Proportionality as Constraint on Indigenous Pre-trial Detention: Realizing the Remedial Potential of s. 493.2(a)

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Introduction

Bill C-75 came into force in September 2019, introducing a host of amendments to significantly reform Canada's *Criminal Code*.[1] One of these amendments was the introduction of s. 493.2(a), which directs peace officers, justices, and judges to "give particular attention to the circumstances of Aboriginal accused" when making decisions about pre-trial release. This is an explicitly remedial provision aimed at reducing the ongoing and deepening crisis of Indigenous over-incarceration in Canada. But true to form, Parliament has given us no direction on how this new provision is to be applied.

In this paper, I contend that s. 493.2(a) should be read as having both corrective and remedial components. The corrective component aims to level the playing field in bail hearings by requiring decision-makers to attend to systemic disadvantage that may impact the flight risk assessment on the primary ground or the public safety assessment on the tertiary ground. This was arguably the state of the law before the enactment of Bill C-75.[2] The remedial component requires bail justices to ask, on the tertiary ground, whether pre-trial detention is a proportionate response to the offences with which the accused has been charged. If it is not, then public confidence in the administration of justice will be undermined if bail is denied–even in the presence of concerns on the primary and secondary ground. The remedial component would be a novel addition to the law of bail for Indigenous persons, but I argue that it finds support in the jurisprudence on bail for accused persons in "time served" positions. It would permit bail justices to look beyond narrow questions of risk and to breathe the life of proportionality into pre-trial release assessments.

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[1] 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, 2018 (Assented to 21 June 2019).

[2] See EG *R v Silversmith* (2008), 77 MVR (5th) 54 (Ont SCJ); *R v Robinson*, 2009 ONCA 205; *R v Oakes*, 2015 ABCA 178; *R v Hope*, 2016 ONCA 648; and *R v Penosway*, 2018 QCCQ 8863 at paras 95-116. See also Jill Rogin, "*Gladue* and Bail: The Pre-trial Sentencing of Aboriginal People in Canada" (2017), 95:2 Can Bar Rev 325.

I develop this argument in three parts. In part one, I trace the road to s. 493.2(a), showing how Parliament intended the provision to respond to the catastrophe of Indigenous over-incarceration in this country. In part two, I outline the corrective component of s. 493.2(a) and argue that on its own it will not be sufficient to meaningfully reduce Indigenous pre-trial detention. In part three, I argue that the remedial component will give justices an additional tool for reducing incarceration by permitting them release accused persons who otherwise could have been detained on the primary or secondary grounds. In this way, it will deliver on the remedial promise of s. 493.2(a), as Parliament intended.

Part One
The road to s. 493.2(a): the worsening catastrophe of Indigenous over-incarceration

The over-representation of Indigenous persons in Canadian jails and prisons is notorious. Repeated interventions by Parliament and our Supreme court have made no difference. When *Gladue* was decided in 1999, Indigenous persons "constituted [close] to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates."[3] Justices Cory and Iacobucci, writing for a unanimous court, had no trouble finding that these figures reflected a "crisis".[4] In 2012, when the Supreme Court again intervened to clarify the application of *Gladue* principles and to chastise lower courts for failing to give effect to s. 718.2(e) in *R v Ipeelee*, matters had gotten far worse.[5] Despite a downward trend in prison admissions overall, the rate of Indigenous incarceration had increased to 17 percent of federal admissions.[6]

[3] *R v Gladue*, [1999] 1 SCR 688 at para 58.
[4] *Ibid* at para 64.
[5] *R v Ipeelee*, 2012 SCC 13.
[6] Ibid at para 62, citing Jonathan Rudin, "Aboriginal Over-representation and *R v Gladue*: Where We Were, Where We Are, and Where We Might Be Going", in Jamie Cameron, James Stribopoulos, eds, *The Charter and Criminal Justice: Twenty-Five Years Later* (2008), 687 at 701.

Notwithstanding Parliament's intervention in 1995 with s. 718.2(e), and notwithstanding our apex court's repeated direction that lower courts take a different approach to sentencing Indigenous persons, today the crisis is worse than ever:

> The incarceration numbers for Indigenous people are worsening year by year. Indigenous inmates in federal institutions rose from 20 percent of the total inmate population in 2008-2009 to 28 percent in 2017-2018, even though Indigenous people represented only 4.1 percent of the overall Canadian population. Similarly, the percentage of federally incarcerated Indigenous women rose from 32 percent of the female inmate population to 40 percent. While the proportion of Indigenous incarceration has risen substantially, the overall inmate federal population (number) has risen only slightly.
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> In 2016-2017, Indigenous youth accounted for 8 percent of all youth in the provinces and territories. However, in 2016-17 they accounted for 46 percent of young people admitted to the corrections system. The overrepresentation of Indigenous youth was even more disproportionate among girls. In 2016-17, Indigenous female youth accounted for 60 percent of all female youth admitted to provincial and territorial corrections systems.[7]

The crisis is not confined to sentenced offenders in the federal penitentiary system. Indigenous persons represented 29% of admissions to remand facilities in 2016-2017, though they comprised only 4.1% of the general population.[8] Indigenous youth—8 percent of all youth in the provinces and territories—represented a staggering 48% of all youth in pre-trial detention.[9]

This failure provides the social context for the enactment of s. 493.2(a). The legislative background to the bill specifically cited the "challenge" of Indigenous over-representation as a motivating factor for the amendments.[10] The background provides that the purpose of s. 493.2 is to "address the disproportionate impacts that the bail system has" on Indigenous and other vulnerable populations.[11] During the House of Commons debates before Bill C-75 was passed, Marco Mendocino—then Parliamentary Secretary to the Minister of Justice, Jody Wilson-

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[7] Research and Statistics Division, Department of Justice Canada, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (Ottawa: Ministry of the Attorney General, 2019), online: <https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf>.
[8] *Ibid* at 10.
[9] *Ibid* at 20.
[10] Department of Justice Canada, *Legislative Background to Bill C-75*, (Ottawa: Ministry of the Attorney General, 2019), online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>.
[11] *Ibid*.

Raybould—argued that s. 493.2 would "address the core" of the problem of over-representation of Indigenous persons in Canadian jails "by requiring the court to take into consideration that Indigenous background and the background of marginalized peoples who come before the courts at the very outset, at the very beginning of the criminal justice system, at bail."[12]

Part Two
The corrective component of s. 493.2(a)

Parliament chose to "address the core" of Indigenous over-incarceration through s. 493.2(a). The full text of the provision reads as follows:

> **Aboriginal accused or vulnerable populations**
> **493.2** In making a decision under this part, a peace officer, justice or judge shall give particular 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.

This language echoes the language of s. 718.2(e), the sentencing provision enacted in 1995 to address Indigenous over-incarceration at the end of a criminal proceeding. In both cases, Parliament declined to tell justice system participants precisely how they are supposed to "give particular attention" to the circumstances of Indigenous persons in making these decisions. In *Gladue*, and again in *Ipeelee*, the Supreme Court interpreted s. 718.2(e) to require that sentencing judges consider "(1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage of connection."[13]

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[12] The Hon. Marco Mendocino, *House of Commons Debates*, 42nd Parl, 1st Sess (5 June 2018): https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-308/hansard
[13] *Ipeelee*, *supra* note 5.

In a piece published before the enactment of s. 493.2(a), Jill Rogin argues that a straightforward importation of the *Gladue* approach to the context of bail fails to account for the key difference between bail and sentencing hearings: the presumption of innocence. She reminds us that "[p]ersons 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."[14] She argues that "[i]f the presumption of innocence is to have any life at the bail phases, the only possible factor that brings the person before the court is the fact of his or her arrest."[15] She points out that reliance on principles of rehabilitation and restorative justice "assumes that the Aboriginal offender is inevitably going to be sentenced and so rehabilitation should occur sooner rather than later."[16] This leads to the imposition of stringent conditions to comply with substance abuse or mental health counseling as part of the release order for those presumed innocent, on pain of arrest and prosecution for the new substantive offence of failing to comply with a release order under s. 145(3) of the *Criminal Code*. Even if acquitted of the original offence, the Indigenous accused could find themselves convicted of failing to comply with their release order–compounding, rather than ameliorating, the problem of Indigenous over-incarceration.

Instead, Rogin argues that the application of *Gladue* at bail hearings should operate to correct systemic disadvantage to Indigenous persons in obtaining release, including over-policing, over-reliance on sureties, and over-reliance on stringent and punitive conditions of release.[17] Bail justices should recognize this systemic disadvantage and use it to level the playing field in assessing flight risk or public safety concerns on the primary and secondary grounds.

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[14] Rogin 2017, *supra* note 2 at 334.
[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid* at 341

This is the essence of what I call the corrective approach to s. 493.2(b). It was arguably the state of the law before the amendment came into force. As Justice Shaner held in *Chocolate*, decided in 2015:

> It would be unreasonable and unfair to conclude detention is justified based solely on an accused's criminal record and/or the circumstances of the alleged offence without considering the role *Gladue* factors may have played in leading to that person committing criminal acts in the past, being charged again and, consequently, seeking bail.
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> An examination of the intergenerational impact of the residential school system, cultural isolation, substance abuse, family dysfunction, poverty, inadequate housing, low education levels and un- or underemployment on an Aboriginal offender may inform questions about why an accused has an extensive criminal record and, if applicable, why that person has demonstrated an inability to comply with pre-trial release conditions in the past. They will also inform the decision about whether, given the accused's circumstances, there are release conditions which can be imposed so that future compliance is realistic and concerns about securing attendance at trial, public safety and overall public confidence in the justice system are meaningfully addressed.[18]

Though s. 493.2(b) remains a relatively new provision, the interpretive trend appears to follow this reasoning. In *EB*, Justice Schreck endorsed *Chocolate* in his reading of s. 493.2 and held that the provision "comes into play … in the court's examination of the type of factors that are relied upon to make the determination of whether detention is necessary."[19] These factors typically include the accused's criminal antecedents, but can also extend to the appropriate conditions to be imposed.[20]

I call this the corrective approach because it does not purport to *change* the law of bail, but instead to aims *correct* what is taken to be its erroneous application. Nothing about the test for detention in s. 515(10) is disturbed. As Justice Schreck noted in *EB*:

> While s. 493.2 requires the court to consider the circumstances of Indigenous accused and members of vulnerable groups, it does not supersede s. 515(10). What

[18] *R v Chocolate*, 2015 NWTSC 28 at paras 49-50. See also *R v Sledz*, 2017 ONCJ 151.
[19] *R v EB*, 2020 ONSC 4383 at para 43. See also *R v Kadjulik*, 2021 QCCQ 4344 at para 13.
[20] Though the Supreme Court's decision in *Zora* did not pronounce on s. 493.2(a), Justice Martin relied on Rogin's paper as authority for the proposition that Indigenous persons are "disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges": 2020 SCC 14 at para 79.

> this means is that regardless of the accused's circumstances, if his detention is necessary on the primary, secondary or tertiary ground, then he cannot be released. […] A dangerous person is no less dangerous because he or she is a member of a vulnerable group.[21]

This kind of language is a theme in many of the decisions interpreting s. 493.2(a).[22] Judges and justices are quick to remind themselves that "section 515(10) was not repealed"[23] and that "the addition of s. 493.2 of the *Criminal Code* was not intended to supplant or 'supercede' [sic] the operation of s. 515(10)".[24] Many justices note in passing that they view s. 493.2 as a codification of the common law prior to its enactment.[25]

In my view, to apply the corrective approach alone would be to fail to learn the lessons of *Gladue*. Comments by bail judges to the effect that that s. 493.2(a) merely codifies the existing law are eerily reminiscent of the same comments made by sentencing judges in the early days after the enactment of s. 718.2(e). When *Gladue* reached the Supreme Court, the Crown made precisely this argument: that "s. 718.2(e), along with the other provisions of ss. 718 through 718.2, are simply a codification of existing sentencing principles" and that they "are largely a restatement of existing law".[26] The Supreme Court quite firmly rejected it:

> In our view, s. 718.2(*e*) is more than simply a re-affirmation of existing sentencing principles. The *remedial component* of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(*e*) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(*e*) does alter is the method of analysis which

[21] *EB*, *supra* note 19 at para 42 [emphasis added].
[22] See *Kadjulik*, *supra* note 19 at para 131; *R v Raheem-Cummings*, 2020 SKQB 342 at para 21.
[23] *Kadjulik*, *ibid* at para 130.
[24] *Raheem-Cummings*, *supra* note 22 at para 21.
[25] See EG *Kadjulik*, *supra* note 19 at para 1; *R v Muminawatum*, 2020 MBQB 75 at para 30; *R v Charlie-Tom*, 2020 BCSC 491 at para 20.
[26] *Gladue*, *supra* note 4 at para 31 [emphasis original].

> each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender.[27]

This logic applies with equal force to s. 493.2(a). The provision is deemed to be remedial by virtue of section 12 of the *Interpretation Act*.[28] But more than that, Parliamentarians in the House of Commons specifically explained that it was intended to remedy over-incarceration. Bail judges cannot take this enactment as Parliament's approval of business as usual. Parliament intended that a new approach be taken to the law of bail that would reduce the crisis of Indigenous over-incarceration, though frustratingly did not explain what that approach should be.

We are left to answer for ourselves the question of what s. 493.2(a) has changed about the bail analysis. I have argued that it cannot be the corrective component alone, as this merely aims to correct erroneous application of the existing law on the assessment of risk, rather than to change the substantive approach. Indigenous persons found to pose a risk of failing to attend court or of committing a further offence will still be detained. In the next part, I argue that the tertiary ground can supply a crucial remedial component to the assessment of bail for Indigenous persons – and that it can justify release even in the presence of primary or secondary ground concerns.

Part Three
Realizing the remedial potential of proportionality in the tertiary ground

Traditionally, the grounds for detention enumerated in s. 515(10) are understood as distinct heads of detention. Unacceptable risk on any one of the three statutory factors can be relied on to deny bail. Conversely, detention must be unnecessary across all three grounds for the accused to be released. But there is authority for the proposition that the tertiary ground analysis can, in an

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[27] *Ibid* [underlining original, italics added]. The Supreme Court revisited this language in *Ipeelee*, as lower courts had interpreted it to meant that *Gladue* principles did not apply to serious offences. The court made clear that that s. 718.2(e) imposes a statutory duty in every case to apply s. 718.2(e), though does not require that a particular sentence be imposed: *supra* note 5 at paras 84-87.

[28] RSC 1985, c I-21.

appropriate case, demand release even in the presence of primary or secondary ground concerns. Where public confidence in the justice system would be undermined by detention, then even if the accused presents a flight risk or a risk to public safety, they may still be released. Herein lies the remedial potential of s. 493.2(a). This proposition is best illustrated by the jurisprudence requiring the release of accused persons in "time served" positions.

In *White*, Justice Hill first observed that "public confidence in the administration of justice, and in particular in the judicial interim release regime, would be substantially eroded by pre-trial incarceration of presumptively innocent individuals to the equivalency or beyond the term of what would be a fit sentence if convicted."[29] The accused in that case was charged with perjury. At the time of the bail hearing, he had served the equivalent of 19 months of pre-trial custody, and by trial would have served over two years' imprisonment. The parties agreed that the time to trial "would, or might well, exceed the sentencing time an accused person might deserve if convicted."[30] In his short reasons for judgment, Justice Hill conducted no assessment on the primary or secondary ground. He simply observed that public confidence in the administration of justice would be undermined if the accused served more than a fit sentence in waiting for his trial to take place. In other words, assuming without deciding that the accused would be found guilty, pre-trial detention would be disproportionate.

Justice Hill's analysis was endorsed by the Court of Appeal for Ontario in *Whyte*.[31] Ms. Whyte was charged with being an accessory after the fact to murder. She was arrested in November 2011 and her trial would not commence until after January 2015. The bail judge held that unless she could produce a surety, she could not meet her onus on the secondary ground.[32] She argued in

[29] *R v White*, 2010 ONSC 3164 at para 10.
[30] *Ibid* at para 6.
[31] 2014 ONCA 268.
[32] *Ibid* at para 10.

the Court of Appeal that the time spent in pre-trial detention would exceed a sentence at the high end of the range for the offence charged. Though emphasizing that public safety concerns had been attenuated, Justice Tulloch agreed with her submission and ordered her released without a surety.[33]

In *Myers*, the Supreme Court put to rest any lingering uncertainty over the holdings in *White* and *Whyte*. The issue before the Court in *Myers* was how superior courts should approach the 90-day detention reviews prescribed by the *Criminal Code*.[34] One of the circumstances the court called on bail justices to consider was the passage of time and unreasonable delay. Writing for a unanimous court, Chief Justice Wagner directed bail justices to consider "whether the time that has already elapsed has had–or the anticipated passage of time will have–an impact on the appropriateness or proportionality of the detention."[35] In applying the tertiary ground, bail justices must "be sensitive to whether the continued detention of the accused person could erode confidence in the administration of justice."[36] Endorsing *White* and *Whyte*, the Chief Justice instructed bail justices to "be particularly alert to the possibility that the amount of time spent by an accused in detention has approximated or even exceeded the sentence he or she would realistically serve if convicted."[37] He concluded this passage as follows:

> In an appropriate case, it may also be possible for the judge to conclude that a hypothetical risk in relation to the primary or secondary ground is simply outweighed by the certain cost of the accused person's loss of liberty or a loss of public confidence in the administration of justice.[38]

Subsequent bail judges have interpreted this language to mean that "an individual should not serve a longer sentence because he was unable to obtain bail, even where there are secondary ground

[33] *Ibid* at paras 34-35 and 43.
[34] 2019 SCC 18.
[35] *Ibid* at para 50 [emphasis added].
[36] *Ibid*.
[37] *Ibid* at para 51.
[38] *Ibid* at para 53.

concerns."[39] Risks on the primary and secondary grounds represent hypothetical risks. As Justice Pomerance noted in *Elliott*, "there is nothing hypothetical about detention."[40] Proportionality demands the release of accused persons who are approaching or have exceeded the low end of the range of sentence that they could reasonably expect to receive on conviction; "[t]o hold otherwise is to risk coercing false guilty pleas from those who are factually innocent."[41]

The *White* line of authority, endorsed by the Supreme Court in *Myers*, admittedly presents a narrow window of opportunity. The Supreme Court was somewhat cryptic in its endorsement; it "may be possible" for a bail judge to conclude "in an appropriate case" that the tertiary ground "outweighs" the primary and secondary grounds. But when this line of authority is read together with s. 493.2(a), in my view, the window widens significantly. Parliament has told us that business as usual is not acceptable in the law of bail for Indigenous persons. As I argue above, the corrective component of the bail assessment is little more than business as usual. But the *White* line of authority leaves space for the remedial component—an assessment that asks whether, even in the presence of concerns on the primary and secondary grounds, release is required to preserve public confidence in the administration of justice. The remedial requirement would require bail judges to critically assess the length and conditions of pre-trial confinement to determine whether the tertiary ground weighs in favour of release, remaining mindful of Parliament's direction to reduce Indigenous over-incarceration. This may well be answer to the challenge posed by s. 493.2(a).

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[39] *R v GP*, 2020 ONSC 3240 at para 27 [emphasis added].
[40] *R v Elliott*, 2020 ONSC 2976 at para 27.
[41] *Ibid*. See also *R v Ahmad*, 2017 ONSC 3364, and Christopher Sherrin, "*R v Whyte*: Protecting the innocent (and the guilty)" (2014), 10 CR (7th) 102. See also Justice Nordheimer's comments in *R v JA*, 2020 ONCA 660 at para 106 (dissenting on other grounds), a decision of the Court of Appeal for Ontario on the relevance of the COVID-19 pandemic to the grounds for detention: "While I accept that maintaining confidence may be engaged by requiring a detention order where the requirements of s. 515(10)(c) are met, it may equally be engaged by requiring that a release order be made where 'the continued detention of the accused person could erode public confidence in the administration of justice': *Myers* [*supra* note 34] at para 50."

Importing the law of proportionality into the tertiary ground analysis could have a host of benefits for Indigenous accused persons. A plain reading of the text of the tertiary ground only discloses the punitive components of the sentencing process: the strength of the Crown's case, the seriousness and circumstances of the alleged offence, and the likelihood on conviction of a lengthy jail sentence.[42] Marie Manikis and Jess De Santi have argued that bail courts "have infused a predominantly retributive interpretation into the public's confidence in the administrative justice ground", importing the punitive components of the law of sentencing into bail to justify detention where the Crown's case is strong and the alleged offences are serious.[43] For Indigenous offenders, s. 493.2(a) can provide an important counterbalance, requiring bail justices to attend to the systemic background factors that brought the accused before the court and the types of sentencing and procedures that would be appropriate to their Indigenous heritage.

The types of factors that could be relevant are as diverse as the variety of Indigenous persons who might be brought before the court. But I would suggest that bail justices pay close attention to the following circumstances in particular:

- The length of sentence likely to be imposed on conviction, having regard to the circumstances of the Indigenous accused, and in particular, whether it is below the *Jordan* ceilings on presumptively unreasonable delay;[44]

- If a trial date is set, whether the time to that date exceeds the low end of the range of sentence the accused could reasonably expect to be imposed on conviction;

- Whether any sentence imposed on conviction could be imposed conditionally, in accordance with the direction in *Gladue* that conditional sentences are a tool for remedying Indigenous over-incarceration;[45]

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[42] *Criminal Code*, s. 515(10)(c).
[43] Marie Manikis and Jess De Santi, "Punishment and retribution within the bail process: an analysis of the public confidence in the administration of justice ground for pre-trial detention (2020), 35:3 CJLS 413 at 415-16.
[44] 18 months in the provincial court and 30 months in the provincial court; see *R v Jordan*, 2016 SCC 27.
[45] See the court's comments in *Gladue*, *supra* note 3 at paras 1, 40, and 93. This point becomes particularly salient if the Court of Appeal for Ontario's decision in *Sharma*, 2020 ONCA 478, is affirmed by our Supreme Court next year and if Parliament passes Bill C-22 (*An Act to amend the Criminal Code (sentencing) and other acts in consequence thereof*, RSC 1995, c 22), legislation that would restore the conditional sentence for a host of offences for which the Harper government rendered it unavailable.

- The conditions of pre-trial confinement, and in particular whether those conditions are harsher for Indigenous persons as a result of systemic racism;[46] and
- The distance between the pre-trial detention facility and the accused's community.[47]

There may be other relevant factors. The important point is that even for an accused person whose release poses risks on the primary or secondary grounds, these factors can nonetheless justify release on the tertiary ground. The overarching question posed by the remedial component of s. 493.2(a) is whether, in the particular circumstances of the Indigenous accused before the court, their detention while presumed innocent pending their trial would bring the administration of justice into disrepute.

This would be a novel addition to the law of bail for Indigenous offenders. But the sapling of the remedial component grows from solid roots. And Parliament has demanded more of us than the corrective component. Though we cannot expect the bail system to carry the immense weight of Indigenous over-incarceration alone, by reading s. 493.2(a) as consisting of both corrective and remedial components, we could honour Parliament's direction to do things differently and make a real difference in the lives of Indigenous persons accused of criminal offences.

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[46] In *R v Marfo*, Justice Ducharme reviewed evidence that Black men in prisons were more likely to face disciplinary charges, more likely to be classified in maximum security, over-represented in segregation, and more likely to be denied vocational opportunity as a result of stereotypical assumptions about their neighbourhoods: 2020 ONSC 5663. He held that "[i]f a sentence is more onerous for a Black man because of systemic anti-Black racism in the correctional system, then any sentence I impose must be shortened to recognize this fact": see para 52. Similar statistics exist for Indigenous offenders: see EG *Ewert v Canada*, 2018 SCC 30. While accused persons in pre-trial custody would not be subject to the same correctional regime as those in the penitentiary system, evidence of a more punitive experience of confinement as a result of systemic discrimination would be relevant to the remedial component of the tertiary ground.

[47] In *R v Turtle*, for example, Justice Gibson held that living on-reserve in a First nation, and as a result being deprived of the opportunity to serve an intermittent sentence constituted a discriminatory distinction contrary to section 15 of the *Charter*: 2012 ONCJ 429. The presence of Canadian jails at a great distance from First Nations communities may deprive an accused person of contact to crucial community supports and echo, if not explicitly carry out, the Canadian state's project of colonization. This dynamic would undoubtedly tend to undermine public confidence in the administration of justice.

Conclusion

Though I am confident of the authority for the corrective and remedial components for s. 493.2(a), I conclude this paper on an ambivalent note. Importing the law of Indigenous sentencing into bail will give some advocates and judges the necessary tools to set Indigenous persons free. But it must be remembered that s. 718.2(e) has been a dismal failure. Indigenous over-incarceration is worse today than it was in 1995 that provision was passed, worse than in 1999 when *Gladue* was decided, and worse than in 2012 when the Supreme Court issued a stern reminder. There is reason to be skeptical that importing the principles of proportionality from those cases into the bail assessment will result in any significant reduction in the over-incarceration of Indigenous persons.

Still, the remedial component has the advantage of virtually requiring release for all offences that would attract a sentence of one year or less, and as a result could have a significant impact on "time served pleas". Judges sitting in practice court, when facing an offender whom the Crown advises is in a "time served" position, might inquire into bail and ask the accused whether they would still plead guilty if they had the choice instead of being released on bail the same day. While there remains a significant empirical basis for skepticism, in my view there is at least some basis for hope that the remedial component of the bail assessment could make a measurable difference in the over-incarceration of Indigenous persons in Canada.