I. Bail

It is widely acknowledged that whether to grant bail to an accused person is generally the most important decision that any judicial actor can make in the life of an accused person. While obviously the decision of a judge determining the person's guilt or innocence following trial is important, most matters in the criminal courts resolve themselves without trial—either by a plea or a withdrawal or stay of charges. The ability of a person to instruct counsel and properly assist with the preparation for trial is negatively affected if the person is denied bail.[4] Similarly, the result of a bail denial

1 *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 [*Anderson*].

2 *United States v Leonard*, 2012 ONCA 622, 112 OR (3d) 496, leave to appeal to SCC refused, [2012] SCCA No 543, [2012] SCCA No 490 [*Leonard*].

3 *Ibid* at para 85; *Anderson*, *supra* note 1 at para 86. These cases will be discussed in more detail later in the chapter.

4 *R v Antic*, 2017 SCC 27 at para 66, [2017] 1 SCR 509 [*Antic*].

is often a relatively quick guilty plea. Despite the need for informed decisions on pleas and the duty on judges to perform plea inquiries, people will plead guilty to offences they may not have committed or may have valid legal defences for if they are denied bail. For some accused persons, a guilty plea is a rational decision motived not by any feelings of guilt, but by a calculation of how long they will have to wait in custody for a trial as opposed to the sentence being offered by the Crown for a plea.[5] Adding to this calculus can be the conditions in a remand facility which are generally harsher than for those serving sentenced time.[6]

Many of the inquiries and commissions that have looked at Aboriginal people and the justice system—described in Chapter 2—looked at the issue of bail, and more precisely the lack of access to bail by Aboriginal accused. Concerns regarding the ability of an Indigenous accused person to receive bail were explicitly raised in Alberta's Justice On Trial,[7] the Law Reform Commission of Canada,[8] the Manitoba Aboriginal Justice Inquiry,[9] and the Manitoba Aboriginal Justice Inquiry Implementation Commission Report.[10]

In 2014, the Canadian Civil Liberties Association issued a study entitled *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*.[11] In the study's chapter on "Systemic Discrimination and Bail," there was particular emphasis on the situation of Aboriginal accused persons. The study found:

> There is a general recognition that the bail system operates in a manner that disadvantages individuals living in poverty and those with mental health or addictions issues. Aboriginal people, who are disproportionately impacted by substance abuse issues, poverty, lower educational attainment, social isolation and other forms of marginalization, are being systematically disadvantaged as result.[12]

5 Christopher Sherrin, "Excessive Pre-Trial Incarceration" (2012) 75 Sask L Rev 55 at 65.

6 *R v Summers*, 2014 SCC 26 at para 2, [2014] 1 SCR 575 [*Summers*].

7 *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta* (Alberta: Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, 1991) vol 1 at 3-5, 4-44.

8 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.

9 *Report of the Aboriginal Justice Inquiry of Manitoba* (Manitoba: Aboriginal Justice Inquiry, 1991) vol 1 at 1-2, 221-24, 737, online: <www.ajic.mb.ca/volumel/toc.html>.

10 Manitoba, *Aboriginal Justice Implementation Commission Final Report* (Manitoba: Aboriginal Justice Implementation Commission, 2001), online: <www.ajic.mb.ca/reports/final_a1.html>.

11 Abby Deshman & Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention* (Toronto: Canadian Civil Liberties Association and Education Trust, 2014), online: <https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf>

12 *Ibid* at 75.

The study identified overuse of conditions such as abstention from alcohol, overreliance on sureties, and the distance from remote Indigenous communities to court locations as some reasons that explain, but do not justify, this phenomenon.[13]

In *Gladue* itself, when discussing the causes of overrepresentation, the Supreme Court noted "an unfortunate institutional approach that is more inclined to refuse bail" to Aboriginal accused persons,[14] a finding they repeated in *Ipeelee*.[15] They returned to this issue in *Summers*,[16] where they stated that "Aboriginal people are more likely to be denied bail, and make up a disproportionate share of the population in remand custody."[17]

In discussing why the judges of the Gladue (Aboriginal Persons) Court at the Old City Hall, which was the first Gladue Court in Canada, decided to have bail hearings in the court before a judge rather than a justice of the peace, as was and still is the practice in Ontario, Justice Brent Knazan, one of the founding judges of the court, wrote:

> Pre-trial detention can become an actual sentence if the judge determining the sentence takes into account any time spent in custody as a result of the offence, as is permitted by s. 719(3). Unless s. 718.2(e) is somehow considered at the bail hearing, a sentence of imprisonment for an Aboriginal person could occur by the time the sentencing judge begins to pay particular attention to the circumstances of Aboriginal offenders; this of course precludes a reasonable sanction other than imprisonment.[18]

Absent a definitive statement from the Supreme Court of Canada on applying *Gladue* to bail, the approach to this issue can depend on where the accused is located for the purposes of a bail hearing.[19]

The application of *Gladue* to bail has been addressed by two courts of appeal. In Ontario, any question of applying the *Gladue* principles to bail was put to rest by the Ontario Court of Appeal in 2009 in *R v Robinson*, a bail review decision by Winkler CJ.[20] At paragraph 13, Winkler CJ states: "It is common ground that principles enunciated in the decision of the Supreme Court of Canada in R. v. Gladue … have application to the

13 *Ibid* at 75-76.

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

15 *R v Ipeelee*, 2012 SCC 13 at para 61, [2012] 1 SCR 433 [*Ipeelee*].

16 *Supra* note 6.

17 *Ibid* at para 67.

18 Brent Knazan, "Time for Justice: One Approach to R v Gladue" (2009) 54 Crim LQ 431 at 435 [footnotes omitted].

19 Because bail decisions are often not reported, a survey relying on reported cases may not properly capture what is actually happening on the ground.

20 2009 ONCA 205, 95 OR (3d) 309 [*Robinson*].

question of bail." *Robinson* was followed by the Alberta Court of Appeal in *R v Oakes*.[21] That case was an application for bail pending appeal where Ms Oakes had been convicted of second-degree murder. At paragraph 11, O'Farrell J states: "I am prepared to assume that *Gladue* also applies to release pending appeal." In both cases, although the court indicated that *Gladue* had to be considered in the bail context, the applications were denied.

While there are no Court of Appeal decisions on the application of *Gladue* to bail in other provinces and territories, the Ontario and Alberta approach has been adopted in Newfoundland and Labrador,[22] Nova Scotia,[23] Manitoba,[24] Saskatchewan,[25] British Columbia,[26] the Yukon,[27] and the Northwest Territories.[28] *Gladue* was found not to apply to bail hearings in New Brunswick, in a decision from the Court of Queen's Bench overturning a decision by a provincial court judge to grant bail to an Aboriginal accused.[29] Overall, however, the clear weight of authorities and practice has been to apply *Gladue* to bail.

But what does it mean to say that *Gladue* and *Ipeelee* apply to bail? This has proven to be a difficult question to answer. Courts that have applied the *Gladue* principles to bail often fail to acknowledge the crucial difference between a sentencing hearing and a bail hearing. At the latter, the person is still presumed innocent, and so what may well make sense as a condition at sentencing that could keep an Indigenous person out of jail is inappropriate at a bail hearing.

This conflation of sentencing and bail conditions where Aboriginal accused persons are concerned can be seen in several cases. *Robinson* at the Ontario Court of Appeal, despite its groundbreaking nature, falls into that trap. After stating that *Gladue* applies to bail, Winkler CJ goes on to say:

> 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

21 2015 ABCA 178, 121 WCB (2d) 480.

22 *R v Rich*, 2009 NLTD 69, 286 Nfld & PEIR 346 [*Rich*]; *R v Rich*, 2016 NLTD(G) 87, 131 WCB (2d) 270.

23 *R v Paul-Marr*, 2007 NSPC 29, 256 NSR (2d) 190. The case is best seen as being supportive of the idea that *Gladue* applies to bail, as opposed to definitely concluding that it does.

24 *R v Mason*, 2011 MBPC 48, 269 Man R (2d) 297.

25 *R v Daniels*, 2012 SKPC 189, 412 Sask R 52; *R v Cyr*, 2012 SKQB 534, 104 WCB (2d) 1137.

26 *R v TJ (J)*, 2011 BCPC 155, 95 WCB (2d) 418.

27 *R v Magill*, 2013 YKTC 8, 113 WCB (2d) 791.

28 *R v Chocolate*, 2015 NWTSC 28, 130 WCB (2d) 201 [*Chocolate*].

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

> 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.[30]

The Alberta Court of Queen's Bench case *DD (P)*[31] raises similar concerns. The case dealt with an Aboriginal accused person with a lengthy criminal record. It was found that there was a high likelihood of conviction, but also that the accused's life was marred by the legacies of colonialism.[32] In opposing bail, the Crown argued (as they often do in the non-sentencing context) that because *Gladue* and *Ipeelee* focused on sentencing, the principles from those cases should not apply to bail.[33] In rejecting that argument, Lee J said:

> I conclude that in addition to the rights of all Canadians under the Charter to reasonable bail, persons of Aboriginal status applying for bail should have their individual special circumstances considered as well irrespective of the existence of the primary, secondary or tertiary grounds. 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 the time he/she is sentenced. If the rehabilitation of the Aboriginal offender is to be deal 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.[34]

The problem with *Robinson* and *DD (P)* is, of course, that at the bail stage the Aboriginal person is not an offender but someone who is presumed innocent. Bail is not the place to enforce sanctions but rather the place to craft appropriate conditions, where necessary, to ensure the accused person's attendance at court or protection of the public while the matter proceeds to resolution. It is not the place to make orders that address the healing of the offender, because at this stage of the process the person is not an offender and indeed may never be convicted of the offence they face. *Robinson* was a bail hearing in the context of a murder charge,[35] and so there was a reverse onus on the accused person to show why he should be released, but again, that is different from presuming him to be guilty.

30 *Robinson*, *supra* note 20 at para 13.

31 *R v DD (P)*, 2012 ABQB 229, [2012] 3 CNLR 289 [*DD (P)*].

32 *Ibid* at paras 1, 4-5, 11.

33 *Ibid* at para 3.

34 *Ibid* at para 9. While the repeated references to 'offenders' in the passage might be explained by the fact that a conviction was likely to be registered in the case, the principle is set out in a way that has much wider application.

35 The specific charges the accused was facing were conspiracy to commit murder, attempted murder, and aggravated assault.

At bail, the presumption is that the accused person should be released on measures that restrict their liberty as little as possible. In the Supreme Court's most recent review of bail in *Antic*, Wagner J (now Wagner CJ) stated for a unanimous court:

> The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons.[36]

The court confirmed that, absent a reverse-onus situation, a judge or justice must "impose the least onerous form of release on an accused unless the Crown shows why that should not be the case."[37] And even in a reverse-onus situation, once the accused has satisfied the judge or justice that their release is justified, the court must resort again to the least onerous form of release.[38] Bail conditions can only be imposed if necessary to ensure the person's attendance at court (the primary ground),[39] the safety of the public or a particular member of the public (the secondary ground),[40] or to maintain confidence in the administration of justice (the tertiary ground).[41]

How are the *Gladue* principles to be applied at bail? What does it look like when courts get it right—or wrong? At the outset of this discussion it must be acknowledged that most bail decisions are unreported. What is actually going on in bail courts across the country cannot always be discerned by those few cases considered by superior courts and then reported. Working with what we have, however, allows for some trends to be discerned and conclusions to be drawn.

A. Gladue Reports at Bail

The extent to which Gladue Reports are being requested in the bail context is difficult to determine with certainty. That this is not an unusual occurrence can be inferred from news articles on the issue,[42] the frequent occasions on which I have been asked about the issue, and the issue arising at conferences that I have attended (admittedly an unscientific source).

36 *Supra* note 4 at para 1.

37 *Ibid* at para 4.

38 *Ibid* at para 51.

39 *Criminal Code*, RSC 1985, c C-46, s 515(10)(a).

40 *Ibid*, s 515(10)(b).

41 *Ibid*, s 515(10)(c); see the decision of the Supreme Court of Canada in *R v St-Cloud*, 2015 SCC 27, [2015] 2 SCR 328, for a discussion of the scope of this ground.

42 See e.g. James Turner, "Bail Delayed to Get Gladue Report," *Winnipeg Sun* (9 May 2012), online: <http://winnipegsun.com/2012/05/08/bail-delayed-to-get-gladue-report/wcm/36a6db48-fe73-4b2e-92d6-a127705be7d0>.

For at least three reasons it is inappropriate to require a Gladue Report prior to considering bail for an Indigenous accused person.[43]

First, as discussed in Chapter 5, Gladue Reports are not equally available across the country. In a jurisdiction where Gladue Reports are rare, to ask that such a report be prepared in the bail context is to ask for the almost impossible.

Second, even where Gladue Reports are available, it often takes weeks or months to prepare such reports. It is wrong to leave an Aboriginal accused person in custody while a detailed history of their life is prepared, particularly because such a history is unnecessary in the bail context.

Third, Gladue Reports look at the history of the individual in the context of sentencing. At the bail stage, while the individual is accused of a crime, there has been no determination of guilt. The personal history of the accused person and that of their family and community does not necessarily have any relevance to the questions that bail courts must determine regarding a bail release. The production of a Gladue Report for bail purposes can inadvertently lead the court to move toward the imposition of conditions that while relevant in the sentencing context are completely inappropriate for someone who is not guilty of the offences for which they have been charged.

B. Connection to Aboriginal Culture and Traditions

Brant[44] is a 2008 bail review decision of Parfett J of the Ontario Superior Court that pre-dates the Court of Appeal's decision in *Robinson*. Mr Brant was charged with a number of offences arising out of a land rights protest in the Tyendinaga Mohawk Territory in southeastern Ontario.[45] While Mr Brant had a dated criminal record, it was not relied upon at the bail review.[46] The court described the Crown's case as "good" but "not overwhelming."[47] There were several triable issues, including identification of Mr Brant as the perpetrator of the alleged criminal acts.[48] The issue in the case was whether bail could be granted given concerns around the secondary grounds—the protection of the public.[49]

At the initial bail hearing, the justice of the peace was concerned that the proposed sureties for the accused supported the blockades that had been erected and were

43 The Ontario Ministry of the Attorney General's Judicial Interim Release (Bail) Directive No 24 (Ontario: MAG, 14 November 2017), online: <https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>, explicitly cautions Crown prosecutors against requesting Gladue Reports in the bail context.

44 *R v Brant*, (2008) 89 WCB (2d) 431 [*Brant*].

45 *Ibid* at paras 3-4.

46 *Ibid* at para 25.

47 *Ibid* at para 23.

48 *Ibid*.

49 *Ibid* at para 24.

steadfast in their belief of Mr Brant's innocence.[50] The justice felt these issues required that Mr Brant have a surety outside of his community and as that could not be found, detention was necessary.[51]

In rejecting this approach, the Superior Court made an important distinction between supporting land claims and advocating breaking the law:

> It is important to draw the distinction between support for the aim of resolving the land claim dispute in a timely manner, and support for violent actions. The witnesses for the defence indicated that they did not support violence. They also made it clear that they did not believe that the allegations against Mr. Brant would ultimately be found to be proven. They made it clear that violent behaviour did not conform to the Great Law's values of peace, friendship, and respect.[52] However, equally, they made it clear that they supported Mr. Brant in his effort to protect the land that is theirs.[53]

Significantly, it was also noted that "the Court must look at whether Aboriginal law and customs provide the assurances of attendance in court and protection of the public that are required for release."[54] This factor was important because one of the proposed sureties was a female Elder in the community. Parfett J noted:

> The evidence before this Court is that the Tyendinaga First Nations community is a matrilineal society, where a mother or a female elder's orders will be complied with. The evidence indicates additionally that a failure to abide by conditions that would result in placing a woman in legal jeopardy, would be viewed very negatively by the community and might result in the offender being shunned.
>
> The evidence before this Court also indicates that, because Mr. Brant is a member of the community, and here the term community means the Tyendinaga Mohawk community, the community as a whole will take responsibility for him. This community commitment to assisting Mr. Brant to keep his promise to the Court takes the concrete form of a deposit of money with the Court. This money was raised through community donations.[55]

In this case the accused's involvement with his Indigenous culture and values helped the court determine that release was appropriate. It is important, however, that the

50 *Ibid* at para 22.

51 *Ibid* at para 12.

52 See John Borrows, *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada* (Ottawa: Law Commission of Canada, 2006) at 29-34 for a discussion of the traditional knowledge and development underlying the Great Law of Peace as well as the principles of peace, love, and friendship meant to guide Haudenosaunee–settler relations according to the Two Row Wampum Belt Covenant, online: <http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf>.

53 *Brant*, *supra* note 44 at para 22.

54 *Ibid* at para 21.

55 *Ibid* at paras 26-27.

connection-to-culture portion of the decision not be applied to all Aboriginal people seeking bail.

First, as was discussed earlier, the onus of showing that detention is necessary rests with the Crown. It is not up to the Aboriginal accused person to show why they should be released; rather, it is up to the Crown to show why that should not occur. If there are no valid concerns over the statutory reasons to detain or those concerns cannot be addressed by other means, there is no need to examine the extent to which an Aboriginal accused person is or is not connected to their culture or community.

Second, not all Indigenous accused persons will be connected to their culture or beliefs. The reason for this disconnection has been discussed extensively in the previous chapters of this book. To hold a person's dislocation and distance from their culture against them as a reason to deny bail would be to ignore the realities of colonialism and to punish the person for what has been done to them by the state. *Gladue* and *Ipeelee* warn precisely against this sort of approach.

C. The Overuse of Conditions and the Imposition of Inappropriate Conditions

One issue arising with the application of *Gladue* at bail is that courts can resort to imposing unnecessary or inappropriate conditions when releasing an Aboriginal person. This can occur if the justice treats the bail stage as akin to a sentencing hearing or resorts to conditions out of what might charitably be seen as abundance of caution. This is precisely the behaviour the Supreme Court warned about in *Antic*, but it is often seen where Aboriginal offenders are released on bail. Not only are these conditions unnecessary restrictions on the liberty of people not convicted of an offence, but breach of those conditions can lead to further criminal charges and convictions.[56]

The *Silversmith*[57] case provides a good example of these tendencies in action. The case followed closely after *Brant*, and the bail review judge—Turnbull J of the Ontario Superior Court—was very influenced by the decision. Mr Silversmith, a member of the Six Nations Mohawk Territory, was facing five charges of driving while disqualified.[58] Over the course of less than a year, he made six court appearances and failed to appear on the seventh appearance when it was anticipated that he was to plead to some

56 See e.g. Department of Justice Canada, *Summary Report: Administration of Justice Offences Among Aboriginal People* (Ottawa: Department of Justice, 2013); "Aboriginal Administration of Justice Offences Research Project: Final Report," Alberta Justice (2012), online: <https://justice.alberta.ca/publications/Documents/AAJO-REPORT-FINALAug2012.pdf>; Pauline Hoang, "Aboriginal Administration of Justice Offences Research Project: Literature Review," Alberta Justice (2012), online: <https://justice.alberta.ca/publications/Documents/AAJO-LITERATURE-REVIEW-FINALAug2012.pdf>;

57 *R v Silversmith* (2008), 81 WCB (2d) 697 [*Silversmith*].

58 *Ibid* at para 2.

or all of the charges.[59] He had started a job prior to his last appearance and did not attend in court because he was afraid he would be jailed and lose his job, and thus his ability to provide for his family.[60]

Mr Silversmith had a prior criminal record that included several driving while disqualified charges as well as impaired driving charges. He also had two fail to appear charges, although the last of those was ten years before the current matter.[61] The court was provided with a great deal of information about his background and personal circumstances. He was a residential school Survivor, as were his parents and his partner.[62] He grew up in "chronic poverty."[63]

Over the opposition of the Crown, Turnbull J granted bail to Mr Silversmith on ten conditions:

1. The primary surety shall be Maureen Turkey with a pledge amount of $5,000.00.
2. The secondary surety shall be Arlene Charles with a pledge amount of $20,000.00.
3. In the event of any default under the recognizance by Mr. Silversmith, the related forfeiture of the recognizance hearing shall take place before me.
4. Mr. Silversmith shall reside with his surety, Maureen Turkey, at 3318 Second Line, Ohsweken, Ontario, and to be amenable to the rules of that household.
5. Mr. Silversmith is to be in his residence nightly (or, more specifically, from the hours of 10 pm and 6 am) except in the case of emergency or when in the presence of one of your sureties;
6. Mr. Silversmith shall report to the Six Nations Police Service on every Monday and Thursday;
7. Mr. Silversmith is to attend ceremonies or any other traditional event or process for the purposes of healing and personal growth as directed by your sureties;
8. Mr. Silversmith shall remain within the Province of Ontario; and,
9. Mr. Silversmith shall not to possess any firearms until his outstanding charges are dealt with according to law;
10. Mr. Silversmith is to refrain from use of alcohol or any non-medically prescribed drug.[64]

Professor Jillian Rogin has noted that the conditions imposed on Mr Silversmith bore little relevance to the statutory bail criteria.[65] While he failed to appear on his sixth appearance, he did not try to leave the jurisdiction. He continued to live at the same

59 *Ibid* at para 3.

60 *Ibid* at para 23.

61 *Ibid* at para 8.

62 *Ibid* at para 20.

63 *Ibid* at para 24.

64 *Ibid* at para 40.

65 Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95 Can B Rev 325.

address he had lived at when he was arrested, and so he was easy to find had the police looked for him.[66] Other than the fail to appear charge, he had committed no substantive offences since his arrest on the initial charges, which should have allayed any concerns on the secondary ground, if such concerns were even reasonable. Yet, in order to be released he had sureties set at $25,000 and a non-consumption of alcohol condition. The no-firearms condition, nightly curfew, and the requirement that he continue to attend traditional counselling also had nothing to do with the primary, secondary, or tertiary bail provisions and read much more like sentencing conditions. While Mr Silversmith likely was going to plead guilty to at least one offence, a bail hearing is not the appropriate venue to start the sentencing process.

As noted, one of the bail conditions imposed on Mr Silversmith was non-consumption of alcohol or drugs. Since the offences for which he was charged had nothing to do with alcohol consumption, it is hard, if not impossible, to justify such a condition in his case. More broadly, that these conditions continue to be imposed on accused persons at bail (and as terms of probation as well) in the face of increased understanding of their futility and counterproductiveness is puzzling.[67]

Resort is often made to non-consumption of alcohol and/or drugs—or "abstain conditions," as they are often referred to—as a response to the secondary ground in the bail context. The thinking goes that if the accused was impaired when they were charged, then it is a safe assumption that the consumption of drugs or alcohol played a role in the commission of the alleged offence. It would then logically follow that if the person abstained from alcohol and/or drugs, the risk of further criminal activity would be reduced. While there may be some merit in that assumption when dealing with individuals without an addiction and where alcohol was a precipitating factor in the alleged offence, the logic falls apart when applied to alcoholics or drug addicts. Alcoholics and addicts consume drugs and alcohol daily, and often more than once during the day. Yet these people do not commit criminal offences every day (other than perhaps drug possession offences), so to assume that the alcohol or drugs were the proximate cause of the alleged offence is a stretch.

Abstention clauses are often agreed to by addicts when appearing at bail. If asked "Do you think you can stop using alcohol and/or drugs" in a bail hearing, it is pretty clear what the right answer should be. If the carrot of release is being offered up at a bail hearing in return for a promise to abstain, is it not at all surprising that people agree to that condition despite how unrealistic it is for them.

66 *Ibid* at 346-47.

67 It is particularly puzzling for Mr Silversmith, who admitted to a history of alcohol abuse but who appeared to have this issue under control at the time of his bail hearing. Even more importantly, there was no evidence that consumption of alcohol was even tangentially related to the fail to appear charge; see *Silversmith*, *supra* note 57 at paras 23, 34.

Making the imposition of these conditions even more pernicious is that fact that failure to comply with previous bail conditions will be raised by the Crown if a person is charged with a subsequent offence. Failures to comply bolster objections from the Crown that no conditions can address the primary or secondary bail grounds and that therefore bail must be denied.

Contrary to what is commonly thought, alcohol use among Indigenous people is actually lower than it is for the population at large.[68] At the same time, levels of risky alcohol consumption, for example, binge drinking, is more prevalent among Indigenous people. In addition, levels of alcohol and drug addiction among Aboriginal people is also higher than in the general population. The reasons for this phenomenon have been discussed in previous chapters of this book.

Omeasoo, a case from the Alberta Provincial Court, excellently discusses these issues in the bail context. After noting the offender's struggles with alcoholism, Rosborough J cites statistics regarding the consumption of alcohol and prevalence of alcoholism in Canada.[69] Referring to *Ipeelee* and the *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta*, the court notes that Aboriginal people's struggles with alcoholism and addiction are particularly acute both in general and in the specific community in this case.[70] Rosborough J then states:

> Alcoholism is a health concern in Canada. Amongst aboriginal populations that concern is elevated and, in some instances, acute. Its existence places added obligations upon justice system participants in order to ameliorate the disproportionately high rates of incarceration of aboriginal offenders both at the bail and sentencing stages. Police agencies must inquire into the possibility of alcohol addiction and how best to control it when determining an aboriginal detainee's bail. And sentencing for the offence of breaching an "abstention clause" is another area in which that obligation should be recognized.[71]

Rosborough J then discusses how clauses that almost certainly cannot be complied with are unreasonable in the bail context:

> It is trite to say that conditions in an undertaking which the accused cannot or almost certainly will not comply with cannot be reasonable. Requiring the accused to perform

68 First Nations Information Governance Centre (FNIGC), *First Nations Regional Health Survey (RHS) 2008/10: National Report on Adults, Youth and Children Living in First Nations Communities* (Ottawa: FNIGC, 2012) at 97; see also *R v Omeasoo*, 2013 ABPC 328 at paras 19-25, 94 Alta LR (5th) 244 [*Omeasoo*] for a detailed discussion of alcohol abuse among Indigenous peoples and in Canada generally.

69 *Omeasoo*, *ibid* at paras 5-21.

70 *Ibid* at paras 22-24.

71 *Ibid* at para 25; in *R v Murphy*, 2017 YKSC 34 at paras 33-40, 78-79, 140 WCB (2d) 271, the court adopts this statement in combination with *Ipeelee* to recognize the systemic impact of abstention clauses and strict surety requirements for vulnerable and marginalized Aboriginal accused and for the Aboriginal offender who breached such a clause in this case.

> the impossible is simply another means of denying judicial interim release. The same would apply to conditions which, although not impossible in a technical sense, are so unlikely to be complied with as to be practically impossible. An example of that would be to release the impecunious accused on $1 million cash bail on the basis that he could buy a lottery ticket and potentially win enough money to post that cash bail.[72]

Rosborough J concludes the discussion by looking at why abstention clauses for alcoholics in the bail context are unreasonable:

> There are circumstances where individuals can be expected to comply with bail conditions merely because they are pronounced by a person in authority and will result in penal sanctions if breached. This is seldom the case with alcoholics subjected to abstention clauses, however. Ordering an alcoholic not to drink is tantamount to ordering the clinically depressed to "just cheer up." This type of condition has been characterized by some courts (at least in the context of a probation order) as "not entirely realistic."[73]

Where the secondary grounds absolutely require a level of alcohol or drug abstention for a particular purpose, certain courts have imposed conditions such as requiring the person to consume intoxicants only while at home or, if the concern is for the safety of others who live in the home, not to return to the home after consuming intoxicants.

D. Relying on the Circumstances of Aboriginal Accused to Deny Bail

There have been cases where the Crown has sought to rely on the unique circumstances of Indigenous people to seek their detention while awaiting trial. The two specific circumstances relied upon in this regard are the assumed ability of Indigenous people to cross into the United States as of right and the difficulty of executing judgment on security that is located on a reserve.

With respect to the first concern, some context is necessary. Following the creation of the United States and before Canada became a country, Britain and the United States entered into the Jay Treaty on November 19, 1794. One provision of the Jay Treaty was that Indigenous people could travel across the border of the two countries

72 *Omeasoo*, *supra* note 68 at para 33; this reasoning was taken up in *R v Netowastanum*, 2015 ABQB 412 at paras 45, 47, where the court gave a (non-Aboriginal) accused who posed a significant risk in the absence of an abstention clause but who was also an alcoholic on bail conditions that allowed him to drink at his sister's house while under supervision but disallowed drinking, being in public while intoxicated, and entrance to premises that sell alcohol (see paras 48-50).

73 *Omeasoo*, *supra* note 68 at para 37 [emphasis added]. In support of this proposition the court cited *R v Forrest* (1992), 10 BCAC 293; *R v Atchooay*, 2003 BCCA 218, 180 BCAC 293; *R v Coombs*, 2004 ABQB 621, 369 AR 215; *R v Geddes*, [2000] OJ No 5837 (Ct J); *R v McLeod*, [1992] YJ No 96 (QL); *R v Ahenakew*, 2007 SKPC 108, 303 Sask R 229; and *R v Night*, 2008 SKPC 169, 329 Sask R 197.

as of right. In 1867, following Confederation, Canada did not explicitly adopt the provisions of the Jay Treaty.[74] The United States has never repudiated the Jay Treaty, and so there is now an asymmetrical application of the treaty where some Canadian Indigenous people can enter the United States as of right but no American Indigenous people can do the same with respect to Canada.[75]

It has never been the case that all Canadian Indigenous people were able to enter the United States as of right. US border guards restricted the right to Indians who could produce their Indian status cards at the border. In recent years, border agents often require "blood quantum letters." These letters are issued by the First Nation and attest to the holder of the letter having over 50 percent Indigenous blood.[76] It has been the case that Canadian First Nations people have been able to enter the United States with a status card (and a blood quantum letter if required) and have not always required a passport.[77]

It is the ability to enter into the United States without a passport that has caused the Crown to argue on several occasions that Indigenous people are inherently more of a flight risk because surrendering their passport will not ensure they remain in Canada. Fortunately, this is not an argument that appears to have received much traction at bail hearings, for two reasons.

First, as noted, the number of Indigenous people able to enter the United States under the Jay Treaty is steadily declining as the United States imposes more and more restrictions on people seeking to rely on that provision.[78] Since 9/11, the US government has moved to require all people seeking to enter the United States to have a valid passport, so even with a right of entry from the Jay Treaty a passport is now required.

One would expect that prior to making the argument that bail should be refused because an Aboriginal person is a flight risk and the surrender of a passport will not mitigate against such a risk, evidence would be provided by the Crown to show that the particular individual actually can enter the United States without a passport. An

74 In *R v Francis*, [1956] SCR 618, 1956 CanLII 79, the Supreme Court of Canada found at page 621 that the provisions regarding Aboriginal people were not binding for *Indian Act* purposes because the Jay Treaty was an international treaty and not an Indian treaty.

75 The exception to this rule concerns the residents of the US portion of the Akwesasne Mohawk Territory. Akwesasne, which is located near Cornwall, Ontario, also stretches into the United States. As a result, residents of the territory can cross both borders as of right (although they are still subject to customs regulations).

76 Blood quantum is often relied on in the United States to determine who is eligible for benefits as member of an Indian tribe. Blood quantum is not used in Canada.

77 For more information on this issue, see American Indian Law Alliance, "Border Crossing Rights Under the Jay Treaty," online: Pine Tree Legal Assistance <https://ptla.org/border-crossing-rights-jay-treaty>.

78 And of course the Canadian government is not in a position to argue against the tightening of these rules since it does not recognize the Jay Treaty at all.

imprecise, and often incorrect, knowledge of the state of law should not be a basis to deny a person bail.

The second problem with the argument is that it cannot be assumed that a person will do something simply because they can. The burden is on the Crown to show why a person is a flight risk. Such a concern should be entertained only if that burden is met by evidence other than the fact that the person might be able to cross into the United States without a passport.

This issue was addressed by the Ontario Court of Appeal in *R v Hope*.[79] Mr Hope applied for bail after his conviction for second-degree murder was overturned by the Court of Appeal and a new trial was ordered.[80] One reason the Crown opposed bail was that "given Mr. Hope's Aboriginal status, he is able to travel into the United States without a passport."[81] In rejecting this argument, Epstein J concluded:

> In the circumstances, I do not view this concern as very significant. First, Mr. Hope's conduct between the time of the killing, when he travelled to the United States, voluntarily returned to Canada and remained here until he was arrested, supports a finding that he is not a flight risk. As well, I find relevant the assessment Mr. Hope can make of the relative lack of strength of the case now raised against him, the demonstration of the ties between him and the social network that is prepared to support him including a young woman to whom Mr. Hope has been engaged to marry since 2009.[82]

The second circumstance of Aboriginal accused persons—the difficulty with realizing on sureties—is also specific to First Nations individuals who live on-reserve. Under section 91(24) of the *Constitution Act, 1867*, the federal government is responsible for Indians and lands reserved for Indians. As a result, reserve lands located in a province are treated as federal Crown land. For this reason, it is not easy for creditors to execute judgments against individuals whose property is located on-reserve. The Crown has used this difficulty with realizing on sureties as reason to deny bail to an Indigenous person.

The potential difficulty in recovering funds that are estreated is not the fault of the Indigenous person who offers themselves up as surety. Reserves are hardly the equivalent of offshore tax havens. The reason that people choose to live on a reserve is not to try to judgment-proof themselves. While on-reserve property may be difficult to seize, that is because of the constitutional makeup of the country. Speaking more broadly on this issue, the Supreme Court in *Antic* stated:

79 2016 ONCA 648, 133 OR (3d) 154 [*Hope*].

80 *Ibid* at para 1.

81 *Ibid* at para 18.

82 *Ibid* at para 19.

> A justice or a judge cannot impose a more onerous form of release solely because he or she speculates that the accused will not believe in the enforceability of a surety or a pledge. The bail system is based on the promises to attend court made by accused persons and on their belief in the consequences that will follow if such promises are broken.[83]

E. Getting It Right

What does it look like when a court properly takes into consideration the relevant circumstances of an Indigenous accused person in the bail context? Two cases from very different parts of Canada involving Indigenous accused persons with very different histories provide helpful illustrations.

Pawal Sledz was charged in Toronto, along with two co-accused, of a serious sexual assault.[84] The charge came over seven months after the alleged incident.[85] He was relying on an alibi defence.[86] While his co-accused both were released on bail to family members who agreed to act as sureties,[87] he had no one to come forward as a surety.[88]

The judge of the Ontario Court of Justice hearing the bail application—Nakatsuru J[89]—had evidence before him of some of Mr Sledz's personal history. The information he had was relevant to the particular inquiries necessary in a bail hearing. Mr Sledz had a Polish father and a Mohawk mother who died in childbirth. He was in an orphanage and foster care for most of his childhood and youth. He only met his father on a few occasions, and when he did they were difficult meetings. His father was a racist who told him about his Indigenous mother. He eventually located some of his maternal family members but was reluctant to meet them at this point in his life.[90]

Mr Sledz, aged 33 at the time of the bail hearing, relied on social assistance because of mental health issues.[91] The plan he put forward was to be released on his own recognizance and to be supervised by the Toronto Bail Program, which would provide bail verification and assistance for him if he requested such assistance.[92] The court had to address the fact that unlike his co-accused, Mr Sledz had no sureties. It is worth quoting in some detail Nakatsuru J's decision to release him:

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83 *Supra* note 4 at para 54.

84 *R v Sledz*, 2017 ONCJ 151 at para 1, 138 WCB (2d) 73 [*Sledz*].

85 *Ibid* at para 20.

86 *Ibid* at para 4.

87 *Ibid* at paras 11-12.

88 *Ibid* at para 19.

89 Now a judge of the Ontario Superior Court.

90 *Sledz*, *supra* note 84 at para 8.

91 *Ibid* at para 9.

92 *Ibid* at para 10.

But when an accused is indigenous, I must think carefully about what having no surety available means to my decision. I have no doubt that your childhood has led to where you are now in life. You had no stability. You were taunted. You were subject to racism. You had no true identity of who you were. No doubt, there were some good and kind people who did their best for you. But I think you did not receive the love and nurturing needed. To grow up straight. To have good people in your life. Who took the time. Who meant something to you. Then and now.

As an indigenous person, you share a history. A common history with others. A history of being here on this land before the settler. A history of broken promises. Of illness and death. The loss of land. The indignity of colonization. Then there is the history of some deliberate state policies that tried to commit cultural genocide of indigenous people. Said crudely but accurately, policies that tried to kill the Indian in the Indian. As Canadians, we are all becoming more knowledgeable and sensitive to this history. And what it means.

This common history sometimes has greater meaning when it comes to the personal history of someone like you. That history has led to too many children in care of the state. Too many children divorced from their indigenous identity. Too many children who find themselves going from care to crime. Some of those children grow up to be adults who live at the margins of society. In poverty. Without much opportunity or connection. They are not embraced by the community. They do not have the friends and the family that the luckier of us take for granted. These are the friends and the family that can come forward to help. Like when you are accused of a serious criminal offence. This is you, Mr. Sledz.

There is a disproportionate number of indigenous persons in jail. That means sir that too many indigenous persons compared to their overall population in this country find themselves behind bars. Too often this starts at the pretrial stage when they cannot get bail. Finding a solution means we must start at the bail stage. We must look at each case. We must carefully look at the unique situation of each indigenous person. And we must try to find an answer. Even when that answer is hard to find. Just as a surety may be hard for you to find.

In this case, the difference between you and your co-accused is stark. They have family. You do not. Their family bailed them out. No one is here for you. They are out. You are in.

So when I look at your case and ask myself whether detention is the only answer, I must be mindful that I do not want to become part of the problem. Of course, it would be perfect if you had perfect sureties. But I believe there is a way you can be safely released. You and the young woman do not know each other. There was a period of some seven months after the alleged attack and before you were identified and arrested that you were out, free in the city. At no point during this time, did you bother this woman or try to seek her out, let alone cause her any harm. There is nothing in your personal history related this type of alleged sexual offence. No one suggests that you are some form of serial sexual predator. The Toronto Bail Program is willing to supervise you. They will offer you help as well. You will only be on bail for three months before you face trial along with your coaccused. Your indigenous identity has meaningfully contributed to the situation where you have no surety. No one to stand beside you. Given all this, I find that Crown has not shown why you must be detained. The Crown has not shown it to be necessary for the safety and protection of the community. To give you this release will

> further the goal of solving the evil that is the over-incarceration of indigenous people without sacrificing the goals of the bail law.[93]

There are four noteworthy aspects of this decision. First, a link is provided in the case between the historical circumstances of Indigenous people and the personal circumstances of Mr Sledz. He was not granted bail simply because Indigenous people suffered the impacts of colonialism, but because his personal circumstances were linked to a broader historical context.

Second, the disconnection Mr Sledz experienced from the Indigenous community was seen as a significant factor to be considered and that militated for his release. The court did not fall into the error of treating the guidelines developed in *Brant* (discussed earlier) that were relevant for Mr Brant's release in Tyendinaga into general principles that would make the release of an Indigenous person estranged from his community more difficult by virtue of that estrangement.[94] By recognizing that dislocation and estrangement were relevant circumstances for this Indigenous accused, the court also clearly came down on the *Kreko* side of the debate on whether estrangement from one's Indigenous community is a relevant circumstance of Aboriginal people.[95]

Third, the decision is an excellent example of following the Supreme Court of Canada's direction in *Ipeelee* that judges need to be front-line workers ensuring that systemic discrimination does not contribute to the continued overrepresentation of Indigenous people in custody.[96] Insisting that Mr Sledz meet the same requirements as others seeking bail, that is, a surety, when he would not be able to meet that requirement is an example of systemic discrimination. The desire for accused persons to have sureties is applied to all accused persons (where relevant and necessary), but treating everyone the same masks the inequities in such an insistence. Mr Sledz would not be able to provide a viable surety through no fault of his own but largely because of his circumstances as an Indigenous person. By looking beyond the requirement for a surety to what might address concerns around release while taking into account the realities faced by Indigenous people generally and Mr Sledz specifically, the court ensured that it was not allowing itself to "become part of the problem."

Finally, the decision is notable because it spoke clearly and directly to Mr Sledz. The decision is an excellent example of how complex legal issues can be delivered in

93 *Ibid* at paras 15-20.

94 *Brant*, *supra* note 44.

95 Following up on the discussion of this issue in Chapter 5, *Sledz* supports the analysis of the Ontario Court of Appeal in *Kreko*, as opposed to that advanced by the Alberta Court of Appeal in *Laboucane* and the Manitoba Court of Appeal in *Rennie*. See *R v Kreko*, 2016 ONCA 367, 131 OR (3d) 685 [*Kreko*]; *R v Laboucane*, 2016 ABCA 176, 337 CCC (3d) 445 [*Laboucane*]; *R v Rennie*, 2017 MBCA 44, 139 WCB (2d) 202 [*Rennie*].

96 *Ipeelee*, *supra* note 15 at para 67.

a way that the subject of the decision actually understands why the decision is being made. It would have been easy for the court to speak about balancing the onus on judicial interim release and the significance of the primary and secondary grounds for detention. The court would have arrived at the same decision, but it would have required Mr Sledz's counsel to spend time explaining to his client how and why the judge reached the decision he did. Speaking to Indigenous people so that they can understand why decisions are being made and in a manner that doesn't speak down to them can reduce some of the estrangement that Aboriginal people experience in the justice system. This approach is in keeping with the direction of the Supreme Court in *Gladue*.[97]

The second case, *Chocolate*,[98] is a decision of Shaner J of the Supreme Court of the Northwest Territories. Mr Chocolate was also charged with sexual assault. In his case the alleged assault occurred while he was in custody serving a sentence.[99] The Crown acknowledged that the case against him was not overwhelming, and estimated the chance of obtaining a conviction as "fair."[100]

Mr Chocolate was 21 years old.[101] The court described his criminal record as "extensive and largely uninterrupted," and it included several convictions for failure to comply with court orders.[102] He acknowledged that alcohol was a significant factor in his offending.[103] The Crown opposed his release on bail on the secondary and tertiary grounds.[104]

The bail release plan presented by Mr Chocolate would have him reside with his parents in Bechokǫ̀, a Tłı̨chǫ community located just outside of Yellowknife. He proposed that he be required to work and/or attend school, observe a curfew, and abstain from alcohol. His parents would provide a $500 cash surety.[105]

Mr Chocolate's father, Mr Mantla, testified at the bail hearing. He too had a significant criminal record, also including fail to comply offences. As with his son, he said that alcohol abuse was the main reason for his offending.[106] He had been sober for two years and his home was alcohol-free.[107] Both Mr Mantla and his father attended residential

97 *Gladue*, *supra* note 14 at para 61.

98 *Supra* note 28.

99 *Ibid* at para 2.

100 *Ibid* at para 66.

101 *Ibid* at para 11.

102 *Ibid*.

103 *Ibid* at para 17.

104 *Ibid* at para 7.

105 *Ibid* at para 20.

106 *Ibid* at para 28.

107 *Ibid* at para 29.

school, and he described it as a negative experience.[108] He acknowledged that he had not been there for his son as a result of his addictions and incarcerations.[109]

It was the Crown's contention that *Gladue* considerations only applied when considering the tertiary ground for detention and that an assessment of the secondary ground—danger to the public—should not be influenced by *Gladue* considerations.[110] In rejecting that argument, the court made important points about how consideration of a prior criminal record should be approached in light of *Gladue*:

> In my view, honouring the constitutional right to reasonable bail requires consideration of the socio-economic factors present in the life of any accused, regardless of whether they are Aboriginal. For many Aboriginal people who come before the courts, however, the factors identified in *Gladue* will form a large part of their overall socio-economic context. 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. There simply must be more than a superficial review of an accused's past criminal conduct and/or the circumstances leading to the current charge.
>
> 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.[111]

Here Shaner J is ensuring that what can be characterized as neutral factors applied equally to all persons seeking bail do not serve to systemically discriminate against Indigenous people. Also, importantly, the court is bringing a nuanced and contextual analysis to determining the weight to be placed on things such as prior criminal records and previous failure to comply convictions. These two factors must be considered in light of the broader history of Indigenous people's experience with the state generally and the criminal justice system specifically.

108 *Ibid* at para 27.

109 *Ibid* at para 28.

110 *Ibid* at para 40.

111 *Ibid* at paras 49-50.

As with *Sledz*, these considerations are not themselves determinative, but they provide a backdrop for applying the principles to the particular facts of the case. In that regard, the court found:

> A look at Mr. Chocolate's personal circumstances provides some explanation as to why he appears to have had such difficulty in complying with court ordered conditions in the past. Most of Mr. Chocolate's past encounters with the justice system occurred while he should have been under parental supervision, but at a time when it was not available to him because of what was going on in his family. From the evidence it appears he was often left to his own devices, with no guidance or supervision, and he got into trouble.
>
> I inferred from Mr. Mantla's testimony that his own problems with alcohol contributed in a significant way to a dysfunctional family and home environment in which Mr. Chocolate spent his childhood. It does not take a great leap in logic to conclude that a person with an alcohol dependency, who has frequent contact with the justice system, may not make being a responsible parent a priority. Indeed, Mr. Mantla admitted that in the past, he failed to keep his son from breaking the law. He stated he "did not really talk to Mikey back then" and that he was not "there" for his son when he was getting into trouble.[112]

The court also noted that Mr Mantla's personal circumstances had changed significantly and that while he might not have been a suitable surety in the past, his sobriety and employment now made him a good surety.[113] At the same time, Shaner J was not satisfied that the plan as presented would be able to sufficiently address concerns about safety of the public. In particular, the proposed curfew condition would allow Mr Chocolate too many opportunities to move about the community unsupervised and provide him with opportunities to breach his conditions.[114] On the other hand, complete house arrest would also be unworkable and counterproductive.[115] In the end he was released to his father and sister as sureties with conditions that included he reside at home unless working with his father, or he was reporting to the RCMP, attending court, or for medical issues, and that he abstain from the consumption of alcohol.[116] The abstain clause is clearly a challenging one, as discussed earlier. In this case, Mr Chocolate was prepared to abide by the condition. His commitment was perhaps more credible because he was attending Alcoholics Anonymous and had abstained from alcohol while in custody.[117] It was also significant that his father's home, where he would be staying,

112 *Ibid* at paras 55-56.

113 *Ibid* at para 57.

114 *Ibid* at para 61.

115 *Ibid*.

116 *Ibid* at para 76.

117 *Ibid* at para 17. The court commented that his abstention from alcohol while in custody was "not surprising, given that the use of alcohol and other intoxicants is prohibited in prison," although this may underestimate the significance of his sobriety. While it is of course correct

was alcohol-free. In other circumstances where, for example, there might be addictions services available in the community, attendance at such programs might make more sense than a complete abstention provision, but that option was not available.

Sledz and *Chocolate*, bail cases involving Indigenous people in urban and rural environments, in the north and south of the country, both estranged and connected to their communities, show how the *Gladue* principles can be given life in the bail context and allow for the release of Indigenous accused persons who, without such considerations, would surely languish in remand.

that alcohol is not allowed in jail, it is also true that it is widely available in jails, because inmates have many ways of making "home-brew." The ability of someone with an addiction to stay away from alcohol and drugs while in prison should be seen as some evidence of the strength of their commitment to sobriety because they are often tested in that commitment every day they are incarcerated, whether serving a sentence or on remand.

118 *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 [Charter].

119 [1987] 1 SCR 1045, 40 DLR (4th) 435.

120 51 CCC (3d) 265, [1990] NWTR 55 [*Chief*].

121 *Ibid* at para 2.

122 *Ibid* at paras 58, 65.