11(e) Shattered: The Historic and Continued Breaching of Indigenous Persons Right to Reasonable and Timely Bail

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I. INTRODUCTION

S. 11(e) of the *Charter* states that "any person charged with an offence has the right not to be denied reasonable bail without just cause."[1] Canada's bail provisions and bail system have historically created barriers to Indigenous[2] peoples accessing reasonable bail in Canada.[3]

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

2 The term Aboriginal and Indigenous will be used interchangeably throughout this paper. Much of the legislation uses the term Aboriginal. However, the writer's understanding is that Indigenous is a more appropriate term. Therefore, Indigenous will be used when not required by the wording of legislation or quotations of others cited.

3 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*, vol 1 (Alberta: Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, March 1991) at 3–5, 4–44 [*Alberta Task Force Report*]; Canada, Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality Respect and the Search for Justice*, (Ottawa: Law reform Commission of Canada, 1991) at 97 [*Aboriginal Commission of Canada Report*]; Manitoba, Aboriginal Justice Inquiry, *Report of the Aboriginal Justice Inquiry of Manitoba*, (Manitoba: Aboriginal Justice Inquiry, 1991), online: <www.ajic.mb.ca/volumel/toc.html> [*Manitoba Inquiry*]; Manitoba, Aboriginal Justice Implementation Commission, *Aboriginal Justice Implementation Commission Final Report* (Manitoba: Aboriginal Justice Implementation Commission, 2001), online: <www.ajic.mb.ca/reports/final_toc.html> [*Manitoba Final report*]; Canada, Canadian Civil Liberties Association, *Set up to Fail: Bail and the revolving Door of Pre-trial Detention*, by Abby Deshman & Nicole Myers (Canada: Canadian Civil Liberties Association, 2014), online (pdf): *Canadian Civil Liberties Association* <ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf> [perma.cc/QM8M-W6NX].

Recent changes in the bail provisions have attempted to address some of these issues.[4] However, recent jurisprudence has demonstrated that the access to justice issue regarding reasonable bail in Manitoba for Indigenous persons is deep-rooted and multifaceted.[5] This paper will look at the historical access to justice issues regarding reasonable bail for Indigenous peoples, the current attempts to address this issue, and the challenges that still need to be addressed.

II. Historical Access to Justice Issues Regarding Reasonable Bail for Indigenous Peoples

The historical issue of barriers to reasonable bail for Indigenous persons is intertwined with the historical and current crisis of the over-representation of Indigenous persons in the correctional system.[6] The over-representation of Indigenous persons in remand custody is a growing concern and a serious access to justice issue. Across Canada, Indigenous peoples comprise approximately 3% of the general population and 21% of the remand custody population.[7] As stated recently in *Myers*, "in our criminal justice system, Indigenous individuals are overrepresented in the remand population, accounting for approximately one-quarter of all adult admissions."[8] One can see between *Rogin's* statistics reported in 2014 and the Supreme Court of Canada's statistics from *Myers* in 2019 that there was an increase in the percentage of Indigenous peoples being held in remand custody.

A. Report of the Task Force on the Criminal Justice System and Its Impact on the "Indian" and Metis Peoples of Alberta

The *Alberta Task Force Report* drew the following conclusions from their interim judicial release (bail) review for Indigenous accused persons: (1)

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4 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 42nd Parl, 2019, (1st Sess), (assented to 21 June 2019), SC 2019, c 25 [Bill C-75].

5 *R v Balfour and Young*, 2019 MBQB 167 [*Balfour & Young*].

6 *R v Gladue*, [1999] 1 SCR 688 para 65, 171 DLR (4th) 385 [*Gladue*].

7 Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325 at 326.

8 *R v Myers*, 2019 SCC 18 at para 27 [*Myers*].

Aboriginal accused persons are less likely to be released than non-Aboriginals;[9] (2) they (Indigenous persons) do not understand the process and are more likely to be found guilty; (3) they are overrepresented in the jail population; (4) they do not have money for cash bail. Many Aboriginals simply plead guilty to "get it over with" because remand time is regarded as dead time or simply a waste of time; and (5) consequently, the judicial interim release process bears heavily on them as a group.[10] In the conclusions of these reports, we can see that the bail system in Alberta, as reported at that time, was having a disproportionately negative effect on Indigenous peoples applying for release. This is highlighted in the 1986 Native Counselling Services Alberta study that stated, "[t]he greatest disparity between Native and non-Native experience of bail outcomes (in Edmonton) is the fact that many more non-Natives (31.5%) as compared to Natives (5.6%) were released on their own undertaking or on a recognizance."[11]

The 1986 Native Counselling Services Alberta study also stated that the single biggest problem many Natives face when going through a bail hearing is their general inability to understand the bail hearing procedure.[12] This issue is also closely related to inadequate self-representation before a Justice of the Peace at a bail hearing.[13] 17.6% of Indigenous and 11% of Non-Indigenous report problems representing themselves before Justice of the Peace at a bail hearing. It follows that, if you do not understand the process you are engaged in, it will be more difficult to provide the information required to represent your case effectively.

The Native Counselling Services of Alberta bail hearing studies were divided between Edmonton and Calgary. The summary from Edmonton included three major findings. First, several individuals had difficulty understanding the bail hearing procedure and appeared to be bewildered by the experience. Second, Indigenous persons were not able to represent themselves adequately during their bail hearing. Lastly, some Indigenous persons were unable to raise the bail money necessary for their release. The

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9 *Alberta Task Force Report, supra* note 2 at 4–44, term Indian being used as it is in the title of the report.

10 *Ibid.*

11 *Ibid* at 4–42, citing Alberta, Native Counselling Services of Alberta, *A Study of Bailling Hearings in Edmonton and Calgary*, (Alberta: Native Counselling Services of Alberta, December 1986) at 3–5.

12 *Ibid* at 12.

13 *Ibid* at 4–43.

Calgary study summary included the following three major issues. First, despite some contradictory evidence, the Justice of the Peace obtained adequate information and a fair outcome through careful questioning of the accused. Second, young Native female offenders were over-represented in the sample. Lastly, a number of young offenders could not be released because they were unable to contact a responsible adult who was willing to supervise them.

Also, coming from within the *Alberta Task Force Report*, the Lesser Slave Lake Indian Regional Council stated that there is a perception of bias or racism by "white" Justices of the Peace. They state that there are instances where bail has been denied to Indigenous persons living on reserve whose residency, employment, and lack of criminal record were all favourable indicators of risk mitigation with respect to the opposed grounds of release. Observations made by the authors show that simple inquiries into these situations to the band office would have sufficed. The council also lamented that issues of language are a contributing factor.[14] Another brief submitted to the Task Force stated that bail is set too high for an Indigenous persons modest income and that issues related to unemployment, poverty, transient housing, and criminal involvement paint the Indigenous accused as untrustworthy for bail.[15] The link between denial of bail and the fact that this will significantly affect the likelihood of a conviction and severity of a sentence was addressed in the *Task Force Report*.[16] These are significant access to justice issues directly affecting Indigenous persons. The idea that Indigenous peoples are being denied reasonable bail because of systemic issues resulting from *Gladue* factors can be described in these early reports. The Elizabeth Fry Society of Calgary's contribution to the *Albert Task Force Report* is an excellent illustration of the historical issues of being denied reasonable bail without just cause:

> Even though the courts have deemed a person to be manageable in the community pending trial, the lack of financial resources or a bail assistance program keeps those with a low socio-economic status in prison. Metis and Native peoples are highly representative of this group who cannot meet bail, even though available.[17]

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14 *Ibid.*

15 *Ibid* at 4–44.

16 *Ibid.*

17 *Ibid.*

The *Alberta Task Force Report* recommendations regarding bail were first to reinstate the Elizabeth Fry Society of Calgary Bail Assistance Program and be modified to be specific to Aboriginals because of their specific problems with respect to bail.[18] This was to address the issue that Indigenous peoples were being denied reasonable bail regardless of their criminal records and the type of offence(s) they were charged with.[19] The second recommendation was that culturally sensitive bail criteria be developed for Aboriginal accused persons.[20] This was important as the study showed that cultural barriers, including language and lack of understanding the process, created barriers in releasing Indigenous persons who satisfied all the other *Criminal Code* grounds for release but due to lack of culturally appropriate bail provisions, were being held in custody.[21]

Along the same vein as culturally sensitive bail criteria and tailored bail support programs was the idea of Elder Sponsorship as an alternative to bail.[22] It was recommended that this be studied and developed. The last two recommendations dealt with cash bail requirements. The first one suggested that where cash bail was required that it not be applied to poor Aboriginal accused persons, particularly those living on welfare.[23] The second is where cash bail is appropriate, Band Councils establish a fund for assistance to Reserve residents.[24] Finally, other recommendations not directly related to the bail portion of the report were still helpful by informing the general problem related to access to justice for Indigenous peoples. The task force recommended cultural and anti-racism training for police officers. They also recommended that the cultural training be delivered by members of the relevant Indigenous community. The task force also recommended there be a real effort to recruit Aboriginal peoples to the police force and for officers to spend time in Aboriginal communities in a non-enforcement capacity.[25]

In summary, looking back at *Alberta Task Force Report* regarding access to reasonable bail and Indigenous peoples, the Report identified some key reasons for Indigenous peoples being held in custody more often than non-

18 *Ibid.*
19 *Ibid* at 4–41.
20 *Ibid* at 4–45.
21 *Ibid* at 4–42.
22 *Ibid* at 4–45.
23 *Ibid.*
24 *Ibid.*
25 *Ibid.*

Indigenous people, including issues such as poverty, unemployment, and cultural barriers. It was a report from its time that there was little connection between what we would now call *Gladue* factors – such as poverty, unemployment, low education, substance use issues – and the Colonial policies/laws that created those systemic factors. *The Alberta Task Force Report* is an example of what I would call identifying the symptoms of high rates of bail denial for Indigenous persons but not the underlying conditions. Overall, the recommendations did not deal with systemic factors, nor did they deal with the outcome that s. 11(e) of the *Charter* is breached by denying so many Indigenous peoples reasonable bail, despite qualifying for release.

B. Report on Aboriginal Peoples and Criminal Justice: Equality Respect and the Search for Justice

Staying in the same time period (1991) but moving the scope of analysis from a provincial one to a nationwide one, we now examine the *Aboriginal Commission of Canada Report* treatment on the subject of Indigenous persons being denied reasonable bail in Canada.[26] The Minister of Justice asked the Law Reform Commission of Canada to look at the *Criminal Code* and related statutes to examine the extent to which Indigenous persons and cultural and religious minorities have equal access to justice. A total of 15 recommendations were made in the report on Aboriginal peoples and criminal justice.[27] The issue of equal access to reasonable bail was examined in section V and was followed with recommendation number 12. Before addressing the bail recommendations, it would help to put the overarching recommendations that came from this report into context. A general conclusion was that Indigenous persons should have the authority to establish Indigenous justice systems. A similar overarching recommendation from the *Alberta Task Force Report* is to bring more Indigenous peoples into working within the justice system and expand cultural training for all persons currently employed in the justice system. There was also a focus on alternative sentencing and having Indigenous community involvement on sentences.[28] The general recommendations

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26 *Supra* note 3.

27 *Ibid.*

28 *Ibid* at 61.

from both the Alberta Report and Nationwide Report heavily focused on addressing the inequality and the access to justice issues of over-representation of Indigenous peoples in the criminal justice system by having more input from Indigenous persons and implementing an Indigenous perspective. Looking at both reports and their conclusions that cultural bias and racism were strong factors in the creation of some of the barriers, it is understandable how believing that having more Indigenous involvement, input, and engagement, may help address the issue of ignorance and non-connection, which can be a factor in cultural bias and racism.

1. The Recommendations

The *Aboriginal Commission of Canada Report* recommendation 12(1) was to address the issue that some Indigenous persons were being arrested and detained on warrants that were not specifically or expressly deemed endorsed.[29] Therefore, the arresting officers did not know if they were to be held or released once arrested. This especially affected people in the North who would be detained and transported to the general detention in the south in order to have a bail hearing. The recommendation was that legislation should expressly require that a Justice consider making an endorsement when issuing an arrest warrant.[30] This change did occur. When a Justice issues a warrant, regardless of the type of offence, they consider whether it will be endorsed or unendorsed. Counsel and Crown, if present, are also allowed to make submissions before the decision is made. However, it is still dependant on the Justice of the Peace to decide on whether the person will be held or not. Therefore, all the issues regarding Indigenous peoples' decision-making and how their alleged offences and previous convictions (especially for administration of justice offences) are still in play.

Recommendation 12(2) was intended to give more release power to lower-ranking police officers.[31] The intention was to give more discretion to the officer in the field to lead to less needless detention.[32] However, it has also been recognized in the Report that ultimately, the success of the recommendation depends on the officer in the field using their discretion

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29 *Ibid.*

30 *Ibid.*

31 *Ibid* at 62.

32 *Ibid.*

in a manner consistent with favouring release rather than detention.[33] This increased discretion, coupled with the increasing scope of police powers through expanding ancillary police powers, has led Justice Stribopoulos, to state that there is a risk of being unjustifiably arrested and detained for considerable periods before the deficiency of the case against them ultimately leads to charges being withdrawn or dismissed.[34] One could argue that this increased discretion of low-level police officers to make decisions regarding release on "any crime," as opposed to oversight by officers in charge, can increase the opportunities for Indigenous persons being detained – especially in areas with high levels of cultural bias and racism. In summary, recommendation 12(2) is well-intentioned. However, I would suggest that for it to be in alignment with the Constitutional standard of s. 11(e) of the *Charter*, the last line should read, "[a] peace officer must be required to release the person unless specific grounds of detention are satisfied."[35]

Recommendations 12(3)(a)(b)(c), (4) dealt with conditions of release. Their recommendation was an attempt to raise awareness for those imposing bail conditions on Indigenous accused in situations where conditions were routinely being applied with no real consideration of whether they were necessary or appropriate.[36] One example of this is where conditions were imposed to stay away from particular areas of the city, which, in many cases, were also areas where most Indigenous peoples congregated or lived, therefore resulting in unintended banishment of the accused from their community.[37] The application of abstaining conditions where Indigenous persons were known to be alcohol dependant created unreasonable conditions.[38] Non-Contact orders on Indigenous peoples who were living in smaller communities where contact was almost unavoidable were difficult to follow.[39] The restriction of firearms was especially inconvenient for Indigenous persons making a living by hunting

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33 *Ibid.*

34 James Stribopoulos. "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta LR at 293.

35 *Aboriginal Commission of Canada Report, supra* note 3 at 62 [emphasis added]. This is in contrast to the wording "should be required...."

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

and trapping.[40] The requirement to regularly report to a probation officer is also very inconvenient.[41] The recommendations did not suggest that these conditions were never to be applied, just that the court recognized the impact of these conditions on Indigenous peoples. They did recognize that the *Criminal Code* already contained s. 515(4)(f) (at the time), which referred to "reasonable conditions," and if a condition is clearly one with which the accused cannot comply, then it is not a reasonable condition.[42] They also recommend that the *Criminal Code* provide a clearer standard to guide the imposition of reasonable conditions.[43] We will later see the case *Antic* and codification of the least restricted condition principle that this issue was elaborated on.[44] These recommendations were progressive because they identified that imposing conditions on Indigenous accused required special consideration in light of their unique cultural and geographical circumstance.[45] However, it did not deal with the connection between the imposition of conditions of release in the sense of breaching the s. 11(e) *Charter* right to reasonable bail. The argument is that when imposing overly stringent bail conditions or imposing non-relevant bail conditions, you deny reasonable bail without just cause.[46] Just because bail is granted does not mean it was reasonable. This can be seen when examining how there is a conflation between sentencing hearing principles and bail hearing principles for many Indigenous persons.[47] The *Aboriginal Commission of Canada Report* was well-intentioned but short-sighted on the breadth of violation of s. 11(e) *Charter* rights to Indigenous persons regarding the imposition of bail conditions.

Recommendations 12(5)(6)(a)(b)(c)(d), (7), (8), (9), (10) dealt with cash bails sureties and the rules and regulations around them. They recommended that there be no criminal liability for breaching non-monetary conditions of release besides the alleged breaching offence itself.[48] They recognized the surface issue of the difficulty of Indigenous peoples gaining sureties, but they appeared to minimize the issue. They

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40 *Ibid* at 63.

41 *Ibid.*

42 *Ibid.*

43 *Ibid*

44 *R v Antic*, 2017 SCC 27 [*Antic*].

45 *Aboriginal Commission of Canada Report*, *supra* note 3 at 62.

46 *Rogin*, *supra* note 7 at 333.

47 *Ibid.*

48 *Aboriginal Commission of Canada Report*, *supra* note 3 at 64.

acknowledged that the economic status for Indigenous persons was a factor and that the issue was compounded by the fact that Indigenous persons cannot individually own their land, such that they cannot post a house as collateral.[49] This greatly understates the issues related to lack of surety which are unemployment, poverty, family dislocation, lack of community supports, mental health, and substance use issues. These are also considered systemic issues of colonization and *Gladue* factors. This Report not only failed in making the connection between *Gladue* factors and surety issues, but also understated the listing of reasons for lack of surety specific to Indigenous persons. This is important because one of the principles of *Gladue* is the over-representation of incarcerated Indigenous persons.[50] It is elementary to reason that if one group is overrepresented in one area – such as having a criminal record – their ability to access things – such as being a surety, which requires no criminal record – would be lessened. This is not considered fully in the recommendations. In their defence, this report predates *Gladue* by nine years. We start to see how the lack of in-depth analysis concerning systemic issues regarding the denial of reasonable bail to Indigenous persons affects Indigenous persons' access to justice. There was an attempt to bring attention to the fact that the suitability of an intended surety for Indigenous accused should be analyzed differently with specific considerations such as finical resource, character and nature of previous convictions, proximity to the accused, and other relevant matters.[51] There was also an attempt to limit the liability of the surety.[52] I am suggesting these recommendations did not go far enough.

C. Report of the Aboriginal Justice Inquiry of Manitoba and Aboriginal Justice Implementation Commission Final Report

The final historical Inquiry we will look at is the *Manitoba Inquiry* and the *Manitoba Final Report*.[53] The purpose of the Inquiry was to investigate the state of conditions regarding Aboriginal peoples in the Manitoba justice system. The inquiry was a result of two specific and separate incidents. The

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49 *Ibid.*

50 *Gladue*, *supra* note 6.

51 *Aboriginal Commission of Canada Report*, *supra* note 3 at 65.

52 *Ibid.*

53 *Manitoba Inquiry*, *supra* note 3 at ch 1.

first was the 16-year delayed trial for the murder of Helen Betty Osborne, and the second was the shooting death of J.J. Harper, executive director of the Island Lake Tribal Council, by a Winnipeg police officer.

1. Bail and Aboriginal Peoples: Some Statistics

Some statistics outline the problem as they saw it. Their analysis is based on Provincial Court cases that reveal Aboriginal persons were 1.34 times more likely to be held in pre-trial detention.[54] For Aboriginal women aged 18–34, the difference was 2.4 times.[55] For adult males between the ages of 18 and 34, Aboriginal persons spent 1.5 times longer in pre-trial detention.[56] Overall, they determined that Aboriginal detainees had a 21% chance of being granted bail, while non-Aboriginal detainees had a 56% chance.[57] The Report discovered that Aboriginal peoples spent considerably more time in pre-trial detention in Winnipeg and Thompson than non-Aboriginal people.[58] In Winnipeg, the average length of detention for an Aboriginal detainee was more than twice as long as it was for non-Aboriginal detainees.[59] In Thompson, the average length of detention was 6.5 times longer for Aboriginal detainees.[60] In Thompson, 28% of Aboriginal peoples who applied for bail had their applications denied, versus 10% of non-Aboriginal accused that were denied.[61] On average, Aboriginal youth in pre-trial detention were detained almost three times longer than non-Aboriginal youth.[62]

2. Consequences of Bail Denial

The consequences of bail denial were also explored. Considering that the statistics already show that Indigenous persons are being denied bail more often and are more likely to be detained in remand custody, the following consequences directly impact Indigenous persons as individuals and a community. Think of it in terms of all the ill effects of one type of bad outcome targeting an already vulnerable and marginalized population.

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54 *Manitoba Inquiry, supra* note 3 at ch 6.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*
61 *Ibid.*
62 *Ibid.*

The separation from family and loved ones for over a year can seriously hurt family and employment.[63] Family dislocation and unemployment are already two major issues created by colonialism and its policies. Therefore, high levels of denied bail to Indigenous persons exacerbate the systemic issues recognized in *Gladue*. The irony is that bail was most likely denied due to the systemic issues of the *Gladue* factors being considered personal risk factors instead of government-created states of being. This creates the cycle of over-representation, as the factors that inform bail denial are being created by bail denial. In a situation where *Gladue* factors and systemic issues that flow from these factors are present, they should not be treated as risk factors and should not militate towards detention. This will be explored in the next section when modern approaches to ensuring Indigenous persons are not denied reasonable bail without just cause are discussed. The *Manitoba Inquiry* also stated that another consequence of bail denial is that sometimes-denied bail can create an "aura" of guilt or suspicion:

> In the eyes of an Aboriginal accused and the general public, the fact that a person has been charged with a serious offence and has been denied bail is highly suggestive both of guilt and of the ultimate need to incarcerate. Studies have shown that individuals who have been denied bail are far more likely to be incarcerated upon conviction. It is difficult to estimate the degree to which the trial or sentencing judge has been influenced in his or her decision, either to convict or to incarcerate, by the fact that the accused was denied bail. However, it is easy to imagine why the accused may feel he or she is at a disadvantage.[64]

Other consequences are that pleading out to charges sometimes seems easier to do when you know that you will be held until the time of trial. Crown attorneys sometimes use this to leverage a guilty plea by offering a reduced sentence. For someone who already has a criminal record, pleading guilty to an offence they did not commit, but would have to wait much longer in custody to prove they are not guilty, is not worth the loss of time from their life.

3. Bail and Systemic Discrimination

The report noted several ways the pre-trial detention system itself can discriminate against Indigenous peoples, with special note to those who live

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63 *Manitoba Inquiry, supra* note 3, Chapter 6 Manitoba Courts, Release from Custody, *The Consequences of Bail Denial.*

64 *Ibid.*

in remote communities.[65] When an Indigenous person is arrested in a remote community, they are removed from their community because there is no local person to hear a bail application.[66] This begins a process of shuffling the Indigenous person around the province.[67] This moving of the accused does not consider the accused's right not to be denied reasonable and timely bail without just cause. Many Indigenous peoples, because of *Gladue* factors and systemic issues of poverty, require a Legal Aid lawyer or rely on the Legal Aid duty council. Legal Aid is famously understaffed, especially in Northern Manitoba, and this directly affects Indigenous peoples seeking bail in Northern Manitoba. This Report did not elaborate on how the courts and their operation in the North are creating unreasonable delays and, therefore, routinely breaching Indigenous persons s. 11(e) *Charter* rights. However, this will be examined when we discussed the recent case of *Balfour & Young*.

The Report did make a serious attempt to address how the use of conditions of release on bail orders can discriminate against the Indigenous accused.[68] The surety system was described, and it was shown how Indigenous Manitobans were discriminated against because as a group Indigenous persons, wealth, income, and ability to access resources to post surety was drastically lower than any other group.[69] Not stated in the Report, but as an observation, ironically, this state of disparity has very much to do with *Gladue* factors and colonization policies. The result is one law for the rich and one for the poor.[70] Indigenous peoples moving often between cities and reserve communities are more likely to be considered transient, which is regarded as another "risk" factor when bail is considered.[71] The report stated that this was especially an issue as they noted a high mobility rate of Indigenous persons between these communities.

There was an attempt by the report to explain the phenomena of judges using factors such as employment, residence, family ties, substance abuse, and a previous criminal record to determine whether to detain a person or

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65 *Manitoba Inquiry, supra* note 3 at ch 6.
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*

not.[72] Here, they used an experiment with those factors and applied them to inmates at the Winnipeg Remand Centre.[73] They found that 39.1% non-Aboriginal people were considered good risks under that system compared to only 29.4% of the Aboriginal inmates being considered a good risk to release.[74] The conclusion was that the criteria the judges currently employ are likely to be biased against Indigenous peoples.[75]

4. Recommendation from Manitoba Final Report

Looking specifically at the Report for recommendations that affect the access to justice issue of the right not to be denied reasonable bail without just cause, the *Manitoba Inquiry* recommendations were as follows. They stated that bail hearings were to be conducted in the community where the offence was committed.[76] This does not occur as a matter of practice in the present day. If it is convenient, a bail hearing will occur in the community in which the offence was committed. However, the majority of the time, the accused are being transported at the cost of time to another community. The problem of shuffling an accused around the province and breaching *Charter* rights by not having the accused appear for a bail hearing is still very much a live issue. The province has not invested money or resources into the northern communities to make this happen. Legal Aid in the north is still underfunded and overworked, leading to delays for the most vulnerable. There is no political will in the province of Manitoba to invest money and resources into this issue.

The Manitoba Government recommended establishing a bail supervision program to provide pre-trial supervision to the accused as an alternative to detention.[77] There was a bail supervision program in Manitoba for a short time. However, there is now no official provincial government bail supervision program. The justice system relies heavily on private, non-profit charities such as the Behavioural Health Foundation and the Elizabeth Fry Society to supervise bail in the Winnipeg Community. These two organizations have the court's confidence in terms

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72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Manitoba Inquiry, supra* note 3, Appendix 1 – Recommendations, Court Reform, *Pre-Trail Detention.*

77 *Ibid.*

of supervising bails, but they are not strongly government-funded and rely heavily on private donations. The Government has not made bail supervision programs a priority in Manitoba. This can also be seen by the funding reduction to the John Howard Society Bail Supervision Program in 2018 and effectively shutting down that bail supervision program. This is especially important in that, when looking at most Indigenous peoples who come before the court, the risks factor for release being used most often are those revolving around issues of stability – that being poverty, homelessness, unemployment, family dislocation, addiction, and mental health issues. These, as stated above, are also systemic factors resulting from the effects of colonization. These systemic issues resulting from *Gladue* factors are being used as grounds of high risk for denying bail to Indigenous peoples.

Ironically, the courts often state that this is a resource issue. If the courts start to address the systemic issues from the *Gladue* factors not as a traditional risk factors generated by the individuals personal choice but as factors that have been generated by external forces of colonial policy that the accused is not responsible for, then perhaps we would see fewer denied bails for Indigenous people based on high risk from poverty, homelessness, unemployment, etc. This, in turn, would put the stress back on the government to provide the resources needed to deal with the systemic issues. The Manitoba Provincial Government does not appear to be interested in investing money in a Government Bail Supervision Program, although the recommendation still stands. As with the first recommendation, there is no political will to invest resources in this area. This is not a popular issue, and it is much easier to appear "tough on crime" than it is to appear as a social justice advocate.

Inappropriate bail conditions were addressed – such as requiring cash deposits or financial guarantees from low-income people that militate against Aboriginal peoples obtaining bail – and are no longer applied.[78] The devasting effect of too many conditions and inappropriate conditions and how it relates to violating the right not to be denied bail without just cause was not mentioned. The *Manitoba Inquiry* focused on creating an Aboriginal Justice Institute and called on the federal and provincial governments to recognize the right of Aboriginal peoples to establish their own justice systems.[79]

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78 *Ibid.*

79 *Ibid.*

5. Summary of Manitoba Inquiry

The *Manitoba Inquiry* and *Manitoba Final Report* were the most comprehensive of the Reports and offer excellent recommendations. The main issue is that most of the recommendations regarding changes to the bail system were not followed, especially the critical ones such as more resources in remote communities and bail supervision programs in urban centres.

III. Modern Attempts to Address the Issue

A. Bill C-75

Bill C-75 is now law.[80] It will be explained below that parts of this Bill attempt to address the issue of over-representation of Indigenous peoples in remand custody by creating a remedial provision that is intended to address the high number of Indigenous peoples being denied bail. Bill C-75's summary states that this enactment amends the *Criminal Code*[81] to, among other things:

> (a) modernize and clarify interim release provisions to simplify the forms of release that may be imposed on an accused, incorporate a principle of restraint and require that particular attention be given to the circumstances of Aboriginal accused and accused from vulnerable populations when making interim release decisions.[82]

These amendments are reflected at cl 210 where it states,

> *The Act* is amended by adding the following after section 493:
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> Principle and Considerations
>
> Principle of restraint
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> 493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused

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80 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,* 1st Sess, 42nd Parl, 2019, (assented to 21 June 2019), SC 2019, c 25 [Bill C-75].

81 *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*].

82 Bill C-75, *supra* note 81 [emphasis added].

> to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.[83]
>
> Aboriginal accused or vulnerable populations
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> 493.2 In making a decision under this Part, a peace officer, justice or judge shall give attention to the circumstances of
>
> (a) Aboriginal accused; and
>
> (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.[84]

S. 493.1 partially codifies the principles[85] set out in *Antic*.[86] The majority of the principles s. 493.1 hoped to codify include the ladder principle, the onus on the crown to show why more restrictive forms of release are required, the justification for moving up each "rung" of the ladder, the recognition that a release with sureties is one of most onerous forms of release, the lack of need to rely on cash bails, the statement against using cash bail amounts that effectively amount to a detention order ,and that terms of release may "only be imposed to the extent that they are necessary."[87] S. 493.2 is a remedial provision and a response to the sporadic case law that has been dealing with the application of *Gladue* factors at Interim Release Hearings (bail hearings). S. 493.2 should be seen as remedial in nature and similar to the enactment of s. 718.2(e) in that it creates a judicial duty to give its remedial purpose real force.[88]

Without addressing the lengthy discussion of the application of *Gladue* factors at bail hearings before the addition of s. 493.2, it is sufficient to surmise that it was generally accepted in the common law jurisprudence in Canada that *Gladue* factors were to be considered at bail hearings. The Supreme Court of Canada, on applying *Gladue* outside of sentencing in *Anderson*, endorsed the following finding of the Ontario Court of Appeal in *Leonard* that:

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83 Bill C-75, *supra* note 81 at cl 210.

84 *Ibid*.

85 *Charter Statement - Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 29 March 2018, online: *Department of Justice* <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c75.html > [perma.cc/JML9-WKWN].

86 *Antic*, *supra* note 44.

87 *Ibid* at para 67.

88 *Gladue*, *supra* note 6 at paras 37, 93.

> [T]he *Gladue* factors are not limited to criminal sentencing but that they should be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system" ... whenever an Aboriginal person's liberty is at stake in criminal; and related proceedings.[89]

The Ontario Court of Appeal in *Robinson* and the Alberta Court of Appeal in *Oakes* directly addressed the application of *Gladue* factors at bail. In *Robinson*, Chief Justice Winkler (as he then was) states, "[i]t is common ground that principles enunciated in the decision of the Supreme Court of Canada in *R. v. Gladue*... have application to the question of bail."[90]

Both rulings were helpful in that many jurisdictions adopted Ontario and Alberta's approach. Newfoundland and Labrador, Nova Scotia, Manitoba, Saskatchewan, British Columbia, the Yukon, and the Northwest Territories all followed Ontario and Alberta in that they stated *Gladue* factors had application at bail hearings.[91] New Brunswick was the only jurisdiction to have a clear decision at the superior court level that stated that *Gladue* factors did not apply to bail hearings.[92] It is interesting to note that the recognition of *Gladue* factors applying at bail for most of the provincial cases was in the early to mid 2000s. As originally stated in *Gladue* and reiterated in *Ipeelee*, "[t]he unbalanced ratio of imprisonment of Aboriginal offenders' flows from a number of sources... It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail...."[93] *Gladue* stated that there were many aspects of this "sad situation" which they could not address for these reasons.[94] *Gladue* was released in 1999, and *Ipeelee* was released in 2012. Therefore, it seems there was an intentional effort by the courts to start addressing this issue. It is commonly accepted that s. 493.2 is the codification of the principle stated in *Robinson*.[95]

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89 *R v Anderson*, 2014 SCC 41 at para 26; *United States v Leonard*, 2012 ONCA 622 at para 85.

90 *R v Robinson,* 2009 ONCA 205 at para 13; *R v Oakes*, 2015 ABCA 178.

91 *R v Rich*, 2009 NLTD 69; *R v Paul-Marr*, 2007 NSPC 29; *R v Mason,* 2011 MBPC 48; *R v Daniels*, 2012 SKPC 189; *R v TJ(J)*, 2011 BCPC 155; *R v Magill*, 2013 YKTC 8, *R v Chocolate*, 2015 NWTSC 28.

92 *R v Sacobie*, (2001) 247 NBR (2d) 94, 52 WCB (2d) 453.

93 *R v Ipeelee*, 2012 SCC 13 at para 61 [*Ipeelee*]; *Gladue*, *supra* note 6 at para 65.

94 *Gladue*, *supra* note 6 at para 65.

95 *Supra* note 91 at para 13.

Even though the courts' have attempted to address the issue of bail denial of Indigenous peoples by applying *Gladue* factors through the common law, remand custody rates of Indigenous peoples continued to rise despite a decline in crime.[96] Professor Rogin states that the reason for this is that *Gladue* was not being applied in a meaningful way. Her main criticisms are the conflation of sentencing proceedings and bail proceedings, lack of reference to colonialism and systemic factors in bail proceedings, over-policing of Indigenous peoples, equal application of sureties creating inequities, and conditions of release.[97] Elaborating on each of these reasons cannot be covered in the breadth of this paper. Suffice it to say that Parliament felt it necessary to legislate perhaps to help address applying *Gladue* factors in a more meaningful way.

In *Zora*, the Court acknowledged that Parliament had recently attempted to address how numerous and onerous bail conditions interact with the offence of breaching conditions on bail order (s. 145(3)) to create a cycle of incarceration among the most vulnerable people.[98] This was a reference to Bill C-78 and, specifically, s. 493.2. The issue in *Zora* was the *mens rea* requirement for s. 145(3) and whether it should be assessed on a subjective or objective standard. Ultimately, they decided that the standard should be subjective. The reasoning by the Court in *Zora* is in alignment with arguments made by scholars, such as Rogin, who have observed that courts should need to prove that Indigenous persons intentionally breached their bail conditions.[99] *Zora* noted that the lack of proof of intentionality and subjective standard for such offences have led to larger amounts of convictions for these types of offences, which present further barriers for release in the future.[100] In this way, *Zora* can be seen as an aid in the application of s. 493.2 submissions.

The courts had been signalling in cases such as *Daniels* and *E(S)*[101] that the application of *Gladue* principles at bail:

> [M]ust be applied within the provisions of s. 515(10) of the Criminal Code. It is for Parliament to amend this section of the Criminal Code, not the Court and

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96 *Rogin*, *supra* note 7 at 326.

97 *Ibid* at 325.

98 *R v Zora*, 2020 SCC 14 at para 5 [*Zora*].

99 *Rogin*, *supra* note 7 at 355.

100 *Zora*, *supra* note 99 at paras 57–58.

101 *R v E(S)* (28 July 2017), Manitoba Y017-01-36139 (MBQB) (Transcript, Justice Kroft's reasons for denial of release at bail review).

> therefore I disagree with Justice Lee of the 19 Alberta Court of Queen's Bench in R. v. P. (D.D.), where he states that aboriginal circumstances can justify release,"... irrespective of the existence of the primary, secondary or tertiary ground.[102]

In short, a Crown argument that gained favour in Manitoba was that *Gladue* factors and systemic issues resulting from those factors could inform the court why the accused is before them and what types of release may be helpful. However, they cannot change the threshold of the test. Furthermore, if Parliament intended for the test threshold to be changed by these factors, they would legislate it. Essentially, what has occurred is that Parliament has now legislated this. The access to justice issue moving forward will be in making bail submissions for Indigenous persons with *Gladue* factors. Stating that the threshold for the test is changed when factors such as unemployment, homelessness, poverty, addiction, and/or mental health issues are attributed to *Gladue* factors is a remedial approach to addressing the discrepancy in the percentage of Indigenous persons being denied bail. The hope is that these issues, when attributed as *Gladue* factors, are not considered risk factors. The theory is that in considering these factors as risk factors leads not just to the cycle of over-incarceration in remand custody but, as stated above, feeds into the cycle of over-represented sentenced Indigenous persons.

This is asking a lot of the courts to do in Manitoba. Ontario, however, has already started moving in this direction, as can been seen in the case of *Sledz*, which was before the legislation.[103] Manitoba took the position from *Daniels* out of Saskatchewan; therefore, this signals that there will be much litigation around this issue. Perhaps the Supreme Court will take on the case at some point to address what s. 493.2 means and how it should be applied as they did with s. 718.2(e) of the *Criminal Code* and *Gladue*.[104]

In summary, the modern approach to addressing the issue of reasonable bail not being denied without just cause for Indigenous persons seems to be an attempt to legislate a remedial provision in the *Criminal Code*. This is new and developing law, and it will be interesting to watch as it progresses. Hopefully, Parliament will attempt to address the issue.

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102 *Ibid* at 9.

103 *R v Sledz*, 2017 ONCJ 151 [*Sledz*].

104 *Criminal Code*, *supra*, note 82, s 718.2(e).

IV. THE CHALLENGES NEEDED TO BE ADDRESSED

Addressed systematically in the above analysis are many challenges that needed to be addressed to stop the systemic breaching of Indigenous person's *Charter* rights at bail hearings. This section will focus on the most recent case in Manitoba, which addressed the list of challenges that affect access to justice for Indigenous persons regarding bail hearings, specifically in Northern Manitoba. Keep in mind as we look at the issues brought by this case, similar issues were brought in the Inquiry's and Commissions from 20 and 30 years ago.

A. *Balfour* and *Young*

The recent case of *Balfour and Young* illustrated the systemic issues of the dysfunctional bail system in Northern Manitoba.[105] That court identified a serious charter breaching issue that is systemic in nature and disproportionately affects a vulnerable group. Furthermore, for the two cases at hand, it was found that their s. 11(e) *Charter* right for reasonable bail was breached.[106] The issue of a remedy of a stay of proceedings was moot for both Balfour and Young, and there was a remedy of modest court costs provided to the council involved. It was also acknowledged that the routine and systemic issues leading to consistent breaches of s. 11(e) *Charter* rights disproportionality affect the Indigenous population that resides in Northern Manitoba.[107]

In his conclusion, Justice Martin stated that it was beyond his scope of application and his role to make any specific declarations, orders, or even recommendations aimed at fixing the systemic shortfalls that continually infringe the *Charter* protected rights of Northern Manitobans.[108]

Justice Martin gave a list of two sets of recommendations, one for the short term and one for the long term. For the short term, it is stated that they must deal with the issues of first JJP appearances, timing out, the custody coordination policy, and Crown disclosure and appointment of counsel processes.[109]

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105 *Balfour & Young*, *supra* note 5 at para 1.
106 *Ibid* at para 101.
107 *Ibid* at para 97.
108 *Ibid* at para 102.
109 *Ibid* at paras 103–05.

The issue of the first appearance before JJP is that often the "appearance" is an audio-recorded telephone appearance. Most often, what occurs is that the JJP offers remand custody to the accused to have help from a lawyer with a bail application — once remanded in custody, an accused stays in the RCMP detachment cells until they can be taken to Thompson, Manitoba. When and how they are taken into Thompson depends on the location, weather, day of the week, holidays, resources, and manpower. Accused are either flown or driven to Thompson.

The Thompson RCMP cells are not designed for multi-day stays. Local judges have stated that it is inhumane to have an accused stay in these cells for multi-days. However, they routinely do this as a rule and not the exception. When they get to Thompson, they may go before a judge for a bail hearing, or they may be adjourned to the next court date, sometimes without ever getting to court to speak to duty counsel. These steps are all considered appearances, even if they do not appear. The next major issue is the Thompson Provincial Court policy of adjourning those who do not appear to a "custody coordination docket."[110]

Once they are on this docket, they can stay there up to four weeks – well past the three-day remand limit. Once on that docket, an accused can only apply to be brought forward to the next available custody court date if they give a clear two days' notice to the Crown. The idea is to cut down on the number of court appearances and relieve a strain on resources. However, nothing in the policy ensures an accused has a timely bail or that an accused must consent to an in-custody remand greater than three days. Also, there is no indication that the court is ensured an accused understands what is happening. Once put on this docket, an accused is moved, at closet, 400 kilometres to the Pas Correctional Centre or to Winnipeg Correctional Centres.[111] Northern Manitoba residents who are held waiting for bail are moved repeatedly, often driving great distances while locked in cramped vans and in foul weather.[112] Constant remands are the norm.

Also, by the policy of the Chief Provincial Judge, the court was required to close by 5:00 p.m. As such, accused were routinely "timed out" or adjourned, often with their appearance "waived" to another date without

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110 *Ibid* at para 17.

111 *Ibid* at para 19.

112 *Ibid* at para 23.

their matter being dealt with.[113] Lawyers stated that many clients have lost their employment, or have been attacked or threatened, while in remand waiting for bail hearings. Some accused consider pleading guilty just to get out of remand custody. The way these processes have been executed have all led to the consistent breach of s. 11(e) of the *Charter*. Ms. Balfour spent 51 days in pre-trial detention without a chance at a bail hearing between her arrest date of November 1, 2018, and December 21, 2018.[114] Mr. Young spent 23 days in custody from arrest to his bail hearing and did not consent to many of the adjournments.[115] The reason for both of their delays in appearing for a bail hearing were all related to the above-mentioned issues. The short-term solution suggested is an immediate injection of court resources.[116] The long-term suggestions should be an independent, comprehensive review of the system, processes, technology, training, and facilities affecting in-custody accused on remand, from arrest onward, in northern Manitoba – particularly as it is connected to the Thompson judicial area and remote communities processes.[117] The court in *Myers* states that, "[d]elays in routine bail and detention matters are a manifestation of the culture of complacency denounced by this Court in Jordan and must be addressed."[118]

It was found that Balfour and Young's case are commonplace. In comparing the reports from 20 and 30 years ago, not much has changed regarding how bail practices are occurring in the north. The issues from the *Alberta Task force Report*, *Manitoba Inquiry*, *Aboriginal Commission of Canada Report* regarding the lack of resources and the delays regarding transporting Indigenous accused from smaller communities to larger communities are still prevalent. The recommendations that were intended to help address this issue in regard to more self-governing criminal justice systems in smaller communities and an increase in resources have not occurred. Therefore, the systemic breaching of Indigenous person rights to reasonable and timely bail continues to be breached routinely. I am going to suggest, as I did earlier, that the issue is not about identification; the issue is about having

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113 *Ibid* at para 21.
114 *Ibid* at para 48.
115 *Ibid* at para 62.
116 *Ibid* at para 104.
117 *Ibid* at para 106.
118 *Myers*, *supra* note 7 at para 38; *Balfour & Young*, *supra* note 4 at para 105.

the political will to put the resources towards addressing the problems in a meaningful manner. The Manitoba Government, by its own action, has determined that it is not a priority in the province to address the issue of Indigenous person's access to timely and reasonable bail, especially those in northern communities. There is hope as other, more progressive provinces – such as Ontario, Nova Scotia, New Brunswick, Saskatchewan, Alberta, and British Columbia – have established Indigenous courts, giving greater access to justice for Indigenous peoples, including access to reasonable and timely bail.

V. SUMMARY

Some issues regarding Indigenous peoples' access to reasonable and timely bail appear more straightforward, such as the commitment to resources and funding in specific program areas – i.e., northern legal circuits, bail supervision programs, and development of Indigenous courts. This, however, takes political will. As stated above, the problem, for the most part, was identified years ago and recommendations were just ignored (i.e., bail supervision programs and bails hearings taking place in the community where the offence occurred). Other issues are more evolving and not well defined, such as how reconciliation, *Gladue* factors, and the resulting systemic issues affect the test for the interim judicial release. I would suggest that as our understanding evolves regarding what reconciliation means and how *Gladue* factors inform the Indigenous experience, this will inform the political will, and the judiciary will need to acknowledge the will of the Parliament. My hope is based on the provisions in Bill C-75. However, it will be a challenge, and it will involve making arguments that are uncomfortable to say and uncomfortable to hear for a period of time, until it is not.