GLADUE AND BAIL: THE PRE-TRIAL SENTENCING OF ABORIGINAL PEOPLE IN CANADA

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The crisis of a failing system of judicial interim release disproportionately disadvantages Aboriginal accused persons. Rather than ameliorating this crisis, the principles articulated in R v Gladue and re-affirmed in R v Ipeelee are being interpreted at the bail phase in a manner that exacerbates the problem. A review of Gladue bail jurisprudence reveals the ways in which Aboriginal people in Canada are improperly being sentenced via bail proceedings. The courts have failed to identify the relevant legal principles that should animate bail. Instead, judicial interim release is being utilized as a diagnostic tool and Aboriginal people are inappropriately being subjected to "treatment" via the over-use of sureties and conditions of release. The relevant systemic factors are not properly considered and should play a far greater role in the assessment of risk and the interpretation of Gladue. The paper concludes with a proposal for how Gladue can more appropriately be interpreted and applied in the context of judicial interim release, including an alternate understanding of what systemic factors should animate Gladue bail proceedings.

La crise qui sévit au sein d'un système défaillant de mise en liberté provisoire porte préjudice aux prévenus autochtones de manière disproportionnée. Les principes articulés dans l'arrêt R c Gladue et confirmés dans l'arrêt R c Ipeelee ont été interprétés, à l'étape de la mise en liberté sous caution, de manière à exacerber le problème au lieu de pallier cette crise. Un examen de la jurisprudence postérieure à l'arrêt Gladue portant sur la question de la mise en liberté sous caution met en exergue le fait qu'au Canada, les Autochtones sont indûment condamnés à des peines au moyen de l'enquête sur la remise en liberté provisoire. Les tribunaux n'ont pas cerné les principes juridiques pertinents qui devraient sous-tendre la mise en liberté sous caution. En revanche, la mise en liberté provisoire sert d'outil de diagnostic, et les personnes autochtones sont soumises de façon inappropriée à un « traitement » par l'entremise du recours abusif aux cautions et aux conditions de mise en liberté. Les facteurs systémiques pertinents n'ont pas fait l'objet d'un examen adéquat bien que ces derniers doivent jouer un rôle bien plus important dans le cadre de l'évaluation des risques et l'interprétation de l'arrêt Gladue. L'article termine en proposant une meilleure façon d'interpréter et d'appliquer l'arrêt Gladue dans le contexte de la mise en liberté provisoire, notamment en interprétant différemment quels sont les facteurs systémiques devant servir de guide lors de ces audiences.

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1. Introduction

The bail system in Canada is broken. The rate of presumptively innocent accused persons in remand custody continues to rise even though crime rates are reportedly on the decline.[1] The devastating impact of a failing bail system is poignantly felt by Aboriginal people who are grossly over represented in remand custody across Canada; they comprise approximately 3% of the general population and 21% of those in remand custody.[2] The over-incarceration of Aboriginal people in Canada is not a new phenomenon—it has persisted for decades.

As an attempt to remedy the mass incarceration of Aboriginal people, section 718.2(e) of the *Criminal Code* was enacted in 1996, requiring all sentencing courts to consider incarceration as a sanction of last resort for all offenders, "with particular attention to the circumstances of Aboriginal offenders."[3] In *R v Gladue*, the Supreme Court of Canada interpreted section 718.2(e) as a remedial provision and provided that courts *must* take judicial notice of the "background and systemic factors" relating to Aboriginal

1 Statistics Canada, "Police Reported Crime Statistics in Canada", by Jillian Boyce in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015) at 3, online: <www.statcan.gc.ca/pub/85-002-x/2015001/article/14211-eng.htm>.

2 Statistics Canada, "Trends in the Use of Remand in Canada", by Lindsay Porter & Donna Calverly in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2011) at 14, online: <www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.pdf>.

3 *Criminal Code*, RSC 1985, c C-46, s 718.2(e) [*Criminal Code*].

people that may have contributed to bringing the particular offender before the courts.[4]

Despite over a decade of jurisprudence acknowledging the application of *R v Gladue* to bail hearings, confusion over exactly how it applies persists.[5] The case law is not well developed in this legal arena; it is sporadic, contradictory, and at times misguided. In this paper, it will be argued that the principles articulated in *R v Gladue* and reiterated in *R v Ipeelee* are applied to judicial interim release in a manner that exacerbates, rather than ameliorates, the systemic failures of the criminal justice system in its dealings with Aboriginal people.[6] Bail proceedings involving Aboriginal accused have devolved into pre-trial sentencing hearings.[7] Three main arguments support this conclusion. Firstly, courts are evoking sentencing principles in a manner that erodes the *Charter* protected right to the presumption of innocence.[8] The erosion of constitutional protections is inextricably linked to the perpetuation of bias against Aboriginal people. Secondly, bail jurisprudence improperly uses bail proceedings as a diagnostic tool necessitating "treatment" of Aboriginal people via the use of sureties and conditions. In this vein, misunderstandings of the relevance of Aboriginal culture and heritage proliferate. Thirdly, the systemic considerations that should animate Gladue bail proceedings are not properly taken into account in the adjudication of judicial interim release.

The Gladue analysis, as it pertains to bail, should be focused on systemic issues such as institutional bias, policing, and bail practices and policies that have disproportionately disparate consequences for Aboriginal people. By way of conclusion, I will propose a framework for the application of Gladue to judicial interim release; a framework that breathes life into the guiding principles as dictated by the Supreme Court of Canada.

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4 *Ibid*; [1999] 1 SCR 688 at para 70, 171 DLR (4th) 385 [*R v Gladue*]. Throughout this paper, I refer to "Gladue" to reference the principles articulated in the initial *R v Gladue* case and its progeny, including the more recent Supreme Court of Canada case *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*] (where the court reiterated the principles initially articulated in *R v Gladue*, referring to the 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" at para 60).

5 *R v Gladue*, *supra* note 4.

6 *Ibid*; *Ipeelee*, *supra* note 4.

7 This paper draws heavily on my LLM thesis: Jillian Rogin, *The Application of Gladue to Bail: Problems, Challenges, and Potential* (LLM Thesis, Osgoode Hall Law School, 2014) [unpublished].

8 *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

By way of methodology, reported bail jurisprudence involving Aboriginal accused were analysed with a focus on how courts are interpreting and applying the Gladue regime in the context of judicial interim release. Cases involving bail pending appeal, bail pending sentence, and those involving youth were not included, as different statutory provisions and legal principles are applicable in these situations.[9] A quantitative analysis of the jurisprudence was not undertaken. Rather, the focus is on the courts' understanding of colonialism, systemic factors, and how Aboriginal people may be negatively impacted by the processes and procedures commonly employed in judicial interim release hearings. 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,[10] and as such, examining the ways that judges understand and are implementing the regime is perhaps most practical via reading case law.[11]

The causes of Aboriginal over-incarceration are complex and multi-faceted and the remediation of high incarceration rates extend far beyond the court's interpretation and application of Gladue. The ongoing process of settler-colonialism, the lack of recognition of Aboriginal 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.

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9 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: see Statistics Canada, "Youth Custody and Community Services in Canada, 2008/2009", by Donna Calverley, Adam Cotter & Ed Halla in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2011), online: <www.statcan.gc.ca/pub/85-002-x/2010001/article/11147-eng.htm#a14>. It is beyond the scope of this paper to include youth, given the different statutory schemes.

10 *R v Anderson*, 2014 SCC 41 at paras 23–25, [2014] 2 SCR 167.

11 The emphasis on reported decisions presents a number of limitations. The many forms of injustices perpetrated against Aboriginal people in the lower bail courts across this country are not captured. Additionally, the reported jurisprudence does not provide an adequate basis for assessing how certain aspects of the law of bail may disproportionately impact Aboriginal people. For example, in the *Criminal Code*, *supra* note 3, the reverse onus provisions enacted in section 515(6), whether police are properly utilizing their discretion not to arrest pursuant to section 495(2) and to release under sections 497 and 498 are all issues that were not canvassed in the reported case law. All of these issues cry out for further research, as they stand to disproportionately affect Aboriginal people. Further, at the time of writing this paper, it was not possible to analyse the impact of the Supreme Court's decision in *R v St-Cloud*, 2015 SCC 27, [2015] 2 SCR 328 [*St-Cloud*], on Gladue and bail, as there are not enough reported decisions involving Aboriginal accused to undertake such an analysis. The *St-Cloud* (*ibid*) decision has the potential to contribute to Aboriginal pre-trial incarceration and attention must be paid to whether or not this becomes the case.

However, exploring how the criminal law, and in particular the regime of judicial interim release, 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 systemic bias might be alleviated.

2. The Applicable Legal Frameworks

A) Judicial Interim Release

By way of introduction, 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, that animate judicial interim release. A person charged with a criminal offence can either be released into the community while they await trial, or can be detained in jail pending their trial. Bail, quite simply, is being released from custody pending one's trial or disposition of criminal charges. 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 (section 11(d)); the right not to be arbitrarily detained or imprisoned (section 9); the liberty and security of the accused (section 7); and the right to have the validity of the detention determined by means of *habeas corpus* (section 10(c)).[12]

The right to reasonable bail in section 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."[13] Detention pending trial is the exception rather than the norm that translates into a presumption of the least onerous form of release, at the earliest opportunity, with as little restriction on accused persons' liberty as possible. This interpretation of section 11(e) accords with the presumption of innocence that cloaks all accused persons until the end of his or her trial.[14]

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12 *Supra* note 8, ss 7, 9, 10(e), 11(e)–(d).

13 *Ibid*, s 11(e); *R v Pearson*, [1992] 3 SCR 665 at 4–7, 12 CRR (2d) 1; *R v Morales*, [1992] 3 SCR 711 at 4, 8–11, 12 CRR (2d) 31; *R v Hall*, 2002 SCC 64, [2002] at para 16, [2002] 3 SCR 309 [*Hall*]; *R v Antic*, 2017 SCC 27 at para 40, 138 WCB (2d) 21 [*Antic*].

14 *Hall*, *supra* note 13 at paras 47–48; Iaccobucci J, dissenting and writing for a four judge minority, though not on this point, stated that the norm should be release, and detention should remain the exception (*ibid* at para 49); this judgement by Iaccobucci J was affirmed in *St-Cloud*, *supra* note 11 at para 70, and *Antic*, *supra* note 13 at paras 66–67.

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 *Criminal Code*.[15] Bail may only be denied where the Crown has shown cause on any one of the following three 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 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, [or]
>
> (c) if the detention is necessary to maintain confidence in the administration of justice.[16]

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 exercise of Crown discretion must be consonant with the prosecutor's role as a minister of justice—contesting bail as a matter of convenience or routine is inappropriate.[17] The accused must be released on the least onerous form of bail unless the prosecutor shows cause as to why a more stringent form of release is justified.[18] This is commonly referred to as the "ladder principle", meaning that "release is favoured at the earliest opportunity and, having regard to the risk of flight and public protection, on the least onerous grounds."[19]

Despite very clear pronouncements highlighting the proper considerations animating the parameters of section 11(e) of the *Charter*, the law of bail is not being applied properly in many jurisdictions across

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15 *Supra* note 3, s 515.

16 *Ibid*, ss 515 (10)(a)–(c) (section 515 (10)(a) is commonly referred to as the primary ground, section 515 (10)(b) is commonly referred to as the secondary ground, and section 515 (10)(c) is commonly referred to as the tertiary ground).

17 *R v Brooks* (2001), 153 CCC (3d) 533 at para 22, 49 WCB (2d) 533 (Ont Sup Ct); *R v Villota* (2002), 163 CCC (3d) 507 at para 70, 53 WCB (2d) 143 (Ont Sup Ct).

18 The onus generally falls on the prosecutor to justify detention and to justify each condition imposed. There are situations where the onus is reversed and the accused must demonstrate why he should be released. See *Criminal Code*, *supra* note 3, s 515(6).

19 *R v Anoussis*, 2008 QCCQ 8100 at 23, 242 CCC (3d) 113, aff'd in *Antic*, *supra* note 13 at paras 29, 30, 44, 47, 67. See also *R v Horvat*, 9 CCC (2d) 1, [1972] BCJ No 540 (SC).

Canada.[20] As noted by the Supreme Court of Canada in *R v Antic*, "It is time to ensure that the bail provisions are applied consistently and fairly. The stakes are too high for anything less."[21] The results of the misapplication of bail are devastating; prolonged time spent in remand custody, loss of jobs, separation from family, onerous conditions imposed, and the over-use of surety bails are just some examples of the collateral consequences of the improper application of the law of bail.

B) The Gladue Regime and Bail

In the sentencing context, the Gladue framework mandates that courts consider: (1) the "systemic or background factors" that have contributed to bringing the Aboriginal offender before the courts; and (2) the "types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."[22] The court in *Ipeelee* clarified that the inquiry into "systemic and background factors" is an inquiry into the systemic impact of colonialism on the individual Aboriginal offender.[23]

The inquiry into the systemic effects that colonization has had on an individual's life circumstances requires recognition that the person's offending behaviour was created, at least in part, by the circumstances of colonization. The trauma and violence inherent to colonial processes

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[20] *Antic*, *supra* note 13 at paras 65–66; *Charter*, *supra* note 8, s 11(e); see also Canadian Civil Liberties Association, "Set up to Fail: Bail and the Revolving Door of Pre-trial Detention", by Abby Deshman & Nicole Myers (Toronto: Canadian Civil Liberties Association and Education Trust, July 2014), online: <ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf> [Canadian Civil Liberties Association]; John Howard Society of Ontario, "Reasonable Bail?" (Toronto: Centre of Research, Policy & Program Development, September 2013), online: <www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf> [John Howard Society]; Martin L Friedland, "The *Bail Law Reform Act* Revisited" (2012) 16:3 Can Crim L Rev 315; Jane B Sprott & Nicole M Myers, "Set up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 Can J Corr 404; Nicole M Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 Current Issues in Criminal Justice 127 [Myers]; Cheryl Marie Webster, Anthony N Doob & Nicole M Myers, "The Parable of Ms. Baker: Understanding Pre-trial Detention in Canada" (2009) 21:1 Current Issues in Criminal Justice 79.

[21] *Antic*, *supra* note 13 at para 66. In *Antic* the Supreme Court reiterated the proper approach to bail, emphasizing the ladder approach and the interests animating the right to reasonable bail under the *Charter*, *supra* note 8, s 11(e). The impact of this decision on the right to reasonable bail in light of Gladue is yet to be seen. There is every reason to be hopeful that the decision will result in restraint in the adjudication of bail generally, and perhaps alleviate at least some of the aspects of bail that have particularly negative consequences for Aboriginal accused.

[22] *R v Gladue*, *supra* note 4 at para 66.

[23] *Ibid*.

alleviates the offender's moral culpability. In this sense, Aboriginal heritage is considered mitigating on sentence.[24] 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.[25]

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 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 utilized. It will be argued that Gladue bail hearings closely resemble sentencing proceedings in a manner that erodes *Charter* protected rights and further exacerbates bias in the application of judicial interim release.

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[26] but have not been explicitly recognized in many others.[27] The "special circumstances" of Aboriginal accused have been

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24 *Ibid* at paras 73–74.

25 See, for example, the analysis of national responsibility and section 718.2(e) articulated in *R v Quash*, 2009 YKTC 54 at para 55, 84 WCB (2d) 66, followed in *R v Magill*, 2013 YKTC 8 at para 46, 113 WCB (2d) 791 [*Magill*].

26 See e.g. *R v Pierce*, 2010 ONSC 6154 at para 45, 91 WCB (2d) 223 [*Pierce*]; *R v Rich*, 2009 NLTD 69 at para 18, 84 WCB (2d) 965 [*Rich*]; *R v Daniels*, 2012 SKPC 189 at para 20, 104 WCB (2d) 1136 [*Daniels*]; *Magill*, *supra* note 25 at para 47; *R v Cyr*, 2012 SKQB 534 at para 52, 104 WCB (2d) 1137 [*Cyr*]; *R v Chocolate*, 2015 NWTSC 28 at paras 49–50, 130 WCB (2d) 201 [*Chocolate*], *R v Sledz*, 2017 ONCJ 151 at para 18, 138 WCB (2d) 73.

27 *R v Misquadis-King*, 2010 ONSC 4592, 95 WCB (2d) 162 [*Misquadis-King* cited to ONSC]; *R v Silversmith* (2008), 77 MVR (5th) 54, 81 WCB (2d) 697 (Ont Sup Ct) [*Silversmith* cited to WCB]; *R v Robinson*, 2009 ONCA 205, 85 WCB (2d) 516 [*Robinson* cited to ONCA]; *R v Murle*, 2013 ONSC 117, 104 WCB (2d) 1214 [*Murle*]; *R v DDP*, 2012 ABQB 229, [2012] 3 CNLR 289 [*DDP* cited to ABQB]; *R v Silas*, 2011 YKTC 22, 96 WCB (2d) 480 [*Silas* cited to YKTC]; *R v J(TJ)*, 2011 BCPC 155, 95 WCB (2d) 418 [*J(TJ)* cited to BCPC]; *R v Green*, 87 WCB (2d) 441, 2009 CarswellOnt 1487 (WL Can) (Sup Ct) [*Green* cited to WCB]; *R v Brant*, 89 WCB (2d) 431, [2008] OJ No 5375 [*Brant* cited to WCB]; *R v Campbell*, 2009 BCPC 448, 89 WCB (2d) 328 [*Campbell* cited to BCPC]; *R v Neshawabin*, 82 WCB (2d) 353, 2008 CanLII 73617 (Ont Sup Ct) [*Neshawabin*]; *R v Wesley*, 2002 BCPC 717, [2002] BCJ No 3401; *R v Crawford* (17 August 2007), Brampton 07-1928-00BR (Ont Sup Ct); *R v Bain*, [2004] OJ No 6147 (QL), 2004WL5368769 (WL Can) (Sup Ct) [*Bain* cited to OJ]; *R v Achneepineskum,* 2015 ONSC 5700, 125 WCB (2d) 73; *R v Gordon*, 2015 ONSC 5495, 125 WCB (2d) 81 [*Gordon* cited to ONSC]; *R v Spence*, 2015 ONSC 1692, 120 WCB (2d) 486 [*Spence* cited to ONSC]; *R v Hope*, 2016 ONCA 648, 132 WCB (2d) 479 [*Hope*]; *R v Ashini*, 2015 NLPC 1711A14396, 119 WCB (2d) 398 [*Ashini* cited to NLPC].

found to apply irrespective of the primary, secondary, or tertiary grounds,[28] or the Gladue factors considered in terms of whether they "outweigh the protection of the public."[29] Contradicting this finding, it has also been concluded that Gladue principles must be assessed within the provisions of section 515(10) of the *Criminal Code*.[30] 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.[31]

The only appellate guidance on the applicability of Gladue to bail derives from two brief endorsements of the Ontario Court of Appeal in *R v Robinson* and *R v Hope*.[32] In *Robinson*, Justice Winkler 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 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.[33]

As noted earlier, the Gladue bail jurisprudence is not well developed and the frameworks currently utilized need to be refined so that all of the applicable principles are properly considered and applied in a more uniform manner in line with the dicta of Gladue.

3. The Application of Gladue to Bail: Pre-trial Sentencing?

Read as a whole, Gladue bail decisions reflect the origins of section 718.2(e) in the *Criminal Code*; it is a sentencing provision and the bail courts have fallen into a trap of treating Aboriginal bail hearings as sentencing proceedings.[34] Transposing the sentencing regime into the context of bail, without modification or accounting for the differing legal contexts, necessarily violates the presumption of innocence that all accused are entitled to at the bail phase.

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28 *DDP*, *supra* note 27 at para 9.

29 *Gordon*, *supra* note 27 at para 16.

30 *Supra* note 3, s 515(10); *Daniels*, *supra* note 26 at para 21; see also *Chocolate*, *supra* note 26 at paras 49–51.

31 *Brant*, *supra* note 27 at para 21.

32 *Robinson*, *supra* note 27; *Hope*, *supra* note 27.

33 *Supra* note 27 at para 13.

34 *Supra* note 3, s 718.2(e).

An inquiry into what brings the Aboriginal *offender* before the courts at the bail phase, as articulated in *Robinson*, is a complete affront to the presumption of innocence.[35] Persons facing charges are not offenders, and an inquiry into what brings 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 an accused is legally innocent until proven guilty, inquiries into the causes of criminal behaviour must remain in the domain of sentencing, after a conviction has been entered. Unfortunately, many of the bail decisions reflect the language illustrated in *Robinson*, referencing the Aboriginal accused as the offender.[36]

It could be argued that the use of the word "offender" instead of "accused" is an inadvertent slip that perhaps pervades many bail hearings, including those involving non-Aboriginal people. This argument could potentially gain traction if it were the only symptom of the erosion of the presumption of innocence for Aboriginal accused. However, the Gladue bail jurisprudence goes further than just semantical error, resulting in the diagnosing, treatment, and rehabilitation of Aboriginal accused persons and decimating any notion of legal innocence pending trial.

Principles such as rehabilitation and restorative justice are all too prevalent in Gladue bail hearings. In *R v DDP*, the following comments were made where 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 he/she is sentenced. If the rehabilitation of the Aboriginal offender is to be [dealt] 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.[37]

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 Aboriginal

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35 *Supra* note 27 at paras 8–9, 13.

36 *Ibid*; See e.g. *DDP*, *supra* note 27 at para 9; *R v Pitawanakwat*, 61 WCB (2d) 597 at para 35, [2003] OTC 1049 [*Pitawanakwat*]; *Pierce*, *supra* note 26 at para 1; *R v McCrady*, 2016 ONSC 1591 at paras 60–61, 129 WCB (2d) 610; *Silversmith*, *supra* note 27 (the court refers to "Aboriginal offenders…seeking judicial interim release" at para 33).

37 *Supra* note 27 at para 9.

people, and the antidote is rehabilitation via the criminal justice system, and in particular, bail proceedings.[38] The Aboriginal accused in this case was essentially found guilty and sentenced via a stringent and rehabilitative release order.[39] The court concludes that in light of the Supreme Court of Canada's decisions in the sentencing of Aboriginal persons, "this Accused should be released and begin his treatment and rehabilitation program, rather than languish at the Remand Centre in custody."[40] The accused in this case was released on bail with numerous conditions of release, including that he regularly attend an addictions treatment program for six weeks.[41] 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.[42] In fact, it is not at all clear in this case how there were any concerns on the primary, secondary, or tertiary grounds that could possibly justify detention at the first instance, let alone a release plan with 14 conditions.

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, if it is requested, provided that the treatment and counseling be given under appropriate terms and conditions…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.[43]

Again, the use of "offender" instead of "accused" frames the decision as does the term "victim" instead of the word "complainant". In *Pitawanakwat*, the allegations involved alcohol and there was evidence that the accused wanted to take steps to address his issues with alcohol abuse and dependency.[44] 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

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38 *Ibid* at para 10.
39 *Ibid* at paras 13–14.
40 *Ibid* at para 13.
41 *Ibid* at para 14.
42 *Ibid* at paras 11, 13.
43 *Supra* note 36 at paras 34–35.
44 *Ibid* at paras 26–27, 30.

reserved for the sentencing domain.[45] 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"[46] 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."[47] 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 grounds for detention, or why treatment would otherwise be relevant to the release of the accused from custody. Rather, the focus is on addressing the root causes of perceived Aboriginal criminality through a release order encompassing treatment and rehabilitation.

The language of rehabilitation is borrowed from the sentencing context, and in particular from the language and principles enunciated in *R v Gladue*—a sentencing decision.[48] Not only does the treatment of Aboriginal accused at the bail stage as presumptively guilty offend the constitutional right to the presumption of innocence and perpetuate systemic discrimination within the criminal justice system, the call for rehabilitation at the bail phase offends the law of bail. Attempts at reforming presumptively innocent accused persons at the bail stage are wholly inappropriate.[49] Although there may be situations where rehabilitative efforts made by the accused can achieve one of the three purposes of bail, any imposed condition requiring counselling or treatment of any kind must be directed to concerns that may have otherwise provided a foundation for detention.[50]

The fact that *R v Gladue* and *Ipeelee* have been found to apply outside of sentencing should not mean that sentencing principles are to be applied inappropriately without regard to the different legal contexts.[51] The application of Gladue to judicial interim release 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 errors deriving from the source of *R v Gladue* and section 718.2(e).[52] However unintended, the erosion of the

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45 *Ibid* at para 35.

46 *Supra* note 27 at 61–62.

47 *Ibid* at 64.

48 *Supra* note 4.

49 Justice Gary T Trotter, *The Law of Bail in Canada* (Toronto: Carswell, 2010) (loose-leaf revision 3), ch 6 at 37 [Trotter].

50 *Ibid* at 6; *R v Peddle*, [2001] OTC 414, 50 WCB (2d) 173 at para 10; *R v Major* (1990), 76 CR (3d) 104, 9 WCB (2d) 420 at 16–19 (Ont Ct J); *Keenan c Stalker*, [1979] CA 446, 12 CR (3d) 135 (Qc).

51 *R v Gladue*, *supra* note 4; *Ipeelee*, *supra* note 4.

52 *R v Gladue*, *supra* note 4; *Criminal Code*, *supra* note 3.

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.[53] Ironically, this kind of bias and the ways that it contributes to the alienation of Aboriginal people from the criminal justice system were exactly what the Supreme Court in *R v Gladue* and *Ipeelee* were attempting to identify and eradicate.[54]

4. 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. Bail proceedings involving non-Aboriginal accused might also over-emphasize inappropriate rehabilitative principles that erode the presumption of innocence.[55] However, this error has very particular implications for Aboriginal accused. 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.

In the sentencing context, feminist and Aboriginal scholars have highlighted the ways that the Gladue analysis overly emphasizes cultural difference as the key factor in creating and maintaining the over-incarceration of Aboriginal people.[56] The emphasis on cultural difference as the main contributing cause of the incarceration of Aboriginal people masks the ways

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53 See e.g. Michael Jackson, "Locking up Natives in Canada" (1988–1989) 23:2 UBC L Rev 215; Ontario, The Ipperwash Inquiry, *Aboriginal Peoples and the Criminal Justice System* by Jonathan Rudin (Toronto: The Ipperwash Inquiry, 2007), online: <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/> at 5 [Rudin]; Aboriginal Justice Implementation Commission, *The Justice System and Aboriginal People*, vol 1 (Winnipeg: Aboriginal Justice Inquiry of Manitoba, 1991), online: <www.ajic.mb.ca/volumel/toc.html> [Aboriginal Justice Inquiry of Manitoba].

54 *R v Gladue*, *supra* note 4 at para 65; *Ipeelee*, *supra* note 4 at paras 61–69.

55 Canadian Civil Liberties Association, *supra* note 20 at 59–61.

56 See e.g. Carmela Murdocca, "From Incarceration to Restoration: National Responsibility, Gender and the Production of Cultural Difference" (2009) 18:1 Soc & Leg Stud 23; Carmella Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: University of British Columbia Press, 2013); Patricia Monture, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in

that the criminal justice system creates and maintains the criminalization of Aboriginal people. In this regard, Patricia Monture describes the need for structural change as opposed to the implementation of programs that aim to teach Aboriginal people 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.[57]

In the bail context, the courts have largely ignored the systemic factors that have impacted 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 no framework for understanding how any systemic issue might be relevant to bail adjudication. This section will explore these issues as they arise in bail jurisprudence 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 Aboriginal person's heritage. The tragic circumstances are understood to be resulting from the fact of the Aboriginal culture as opposed to being understood as attributable to colonialism that is historic and ongoing.

Discussing the application of Gladue to bail in *R v Pierce*, the court notes that "All performers, perpetrators and victims, are native. Theirs is the native community and that is a necessary consideration."[58] There is no elaboration on how the fact that "theirs is a native community" might be relevant to bail.[59] Within the rest of the ruling, the very tragic circumstances of the young female accused person 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.[60] Absent this connection, there is a danger that the court paints this young woman

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Elizabeth Comack, ed, *Locating Law: Race/Class/Gender/Sexuality/Connections*, 2nd ed (Halifax: Fernwood Publishing, 2006) 73 [Monture].

57 Monture, *supra* note 56 at 77.

58 *Supra* note 26 at para 41.

59 *Ibid*.

60 *Ibid* at para 23.

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 the context of colonialism. In this way, Indigeneity becomes equated with suffering a tragic life, trauma, or life circumstances—as if these ills are part of Aboriginal culture. This is not what the dicta of Gladue 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 such as substance abuse or trauma and not connecting them to broader structural issues runs afoul of Gladue.

This lack of reference to colonialism is further exemplified in *R v Silversmith*.[61] 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 home community.[62] The court correctly noted that unemployment is prevalent on many First Nations reserves in Canada, as it was in the accused's community, the Six Nations of the Grand River Nation.[63] 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.[64] However, these factors are not only disconnected from any specific colonial policy or phenomenon, but colonialism itself is not referenced. 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."[65] The court also attributes the accused's criminal record to his alcoholism and poverty, not as impacts of colonialism, but rather as issues that are 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."[66] Without any discussion of how colonialism or any specific colonial policy has 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."[67] The analysis under this heading consists of a

61 *Supra* note 27; see also *Spence*, *supra* note 27.

62 *Silversmith*, *supra* note 27 at paras 22–25, 31, 34.

63 *Ibid* at para 31.

64 *Ibid* at paras 22–25.

65 *Ibid* at para 31 [emphasis added].

66 *Ibid* at para 24.

67 *Supra* note 27 at para 6.

discussion of the accused's recent plan to connect to Aboriginal services that would assist him with treatment and counselling for substance abuse.[68] The accused's charges and criminal antecedents were related to selling drugs and breaching court orders not to possess non-prescription drugs.[69] There is no discussion of whether or not the accused actually suffered an addiction to drugs or how treatment is related to Aboriginal heritage. The implication is that Aboriginal heritage is 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 it suggests that if a person is Aboriginal, there is need for 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 as indicated in *Robinson*, above.[70] Similarly, the court in *R v Brant* encouraged examining sureties and release plans in the context of Aboriginal heritage.[71]

Both *Robinson* and *Brant* 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 enforcement of conditions of release and preventing the accused from committing further criminal offences while on release.[72] Again, in these cases, we see the courts focus on "cultural difference" as being the focus of the implementation of Gladue. The analysis thus 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 only if the Aboriginal culture can enforce Canadian criminal legal mechanisms such as the supervision of the accused while on bail.

The lack of explicitly stated connections 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 treatment and reform, resulting in 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.

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68 *Ibid* at paras 6, 13.

69 *Ibid* at para 15.

70 *Supra* note 27 at para 13, Winkler CJA; *Magill*, *supra* note 25; *Daniels*, *supra* note 26; *Cyr*, *supra* note 26.

71 *Supra* note 27 at para 21.

72 *Robinson*, *supra* note 27 at para 9; *Brant*, *supra* note 27 at para 21.

5. 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.[73] In many jurisdictions where Gladue has been found to apply, it is not being implemented in a meaningful way.[74] A review of the jurisprudence reveals that courts have not properly considered the ways in which Aboriginal people are systemically disadvantaged by the procedures 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 may be disproportionately disadvantaged by specific aspects of the process of judicial interim release, including the policing of Aboriginal people, over-reliance on sureties, and the imposition of conditions of release.[75] 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 section, instances of institutional bias against Aboriginal people in the judicial interim release setting are reviewed in order to uncover aspects 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, in proper regard to Gladue.

A) 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 engaged in by way of separationist policies, or those intended to assimilate or to curb the dissent of unjust colonial laws, the police have been an integral component of

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73 In New Brunswick, Gladue was found inapplicable in *R v Sacobie*, 2011 NBCA 23 at para 6, 93 WCB (2d) 404. In Manitoba, the media reported a case where the Superior Court found Gladue to be essentially inapplicable: James Turner, "Native Bail Reform Urged: Current Rules 'Eurocentric'", *Winnipeg Free Press* (10 March 2013), online: <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).

74 Canadian Civil Liberties Association, *supra* note 20 at 74–76.

75 These issues are not the only aspects of the bail process that contribute to systemic bias against Aboriginal accused in the bail process. There are a myriad of ways that the procedure and process of judicial interim release are capable of producing systemic bias against Aboriginal people. It is not within the scope of this paper to discuss each and every point of systemic bias. I have chosen instead to highlight a few poignant and prevalent examples.

Canada's colonial regime.[76] This regime continues, manifesting in the racist and biased policing of Aboriginal people in Canada. Seemingly endless reports, inquiries, and scholarly discussions highlight the racism and discrimination endemic in the policing of Aboriginal people. 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 JJ Harper that in part led to the Manitoba Justice Inquiry.[77] Racism and biased policing contributed to the death of Neil Stonechild who died of exposure to the cold after being in police custody.[78] The wrongful conviction of Donald Marshall was attributable in part to the biased police investigation of Marshall because he was Aboriginal.[79] Police racism led to the deadly shooting of activist Dudley George at Ipperwash.[80] The Ipperwash Inquiry documented the racism that pervaded the policing of the protesters at Ipperwash as follows:

> 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."[81]

The lived experience of racism in policing and its impact on Aboriginal people is also well documented.[82] Systemic issues in the policing of Aboriginal people are perhaps the most important factors impacting how

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76 Rudin, *supra* note 53 at 29–38.

77 Aboriginal Justice Inquiry of Manitoba, *supra* note 53; see also Ontario, *Report of the Ipperwash Inquiry* (Toronto: Ipperwash Inquiry, 2007) vol 1 (The Honourable Sidney B Linden), online: <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html> [*Ipperwash Inquiry*]; Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of 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)* (Edmonton: Aboriginal Affairs and Northern Development, 1991) vol 1 (The Honourable Mr. Robert Allan Cawsey), online: <open.alberta.ca/publications/1369434#detailed>.

78 Saskatchewan, Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild (Regina: Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild, 2004) (The Honourable Mr. Justice David A Wright), online: <www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Stonechild/Stonechild.pdf>.

79 Nova Scotia Royal Commission on the Donald Marshall Jr Prosecution, *Digest of Findings and Recommendations* (Halifax: Royal Commission on the Donald Marshall Jr Prosecution, 1989) vol 1 (Chief Justice T Alexander Hickman) at 20.

80 *Ipperwash Inquiry*, *supra* note 77.

81 *Ibid* at 683.

82 See e.g. Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003); Aboriginal Justice Inquiry of Manitoba, *supra* note 53; Royal Commission on Aboriginal Peoples, *Bridging the*

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 swelling remand populations.[83] 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.[84] Aboriginal people are more likely to be detained and held for bail than to be released by the police.[85] There is 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, there are no reported bail cases involving Aboriginal accused where the court properly considers 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.[86]

B) 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 in remand custody. Given that many Aboriginal accused who are arrested are often those who

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Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Canada Communication Group, 1996) at xii, 315.

83 Sections 495, 498, and 499 of the *Criminal Code*, *supra* note 3, provide the police with discretion not to arrest, and to release accused persons with conditions. There is much commentary indicating that these powers are not adequately used by the police. See Canadian Civil Liberties Association, *supra* note 20 at 14, 15, 25; John Howard Society, *supra* note 20 at 3.

84 Aboriginal Justice Inquiry of Manitoba, *supra* note 53, ch 4.

85 *Ibid*; Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer, 1995) ch 5.

86 The specific ways that courts might consider the policing of Aboriginal accused in the context of Gladue bail hearings will be discussed in Part 6, below.

are most marginalized—unemployed, have minimal income, and are often homeless or otherwise socially isolated—securing a suitable surety may be extremely difficult.[87] For urban Aboriginal accused, especially those facing homelessness, social isolation may be a reality precluding access to family or friends with the means for bail.[88]

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 in securing a surety if the accused was arrested in a remote community. This was exemplified in a report undertaken by the Canadian Civil Liberties Association where it was 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.[89]

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. This delay runs afoul of section 516 of the *Criminal Code* that mandates an accused's bail hearing cannot be delayed more than "three clear days" absent the accused's consent.[90] If the Crown insists on a surety release, the surety may have to travel, at their own expense, to the bail hearing.[91]

Barriers in finding a "suitable" surety have disproportionate consequences for Aboriginal accused persons, including more time spent in remand custody awaiting family members, or being denied bail altogether. In addition to geographical challenges and alienation from family or friends attributable to

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87 Rudin, *supra* note 53 at 53.

88 Dr Peter Menzies, "Homeless Aboriginal Men: Effects of Intergenerational Trauma" in J David Hulchanski et al, eds, *Finding Home: Policy Options for Addressing Homelessness in Canada* (Toronto: Cities Centre Press, 2009), reprinted in The Homeless Hub, online: <www.homelesshub.ca/sites/default/files/6.2%20Menzies%20-%20Homeless%20Aboriginal%20Men.pdf> at 2.

89 Canadian Civil Liberties Association, *supra* note 20 at 76.

90 *Supra* note 3, s 516.

91 For an example of a case where the accused's surety faced a number of barriers traveling to the place where the bail hearing was held, see *R v Atlookan*, 2011 ONSC 4885 at paras 6–10, 97 WCB (2d) 391 [*Atlookan*] (there were also difficulties in this case in securing an interpreter for the accused's surety and the accused spent a long time in pre-trial custody—90 days at the time of trial—as a result of these kinds of barriers at para 1).

the violence of colonial processes, 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.[92] In light of disproportionate levels of unemployment and the lack of ability to show real property ownership for those living on reserve,[93] it may be difficult to locate a surety with the financial ability to fulfill the amount of the bail or travel to the location of the bail hearing. Although the amount of the bail is supposed to be tailored to the means of the surety[94]—not to the seriousness of the offence—a high quantum of bail continues to be required for very serious classes of offences.[95] This practice "effectively discriminate[s] against people without well-to-do friends or family."[96]

The reliance on sureties is a practice 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 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.[97]

Given the systemic barriers faced by Aboriginal accused persons, it seems that Gladue should provide a mechanism for judges to use to scrutinize whether or not a surety is required. 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.

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92 *Green*, *supra* note 27 at para 20.

93 Canadian Civil Liberties Association, *supra* note 20 (defence counsel in Manitoba reported that in some instances, sureties are required to prove real property ownership as a pre-requisite to acting as a surety at 76).

94 This longstanding principle was affirmed in *Antic*, *supra* note 13 at para 56.

95 Trotter, *supra* note 49, ch 6 at 22.

96 Myers, *supra* note 20 at 139.

97 There are a number of cases critiquing the over-use of surety bails, see e.g. *R v Cole*, [2002] OJ No 4662 (QL) (Ct J); *Canada (Minister of Justice) v Mirza*, 2009 ONCA 732, 248 CCC (3d) 1; *Shaw v Shaw*, 2008 ONCJ 130, 170 ACWS (3d) 310; see also *Antic*, *supra* note 13 (where the Supreme Court re-affirmed the ladder approach).

In *Silversmith*, the accused was charged in 2006 with six counts of driving while he was disqualified from doing so.[98] 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.[99] From the time of his initial release until the time that he was re-arrested 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.[100] 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.

Mr. Silversmith is a member of the Six Nations of the Grand River First Nation where he lived with his partner and five children and resided for many years.[101] 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.[102] He lived at an address where the authorities could easily locate him, and although he was released after the bail review, he was released to two sureties with a total quantum of $25,000.[103] Because the accused had not committed any further substantive offences since his initial arrest, the focus of the bail hearing should solely have been on the primary ground focused on 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.[104] At one point, the court remarked 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."[105]

Presumably, the court ordered the two-person 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."[106] In the absence of any evidence that the

98 *Supra* note 27 at para 8.
99 *Ibid* at paras 2–4.
100 *Ibid* at para 3.
101 *Ibid* at para 5.
102 *Ibid* at para 8.
103 *Ibid* at para 40.
104 *Ibid* at paras 22–25.
105 *Ibid* at para 34.
106 *Ibid*.

accused was intending to abscond or evade the court process, requiring two sureties with a total quantum of $25,000 was grossly unnecessary in light of established legal principles.

The requirement of a surety release in *DDP* was equally redundant.[107] The accused was initially charged with breaking and entering into a dwelling house, which can be considered an extremely serious offence.[108] 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.[109] 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.[110]

The accused was subsequently charged with failing to attend court and for "bylaw infractions."[111] The failure 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.[112] The accused was detained at his bail hearing, applied for review, and the bail review court released the accused on a strict house arrest bail with a surety and a $1,000 cash deposit.[113] As in *Silversmith*, above, it is not clear what concerns the court had that could justify a surety bail.[114] The police initially had no primary or secondary ground concerns, there were no new substantive offences committed, and the failure to attend court charge was not being pursued. There was no legal justification for requiring a surety in the circumstances.

The over-reliance on surety forms of release presents multiple and significant barriers to accessing bail for Aboriginal people and contributes to unnecessary time spent in pre-trial custody. As previously mentioned, the arrest of Aboriginal accused in remote communities presents particular challenges for both the accused and their family. Where the Crown insists on having a surety form of release, and if the Crown or court requires that the

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107 *Supra* note 27.

108 *Ibid* at para 1.

109 *Ibid* at para 6.

110 *Ibid*.

111 *Ibid* at para 7.

112 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 *Criminal Code* (*supra* note 3) section 524 application to revoke the promise to appear as a result of the by-law infractions. If this is the case, it is questionable whether bylaw infractions could constitute a sound basis for a section 524 revocation application.

113 *DDP*, *supra* note 27 at para 12.

114 *Supra* note 27.

surety attend personally at the court house, the results can prove disastrous. There is evidence that this problem persists in a number of jurisdictions.[115] 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 as courts apply Gladue to bail proceedings. 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 section 718.2(e), the Gladue mandate, and also accords with the law of bail in relation to surety bails.

C) Conditions of Release

Reviewing the Gladue case law, it is clear that courts are not considering how conditions attaching to release orders may contribute to the over-incarceration of Aboriginal people.[116] 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.[117]

In *R v J(TJ)*, the accused, a young man of the Squamish First Nation, was charged with various assault charges, one of which was a serious aggravated assault.[118] However, the Crown's case against the accused was weak, as the witnesses were reluctant to speak with the police and would otherwise have been likely considered "unreliable" at trial.[119] 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.[120] 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

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115 See e.g. Canadian Civil Liberties Association, *supra* note 20 (sureties in Manitoba are expected to travel at their own expense to bail hearings at 76). In *R v Cook*, 2007 SKQB 69 at para 6–7, 72 WCB (2d) 435, the court explains that when accused persons who are arrested, transported hundreds of kilometers for bail, and are eventually released, they are expected to travel home at their own expense. In Ontario, see *Atlookan*, *supra* note 91 at paras 7, 25, 97 WCB (2d) 391, for mention of the accused's and his mother's limited financial resources preventing them from attending court.

116 The court in *Daniels*, *supra* note 26 at para 3, makes brief mention of the application of Gladue to bail conditions, but does not elaborate on what this might look like.

117 There are, unfortunately, numerous cases that can and should be critiqued for the over-use of conditions of bail in cases involving Aboriginal accused.

118 2011 BCPC 155 at para 1, 95 WCB (2d) 418.

119 *Ibid* at paras 10, 13–14.

120 *Ibid* at paras 23–34, 36, 38, 47, 57.

applying for bail a third time.[121] None of the breach allegations involved any suggestion 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 breach of an absolute abstention from alcohol condition.[122]

The court carefully considered evidence relating to FAS, noting the difficulty that persons with FAS have in abiding by court orders and that courts have the responsibility to accommodate this disability: "[t]he justice system should not be used as a substitute for social services and supports for these most vulnerable citizens."[123] The accused was ultimately released on a strict bail with 13 conditions attaching to his release, including: a curfew, an absolute abstention condition, residency requirements, reporting to a bail supervisor, that he assign his monthly disability cheque to the John Howard Society for their distribution to the accused's funds, and electronic monitoring.[124] 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. The Crown's case was so weak that the justice commented that there was "no substantial likelihood of conviction."[125] 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 were 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."[126] These considerations are outside of the purview of the court's concerns, especially given the weakness of the Crown's case and the unlikelihood of conviction. The conditions imposed not only had no legal foundation, they also set the accused up for future failure, as a breach of any of the conditions is a criminal offence. Such failure is not just impactful on

121 *Ibid* at para 3.
122 *Ibid* at para 42.
123 *Ibid* at para 47.
124 *Ibid* at paras 59–74.
125 *Ibid* at para 55.
126 *Ibid* at para 37.

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. If convicted of failing to comply with court orders, the ability to secure release in the future becomes difficult, if not impossible.

In *Brant*, the conditions imposed were particularly egregious given the nature of the allegations against Mr. Brant and the lack of any history of similar criminal antecedents.[127] 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.[128] The allegations arose in the context of a protest—a protest staged by the Tyendinaga community in protection of their land.[129] The allegation of obstructing the police arose when the accused allegedly refused to move out of the way of a police officer attempting to videotape the protestors.[130] 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 ATV "narrowly missing" several officers and their cruisers.[131] The police also alleged that the accused spat on the police while he was driving the ATV; 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.[132] The threat charge was that the accused allegedly yelled at protestors to "shoot the police."[133] Again, there was no clear evidence that this was uttered or that it was the accused who uttered the threat. The two mischief charges were that the accused was alleged to have broken two car windows, and the third mischief charge related to the accused's participation in a blockade.[134] Identification would also be a live issue with the latter two charges.

Shockingly, Mr. Brant was detained at his initial bail hearing. He spent 34 days in custody before having his bail reviewed in the Superior Court.[135] 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

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127 *Supra* note 27.

128 *Ibid* at para 3.

129 It was not in dispute that the land in question belonged to the Mohawk people of Tyendinaga.

130 *Brant*, *supra* note 27 at para 8.

131 *Ibid* at para 9.

132 *Ibid*.

133 *Ibid* at para 10.

134 *Ibid* at para 11.

135 It is not clear on 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.

charges.[136] 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 commit any further offences if released. Given the specific context in which the allegations against the accused arose, it seems 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 also 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."[137] 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: reside with the surety at a particular address; take direction from both sureties and participate in the process of counselling where concerns are raised; 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 100 metres of the gravel quarry within Culbertson Tract; maintain employment, including fishing, farming, and construction; report once a week to the Tyendinaga Police Service; not to plan, insight, encourage, or participate in any unlawful protests, including, but 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.[138]

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 Aboriginal protests.[139] Rather, Gladue was used as a mechanism for determining surety suitability.[140] When reviewing the conditions ordered, it is difficult to understand the connection that any of the conditions had to the offences before the court.

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136 *Brant*, *supra* note 27 at para 25.

137 *Ibid* at para 12.

138 *Ibid* at para 29.

139 For insight into the demonstrations on the Culbertson Tract, see Dominik Wisniewski, "'I was Never so Frightened in my Entire Life': Excessive and Dangerous Police Response During Mohawk Land Rights Demonstrations on the Culbertson Track", *Amnesty International Canada* (May 2011), online: <www.amnesty.ca/research/reports/i-was-never-so-frightened-in-my-entire-life-excessive-and-dangerous-police-response>; Shiri Pasternak, Sue Collis & Tia Dafnos, "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims" (2013) 28:1 CJLS 65.

140 *Brant*, *supra* note 27 at para 21.

It is impossible to imagine why the accused should be ordered to attend counselling when there was no stated basis for such a condition, or how an order to maintain employment could be sustained. This condition does not account for the accused being unable to gain employment in the areas specified by the court. Given the 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 would be committing a criminal offence, could potentially face a breach charge, have his bail revoked, and the sureties could stand to lose the money. Perhaps the most shocking conditions relate to the silencing of Mr. Brant's dissent, implicating 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 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.[141]

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 referenced evidence connecting the offences before the court to alcohol abuse.[142] There are also a number of cases where either treatment, counselling, or assessment were ordered when it was not clear how such conditions would be geared to treatment,[143] as well as situations where the accused was detained, at least in part, for an inadequate treatment plan.[144] The condition that the accused "keep the peace and be of good behaviour" has also been imposed in many decisions

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[141] 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" (2003) 41:2 Osgoode Hall LJ 323 at 333. 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 *Collins v R* (1982), 31 CR (3d) 283, 4 CRR 78 (Ont Ct J); *R v Clarke*, 68 WCB (2d) 366, [2000] OJ No 5738 (QL) (Sup Ct); *R v Singh*, 2011 ONSC 717, [2011] OJ No 6389 (QL). None of these principles were considered in *Brant*, *supra* note 27.

[142] See e.g. *Campbell*, *supra* note 27; *Silversmith*, *supra* note 27; *DDP*, *supra* note 27; *Silas*, *supra* note 27. 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 rulings do 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.

[143] See e.g. *Brant*, *supra* note 27; *R v McGregor*, [2005] OJ No 4769 (QL) (Qt J) [McGregor].

[144] See e.g. *Rich*, *supra* note 26; *Murle*, *supra* note 27; *Green*, *supra* note 27; *Neshawabin*, *supra* note 27.

regardless of the legal ambiguity of this order at the bail phase.[145] This condition is arguably not an appropriate one on bail orders because it is unrelated to any of the grounds of detention, can only relate to the particular offences before the court if one is presumed guilty, and can and often does result in duplicative charges.[146]

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.[147] It is imperative that conditions ordered at the bail phase be understood to contribute to increased time in remand custody, a major systemic factor to consider in the application of Gladue to bail. Additionally, reformative and rehabilitative conditions imposed on Aboriginal accused have a paternalistic 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.

6. A Proposal for Moving Forward

The following framework is a summary of the principles discussed above and how Gladue should be applied to judicial interim release proceedings.[148] 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

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[145] See *Pierce*, *supra* note 26 at para 51; *Bain*, *supra* note 27 at para 8; *McGregor*, *supra* note 143 at paras 66, 138; *Silas*, *supra* note 27 at para 21; *Campbell*, *supra* note 27 at para 29; *Spence*, *supra* note 27 at para 92; *J(TJ)*, *supra* note 27 at para 59.

[146] The legality of the condition in the bail context has been questioned, see *R v SK*, 1998 CanLII 13344, [1998] SJ No 863 (QL) (Prov Ct); *R v B(AD),* 2009 SKPC 120, 85 WCB (2d) 328; Trotter, *supra* note 49, ch 6 at 41.

[147] See e.g. *R v Kajuatsiak*, 127 WCB (2d) 683, 2016 NLPC 1716A00034 [cited to NLCP] where the accused was denied bail on the tertiary grounds. His prior criminal antecedents spanned over a one-year period, consisted of eight convictions—seven of which were for failing to comply with a court order. The court noted that public confidence would be lost if the law ignores a "pattern of bail being breached" at para 58. Keeping in mind that conditions of bail often criminalize conduct that would otherwise be lawful, this case exemplifies how conditions seem to create criminality—not prevent it—and how this can result in prolonged pre-trial custody for Aboriginal accused.

[148] I contributed this framework to the report by the Canadian Civil Liberties Association, *supra* note 20 at 76–79.

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 and 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;[149]

- 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 section 516(1) of the *Criminal Code*;[150]

- 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. Extensive evidence of the accused's background should not be elicited unless it is relevant to one of the three purposes of bail;[151]

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149 *Ipeelee*, *supra* note 4.

150 *Supra* note 3, s 516(1). Where a Crown request for an adjournment is denied, the presiding Justice may release the accused unconditionally on a promise to appear as in *R v Obed*, 96 WCB (2d) 481, NLPC 1711A00694 at paras 8, 11–12; *Ashini*, *supra* note 27 at para 161.

151 The Crown bail review in *Rich*, *supra* note 26 at paras 17, 22, was allowed, in part due to the fact that there was no case specific evidence presented to the court regarding the accused's Aboriginal background and there was no evidence of, as *R v Gladue*, *supra* note 4, states, "unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts" (at para 66). At the bail phase, such evidence is not necessary and the focus should remain on the systemic issues that inhere in the process of judicial interim release with special attention paid to policing. Asking for extensive background information at a bail hearing would in fact result in Aboriginal people spending more time in custody waiting for their bail hearings while evidence is gathered. Surely this result is in stark contradiction to the mandate of Gladue, as it would mean that Aboriginal people would spend more time in jail because they are Aboriginal. See also *R v*

- 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 of the over-zealous policing of Aboriginal people 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. Sentences imposed prior to 1999 cannot be said to be "fit" or appropriate for full consideration, as they 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 than as intentional disregard for the law, particularly in relation to convictions for failing to attend court or failure to comply with conditions. Any allegation of failing to attend court should be scrutinized to determine whether there was an intention to abscond or evade the law or whether systemic factors prevented the accused from appearing in court;

- 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; and

- 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.

Benson, 2013 ABQB 75, [2015] AWLD 3823; *Green*, *supra* note 27 (where the courts similarly commented on the lack of evidence relating to the accused's Aboriginal background at paras 21–22).

7. 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 may be contributing to swelling remand rates and perpetuating 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 court's 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 and not a privilege, is a necessary first step. Consideration of the potential for biased policing should inform the assessment of both the charges before the court and the accused's criminal record. Restraint in the use of conditions, the insistence of sureties, and the quantum of bail are mandated by the law of bail but should find 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 also entitled to have their systemic disadvantage considered, as per Gladue, within the right to reasonable bail.