack (ed.), *Locating Law: Race. Class, Gender, Sexuality, Connections* (2nd ed.) (Fernwood Publishing: Nova Scotia, 2006) at p. 80.
[21] *R. v. Anderson*, 2014 SCC 41.

4) What kind of evidence was called at the bail hearing? Was there evidence of the type of institutional bias referenced in *Gladue*?[22]

5) How are the outcomes of bail decisions (release or detention) gendered?

6) How much time did the accused spend in pre-trial detention?

7) Was the pre-trial facility close to the accused's home or were they held somewhere far away from their communities?

8) If released on a bail, what were the conditions of release? Was a surety required by the Crown? Was a surety available?

9) If released on a bail, was the quantum of the bail reasonable having regard to the circumstances of the accused and/or their surety?

In addition to collecting case law, I also drew on various commissions of inquiry involving Aboriginal people and the criminal justice system as well as statistics relating to Aboriginal people.[23] The Supreme Court in *Gladue* and in *Ipeelee* cited commissions of inquiry dealing with Aboriginal people and noted that subsequent courts *must* take judicial notice of the history of colonialism, and the background and systemic factors faced by the individual before

[22] Examples of institutional bias could include: her interaction with the police; the synopsis of the charges as read in by the Crown; the potential for gender/racial profiling; the potential for police over-charging

[23] See for example: Jodi-Anne Brzozowski, Andrea Tayler-Butts and Sara Johnson, "Victimization and Offending Among the Aboriginal Population in Canada" (Ottawa: Statistics Canada, 2006); Canada, *Report of the Royal Commission on Aboriginal Peoples*, "Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada" (Ottawa: Canada Communication Group, 1996); Michael Jackson *Locking Up Natives in Canada* (Ottawa: Canadian Bar Association, 1989); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, Vol. 1* (Winnipeg: Queen's Printer, 1991) (Commissioners: Alvin C. Hamilton & C. Murry Sinclair (as he then was); Lindsay Porter and Donna Calverly, "Trends in the Use of Remand in Canada" (2011) (Juristat, online: http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm#a1; Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013).

the court. Many of these systemic factors are outlined in these inquiries and are drawn heavily upon in understanding many of the systemic barriers Aboriginal people face in terms of accessing pre-trial release, and the disproportionate impact that the bail process may have on Aboriginal people.

Additionally, between September, 2013 and March, 2014, I was involved in an extensive study on bail and pre-trial detention undertaken by the Canadian Civil Liberties Association ("CCLA").[24] As a volunteer with this project, I transcribed interviews, provided research and editing assistance and did some writing for the final report. Some of my arguments and ideas were adopted by the report particularly in the section discussing *Gladue.* The study includes interviews of various participants in the criminal justice system across Canada[25], predominantly defence lawyers. As part of the interview, participants were asked whether *Gladue* was being argued at the bail phase, and many of the interviewees also discussed issues facing Aboriginal, Metis and Inuit peoples in the bail process. I rely heavily on the findings contained in this report particularly as they impact Aboriginal accused persons. The report allowed me not only to gain insight into how courts are applying *Gladue*, including whether it is being raised and argued, it also provided valuable information about the different bail practices and procedures across the country that was not obvious from reading case law.

Reviewing only reported case law has had some limitations. There are relatively few reported bail decisions. While it is impossible to fully account for this paucity, a few observations may be helpful. The law of bail is highly discretionary and as a result of this, there is not an evolution of legal pronouncements in the bail context as in other arenas of criminal law.

[24] Abby Deshman and Nicole Myers, "Set up to Fail: The Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014).

[25] The study only looked at the bail process in British Columbia, Manitoba, Ontario, Nova Scotia and the Yukon. These provinces and territory have the highest remand populations in Canada and that is why they were chosen to be included in the study.

The cases that get reported tend to be those that involve interesting facts, more serious offences, and are often review or appellate decisions. As a result of these limitations, the daily operation of *Gladue* bail hearings involving minor offences, such as the examples I presented in the beginning of this introduction, are not captured. To fill in this gap, I rely on both academic research on the daily operation of bail courts as well as the CCLA report. A further limitation has been that there are some jurisdictions in Canada that have not been studied at all in an academic sense, nor are there any reported decisions involving bail and Aboriginal accused. Much of the quantitative research derives from court observations in Ontario. The CCLA report studied only British Columbia, Manitoba, Ontario, Nova Scotia and the Yukon as these are the jurisdictions with the highest remand populations. Although much of the data is jurisdiction specific, many of the trends in the case law involving Aboriginal accused are consistent. For this reason, I discuss many of the problems facing Aboriginal accused in general terms without regard to the specificities of the practices in varying jurisdictions.

CHAPTER TWO – Aboriginal Over-incarceration, Section 718.2e and *R. v. Gladue*

In this chapter I will explore the circumstances leading to the genesis of s.718.2(e), the Supreme Court's interpretation of that section in *R. v. Gladue* as well as the scholarly debates surrounding the decision and its progeny.

The over-incarceration of Aboriginal people in the Canadian criminal justice system has been a reality for decades.[26] The criminal justice system has been utilized as a tool of colonization in many different ways over Canada's history. The publication of the report "Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release" in 1988, by Professor Michael Jackson has been cited as a catalyst for attention to be paid to the issue of over-incarceration.[27] A few years later in 1995, the Royal Commission on Aboriginal People was released and it included a comprehensive report on the over-representation of Aboriginal people in Canadian prisons across the provinces. In 1998, the Supreme Court of Canada recognized that systemic and insidious bias against Aboriginal people was a reality impacting the criminal justice system noting that "…widespread racism has translated into systemic discrimination in the criminal justice system."[28] Indeed, bias against Aboriginal people within the criminal justice system was beginning to gain traction as a pressing issue in need of immediate attention.

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[26] Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013) at p.11 citing Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, The Justice System and Aboriginal People, A.C. Hamilton and C.M. Sinclair, Commissioners (Winnipeg, 1991), p. 101.

[27] Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013) at p.11.

[28] *R. v. Williams*, [1988] 1 S.C.R. 1128 at para. 58.

In 1996 in the sentencing arena, s. 718.2(e) of the *Criminal Code* was enacted by Parliament in response to the over-representation of Aboriginal people in Canadian prisons. Section 718.2(e) reads:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

In 1999, the Supreme Court of Canada interpreted s.718.2(e) for the first time in *R. v. Gladue*[29]. The facts of this case are as follows. Jamie Tanis Gladue was charged with the second degree murder of her common law partner Reuben Beaver. The offence took place at the appellant's 19th birthday celebration. She had suspected that Beaver was being unfaithful to her and was having an affair with her sister. Reuben Beaver and the appellant's sister left the party together and Gladue tried to locate them. She eventually confronted Beaver when he returned to the party and they returned to their apartment. She and Beaver argued, Beaver hurled insults at the appellant and she stabbed him.[30] She was eventually charged with second degree murder. After spending 17 months on bail awaiting disposition, she pleaded guilty to the charge of manslaughter.[31] Jamie Gladue was born in McLennan, Alberta in 1976. She had 8 siblings. Her mother was Cree and left the family home in 1987 and died in a car accident in 1990. The

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[29] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.).

[30] These findings of fact have been questioned. In the 41st meeting of the "Standing Committee on Aboriginal Affairs and Northern Development" (Dec. 1, 2009), available online: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4282684&Language=E&Mode=1 accessed April 18, 2014, Kim Pate, executive director of the Elizabeth Frye Society commented on the findings of fact by the sentencing courts, and subsequent courts noting that Jamie Gladue was described as having a jealous rage and killing her common-law husband. Ms. Pate notes: "In fact, when you read the preliminary inquiry transcripts…you realize, no her sister had just been raped by him. He had just beaten her up and she was trying to get away, and it was in that context. Yet they only listened to the white, non-aboriginal witnesses. Most of the aboriginal witnesses were asked what beer they drank, so you already see a bias, not just a systemic bias but a very individual racialized bias against those individuals. When you read the Gladue sentencing decision, you realize it's probably an attempt to rectify the discriminatory treatment at the stage of the trial."

[31] *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 2-7.

appellant and her siblings were raised by their father who was Metis. The appellant and the deceased began living together in 1993, when the appellant was 17 years of age. They subsequently had children together and at the time of the offence were engaged to be married.[32]

The sentencing judge considered the following circumstances to be mitigating: Gladue had virtually no criminal record at the time of the offence and was youthful; she had two children and was pregnant (although this was treated as neutral); since the offence, the appellant had taken extensive counseling for alcohol abuse, was upgrading her education and had the support of her family; the appellant had been provoked by the deceased's insulting behaviour and remarks; at the time of the offence, the appellant had suffered from an undiagnosed hyperthyroid condition which caused her to overreact to emotional situations; she pleaded guilty and showed some signs of remorse.[33] There was evidence that the deceased had been abusive towards Jamie Gladue in the past and that he had been convicted of assaulting her. However, the sentencing judge found that she was not afraid of the deceased and that she had been the aggressor in the argument leading to his death.[34]

At her sentencing hearing there was very little reference to her Aboriginal heritage and the sentencing judge concluded that because she lived off-reserve, there were no special circumstances arising from her Aboriginal ancestry to be taken into account. The British Columbia Court of Appeal unanimously found that the sentencing judge erred in his conclusion that s.718.2(e) did not apply because the appellant was living off-reserve. However, the Court of Appeal split on the question of the manner in which s.718.2(e) was to be applied, it's purpose, and the proper interpretation of the provision.

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[32] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 2.

[33] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 15.

[34] This finding has been critiqued as being dismissive of the abuse faced by Jamie Gladue and a misunderstanding of the realities of domestic violence. See for example: Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons From the Transcripts* (UBC Press: Vancouver, 2014).

The Supreme Court of Canada interpreted s.718.2(e) as being remedial in nature and not merely a codification of already existent sentencing principles. The Court reflected on the over-incarceration of Aboriginal people in Canada and "…the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system" leading the court to conclude that s.718.2(e) "creates a judicial duty to give its remedial purpose real force."[35] The Supreme Court judicially noted various findings of the Royal Commission on Aboriginal People as well as those found in the Manitoba Justice Inquiry and used strong language to describe the current state of crisis facing Aboriginal people in Canada and particularly, within the criminal justice system:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree.
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> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. [36]

In light of the above factors at play in the over-incarceration of Aboriginal people as well as the need to ensure s.718.2(e) was given the proper remedial force, sentencing courts were mandated to consider:

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[35] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 34.
[36] *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 64-65.

1) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
2) The types of sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of his or her particular Aboriginal heritage or connection.[37]

The Court outlined examples of "background and systemic factors" and although the word 'colonialism' was not used, the policies and residual impacts still felt as a result of colonialism were being referenced. For example, the Court noted, "Years of dislocation and economic development have translated into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation"[38] and went on to describe that "…many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions".[39]

The inquiry into the systemic impact of colonialism on the individual Aboriginal offender is a recognition that the person's criminal behaviour may have been created, in part, by systemic barriers caused by colonialism. In this sense, one's Aboriginal heritage becomes a mitigating factor on sentence as these systemic issues tend to diminish the person's moral culpability in recognition that the effects of colonialism created the circumstances that contributed to the offending.[40] The second branch of *Gladue* recognizes that traditional principles of sentencing including deterrence and denunciation, may not be meaningful for Aboriginal people. To the extent that it is possible, alternatives to custody, with an emphasis on restorative justice, should

[37] *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 66.
[38] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 67.
[39] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 68.
[40] *R. v. Ipeelee*, 2012 1 S.C.R. 433 at para. 74.

be considered and imposed where possible. Both branches of *Gladue* are intended to give effect to the remedial purpose of s.718.2(e). In terms of sentencing procedures and sanctions that might be appropriate, the Court emphasized principles of restorative justice including the use of conditional sentences, sentencing circles and other non-carceral options that might be more meaningful to Aboriginal offenders.[41]

Subsequently, in 2012, the Supreme Court of Canada in *R. v. Ipeelee* clarified that the *Gladue* analysis applies in every situation where the offender is Aboriginal regardless of the seriousness or violent nature of the offence.[42] The extent to which *Gladue* was applicable where the offence was violent or 'serious' was a source of debate pre-*Ipeelee* with divergent case law on the issue. In *Ipeelee*, the offender was charged with breaching a long term supervision order (LTSO), the predicate offences for which were necessarily very serious and violent. The Court concluded that sentencing judges have a statutory duty to consider s.718.2(e) in every case involving an Aboriginal offender regardless of the seriousness or violent nature of the offence and that failure to do so is an error justifying appellate intervention. Failure to do so would additionally result in an unfit sentence, inconsistent with the fundamental sentencing principle of proportionality.[43]

In *R. v. Ipeelee*, the Supreme Court also clarified what was meant by "systemic or background factors":

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher

[41] It is important to note that the restorative justice initiatives enacted in the 1996 *Criminal Code* amendments and promulgated in *R. v. Gladue* are not necessarily rooted in any particular Aboriginal tradition but rather are approximations of Aboriginal traditions created by the state. See Carmela Murdocca,, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (UBC Press: Vancouver, 2013) at p. 31.
[42] *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at paras. 84-87.
[43] *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 87.

> unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[44]

The *Ipeelee* Court attempted to focus sentencing judges' attention on an analysis that properly acknowledges and considers the systemic issues faced by Aboriginal people as caused by colonialism. As noted by Jonathan Rudin, the decision,

> …goes beyond Gladue in its analysis, its acknowledgment of the realities of colonialism and its strong defence of the need to sentence Aboriginal offenders differently.[3] The Court also acknowledges that judicial uptake of Gladue has not been what the Court had expected and the decision urges judges to redouble their efforts in this area.[45]

In what can now be considered a somewhat prophetic response to the decision in *R. v. Gladue*, Mary Ellen Turpel-Lafonde problematized the practical implications of the 'restorative justice' approach that was articulated in *Gladue* noting that,

> My point is that restorative justice, fully envisioned, is not something that is passed to the Aboriginal community who are directed to 'fix' a problem on their own, especially if they do not have the resources and institutions to do so at this point. This might represent an off-loading of responsibility for corrections.[46]

These comments can be considered somewhat prophetic because more than a decade after *Gladue*, the concern regarding the resources necessary to implement the dicta and spirit has been echoed by a number of scholars. Professors Milward and Parkes have noted that, at least in Manitoba, lack of legal aid funding for defence counsel, inadequate *Gladue* report[47] writing resources and a lack of dedicated programs contribute to undermine the force of *Gladue* in the sentencing of Aboriginal clients. The authors argue for increased funding and resources and a

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[44] *R. v. Ipeelee*, [2012] 1 S.C.R. 433, at para. 60.

[45] Jonathan Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in R. v. Ipeelee" (2012), 57 S.C.L.R. (2d) 375-388 at para. 2.

[46] M.E. Turpel-Lafond, "Sentencing Within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (1999) 43 Crim. L.Q. 34 at 49.

[47] A "*Gladue* Report" is a type of report used in both sentencing hearings and in some jurisdictions, for bail hearings. It includes extensive background information of the offender or the accused that is intended to provide the court with the information necessary to properly apply s.718.2(e) and *Gladue*.

more comprehensive *Gladue* program in Manitoba including more effective community based programming and services so as to provide meaningful alternatives to incarceration. A more comprehensive program would not only contribute to a more meaningful implementation of *Gladue*, but the authors argue that it has the potential to provide a foundation for a transition to Aboriginal self-determination, including the domain of justice, where Aboriginal communities ultimately decide for themselves how they will address crime and disorder.[48]

Jonathan Rudin echoes these concerns indicating that "[i]n light of the findings in *Gladue*, complacency is perhaps the biggest bar to change."[49] As Rudin points out, the provincial legislatures have not responded to the Supreme Court decision in *Gladue* in the same manner in which they have responded to other Supreme Court decisions. Generally speaking, the approach taken by provincial and territorial governments in reacting to *Gladue* "…has been simply to ignore it, to continue on in essentially a business-as-usual approach."[50] Rudin has argued that one of the biggest barriers to a robust sentencing regime capable of realizing the potential of *R. v. Gladue* is the inability of courts to access information regarding Aboriginal offenders. He argues that initiatives that "Aboriginal Legal Services of Toronto" (ALST) has been providing, including the use of *Gladue* reports, *Gladue* after-care workers and the use of specialized *Gladue* courts, have been found to make a positive impact on sentence.[51] He notes that:

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[48] David Milward and Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011-2012) 35 Man. L.J. 84.

[49] Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2008-2009) 54 Crim. L.Q. 447 at 469. See also Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008), 40 S.C.L.R. (2d) 687.

[50] Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2008-2009) 54 Crim. L.Q. 447 at 455.

[51] Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008), 40 S.C.L.R. (2d) 687 at 706.

> The experience of the *Gladue* Courts and *Gladue* Reports shows that jail need not be the default option when sentencing Aboriginal offenders. It also shows that there is a need to consciously address how to do things differently if change is going to occur.[52]

Scholars have also focused on the narrowness of the sentencing context as limiting the ability of courts to be the site for remedial relief for Aboriginal over-representation particularly in light of ambiguous and perhaps contradictory comments made by the Supreme Court in *Gladue* regarding the applicability of s.718.2(e) to violent offences.[53] Although it is now settled that *Gladue* and s.718.2(e) apply in every single case where the offender is Aboriginal regardless of the nature of the offences before the court, the question of whether a sentencing provision has the capacity to actually reduce Aboriginal over-incarceration persists.

There is a general acknowledgement amongst varied scholars that Aboriginal over-representation is directly tied to historic and ongoing colonization and the amelioration of this circumstance can only arise in relation to Aboriginal sovereignty and decolonization. The *Gladue* decision has been criticized for focusing on the havoc that colonialism has caused as opposed to focusing on the institutions that continue to perpetuate it. Such an approach leads to a sentencing provision that is aimed at 'fixing' the 'Aboriginal problem'. Isobel M. Findlay condemns this approach that perpetuates colonial tendencies:

> Keeping the expert gaze firmly focused on the Aboriginal 'problem' rather than on non-Aboriginal institutions and responsibilities has effectively placed the

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[52] Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008), 40 S.C.L.R. (2d) 687 at 706.

[53] See for example: David Milward and Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011-2012) 35 Man. L.J. 84; Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2008-2009) 54 Crim. L.Q. 447; Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008), 40 S.C.L.R. (2d) 687; Adam Vasey, "Rethinking the Sentencing of Aboriginal Offenders: The Social Value of s.718.2(e)" (March, 2003) 15 W.R.L.S.I. 73; and Justice Melvyn Green, "The Challenge of Gladue Courts" (2012) 89 C.R. (6th) 362.

> burden of responsibilities on Aboriginal shoulders, while sustaining strategies of domination/exculpation.[54]

The persistence of colonial policies, tendencies, racism, and violence directed towards Aboriginal people in Canada are a reality on many fronts. Unresolved land claims, the continued appropriation of Aboriginal land, and the policing of Aboriginal people are all examples of the continuing phenomenon of colonialism.[55] There are currently more Aboriginal children in state care than there were at the height of the residential school era. Systemic discrimination plagues the child welfare system in Canada including under-funding of Aboriginal child welfare agencies in comparison to their non-Aboriginal counterparts.[56] Lack of consultation and transparency coupled with paternalistic approaches in the 'governance' of Aboriginal peoples through the *Indian Act* by the Canadian government continue to preserve the legacy of colonialism in very real and potentially racist ways.[57] Indeed the legacy of, and persistence of colonialism challenges the idea that Aboriginal over-incarceration can be addressed at the sentencing phase within the criminal justice system making it appear a futile exercise.

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[54] Isobel M. Findlay, "Discourse Difference and Confining Circumstances: The Case of *R. v. Gladue* and the 'Proper Interpretation and Application' of s.718.2(e) of the *Criminal Code*" (2001) 10 Griffith L. Rev. 225 at 227. See also Margaret Beare, "Aboriginal Justice Issues - Trying for New Approaches, While Clinging to the Old: Our Shared Experiences" (2010) ANZSOC 23rd Annual Conference, Alice Springs at p.10; Carol LaPrairie, "Dimensions of Aboriginal Over-representation in Correctional Institutions and Implications for Crime Prevention" (Ottawa: Solicitor General Canada, 1992) at p.23; Carol LPrairie, "The Role of Senencing in the Over-Representation of Aboriginal People in the Correctional Institutions" (1990) 32 Can. J. Crim. 429 at 436-438.

[55] See for example: Patricia Monture-Angus, *Thunder in My Soul* (Fernwood Publishing: Halifax, Nova Scotia, 1995); Todd Gordon, *Imperialist Canada* (Arbeiter Publishing: Manitoba, 2010); Tia Dafnos, "Pacification and Indigenous Struggles in Canada" (Winter 2013), 9 Socialist Studies 2; Shiri Pasternak, Sue Collis, and Tia Dafnos, "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims" (April, 2013) Vol.28 Issue 01 Can. J. of Law and Society 65.

[56] See for example: Ashley Smith, "Aboriginal Adoptions in Saskatchewan and British Columbia: An Evolution to Save or Lose Our Children" (2009) 25 Can. J. Fam.L. 297; and Cindy Blackstock and Nico Trocme, "Community-Based Child Welfare for Aboriginal Children: Supporting Resilience Through Structural Change" (2005) 24 Social Policy J. of New Zealand 12

[57] See Patricia Monture, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack (ed.), *Locating Law: Race, Class, Gender, Sexuality Connections* (2nd ed.) (Fernwood Publishing: Nova Scotia, 2006).

In light of the above, formal engagement with the Canadian legal system has been questioned by numerous Indigenous scholars who argue that such engagement only serves to maintain colonialism and a relationship in which Aboriginal people will continue to be subjugated. Many scholars point to the ways in which the Canadian legal system is incapable of producing justice for Aboriginal people. The Canadian legal system, rooted in liberal values, continues to assume its position as superior to any and all 'other' intellectual traditions or legal systems thus conserving a colonial relationship with Aboriginal peoples.[58] The inability of Canadian law to decolonize is a barrier to any kind of meaningful justice for Aboriginal people and it has been argued that Canadian law continues to suffer from a Euro-centrism that is at the heart of the colonial project and cries out for re-imagining. As articulated by Professor James (Sakej) Youngblood Henderson:

> To shore up their failing imaginative contexts and structures, Eurocentric governments resort to coercive authority or violence or imprisonment to maintain their enormous privileges and enslaving visions. The Eurocentric order and thought is constructed on the idea that terror is a legitimate source of sovereign power and law. What it conceals, however, are the effects of such terror on those who suffer under the rule of this law.[59]

In these terms, the lack of resources allocated to the proper implementation of *Gladue* and other Supreme Court decisions regarding Aboriginal rights can be understood as an unwillingness to de-colonize, an unwillingness to truly address Aboriginal over-incarceration because of the state's self interest in maintaining domination. It falls in line with an historical and ongoing pattern by the Canadian state, government and courts of failing to address the fundamental issue that perpetuates colonialism; a fundamental unwillingness to look inward as opposed to fixing 'the Aboriginal problem'. As Professor Youngblood Henderson describes,

[58] Gordon Christie, "Law, Legal Theory and Aboriginal People" (2003) 2 Indigenous Law Journal 70 at p.70.
[59] James (Sakej) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous L.J. 1 at 15-16.

"They do not want to end their national fantasies and myths about their nation, or to expose the injustices that have informed the construction of state institutions and practices."[60] In this vein, Patricia Monture describes the need for structural change as opposed to the implementation of programs that aim to "teach" Aboriginal about the Canadian system, and assume cultural difference as opposed to the violence of colonialism as the problem in need of fixing:

> Culture has been used to obscure the structural racism in the Canadian criminal justice system. The failure of the system is placed squarely on the shoulders of Aboriginal people and not on the system, where it really belongs. This is not transformative change, because transformative change requires structural change in the system when it is required and necessary.[61]

Feminist scholars have echoed the above concerns that addressing systemic concerns has been obfuscated by 'culture talk'. This body of scholarship critiques s.718.2(e) and *Gladue* as well as other attempts that courts have made at contextualized sentencing[62] as re-inscribing structural forms of violence particularly in relation to Aboriginal women.

Professor Murdocca has undertaken a thorough review of gender and contextualized sentencing and uncovers the ways in which the focus in *Gladue* on "cultural difference" as the cause of Aboriginal over-incarceration serves as a means of exacerbating, as opposed to alleviating, the colonial encounter between Aboriginal women and the criminal justice system.[63] Her work questions the underpinnings of s.718.2(e) as a mode of national reparation and the discourses that assume over-incarceration to be a problem attributable to Aboriginal "cultural

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[60] James (Sakej) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous L.J. 1 at 15-16.

[61] See Patricia Monture, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack (ed.), *Locating Law: Race, Class, Gender, Sexuality Connections* (2nd ed.) (Fernwood Publishing: Nova Scotia, 2006) at 77.

[62] In addition to the authors discussed in this section, see also Sonia N. Lawrence and Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (Fall, 2006) 56 Univ. of Toronto L.J. 285 and Senem Ozkin, "Down But Not Out: Re-Evaluating the Use of Social Context Evidence in Sentencing" (2012) 32 W.R.L.S.I. 159.

[63] See Carmela Murdocca, "From Incarceration to Restoration: National Responsibility, Gender, and the Production of Cultural Difference" (2009) 18 Social and Legal Studies 1, and Carmella Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (UBC Press: Vancouver, 2013).

difference" as opposed to a commitment to confronting the structural forms of violence faced by Aboriginal women. The use of restorative justice paradigms as envisioned by the state becomes a means of 'fixing' Aboriginal people and their perceived disfunctionality as opposed to addressing the colonial violence that causes the many complex problems facing Aboriginal communities. Professor Murdocca grapples with the complex difficulties posed by s.718.2(e) and *Gladue* and its progeny and describes the difficulty in this way:

> The dilemma that *Gladue* sets up is that while the intent of addressing the systemic incarceration of Aboriginal peoples (which includes the interweaving of carceral networks into every aspect of their lives) is appealing as a national project, and appealing to social justice advocates, the functionality of remedial sentencing as a program of government in the context of sentencing highlights how ineffective this project is as a tool to address the material reality of over incarceration.[64]

However misguided, messy, and perhaps even counter-productive an initiative such as s.718.2(e) might be, there is every reason to continue to examine it and to propose alternate frameworks for its application in the context of bail. Aboriginal people are bound by the Canadian criminal legal system; this alone provides good reason to engage with it.[65] Within this system, it is important to examine and point out the ways in which facially neutral rules, provisions, and the common law are not functioning properly and are furthering the disadvantaged position of Aboriginal people within the criminal justice system. Highlighting the ways that *Gladue* is not operating in a manner that alleviates the criminalization of Aboriginal people in judicial interim release is an exercise in highlighting how this system is not working even on its own terms. For the purposes of this paper, all of the above scholarship assists in identifying the ways that *Gladue* may not be operating in a robust manner in a doctrinal sense as

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[64] Carmella Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (UBC Press: Vancouver, 2013) at p. 112.

[65] For an excellent argument deconstructing the outright rejection of formal rights litigation from a critical race perspective, see: Patricial J. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" 22 Harvard Civil Rights-Civil Liberties Law Review 401 (1987).

well as the potential for a more vigorous framework of analysis as *Gladue* relates to judicial interim release.

The above discussed legal framework for implementing *Gladue* as well as the scholarship focuses on *Gladue* in the sentencing context. There has been very little attention paid to the application of *Gladue* to bail proceedings. This is surprising given that it has been long noted that Aboriginal people are more likely to be denied bail than non-Aboriginal people. In *R. v. Summers*, the Supreme Court of Canada reiterated that "…Aboriginal people are more likely to be denied bail, and make up a disproportionate share of the population in remand custody."[66] This fact was first noted in *The Manitoba Justice Inquiry* in 1991[67] and cited for the first time by the Supreme Court in *R. v. Gladue* in 1999 where the denial of bail for Aboriginal people was described as an "…unfortunate institutional approach that is more inclined to refuse bail" .[68] Notwithstanding the acknowledgment of systemic issues relating to Aboriginal people and judicial interim release, there is been very little scholarly attention paid to the application of *Gladue* to bail. My paper will explore the tensions relating to the application of *Gladue* to judicial interim release.

[66] *R. v. Summers*, 2014 SCC 26 at para. 67.
[67] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991).
[68] *R. v. Gladue*, 1999 CanLII 679 at para. 65.

CHAPTER THREE – Literature, Legislation, and Cases Pertaining to Bail

In this chapter I provide an overview of the law of bail including legislation and jurisprudence as well as the literature identifying the current debates regarding failures of the bail system in Canada.

As an introductory prelude, it is important to have a general understanding of what is meant by 'bail' and 'judicial interim release' as well as the legal principles, including *Charter* rights, applicable to judicial interim release. Bail, quite simply is being released from custody pending one's trial or disposition of criminal charges. In *R. v. Pearson* the Supreme Court of Canada discussed the meaning of bail for the purpose of s.11(e) of the *Charter* which guarantees the right to reasonable bail as follows:

> The dual aspect of s. 11(e) mandates a broad interpretation of the word "bail" in s. 11(e). If s. 11(e) guarantees the right to obtain "bail" on terms which are reasonable, then "bail" must refer to all forms of what is formally known under the Criminal Code as "judicial interim release". In common parlance, "bail" sometimes refers to the money or other valuable security which the accused is required to deposit with the court as a condition of release. Restricting "bail" to this meaning would render s. 11(e) nugatory because most accused are released on less onerous terms. In order to be an effective guarantee, the meaning of "bail" in s. 11(e) must include all forms of judicial interim release.[69]

A person charged with a criminal offence can either be released into the community while they wait for their trial, or can be detained in jail pending their trial. The right to reasonable bail enshrined in section 11(e) of the *Charter* is intertwined with numerous other constitutional rights including: the presumption of innocence (s. 11(d)); the right not to be arbitrarily detained or imprisoned (s.9); the liberty and security of the accused (s.7) and the right to have the validity of the detention determined by means of *habeas corpus* (s.10(c)). The

[69] *R. v. Pearson*, [1992] 3 S.C.R. 665 at para. 48.

interplay of these rights in relation to bail proceedings was described by the Supreme Court in *R. v. Hall* as follows:

> In the context of the criminal law, this fundamental freedom [liberty] is embodied generally in the right to be presumed innocent until proven guilty, and further in the specific right to bail. When bail is denied to an individual who is merely accused of a criminal offence, the presumption of innocence is necessarily infringed. This is the context of this appeal, one in which the 'golden thread' that runs through our system of criminal law is placed in jeopardy. And this is the context in which laws authorizing pre-trial detention must be scrutinized.
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> Section 11(e) of the Canadian Charter of Rights and Freedoms calls particularly on courts, as guardians of liberty, to ensure that pre-trial release remains the norm rather than the exception to the norm, and to restrict pre-trial detention to only those circumstances where the fundamental rights and freedoms of the accused must be overridden in order to preserve some demonstrably pressing societal interest.[70]

The right to reasonable bail in s.11(e) has been interpreted to contain two distinct elements: 1) the right to reasonable bail in terms of the quantum of any monetary element and any other restrictions; and 2) the right not to be denied bail without 'just cause'.[71] That detention pending trial is to be considered the exception rather than the norm translates into a presumption of the least onerous form of release, at the earliest opportunity, with as little restriction on accused persons' liberty as is possible. This interpretation of s.11(e) accords with the presumption of innocence which cloaks all accused persons until the end of his or her trial.

[70] 2002 SCC 64, [2002] S.C.J. No. 65 at paras. 47-48, Iaccobucci J. for a four judge minority, dissenting, but not on this point.

[71] *R. v. Pearson*, [1992] 3 S.C.R. 665, *R. v. Morales*, [1992] 3 S.C.R. 711 and affirmed in *R. v. Hall*, 2002 SCC 64, [2002] S.C.J. No. 65 at para. 16.

When a person is charged with a criminal offence or offences, there are generally[72] a number of options available to the police in terms of releasing the person[73] all of which are referred to as 'police bail'. The least onerous form of releasing a person is with the intention of compelling their appearance by way of a summons to come to court. The next step up would be release on that person promising to appear in court, often referred to as an appearance notice. The most onerous form of police bail would be for an accused to enter into a recognizance not exceeding $500, or to enter into a recognizance with a cash deposit not exceeding $500. Justice Trotter defines a "recognizance" as follows, "Generally, a recognizance is the formal record of an acknowledgment of indebtedness to the Crown which is defeasible upon the fulfillment of certain conditions, the primary one being attendance in court for trial."[74] In addition to the primary obligation of attending court for trial, the police may attach certain enumerated conditions to the recognizance.[75]

Where the police are not satisfied that the accused can be released from their custody, they bring the accused before a justice to determine release or detention. As per section 503 of the *Criminal Code*, the accused must be brought before a justice within 24 hours of arrest, or as soon as practicable. Because of the primacy of the liberty of the accused, and in recognition that freedom is fundamentally not to be restrained except in accordance with constitutionally valid law, this requirement has been described as one of the most important procedural provisions of

[72] Where a person is charged with an offence listed in s.469 of the *Criminal Code*, s.522 mandates that only a judge presiding in the Superior Court of Justice may release the person pending their trial. For all other offences, the police have the power to release an accused.
[73] The options available to the police in releasing an accused charged with an offence are enumerated in ss.497 and 498 of the *Criminal Code*.
[74] Gary T. Trotter, *The Law of Bail in Canada*, (Toronto: Carswell, 2010) at 6-11.
[75] as per section 499(2) of the Code.

the *Criminal Code*.[76] Given the paramountcy of the liberty of the accused in this context, it is clear that the appearance before a justice must be a meaningful appearance and not merely a procedural formality.

In addition to s.503, there are many indications that the determination of an accused's release from custody is to be considered in an expeditious manner having regard to the accused's many *Charter* rights at stake. Section 516(1) outlines that the prosecutor may make an application requesting the adjournment of the proceedings but that no adjournment shall be for more than three clear days except with the consent of the accused. That evidentiary and disclosure rules are relaxed at the bail hearing stage has been interpreted to have been so because 'time is of the essence' for the accused in judicial interim release proceedings.[77] Indeed, the *Bail Reform Act* of 1972, which closely resembles our current statutory regime of bail, was "…designed to ensure early pre-trial release with a speedy or quick determination of the bail issue".[78]

Where an accused has been taken into custody and brought before a justice for a bail hearing, the procedure is governed by section 515 of the *Code*. Bail may only be denied where the Crown has shown cause on any one of the following three grounds:

1) where the detention is necessary to ensure his or her attendance in court, commonly referred to as the primary ground;[79]

[76] Originally noted in *R. v. Simpson* (1994), 117 Nfld. & P.E.I.R. 110 (Nfld. C.A.), appeal allowed by the Supreme Court on grounds not affecting this point, [1994] S.C.C.A. No. 180 and affirmed in *R. v. W.(E.)* (2002),168 C.C.C. (3d) 38 (Nfld. C.A.).
[77] See for example: *R. v. O'Neil*, [2007] O.J. No. 3790, 253 C.C.C. (3d) 120 (S.C.J.); *R. v. Willis*, [2004] O.J. No. 4593 (S.C.J.); *R. v. Ghany*, 2006 CanLII 24454 (S.C.J.); and *R. v. John*, [2001] O.J. No. 3396, (S.C.J.)
[78] *R. v. V.(J.)*, [2002] O.J. No. 1027, 163 C.C.C. (3d) 507 (S.C.J.) at para. 65 per Hill J.
[79] Section 515(10)(a).

2) where the detention is necessary for the protection or safety of the public, including any victim or witness having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice, commonly referred to as the secondary ground;[80] or
3) if the detention is necessary to maintain confidence in the administration of justice, commonly referred to as the tertiary ground.[81]

The Crown has discretion in terms of consenting to, or contesting, the accused's release from custody having regard to the rights of the accused, the above legal grounds and the protection of the public including any victims or witnesses. The discretion of the Crown has been described as follows:

> Crown counsel are expected to exercise discretion to consent to bail in appropriate cases and to oppose release where justified. That discretion must be informed, fairly exercised, and respectful of prevailing jurisprudential authorities. Opposing bail in every case, or without exception where a particular crime is charged, or because of a victim's wishes without regard to individual liberty concerns of the arrestee, derogates from the prosecutor's role as a minister of justice and as a guardian of the civil rights of all persons.[82]

The accused must be released on the least onerous form of bail unless the prosecutor shows cause as to why each more stringent form of release is justified.[83] This is commonly referred to as the 'ladder principle' and has been described as follows:

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[80] Section 515(10)(b).
[81] Section 515(10)(c).
[82] *R. v. Brooks*, [2001] O.J. No. 1563, 153 C.C.C. (3d) 533 (S.C.J.) at para. 22 per Hill J. *R. v. V.(J.)*, [2002] O.J. No. 1027, 163 C.C.C. (3d) 507 (S.C.J.) at para. 70 per Hill J
[83] The onus generally falls on the prosecutor to justify detention, and to justify each condition imposed. There are situations where the onus reverses to fall on the accused why he should be released, which are enumerated in s.515(6) of the Code.

> At its core this means…that release is favoured at the earliest reasonable opportunity and, having regard to the risk of flight and public protection, on the least onerous grounds. The first option to consider is release upon an undertaking without conditions (s.515(1). Second, if the prosecution considers that this will not secure the aims of Part XVI it may seek to show cause for other, non-monetary conditions (s.515(2)(a). Only in the last resort should those conditions include a requirement for cash by deposit or recognizance by the accused or a third party (s.515(3). These are the steps on the ladder. Even then, however, there is a progression in the types of cash conditions that may be sought and imposed under paragraphs 515(2)(b) through (d) and (e) and, again, the policy favours less onerous conditions unless cause is shown for more onerous grounds.[84]

Sureties

What is commonly referred to as a 'surety bail' is the highest, most onerous form of release available. It is the highest rung on the ladder of bail and is to be utilized only where the Crown has shown cause that no other lesser form of bail is available to ensure court attendance and to ensure the accused is prevented from committing any further criminal offences while on release. In general terms, the surety is a person who is familiar with the accused and who promises a certain amount of money to the Crown as a promise that he or she will ensure that the accused attends court and abides by any conditions attaching to the bail. Any money promised to the Crown may be forfeited should the accused abscond or otherwise breach the conditions of release.[85] If the accused does not attend court, or breaches his bail, the surety is expected to notify the police or otherwise render the person into custody.[86]

While historically the role of the surety focused on ensuring the accused's attendance at trial, more recently, sureties have taken on the expanded role of acting as the accused's jailer in

[84] *R. v. Anoussis* (2008), 60 C.R. (6th) 144 (C.Q.) at 153. See also *R. v. Horvat* (1972), 9 C.C.C. (2d) 1 (B.C.S.C.).
[85] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p. 7-1.
[86] Sections 766 and 767 of the *Criminal Code* govern the law and procedure relating to the discharge of a surety and the rendering of the accused into custody.

the community.[87] This enhanced role includes ensuring that the accused does not breach the terms of bail and does not commit any further criminal offences while on release. In some circumstances, the surety may be expected to watch the accused at all times, 24 hours a day, 7 days a week, exacting a heavy burden on both the surety and the accused.[88]

It is generally accepted that the surety be someone who is familiar with the accused and enjoys a close relationship with the accused. Justice Trotter has outlined that the surety should be: 1) a person of "good character" to whom the duties of a surety may be entrusted; 2) a person with meaningful links to the accused person; and 3) a person capable of discharging the obligations and exercise the powers of a surety.[89] Although there are no strict rules relating to surety suitability, it is generally accepted that the following persons are excluded from acting:

a) co-accused;

b) persons with a prior conviction(s);

c) counsel for the accused;

d) a person who has been indemnified in respect of the bail or who has received a promise of consideration;

e) a person in custody or on bail awaiting trial;

f) an infant or someone underage;

g) a person who is already acting as a surety for another person;

h) a non-resident of the province.[90]

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[87] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p. 7-8.
[88] Joel Katz, *The Art of Bail: Strategy and Practice* (Toronto: Butterworths, 1999) at p.15.
[89] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p. 7-18.
[90] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p. 7-17 reference Eric Armour, "Bail in Criminal Cases" (1927), 47 C.C.C. 1, an oft cited article.

The above criteria are not determinative of surety suitability. Rather, a functional approach should be taken having regard to what the law expects of the surety and what the capabilities of the surety are.[91]

Because one of the criteria of acting as a surety is a financial promise to the Crown, the financial assets available to the surety are a factor that is considered in the determination of suitability. There is no fixed amount that the surety must promise or pledge; the amount of the bail must be determined having regard to the financial resources of the surety. The right to reasonable bail enshrined in s.11(e) of the *Charter* mandates that the quantum of bail be reasonable[92] and to be reasonable, the quantum must be set within the means of the surety. Setting an amount of bail that is beyond the means of the surety (or the accused in certain circumstances) is tantamount to a detention order and cannot be considered reasonable for the purpose of s.11(e).[93] However, in many instances the amount of the surety still predominates in the assessment of suitability.[94]

There is much debate and confusion regarding the determination of surety suitability in terms of the most appropriate and efficient mechanisms to be employed. A particular person can be named as a surety in court by the justice presiding over the bail hearing.[95] The determination of suitability can also occur by the justice taking the recognizance.[96] Naming sureties in court

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[91] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p. 7-17 – 7-18.

[92] *R. v. Pearson* (1992), 77 C.C.C. (3d) 124 (S.C.C.) at p.141.

[93] See for example *R. v. K.(M.),* [2004] A.J. No. 1313 (Q.B.); *R. v. Garrington* (1972), 9 C.C.C. (2d) 472 (Ont. High Ct.); *R. v. Cichanski* (1976), 25 C.C.C. (2d) 84 (Ont. High Ct.); *R. v. Crawford*, (unreported) (August 17, 2007) Brampton, ON, No. 07-1928-00BR (S.C.J.).

[94] Nicole M. Myers, "Shifting Risk: Bail and the Use of Sureties" (2009-2010), 21 Current Issues Crim. Just. 127 at p.139. See also Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p.6-22.

[95] See section 515(2.1) of the *Criminal Code*.

[96] For example, at the College Park courthouse in Toronto, a justice may take the recognizance and qualify the surety in an intake office as opposed to in court which can save precious court resources.

can be a time consuming process as it often involves the surety testifying under oath and being cross-examined. Such practice has been criticized as being unnecessary[97] and as dominating the bail hearing which obscures the purpose of the hearing which is to determine whether the Crown has shown cause.[98] Additionally, the focus on the appropriateness of the surety tends to solidify surety releases as the dominant form of release when the default position should be unconditional release, followed by an undertaking with conditions, and then a recognizance without sureties, adhering to the ladder approach.[99] While in hearings involving more serious offences it may be justified to have the surety attend, "…a blanket requirement that all prospective sureties, in every case, must appear before the Court at the show cause hearing amounts to an abuse of discretion."[100]

Having to attend at the courthouse and testify at a bail hearing can be extremely onerous on both the accused and the prospective surety. For the accused it may mean that they will have to wait, in custody, for their surety to become available in order to attend to testify. For the surety it may mean taking time off work, having to secure childcare, or arranging for any number of obligations. Where it is possible for the surety to attend, it is not uncommon for them to wait all day only to find out that the court has run out of time to hear the bail hearing of their loved one. In some instances sureties are faced with the impossible decision whether to come back another day to try again for bail and risking their employment status, or returning to work leaving their loved one to languish in custody.

There is evidence that the insistence on surety forms of release, and requiring the surety personally attend to testify in court are the main cause of significant delays that plague bail

[97] See for example *R. v. Brooks* (2001), 153 C.C.C. (3d) 533 (Ont. S.C.J.) and *R. v. Villota* (2002), 163 C.C.C. (3d) 507 (Ont. S.C.J.) both rulings per Hill J.
[98] *R. v. Cole*, [2002] O.J. No. 4662 (C.J.).
[99] *R. v. Cole*, [2002] O.J. No. 4662 (C.J.) at para. 19.
[100] *R. v. Brooks* (2001), 153 C.C.C. (3d) (Ont. S.C.J.) at para. 37.

courts in various jurisdictions.[101] Where a surety is required, the accused's bail hearing is often adjourned in order for the person to secure a surety and for the surety to attend court. The routine adjournment of bail hearings has been strongly criticized as unconstitutional as it necessarily entails the accused person waiting in custody until their bail hearing is reached.[102] Recent data indicates that at least in Ontario and the Yukon, surety releases predominate as the most common form of release from custody.[103] The over-reliance on surety releases has become the subject of much criticism.[104] Perhaps one of the most impactful collateral consequences of the over-insistence of surety releases is that it prevents marginalized persons from accessing pre-trial release. One author describes the situation as follows:

> What appears to be happening is that the requirement to find sureties has taken the place of cash bail as a method of holding accused persons in custody. The majority of persons who are caught up in the criminal justice system, many of whom are not from the community where they are arrested, have difficulty finding sureties.[105]

Conditions Attaching to Release Orders

The ability to impose conditions to release orders is enumerated in the *Criminal Code*.[106] The ladder approach to the restriction of accused persons' liberty pending trial mandates that

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[101] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at p. 39. See also *R. v. Jevons*, 2008 ONCJ 559, [2008] O.J. No. 4397 at paras 27, 29; John Howard Society of Ontario, "Reasonable Bail?" (The Centre of Research, Policy & Program Development, 2013) accessed online April 8th, 2014: http://johnhoward.on.ca/research/type.html at pp. 7-9.

[102] *R. v. V.(J.)*, [2002] O.J. No. 1027 (S.C.J.) at para. 67 per Hill J.

[103] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at pp. 35-40.

[104] See Nicole M. Myers, "Shifting Risk: Bail and the Use of Sureties" (2009-2010) 21 Current Issues Crim. Just. 127; *Canada v. Horvath*, 2009 ONCA 732, [2009] O.J. No. 4308 citing Martin L. Friedland, "Criminal Justice in Canada Revisited" (2004), 48 C.L.Q. 419 at 433-434; Martin Friedland, "The *Bail Law Reform Act* Revisited" (2012) 16 Can. Crim. L. Rev. 315.

[105] Martin L. Friedland, "Criminal Justice in Canada Revisited" (2004), 48 C.L.Q. 419 at 434. See also Nicole M. Myers, "Shifting Risk: Bail and the Use of Sureties" (2009-2010), 21 Current Issues Crim Just. 127 at 139.

[106] Conditions that police officers may impose on police bails are enumerated in s.499(2) of the Code. Conditions that a justice may impose are enumerated in s.515(4) of the Code.

conditions of release, if any, must be as minimally intrusive as possible having regard to the many *Charter* rights at stake. Any conditions imposed must be directly related to the offences charged and should be directed to concerns that might have otherwise provided a basis for detention.[107] In other words, any condition imposed must be imposed for the purpose of alleviating primary, secondary or tertiary concerns; the three purposes of bail. The Crown must, based on evidence, show cause that each and every condition correlates to one of the three purposes of bail.[108] Bail conditions are not to be ordered as a means of reforming the accused or for any corrective purpose unconnected to the three grounds for detention. As noted by Justice Trotter, "There may be a temptation at bail hearings to right all wrongs and intervene in a substantial way in the accused person's life. As such, the bail order begins to resemble a probation order or a conditional sentence."[109] In this vein, efforts to rehabilitate or reform the accused at the bail stage are inappropriate and violate the presumption of innocence.[110]

Evidence

The admission of evidence at bail hearings is governed by s.518 of the *Criminal Code*. Evidentiary rules are relaxed in judicial interim release proceedings as compared to those governing trials. The relaxed rules have been generally understood to benefit the accused as adherence to strict rules would likely complicate bail hearings and result in delay[111]. Relaxed evidentiary standards are intended to protect the constitutional imperative that proceedings for

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[107] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p. 6-4; *Re Keenan and the Queen* (1979), 57 C.C.C. (2d) 267 (Que. C.A.); *R. v. Peddle*, [2001] O.J. No. 2116 (C.J.); *R. v. Major*, [1990] O.J. No. 345 (Dist. Ct.).

[108] *R. v. Major*, [1990] O.J. No. 345 (Dist. Ct.), *R. v. Saunders* (2002), 159 C.C.C. (3d) 559 (B.C.S.C.), *R. v. Porter* (2007), 221 C.C.C. (3d) 309 (B.C.C.A.).

[109] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p. 6-24.

[110] Justice Trotter, *The Law of Bail in Canada* (3d ed) (loose leaf) (Toronto: Thomson Reuters, 2010) at p.6-37.

[111] Justice Gary T. Trotter, *The Law of Bail in Canada*, 3rd ed. (Toronto: Carswell, 2010) at 5-1; *R. v. Courchene* (1999), 141 C.C.C. (3d) 431 (Man. Q.B.) at paras. 32-36; *R. v. Powers* (1972), 9 C.C.C. (2d) 533 (Ont. High Ct.) at para. 19; *R. v. O'Neil* (2007), 253 C.C.C. (3d) 120 (Ont. S.C.J.) at paras. 13-14.

presumptively innocent accused occur as expeditiously as possible. Assuming relevance, evidence that is both credible and reliable is receivable and often includes a wide array of character evidence.

Although the relaxed standard can be seen as being in the accused's favour as 'time is of the essence' in judicial interim release, the standard often allows the Crown to proffer very prejudicial evidence. While section 518 specifically allows for the admission of the accused's prior criminal convictions and pending charges[112], it is not uncommon for the Crown Attorney to proffer evidence of non-conviction records and occurrences with the police; conduct for which the accused has never been found guilty.[113] As noted above, evidence that is both credible and trustworthy as well as relevant, is admissible, conferring a broad discretion on the presiding justice to receive evidence. Nonetheless, the presiding justice should receive evidence with an eye to protecting the integrity of the evidentiary record in order to ensure a fair hearing having regard to the *Charter* protected right to reasonable bail.[114]

The criminal antecedents of the accused at a bail hearing are by far relied upon as the most determinative evidence as the past conduct of the accused is commonly used to predict future behaviour. The past record of the accused is often used to determine whether the person is likely to attend court, likely to abide by the conditions of bail, and substantially unlikely to commit further criminal offences.

Bail: Issues and Debates

Despite the very clear and established principles mandating that detention orders and onerous forms of bail be an absolute last resort reserved for exceptional cases where one of the

[112] Section 518(c) of the Code.

[113] The admissibility of such evidence is debatable. There is at least one pre-*Charter* case supporting the admissibility of non-conviction evidence, see: *R. v. Larsen*, [1976] B.C.J. No. 1045 (S.C.).

[114] S. Casey Hill, David M. Tanovich, and Louis P. Strezos, *McWilliams Canadian Criminal Evidence* (Toronto: Canada Law Book, 2013) at 35-4 – 35-5.

legal grounds for detention is met, there is much to suggest that the ladder principle is not being followed resulting in a bail process that disadvantages marginalized individuals who find themselves before the courts.

By way of background to the problems of the current system, the following provides some context. In 1965, Professor Martin Friedland published an extensive study of the bail system in Canada concluding that it was operating in a manner which infringed constitutional standards, unduly deprived accused persons of their liberty, and discriminated against impecunious accused.[115] He also argued that the discretion exercised in the determination of bail was not guided by clear criteria resulting in seemingly arbitrary decisions being made. Professor Friedland's work informed much of the Ouimet Report[116] which examined many aspects of the criminal justice system including judicial interim release and echoed Professor Friedland's conclusions including that the bail system was operating in a discriminatory manner:

> Many people take the view that the bail system is discriminatory and operates to the detriment of the poor. That the bail system – unless properly applied – is capable of producing this result cannot be denied, and the Committee is satisfied that the misapplication of the Canadian bail system has produced many discriminatory results.[117]

The *Bail Reform Act* was passed in 1972 as an attempt to remedy many of the concerns raised, and to respond to many of the recommendations made, in the Ouimet Report. The *Bail Reform Act*, which is quite similar to the statutory scheme currently in place, has been referred to as " a liberal and enlightened system of pre-trial release" which established a basic, presumptive,

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[115] Martin Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965).

[116] Canada. Committee on Corrections. Report of the Canadian Committee on Corrections -- Toward Unity: Criminal Justice and Corrections. Ottawa: Queen's Printer, 1969, commonly referred to as "The Ouimet Report".

[117] Canada. Committee on Corrections. Report of the Canadian Committee on Corrections -- Toward Unity: Criminal Justice and Corrections. Ottawa: Queen's Printer, 1969, commonly referred to as "The Ouimet Report" at p. 115.

entitlement to bail.[118] The Act granted the police the power to release persons rather than arresting them, and gave officers additional powers to release a person subsequent to arrest.[119] Attempting to reduce the disparity between impecunious accused and those with means, the Act also tried to reduce cash bails by enumerating them to be an exception rather than the rule.[120] It laid out clear criteria to guide the discretion of the presiding justice, namely that bail should only be denied where there is a risk that the accused will abscond, or where the accused posed a substantial likelihood of re-offence. The *Criminal Code* has since been amended to include the tertiary ground as a basis for detention where necessary to maintain confidence in the administration of justice. As well, more recent amendments have created a series of reverse onus provisions where, in certain circumstances, the onus is on the accused to show cause as to why he should be released.[121] Both the tertiary ground in its current form, as well as the reverse onus provisions have been upheld as constitutionally valid.[122]

More recently, Professor Friedland has written that not only have things not changed since the passing of the *Bail Reform Act*, they may in fact be getting worse.[123] Systemic delays in bail courts, a significant rise in remand populations across Canada, the routine imposition of onerous and superfluous conditions attaching to release orders, the disadvantage imposed by the

[118] *R. v. Bray* (1983), 2 C.C.C. (3d) 325 (Ont. C.A.) at 328 per Martin J.A.; *R. v. Pearson*, [1991] 3 S.C.R. 665 at para. 50; *R. v. V.(J.)*, [2002] O.J. No. 1027 (S.C.J.) at para. 65 per Hill J.
[119] Martin Friedland, "The *Bail Reform Act* Revisited" (2012), 16 C.C.L.R. 315 at 318.
[120] Martin Friedland, "The *Bail Reform Act* Revisited" (2012), 16 C.C.L.R. 315 at 319.
[121] See s.515(6) of the *Criminal Code* which enumerates the circumstances where the onus is on the accused to show cause why he should be released.
[122] The reverse onus provisions were upheld by the Supreme Court of Canada in *R. v. Pearson* (1992), 77 C.C.C. (3d) 124 and *R. v. Morales* (1992), 77 C.C.C. (3d) 91. In *R. v. Morales* however, the then tertiary ground provision was struck down. The tertiary ground in its current iteration was upheld in *R. v. Hall*, 2002 SCC 64, [2002] S.C.J. No. 65.
[123] Martin Friedland, "The *Bail Reform Act* Revisited" (2012) 16 C.C.L.R. 315.

bail system on already marginalized accused persons, and the continued perceived arbitrariness of bail decisions have recently garnered some attention.[124]

All of the above listed systemic problems may contribute to protracted time in remand custody. By "remand", I refer to those who are detained in custody pending either a bail hearing, or pending trial; remand refers to those who are in custody but have not been sentenced. Those on remand are held in provincial custodial institutions. There has been a rise in remand populations in the recent past. As noted by Professor Friedland,

> The remand prisoners in custody at any one time doubled between 1986 and 2000, and almost doubled again between 2000 and 2010. Today, there are more remanded persons in provincial institutions at any one time than there are sentenced persons in those institutions.[125]

The rise in remand populations in the past twenty-five years is particularly curious given that police reported crime rates in Canada are decreasing. It has been reported that in 2012 the crime rate in Canada was at its lowest since 1972 and that violent crime was at its lowest rate since 1987.[126] As noted by the Canadian Civil Liberties Association, "There are fewer crimes being committed, and those that are committed are less violent than they were in the past."[127] Why then is the remand population on the rise when crime is generally on the decline?

Remand populations differ across the provinces and territories in Canada and despite having a single *Criminal Code* governing judicial interim release, there are significant variations

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[124] These phenomena have been documented: John Howard Society of Ontario, "Reasonable Bail?" (The Centre of Research, Policy & Program Development, 2013) accessed online April 8th, 2014: http://johnhoward.on.ca/research/type.html; Martin Friedland, "The *Bail Reform Act* Revisited" (2012), 16 C.C.L.R. 315; Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014); Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer, 1995).

[125] Martin Friedland, "The *Bail Reform Act* Revisted" (2012), 16 C.C.L.R. 315 at 317 citing Lindsay Porter and Donna Calverley, "Trends in the Use of Remand in Canada" *Juristat* Article, Statistics Canada, at p. 7, (May 2011).

[126] Samuel Perreault, "Police-reported crime statistics in Canada, 2012" (Ottawa: StatCan, 25 July 2013), online: <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.htm#wb-tphp> accessed April 8, 2014.

[127] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at p.7.

in the practices and outcomes of the bail system across the different jurisdictions. Given these variations, it may be impossible to definitively identify the reasons for the rise in remand populations. However, it is possible to identify certain trends, and to locate practices, policies, and procedures and other factors that likely contribute to swelling remand populations.

Professor Myers and others have articulated that, at least in Ontario, key decision makers are reluctant to make the ultimate decision to release accused persons pending trial in fear that the person will commit further crimes while on bail, resulting in a culture of risk aversion when it comes to bail decisions.[128] The police off-load the responsibility to the Crown Attorneys who may contest release, forcing a contested hearing where the presiding justice determines release or detention. Where the person is released into the community, the justice then offloads the responsibility to supervise and prevent criminal behaviour onto a surety, as well as through the use of overly restrictive bail conditions.[129] There is an increasing emergence of what has been termed a "blame system; a system where every misfortune is turned into a risk which was potentially preventable, and for which someone is culpable."[130]

A risk averse bail culture has many adverse consequences for accused persons and may be a contributing factor to rising remand populations. Not being released by the police means being taken into custody, which, even if only for a very short time period, can have devastating consequences. As noted in Abby Deshman and Nicole Myers, "For a person who has been charged with an offence, the difference between being released from police custody and being

[128] Cheryl M Webster, Anthony N. Doob, and Nicole Myers, "The Parable of Ms. Baker: Understanding Pre-trial Detention in Canada" (2009-2010) 21 Current Issues Crim. Just. 79; Nicole Myers, "Shifting Risk: Bail and the Use of Sureties" (2009 – 2010) Current Issues Crim. Just. 127; and Nicole Myers, "Creating Criminality: The Intensification of Institutional Risk Aversion Strategies and the Decline of the Bail Process" (2013) P.h.D Dissertation, (University of Toronto: Toronto), online: https://tspace.library.utoronto.ca/handle/1807/35915 accessed April 16, 2014.

[129] Nicole M. Myers, "Shifting Risk and the Use of Sureties" (2009-2010), 21 Current Issues Crim. Just. 127 at p. 144.

[130] Nicole M. Myers, "Shifting Risk and the Use of Sureties" (2009-2010), 21 Current Issues Crim. Just. 127 at p.129.

detained for a bail hearing can be significant. Even a few days in detention can mean emergency childcare arrangements, lost income, a lost job or skipped medication."[131]

Once before the courts the defence often agrees to overly onerous bails including the use of a surety even where one is not legally necessary, and unreasonable conditions of release – all in order to secure the Crown's consent thus avoiding a risky contested bail hearing.[132] The over-reliance of surety forms of release has been cited as a significant contributing factor to the back log in the bail courts and has also been cited as disadvantaging those who are socially isolated and may not have family or friends that are willing, or able financially, to bail them out.[133]

Despite the law reform efforts to provide more objective criteria to determine release or detention, arbitrary decisions in the determination of bail persist.[134] There continues to be a great deal of discretion and subjective interpretation in the assessment of the risk posed by an individual charged with committing a criminal offence. The lack of objective criteria and the lack of consensus in the literature regarding what constitutes risk and the predictability of danger means that subjective and perhaps biased assessments are being made. As pointed out by Hannah-Moffat and O'Malley,

> …the prediction of risk has shifted away from focusing on specific individuals to targeting entire categories of individuals who share 'risk factors'…The other factors that may possibly influence the bail decisions are subjective interpretations and assignments of cultural meaning to a variety of personal

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[131] "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at p. 9. See also *R. v. Hall*, 2002 SCC 64, [2002] S.C.J. No. 65 at para. 47.

[132] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at p.30.

[133] Nicole Myers, "Creating Criminality: The Intensification of Institutional Risk Aversion Strategies and the Decline of the Bail Process" (2013) P.h.D Dissertation, (University of Toronto: Toronto), online: https://tspace.library.utoronto.ca/handle/1807/35915 accessed April 16, 2014. The author argues that sureties have come to replace what used to be the cash bail system replicating the same inequities. See also Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014).

[134] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at pp. 44-46.

> factors such as employment, housing, income, neighbourhood, immigration status, age, and the availability of a suitable surety.[135]

In this sense, the subjective interpretation of risk is impacted by factors such as race, class, Aboriginal heritage, ability, and so on and the inherent biases and discriminatory attitudes of those with the power to exercise discretion reveal themselves within the interpretation of risk. In the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* it was reported that "…systemic racism makes black and many other racialized accused in Ontario especially vulnerable to imprisonment before trial.[136] Similar conclusions were drawn in relation to Aboriginal people in the *Manitoba Justice Inquiry*.[137] Accused persons who are marginalized face increased difficulty in accessing pre-trial release and risk spending disproportionate time in jail awaiting trial.

In order to manage perceived risk, the courts have come to rely on both the use of conditions to mitigate 'risk' as well as the use of sureties. As Myers argues, "By outsourcing control of the accused to a private controller – the surety – the organization is relieved of much of the risk to its reputation."[138] Sureties and the use of conditions have become a mechanism for decision makers to alleviate the risk involved in releasing accused pending trial and to transfer the responsibility for ensuring the accused doesn't commit further offences from the state onto the family members of the accused.

Although the law on the books describes bail as a *Charter* protected right for all presumptively innocent accused persons, the law of bail in reality has become overly restrictive,

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[135] K. Hannah-Moffat & P.O'Malley, *Gendered Risks* (Routledge-Cavendish Glass House: Oxton, 2007) at p. 17.
[136] Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer, 1995) at p.113.
[137] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) at p. 101.
[138] Nicole Myers, "Shifting Risk: Bail and the Use of Sureties" (2009 – 2010) Current Issues Crim. Just. 127 at p. 130.

punitive, and coercive, especially for marginalized people. In light of the dicta in *Gladue*, this phenomenon should be particularly alarming to courts when adjudicating bail hearings involving Aboriginal accused.

CHAPTER FOUR – The Application of *Gladue* to Bail: Pre-trial Sentencing?

Although various courts across Canada have been applying *Gladue* in bail hearings involving Aboriginal accused since 2002, there continues to be a lack of clarity regarding exactly how this sentencing regime applies to bail hearings. This chapter explores the ways in which the *Gladue* analysis has come to be understood in judicial interim release proceedings. I will argue that *Gladue* at the bail phase has focused on inappropriate considerations and exacerbates rather than alleviates the systemic issues faced by Aboriginal people at the bail phase. Instead of focusing on the barriers that Aboriginal people might face in accessing bail, courts have turned their attention to considerations that are more attuned to sentencing principles. In order to lay the groundwork for this discussion, I will begin with a review of the case law and present the current frameworks being utilized. I will then discuss some of the problems and challenges with the current state of the law. I will argue that at best, *Gladue* is not being applied in a meaningful way (and in some cases it is not raised as an issue at all) and at worst, it is being applied in a manner which perpetuates systemic bias against Aboriginal people. The jurisprudence reflects a general tendency to treat Aboriginal accused in a manner that erodes the presumption of innocence and in many respects, does not accord with the law of bail. Additionally, the courts appear to misunderstand how 'systemic factors' should be interpreted in the context of bail. Read as a whole, the jurisprudence in this legal landscape reads as if the bail hearings involving Aboriginal accused are presumptively guilty and the hearings proceed in manner more consistent with sentencing hearings than with judicial interim release.

The Framework

As previously discussed, the *Gladue* framework in sentencing mandates that courts consider 1) the systemic or background factors that have contributed to bringing the Aboriginal

offender before the courts and 2) courts must consider the types of sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of his or her particular Aboriginal heritage or connection. The *Ipeelee* Court clarified that the inquiry into 'systemic and background factors' is an inquiry into the systemic impact of colonialism on the individual Aboriginal offender. It is a recognition that the person's criminal behaviour may have been created, in part, by systemic barriers caused by the legacy of colonialism. In this sense one's Aboriginal heritage becomes a mitigating factor on sentence as these systemic issues tend to diminish the person's moral culpability in recognition that the impact of colonialism created the very circumstances that contributed to Aboriginal offending. The second branch of *Gladue* recognizes that traditional principles of sentencing including deterrence and denunciation may not be meaningful to Aboriginal offenders because of perceived 'cultural differences'. Alternatives to custodial sentences should be considered with an emphasis on principles of restorative justice and rehabilitation in order to breathe life into the remedial purpose underpinning s.718.2(e).

The inquiry into the systemic effects that colonization has had on the individual's life circumstances has to do with recognition that the person's offending behaviour was created, at least in part, by the circumstances of colonization. In this sense, Aboriginal heritage, insofar as that person's criminality was informed by colonization, is mitigating.[139] This inquiry can also be seen as an attempt by Parliament to take responsibility for the policies and legacy of colonialism that have created the circumstances leading to criminal behaviour.[140]

Courts have found that the above principles are applicable to bail hearings in a number of disparate and contradictory ways, presenting a piecemeal approach to the application of *Gladue*

[139] *R. v. Ipeelee*, at para 74.

[140] See for example the analysis of national responsibility and s.718.2(e) articulated in *R. v. Quash*, 2009 YKTC followed in *R. v. Magill*, 2013 YKTC 8, [2013] Y.J. No. 127.

to bail that lacks cohesion. The following discussion outlines the ways that *Gladue* has been found to apply to bail proceedings and the frameworks that are currently being utilized.

The need to recognize the gross over-incarceration of Aboriginal people and the impact that pre-trial custody can have on Aboriginal accused have been articulated as relevant considerations in the determination of judicial interim release in some cases[141] but not explicitly recognized in many others.[142] The 'special circumstances' of Aboriginal accused have been found to apply irrespective of the primary, secondary, or tertiary grounds[143]. Contradicting this finding, it has also been concluded that *Gladue* principles must be assessed within the provisions of s.515(10).[144] Surety suitability, and the type of mechanisms and conditions used to enforce the bail are all to be understood having regard to the accused's particular connection to Aboriginal heritage. This approach was outlined in *R. v. Brant*, where the application of *Gladue* to interim release proceedings was described as follows:

> What the principles in *Gladue* do alter is the method of analysis which the justice must use in determining whether detention is justified. Specifically, the Court must look at whether the sureties offered, in the context of the Aboriginal culture, can control the accused's behaviour. The Court must also look at whether detention of the Aboriginal accused has a disproportionately negative impact on that accused, and whether that impact could be alleviated by strict bail conditions. Finally, the Court must look at whether Aboriginal law and customs provide the assurances of attendance in court and protection of the public that are required for release. Each case will be dependent on its specific facts, but a

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[141] See for example: *R. v. Pierce*, 2010 ONSC 6154, [2010] O.J. No. 4925 (S.C.J.) at para. 45; *R. v. Rich*, 2009 NLTD 69, [2009] N.J. No. 117 at para. 18; *R. v. Daniels*, 2012 SKPC 189, [2012] S.J. No. 810 at para. 20; *R. v. Magill*, 2013 YKTC 8, [2013] Y.J. No. 127, Whitehorse 12-00450A (YKTC) at para. 47; *R. v. Cyr*, 2012 SKQB 534 at para. 52.

[142] *R. v. Misquadis*-King, 2010 ONSC 4592, [2010] O.J. No. 6310; R. *v. Silversmith*, [2008] O.J. No. 4646 (S.C.J.); *R. v. Robinson* (2009), 95 O.R. (3d) 309 (C.A.); *R. v. Murle*, 2013 ONSC 117, [2013] O.J. No. 45 (S.C.J.); *R. v. P.(D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86; *R. v. Silas*, 2011 YKTC 22, [2011] Y.J. No. 46; *R. v. J.(T.J.)*, 2011 BCPC 155, [2011] B.C.J. No. 1252; *R. v. Green*, [2009] O.J. No. 1156 (S.C.J.); *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.); *R. v. Campbell*, 2009 BCPC 2812, [2009] B.C.J. No. 2812 (P.C.J.); *R. v. Neshawabin*, [2008] O.J. No. 5606 (S.C.J.); *R. v. Wesley*, 2002 BCPC 717, [2002] B.C.J. No. 3401; *R. v. Crawford*, (unreported) (August 17, 2007) Brampton ON, No. 07-1928-00BR (S.C.J.); *R. v. Bain*, [2004] O.J. No. 6147 (S.C.J.).

[143] *R. v. P.(D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86 at para. 9.

[144] *R. v. Daniels*, 2012 SKPC 189, [2012] S.J. No. 810 at para. 21

broader analysis is required where the accused is Aboriginal.[145]

The only appellate guidance on the applicability of *Gladue* to bail derives from a very brief endorsement of the Ontario Court of Appeal in *R. v. Robinson*.[146] In that case Justice Winkler C.J.O., affirmed that *Gladue* is engaged in judicial interim release and articulated its relevance as follows:

> Application of the *Gladue* principles would involve consideration of the unique systemic background factors which may have played a part in bringing the particular Aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release.[147]

As in the sentencing context, failure to consider the accused's Aboriginal heritage in a bail hearing has been found to be an error that will justify appellate intervention.[148] It is not sufficient to merely mention that *Gladue* has been considered; it must be clear how it has been considered and applied, otherwise "…the courts will just be considered to be giving 'lip service' to the recognition of the unique circumstances of Aboriginal offenders."[149] The courts diverge on exactly how systemic and background factors are to be taken into account and this will be discussed as a separate issue below. Despite the fact that there are *Gladue* bail decisions deriving from almost every area of Canada, the jurisprudence is not well developed and is sporadic.

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[145] *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.) at para. 21.
[146] *R. v. Robinson*, 2009 ONCA 205.
[147] *R. v. Robinson*, 2009 ONCA 205 at para. 13.
[148] See *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.) at para. 15 citing *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664 (C.A.).
[149] *R. v. Silversmith*, [2008] O.J. No. 4646 (S.C.J.) at para. 18.

The Aboriginal Accused Becomes an Offender

On the face of it, the above principles may appear to adhere to the groundwork laid down by the Supreme Court relating to Aboriginal people. However, read as a whole, *Gladue* bail decisions reveal the roots of s.718.2(e); it is a sentencing decision and the bail courts have fallen into a trap of treating these bail hearings as if the Aboriginal accused is being sentenced. It is trite to say that in sentencing proceedings, the offender is no longer entitled to the presumption of innocence as they have either pleaded guilty, or have been found guilty after a trial. Transporting this sentencing framework into the context of bail, without any modification accounting for the differing contexts will necessarily violate the presumption of innocence that all accused are entitled to at the bail phase. In this section I argue that in fact this is exactly what has happened in the arena of *Gladue* bail hearings.

There are several problems with the above frameworks articulated in *R. v. Brant*, and *R. v. Robinson* relating to the presumption of innocence. Inquiring into what brings the "Aboriginal offender" before the courts, as articulated in *R. v. Robinson*, at the bail phase is a complete affront to the presumption of innocence. Persons facing charges are not "offenders" and an inquiry into 'what bring the person before the courts' is necessarily an inquiry into what caused their criminal behaviour. If the presumption of innocence is to have any life at the bail phase, the only possible factor that brings the person before the court is the fact of his or her arrest. If one is truly legally innocent until proven guilty, inquiries into the causes of criminal behaviour must only be delved into upon conviction. Unfortunately, many of the bail decisions reflect the

slippage in language illustrated in *Robinson* referencing the Aboriginal accused as the 'offender'.[150]

It could be argued that the use of the word offender instead of accused is a meaningless slippage that perhaps occurs in any type of bail hearing. This argument could potentially gain traction if it were the only symptom of the erosion of the presumption of innocence. However, the *Gladue* bail jurisprudence goes much further than just a semantic error, entering territory that should be the sole preserve of sentencing proceedings. Beginning with the premise that the bail courts are dealing with Aboriginal *offenders*, the case law goes further to diagnose, and to treat the Aboriginal offending behaviour decimating any notion of legal innocence pending trial.

The introduction of principles of 'rehabilitation' and 'restorative justice' is all too prevalent in *Gladue* bail hearings. In *R. v. P.(D.D.)*, the following comments were made as the court describes how *Gladue* might guide bail proceedings:

> The failure to consider an Aboriginal person's special circumstances during the often lengthy, protracted and stressful pre-trial period would amount to ignoring the important reality of our criminal justice system, which is that pre-trial custody can adversely, directly and inevitably affect the Aboriginal offender long before s/he is sentenced. If the rehabilitation of the Aboriginal offender is to be deal [sic] with meaningfully, it should begin as soon as possible; and if the recidivism rates for Aboriginal offenders are to be brought down, their special and individual circumstances must be addressed at the pre-trial custody stage.[151]

The language here assumes that the Aboriginal offender is inevitably going to be sentenced and so rehabilitation should occur sooner rather than later. The 'reality' that the court references is that the Aboriginal person before the court is guilty and in need of rehabilitation because of his 'special circumstances'. The special circumstances here appear to be recidivism rates for

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[150] See for example: *R. v. P. (D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86 at para. 9; *R. v. Pittawanakwat*, 2003 CanLII 12645 (ONSC) at para. 35; *R. v. Pierce*, 2010 ONSC 6154, [2010] O.J. No. 4925 (S.C.J.) at para. 1; *R. v. Silversmith*, [2008] O.J. No. 4646 (S.C.J.) at para. 33. In *Silversmith*, the court refers to Aboriginal offenders seeking judicial interim release.

[151] *R. v. P.(D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86 at para. 9.

Aboriginal people and the answer is rehabilitation. This is how the court interprets *Gladue* as being applicable to bail hearings. The court noted that these special circumstances apply regardless of the primary, secondary or tertiary grounds, rendering the law of bail nugatory, replacing it with sentencing considerations. Recidivism is to be dealt with in sentencing proceedings and attempts to prevent it at the phase of judicial interim release offend the presumption of innocence.

The court also did not specifically reference any facets of colonialism that might have impacted the accused, or that should be considered in bail adjudication. Rather, the Aboriginal accused appears to have been found guilty and the court provided what it deemed to be the necessary rehabilitative sentence via a release order. The court concluded that in light of the Supreme Court of Canada's decisions in the sentencing of Aboriginal persons, which apply to bail, that "…this Accused should be released and begin his treatment and rehabilitation program rather than languish at the Remand Centre in custody."[152] The accused was released on a bail with fourteen conditions of release including that he regularly attend an addictions treatment program for six weeks. Although there was evidence presented at the bail hearing that the accused was alcohol dependent, alcohol was not stated to have played any part in the alleged commission of the offence.[153]

Language of rehabilitation and reform was articulated in the first bail decision in Ontario to apply *Gladue* to bail. In *R. v. Pitawanakwat*, the presiding justice commented as follows:

> …I believe that it is in the interests of all concerned, including the accused, the victim, the possible victims, the community at large, and the justice system itself, that appropriate treatment and counseling be given under appropriate terms and conditions…

[152] *R. v. P.(D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86 at para. 13.
[153] Conditions imposed that are unrelated to the offence will be discussed in further detail *infra*.

> …it is in the interests of all concerned that, to the extent possible, the root causes, and not merely the symptoms, of an offender's actions be dealt with at all stages in the criminal justice process.[154]

Again, the use of "offender" instead of accused frames the decision as does the term 'victim' instead of the word 'complainant'. In this case, the allegations involved alcohol and there was evidence that the accused wanted to take steps to address his issues with alcohol abuse and dependency. However, there was no stated connection between the accused accessing services for substance abuse and any of the grounds for detention. Absent this connection, the court's language becomes inappropriate in the context of a bail hearing. The use of treatment for substance abuse as a means of dealing with the 'root causes' of the 'offender's actions' is language that should be reserved for the sentencing domain. This same language was employed in *R. v. Misquadis-King* where the justice noted that the Supreme Court instructs judges to "look at some of the root causes of these problems"[155] and then goes on to discuss the need to lead people to treatment, and to lead the accused to treatment: "Mr. King, we are trying to lead you and you are trying to lead yourself to treatment – we have to find a way to work with you."[156] In this case there was no discussion of the circumstances of the offences before the court, how alcohol may have related to any of the primary or secondary grounds for detention, or why treatment would be otherwise relevant to the release of the accused from custody. Rather, the focus is on addressing the root causes of perceived Aboriginal criminality through treatment and rehabilitation.

It is clear that the language of rehabilitation is borrowed from the sentencing context and in particular, from the language and principles enunciated in *Gladue*. In addition to bail being

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[154] *R. v. Pittawanakwat*, 2003 CanLII 12645 (ONSC) at paras. 34-35.
[155] *R. v. Misquadis-King*, 2010 ONSC 4592, [2010] O.J. No. 6310 at para. 12. The same justice that presided over *R. v. Pitawanakwat*, 2003 CanLII 12645 presided over *R. v. Misquadis-King*.
[156] 2010 ONSC 4592, [2010] O.J. No. 6310 at para. 18.

used as a rehabilitative tool, principles of 'restorative' justice have also been misguidedly drawn upon in judicial interim release. In *R. v. Pierce*[157] the accused, a young Aboriginal woman with no criminal record, found herself before the courts for the first time. She had been pregnant and lost the child who was near term. Following this tragic loss, she sank into a deep depression and used alcohol and marijuana to ease her emotional pain. After drinking too much one evening, she and a few others were alleged to have perpetuated a very serious assault against another person. She was charged with aggravated assault and released to two sureties with an alcohol abstention condition attaching to her bail which she eventually breached. She was detained after a bail hearing and after spending months in remand custody, she applied for a bail review. In the course of this review it came to light that she had come to terms with her emotional losses and was ready to access help for her reliance on alcohol. The bail review judge noted her need for self-help – not in relation to any of the grounds for detention but rather it seems just for the sake of the betterment of Ms. Pierce:

> Ms. Pierce's plan includes a restorative component and she acknowledges the necessity of professional engagement to help with the bereavement, self esteem and anger management. I take notice that the native community would prefer judicial interim release and restorative approaches to Ms. Pierce's needs.
>
> In this case, the centrepiece of the interim release plan involves a young woman who lost a near term child and suffered emotional damage as the result. She resisted counselling and the loss is said to have changed her behaviours. From a restorative perspective, Ms. Pierce requires counselling to deal with one or more of bereavement, substance abuse, self esteem and anger management issues.[158]

Again, there may well have been good reason to require counseling as a component of a release for this young woman in order to alleviate any secondary ground concerns the court may

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[157] 2010 ONSC 6154, [2010] O.J. No. 4925.

[158] *R. v. Pierce*, 2010 ONSC 6154, [2010] O.J. No. 4925 at paras. 41 and 45. The court also employs sentencing language at para. 42 where, in relation to the application of *Gladue* it is noted that "…every [bail] application is an individual process and in each case the analysis must be what is a fit determination for the accused for this offence in this community." ("Self esteem" appears in the original).

have had. However, the resort to the utilization of a 'restorative' approach erodes the presumption of innocence as it is being employed as a means of assisting the accused to overcome her demons not in relation to the law of bail, but for the sake of her wellbeing having regard to her life circumstances.

In *R. v. Gladue*, restorative justice is described as involving "…some form of restitution and reintegration into the community."[159] It involves the offender taking responsibility for their actions.[160] Principles of restorative justice and rehabilitation are inherently sentencing ideals where the presumption of innocence is no longer a relevant consideration. The fact that *Gladue* and *Ipeelee* have been found to apply outside of sentencing should not mean that sentencing principles are to be applied inappropriately with no regard to the different legal contexts. The application of *Gladue* in the bail context requires a different analysis that accords with the law of bail and the presumption of innocence. It may be that the language slippages, and use of sentencing conventions in the bail context are merely unintended slippages deriving from the source of *Gladue* and s.718.2(e). However, such slippages lead to the presumption of guilt for Aboriginal accused and should be avoided. However unintended, the erosion of the presumption of innocence for Aboriginal accused re-enforces a bias that Aboriginal people are 'criminals', more likely to commit crimes, and more likely to be guilty than their non-Aboriginal counterparts. The danger of this kind of stereotyping is obvious; it solidifies stereotypes of Aboriginal persons that have pervaded the criminal justice system for far too long.[161] Ironically, this kind of bias insofar as it contributes to the alienation of Aboriginal people from the criminal

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[159] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.) at para. 43.

[160] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.) at para. 43.

[161] See for example: Michael Jackson, "Locking up Natives in Canada", (1988-1989) 23 U. Brit. Colum. L.R. 215; Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013) at p.5; Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991).

justice system was exactly the kind of phenomenon that the Supreme Court in *Gladue* and *Ipeelee* was attempting to name and eradicate.[162]

Not only does the treatment of Aboriginal accused at the bail stage as presumptively guilty offend the constitutional right to the presumption of innocence while simultaneously perpetuating systemic discrimination within the criminal justice system, the call for rehabilitation at the bail phase offends the law of bail. As noted previously, attempts at reforming presumptively innocent accused persons at the bail stage are inappropriate.[163] Although there may be situations where rehabilitative efforts made by the accused can achieve one of the three purposes of bail, any condition imposed requiring counseling or treatment of any kind should be directed to concerns that may have otherwise provided a foundation for detention.[164]

Colonialism, Systemic Factors and 'Culture Talk'

The reversion to the rehabilitation of Aboriginal people in bail proceedings is intertwined with the ways in which the courts understand, or misunderstand, the relevance of systemic factors, and the legacy of colonialism in the adjudication of bail. This section will explore how the emphasis on rehabilitation in *Gladue* bail hearings has specific discursive implications for Aboriginal people. It may be true that bail proceedings involving non-Aboriginal accused may also over-emphasize inappropriate rehabilitative principles that erode the presumption of innocence.[165] However, this slippage has very particular implications for Aboriginal accused.

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[162] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.) at para. 65; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 at paras. 67-69.

[163] Justice Gary Trotter, *The Law of Bail in Canada* (3d ed.) (looseleaf) (Toronto: Thomson Reuters, 2010) at p. 6-37.

[164] Justice Gary Trotter, *The Law of Bail in Canada* (3d ed.) (looseleaf) (Toronto: Thomson Reuters, 2010) at p. 6-4; *Re Keenan and The Queen* (1979), 12 C.R. (3d) 135 (Que. C.A.); *R. v. Peddle*, [2001] O.J. No. 2116 (C.J.) at para. 10 and; *R. v. Major*, [1990] O.J. No. 345 (Dist. Ct.).

[165] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at pp. 59-61.

Firstly, the slippage likely derives from the courts efforts to implement *Gladue* and a misunderstanding of how the dicta of *Gladue* should inform bail courts' analyses. Secondly, as noted above, the potential for bias resulting from the presumption of guilt has very particular resonance in terms of the history of colonialism. The former implication will be explored by examining the way that the bail courts have interpreted and considered systemic factors in the context of bail. The latter implication will be explored in this section where I will argue that a focus on rehabilitation re-inscribes a colonial encounter which runs afoul of the purpose of *Gladue.*

As discussed previously, in the sentencing context, feminist and Indigenous scholars have highlighted the ways that the *Gladue/Ipeelee* analysis overly emphasizes cultural difference as the key factor in creating and maintaining the over-incarceration of Aboriginal people. The emphasis on cultural difference as the main contributing cause of the incarceration of Aboriginal people masks the ways that the criminal justice system creates and maintains the criminalization of Aboriginal people. In the bail context, the courts have largely ignored the systemic factors that have caused the life circumstances of the Aboriginal accused before the courts in a number of ways. There is a general lack of discussion of, or reference to, specific facets of colonialism. Where colonialism is mentioned, there is a general lack of a framework for understanding how any systemic issue is relevant to bail adjudication. This section will explore these issues as they arise in the bail case law and will then explore the implications that flow from them.

A common feature of the cases is reference to the difficulties faced by the Aboriginal accused and the attribution of these tragic circumstances to the fact of the person's Aboriginal "heritage". The tragic circumstances are understood to be resulting from the fact of the

Aboriginal heritage as opposed to being understood as attributable to colonialism – historic and ongoing – that is the cause of the life circumstances of the accused.

Discussing the application of *Gladue* to bail, in *R. v. Pierce*, the court noted that "All performers, perpetrators and victims, are native. Theirs is the native community and that is a necessary consideration."[166] The court does not elaborate on the ways that the fact that "theirs is a native community" might be relevant to bail. Within the rest of the ruling, the very tragic circumstances of the young woman are discussed at length – her substance abuse issues, the trauma she experienced after having a near term miscarriage, and her mental health – yet there is no stated connection of these factors to any systemic issue or historical or ongoing facet of colonialism. Absent this connection, there is a danger that the court paints this young woman as having all of these issues, and suffering all of these ills because she is Aboriginal, as if these factors are part of Aboriginal heritage or 'culture' divorced from historical context. In this way Aboriginality becomes equated with suffering a tragic life, or trauma, or life circumstances as if these ills are part of Aboriginal culture. This is not what the dicta of *Gladue* and *Ipeelee* mandate. Courts are mandated to connect these issues to the broader systemic or structural realities of colonialism. Policies of colonialism have impacted many Aboriginal communities and individuals in a myriad of ways, resulting in a myriad of traumas. This should be at the heart of any discussion of an Aboriginal accused's life circumstances. Merely mentioning issues like substance abuse or trauma and not connecting these things to broader structural issues runs afoul of *Gladue* and *Ipeelee*.

[166] *R. v. Pierce*, 2010 ONSC 6154, [2010] O.J. No. 4925 at para. 41.

This can be further exemplified in *R. v. Silversmith*[167]. The court in this case went to great lengths to point out the prevalence of poverty, unemployment, and substance abuse experienced by both the accused and his community. The court correctly noted that unemployment is prevalent on many Indian reservations in Canada as it is in the accused's community, the Six Nations of the Grand River Nation. Chronic poverty and substance abuse are also properly considered to be systemic factors that the court must consider as relevant to the question of bail. However, these factors are not only disconnected from any specific colonial policy or phenomenon, colonialism itself is not referred to. Instead, the court refers to unemployment as a "systemic and cultural factor" that the court must carefully weigh at a bail hearing involving an Aboriginal person and that the "endless cycle of aboriginal unemployment and poverty can have a negative impact on Mr. Silversmith.[168] The court also attributes the accused's criminal record to his alcoholism, not as one of the impacts of colonialism, but rather as an issue that is prevalent amongst Aboriginal people: "The court must consider that that extent of poverty is a background factor which may predispose Mr. Silversmith to having to appear before the Canadian courts on a regular basis."[169] Without any discussion of how colonialism or any specific colonial policies have caused the very circumstances that the court is considering, poverty, addiction, and unemployment become immediately attributable to Aboriginal "culture" or heritage.

In *R. v. Murle* the *Gladue* analysis begins with the heading "The Aboriginal Heritage Issue".[170] The analysis under this heading consists of a discussion of the accused's recent plan to

[167] *R. v. Silversmith*, [2008] O.J. No. 4646 (S.C.J.).

[168] *R. v. Silversmith*, [2008] O.J. No. 4646 (S.C.J.) at para. 31.
[169] *R. v. Silversmith*, [2008] O.J. No. 4646)S.C.J.) at para. 24.
[170] *R. v. Murle*, 2013 ONSC 117, [2013] O.J. No. 45 (S.C.J.) at para. 6.

connect to Aboriginal services that would assist him with 'treatment' and counseling for substance abuse. The accused's charges and criminal antecedents related to selling drugs and breaching court orders not to possess non-prescription drugs. There was no discussion of whether or not the accused actually suffered with an addiction to drugs or what 'treatment' has to do with 'Aboriginal heritage'. The implication is that Aboriginal heritage becomes equated with necessitating treatment for drug abuse. It is not clear how 'the Aboriginal heritage' issue that the court identifies relates to drug addiction except that if one is Aboriginal one is in need of treatment.

Another facet of assessing the relevance of Aboriginal heritage in bail hearings is where courts attempt to account for cultural difference in terms of the assessment of surety suitability and release plans. In *R. v. Robinson*, Winkler C.J.O. noted the following:

> Application of *Gladue* principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular Aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release.[171]

Similarly, the court in *R. v. Brant* encouraged examining sureties and release plans in the context of Aboriginal heritage:

> …the Court must look at whether the sureties offered, in the context of the Aboriginal culture, can control the accused's behaviour…the Court must look at whether Aboriginal law and customs provide the assurances of attendance in court and protection of the public that are required for release.[172]

Both of the above cases encourage an examination of whether the sureties and release plans proffered are capable, within the context of the culture of the accused, of carrying out the

[171] *R. v. Robinson* (2009), 95 O.R. (3d) 309 (C.A.) per Winkler C.J.O. (endorsement) at para. 13, followed in *R. v. Magill*, 2013 YKTC 8, [2013] Y.J. No. 127, *R. v. Daniels*, 2012 SKPC 189, [2012] S.J. No. 810 and *R. v. Cyr*, 2012 SKQB 534.
[172] *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.) at para. 21.

enforcement of conditions of release, capable of preventing the accused from committing further criminal offences while on release. Again we see the courts focus on 'cultural difference' as being the focus of the implementation of *Gladue.* The difficulty with this is the focus becomes centred on Aboriginal culture as opposed to the structures within the bail system that cause and contribute to the over-incarceration of Aboriginal people. The state off-loads the responsibility of policing the Aboriginal accused onto the surety or family member if, and only if, the Aboriginal culture is competent enough to enforce Canadian criminal legal mechanism such as the supervision of the accused while on bail.

The lack of stated connection between the traumas faced and colonialism in the case law re-enforces the notion that it is Aboriginal heritage or culture that is responsible for the perceived degeneracy of the accused. The implication is that if Aboriginal culture or heritage is the problem, the solution becomes reform, and potentially justifies the court's misguided efforts to rehabilitate Aboriginal accused. As discussed in the previous section, this kind of analysis is flawed and inappropriate in the bail context.

CHAPTER 4 - The Non-Application of *Gladue*

Despite the wealth of jurisprudence dictating that *Gladue* is relevant to bail proceedings, there continue to be jurisdictions where *Gladue* has been found inapplicable.[173] In many jurisdictions where it has been found to apply, it is not being implemented in a meaningful way.[174] A review of the case law reveals that *Gladue* at the bail phase has not considered the ways in which Aboriginal people are systemically disadvantaged by the law and practice of bail. It also reveals a propensity to exacerbate systemic disadvantage that inheres in the bail process often resulting in increased, rather than decreased imprisonment pending trial. This section will explore specific examples of how Aboriginal accused maybe disproportionately disadvantaged by specific aspects of the process of judicial interim release including the policing of Aboriginal people, over-reliance on sureties, the imposition of conditions of release, and evidence proffered at bail hearings. These aspects should comprise part of the courts analysis of the systemic factors to consider in the adjudication of bail as per *Gladue*. However, this does not appear to be happening. In this chapter I review instances of institutional bias against Aboriginal people in the judicial interim release setting in order to uncover the facets of the system that disproportionately affect Aboriginal people. It is these factors that should comprise the 'systemic factors' relating to Aboriginal people that bail courts should be taking into account in bail adjudication. Reviewing *Gladue* bail jurisprudence, it becomes clear that these facets are not being properly considered.

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[173] In New Brunswick *Gladue* was found inapplicable in *R. v. Sacobie*, [2001] N.B.J. No. 51 (Q.B.). In Manitoba, the media reported a case where the Superior Court found *Gladue* to be essentially inapplicable: http://www.winnipegfreepress.com/local/native-bail-reform-urged-226420671.html. I have been unable to locate any reported Manitoba decisions on this issue so I draw this conclusion from the media reports of one particular case.

[174] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at pp. 74-75.

Policing

The policing of Aboriginal people in Canada has always been at the forefront of the colonial agenda as a means of enforcing laws intended to carry out the state's varied policies. Whether the status quo was involved in separationist policies, those intended to assimilate, or to curb the dissent of unjust colonial laws, the police have been an integral component in maintaining Canada's colonial regime.[175] This regime continues, manifesting in the racist and biased policing of Aboriginal people in Canada. There are seemingly endless reports, inquiries, and scholarly discussions highlighting the racism and discrimination endemic in the policing of Aboriginal people in Canada. Aboriginal activism and resistance to biased policing speaks to its prevalence. Over-zealous and racist policing of Aboriginal people has led to tragic events such as the shooting of J.J. Harper which in part lead to the *Manitoba Justice Inquiry*.[176] Racism and biased policing contributed to the death of Neil Stonechild who died of exposure to the cold after being in police custody.[177] The wrongful conviction of Donald Marshall was attributable in part to the biased police investigation of Marshall because he was Aboriginal.[178] Police racism lead to the deadly shooting of activist Dudley George at Ipperwash. The most apparent instances of racism were described in The Ipperwash Inquiry as follows:

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[175] Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013) at pp. 29-38.

[176] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991). See also: Ontario. Report of the Ipperwash Inquiry. (Toronto, Ontario: 2007), online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html; Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (Canada)*, Vol. 1 (Edmonton: The Task Force, 1991), online: http://justice.alberta.ca/programs_services/aboriginal/Pages/Publications.aspx.

[177] Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild (Saskatchewan: 2004), online: http://www.justice.gov.sk.ca/stonechild/;.

[178] Nova Scotia Royal Commission on the Donald Marshall Jr. Prosecution, T.A. Hickman C.J.N.S., Chair, Findings and Recommendations, vol.1 (Halifax: Royal Commission on the Donald Marshall Jr. Prosecution, 1989) at p.20.

> The most obvious instance of racism and cultural insensitivity was a conversation among members of the OPP intelligence team on September 5, 1995, in which an Aboriginal person was referred to as a 'big, fat, fuck Indian' and the suggestion was made that they (i.e. the Aboriginal people in the park) could be baited into 'a net as a pit' with 'five or six cases of Labatt's 50' which 'works in the south with watermelons'.[179]

The lived experience of racism in policing and its impact on Aboriginal people is also well documented.[180] The systemic issues in the policing of Aboriginal people are perhaps the most important factors impacting how Aboriginal people come to be over-criminalized and over-represented in the criminal justice system.

In the context of judicial interim release, the police are not making adequate use of their powers to release accused persons charged with criminal offences and this has been cited as a contributing factor to rises in remand populations.[181] The exercise of police discretion is mediated by factors such as race and Aboriginality. Starting from the decision to arrest, and ending with the decision to release or detain pending a bail hearing by a justice, Aboriginal people are disadvantaged in the exercise of police discretion. Aboriginal people fall victim to police over-charging that is disproportionate to their non-Aboriginal counter-parts.[182] Aboriginal

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[179] The Ipperwash Inquiry, The Honourable Sydney B. Linden, Commissioner (Queen's Printer for Ontario, 2007) online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_1/index.html at p. 683.

[180] See for example: Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2004); Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991); *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996, pp. xii, 315.

[181] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at pp.23-25,John Howard Society of Ontario, "Reasonable Bail?" (The Centre of Research, Policy & Program Development, 2013) at p.24,online April 8th, 2014: http://johnhoward.on.ca/research/type.html.

[182] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) at p. 102.

people are more likely to be detained and held for bail than to be released by the police.[183] There can be no question that the criminalization and over-incarceration of Aboriginal people begins with the exercise of police discretion. There is overwhelming evidence that police discretion is tainted with bias against Aboriginal people and that Aboriginal people fall victim to the experience of racism at the hands of the police.

Despite the wealth of evidence of biased policing of Aboriginal people in Canada, I have been unable to find any bail cases involving Aboriginal accused where the court considered the systemic issues with the policing of Aboriginal accused. Because *Gladue* encourages courts to consider the systemic factors that bring the Aboriginal person before the courts, the policing of Aboriginal accused should be at the forefront of *Gladue* bail hearings.[184]

Sureties

The difficulty, or even inability to find a suitable surety has very particular consequences for Aboriginal accused and could potentially be a contributing factor in the over-incarceration of Aboriginal people on remand. Given that many Aboriginal accused who are arrested are often unemployed, have minimal income, and are often homeless or otherwise socially isolated, securing a suitable surety may be extremely difficult.[185]

For urban Aboriginal accused, especially those facing homelessness, social isolation may be a reality precluding access to family or friends with the means to bail them out. In one study

[183] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) at p. 102 and Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer, 1995), Chapter 5 "Imprisonment Before Trial".

[184] The specific ways that courts might consider the policing of Aboriginal accused in the context of *Gladue* bail hearings will be discussed *infra*.

[185] Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013) at p. 53.

in Toronto, the author describes the systemic and systematic policies that have contributed to Aboriginal homelessness and the corollary of social isolation in the following terms:

> There is increasing evidence that more than 140 years of social strategies aimed at the assimilation, segregation, and integration of generations of Aboriginal children into mainstream Eurocentric culture have resulted in personal, familial, community, and national trauma.[186]

The idea that bail could be delayed, or even denied because of the lack of an appropriate surety becomes one more Canadian legal policy to add to the litany of forces that have contributed to the systematic marginalization of Aboriginal people in Canada. Equally problematic is the difficulty an Aboriginal accused person might face who has been arrested in a remote community. This was exemplified in a report undertaken by the Canadian Civil Liberties Association where it noted that:

> Counsel in northern Manitoba also report the distance and difficulties arranging for transportation result in accused who are arrested from reserves spending up to eight days in custody before they can make their first appearance in bail court or place a phone call to start setting up a release plan.[187]

Accused who are arrested on reserves in remote areas are transported to the nearest provincial detention centre where bail can be processed resulting in delays in the hearing of their bail matter. It also means that if the Crown insists on a surety release, the surety would have to travel, at their own expense, to where the bail hearing is being heard.

Barriers in finding a 'suitable' surety have disproportionate consequences for Aboriginal accused persons, including spending more time in remand custody awaiting family members as above, or being denied bail altogether. In addition to geographical challenges, and alienation

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[186] Dr. Peter Menzies, "Homeless Aboriginal Men: Effects of Intergenerational Trauma" at p. 1, in J. David Hulchanski, Phillippa Campsie, Shirley B.Y. Chau, Stephen W. Hwang, Emily Paridis (ed.), *Finding Home: Policy Options for Addressing Homelessness in Canada*, online: www.**homeless**hub.ca/.../Docu**men**ts/6.2%20**Menzies**%20-%20**Homeless** accessed June 2, 2014.

[187] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at p. 76.

from family or friends, there are a number of other reasons why finding a surety may be particularly difficult for Aboriginal accused. Given the historical and current over criminalization of Aboriginal people, it may be difficult for some accused persons to locate family members with no prior involvement with the criminal justice system. For example, in *R. v. Green*, the Crown bail review was granted in part because the court disapproved of the proposed surety's criminal record and pending charges. It was noted that all of the accused's friends were either in jail, or involved in the criminal justice system.[188] In light of disproportionate levels of unemployment, and the lack of ability to show real property ownership for those living on reserve[189], it may be very difficult to locate a surety with the financial ability to fulfill the amount of the bail. Although the amount of the bail is supposed to be tailored not to the seriousness of the offence but rather to the means of the surety, it has been suggested that a high quantum of bail continues to be required for very serious classes of offences.[190] This practice "…effectively discriminate[s] against people without well-to-do friends or family."[191]

The reliance on sureties is a procedure that disadvantages Aboriginal accused persons in a multitude of ways. As a matter of policy, the reliance could potentially be justified if there was evidence that sureties are in fact capable of controlling accused persons and preventing criminal conduct if released. In the absence of this kind of evidence, the discriminatory impact that insistence on sureties has on Aboriginal accused is completely unjustified. As well, routine insistence on surety bails does not accord with established legal principles.

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[188] *R. v. Green*, [2009] O.J. No. 1156 (S.C.J.) at para. 20.

[189] In Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014), defence counsel in Manitoba reported (at p. 76) that in some instances, sureties are required to prove real property ownership as a pre-requisite to acting as a surety.

[190] Justice Trotter, *The Law of Bail in Canada* (3d ed.) (loose leaf) (Toronto: Thomson Reuters, 2010) at p.6-22.

[191] Nicole M. Myers, "Shifting Risk: Bail and the Use of Sureties" (2009-2010), 21 Current Issues Crim. Just. 127 at p. 139.

Given the systemic barriers that may be faced for Aboriginal accused persons, it seems that *Gladue* should provide a mechanism for judges to use to scrutinize whether or not a surety is required. However, that does not appear to be happening. There are a number of reported decisions involving Aboriginal accused where the court ordered a surety form of release where it was arguably not necessary given the nature of the charges, or the lack of criminal antecedents of the accused.

In *R. v. Pierce*[192], discussed previously, the young Aboriginal woman was released in the first instance to two sureties. While the assault was very serious, why would it require two sureties to ensure the safety of the complainant or the public? In the absence of *any* criminal antecedents and no history of *any* kind of violence, what evidence could the Crown rely on to show cause that the accused would likely breach a no-contact order with the complainant, or become violent again unless she had two sureties?

In *R. v. Silversmith*[193], the accused was charged in 2006 with six counts of driving while he was disqualified from doing so. He was released on a promise to appear. He appeared in court, as required, on six occasions, and then failed to attend court on his seventh appearance and was arrested almost two years later for failing to attend court. From the time of his initial release until the time that he was re-arrested for failing to attend court, he did not commit any further offences. He was detained at his initial bail hearing and applied for a bail review to the Superior Court. At the time of the review, it was anticipated that he would be pleading guilty and was to be sentenced within two weeks. There was evidence that he had failed to attend court because he was faced with the impossible decision of missing work to attend court - risking his employment status - or missing court and risking re-arrest.

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[192] 2010 ONSC 6154, [2010] O.J. No. 4925.
[193] [2008] O.J. No. 4646 (S.C.J.).

Mr. Silversmith was a member of the Six Nations of the Grand River First Nation where he lived with his partner and five children and where he had resided for quite some time. In these circumstances, it is difficult to imagine what concerns the court could possibly have on the primary grounds. It is clear that by failing to attend court he was not in any way attempting to abscond; he made no attempt to flee the jurisdiction or evade the authorities. He lived at an address where the authorities could easily locate him. Although he was released after the bail review, he was released to two sureties with a total quantum of $25,000. Because the accused had not committed any further substantive offences since his initial arrest, the focus of the bail hearing should have been solely on the primary ground; the court's sole concern should have been ensuring Mr. Silversmith's attendance in court. However, the court considered the accused's lifelong struggle with alcohol in great detail, even though there was no connection between the alcohol addiction and the offences before the court. At one point the court remarks that the accused had been taking steps to address his alcohol addiction and that "With less or no alcohol, the protection of the public is significantly increased".[194]

Presumably, the court ordered the two surety bail so that the sureties could monitor the accused's path to recovery. However, given the lack of substantive offences alleged while on release, the court's concerns should have been focused solely on the primary ground, which has nothing to do with 'the protection of the public'. In the absence of any evidence that the accused was intending to abscond or intentionally evade the court process, requiring two sureties, with a total quantum of $25,000, was grossly unnecessary in light of established legal principles.

[194] *R. v. Silversmith*, [2008] O.J. No. 4646 (S.C.J.) at para. 34.

The requirement of a surety release in *R. v. P.(D.D.)*[195], was equally redundant. The accused was initially charged with breaking and entering into a dwelling house, which can be considered a very serious offence. He was arrested approximately nine months after the date of the alleged offence. Despite the seriousness of the offence, he was originally released on a promise to appear as it had been determined by the police that there were no concerns that he would recommit the offence given the lack of any criminal conduct between the offence date and the date of arrest. The police also noted that in this time period, there had been no contact between the complainants and the accused, so their safety was not at issue.

The accused was subsequently charged with failing to attend court and for "by-law infractions". The fail to attend court charge was not pursued because the accused had confirmed that he missed court in order to attend the burial and wake for his stillborn child.[196] Shockingly, the accused was detained at his bail hearing and applied for review. The bail review court released the accused on a very strict house arrest bail with a surety and a $1000 cash deposit. As in *R. v. Silversmith*, above, it is not at all clear what concerns the court had that could justify a surety bail. The police initially had no primary or secondary ground concerns, there were no new substantive offences committed and the fail to attend court charge was not being pursued. There was no legal justification for requiring a surety in these circumstances.

As previously mentioned, the arrest of Aboriginal accused in remote communities presents particular challenges both for the accused and for their family. Where the Crown insists on having a surety form of release, and if the Crown or court requires that the surety attend

[195] 2012 ABQB 229, 94 C.R. (6th) 86.

[196] It is unclear in the ruling why the accused was not released on the original promise to appear if the fail to attend court charge was not being pursued. It is possible that the Crown brought a s.524 application to revoke the promise to appear as a result of the by-law infractions. If this is the case, it is a very questionable whether by-law infractions could constitute a sound basis for a s.524 revocation application.

personally at the court house, the results can prove disastrous. The procedural history of *R. v. Atlookan*[197] is instructive in this regard. On March 12, 2011, the accused was arrested on the Eabametoong First Nation, also known as Fort Hope, which is three hundred kilometers from Thunder Bay. He was transported to Thunder Bay and appeared before a Justice on March 14 at which time the Crown indicated he was in a reverse onus situation[198]. The accused was adjourned until March 21[199] and an interpreter was requested for his mother, the surety that would be proposed. On March 21st, an interpreter was present but the surety was not able to attend because she did not have the financial resources for the flight to Thunder Bay. The matter was adjourned until March 23rd at which time the interpreter was again present, but again, the mother was not able to attend. The matter was remanded until April 1st, and the mother was there but the interpreter was ill and not able to be present. The bail hearing was again delayed until April 6th at which time the mother again lacked the financial resources to attend. At this time the accused asked to be remanded before an Ontario Court judge sitting in Fort Hope for the purpose of setting a speedy, in-custody trial date, a request that was denied due to a policy that matters not be remanded for this purpose until the accused addressed his bail matter.[200] On April 21st, the accused consented to his detention and was remanded to an Ontario court judge in Fort Hope for trial on August 24th.

There are so many systemic flaws that occurred in the above case that are worthy of examination but first and foremost, the most egregious flaw was the practice of having the surety

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[197] *R. v. Atlookan*, 2011 ONSC 4885, [2011] O.J. No. 4370.

[198] It appears that it was later determined that it was not in fact a reverse onus situation, *R. v. Atlookan*, 2011 ONSC 4885, [2011] O.J. No. 4370 at para. 23.

[199] A remand of seven days absent the consent of the accused directly violates s.516(1) of the *Criminal Code*. The case does not discuss whether or not the accused consented to the length of the remands but it is difficult to imagine why any accused, apprised of s.516(1), would consent.

[200] Approximately a month after the ruling in *Atlookan*, a similar policy, that had been the practice in Toronto, was disapproved because of the unfairness it occasions to accused persons by Justice Trotter in *R. v. Hudson*, 2011 ONSC 5176, [2011] O.J. No. 4195.

attend in person in order for the bail hearing to proceed. In many areas of Canada, bail hearings are held via telephone. It is ironic that in denying the accused's application for a stay of proceedings brought in part brought because of the lack of an interpreter, the court found that no abuse had occurred because the defence had not made efforts to locate an interpreter in the region to attend electronically. The court noted the following:

> In this day and age of electronic communication I do not see why the accused could not have asked that an interpreter in some other judicial Centre be made available by telephone to assist his surety. Courtrooms have telephone facilities with speakerphones. If this requested been [sic] refused then he could say that no alternate interpreter was available. I do not accept this argument on the facts of this case.[201]

The notion that the defence was at fault for not securing an interpreter to assist via telephone defies all logic and common sense when the surety was not afforded the luxury of doing the same. That the defence is responsible for securing an interpreter as opposed to the Crown is also constitutionally questionable. This situation becomes even more egregious in light of *Gladue* which mandates judges to consider the gross over incarceration of Aboriginal people. The number of adjournments required to have the surety attend in person resulted in a significant amount of pre-trial custody that would have been totally unnecessary had the surety been able to participate in the first instance via telephone. In this 'day and age of electronic communication', and in light of the duty of justices to consider *Gladue* whenever an Aboriginal person's liberty is at stake, it is an aberration that an Aboriginal accused should spend weeks in custody, that his family who live on reserve be forced to travel hundreds of kilometers, at their own expense, in order to testify at a bail hearing when there are clearly alternatives available. The problem of

[201] *R. v. Atlookan*, 2011 ONSC 4885, [2011] O.J. No. 4370, at para. 13.

transportation for Aboriginal people living on reserve in remote areas is not limited to Ontario. There is evidence that the same problem persists in other jurisdictions as well. [202]

Not only was the application for *Charter* relief denied in *Atlookan*, the continued detention of the accused until his trial - which was to take place eight days from the date of the bail review - was ordered, in part due to transportation issues. The court indicated that, "It is not at all clear to me that this man would have the financial resources or that a plane would be available to transport him from Thunder Bay to Fort Hope for his trial."[203] In essence, Mr. Atlookan spent weeks in custody before his bail hearing could proceed *because* he was an Aboriginal man living on reserve.

The over-reliance on surety forms of release presents multiple and significant barriers to accessing bail for Aboriginal people. The routine reliance on surety bails disproportionately impedes access to bail for Aboriginal people and as such this reliance should form part of the analysis of systemic factors to consider as courts apply *Gladue* to bail proceedings. Because reliance on surety bails has been cited as a contributing factor in the delay and even denial of bail, this reliance necessarily can be considered as resulting in accused persons spending time in pre-trial custody. Concerns about Aboriginal over-incarceration should be at the forefront of the analysis of whether a surety is necessary. This is at the heart of s.718.2(e), and the *Gladue*/*Ipeelee* mandate.

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[202] See for example Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at p.76 where it is noted that sureties in Manitoba are expected to travel at their own expense in order to bail out their friends and family. There is also evidence that this occurs in Saskatchewan, see *R. v. F.(C.)*, [2008] S.J. No. 722 (P.C.) where the accused was arrested in Cumberland House and transported over 500km to La Ronge where his mother also traveled in order to bail out her son. See also *R. v . Cook*, 2007 SKQB 69, [2007] S.J. No. 56 where it is explained that when accused persons who are arrested and transported hundreds of kilometers for bail, are eventually released, they are expected to travel home at their own expense.

[203] *R. v. Atlookan*, 2011 ONSC 4885, [2011] O.J. No. 4370 at para. 25.

Conditions of Release

Reviewing the *Gladue* case law, it appears that courts are not considering how conditions attaching to release orders may contribute to the over-incarceration of Aboriginal people.[204] There are two cases that are particularly illustrative of the impact that overly intrusive conditions can have, how they contribute to increased pre-trial detention, and how particular conditions are not necessary to protect a particular complainant or to protect the public. In *R. v. J.(T.J)*[205] the accused, a young man of the Squamish First Nation, was charged with various assault charges, one of which was an aggravated assault and was quite serious. However, the Crown's case against the accused was extremely weak as the witnesses were reluctant to speak with the police and would likely otherwise be considered 'unreliable' at trial. The accused had a lengthy criminal history, suffered from alcohol abuse, had been diagnosed with fetal alcohol syndrome ("FAS"), suffered from depression, and appeared to have cognitive difficulties. He was originally released on bail for the underlying assault charges, breached within one month, was released again, breached within another month and was then in custody for months before applying for bail a third time. None of the breach allegations involved any allegation that the accused had been violent, had threatened any of the witnesses or complainants, or had committed any type of further substantive offence. The alleged offences that brought him before the court were breaches of a curfew condition and breaching an absolute abstention from alcohol condition.

The court carefully considered evidence relating to FAS, noting the difficulty that persons with FAS have in abiding by court orders and acknowledged that courts have the

[204] The court in *R. v. Daniels*, 2012 SKPC 189, [2012] S.J. No. 810, [2012] S.J. No. 810 makes very brief mention of the application of *Gladue* to bail conditions at para. 3. However, the court does not elaborate on what this might look like.
[205] 2011 BCPC 155, [2011] B.C.J. No. 1252.

responsibility to accommodate this disability as "[t]he justice system should not be used as a substitute for social services and supports for these most vulnerable citizens".[206] The accused was released on a very strict bail, with thirteen conditions attaching to his release including: a curfew, an absolute abstention condition, residency requirements, reporting to a bail supervisor, that he assign his disability cheque to the John Howard Society upon receipt each month who will distribute the funds to the accused, and electronic monitoring.[207] Given the justice's comments regarding the need for courts to accommodate and consider FAS it is ironic that these conditions were imposed as they are complicated, onerous, and extremely difficult to comply with.

Additionally, and perhaps most importantly, it is very difficult to comprehend how each and every one of these conditions was absolutely necessary to ensure any of the three purposes of bail. The breaches were for conduct that was non-violent and did not pose any risk to the public. This was also an extremely weak Crown case, so weak in fact the justice commented that there was 'no substantial likelihood of conviction'.[208] It is difficult to understand how the further ordering of conditions was necessary at all. What is absolutely clear is that the conditions were directed at rehabilitating the accused and represented an attempt to ensure his 'well-being'. This paternalistic approach is most poignant when considering the condition that the accused assign his disability cheque to the John Howard Society. This condition had been imposed on at least one of the prior releases to prevent the accused from using his money to buy alcohol and to "…prevent him from being taken advantage of by other people…".[209] These considerations are outside of the purview of the courts concerns especially given the weakness of the Crown's case

[206] *R. v. J.(T.J.)*, 2011 BCPC 155, [2011] B.C.J. No. 1252 at para. 47.
[207] *R. v. J.(T.J.)*, 2011 BCPC 155, [2011] B.C.J. No. 1252 at paras 59-74.
[208] *R. v. J.(T.J.)*, 2011 BCPC 155, [2011] B.C.J. No. 1252 at para. 55.
[209] *R. v. J.(T.J.)*, 2011 BCPC 155, [2011] B.C.J. No. 1252 at para. 37.

and the unlikelihood of conviction. At the end of the day, the conditions imposed not only had no legal foundation, they also set the accused up for future failure. Such failure is not just impactful on the accused's ability to succeed in bettering his life, it also means that the accused would likely be subjected to more breach charges, and an increased likelihood that he would spend more time in pre-trial custody pending his trial.

The conditions imposed in *R. v. Brant*[210] were particularly egregious given the nature of the allegations against Mr. Brant, and the lack of any history of similar criminal antecedents. Mr. Brant, of the Tyendinaga First Nation was charged with the following offences: obstructing a police officer, dangerous driving, uttering a threat, three counts of mischief to property, and assault of a peace officer. The allegations arose in the context of a protest; a protest staged by the Tyendinaga community in protection of their land.[211] The allegation of obstructing the police arose when the accused allegedly refused to move out of the way of a police officer who was attempting to videotape the protestors. Whether the police officer was acting in execution of his duties would be a live issue at trial in defence of the obstruct charge. The dangerous driving allegation was that the accused drove around the police on an A.T.V. "narrowly missing" several officers and their cruisers. The police also alleged that the accused spat on the police while he was driving the A.T.V. There was no videotape of this incident even though there were police officers with video cameras present when the accused was alleged to have assaulted the police by spitting. The threat charge was that the accused allegedly yelled at protestors to 'shoot the police'. Again, there was no clear evidence that this was what was uttered, and there was no clear evidence that it was the accused that uttered the threat. The two mischief charges were that the accused was alleged to have broken two car windows and the third mischief related to

[210] *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.).
[211] It was not in dispute that the land in question belonged to the Mohawk people of Tyendinaga.

the accused's participation in a blockade. Identification would also be a live issue with the latter two charges.

Mr. Brant was detained at his initial bail hearing. He spent 34 days in custody before having his bail reviewed in the Superior Court.[212] The bail review court noted that although the accused had a criminal record, it was dated, and essentially irrelevant to the bail hearing on the current charges.[213] The fact that the accused was even held for bail is shocking. With an irrelevant criminal history, there would be no basis to assume that the accused would not attend for trial, breach any condition of release, or would commit any further offences if released. Given the very specific context in which the allegations against the accused arose, it would seem very remote that the accused was at any risk of re-offending while awaiting trial or that he posed any further threat to the police complainants.

It is even further surprising that the accused was detained in the first instance. He had been detained on the secondary grounds because of concerns for public safety and concerns that the sureties could not provide a place of residence for the accused that was "away from this community". Although the bail review court went to great lengths to correct these flawed conclusions, the accused was nevertheless released on an extremely onerous, two surety bail, totaling $11,000 (non-deposit), with eight conditions attached including the following: reside with your surety at a particular address; take direction from both sureties and participate in the process of counseling where concerns are raised; to be within his residence each day between the hours of 10pm and 6am; remain within the Province of Ontario; not to attend or be within 100m of the gravel quarry within Culbertson Tract; to maintain employment, including fishing, farming, and construction; report once a week to the Tyendinaga Police Service; not to plan,

[212] It is not clear which date Mr. Brant was arrested but the accused's initial bail hearing was May 2, 2008. The date of the bail review was June 4, 2008.
[213] *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.) at para. 25.

insight, encourage, or participate in any unlawful protests which include but are not restricted to the protests that interfere in any way with commercial traffic or non-commercial traffic on all public and private roads, airports, railways, or waterways[214].

Each and every one of the above conditions creates a criminal offence if not followed and if breached, the sureties could stand to lose the money promised by them. The bail review court did not consider the context of the disputed land, including the history of the Culbertson land tract or the troubled and violent history of the policing of Indigenous protests.[215] Rather, *Gladue* was used as a mechanism for determining surety suitability.[216] When reviewing the conditions ordered, it is difficult to understand the connection that any of the conditions had to the offences before the court. It is utterly impossible to imagine why the accused should be ordered to attend counseling and there was no stated basis for such a condition. As well, how can an order to maintain employment be sustained? This condition does not account for the accused being unable to gain employment in the areas specified by the court and given grossly disproportionate levels of unemployment faced by Aboriginal persons in Canada, it is nothing less than egregious for a court to impose this condition. If the accused is unable to 'maintain employment' he could potentially face a breach charge, have his bail revoked and the sureties could stand to lose the money promised. Perhaps the most shocking conditions relate to the curb of Mr. Brant's dissent which implicates his right to free expression. The court did not undertake any analysis of the balance of the right to reasonable bail, the right to freedom of expression and assembly or

[214] *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.) at paras. 29 and 53.
[215] For insight into the demonstrations on the Culbertson Tract, see: Amnesty International Canada, "I was never so frightened in my entire life: Excessive Police Response During Mohawk Land Rights Demonstrations on the Culbertson Tract" (Amnesty International Canada: Ottawa, ON, May 2011) as well as Shiri Pasternak, Sue Collis, and Tia Dafnos, "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims" (2013) 28 Can. J.L. & Soc. 65.
[216] *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.) at para. 21.

discuss the reasons why Mr. Brant was at further risk to break the law if he attended any further protest in protection of his land.[217]

Conditions that appear unrelated to the grounds of bail and often unrelated to the allegations before the court seem to be routinely imposed. Keeping in mind that bail conditions are not to be utilized for the general improvement of the accused's life prospects, it is surprising that there are instances where alcohol abstention conditions are imposed on the Aboriginal accused where there is no evidence referred to that connects the offences before the court to alcohol abuse.[218] There are also a number of cases where either treatment, counseling or assessment was ordered where it was not at all clear what such condition would be geared to treating[219], as well as situations where the accused was detained at least in part, for an inadequate treatment plan.[220] The condition that the accused "keep the peace and be of good behaviour" was also imposed in many decisions[221] regardless of the ambiguous legality of this order at the bail phase. This condition is arguably not an appropriate condition on bail orders because it is

[217] Restricting political activity through bail conditions has been described as the criminalization of dissent, see: Jackie Esmond, "Bail, Global Justice and the Limits of Dissent" 41 Osgoode Hall L.J. 323-361. For cases that speak to the need to consider the *Charter* protected rights to expression and assembly in the imposition of bail conditions relating to political activity, see: *R. v. Collins*, [1982] O.J. No. 2506, 31 C.R. (3d) 283 (Co. Ct.); *R. v. Clarke*, [2000] O.J. No. 5738 (S.C.J.); and *R. v. Singh*, 2011 ONSC 717, [2011] O.J. No. 6389. None of these principles were considered in *R. v. Brant*.

[218] See for example: *R. v. Campbell*, 2009 BCPC 2812, [2009] B.C.J. No. 2812; *R. v. Silversmith*, [2008] O.J. No. 4646 (S.C.J.); *R. v. P.(D.D.)*, 2012 ABQB 229; 94 C.R. (6th) 86; and *R. v. Silas*, 2011 YKTC 22, [2011] Y.J. No. 46. In all of these cases there was evidence that the accused had a history of alcohol abuse, but there was no indication that the offences before the court involved alcohol. It is possible that the ruling does not reflect the evidence proffered at the bail hearing. However, because an abstention condition must relate to the offences, it is assumed that such a connection would be explicit if it had been considered.

[219] See for example: *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.); and *R. v. McGregor*, [2005] O.J. No. 4769 (P.C.J.).

[220] See for example: *R. v. Rich*, [2009] N.J. No. 117, 2009 NLTD 69; *R. v. Murle*, 2013 ONSC 117, [2013] O.J. No. 45 (S.C.J.); *R. v. Green*, [2009] O.J. No. 1156 (S.C.J.); and *R. v. Neshawabin*, [2008] O.J. No. 5606 (S.C.J.).

[221] See: *R. v. Pierce*, 2010 ONSC 6154, [2010] O.J. No. 4925 at para. 51; *R. v. Bain*, [2004] O.J. No. 6147 (S.C.J.) at para. 8; *R. v. McGregor*, [2005] O.J. No. 4769 (O.C.J.) at para. 69; *R. v. Silas*, 2011 YKTC 22, [2011] Y.J. No. 46 at para. 21; *R. v. Campbell*, 2009 BCPC 2812, [2009] BCJ No 2812 (P.C.J.) at para. 29; and *R. v. J.(T.J.)*, 2011 BCPC 155, [2011] B.C.J. No. 1252 at para. 59.

unrelated to any of the grounds of detention and can only relate to the particular offences before the court if one is presumed guilty and can and does result in duplicative charges.[222]

The bail case law involving Aboriginal accused is rife with onerous, superfluous conditions more directed at 'reforming' the accused than with concerns related to the law of bail. The implementation of conditions of bail has serious consequences for Aboriginal accused and should be considered both in the assessment of reasonable bail and in the assessment of *Gladue*. Over-policing of Aboriginal persons means that breach charges are more likely to impact Aboriginal people and limit the ability to access pre-trial release again resulting in more Aboriginal people in custody pending trial. It is imperative that conditions ordered at the bail phase be understood to contribute to increased time in remand custody and this is a major systemic factor to consider in the application of *Gladue* to bail. Additionally, reformative and rehabilitative conditions imposed on Aboriginal accused have particular colonial resonance that should be avoided if *Gladue* is to be taken seriously as a mandate to alleviate the systemic bias in the criminal justice system.

Gladue and Evidence at Bail Hearings

In the sentencing context, the Supreme Court has indicated that extensive background about the offender including detailed information about the person's Aboriginal heritage and the impact of systemic factors on the person's life, is often required in order to assist the court in determining a fit sentence.[223] Included in this type of evidence would be any culturally appropriate programs that may assist the offender in achieving the rehabilitative aspect of sentencing. Understanding the background circumstances of offenders in the sentencing context,

[222] The legality of the condition in the bail context has been questioned, see: *R. v. K.(S.)*, [1998] S.J. No. 863 (P.C.J.); *R. v. B.(A.D.)*, 2009 SKPC 120, [2009] S.J. No. 628, and Justice Trotter, *The Law of Bail in Canada* 3d ed. (looseleaf) (Toronto: Thomson Reuters, 2010) at p.6-41.

[223] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.) at paras 83-83, and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 at para. 60.

and perhaps more extensive background information where the offender is Aboriginal, are consistent with longstanding principles of sentencing.[224] Arriving at a fit sentence is an individualized process as no two offenders are exactly alike and sentencing courts must be alive to the life circumstances of the individual before the court. The extensive information required by courts applying the *Gladue* framework on sentence is often gathered in a type of enhanced pre-sentence report, commonly referred to as a *Gladue* report. The preparation of these reports often take a number of weeks to prepare as the process involves the writer meeting with the accused, doing research and even meeting with the accused's family members.[225]

This kind of evidence is at the crux of sentencing Aboriginal offenders as it is the most informative way that the systemic factors of colonialism on the individual's life can impact the courts' assessment of multiple principles of sentencing, including the degree of responsibility of the offender or moral culpability and their prospects at rehabilitation. A *Gladue* report would also speak to any cultural differences that might impact on the determination of a fit sentence.

Once again, the above principles should have little place in the bail context. Systemic factors insofar as they affect moral culpability are essentially irrelevant in bail proceedings as moral culpability is irrelevant to the primary, secondary, and tertiary grounds. Additionally, the time it takes to prepare the kind of evidence required by a sentencing court would be prohibitive in the bail context. The investigation into the systemic impact of colonialism that brings the person before the court is premised on the offender having been found guilty of a crime, and relates to the person's responsibility for the offence. Any such examination into an accused's

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[224] The duty to consider the background circumstances and character of the accused and any other factors that have brought the offender before the courts was discussed and emphasized in *R. v. Borde*, 2003 CanLII 4187, [2003] O.J. No. 354 (C.A.) at para. 35.

[225] Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ at pp.48-50.

circumstances focusing on the prevention of recidivism at the bail phase starkly violates the presumption of innocence.

Notwithstanding the different contexts, bail courts seem to be requiring and relying upon this kind of evidence when presiding over *Gladue* bail hearings. The court in *R. v. Robinson* emphasized that the application of *Gladue* at bail requires courts to inquire into the systemic and background factors that may have played a part in bringing the offender before the court as well as the 'types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular Aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release."[226] In the absence of this type of evidence in *Robinson*, Winkler C.J.O (as he then was) declined to direct a hearing of the matter to a panel of the Court of Appeal effectively ensuring the accused's continued detention pending trial. This reasoning was followed in *R. v. Green*[227] where the Crown bail review of a release order was granted in part because of the absence of similar evidence.[228] In one Manitoba case, the bail hearing was adjourned for the preparation of an actual *Gladue* report meaning the accused spent excessive time in custody solely because he was Aboriginal. The bail judge ultimately found the report to be "unhelpful".[229]

In many other instances, courts releasing Aboriginal accused persons delved into the personal circumstances of the accused. Discussing intimate details of inter-generational traumas, numerous courts took great pains to ensure these issues were acknowledged and in many

[226] *R. v. Robinson* (2009) 95 O.R. (3d) 309 (C.A.) at para. 35.
[227] [2009] O.J. No. 1156 (S.C.J.).
[228] *R. v. Green*, [2009] O.J. No. 1156 (S.C.J.) at paras. 20-22.
[229] http://www.winnipegfreepress.com/local/change-bail-system-for-natives-lawyer-226261491.html

instances, appear to inform the court's decision to release. However the relevance of these kinds of systemic factors to the law governing judicial interim release is often not articulated.[230]

The insistence on extensive background information has the potential to significantly delay bail proceedings or result in the denial of bail altogether for Aboriginal accused. This kind of evidence is arguably not relevant insofar as its value lies in assessing the accused's culpability and it is certainly irrelevant to consider what brings the accused before the court in the context where the Aboriginal accused is presumed innocent.

The ways that evidence of the personal circumstances of the Aboriginal accused has been required in the context of bail results in Aboriginal people spending more time in custody than their non-Aboriginal counterparts because they are Aboriginal. This of course directly violates the very core principles articulated in *Gladue*.

Pre-trial Custody: Collateral Consequences

Time in pre-trial custody can be described literally as 'dead time'. Conditions in detention centres are notoriously atrocious with lack of programming, over-crowding, plagued with violence, and lack of access to being outside.[231] Although those in jail serving dead time awaiting trial are presumptively innocent, and remand is not intended to be punitive, it is often deemed to comprise part of the accused's sentence if they are convicted.[232] Detention pending trial also impedes the accused's ability to prepare a defence as access to counsel is severely

[230] See for example: *R. v. P.(D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86; *R. v. Silvermith*, [2008] O.J. No. 4646 (S.C.J.); and *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J). In *R. v. Brant*, the bail review judge although the court below erred in it's application of *Gladue*, the review court also noted that evidence relating to the accused's background, including his heritage and his beliefs had been lacking. The court heavily relied on this kind of evidence in releasing the accused.

[231] *R. v. Johnson*, 2011 ONCJ 77, 82 C.R. (6th) 241 at para. 28 citing *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.) at para. 25. See also Christopher Sherrin, "Excessive Pre-Trial Incarceration" (2012) 75 Sask. L. Rev. 55 at para. 65.

[232] *R. v. Wust*, 2000 SCC 18, [2000] S.C.J. No. 19 at para. 41.

curtailed.[233] The disproportionate impact that detention has on Aboriginal people was acknowledged in *R. v. Gladue*[234] and includes potentially being held hundreds of kilometers from family and friends, lack of any access to culturally appropriate programming, and the reality that the incarceration of Aboriginal people is an extension of a colonial legacy.[235]

The cumulative effect of routinely requiring sureties, failing to accommodate accused persons living in remote communities, imposing onerous and legally unjustified conditions, and requiring extensive background information about the Aboriginal accused all contribute to excessive pre-trial custody for presumptively innocent Aboriginal people. Additionally, insofar as these factors contribute to the delay or outright denial of bail, they often contribute to forcing accused persons to plead guilty which in turn forecloses the chance of being subsequently released on bail for any future offences. Where bail is delayed or denied, accused persons are often incentivized to plead guilty to avoid spending excessive time imprisoned before trial. A person charged with a minor offence who is denied bail might wait months in custody for a trial on the merits. However, if the person pleads guilty, they may be facing little, or even no jail time if convicted. It is not surprising that many accused choose to plead guilty, whether or not they actually committed the offence, rather than spend months waiting in jail to have a trial.

The *Gladue* regime of course was motivated by concerns about the excessive incarceration of Aboriginal people. This concern applies with even more force in the context of judicial interim release where Aboriginal people are presumptively innocent.

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[233] *R. v. Hall*, 2002 SCC 64, [2002] S.C.J. No. 65 at paras. 58-60, citing Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer, 1995) and *Justice and the Poor: A National Council of Welfare Publication* (2000).

[234] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.).

[235] Jonathan Rudin, "Aboriginal People and the Criminal Justice System" (Report prepared for the *Ipperwash Inquiry*, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/ (accessed Dec. 19, 2013) at pp. 29-35.

Gender

Access to bail, as well as the consequences of being denied bail, have gendered implications for Aboriginal women. In the sentencing arena, feminist scholars have critiqued the *Gladue* regime for failing to differentiate the gendered processes of colonialism and have illuminated the ways that gender matters when assessing systemic and background factors particular to the Aboriginal offender before the court. In *Gladue*, the Supreme Court did not avert its attention to the gendered dynamics of the case and additionally ignored the statistics indicating that Aboriginal women are more over-incarcerated than Aboriginal men. However, there is nothing in the decision that precludes courts from considering gender in the application of *Gladue* and in fact, the intersection of gender and Aboriginality should be discussed in a manner that acknowledges both as systemic factors to be considered when Aboriginal women are before the courts. As described by Professor Cameron:

> In order to fully and fairly take into account the impact of colonialism in the lives of Aboriginal women in conflict with the law, the gendered aspects of judicially considered 'circumstances' must be actively and consciously considered as interlocking with racial or cultural circumstances. Colonization has depended upon the ways in which gender and race-based discrimination support and perpetuate one another.[236]

There is some indication that Aboriginal women are more likely to be denied bail than their Aboriginal male counterparts.[237] Understanding that systemic barriers to accessing pre-trial release such as unemployment, poverty, homelessness, social isolation, policing, are also

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[236] Angela Cameron, "*R. v. Gladue*: Sentencing and the Gendered Impacts of Colonialism", in John Whyte (ed.), *Moving Towards Justice* (Saskatoon: Purich Press, 2008) at p.10. For further discussion of interlocking and intersecting modes of oppression, see: Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1999) and Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics" (1989) University of Chicago Legal Forum 139.

[237] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol.1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) at p. 102.

gendered is important in understanding how Aboriginal women are differently disadvantaged by the bail system.

The disenfranchisement of Aboriginal women if they married non-Aboriginal men pursuant to the *Indian Act* has resulted in Aboriginal women suffering greater dislocation from their home communities and enhanced social and economic deprivation as compared to Aboriginal men.[238] The legacy of gendered, colonial violence has translated into shockingly high numbers of Aboriginal women continuing to experience physical and sexual violence resulting in further marginalization and social isolation. Increased levels of intimate partner violence accounts to some extent for the over-incarceration of Aboriginal women often times in response to the violence experienced.[239] All of these factors combined contribute to barriers for Aboriginal women in accessing bail, for example, in the ability to locate and secure a surety. The insistence on surety forms of release may also mean that Aboriginal women might potentially choose an abusive surety rather than remain incarcerated.[240]

There is every reason to believe that Aboriginal women are likely bound by more numerous and stringent conditions than Aboriginal men.[241] Conditions of release may also have

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[238] Patricia Monture, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack (ed.), *Locating Law: Race, Class, Gender, Sexuality, Connections* (2nd ed.) (Fernwood Publishing: Nova Scotia, 2006) at pp.85-89; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6:1 Canadian Journal of Women and the Law 174-192 at p. 31; Beverly Jacobs and Andrea Williams, "Legacy of Residential Schools: Missing and Murdered Aboriginal Women" in Marlene Brant Castellano, Linda Archibald, and Mike DeGagne (eds.), *From Truth to Reconciliation Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) at pp. 122-125

[239] John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50 Osgoode Hall L.J. 699 at p.1.

[240] CCLA report. This phenomenon is also consonant with my experience as duty counsel.

[241] Although there is no available data on this issue there are several indications that Aboriginal women likely are subjected to more conditions than Aboriginal men. In one study, it was found that female youth were significantly subjected to more conditions of release than were male youth, see Jane B. Sprott and Anthony N. Doob, "Gendered Treatment: Girls and Treatment Orders in Bail Court" (July 2010) 52.4 Can. J. Crim. and Crim. Jus. 427. Additionally, there is a great deal of research indicating that Aboriginal women are disproportionately facing increased penalization, punishment, and carceral sanctions in comparison to Aboriginal men, see for example: Mandy Wesley, "The Aboriginal Woman's Experience in Federal Corrections" (Aboriginal Peoples Collection: Ottawa, 2012) online: http://www.publicsafety.gc.ca; Gillian Balfour, "Falling Between the Cracks of Retributive

disproportionate consequences for Aboriginal women perhaps the most poignant example being non-contact orders, and not to attend orders that are often imposed in domestic violence situations. Aboriginal women are overwhelmingly more likely to be single parents than are Aboriginal men[242] and Aboriginal women are subject to heightened scrutiny of child welfare agencies.[243] As previously mentioned, there are more Aboriginal children in child welfare care than at any time in history.[244] Being bound by no-contact orders and not to attend the family home orders may mean that the Aboriginal female accused is alienated from her children and home. Any involvement with the criminal justice system, conditions imposed on release orders and any breaches, all attract the involvement of child welfare services; an agency already disproportionately involved in the lives of Aboriginal women. Moreover, the economic disadvantage, social isolation, and poverty faced by Aboriginal women may mean less support networks available to assist in child care where the accused is incarcerated waiting for bail, or denied bail altogether. All of these factors result in differential disadvantage in terms of Aboriginal women's access to pre-trial release.

The policing of Aboriginal women in British Columbia has recently and justifiably garnered international attention with the Human Rights Watch publication of "Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in

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and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3:2 Feminist Criminology 101; Debra Parkes, Kathy Bent, Tracey Peter, and Tracy Booth, "Listening to Their Voices: Women Prisoners and Access to Justice in Manitoba" (2008) 26 Windsor Y.B. Access Just. 85.

[242] Native Women's Association of Canada, "What Their Stories Tell us: Research Findings from the Sisters in Spirit Initiative" (Ohsweken, Ont. Native Women's Association of Canada, 2010) at p. 12.

[243] Native Women's Association of Canada, "What Their Stories Tell us: Research Findings from the Sisters in Spirit Initiative" (Ohsweken, Ont. Native Women's Association of Canada, 2010);

[244] Native Women's Association of Canada, "What Their Stories Tell us: Research Findings from the Sisters in Spirit Initiative" (Ohsweken, Ont. Native Women's Association of Canada, 2010) at p. 8.; Beverly Jacobs and Andrea Williams, "Legacy of Residential Schools: Missing and Murdered Aboriginal Women" in Marlene Brant Castellano, Linda Archibald, and Mike DeGagne (eds.), *From Truth to Reconciliation Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) at p.127.

Northern British Columbia, Canada".[245] The report documents shocking details of police abuse directed at Aboriginal women including racism and gender based sexual violence, over-policing and under-policing. Although this report culminated from research involving Aboriginal women in British Columbia, it speaks to the legacy of colonialism and has broad implications for all Aboriginal women and the ways in which racist and discriminatory policing are a pre-cursor to any discussion of bail.

In *R. v. Daniels*[246] the accused was charged with a total of thirty-one offences between 2009 and 2012, eleven of which were charges for failing to comply with conditions of bail, and eight charges for failing to attend court. None of the substantive charges were serious in nature, mostly relating to low-level drug offences.[247] Her criminal record was filled with many similar convictions. The court in *Daniels*, properly considered the systemic economic and social disadvantages faced by the accused, accounting for both her criminal antecedents as well as the charges faced. However, there was no discussion of how her systemic disadvantage may contribute to her being over-policed, over-charged, and a victim of structural bias. Focus on the former aspects of systemic disadvantage does nothing to acknowledge the structural bias that Aboriginal people face in being policed and criminalized. Rather, the focus on her circumstances attributes blame to Ms. Daniels, re-enforcing the notion that it is her behaviour that the court must focus on 'fixing'.

[245] Human Rights Watch, "Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada" (Printed in the United States of America, 2013).

[246] 2012 SKPC 189, [2012] S.J. No. 810.

[247] 2012 SKPC 189, [2012] S.J. No. 810 at para. 35, the drug offences are described as being on a "small to moderate level."

As bail courts analyze the systemic factors impacting Aboriginal accused accessing judicial interim release, gender as well as ancestry should be accounted for in the application of *Gladue*.

CHAPTER 5 - A Proposal for Moving Forward

A Return to First Principles

The application of *Gladue* to bail hearings must be differentiated from the sentencing of Aboriginal offenders. A first step in this differentiation is for courts to return to first principles of bail in the adjudication of judicial interim release. Bail is not and cannot be rehabilitative without violating the presumption of innocence. Although the prevention of the commission of further offences has come to be understood as the prevention of any further criminal offences while on release, it must be remembered that courts are unable to wholly prevent recidivism at the pre-trial phase, especially given the lack of sentencing tools available at the pre-trial phase. Judicial interim release was never intended to reform criminality, it was intended to protect the public and ensure the accused's attendance in court. As stated by Chief Justice Lamer in *R. v. Morales*, "…danger or likelihood that an individual will commit a criminal offence does not in itself provide just cause for detention. In general, our society does not countenance preventative detention of individuals simply because they have a proclivity to commit crime."[248] Bail is only to be denied where there is a substantial likelihood of re-offence *and* where detention is necessary for public safety.[249] What this should mean in practice is that detention can only be justified where the accused poses a risk to public safety; not merely where the accused has a lengthy criminal record. Not only should detention be a last resort, the exception rather than the rule, but sureties, high quantum of bail and stringent bail conditions should also be reserved for cases where absolutely necessary to ensure the goals of bail. These aspects of bail should not be utilized in order to 'improve' the life of the accused, reform the accused or to cure the accused of all criminal behaviour. Rather, surety bails and onerous conditions can only be legally justified

[248] *R. v. Morales*, [1992] 3 S.C.R. 711 at para. 37.
[249] *R. v. Morales*, [1992] 3 S.C.R. 711 at para. 39.

where there is no lesser option in the face of a concern for public safety. This should be interpreted as meaning that if the personal safety of a witness or complainant is in danger, then conditions, or a surety may be justified.

The implementation of conditions that an accused cannot comply with is akin to issuing a detention order and violative of the right to reasonable bail.[250] There is evidence suggesting that breaches of bail conditions tend to be as a result of conduct that does not put the public safety at risk and is not behaviour that interferes with the administration of justice.[251] This is consistent with the cases reviewed for the purpose of this paper; none of the breaches at issue revealed any concern for the safety of any person or the public at large. The consequences of breaches are that the accused spends more time in pre-trial custody, may be denied bail, be forced to plead guilty and accrue breach convictions on their criminal record that makes it difficult to obtain bail in the future. As pointed out in the Canadian Civil Liberties report, this situation could potentially be justified if it were shown that stringent conditions assist in achieving the goals of bail. The opposite seems to be true. Conditions cause criminality[252] and contribute to the criminalization of Aboriginal people. This in itself is one of the systemic factors to be considered in the implementation of *Gladue* in the determination of judicial interim release, and in particular, the ordering of conditions attaching to release orders.

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[250] *R. v. Omeasoo*, 2013 ABPC 328 at para. 33.

[251] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) at pp. 61-66.

[252] Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014); see also Nicole Myers and Jane Sprott, "Set up to Fail: the Unintended Consequences of Multiple Bail Conditions" (2011) 53(4) Can. J. of Criminology and Crim. Jus. 404.

The ability to abide by conditions of release, including the ability to attend court, must be understood as mediated by systemic factors. It is these systemic factors that must be scrutinized in *Gladue* bail hearings. For example, if an Aboriginal accused has accrued convictions for failing to attend court, it must be ascertained whether the accused had intended to abscond or otherwise evade the courts process or whether the accused was simply unable to attend because of systemic reasons. Homelessness, living hundreds of kilometers from the place where the courthouse is, lack of resources to physically attend at the courthouse – these are all systemic problems, stemming from colonization, that may be faced by Aboriginal accused. Where there is no evidence of an intentional disregard for court orders, convictions for failing to attend or failing to comply should not militate in favour of a detention order or the implementation of extremely onerous releases. To do so would be to withhold reasonable bail *because* of the systemic factors faced by Aboriginal accused. Rather, when assessing the primary, secondary, and tertiary grounds, courts must focus on how the interpretation of these grounds has traditionally served to disadvantage Aboriginal accused. It is not being suggested that courts disregard the three purposes of bail when adjudicating judicial interim release for Aboriginal accused.[253] Rather, the conventional factors to be considered must be refined and reconsidered to account for systemic disadvantage.

Gladue and *Ipeelee* acknowledge that the criminal justice system operates to further marginalize Aboriginal people and mandates that judges work to alleviate systemic disadvantage in this process. The conventional modes of assessing risk on the primary, secondary, and tertiary grounds must be understood as perpetuating the systemic disadvantage of Aboriginal people and must be reconsidered. As stated by Justice Knazan, "…as for the unfortunate institutional

[253] The was the approach taken in *R. v. P.(D.D.)*, 2012 ABQB 229, 94 C.R. (6th) 86 where the court opined that the *Gladue* analysis applies "irrespective" of the primary, secondary, and tertiary grounds. This approach was disapproved of in *R. v. Daniels*, 2012 SKPC 189, [2012] S.J. No. 810, 412 Sask. R. 52.

approach that is more inclined to refuse bail, the judge can address that immediately and in every case, because the court is the central institution that grants or refuses bail."[254]

Policing: The Crux of the Matter

Gladue and its progeny in the sentencing landscape have not and cannot address the systemic factors inherent in the policing of Aboriginal people. Sentencing, which focuses on the individual offender before the court, is limited in terms of being able to address structural bias in policing. This kind of bias is essentially legally irrelevant to the sentencing project and therefore does not enter the realm of the 'systemic and background' factors to be considered in the application of *Gladue* in sentencing.[255]

The policing of Aboriginal people should be at the forefront of the assessment of evidence at the bail stage. *Gladue* can and should be used as a social context lens through which evidence is reviewed in judicial interim release. Understanding that Aboriginal people may be over-charged in comparison to non-Aboriginal people[256] should inform the court's understanding of the charges before the court including breach charges. The heightened visibility of Aboriginal people to the police because of the person's Aboriginality should also be considered. Racial profiling, the rounding up of the 'usual suspects' and the heightened scrutiny faced by Aboriginal people by police should all be considered both in the courts assessment of the charges faced as well as the assessment of the accused's criminal record. These factors highlight that the

[254] Justice Brent Knazan, "Sentencing Aboriginal Offenders in a Large City: The Toronto Gladue (Aboriginal Persons) Court" (National Judicial Institute Aboriginal Law Seminar, Calgary: January 23-25, 2003) available on the website of Aboriginal Legal Services of Toronto: http://www.aboriginallegal.ca/#!more-info-on-gladue/c20e.
[255] In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court found that state misconduct can be taken into account in mitigation of sentence without formal regard to s.24(1) of the *Charter*. However, a specific allegation of misconduct would have to be made, supported by evidence. There is no room in the sentencing context to consider the potential for bias policing, or the context and history of policing of Aboriginal people in a general sense.
[256] Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) at p.102.

person has not come before the court solely because of their criminal behaviour but also potentially because of the way policing occurs. This must be taken into account when courts assess the charges faced by the accused and when analyzing the three purposes of bail.

R. v. Daniels[257], discussed above, is an example of where policing could have been considered as part of the application of *Gladue*. None of the substantive charges were serious in nature, mostly relating to low-level drug offences.[258] Her criminal record was filled with many similar convictions as well as breach convictions. The court in *Daniels*, properly considered the systemic economic and social disadvantages faced by the accused, accounting for both her criminal antecedents as well as the charges faced. However, there was no discussion of how her systemic disadvantage may contribute to her being over-policed, over-charged, and a victim of structural bias. Focus on the former aspects of systemic disadvantage does nothing to acknowledge the structural bias that Aboriginal people face in being policed and criminalized. Rather, the focus on her circumstances attributes blame to Ms. Daniels, re-enforcing the notion that it is her behaviour that the court must focus on 'fixing'. This case is an example of where the court could have considered policing as one of the systemic factors to consider in understanding how the accused came before the court. This kind of assessment is aligned with the dicta of *Gladue* but did not form part of the court's analysis.

Understanding the historically continuing social context of the policing of Aboriginal people in Canada should inform courts analyses of the application of *Gladue* at the bail phase. Courts need to be alive to the over-policing of Aboriginal accused as well as the potential for

[257] 2012 SKPC 189, [2012] S.J. No. 810.
[258] 2012 SKPC 189, [2012] S.J. No. 810 at para. 35, the drug offences are described as being on a "small to moderate level."

police over-reaction to Aboriginal accused.[259] The context of the policing of Aboriginal people in Canada must also inform the assessment of evidence proffered by the Crown at bail hearings. The criminal record, the synopsis of the charges against the accused, and any other bad character evidence proffered must all be read by the court through a lens that acknowledges the place that systemic bias against Aboriginal people holds in the criminal justice system. These are the systemic factors to be considered in the application of *Gladue* to bail proceedings in Canada.

Pre-Trial Custody

Any time spent in custody in the arrest, transfer, adjournment, or delay of the accused should be considered in light of *Gladue*'s mandate that courts consider the gross and tragic disproportion of Aboriginal people in Canadian prisons. It seems trite to say that provisions of the *Criminal Code*, most notably ss.503 and s.516(1), must be adhered to but in light of the evidence that these sections are often ignored, it is worth repeating.[260] For example, an accused is under no obligation to consent to an adjournment for more than three clear days and each and every Crown request for an adjournment must be scrutinized even where the request is for one day. *Gladue*, insofar as it mandates that courts be alive to the over-incarceration of Aboriginal accused, must guide the court's discretion in granting or denying adjournment requests. Any request for an adjournment that derives from a lack of resources should be denied. Where an adjournment request is denied, or where s.516(1) has been violated, the accused should be released on an undertaking with no conditions.[261]

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[259] The perception and stereotype that Aboriginal people are more likely to be dangerous has translated in police over-reaction to Aboriginal people. This should be kept in mind in *Gladue* bail hearings especially if the charges involve allegations against the police as in *R. v. Brant*, [2008] O.J. No. 5375 (S.C.J.).

[260] In *R. v. Atlookan*, 2011 ONSC 4885, [2011] O.J. No. 4370, despite the numerous adjournments, there was no mention of s.516(1). As well, the days on end that accused persons wait to be transported from remote communities to larger centres for their bail to be adjudicated potentially directly violates ss.503 and s.516(1).

[261] This approach was followed in *R. v. Obed*, [2011] N.J. No. 304, 314 Nfld. & P.E.I.R. 229 (P.C.J.) a bail hearing involving a non-Aboriginal accused.

The impact of pre-trial custody on the accused is a relevant consideration in the determination of bail. The fact that pre-trial detention can impact the accused's ability to make full answer and defence, particularly because of the location of the detention centre, is a factor militating in favour of release.[262] *Gladue* mandates that the consideration of the impact of pre-trial detention on Aboriginal accused must be the subject of heightened scrutiny. The resources available in the detention centre, the location of the jail in relation to the accused's home community, the ability of the accused to access defence counsel while in custody are all factors that ought to be considered in light of the impact that these have on Aboriginal accused.

A Summary of the Framework to be Applied

The following framework is a summary of the above discussed principles of how *Gladue* should be applied to judicial interim release proceedings.[263] As an over-arching guiding principle, *Gladue* should be understood as part of the right to reasonable bail and courts must be alive to the ways in which the bail system, in its current operation, exacerbates systemic disadvantage for Aboriginal accused. As such, the following summary is a potential framework for the application of *Gladue* to judicial interim release:

- *Gladue* must be applied in all bail proceedings in a meaningful way that recognizes the systemic disadvantage, caused by colonialism, faced by Aboriginal people accessing pre-trial release.
- *Gladue* applies in every bail proceeding where the accused is Aboriginal regardless of the seriousness of the offence and failure to apply *Gladue* is an error of law.[264]

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[262] See *R. v. J.(J.)*, [2009] O.J. No. 1626 (S.C.J.), *R. v. W.(S.T.)*, [2003] O.J. No. 4253 (C.A.).

[263] I contributed this framework to the CCLA report Abby Deshman and Nicole Myers, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention" (Canadian Civil Liberties Association and Education Trust, March 2014) and it is published in that report at pages 76-79.

[264] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

- *Gladue* mandates a return to first principles of the law of bail in recognition of the crisis facing the bail system in Canada and the ways it might impact Aboriginal people.
- The disproportionate impact of detention on Aboriginal people must be explicitly considered not only as an over-arching principle, but also in the decision to grant Crown adjournments. Requests for the adjournment of bail proceedings must be determined having regard to the over-incarceration of Aboriginal peoples – routine adjournments as a result of a lack of institutional resources should be denied. Any and all adjournments should also be lawful and adhere to s.516(1) of the *Criminal Code*.
- All evidence proffered at a bail hearing should be viewed through a social context lens that accounts for the colonization of Aboriginal people in Canada.
- Courts must consider the potential for institutional bias in the arrest and charging of the accused including the possibility of over-policing and over-charging. Both the charges against the accused as well as any prior criminal antecedents should be viewed with the current and historical context in mind.
- Any convictions prior to 1999 should be given reduced weight as the accused would not have had the benefit of *Gladue* in the determination of the sentence. Convictions prior to 1999 cannot be said to be a 'fit' or appropriate sentence as it would omit the consideration of *Gladue*.
- To the extent that the accused's criminal antecedents are attributable to systemic factors deriving from colonialism, such as poverty or substance abuse, courts should view prior convictions as systemically motivated rather as intentional disregard for the law, particularly in relation to convictions for failing to attend court or failure to comply with conditions.

- The necessity of a surety must be scrutinized carefully as securing a suitable surety may be disproportionately difficult for Aboriginal accused.
- Surety suitability should be determined in a manner that acknowledges the systemic barriers facing Aboriginal accused that may otherwise render a person ineligible.
- The quantum of bail must be determined having regard to the disproportionate poverty, and where applicable, the lack of private land ownership faced by Aboriginal people.
- The imposition of conditions must be approached with restraint having regard to the necessity of the condition, and the ability of the Aboriginal accused to comply. Conditions unconnected to the offences before the court or the three purposes of bail are unconstitutional.

CONCLUSION

The current misapplication of the law and practice of bail in Canada has contributed to rising pre-trial detention rates and presents an affront to the constitutional interests of accused persons. Aboriginal people, who are over-represented in remand populations, are disproportionately impacted by this crisis and *Gladue*, as it has been applied to judicial interim release, has not alleviated this unacceptable reality. The application of *Gladue* to bail proceedings at worst may in fact be contributing to swelling remand rates and at best, perpetuates a colonial encounter where Aboriginal people are overly subjected to paternalistic efforts to reform. The focus on 'fixing' the Aboriginal problem via the use of sureties, the implementation of conditions to assist in 'rehabilitation' and the obfuscation of the structural forms of bias faced by Aboriginal accused all find resonance in the history of the Canadian legal system. These efforts are misguided and do not abide by the mandate and spirit of *Gladue*.

Gladue can and should be re-imagined to focus the attention of the courts analysis on the systemic causes of Aboriginal over-incarceration and the mechanisms that can be utilized to minimize Aboriginal encounters with the criminal justice system. A return to the first principles of the law of bail, including the constitutional imperative that bail is a presumptive right, not a privilege, is a necessary first step. Restraint in the use of conditions, the insistence of sureties, and the quantum of bail is mandated by the law of bail but finds particular meaning when the accused is Aboriginal. Restraint should be a guiding principle in the exercise of discretion of the presiding justice. Presumptively innocent accused persons are entitled to reasonable bail and presumptively innocent Aboriginal accused are additionally entitled to have their systemic disadvantage considered, as per *Gladue*, within the right to reasonable bail.

I have attempted to point out the current state of crisis in the bail system, how this crisis is exacerbated for Aboriginal accused, how the case law reflects these problems, and suggestions for moving forward. Uncovering systemic bias in the application of *Gladue* to bail is important in and of itself but could potentially also serve to reduce the incarceration rates of Aboriginal accused persons on remand. The focus on *Gladue* and how the courts interpret their obligations under this regime is a means of uncovering bias and a means of moving forward to ensure the criminal justice system minimizes the harm that it occasions Aboriginal people in Canada. It is this goal that lies at the heart of the *Gladue* regime; the recognition that the criminal justice system creates and contributes to Aboriginal over-incarceration. The bail system in particular not only contributes to over-incarceration, in its current form, it contributes to the criminalization of Aboriginal people. Using *Gladue* to lessen these phenomena is possible and is a means of uncovering the bias that creates and maintains the status of Aboriginal people within the criminal justice system. Of course it is not the only means of achieving these goals. Aboriginal people

have been resisting colonial dominance for centuries and continue to do so. Using the law as a transformative mechanism to resist colonial strategies is only one tool in a litany of many.

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APPENDIX

Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

Section 7
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 9
Everyone has the right not to be arbitrarily detained or imprisoned.

Section 10(c)
Everyone has the right on arrest or detention
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Section 11(e)
Any person charged with an offence has the right
(e) not to be denied reasonable bail without just cause.

Criminal Code, R.S.C. 1985, c. C-46

Release from custody by peace officer

497. (1) Subject to subsection (1.1), if a peace officer arrests a person without warrant for an offence described in paragraph 496(*a*), (*b*) or (*c*), the peace officer shall, as soon as practicable,

(*a*) release the person from custody with the intention of compelling their appearance by way of summons; or

(*b*) issue an appearance notice to the person and then release them.

Exception

(1.1) A peace officer shall not release a person under subsection (1) if the peace officer believes, on reasonable grounds,

(*a*) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence,

(iii) prevent the continuation or repetition of the offence or the commission of another offence, or

(iv) ensure the safety and security of any victim of or witness to the offence; or

(*b*) that if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

Where subsection (1) does not apply

(2) Subsection (1) does not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 503(3).

Consequences of non-release

(3) A peace officer who has arrested a person without warrant for an offence described in subsection (1) and who does not release the person from custody as soon as practicable in the manner described in that subsection shall be deemed to be acting lawfully and in the execution of the peace officer's duty for the purposes of

(*a*) any proceedings under this or any other Act of Parliament; and

(*b*) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (1).

Release from custody by officer in charge

498. (1) Subject to subsection (1.1), if a person who has been arrested without warrant by a peace officer is taken into custody, or if a person who has been arrested without warrant and delivered to a peace officer under subsection 494(3) or placed in the custody of a peace officer under subsection 163.5(3) of the *Customs Act* is detained in custody under subsection 503(1) for an offence described in paragraph 496(*a*), (*b*) or (*c*), or any other offence that is punishable by imprisonment for five years or less, and has not been taken before a justice or released from custody under any other provision of this Part, the officer in charge or another peace officer shall, as soon as practicable,

(*a*) release the person with the intention of compelling their appearance by way of summons;

(*b*) release the person on their giving a promise to appear;

(*c*) release the person on the person's entering into a recognizance before the officer in charge or another peace officer without sureties in an amount not exceeding $500 that the officer directs, but without deposit of money or other valuable security; or

(*d*) if the person is not ordinarily resident in the province in which the person is in custody or does not ordinarily reside within 200 kilometres of the place in which the person is in custody, release the person on the person's entering into a recognizance before the officer in charge or another peace officer without sureties in an amount not exceeding $500 that the officer directs and, if the officer so directs, on depositing with the officer a sum of money or other valuable security not exceeding in amount or value $500, that the officer directs.

Exception

(1.1) The officer in charge or the peace officer shall not release a person under subsection (1) if the officer in charge or peace officer believes, on reasonable grounds,

(*a*) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence,

(iii) prevent the continuation or repetition of the offence or the commission of another offence, or

(iv) ensure the safety and security of any victim of or witness to the offence; or

(*b*) that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

Where subsection (1) does not apply

(2) Subsection (1) does not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 503(3).

Consequences of non-release

(3) An officer in charge or another peace officer who has the custody of a person taken into or detained in custody for an offence described in subsection (1) and who does not release the person from custody as soon as practicable in the manner described in that subsection shall be deemed to be acting lawfully and in the execution of the officer's duty for the purposes of

(*a*) any proceedings under this or any other Act of Parliament; or

(*b*) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the officer in charge or other peace officer did not comply with the requirements of subsection (1).

Release from custody by officer in charge where arrest made with warrant

499. (1) Where a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one mentioned in section 522, the officer in charge may, if the warrant has been endorsed by a justice under subsection 507(6),

(*a*) release the person on the person's giving a promise to appear;

(*b*) release the person on the person's entering into a recognizance before the officer in charge without sureties in the amount not exceeding five hundred dollars that the officer in charge directs, but without deposit of money or other valuable security; or

(*c*) if the person is not ordinarily resident in the province in which the person is in custody or does not ordinarily reside within two hundred kilometres of the place in which the person is in custody, release the person on the person's entering into a recognizance before the officer in charge without sureties in the amount not exceeding five hundred dollars that the officer in charge directs and, if the officer in charge so directs, on depositing with the officer in charge such sum of money or other valuable security not exceeding in amount or value five hundred dollars, as the officer in charge directs.

Additional conditions

(2) In addition to the conditions for release set out in paragraphs (1)(*a*), (*b*) and (*c*), the officer in charge may also require the person to enter into an undertaking in Form 11.1 in which the person, in order to be released, undertakes to do one or more of the following things:

(*a*) to remain within a territorial jurisdiction specified in the undertaking;

(*b*) to notify a peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;

(*c*) to abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with the conditions specified in the undertaking;

(*d*) to deposit the person's passport with the peace officer or other person mentioned in the undertaking;

(*e*) to abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, licence or registration certificate or other document enabling that person to acquire or possess a firearm;

(*f*) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;

(*g*) to abstain from

(i) the consumption of alcohol or other intoxicating substances, or

(ii) the consumption of drugs except in accordance with a medical prescription; and

(*h*) to comply with any other condition specified in the undertaking that the officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

Taking before justice

503. (1) A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 494(3) or into whose custody a person is placed under subsection 163.5(3) of the *Customs Act* shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:

(*a*) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and

(*b*) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,

unless, at any time before the expiration of the time prescribed in paragraph (*a*) or (*b*) for taking the person before a justice,

(*c*) the peace officer or officer in charge releases the person under any other provision of this Part, or

(*d*) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.

Order of release

515. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

Conditions authorized

(4) The justice may direct as conditions under subsection (2) that the accused shall do any one or more of the following things as specified in the order:

(*a*) report at times to be stated in the order to a peace officer or other person designated in the order;

(*b*) remain within a territorial jurisdiction specified in the order;

(*c*) notify the peace officer or other person designated under paragraph (*a*) of any change in his address or his employment or occupation;

(*d*) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, or refrain from going to any place specified in the order, except in accordance with the conditions specified in the order that the justice considers necessary;

(*e*) where the accused is the holder of a passport, deposit his passport as specified in the order;

(*e.1*) comply with any other condition specified in the order that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and

(*f*) comply with such other reasonable conditions specified in the order as the justice considers desirable.

Order of detention

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(*a*) with an indictable offence, other than an offence listed in section 469,

(i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,

(ii) that is an offence under section 467.11, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,

(iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,

(iv) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*,

(v) an offence under subsection 21(1) or 22(1) or section 23 of the *Security of Information Act* that is committed in relation to on offence referred to in subparagraph (iv),

(vi) that is an offence under section 99, 100 or 103,

(vii) that is an offence under section 244 or 244.2, or an offence under section 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 that is alleged to have been committed with a firearm, or

(viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1);

(*b*) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,

(*c*) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or

(*d*) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.

Justification for detention in custody

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(*a*) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(*b*) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(*c*) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Remand in custody

516. (1) A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused.

Inquiries to be made by justice and evidence

518. (1) In any proceedings under section 515,

(*a*) the justice may, subject to paragraph (*b*), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;

(*b*) the accused shall not be examined by the justice or any other person except counsel for the accused respecting the offence with which the accused is charged, and no inquiry shall be made of the accused respecting that offence by way of cross-examination unless the accused has testified respecting the offence;

(*c*) the prosecutor may, in addition to any other relevant evidence, lead evidence

(i) to prove that the accused has previously been convicted of a criminal offence,

(ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence,

(iii) to prove that the accused has previously committed an offence under section 145, or

(iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;

(*d*) the justice may take into consideration any relevant matters agreed on by the prosecutor and the accused or his counsel;

(*d.1*) the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI, in writing, orally or in the form of a recording and, for the purposes of this section, subsection 189(5) does not apply to that evidence;

(*d.2*) the justice shall take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence; and

(*e*) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

Issue of warrant for arrest of accused

524. (1) Where a justice is satisfied that there are reasonable grounds to believe that an accused

(*a*) has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him, or

(*b*) has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

he may issue a warrant for the arrest of the accused.

Arrest of accused without warrant

(2) Notwithstanding anything in this Act, a peace officer who believes on reasonable grounds that an accused

(*a*) has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him, or

(*b*) has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

may arrest the accused without warrant.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.