

Reducing the Overrepresentation of Indigenous Peoples in Canadian Prisons:
Bail and the Promise of Gladue Courts

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Thesis submitted in partial fulfillment of the requirements for the
Doctorate in Philosophy degree in Criminology

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ABSTRACT

This dissertation explores the promise of bail-oriented interventions vis-à-vis the overrepresentation of Indigenous peoples in Canadian prisons. While this research project argues that the bail system's underlying risk logic is inherently discriminatory against Indigenous peoples, it is proposed that specialized courts for Indigenous peoples – *Gladue Courts* – may be well-positioned to overcome systemic barriers to Indigenous peoples' release on bail. This research explores the extent to which two Toronto Gladue Courts have been able to produce equitable bail outcomes, as well as potential downstream effects of these outcomes, utilizing two unique and complementary longitudinal datasets from the Ontario Ministry of the Attorney General which span from 2006 to 2017. Analyses examine i) bail case characteristics, ii) bail processing and court processing measures, and iii) final case outcomes and sentences for Indigenous peoples' bail cases which were processed in these Gladue Courts compared to (predominantly non-Indigenous people's) bail cases processed in the conventional bail courts of these same courthouses. Study findings suggest that while these two bail populations shared many similarities, charges against the administration of justice were particularly widespread among Gladue bail cases. While Gladue Courts appeared largely successful in producing substantively equitable bail outcomes, the impact of these courts is limited by Gladue bail cases' disproportionate early guilty pleas and waiving of the right to bail. Despite the apparent successes of Gladue Courts with regards to bail, Indigenous peoples in Gladue bail cases continued to be disproportionately convicted and sentenced to custody compared to their conventional bail counterparts. Study findings are considered within the wider context of settler colonialism and Indigenous peoples' overincarceration and possible targeted solutions to this phenomenon are discussed.

ACKNOWLEDGEMENTS

I would like to begin by thanking my supervisor, Professor Cheryl Webster, for her expertise, guidance and unwavering support throughout my graduate studies. Having met her more than a decade ago at the beginning of my MA, Cheryl has played an instrumental role in shaping me into the researcher – and the person – that I am today. Cheryl's enthusiasm and encouragement have kept me motivated throughout the research and writing process and her thoughtful feedback and attention to detail have greatly strengthened my thesis. Cheryl has pushed me to be the best that I can be, and for that, I am truly grateful.

I also extend my gratitude to the members of my PhD Advisory Committee – Professor Kathryn Campbell and Professor Jane Sprott. I have appreciated their guidance, support and enthusiasm throughout the research process, as well as their valuable insights and helpful feedback on this dissertation.

Thank you to my thesis evaluators – Professor Carolyn Yule and Professor David Joubert. I appreciate the time and effort invested in reading and evaluating my dissertation and I am very grateful for their thoughtful comments, insights and questions.

I am also grateful to those who have assisted and guided me throughout my research, particularly in its formative stages. Thank you to Mr. Jonathan Rudin and others at Aboriginal Legal Services for discussing research ideas and providing insights into the operation of Gladue Courts “on the ground”. Thank you to the Ontario Ministry of the Attorney General and the Ontario Court of Justice for granting me access to the data which made this research possible. Thank you also to Professor Anthony Doob for assisting me in preparing my data request to the Ontario Ministry of the Attorney General and for guiding me in my early analyses.

I would also like to thank my friends and family for their support throughout my PhD. Thank you especially to my friend Andrew Bene for proofreading my dissertation and providing thoughtful comments for my consideration. Thank you also to Lucy, Kevin and Gemma for their unconditional support.

A special thank you to my husband, Paul, for his ongoing support. His encouragement and steadfast belief in my abilities have been an enormous comfort throughout my doctoral studies.

I would like to express my gratitude for the financial assistance that I received from the Social Sciences and Humanities Research Council (SSHRC) as well as the University of Ottawa.

Finally, I would like to acknowledge that, while at the University of Ottawa, I have been on the traditional and unceded territory of the Algonquin Anishinaabe people. I am grateful to be here today, living, working and enjoying this beautiful land which has been and continues to be cared for by generations of Algonquin people.

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1 – INTRODUCTION

It has long been accepted that Canadian prisons are disproportionately filled with Indigenous peoples¹. Evidence of Indigenous overrepresentation was first published more than fifty years ago², with this phenomenon receiving more serious scholarly attention in the late 1980s with Jackson's (1989) *Locking up Natives in Canada*. This paper argued not only that Indigenous overrepresentation had worsened over time, but also that "the figures are so stark and appalling that the magnitude of the problem [of Indigenous overincarceration] can be neither misunderstood nor interpreted away" (p.215). While more than thirty years have now passed since Jackson's report, and twenty years since the issue was labelled a "crisis" by the Supreme Court of Canada in *R. v. Gladue* (1999), the situation today remains as stark as ever, despite a multitude of federal, provincial/territorial and local efforts to address the issue³. In response, the Government of Canada has repeatedly expressed concern over the overrepresentation of Indigenous peoples in the criminal justice system, as well as a commitment to address the issue⁴. Furthermore, the Truth and Reconciliation Commission of Canada (TRC) (2015) issued a call to action that "federal, provincial, and territorial governments [...] commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade" (p.172; Call to Action #32). Arguably more than any other time in Canada's history, the overrepresentation of Indigenous peoples in the criminal justice system is widely recognized as a significant problem which requires urgent address⁵.

¹ In Canada, the term *Indigenous* (or previously *Aboriginal*) *peoples* refers to those who identify as First Nations (formerly "North American Indian"; status and non-status), Métis or Inuk/Inuit. See Rudin (2022, pp.61-62) for a discussion of the specific meanings of these terms. Indigenous peoples may live on reservations, in rural communities or in urban centres.

² See the Canadian Corrections Association's 1967 report *Indians and the Law*. See also the Law Reform Commission of Canada's 1974 report *The Native Offender and the Law*, prepared by Schmeiser, Heumann and Manning (1974).

³ For instance, the Canadian Department of Justice introduced the Aboriginal Justice Initiative in 1991, which later became the Aboriginal Justice Strategy. The primary purpose of this strategy has been to provide alternatives to mainstream justice processes by funding and supporting Indigenous community-based justice programs. Its long-term goals are to reduce crime and incarceration rates in communities where its programs operate and, more generally, to produce safer and healthier communities (Department of Justice, 2011).

⁴ Notably, Prime Minister Justin Trudeau's Mandate Letter to the Minister of Justice and Attorney General of Canada in 2015 directed that "initiatives to reduce the rate of incarceration amongst Indigenous Canadians" be implemented as part of a review of the criminal justice system (priority #5), while his 2021 letter directed this Minister to "[a]ddress systemic discrimination and the overrepresentation of [...] Indigenous Peoples in the criminal justice system and ensure all Canadians have access to fair and just treatment" (priority #6).

⁵ The topic of the overrepresentation of Indigenous peoples in the Canadian criminal justice system has received significant attention from scholars (e.g., LaPrairie 1992, 1997, 2002; Monture-Angus, 2000; Pelletier, 2001; Quigley,

Despite the attention generated by Indigenous overrepresentation in Canada, it has not always been understood what is meant by this common expression. Rudin (2006; 2022) explains that overrepresentation occurs when a greater proportion of a particular group is enmeshed in the criminal justice system than is represented in the general population. Thus, Indigenous overrepresentation is widely understood to occur when the proportion of Indigenous peoples involved in the criminal justice system (as offenders or as victims) is higher than their proportion within the general Canadian population⁶.

While it has been contended that Indigenous peoples are overrepresented at all stages of the criminal justice system, a lack of reliable data makes this statement difficult to evaluate empirically (Aboriginal Justice Inquiry of Manitoba (AJI), 1991; Dickson-Gilmore & LaPrairie, 2005; Rudin, 2006, 2022). Rudin (2022) explains that “there is no data that show, in any definitive sense, Indigenous participation in the criminal justice system as a whole” (p.47). Indeed, Dickson-Gilmore and LaPrairie (2005) note that police and courts in Canada have historically been prohibited from recording and reporting data on race (see also Millar & Owusu-Bempah, 2011; Rudin, 2022). Although there have been some jurisdiction-specific advancements in terms of race-based data collection, there remains a lack of comparable and longitudinal data at the national, provincial and territorial levels on Indigenous participation in the criminal justice system (Dickson-Gilmore & LaPrairie, 2005; Kong & Beattie, 2005; Millar & Owusu-Bempah, 2011; TRC, 2015).

While the existence of more reliable data would almost certainly not undermine any notions of the widespread overrepresentation of Indigenous peoples throughout the criminal justice system, this doctoral

1994; Roberts & Melchers, 2003; Roberts & Reid, 2017; Rudin, 2006, 2009, 2022; Zimmerman, 1992), government institutions and inquiries (e.g., the Aboriginal Justice Inquiry of Manitoba (AJI) 1991; the Osnaburgh/Windigo Tribal Justice Review, 1990; the Royal Commission on Aboriginal Peoples (RCAP), 1996; the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta (Task Force of Alberta), 1991; the Truth and Reconciliation Commission of Canada (TRC), 2015; the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG), 2019) as well as mainstream media outlets (e.g., Globe and Mail, 2015; Hamilton, 2016; Macdonald, 2016).

⁶ Rudin (2006; 2022) cautions against more simplistic conceptions of Indigenous overrepresentation. Indeed, the proportion of Indigenous prisoners in a given prison population cannot, by itself, demonstrate overrepresentation. Illustratively, if Indigenous peoples in province A make up 50% of the prison population but also 50% of the general population this is not evidence of overrepresentation. In contrast, if Indigenous peoples in province B constitute 5% of the prison population, but they make up only 1% of the general population, this would suggest that Indigenous peoples are, in fact, overrepresented at a rate of five to one. Thus, the relationship between the Indigenous criminal justice population and the general Indigenous population is crucial when assessing potential overrepresentation.

project (like most research addressing Indigenous overrepresentation) is framed primarily in the more restricted context of the overrepresentation of Indigenous peoples in Canada's penal institutions, that is, Indigenous overincarceration. This framing reflects the fact that admissions to correctional services is the only point in the Canadian criminal justice system at which Indigenous identity is consistently compiled and reported. These data thus arguably put forth the most compelling evidence of Indigenous overrepresentation⁷.

Furthermore, these data are startling. According to 2021 census data, Indigenous peoples accounted for 5.0% of the overall Canadian population (Statistics Canada, 2022e), or an estimated 4.5% of the adult population in 2018/2019 (Malakieh, 2020). In contrast, Indigenous peoples accounted for 30.4% of all adult admissions to provincial/territorial custody (both sentenced and remand) in 2018/2019⁸ – up from 22.6% ten

⁷ Nevertheless, these data are not without limitations. Notably, difficulties arise in determining both the numerator and denominator when evaluating rates of overincarceration of Indigenous peoples – both of which are likely to be underestimated. For the numerator, Rudin (2006) contends that correctional officers do not always ask incoming prisoners whether they identify as Indigenous and may not believe all those who do self-identify. Indeed, some correctional officers will rely on their personal assessments alone when determining Indigenous status. Rudin (2006) also notes that many Indigenous peoples coming into custody may be hesitant to self-identify as Indigenous, given concerns over potentially receiving harsher or discriminatory treatment. In terms of the denominator, Rudin (2006) explains that it can be challenging to reliably determine the number of Indigenous persons in the general national and provincial/territorial populations, which also tend to be underestimated. Most obviously, Statistics Canada notes with virtually every census that data are unavailable for *all* First Nations reserves. For instance, Statistics Canada (2017c) remarked that for the 2016 census, 14 Indian reserves or Indian settlements had not been completely enumerated: “dwelling enumeration was either not permitted or was interrupted before it could be completed” (para 1). Notably, for the 2021 census, 63 reserves or settlements could not be fully enumerated, with this significant increase being attributed to health and safety concerns related to Covid-19 as well as forest fires requiring evacuations (Statistics Canada, 2022b). Difficulties also exist in counting Indigenous peoples living in urban areas. Indeed, a non-trivial number of Indigenous peoples who are experiencing homelessness and living in major metropolitan areas are also likely to be missing from census data. For instance, a study by Our Health Counts - Toronto, which used respondent-driven sampling and did not require that respondents reside at a fixed address (and thus better accounted for those experiencing homelessness), estimated the city of Toronto's Indigenous population in 2016 to be 75,005 Indigenous residents (Smylie, McConkey, Blais, Bourgeois and Rotondi, 2022) compared to the 23,065 Indigenous residents of Toronto reported in the 2016 census. Hence census data tend to underestimate the number of Indigenous peoples living in Canada, both on- and off-reserve. Further, tracking Indigenous populations over time may be particularly challenging. Reporting changes tend to occur from one census to the next, related to an increased willingness on the part of Canadians to report being of Indigenous identity, in addition to demographic growth (Statistics Canada, 2007, 2017).

⁸ Note that correctional data available through Statistics Canada are generally produced for fiscal years (i.e., April 1 to March 31). While more recent correctional data are available than the 2018/2019 fiscal year, correctional admissions and count data were significantly affected by the Covid-19 pandemic and related efforts to reduce imprisonment and over-crowding in custody (see, for example, Statistics Canada (2020a) for an analysis of the effects of Covid-19 on custodial populations early in the pandemic). Hence data from 2018/2019 are the most recent data which were not affected by the pandemic. These 2018/2019 data also have the added benefit of being closer to the timeframe examined in this research study, which spans from 2006 to 2017.

years earlier in 2008/2009 (Statistics Canada, 2023c). Equally alarming, they represented 29% of all adult (sentenced) admissions to federal correctional facilities in 2018/2019 (Malakieh, 2020)⁹ – up from 18% ten years earlier in 2008/2009 and representing a 61% increase (Calverley, 2010)^{10,11}. Furthermore, Indigenous women are overrepresented in custody to a greater degree than men: in 2018/2019, they represented 42% of provincial/territorial custodial admissions (versus 28% for Indigenous men) and 41% of federal custodial admissions (versus 29% for Indigenous men) (Malakieh, 2020)¹². Despite variability across jurisdictions, Indigenous peoples are overrepresented in provincial/territorial correctional facilities in every Canadian province and territory¹³.

⁹ While provincial/territorial count data are not available, Indigenous peoples are also overrepresented in terms of *federal count* data – that is, the number of incarcerated individuals on an average day in federal custodial facilities. Indeed, there was an average of 4,168 Indigenous adults in federal custody in 2018/2019, comprising 29.5% of the federal custodial population (14,149) (Public Safety Canada, 2020).

¹⁰ Note that there has been some contradictory evidence as to whether Indigenous peoples are more likely than non-Indigenous people to receive custodial sentences and longer terms of incarceration. Some scholars have suggested that Indigenous offenders receive similar length or shorter custodial sentences, when controlling for demographic and legal factors (LaPrairie, 1990; Sprott, Webster & Doob, 2023; Stenning & Roberts, 2001; in Australia see Bond, Jeffries & Weatherburn, 2011; Snowball & Weatherburn, 2007). For a compelling critique of this overly simplistic argument, see Rudin and Roach (2002). For further empirical evidence of Indigenous overincarceration relative to non-Indigenous offenders, consider that Indigenous offenders have also historically accounted for a disproportionate number of prisoners deemed ‘dangerous offenders’ who are subject to indeterminate imprisonment (with a possibility for eventual parole). Indeed, there were 98 Indigenous persons deemed dangerous offenders in 2007 – representing 23% of the overall dangerous offender population (Valiquet, 2008).

¹¹ Furthermore, there is evidence to suggest that once in custody, Indigenous peoples, compared to non-Indigenous people, are more likely to receive higher security classifications (Public Safety Canada, 2020; Webster & Doob, 2004) and more likely to spend longer periods in segregation (Public Safety Canada, 2020). Even at the very end of the criminal justice process, Indigenous peoples, compared to non-Indigenous people, are more likely to be released only on statutory release or warrant expiry rather than on parole (Parole Board of Canada, 2009; Public Safety Canada, 2020).

¹² In comparison, 2021 Census data estimate that Indigenous women (and some non-binary persons) made up 5.05% of the female population while Indigenous men (and some non-binary persons) made up 4.89% of the male population (Statistics Canada, 2022e), meaning that the marginal differences in the general Indigenous population cannot account for these much greater differences in custodial admissions.

¹³ The highest rates of overrepresentation occur in the Western provinces and Ontario, with Indigenous peoples overincarcerated at a rate of 6.47 in Alberta, 5.48 in British Columbia, 4.57 in Saskatchewan, 4.39 in Ontario and 4.15 in Manitoba. Data used to calculate these rates were taken from the Aboriginal Peoples Highlight Tables, 2016 Census (to determine the proportion of Indigenous residents in each province, see Statistics Canada, 2017) and Statistics Canada Table 35-10-0016-01 - Adult custody admissions to correctional services by Indigenous identity, using data from 2018/2019 (to determine the proportion of provincial/territorial admissions for Indigenous peoples, see Statistics Canada, 2023c). The rate of overrepresentation is the proportion of Indigenous admissions divided by the proportion of Indigenous residents in each province/territory. Overrepresentation is least pronounced in Quebec and the Atlantic provinces, where Indigenous peoples are overrepresented in provincial custody at a rate of between 1.68 and 2.55. While the rates of overrepresentation in the territories are also reasonably low (YT = 2.84; NWT = 1.76; NVT = 1.10), this is largely due to the high proportion of Indigenous peoples living in the general territorial populations. Indeed, in some cases, higher rates of overrepresentation may be almost statistically impossible. While a rate of overrepresentation of 1.10 in Nunavut might be interpreted as low and reasonably unproblematic, close to 100 percent of individuals admitted

While these figures are certainly concerning, an examination of the issue of overincarceration using another common measure – imprisonment rates – further underscores the scope of the problem. Indeed, Sprott et al. (2023) estimate the imprisonment rate for Indigenous peoples in Canada in 2017/2018 to be 677 Indigenous prisoners per 100,000 Indigenous residents of Canada. This staggering figure is nearly ten times the estimate for non-Indigenous Canadians (78.6 non-Indigenous prisoners per 100,000 non-Indigenous residents) and actually exceeds that of the United States generally (655 prisoners per 100,000 residents) – a country widely considered to be the hallmark of mass incarceration (the Sentencing Project, 2020)¹⁴.

Despite the problem of Indigenous overincarceration being long-known, potential solutions have been less clear. While efforts to reduce the overincarceration of Indigenous peoples and ensure their more equitable treatment throughout the criminal justice system can (and should) be introduced at all stages or contact points in the justice process (as well as even earlier), the vast majority of interventions to date have been focused almost exclusively at the sentencing phase. Arguably, the (potentially short-sighted) rationale is that the overrepresentation of Indigenous peoples in correctional facilities is the direct result of custodial sentences handed down by sentencing judges. By this logic, attempts to reduce judicial recourse to imprisonment should lead to a decrease in the number of Indigenous peoples in these institutions.

Interventions focused on the sentencing phase find their impetus in s. 718.2(e) of Canada's *Criminal Code*. In this respect, a significant turning point in the efforts to address Indigenous peoples' overrepresentation in Canadian custodial facilities came in 1996 with the codification of the purposes and principles of sentencing in s.718 of the *Criminal Code*, with s.718.2(e) outlining the need for restraint in the use of imprisonment. While 718.2(e) dictates that restraint be used with all offenders, it subsequently singles out Indigenous offenders as a group requiring special attention. Indeed, it advises sentencing judges that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with

to custody in Nunavut are Indigenous and a rate of 1.10 is actually the highest possible rate of overrepresentation, given that 85.9% of the general population of Nunavut identify as Indigenous.

¹⁴ Moreover, Sprott et al. (2023) note that whereas the non-Indigenous imprisonment rate decreased by about 20% from 1996 to 2017/2018, the Indigenous imprisonment rate actually increased by roughly 33% during this period.

the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders*” (emphasis added)^{15,16}.

Perhaps equally notable, the remedial nature of this sentencing provision received Supreme Court of Canada imprimatur shortly after its codification, in its unanimous *R. v. Gladue* (1999) decision. In particular, the Court explained that 718.2(e) was not merely a codification of pre-existing sentencing principles, but that it was remedial in nature and intended to reduce the overrepresentation of Indigenous peoples in prisons. Indeed, Cory and Iacobucci JJ noted that s. 718.2(e) “creates a judicial duty to give its remedial purpose real force” (para 34). Furthermore, the Court appeared to recognize the negative impact of Canada’s settler colonial practices on Indigenous peoples and emphasized the importance of conceptualizing any criminal behaviours within this wider context. Specifically, the Supreme Court mandated that when sentencing an Indigenous offender, a judge must consider:

(A) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. (para 66)

This provision, and the applicability of what have become known as *Gladue principles* and *Gladue factors*, were later reaffirmed and expanded upon by the Supreme Court of Canada in *R. v. Ipeelee* (2012). In fact, this later decision can be understood as a critique of the hesitancy and haphazard implementation of s.718.2(e) and Gladue principles by the courts. In *Ipeelee*, the Court also further acknowledged the specific connection between the nation’s settler history and Indigenous overincarceration when it stipulated that judges must consider “such matters as the history of colonialism, displacement, and residential schools and how that

¹⁵ Note that the direction that alternative sanctions must be “consistent with the harm done to victims or to the community” was only added to s.718.2(e) in 2015. Rudin (2022) suggests, however, that its addition has had limited impact due to similar concerns for victims and the community already being included the objectives of sentencing outlined in s.718 and in *R. v. Gladue* (1999), *as well as the challenges* associated with considering the wishes of the community.

¹⁶ The *Youth Criminal Justice Act* – the Canadian criminal statute that governs youth between the ages of 12-17 years at the time of an (alleged) offence – contains a similar provision in its outline of the Purposes and Principles of Sentencing which instructs judges that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, *with particular attention to the circumstances of aboriginal young persons*” (s.38(2)(d), emphasis added).

history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples” (para 60) when determining a sentence. Moreover, LeBel J. explained that while systemic and background factors provide important context to an Indigenous person in the criminal justice system, these factors need not be explicitly, nor causally linked to any offending behaviour. Furthermore, he clarified that Gladue principles, contrary to many lower courts’ interpretations, continue to apply to Indigenous persons even when charged with serious and/or violent offences, as well as for those who have been subjected to a long-term supervision order.

Despite these legislative efforts to address Indigenous overincarceration and the Supreme Court’s calls to action, the implementation of s.718.2(e) and ensuing Gladue principles for sentencing have been largely unsuccessful in addressing Indigenous overincarceration (e.g., Balfour, 2012; Pelletier, 2001; Roach 2009; Rudin, 2008, 2009, 2022)¹⁷. It may be that s.718.2(e) – on its own – is simply too limited in its reach. As a window into the potential limits of this legislation, consider that Indigenous peoples have actually accounted for a growing proportion of those given non-custodial sanctions – both conditional sentences and terms of probation (Sprott et al., 2023). This increased representation within *community* corrections might suggest that judges are, in fact, making efforts to craft non-custodial sentences for Indigenous offenders. However, there are many other determinants of the imprisonment rate which are almost entirely outside of their influence, such that judges’ proverbial hands may be largely tied at this point in the judicial process – at least in part – due to prior decisions made ‘upstream’ in the criminal justice system.

This dissertation explores this possibility. That is, this dissertation examines whether the enormous focus to date on addressing Indigenous overincarceration through sentencing ignores the impact of decisions made at earlier stages of the criminal court process. Specifically, I examine the bail process as yet another

¹⁷ Indeed, in the direct aftermath of s.718.2(e) (from 1997/1998 to 2000/2001), the volume of Indigenous admissions to sentenced provincial/territorial custody increased by 3%, whereas non-Indigenous admissions declined by 22% (Roberts & Melchers, 2003). During this same period, the proportion of Indigenous admissions to sentenced provincial/territorial custody rose from 17% to 19% while the proportion in sentenced federal custody remained stable at 17% (Carrière, 2003; Hendrick & Farmer, 2002).

decision-making point that may contribute to the overincarceration of Indigenous peoples in Canada. In particular, this research explores the potential of Gladue Courts – specialized courts for Indigenous peoples which were developed in response to *R. v. Gladue* to better account for systemic issues facing this population – in terms of the ways in which these courts handle bail cases. Indeed, this doctoral research seeks to explore the largely untested promise of Gladue Courts as they relate to the bail process and the overrepresentation of Indigenous peoples in Canadian penal institutions. Using a case study of two prominent Toronto Gladue Courts, this research examines the types of bail cases being heard in these courts and how cases are processed through the bail phase and the court system more generally, as well as eventual case and sentencing outcomes for Gladue bail and conventional bail cases. This research seeks to explore whether the bail processes in Gladue Courts may be able to better address Indigenous overincarceration and whether these processes may have far-reaching consequences later in the sentencing phase of the court process.

To this end, this thesis will begin, in Chapter 2, by contextualizing the issue of Indigenous overincarceration within Canada’s wider socio-political backdrop. In particular, settler colonialism is explored as a conceptual framework for understanding how Indigenous peoples have come to be overrepresented in penal institutions across Canada. It is also argued that the Canadian criminal justice system is a settler colonial system which systemically discriminates against Indigenous people. Chapter 3 begins by outlining the various mechanisms through which the bail system – as a settler colonial system – may be contributing to Indigenous peoples’ mass incarceration. The chapter subsequently turns its attention to possible strategies for intervention at the bail stage of the court process and explores the apparent – although largely untested – promise of Gladue Courts in reducing Indigenous overincarceration through more equitable bail treatment. Chapter 4 explains the research methodology and details the lengthy, qualitatively-informed knowledge-gathering process which preceded formal quantitative data analyses. This chapter also describes the process of accessing data – including a new variable produced specifically for this research – from the Ontario Ministry of the Attorney General, as well as the aggregation process which produced the two complementary datasets used in this research. In Chapter 5, data analyses are presented, including in-depth comparative analyses

between Gladue Court bail cases and non-Gladue (read: conventional bail) cases in terms of case characteristics, bail and general court processing, as well as case outcomes and sentences. Two regression models are then presented which explore factors related to bail outcomes and case outcomes, before comparative longitudinal analyses examine several bivariate relationships throughout the study period. These research findings are discussed in Chapter 6 within the wider context of the overincarceration of Indigenous peoples in Canada and the search for potential solutions to this phenomenon. Finally, this dissertation concludes in Chapter 7 with broader reflections on study limitations and paths forward in the pursuit to remedy Indigenous overincarceration, as well as discussion of this research's many criminological contributions.

2 – CONCEPTUAL FRAMEWORK

2.1 – Settler Colonialism as the Root of Indigenous Overincarceration

Any discussion of Indigenous overincarceration in Canada must be situated within the context of settler colonialism and the nation's historical and ongoing treatment of Indigenous peoples. The Royal Commission on Aboriginal Peoples (RCAP) (1996) has emphasized that “what happens in one discrete area like ‘criminal justice’ cannot be separated from the broader context of Aboriginal experiences in Canadian society and under the Canadian legal and political regimes” (p.5). Moreover, Cunneen and Tauri (2016) contend that an analysis of settler colonialism¹⁸ – while absent from much criminological literature – is necessary for any exploration of Indigenous overrepresentation in settler colonial justice systems, as well as in the search for meaningful solutions to this issue. Indeed, Indigenous overincarceration may be understood, at least in part, as a product of Canada's ongoing settler-colonial relations with Indigenous peoples.

Settler colonialism provides a useful conceptual framework for understanding Indigenous overincarceration in that it not only contextualizes this issue, but it also unifies more simplistic understandings within a much wider (historical, cultural, social and legal) framework. Indeed, whereas some explanatory models have been overly narrow in scope and simplistic in their conceptualization of the problem, settler colonialism goes beyond these surface-level explanations when attempting to comprehend the overrepresentation of Indigenous peoples. Specifically, while causes of overrepresentation rooted in Indigenous peoples' marginalized positions in society and associated higher crime rates, as well as those linked to criminal justice system bias may present as somewhat obvious, discussion of settler colonialism helps to contextualize these explanations by shedding light on what are perhaps less obvious forces at play. That is, settler colonialism identifies the underlying processes which have produced these more empirical, easily identifiable causes.

¹⁸ Settler colonialism is a relatively recent scholarly field, despite settler colonial projects having existed for centuries. Veracini (2010) suggests that Wolfe's *Settler Colonialism and the Transformation of Anthropology* (1999) was a starting point in the divergence of settler colonialism as a distinct structure of inquiry. Settler colonialism has slowly gained traction in the scholarly community generally, as well as in discussions of the overincarceration of Indigenous peoples specifically (e.g., in Canada, see Chartrand, 2019; Dickson & Stewart, 2021 and Razack, 2015; internationally, see Cunneen & Tauri, 2016).

Broadly, settler colonialism is characterized by a *continuing and ongoing* project of colonization (Razack, 2015; Veracini, 2010; Wolfe, 2006). Whereas colonizers in colonial states rely on a relationship of domination over an Indigenous majority, settlers seek to disappear the Indigenous population (Veracini, 2010, 2011). Whereas colonial powers eventually return to their country of origin, settlers stay (Veracini, 2010, 2011). An examination of settler colonialism thus considers how colonizing efforts have been, and continue to be, exerted from within the 'settled' locale (Veracini, 2010). That is, settler colonialism is a structure of governance which persists within the settled territory, despite its (never realized) goal of achieving a post-colonial or truly settled state in which settlers have eradicated and replaced those Indigenous to the land (Veracini, 2010; Wolfe, 2006)¹⁹. Settler colonial situations consist of three essential parties: the settler collective, the Indigenous Other and the exogenous Other (Veracini, 2010). The settler collective are outsiders who attempt to establish themselves as normative and righteous, entitled to rule permanently over the settled locale (Veracini, 2010). Like the settler collective, exogenous Others also originate from outside the settled locale, but are not (yet) considered a part of the settler body politic. In contrast, Indigenous Others are people who are indigenous to the land, and so do not belong to the settler collective (Veracini, 2010). Indigenous Others are generally considered by the settler collective to be uncivilized or "degraded" and unworthy of occupying the territory sought by the collective (Veracini, 2010, p.19)²⁰.

Unlike with colonial projects, the ultimate goal of settler colonialism is not the exploitation of Indigenous peoples, but rather their disappearance or their *elimination* (Razack, 2015; Wolfe, 1999, 2006). Indeed, Wolfe (1999) explains that "settler-colonization is at base a winner-takes-all project whose dominant

¹⁹ On this note, Veracini (2010) contends that total settlement is never actually achievable. Rather, a settler colonial situation is "characterized by the promise rather than the practice of a truly 'settled' lifestyle" (p.23). Thus, the structures and practices of settler colonialism are continuous and ongoing.

²⁰ The belief in the righteousness of certain populations and the degradation of other, largely racialized populations, calls attention to race thinking, which has been central to Western imperial endeavours for centuries (Razack, 2010). According to Razack (2010), race thinking is a mode of thought which "divides up the world between the deserving and the undeserving according to racial descent" (p.91). Within a settler colonial society such as Canada, race thinking has manifested itself in the belief that inhabitants are either 'civilized', as with the settler collective, or inherently 'primitive' and 'savage', as with Canada's Indigenous populations.

feature is not exploitation but replacement. The logic of this project [is] a sustained institutional tendency to eliminate the Indigenous population" (p.163). Similarly, Veracini (2010, 2011) asserts that the defining feature of settler colonialism is *Indigenous transfer*, or the removal of Indigenous populations from the body politic. Broadly, then, the central objective of settler colonialism is to eradicate and replace the Indigenous population with a sovereign settler collective. Indeed, settler colonial situations are characterized by a large group of outsiders transferring their bodies and their culture to a new locale. However, in order to claim sovereignty over these newly settled territories and impose settler values and laws on inhabitants, additional transfer must occur. Specifically, if settlers are ever to achieve a truly settled society, Indigenous and exogenous Others must be transferred out of the new body politic (Veracini, 2010). Thus, the initial transfer of settlers into a new territory is followed by the transfer(s) of Others out of this same territory.

Razack (2010) notes that in settler society "[v]iolence against the racialized Other comes to be understood as necessary in order for civilization to flourish, something the state must do to preserve itself" (p.91). The transfer of Indigenous Others is generally prioritized in that their continued existence threatens to delegitimize the settlers' claim to Indigeneity, whereas the presence of exogenous Others would tend to legitimize this claim²¹ (Veracini, 2010; Wolfe, 2006). Thus, Indigenous transfer can be understood as a means of self-preservation for the settler collective. Yet despite the clearly violent objective of elimination, settler colonial projects are also characterized by a disavowal of any foundational and ongoing violence (Veracini, 2010). Instead, settler societies are reconstructed to be the result of peaceful settlement and non-violent dealings, with the effect that "images of 'peaceable assimilation' continuously coexist with genocidal impulses" (Veracini, 2010, p.25).

²¹ Razack, Smith & Thobani (2010) note in their discussion of race politics within Canadian settler society that "Indigenous peoples [are] marked for physical and cultural extinction, European settlers for integration, and people of colour for perpetual outsider status as 'immigrants' and 'newcomers'" (p.5). This characterization essentially summarizes Veracini's (2010) discussion of transfer with regards to the Indigenous Other, the settler collective, and the exogenous Other.

2.1.1 – Settler Colonialism in Canada

Throughout the history of what is now recognized as Canada, governmental policies and practices have regularly been developed with the goal of ridding society of Indigenous peoples, whether physically or figuratively²². Indeed, Canada has practised numerous modes of Indigenous transfer throughout its history. While a variety of forms of Indigenous transfer have been utilized in Canada since the time that French and British settlers arrived in the seventeenth century, strategies for transfer became much more systematized following Confederation. It is not coincidental that the *Indian Act* – race-based legislation which applies only to status First Nations people – was first passed in 1876 and has been amended many times since. In essence, this legislation gave the Canadian government (as the settler collective) the authority to govern over Indigenous peoples and their lands in ways which often led to their elimination. In fact, Rudin (2006) suggests that “Canadian governments since [Confederation] pursued a generally single-minded policy aimed at ensuring the disappearance of Aboriginal people in Canada”²³ (p.25; see also Rudin, 2022). While Canada has employed many forms of Indigenous transfer, three notable strategies used in Canada are *ethnic transfer*, *transfer by assimilation* and *Indigenous institutionalization*²⁴.

Ethnic transfer occurs when Indigenous communities are forcibly removed from their lands and relocated at the discretion of the settler government, often into comparatively small and barren land reservations (Veracini, 2010)²⁵. Ethnic transfer is widespread throughout Canadian history. Many Indigenous

²² While some settler policies aim to physically eliminate Indigenous peoples through death or confinement, other policies have been implemented with the objective of eliminating Indigenous peoples figuratively, such that their claims to Indigeneity cease to exist (e.g., policies of forced enfranchisement or various assimilative policies).

²³ Among these, Rudin (2022) lists “the relocation of Indigenous people to often marginal land bases, criminalization of spiritual practices, and severe restrictions on the fundamental rights and liberties of Indigenous people with respect to freedom of speech and assembly, mobility, and voting. *Indian Act* provisions regarding enfranchisement forced Indigenous people who had ambitions to move outside of the reserve community to give up their status, and discriminated against Indigenous women and their children on the basis of the status of the man the woman had married.” (p.54)

²⁴ Note that a full discussion of the many settler colonial policies and practices implemented in Canada is beyond the scope of this research. Instead, this section explores three common and widespread forms of Indigenous transfer in order to illustrate some of the ways in which Canadian settler colonial practices have aimed to eliminate Indigenous peoples from the settler body politic and the disastrous consequences of these practices.

²⁵ Beyond the more obvious physical transfer of Indigenous bodies, Veracini (2010) notes that a conceptual transfer also occurs. When Indigenous peoples are displaced from their homelands, they become ‘refugees’ forced to live on small areas of lands from which their people did not specifically originate, and so any claims of indigeneity to their lands arguably cease.

peoples, particularly First Nations peoples, were forced from their traditional and sacred lands and into reserves so as to free up economically valuable lands for settlement and exploitation. Settler governments did not typically respect Indigenous land claims and were content to take lands from Indigenous peoples while offering little to no benefit in return (AJI, 1991). In many cases, settler governments negotiated (sometimes misleading) treaties with First Nations²⁶, while in other cases, they simply claimed land ownership through occupation or seizure, without the consent of its Indigenous occupants²⁷ (TRC, 2015). On some occasions, the government even forced First Nations peoples and Inuit to relocate their settlements, typically to more remote and less resource-rich areas²⁸.

Transfer by assimilation is a process through which an Indigenous person is transformed and purportedly ‘uplifted’ into a ‘righteous’ member of the settler collective (Veracini, 2010). That is, transfer by assimilation is a process through which the ‘degraded’ Indigenous Other is transformed and ‘elevated’ into a righteous member of the settler collective through the imposition of settler traits which are expected to facilitate Indigenous peoples’ absorption into the settler body politic (Veracini, 2010). While assimilative policies have taken many forms, residential schools were considered by the Canadian government to be particularly effective²⁹. By impeding the inter-generational transmission of supposedly inferior Indigenous cultures and norms, and instead exposing Indigenous children to Euro-Christian beliefs and modes of life, it was believed that residential schools could more effectively transform and ‘elevate’ Indigenous children into

²⁶ The TRC (2015) contends that treaty negotiation, “while seemingly honourable and legal, was often marked by fraud and coercion” (p.1).

²⁷ Indeed, European settlers typically adhered to the *Doctrine of Discovery*, whereby it was believed that their racial and cultural superiority gave them sovereignty and title rights over any non-European lands that they ‘discovered’ (Monchalin, 2016; TRC, 2015).

²⁸ See Campbell (2007) for a discussion of the long-term and devastating emotional, social and cultural effects of displacement on one Indigenous community in northern Canada which was forced to relocate from its ancestral island to the mainland as a result of hydroelectric development.

²⁹ As part of the 2006 *Indian Residential Schools Settlement Agreement* (IRSSA) (an agreement made in response to the largest class action lawsuit in Canada’s history), the Truth and Reconciliation Commission (TRC) (2015) was established for the purpose of conducting an inquiry into the Canadian residential school system. The TRC (2015) has contended that this process of assimilation resulted in *cultural genocide*. The commission defines cultural genocide as “the destruction of those structures and practices which allow the group to continue as a group” and involves “families [being] disrupted to prevent the transmission of cultural values and identity from one generation to the next” (p.1). Thus, transfer by assimilation and cultural genocide may be considered two sides of the same coin. Whereas the concept of transfer by assimilation focuses on the Indigenous Other adopting new and exogenous structures and practices, cultural genocide addresses the Indigenous populations’ consequential loss of their own structures and practices.

what was considered the superior and more civilized settler culture (TRC, 2015; see also Rudin, 2022)³⁰. The Canadian government estimates that at least 150,000 Indigenous children passed through this system which operated through a partnership with churches of various denominations (TRC, 2015). Indigenous cultures and languages were forbidden and widely disparaged in these schools. The conditions in residential schools reflected a general disregard for the well-being of Indigenous students. The TRC (2015) describes that many students “were fed a substandard diet and given a substandard education, and worked too hard. [...] they died in tragically high numbers. Discipline was harsh and unregulated; abuse was rife and unreported. It was, at best, institutionalized child neglect” (p.43). In sum, life in residential schools tended to be both alienating and devastating for Indigenous children.

Lastly, *Indigenous institutionalization* occurs when Indigenous peoples are compelled to leave their land and community in order to be confined in a distant and highly regulated institution. Indigenous institutionalization has taken many forms throughout Canada’s history, including the residential school system, as well as the institutionalization of Indigenous children in the child welfare system. Believing that Indigenous values, ways of life and parenting styles are inferior, settlers have often felt that Indigenous parents were neglectful and unfit to care for their children. As residential schools slowly began to close in the 1960s, many children were sent to foster homes instead (Milloy, 1999), in what became known as the ‘Sixties Scoop’³¹. Indeed, there was a general “transferring of children from one form of institution, the residential school, to another, the child-welfare agency” (TRC, 2015, p.68). Many Indigenous communities lost most – or in some cases, all – of their children to child welfare agencies (Rudin, 2006, 2022). The TRC (2015) contends that this practice of widespread child apprehension continued until at least the mid- to late-1980s and

³⁰ Note that the language which frames discussions of assimilation (e.g., ‘education’, ‘elevation’ and ‘civilization’) acts to mask the inherent violence of forceful transformation. Characteristic of settler colonial projects, Canada’s violent policies were reconstructed as an attempt to ‘do good’ and to benefit Indigenous peoples, and thus to perpetuate what Regan (2010) refers to as the Canadian myth of the ‘benevolent peacemaker’. Similarly, Woolford and Benvenuto (2015) argue that the Canadian myth of the ‘peaceful frontier’ has contributed to a widespread denial of the genocide caused by these settler colonial practices.

³¹ Recognizing the harms caused by the Sixties Scoop, the federal government settled a class action lawsuit in 2018 on behalf of all status or registered Indians who were removed from their homes between 1951-1991 (Rudin, 2022). To illustrate the scope of this practice, the Sixties Scoop Settlement website (<https://sixtiescoopsettlement.info/>) notes that 34,785 claims were received (and 21,173 claims approved).

continues at elevated rates still to this day. Moreover, despite the mission of child welfare agencies to protect and care for children, this has rarely been the case. Children who are not adopted are often placed in a succession of foster and/or group homes in which neglect and abuse are commonplace (Rudin, 2006, 2022; TRC, 2015). Even those who are adopted are almost exclusively placed with white families and tend to be – once again – cut off from their communities and culture (Rudin, 2006, 2022; TRC, 2015).

While settler colonialism helps to explain some of the processes which have produced the overrepresentation of Indigenous peoples in Canadian penal institutions, it notably also offers its own distinct explanation for this phenomenon. Indeed, Veracini's (2010) notion of Indigenous institutionalization is also referred to as Indigenous incarceration. Thus, while Indigenous peoples were earlier confined in residential schools and later foster homes, they have now been partially transferred out of the settler collective and into a new type of institution – penal institutions. Perhaps unsurprisingly, Canadian prisons have, at times, been referred to as the 'new' residential schools (e.g., Macdonald, 2016). Indeed, Chartrand (2019) contends that the penitentiary and other carceral institutions (e.g., youth detention centres) have replaced reserves and residential schools as the primary manifestation of settler colonialism. This scholar suggests that this shift toward the criminal justice system and penal institutions has concealed the settler colonial logic of elimination, which is now obscured in the language of criminal justice, reform and rehabilitation. In fact, Arbel (2019) contends that the mass imprisonment of Indigenous peoples in Canada³² is actually a predictable by-product of Canada's (settler) colonial legal system.

Overall, the Canadian settler government has employed numerous methods of Indigenous transfer, both historically and presently³³. Whether through dislocation, assimilation or institutionalization, the end

³² Arbel (2019) prefers to characterize the situation as mass imprisonment, rather than simply overincarceration. Moreover, this scholar explicitly rejects the use of the term "crisis" to describe Indigenous mass imprisonment, asserting that this term suggests that this phenomenon is somehow atypical and transient, whereas in reality it is longstanding and persistent, a foreseeable outcome in a (settler) colonial society. She further contends that when those employed in the legal system use the term "crisis", it obscures the role that this very system is playing in producing this phenomenon, serves to normalize it and invites complacency: "[t]o continue to indulge in this language [of "crisis"], rather than rethink its use, is to perpetuate Indigenous mass imprisonment and to reinforce the colonial structures that enable it to thrive" (Arbel, 2019, p.456).

³³ While Prime Minister Stephen Harper formally apologized on behalf of Canada for the Indigenous residential school system in 2008, it is important to note that national apologies (as well as national inquiries or inquests, see Razack,

result has generally been the same for Indigenous peoples. That is, it has constituted, in many respects, a devastation of their cultural traditions and their sense of belonging (on an aggregate level), as well as repeated experiences of physical, psychological and sexual harm (on an individual level). The ongoing legacy of settler colonialism thus emerges as a useful lens which offers a more sophisticated understanding of the intergenerational socio-economic marginalization of Indigenous peoples, as well as the continued existence of racist or discriminatory criminal justice practices. Indeed, the central notions of a continuing and ongoing project of colonization, the existence of race thinking and, perhaps especially, the underlying objective of the elimination of Indigenous peoples shed important light on how Indigenous overincarceration has come to proliferate.

2.2 - The Ongoing Legacy of Settler Colonialism: Socio-Economic Marginality

A discussion of settler colonialism provides an important context which goes well beyond the traditional and relatively simplistic explanations for Indigenous overincarceration which are rooted in socio-economic marginality and higher crime rates. This traditional explanation argues that Indigenous peoples are incarcerated at disproportionately high levels because they commit criminal offences at disproportionately high rates (e.g., LaPrairie, 2002; Stenning & Roberts, 2001). It is typically linked to a discussion of Indigenous marginalization and how these socio-economic characteristics (e.g., low educational attainment, unemployment, poverty, history of violent victimization, substance use) are considered ‘risk factors’ for criminal behaviours. Given the apparent high-risk status of so many Indigenous peoples, the argument follows that many of these individuals will engage in criminal activity, in turn leading to criminal charges, convictions, and ultimately incarceration.

We must, however, consider the wider historical, cultural, social and legal context through which this marginalization has been produced. Rather than accept – at face value – that Indigenous peoples tend to be more marginalized and consequently have higher crime rates, Rudin and Roach (2002) assert that scholars

2015) do not denote an end to settler colonialism. In fact, such gestures can be understood as a settler strategy for placing wrongdoing in the past in order to distract from continued and ongoing harms, while perpetuating the notion of Canadian settlers as a well-intentioned and benevolent people, and thus not disrupting the status quo (Chartrand, 2019).

must ask *why* Indigenous peoples have come to occupy these disadvantaged positions in Canada. The answer is intimately tied to the ongoing legacy of settler colonialism and the various modes of elimination employed by the Canadian government throughout its history³⁴. Indeed, failed policies of Indigenous transfer have left behind a trail of pain, suffering and disadvantage which have, and continue to be, transmitted intergenerationally.

2.2.1 – Socio-Economic Marginalization in the Context of Settler Colonialism

The ethnic transfer of Indigenous communities from their traditional lands to remote and often desolate territories has had a myriad of adverse effects on Indigenous communities (AJI, 1991; Jackson, 1989; *R. v. Gladue* (1999)). In its discussion of the consequences of dispossession, the Osnaburgh/Windigo Tribal Council Justice Review Committee (1990) explained that, for many Indigenous peoples, “the only reaction to situations of despair, poverty and powerlessness manifests itself in alcoholism, substance abuse, family violence and suicide to name but a few” (p.5). For many Indigenous peoples and communities, other consequences of dislocation include loneliness, community fragmentation and unemployment (*R. v. Gladue* (1999)) as well as low income (Jackson, 1989; *R. v. Gladue* (1999)).

Likewise, the ongoing legacy of residential schools has had similarly adverse effects on Indigenous populations. Given the settler government’s general disdain for Indigenous peoples, it may be unsurprising that these schools failed to meet children’s needs on virtually every level (Milloy, 1999; TRC, 2015)³⁵. The quality of care and education in residential schools “ensured that students could not participate socially or economically in the dominant society, but also prevented them from returning to their traditional ways of life” (Hare & Barman, 2000, p.300). One of the most apparent effects of the Indian residential school system

³⁴ Interestingly, Rudin and Roach (2002) have argued that by ignoring the role played by (settler) colonialism in Indigenous overrepresentation in Canada, we may in some ways – conceptually, at least – be facilitating the attainment of its primary goal – Indigenous transfer. Specifically, the classic socio-economic explanation of Indigenous overrepresentation (which does not consider Indigenous peoples’ unique and systemic experiences of settler-colonialism) actually risks assimilating Indigenous peoples into the general Canadian population as ‘just another disadvantaged minority group’.

³⁵ Indeed, as a result of “chronic underfunding” (TRC, 2015, p.59), children in residential schools were often taught in understaffed (Hare & Barman, 2000; Milloy, 1999; TRC, 2015), overcrowded classrooms, in a language foreign to them and through a culturally inappropriate curriculum (TRC, 2015).

for former students – or *survivors* – is (somewhat ironically) low educational achievement levels and associated unemployment and low income. As a result of this grossly flawed school system, the vast majority of students failed to meet the educational expectations set out by the settler government (TRC, 2015)³⁶. Furthermore, this sub-standard and culturally alienating education appears to have influenced the decision of survivors to end their formal educational pursuits much earlier than other Indigenous peoples³⁷.

Yet, the harm and suffering caused by the residential school experience did not cease when these schools closed. For many survivors of the residential school system, their traumatic experiences during their time in these institutions have had far-reaching repercussions. Indeed, harm and suffering caused by residential schools is intergenerational whereby its effects continue to be felt by survivors' loved ones and their communities³⁸. Milloy (1999) explains how being taken from parents and communities, raised in sterile and cold institutions, never hugged or comforted growing up and taught to be ashamed of oneself and one's culture often produced adults who struggled to form loving and nurturing relationships with their own children (see also TRC, 2015). Similarly, many Indigenous peoples institutionalized in the child welfare system have also struggled to develop healthy parenting skills (TRC, 2015)³⁹. This appears to have produced a vicious cycle whereby individuals' parenting struggles, combined with "prejudicial attitudes toward Aboriginal parenting skills and a tendency to see Aboriginal poverty as a symptom of neglect, rather than as a consequence of failed government policies" (TRC, 2015, p.138) have led to a continuation of elevated rates

³⁶ Illustratively, the TRC (2015) reveals that "[f]rom 1940–41 to 1959–60, 41.3% of each year's residential school Grade One enrolment was not promoted to Grade Two. Just over half of those who were in Grade Two would get to Grade Six" (p.71). Underlining the failures of residential schools to educate children, one residential school principal noted in 1923 that "when [students] return to the Reserves they have not enough education to enable them to transact ordinary business—scarcely enough to enable them to write a legible letter" (quoted in TRC, 2015, p.71).

³⁷ Symptomatically, high school non-completion rates for residential school survivors and other Indigenous peoples are 36% and 28% respectively, according to data from the 2006 Aboriginal Peoples Survey (Bougie & Senécal, 2010).

³⁸ See Gagné's (1998) case study of the James Bay Cree for a discussion of the ways in which the effects of trauma have become intergenerational within many First Nations communities.

³⁹ To illustrate the scope of parenting challenges, data from the 2019 General Social Survey (GSS) indicate that Indigenous peoples are more likely to have experienced harsh or severe parenting compared to non-Indigenous people (78% versus 66%) (Perreault, 2022). The GSS defines harsh or severe parenting practices as including spanking, slapping on the hand, saying hurtful comments and making children feel unwanted or unloved, whether perpetrated by biological parents, step-parents, foster parents, or other guardians (Perreault, 2022). More specifically, Indigenous respondents were far more likely than non-Indigenous respondents to report having felt unwanted or unloved on multiple occasions as a child (17% versus 7.8%) and not having basic needs (e.g., washing, feeding, clothing) met on multiple occasions during their childhood (7.6% versus 1.4%) (Perreault, 2022).

of child apprehension among Indigenous peoples⁴⁰.

Experiences in residential school and the child welfare system have also had serious detrimental and intergenerational effects on Indigenous peoples' mental and physical health. Psychologically, children suffered as a result of the residential school system's constant and pervasive denigration of Indigenous cultures, languages and spirituality (TRC, 2015)⁴¹. Children in foster care or living in settler-run group homes often faced a similar denigration of their culture. Further, trauma in the form of physical and sexual abuse was also rampant in many residential schools as well as child welfare placements. Moreover, the government's disregard for the treatment and well-being of Indigenous children resulted in punishments which Indian Agent D.K. Clink asserted in 1896 "would not be tolerated in a white school for a single day in any part of Canada" (quoted in Milloy, 1999, p.141)⁴². Living in a foster or group home has similarly been associated with higher rates of child abuse and family violence (LaPrairie, 1994)⁴³.

Despite the pervasiveness of these forms of childhood trauma, many Indigenous children were initially denied (and later reluctant to seek) spiritually relevant healing measures, given the sense of cultural shame ingrained within them by settler society (TRC, 2015). Consequently, a common response to these experiences has been to adopt coping mechanisms which are harmful to oneself and others. Some residential school and child welfare survivors also developed eating disorders, engaged in self-harming behaviour and/or attempted or died by suicide. Many also began using alcohol and drugs as a means of numbing their pain (TRC, 2015).

⁴⁰ Illustratively, 11% of Indigenous respondents (aged 15 or older) to the 2019 GSS indicated having been under the legal responsibility of the government during their childhood, compared to only 1.3% of non-Indigenous respondents (Perreault, 2022). Indeed, the MMIWG (2019) asserts that investigations and assessments made by child protection services are often racist and inappropriate.

⁴¹ For instance, upon arriving at most residential schools, children were given a new, Anglophone or francophone name (and sometimes even assigned a number), had their hair cut, were stripped of their traditional clothing, and forbidden to speak their native language, participate in any Indigenous cultural practices or practice their faith or healing rituals (TRC 2015).

⁴² To illustrate the scope of abuse, the TRC (2015) notes that almost 38,000 claims of sexual and serious physical abuse had been submitted as part of the Indian Residential Schools Settlement Agreement's (IRSSA) Independent Assessment Process. The Independent Assessment Process (IAP) is a claimant-centered adjudicative process established through the 2006 IRSSA to financially compensate former residential school students for serious sexual and physical abuses experienced in these schools (TRC, 2015).

⁴³ Symptomatically, 2019 GSS data indicates that 34% of respondents who reported experiencing violence while under government responsibility were Indigenous persons.

Ultimately, the traumatic and harmful experiences of forced relocation, assimilation and institutionalization in the residential school system and child welfare system have hindered, and continue to hinder, the ability of many Indigenous peoples and their families to thrive in either settler society or their own Indigenous communities (TRC, 2015). The result is often the perpetuation of deep-seated socio-economic marginalization. While LaPrairie and Stenning (2003) are likely correct when arguing that factors associated with Indigenous peoples' involvement in the criminal justice system are essentially the same as those associated with non-Indigenous peoples' involvement, they fail to recognize or fully acknowledge that it is precisely as a consequence of the ongoing effects of settler colonialism that Indigenous peoples are much more likely than non-Indigenous people to exhibit these traits.

2.2.2 – Risk Knowledge Contextualized within Settler Colonialism

Western risk knowledge is predicated on a belief that criminal behaviour can be predicted and that propensity for criminal behaviour can be classified through the use of aggregated group traits (Hannah-Moffat, 2015; Hannah-Moffat, Maurutto & Turnbull, 2009). Although this risk-oriented literature may have some value in that it can help to identify particular traits correlated with criminality and thereby allow professionals to target these traits in an effort to reduce criminal (re-)offending⁴⁴, it is not without criticism. Indeed, Hannah-Moffat (2005) contends that Western risk knowledge is often based on highly gendered and racialized (i.e., settler-colonial) middle-class norms (see also Monture-Angus, 1999). Perhaps symptomatically, some scholars have questioned the predictive validity of risk-based tools for Indigenous peoples, while arguing that they systemically discriminate against them and lead to their unjustified overclassification (e.g., Dickson & Stewart, 2021; Hannah-Moffat & Maurutto, 2010; Webster & Doob, 2004). Western risk knowledge also tends to place the responsibility for life circumstances, as well as any onus for change, entirely on the individual, while ignoring or discounting the role played by broader societal forces – such as settler colonialism – in producing these perceived risks (Cunneen & Tauri, 2016; Dickson & Stewart,

⁴⁴ Importantly, these correlations do not indicate causation. While certain socio-economic and demographic traits are associated with criminality, this does not mean that all – or even most – individuals who possess these characteristics will engage in criminal behaviour. Put simply, persons who exhibit a given trait which correlates with criminality are simply *more likely* to engage in criminal behaviour than otherwise similar persons who do not possess this trait.

2021; Gallop, 2021; Hannah-Moffat & Maurutto, 2010; Maurutto & Hannah-Moffat, 2016; Monture-Angus, 1999). In fact, in her discussion of risk assessment tools and their incompatibility with Indigenous cultures, laws and traditions, Monture-Angus (1999) suggests that many of the areas of perceived risk identified in these assessments are actually measuring experiences of colonialism: “What is being measured is not ‘risk’ but one’s experience as part of an oppressed group” (p.27).

In light of these critiques of Western risk literature – particularly within the context of Indigenous peoples – settler colonialism offers a useful lens through which to re-consider this risk literature and explore the various ways in which risk knowledge may actually be contributing to the overincarceration of Indigenous peoples. Specifically, by contextualizing notions of risk within a discussion of broader structural, racial and historical processes, it challenges the simplistic stereotype of Indigenous peoples as an inherently risky or criminal population. Instead, settler colonialism highlights the ways in which settler colonial histories have placed Indigenous peoples at heightened risk of living socio-economically disadvantaged lives and, by extension, engaging in criminal behaviour and becoming enmeshed in the justice system.

First, Indigenous peoples are more likely to exhibit low educational attainment, chronic unemployment, poverty and homelessness. Illustratively, according to 2021 census data⁴⁵, Indigenous peoples aged 25-64 have lower rates of high school completion and lower rates of post-secondary education compared to non-Indigenous Canadians (Statistics Canada 2022g)⁴⁶. Similarly, Indigenous peoples were also much less likely to be employed than non-Indigenous people (e.g., 72.8% versus 83.8% in 2019) (Statistics

⁴⁵ Recall that, due to challenges in surveying Indigenous populations, survey and census-based statistics may not be reflective of all Indigenous peoples in Canada. In particular, the lack of access to certain reserves, as well as the inability to access persons experiencing homelessness might cause some statistics to be over or under-estimates. For instance, in the case of measures of employment or poverty, census-based data will likely underestimate the true extent of unemployment and poverty as a result of unhoused persons being excluded from these data.

⁴⁶ Specifically, 22.3% of Indigenous peoples aged 25-64 did not complete high school or receive an equivalency certificate, compared to only 9.3% on non-Indigenous Canadians, according to 2021 Census data (Statistics Canada, 2022g). Moreover, only 49.2% of Indigenous peoples had a post-secondary certificate, diploma or degree, compared to 68.0% of non-Indigenous people (Statistics Canada, 2022g). For Indigenous peoples between the ages of 18-44 years old, commonly cited barriers to education from the 2011 census included a lack of preparedness or confidence in one’s abilities, education not being a personal priority for individuals, prohibitive costs and other personal and/or family responsibilities (Statistics Canada 2015).

Canada, 2023a)⁴⁷ and, perhaps consequentially, also tended to have much lower incomes (e.g., a median after-tax income of \$32,400 versus \$37,200 in 2021; Statistics Canada, 2022f)⁴⁸. Poverty among Canada's Indigenous population can also be evidenced by poor housing conditions. Indeed, 2021 census data indicate that Indigenous peoples, compared to non-Indigenous Canadians, are more likely to live in crowded homes (17.1% versus 9.4%) and more likely to live in homes requiring major repair (16.4% versus 5.7%) (Statistics Canada 2022a). Finally, 2014 GSS data suggest that Indigenous peoples, compared to non-Indigenous Canadians, are 2.5 times more likely to report a history of homelessness (20% versus 8%) (Boyce, 2016).

Perhaps unsurprisingly, within the Western risk literature, low educational attainment, unemployment and poverty have all, in fact, been linked to criminality (e.g., Fitzgerald & Carrington, 2008; Hsieh & Pugh, 1993; La Prairie, 1994, 2002; LaPrairie & Stenning, 2003; Patterson, 1991; World Health Organization (WHO), 2002)⁴⁹. Thus, while empirical data demonstrating low educational achievement, unemployment and poverty among Canada's Indigenous peoples may be combined with risk literature linking these qualities to criminal behaviour in order to partially account for Indigenous peoples' disproportionate involvement in the legal system, this alone is an incomplete accounting of a far more complex problem. Indeed, Indigenous peoples' circumstances or 'risks' must not be divorced from the broader structural forces which helped to produce

⁴⁷ Commonly cited barriers to employment from the 2011 census included a shortage of work opportunities, work inexperience and a lack of education (Statistics Canada, 2015).

⁴⁸ Perhaps symptomatically, 22% of Indigenous respondents to the 2019 GSS reported being unable to pay scheduled bills or other payments in the previous 12 months, compared to only 10% of non-Indigenous respondents (Perreault, 2022).

⁴⁹ These individual-based factors also call attention to community-based explanations rooted in theories of social disorganization. Specifically, many of the outcomes of settler colonial policies have negatively impacted Indigenous communities as a whole, rendering many communities 'socially disorganized'. Social disorganization theories suggest that crime is most prevalent in communities with significant physical and social disorder (e.g., poverty, unemployment, substance abuse) and limited collective efficacy (i.e., a breakdown of social bonds, group relations and informal social control from community members) (e.g., Bloch, 1952; Bursik & Grasmick, 1993; Faris, 1955; Sampson & Groves, 1989; Wilson 1987). Indeed, Shaw and McKay (1942) found that juvenile offenders in Chicago tended to come from neighbourhoods characterized by poverty, poor housing and disrupted families, as well as drug and alcohol abuse. Social disorganization theories also suggest that alienation of children from parents and the related breakdown of traditional social ties and mechanisms of social control may also contribute to youth involvement in criminal activity. Moreover, because police tend to target these high-crime areas, the likelihood of police encounters in these neighbourhoods is also greater (Kochel and Weisburd, 2019; Sampson and Bartusch, 1998). Settler colonialism might therefore be considered a complementary framework to these more traditional social disorganization theories. Indeed, settler colonialism considers the underlying political and social mechanisms specific to Indigenous peoples' experiences which have produced social disorganization in many Indigenous communities.

them. Within Indigenous populations, these realities must be understood as outcomes of Canada's settler colonial policies and practices, rather than some reflection of individual choices or deficits. That is, it is precisely as a result of settler colonial practices and policies that Indigenous peoples are more likely to have lower education levels and greater experiences of unemployment and poverty. Indeed, these practices would appear to have been instrumental in producing Indigenous peoples' disproportionate involvement in the Canadian criminal justice system.

Second, Indigenous peoples have experienced, and continue to experience, elevated rates of physical and sexual violence. Given the prevalence of psychological, physical and sexual abuse in residential schools and the child welfare system, as well as the intergenerational effects of violence and abuse, experiences of physical and sexual violence remain prevalent in Indigenous communities today. In fact, the TRC (2015) notes that "[i]t should not be surprising that those who experienced and witnessed very serious violence against Aboriginal children in [residential schools] frequently became accustomed to violence in later life" (p.171). To illustrate, 2019 GSS data suggest that Indigenous peoples, compared to their non-Indigenous counterparts, are more likely to witness violence perpetrated by a parent against another person during their childhood (34% versus 20%) as well as more likely to witness violence by a parent against another parent on five or more occasions (8.8% versus 2.4%) (Perreault, 2022). Moreover, Indigenous respondents to this survey were also more likely to have experienced physical and/or sexual violence as a child (e.g., prior to the age of 15) at the hands of an adult (41% versus 25%) (Perreault, 2022)⁵⁰. More generally, Indigenous respondents were also more than twice as likely to have experienced a violent victimization (assault, sexual assault or

⁵⁰ Notably, the proportion of Indigenous peoples who report childhood sexual or physical violence appears to be declining in younger generations. Indeed, Indigenous GSS respondents aged 15-34 (26%) were significantly less likely to have experienced childhood abuse compared to those aged 35-45 (45%) or 55 or older (54%) (Perreault, 2022). The greater prevalence of childhood physical and sexual abuse among older generations is likely (at least partially explained) by residential school experiences, while the prevalence among younger generations may reflect intergenerational trauma, as well as strength and resilience on the part of Indigenous peoples to overcome these traumas.

robbery) in the last twelve months (8.4% versus 4.2% or 177 incidents per 1,000 versus 80 incidents per 1,000), with incidents of intimate partner violence being particularly prevalent⁵¹ (Perreault, 2022).

Again, the literature on criminal risk factors identifies a history of violent victimization, and particularly family violence, as another risk factor for criminal behavior generally, and violent criminal behaviour in particular (e.g., English, Widom & Brandford, 2002; Kilpatrick, Saunders & Smith, 2003; LaPrairie, 1994; Waldram, 1997; WHO, 2002). Thus, evidence of violent victimization among Indigenous peoples, combined with the research linking abuse to criminality, may again offer another partial explanation for Indigenous overincarceration (particularly when one considers that convictions for violent offences often lead to custodial sentences). Yet these statistics and associated explanation for Indigenous overincarceration – decontextualized of broader structural forces – continue to paint an incomplete picture. One must, again, recall the settler colonial practices, designed to eliminate Indigenous peoples from Canadian society, which have caused widespread harm to Indigenous communities, such that Indigenous peoples are more likely to have experienced violence and abuse in their lifetimes. Indeed, these practices have contributed significantly to Indigenous peoples' disproportionate enmeshment with the Canadian legal system.

Third, the prevalence of trauma among members of Indigenous communities is also associated with substance abuse. Indeed, many individuals begin using drugs and alcohol to cope with experiences of physical and/or sexual abuse (WHO, 2002). Substance use may also offer an escape for those suffering from a lack of cultural pride or feelings of hopelessness as a result of their experiences of spiritual and psychological abuse, as well as the cultural denigration within residential schools, foster care, and/or settler society more generally⁵² (see also Rudin, 2022). Data from the 2014 GSS indicate that Indigenous persons were 1.2 times more likely to report having engaged in binge drinking in the last month than non-Indigenous Canadians (30%

⁵¹ The 2019 GSS found that 7.5% of Indigenous respondents who were married or in a common-law relationship in the last five years indicated that they had experienced physical or sexual violence at the hands of an intimate partner within the last five years versus only 3.4% of non-Indigenous Canadians (Perreault, 2022).

⁵² Speaking to Indigenous peoples' experiences of trauma stemming from (settler) colonial practices, Wesley-Esquimaux & Smolewski (2004) explain, in their report for the Aboriginal Healing Foundation, how "Aboriginal people began to drink because they were emotionally numb from what happened to them and wanted to feel something other than pain and despair. Their grandchildren and great grandchildren now drink for exactly the same reasons" (p.36).

versus 26%) (Boyce, 2016)⁵³. Similarly, 2019 GSS data suggest that Indigenous persons are nearly 1.7 times more likely to report having used cannabis or illicit drugs in the 12 months prior to the survey compared to their non-Indigenous counterparts (25% versus 15%) (Perreault, 2022). The First Nations Centre (2005) notes that First Nations peoples specifically, as compared to the general Canadian population, are six times more likely to die of alcohol-related causes and more than three times as likely to die of drug-related causes. 2014 GSS data also suggest that Indigenous peoples were roughly twice as likely to report having a mental health condition⁵⁴ (Boyce, 2016) – which could have conceivably been triggered or otherwise exacerbated by experiences of victimization (whether psychological, physical and/or sexual) and/or by substance abuse.

A wealth of literature has established a link between substance use and criminal behaviour (La Prairie, 1994; Waldram, 1997; WHO, 2002). Moreover, while substance abuse is often triggered by past experiences of violent victimization, it may also trigger the commission of new acts of violence⁵⁵. Mental health issues have likewise been associated with criminal activity (Lambertus, 2007). Notably, alcohol consumption during pregnancy can also negatively affect a developing fetus and can cause fetal alcohol spectrum disorder (FASD). FASD is a complex condition resulting from permanent brain injury, with symptoms that include poor memory, impulsivity, impaired judgement and reasoning skills (including the ability to foresee consequences or anticipate cause and effect) as well as poor adaptive functioning, among other cognitive impairments⁵⁶

⁵³ Note, however, that despite Indigenous peoples being more likely than non-Indigenous Canadians to engage in heavy drinking behaviours, they also have higher rates of *abstinence* with respect to alcohol than Canadians generally (Kelly-Scott & Smith, 2015; Rudin, 2022).

⁵⁴ Indigenous peoples are also much more likely than their non-Indigenous counterparts to report having had police contact over the past 12 months as the result of their emotional distress, mental health issues and/or substance abuse (2.5% versus 0.6%), or that of a family member (9.9% versus 2.5%), according to 2019 GSS data (Perreault, 2022).

⁵⁵ To illustrate, among Indigenous respondents of the 2014 GSS who reported having been the victim of a non-spousal violent offence in the past year, 69% believed that the violent incident was related to the offender's alcohol or drug use (compared to only 52% of non-Indigenous counterparts) (Boyce, 2016). Similarly, among respondents to the 2019 GSS, 52% of Indigenous women who had been assaulted in the previous 12 months felt the (most serious) assault could have been related to the perpetrator's alcohol or drug use, compared to only 29% of non-Indigenous women who reported similar victimization (Perreault, 2022).

⁵⁶ Although there is a lack of conclusive and reliable data on the prevalence of FASD within Indigenous populations, Rudin (2022) contends that Indigenous peoples are “dramatically overrepresented among those identified with FASD in the criminal justice system” (258). Moreover, a study by Tait (2003) for the Aboriginal Healing Foundation has drawn links between the intergenerational trauma of residential schools, alcohol addictions and FASD, however it is difficult to estimate the prevalence of this disorder among Indigenous and non-Indigenous populations, given that this disorder is considered to be grossly under-diagnosed (as a result of the lengthy and costly process of seeking an official diagnosis). For a discussion of some of the barriers that Indigenous peoples face in accessing the diagnostic process – rooted in

(e.g., Milward, 2014; TRC, 2015). FASD and associated neuropsychological impairments have also been linked to elevated levels of contact with the justice system (MacPherson, Chudley & Grant, 2011; Milward, 2014; TRC, 2015)⁵⁷. Again, though, these statistics – and the risk literature which links these traits to Indigenous peoples’ involvement in the criminal justice system – must not be viewed in a socio-political vacuum. Rather, one must remember that Indigenous peoples, as a collective group, are more likely to experience substance abuse and concerns regarding their mental health as a consequence of settler colonial policies and practices which have caused irreparable and intergenerational harm to their communities.

Certainly, the overrepresentation of Indigenous peoples in the criminal justice system would seem to be an understandable – albeit unfortunate – outcome when one considers the greater prevalence of purported criminogenic risk factors within the Indigenous population. Yet, it is an oversimplification to suggest that Indigenous overrepresentation occurs simply because Indigenous peoples disproportionately display these traits and so will disproportionately engage in criminal activity. Indeed, this explanation takes for granted Indigenous peoples’ greater socio-economic marginality and risks conflating Indigeneity with criminality. Instead, any discussion of Indigenous peoples’ socio-economic marginalization and perceived criminal risk factors must be rooted in a recognition of the ways in which settler colonial policies and practices have contributed to this reality. Thus, when thinking about the overincarceration of Indigenous peoples, one must look beyond surface-level discussion of risk factors in order to understand the broader settler colonial context and its role in producing the current situation.

experiences of settler colonialism – as well as some of the ways in which the use of risk knowledges in the justice system perpetuates systemic racism and ableism, see Dickson & Stewart (2021). See Rudin (2022) for further discussion of the diagnosis and impacts of FASD (both generally and in the context of the justice system), as well as practical guidance for practitioners working with FASD-affected individuals in a court setting.

⁵⁷ Notably, while only about 1% of infants are estimated to be born with a pre-natal alcohol-related disease, it has been estimated that in Canada and the United States between 15% and 20% of prisoners are affected by FASD (TRC, 2015). Similarly, a study by MacPherson et al. (2011) for the Correctional Service of Canada found that 10% of participating federal prisoners met the criteria for FASD, while another 15% received an inconclusive FASD diagnosis, despite none of these individuals (N=91) having previously been identified as having this disorder. Notably, these individuals were also more likely to have been previously incarcerated in provincial custody and as a youth (MacPherson et al., 2011). Speaking to the significance of FASD in justice issues for Indigenous peoples, the TRC (2015) has called upon Canadian governments to “undertake reforms to the criminal justice system to better address the needs of offenders with... FASD”, including increased resources and supports, as well as statutory exemptions from mandatory minimum sentences of incarceration for those affected by FASD (p.177).

2.3 - The Ongoing Legacy of Settler Colonialism: Criminal Justice Bias

The value of settler colonialism as a conceptual framework for understanding Indigenous overincarceration extends beyond explaining socio-economic marginalization and its relationship to crime and incarceration. In this respect, it also encourages us to look beyond traditional and simplistic explanations for Indigenous overincarceration rooted in criminal justice bias. This traditional model attempts to account for Indigenous overincarceration by focusing on biases within the criminal justice system. Stemming from a 'culture clash' between Indigenous and non-Indigenous people (e.g., Ross, 1992; Zimmerman, 1992), this explanation posits that discriminatory treatment of the former by the latter has resulted in Indigenous peoples being more likely to be charged, convicted, and incarcerated. Criminal justice bias may occur in two different, but similar, ways: through the exercise of *overt racism* and *systemic discrimination*. Dickson-Gilmore and LaPrairie (2005) explain this distinction:

Racism involves overt and conscious attitudes of bias which are willingly and knowingly translated into both physical and psychological violence against members of targeted groups; discrimination, while no less devastating in impact, tends to arrive from the unconscious implementation of structures or policies which were not intended to be discriminatory but which, owing to the manner in which they interact with larger social structures, have a negative impact on members of certain groups. (p.55)

While it is true that biases in the justice system contribute to the overrepresentation of Indigenous peoples, this conception is, again, too narrow in scope. Specifically, this traditional explanation does not give serious consideration to the ways in which specific forces contribute to criminal justice bias, nor to how criminal justice processes have developed to encompass discriminatory practices. Discussion of settler colonialism and its ongoing effects provides important context to these familiar arguments. Indeed, settler colonialism helps to shed light on the multiple ways in which the Canadian criminal justice system has been designed without regard for Indigenous peoples' well-being or their specific needs, leading to it be discriminatory against Indigenous peoples.

2.3.1 - Overt Racism: Over and Under-Policing in the Context of Settler Colonialism

Overt racism refers to policies and behaviours which are openly and deliberately based on perceptions of race⁵⁸ and whose effects are intended to be discriminatory (AJI, 1991). Overt racism is based on broad generalizations and prejudiced opinions about a given population (AJI, 1991). For Indigenous peoples in Canada, these generalizations and negative stereotypes are often rooted in settler colonial attitudes regarding the supposed inferiority of Indigenous peoples. Negative stereotypes of Indigenous peoples may lead to the belief that Indigenous peoples are more likely to engage in criminal activity than other Canadians or that they require harsher criminal justice interventions. Overt racism affects Indigenous peoples when, having perceived someone to be Indigenous, decisions which disadvantage them are deliberately made on the basis of these types of stereotypes.

In general, overt racism toward Indigenous peoples manifests itself as both over-policing and under-policing. While racism is difficult to demonstrate statistically (Dickson-Gilmore & LaPrairie, 2005; Rudin, 2006), in part due to the difficulty in proving someone's motivations or intentions, there is ample qualitative research – largely based on interviews with Indigenous peoples – which suggests that these practices are relatively widespread (e.g., AJI, 1991; Comack, 2012; McGillivray & Comaskey, 2000; Greene, Urbanik & Samuels-Wortley, 2022; MMIWG, 2019; Ontario Human Rights Commission, 2017; Razack, 2015; RCAP, 1996; Sinclair, 2018). Brodeur (1991) explains that, “[i]n the Canadian context, Aboriginals are submitted to over-policing for minor or petty offences – e.g., drinking violations – and suffer from under-policing with regards to being protected from more serious offences, such as violent assaults against persons (particularly within the family)” (p.17).

Generally, over-policing occurs when the police actively direct a disproportionate amount of their attention and/or resources to a particular geographic area or racial or ethnic group (Rudin, 2006). It is tied to the exercise of police discretion and police officers' prerogative to decide when – and when not – to arrest and lay charges against someone, particularly in the case of minor offences (Rudin, 2006). In many cases,

⁵⁸ In the context of overt racism, the AJI (1991) suggests that “race” refers not only to skin colour, but also to ethnicity, religion, language and country of origin.

over-policing may be tied to police perceptions of Indigenous peoples as either more likely to engage in criminal behaviour or are otherwise more deserving of criminal justice intervention. Police may feel that intervening with Indigenous peoples will somehow help to promote order, or that it is necessary in order to protect members of the dominant society from Indigenous peoples' purported 'uncivilized' behaviour. Ultimately, the practice of over-policing may be self-sustaining, in that increasing police attention toward a particular group is likely to lead to the detection of more criminal activity, thus seemingly re-enforcing the need for a high police presence (Quigley, 1994). Notably, as police are effectively the gatekeepers to the criminal justice system (e.g., Zimmerman, 1992), police decisions made at this very early stage in the criminal justice process are likely to have far-reaching consequences, even in later stages, such as sentencing.

In light of the country's settler colonial history – through which police were often utilized in order to repress Indigenous cultures and enforce assimilative policies⁵⁹ – it may be unsurprising that Indigenous peoples are seemingly over-policed today (David & Mitchell, 2021; Ontario Human Rights Commission, 2017; Rogin, 2017). A common form of over-policing occurs when Indigenous peoples are charged with public intoxication when non-Indigenous people in similar situations would not be. As Rudin (2006) comments: "Drunk in public laws are notoriously subject to the abuse of the exercise of police discretion... There is no question that this form of over-policing [directed toward Indigenous peoples] thrived, and continues to thrive today" (Rudin, 2006, pp. 33-34)⁶⁰. While public intoxication is considered a relatively minor charge, these arrests can also lead to additional and more serious charges of obstruction of justice, resisting arrest and sometimes even assaulting a peace officer (Jackson, 1989) – all of which are more likely to lead to incarceration⁶¹. Thus, it would seem that the practice of over-policing Indigenous peoples – rooted in settler

⁵⁹ Notably, police forcefully removed Indigenous children from their families and communities in order to deliver them to residential schools against their will (Monchalin, 2016; Nettelbeck and Smandych, 2010; TRC, 2015). Police also enforced other laws designed to control and eliminate Indigenous peoples, including the implementation of a pass system which limited the freedom of movement and gathering of Indigenous peoples, as well as the criminalization of Indigenous spiritual practices such as the potlatch and Sundance (Monchalin, 2016; Nettelbeck and Smandych, 2010; Razack, 2015; Rudin, 2006; TRC, 2015).

⁶⁰ For instance, both Quigley (1994) and Rudin (2006) have noted that police tend to patrol bars and streets known to be frequented by Indigenous peoples far more than those where white people gather.

⁶¹ Recent data highlight the ongoing nature of this trend. In 2018, police that served majority Indigenous communities or reserves were considerably more likely to report minor offences (as the most serious violation in an incident)

colonial prejudices against Indigenous peoples – may be contributing to their overrepresentation in later stages of the criminal justice system.

Notably, over-policing of Indigenous peoples is not limited to disproportionate arrests, laying of charges, and other criminal justice interventions. Over-policing also includes unjustified and/or excessive use of force and other inappropriate police responses which may lead to injury and even death⁶². For instance, consider the Saskatchewan freezing deaths which received widespread media attention and were caused by police driving Indigenous peoples – among them Neil Stonechild – to city outskirts and abandoning them in freezing temperatures (Reber & Renaud, 2019; Wright, 2004)⁶³. Indeed, in Razack's (2015) examination of Indigenous deaths in police custody, she argues that settler society's view of Indigenous bodies as dysfunctional and unsuitable for modern life manifests itself in the police feeling justified in their efforts to 'disappear' Indigenous peoples – including by physically relocating Indigenous peoples to the outskirts of settler cities and towns: "Indigenous people are considered by settler society as the waste or excess that must be expelled. The daily routines of policing the prairie city have long been devoted to inscribing this truth on the ground" (p.24).

While Indigenous peoples are sometimes over-policed for minor offences, at times they are also under-policed with regards to more serious offences affecting their communities (Razack, 2015; Rudin, 2006). Rudin (2006) explains that under-policing occurs when police choose not to act in a particular situation, even when there is evidence that crimes have been committed. Rudin (2006) suggests that Indigenous peoples may be viewed as 'less worthy victims' than those of the dominant culture – a phenomenon which is again linked to the settler notion of the 'degraded' Indigenous Other. This is significant for many Indigenous communities

compared to police serving communities in which the majority of residents were not Indigenous (Allen, 2020). Specifically, 30% of police-reported crime in Indigenous communities were for mischief and 12% were for disturbing the peace (versus 11% and 4%, respectively, in non-Indigenous communities) (Allen, 2020).

⁶² Illustratively, from 2007-2017, Indigenous peoples accounted for 36% (22/61) of individuals fatally shot by the RCMP, according to a briefing note prepared for the federal Public Safety Minister at the time (Freeze, 2019).

⁶³ See also the Supreme Court of Canada decision in *R. v. Nasugluk* (2010) in which this court ruled that excessive force by police which breaches an individual's s.7 right to life, liberty and security of person may be considered at sentencing as a mitigating factor warranting a reduced sentence (although any reduction in sentence must still respect statutory mandatory minimum sanctions).

because their members are not only overrepresented as offenders, but also as victims of crime generally and as victims of violent crime specifically (Boyce, 2016; Chartrand and McKay 2006; Perreault 2011, 2022)⁶⁴. As a consequence of viewing Indigenous victims as less worthy, police will sometimes not investigate crimes against Indigenous persons in a timely or thorough manner or, should charges be laid, Crown counsel may not prosecute them as vigorously as they would in cases with victims who are deemed more 'worthy' (Rudin, 2006)⁶⁵. Consider the large (and growing) number of missing and murdered Indigenous women and girls in Canada. The proliferation of this phenomenon suggests that police services are not placing the appropriate resources into solving these serious cases when victims are known to be Indigenous (and therefore potentially considered by police to be less valuable and/or more dispensable). Illustratively, the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) noted that, at times, there was a complete lack of police response to calls for assistance. Indeed, many family members and friends interviewed for the Inquiry recounted being dismissed or ignored by police when reporting the physical and/or sexual victimization of Indigenous women and girls. Hence, the under-policing of Indigenous peoples would suggest that when this population is victimized, they do not always receive appropriate assistance from police.

Overall, overt racism – rooted in prejudicial settler beliefs regarding the supposed inferiority of Indigenous peoples – manifests itself as both the over- and under-policing of Indigenous populations. Given that police, in effect, determine who does (and does not) enter the criminal justice system, racist policing practices have the potential to significantly affect later stages in the justice process, including sentencing and

⁶⁴ According to 2014 GSS data, 28% of Indigenous respondents reported being the victim of one of the eight types of offences included in the survey (sexual assault, robbery, physical assault, theft of personal property, break and enter, motor vehicle/parts theft, theft of household property and vandalism) in the 12 months preceding the survey compared to only 18% of non-Indigenous people (Boyce, 2016). According to 2019 GSS data, 8.4% of Indigenous respondents reported being a victim of one or three types of violent offences included in this survey (assault, sexual assault and robbery) in the 12 months preceding the survey compared to only 4.1% of non-Indigenous Canadians (Perreault, 2022).

⁶⁵ Canada has a long history of under-policing Indigenous peoples on the basis of their being considered unworthy victims. Recall the nearly 38,000 claims of sexual and serious physical abuse submitted under the IRSSA. Yet the TRC (2015) identified fewer than fifty convictions resulting from allegations of abuse at these schools. This may be (partially) explained by Indigenous students being considered by settler police as dishonest or lacking credibility (Milloy, 1999; Rudin, 2006).

corrections. Particularly in the case of the over-policing of Indigenous peoples, greater police scrutiny and over-charging of this population may be contributing to their overrepresentation in Canadian custodial facilities.

2.3.2 - Systemic Discrimination: Unintended Disadvantage in the Context of Settler Colonialism

While acts of overt racism are made consciously in light of prejudiced notions about a particular group, systemic discrimination tends to operate much more subtly. Indeed, systemic discrimination is often unintentional (AJI, 1991; Dickson-Gilmore & LaPrairie, 2005; Quigley, 1994; RCAP, 1996), and occurs when the application of apparently neutral criteria and standard practices adversely impacts an identifiable group (AJI, 1991; Dickson-Gilmore & La Prairie, 2005; Quigley, 1994; RCAP, 1996). Adverse impacts include “imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society” (*Andrews v. Law Society of British Columbia*, 1989, para 308).

The presence of systemic discrimination within the Canadian criminal justice system can again be partially attributed to its existence within a settler colonial society. Canada was founded on a belief in the righteousness of its settlers as well as the inferiority – or even the perceived nonexistence – of Indigenous peoples’ cultures, customs and laws. The RCAP (1996) contends that “the mischaracterization of [Indigenous] systems as ‘uncivilized’ has provided a moral justification for imposing western concepts of law and justice in ever-widening geographical and conceptual arcs” (RCAP, 1996, p.14). In this sense, the Canadian justice system – as a whole – may aptly be labelled as *settler-centric* in that its policies and practices have been developed for the benefit of settler society. A settler-centric justice system assumes the singularity of the settler approach to justice and the sameness of all those whom it processes. It assumes that all Canadians share – or should share – the same general experiences, culture, values and experiences as the dominant settler society. Thus, a settler-centric system does not account for differences in worldview nor for the structural and socio-political forces which have shaped the experiences of Indigenous peoples in Canada.

When identifying systemic discrimination, it is important to distinguish between the concepts of *formal equality* and *substantive equality*. Rudin and Roach (2002) explain that formal equality is predicated on a naïve belief that all individuals are equal and similarly situated. Thus, discrimination is said to occur when similarly situated people are treated differently; for instance, if an Indigenous person received a harsher sentence than a similarly situated non-Indigenous person. In contrast, Rudin and Roach (2002) explain that substantive equality “finds discrimination not only in formal discrimination, but also in failures to take account of the disadvantaged positions of groups in Canadian society” (p.24).

Notably, the formal understanding of equality has been largely dismissed in Canadian law. Abella (1984), in her role as Commissioner for the Commission on Equality in Employment, advocated for a more substantive approach to equality, arguing that:

Ignoring differences may mean ignoring legitimate needs [...] Equality means nothing if it does not mean that we are of equal worth regardless of differences in gender, race, ethnicity, or disability [...] Ignoring differences and refusing to accommodate them is a denial of equal access and opportunity. It is discrimination. (p.3)

These sentiments were largely embraced by the Supreme Court of Canada when it later denounced formal equality in the historic *Andrews v. Law Society of British Columbia* (1989) decision. Indeed, the Court argued that formal equality was reflective of a past era in which gender and other grounds for discrimination were ignored or dismissed. Specifically, the Court argued that applying the same policies to different people will not necessarily result in equality and may, in some cases, produce serious inequality – constituting systemic discrimination. With this in mind, the Court advocated for a more substantive understanding of equality in which the accommodation of differences is an important component. One does not need to look far to find systemic discrimination occurring with Indigenous peoples in the Canadian criminal justice system.

i) Systemic Discrimination: A Settler-Centric Justice System

One way in which Indigenous peoples are commonly subjected to systemic discrimination is on the basis of cultural differences and conflicting conceptualizations of justice. This form of systemic discrimination is facilitated by the settler-centric outlook of many criminal justice officials who belong overwhelmingly to the dominant culture. Systemic discrimination on the basis of culture occurs when those of the dominant

culture fail to consider how the different cultural backgrounds of others may shape their behaviour. Instead, criminal justice practitioners (mis)interpret words and actions on the basis of the dominant settler culture, sometimes leading them to believe that Indigenous peoples are less trustworthy or more culpable. Ross (1992) cautions that:

Until we realize that [Indigenous peoples] are not simply “primitive versions of us” but a people with a highly developed, formal, complex and wholly foreign set of cultural imperatives, we will continue to misinterpret their acts, misperceive their problems, and then impose mistaken and potentially harmful “remedies”... It is exactly this misunderstanding that is at the heart of systemic discrimination. (p.16)

Discrimination that occurs as a result of settler-centric attitudes – particularly at the court phase of the legal process – commonly stems from divergent conceptions of justice between Indigenous cultures and the dominant settler culture⁶⁶. In fact, for many Indigenous persons, the court process is not only confusing, but even frightening, given the mistrust that these individuals may feel toward the system and those who administer it (Cariboo-Chilcotin Justice Inquiry, 1993; Carling, 2017; Clark, 2016b; Milward, 2008; see TRC 2015 for discussion of the mistrust that many Indigenous peoples feel toward Canadian political and legal systems more generally).

Admittedly, Canada’s Indigenous populations are comprised of a variety of distinct nations and communities and consequently Indigenous worldviews will not all be identical⁶⁷. Nevertheless, Sinclair (1994)

⁶⁶ Perhaps even more tangibly, linguistic barriers may also lead to systemic discrimination. Consider that 2021 census data show that 184,170 individuals speak an Indigenous language as their mother tongue (Robertson, 2023) – likely an underestimate due to data collection issues discussed in footnote 7. While s.14 of the *Canadian Charter of Rights and Freedoms* guarantees all parties or witnesses in legal proceedings the right to an interpreter, these services are often unavailable to Indigenous peoples for whom English or French is not their first language – across policing agencies, courts, and corrections. Indeed, Currie’s 2003 study of criminal Legal Aid clients concluded that language and cultural issues continued to act as barriers for Indigenous peoples in the justice system, particularly during critical lawyer-client communications. Moreover, when interpretation services are available, the AJI (1991) suggests that they are sometimes inadequate or otherwise prejudicial, and that some legal terms from the dominant society cannot be accurately translated into some Indigenous languages. Notably, many Indigenous peoples speak distinct dialects which are broadly referred to as Aboriginal English, which may include accents, pronunciation and word usage which differ from standard English, as well as the use of different grammatical structures and discourse styles and the use of silence or gratuitous concurrence (see Carling, 2017; Rudin, 2022). However, Aboriginal English is often not recognized, nor accommodated in the legal system, such that it may lead to misinterpretation of Indigenous peoples’ statements (and has the potential to lead to wrongful convictions – see Carling, 2017; Rudin, 2022). These many linguistic barriers are, again, a reflection of a settler-centric criminal justice system which fails to meet the needs of peoples who differ from the dominant society.

⁶⁷ Although there are a variety of distinct cultural views and traditions among Métis, Inuit and the more than 630 First Nation communities (speaking more than 50 distinct languages) across Canada, it would not seem incorrect to

provides a helpful broad generalization of some differences between the dominant settler approach to justice and the traditional approaches of Indigenous peoples in Canada⁶⁸ (see also Monchalin, 2016). He explains that in Western (settler) culture, crime is considered a wrong which must be controlled through correction, punishment and deterrence. The goal is to make the offender conform to societal expectations or to protect the public. Similarly, Milward (2008) characterizes Western models of justice as 1) using adversarial, confrontational procedures to persuade a judge or jury of one's case, and 2) seeking punitive, sometimes retributive or deterrent sanctions – including imprisonment – for those who have contravened criminal laws and therefore caused harm. In contrast, Sinclair (1994) explains that in Indigenous cultures, justice tends to be more about reconciliation between the offender, the harmed individual(s) and the community (see also the Cariboo-Chilcotin Justice Inquiry, 1993; Monchalin, 2016). The goal is to restore peace and equilibrium. Indeed, Milward (2008) suggests that Indigenous customary laws tend to deal with an offender more constructively, and that in this more conciliatory approach, imprisonment (or similar responses) is largely unnecessary.

More specifically, Indigenous cultures tend to have a different understanding of responsibility and guilt compared to settler culture (Cariboo-Chilcotin Justice Inquiry, 1993; Carling, 2017; Rudin, 2022). These different approaches to responsibility may partially account for why Indigenous peoples are more likely than their non-Indigenous counterparts to plead guilty (Carling, 2017; *R. v. CK* (2021)) and, perhaps by extension, spend time in custody. Indeed, concepts of guilt and innocence have no equivalent in Indigenous cultures (AJI, 1991; Rudin, 2006; 2022; Sinclair, 1994). Rudin (2022) explains:

In many Indigenous societies, there is a great emphasis on taking responsibility for one's actions. In the criminal justice system, taking responsibility means pleading guilty. However, being responsible for

nevertheless recognize that many of these groups share some broad similarities regarding what constitutes social harm and wrongdoing and how to these harms should be repaired.

⁶⁸ Notably, Indigenous peoples today will not all share these traditional views regarding justice (Milward, 2008). Indeed, Milward (2008) notes that Western influence, economic structures, and technological advancements will affect individuals' lifestyles and belief systems in such a way that "significant numbers of Indigenous community members [departing] from the old beliefs seems inevitable" (p.111). This may be particularly so for Indigenous peoples not living in Indigenous communities. However, even Indigenous peoples whose views more closely align with Western concepts of justice may nevertheless encounter systemic discrimination and overt racism in the legal system.

an event occurring is not necessarily the same as being legally guilty of the offence—that distinction may be lost on Indigenous people who plead to offences for which they may have valid defences. (p.50)

Sinclair (1994) adds that in Indigenous cultures, someone pleading ‘not guilty’ to an offence that they have committed might be condemned as dishonest, whereas in the dominant settler society the denial of a true allegation⁶⁹ is generally not considered deceitful. Rather, pleading not guilty is largely considered to be a standard response, given the presumption that one is innocent until proven guilty. Hence, the assumption that the dominant society’s notion of guilt will apply equally to everyone in the criminal justice system is not only settler-centric. Rather, it may also be considered discriminatory in that it appears to contribute to Indigenous peoples pleading guilty at rates which are disproportionate to the general population and, by extension, contributes to their further enmeshment in the criminal justice system.

Within this broader context, it is perhaps unsurprising that Indigenous peoples tend to plead guilty at higher rates than do non-Indigenous Canadians (AJI, 1991; Carling, 2017; *R. v. CK* (2021); RCAP, 1996). For instance, RCAP’s (1996) provincial court data suggest that Indigenous peoples pleaded guilty in 60% of cases, compared to non-Indigenous peoples who pleaded guilty in only 50% of cases. In light of these trends, wrongful convictions resulting from guilty pleas have been raised as a particularly concerning issue for Indigenous accused, including at the bail phase (e.g., Bressan & Coady, 2017; Carling, 2017)⁷⁰. In fact, beyond differences in conceptions of social responsibility, honesty and guilt, disproportionate rates of guilty pleas

⁶⁹ Furthermore, the concept of ‘truth’ in Indigenous cultures tends to be considered relative and incomplete, rather than something absolute which exists objectively, as it is viewed in the dominant settler culture (AJI, 1991; Sinclair, 1994). Sinclair (1994) suggests that many Indigenous persons testifying before the court would likely feel that they are presenting their truth but would not be inclined to dispute the validity of someone else’s truth regarding an event or issue. However, a failure to assert oneself on the stand, to appear uncertain of one’s testimony, or to give the impression of changing one’s testimony are all looked upon unfavourably in Canada’s justice system. As Sinclair (1994) explains, “[i]n a system where one’s credibility is determined to a large extent by how well one’s testimony stands up to cross-examination, the Aboriginal view of the relativity of truth can give the erroneous perception that the witness is changing his or her testimony” (p.180). Thus, when the dominant society fails to recognize the relativity of truth in many Indigenous cultures, it may find Indigenous peoples’ testimony to be less credible. Accordingly, an accused Indigenous person may be viewed as dishonest, making their defence less believable, and thereby increasing their likelihood of conviction.

⁷⁰ In fact, one of Clark’s (2016b) key takeaways from his study on the Old City Hall Gladue Court was that more research was needed to better understand why some Indigenous accused not only do not apply for bail, but do not enter a not guilty plea “when, in many cases, they should be doing both” (p.4).

among Indigenous and non-Indigenous populations also appear to be rooted in a number of other issues relating to Canada's settler-centric criminal justice system.

Indeed, Carling (2017) suggests that Indigenous peoples are particularly vulnerable to being wrongly convicted as a result of a false guilty plea due to a lack of trust or confidence in Canada's Western justice system broadly. Indigenous peoples who understand this system to be inherently racist and/or discriminatory may have little to no faith that the system will treat them justly, such that a guilty plea may be viewed as simply expediting the inevitable. Beyond this more generalized distrust, Carling (2017) contends that challenges also exist for Indigenous persons in terms of fully understanding their legal rights within Canada's Western justice system (e.g., to remain silent, to a fair trial) and making a truly informed plea (with specific issues relating to language barriers and cross-cultural communication differences, and the greater prevalence of mental health disorders and FASD⁷¹)⁷².

Finally, Indigenous peoples are systemically discriminated against when the criminal justice system implicitly expects and rewards accused persons who display what settler society has come to recognize as 'remorse'. Sinclair (1994) explains that, "years of cultural and social oppression, combined with the high value placed on controlled emotion in the presence of strangers or authority, can result in an [Indigenous] accused's conduct in court appearing to be inappropriate to his plea" (p.183). For instance, Ross (1992) notes that in the cultures of the Cree and Ojibway peoples of northwestern Ontario, looking someone in the eye is considered disrespectful, whereas in the dominant settler society, when someone does *not* look another in the eye, it may be considered a sign of evasiveness and guilt. Thus, the body language of some Indigenous peoples may appear inappropriate and incongruent with western notions of shame or regret. Courts may subsequently misinterpret Indigenous peoples' body language, possibly believing that they are avoiding

⁷¹ For discussion of how persons affected by FASD are at heightened risk of false guilty pleas due to greater suggestibility, see Novick Brown, Gudjonsson and Connor (2011). See also Rudin (2022).

⁷² Illustratively, the Cariboo-Chilcotin Justice Inquiry (1993) discussed a number of cases in which Indigenous persons pleaded guilty when it may not have been appropriate, often as a result of confusion or a lack of understanding of the legal process: "Some stated that they wanted a trial, but pleaded guilty because their lawyer told them to. Some were told that if they pleaded guilty, there would be an acceptable penalty or sentence imposed but, in fact, a more harsh or stringent one was imposed. Others stated they were hurried through the court to get it over with; still others complained about having to return again and again" (p.14).

taking responsibility for their actions and/or are more culpable and so more deserving of harsher types of sentences, such as incarceration. Yet these settler-centric practices demean the cultural identity and integrity of Indigenous populations. Sinclair (1994) explains that:

To require people to act in ways contrary to their most basic beliefs is not only a potential infringement of their rights; it is also, potentially, a deeply discriminatory act. Witnesses who do not testify directly, complainants who do not complain vociferously and accused who do not behave “appropriately” or who show little emotion may find that they are “dealt with” differently or achieve different results than those who react in ways expected by the system. (p.184)

Ultimately, a settler-centric legal system disadvantages Indigenous persons in a number of ways – all of which are likely to be significant contributors to their overrepresentation in Canadian correctional facilities. Whether Indigenous peoples are pleading guilty at elevated rates, or otherwise being viewed by settler criminal justice professionals as less trustworthy or more culpable when their behaviours differ from settler norms and expectations, a settler-centric justice system appears to be more likely to convict Indigenous persons and to sentence them to custody.

ii) Systemic Discrimination: The Effects of “Standard Practice” on the Marginalized

Within the context of a settler-centric justice system and its propensity for discrimination, the socio-economic positioning of Indigenous peoples takes on additional meaning. Having established that Indigenous peoples in Canada are disproportionately represented among the lower socio-economic strata – largely as a result of settler colonial processes – it follows that policies which negatively affect the disadvantaged will disproportionately affect Indigenous peoples. The AJI (1991) explains that “[t]his is no less racial discrimination; it is merely ‘laundered’ racial discrimination. It is untenable to say that discrimination which builds upon the effects of racial discrimination is not racial discrimination itself” (chapter 4, para 226). Scholars have contended that this type of systemic discrimination is commonplace in the Canadian criminal justice system (e.g., AJI, 1991; Quigley, 1994). Consequently, settler colonialism exposes not only how Indigenous socio-economic marginality and criminal justice bias have been produced through settler colonial structures and practices, but also how they interact in ways which constitute yet another partial explanation for Indigenous peoples’ overincarceration in Canada.

Quigley (1994) explains that socio-economic factors may lead to systemic discrimination against Indigenous peoples by observing that “[s]ocio-economic factors such as employment status, level of education, family situation, etc., appear on the surface [to be] neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process” (p.276). When a court system fails to consider the ways in which Indigenous peoples have been disproportionately marginalized and instead treats them as though they are similarly situated to the rest of settler society, it risks exacerbating their already marginalized positions in society. For instance, this scholar explains that convicted persons who are steadily employed and able to demonstrate financial stability are much less likely to receive a custodial sentence for a ‘borderline imprisonment offence’ than are those without these signs of apparent stability⁷³. Yet, even when Indigenous peoples are initially spared a custodial sentence, a low socio-economic position predisposes them to later incarceration for non-payment of fines (AJI, 1991; RCAP, 1996; Quigley, 1994)⁷⁴. Quigley (1994) has aptly summarized some of the ways in which socio-economic marginality and forms of bias interact in order to produce elevated levels of Indigenous incarceration:

If there are more young Aboriginal people, if they are disproportionately unemployed, idle and alienated, and if they are overly scrutinized by the police, it should not be surprising that frequently breaches of the law are detected and punished. Add to that the greater likelihood of being denied bail (which increases the chance of being jailed if convicted), the greater likelihood of fine default, and the diminished likelihood of receiving probation, and there is a greater probability of imprisonment being imposed. Some of the same factors increase the chances of the same person re-offending and being detected once again. After that, every succeeding conviction is much more apt to be punished by imprisonment, thus creating a snowball effect: jail becomes virtually the only option, regardless of the seriousness of the offence. (p.275)

Indeed, it is within the wider settler colonial context that criminal justice bias takes on new meaning in terms of the overincarceration of Indigenous peoples. The ongoing effects of settler colonialism are

⁷³Quigley (1994) expands on the notion of stability as a mitigating factor in sentencing when noting that: “Although providing “credit” to an accused who is employed [etc.] does not necessarily mean that the lack of that credit for the converse situation is intended as punishment, the effect is the same... The notion that positive factors such as these should mitigate the sentence is deeply embedded, with little reflection on its systematically adverse effects on those who do not have those advantages” (p.276).

⁷⁴ In Canada, s.734 of the *Criminal Code* stipulates that an offender who is given a fine as part of a criminal sentence but does not pay that fine by its due date is considered to be in default of payment and may have a term of imprisonment imposed instead, with instructions on how to calculate this term.

manifested not only in the negative stereotypes in which overt racism is rooted, but also in the settler-centric belief in the superiority, universality and neutrality of the Canadian criminal justice system which is at the base of much of its systemic discrimination against Indigenous peoples. Settler colonialism therefore highlights the need – when thinking about the overrepresentation of Indigenous peoples in Canadian prisons – to not only recognize but also mitigate criminal justice biases through more culturally informed criminal justice policies and practices.

More broadly, settler colonialism contextualizes the experiences of Indigenous peoples in Canada in ways that help to explain how they have become overrepresented in Canadian prisons. Yet this framework goes beyond merely explaining the conditions of existence which have made both Indigenous socio-economic marginality and criminal justice bias possible. Rather, it also demonstrates the ways in which these two overly simplistic understandings of Indigenous overrepresentation actually interact with each other in a type of feedback model. Ultimately, settler colonialism emerges as a sophisticated and nuanced conceptual framework for understanding how Indigenous peoples have come to be overrepresented in Canadian penal institutions.

3 – LITERATURE REVIEW

3.1 – The Search for Solutions to Remedy Indigenous Overincarceration

Given the multiple and interactive ways in which settler colonialism has shaped the overincarceration of Indigenous peoples in Canada, remedies to this problem will also be necessarily complex. Most obviously, it is imperative that remedial strategies be grounded in a broader understanding of the ways in which Canada's ongoing settler colonial history has negatively affected – and continues to affect – Indigenous peoples. Indeed, any solutions must overcome traditional notions of Indigenous peoples' criminality by contextualizing any socio-economic marginality and perceived risk factors within a settler colonial framework. Similarly, solutions must also be sensitive to the existence of criminal justice biases and discrimination against Indigenous peoples and must therefore attempt to mitigate the multiple opportunities and contact points at which such biases may occur.

3.1.1 – The Promise of Gladue Courts as Specialized Sentencing Courts

The limited effect of s.718.2(e) of the *Criminal Code* and ensuing Gladue principles on Indigenous incarceration rates – presented in the introduction of this dissertation and discussed further below – may lie, in part, in the Supreme Court's lack of practical guidance to sentencing judges with regards to how to give form and substance to these directives. Indeed, Rudin (2009) explains that:

While *Gladue* very clearly set out the problems around Aboriginal overrepresentation it did not do much to set out solutions... How was a system that had, advertently or inadvertently, created a crisis, going to resolve that crisis if nothing about how the system operated was going to change? (p.453)

While the Supreme Court spoke to the need to consider Indigenous peoples' systemic and background factors which are rooted in (settler) colonial experiences, the Court did not make clear how this information was to be adduced. Indeed, there was no mandatory or widespread training for judicial officials in the wake of the *Gladue* decision. Consequently, there was considerable confusion among sentencing judges, Crown

prosecutors and other criminal justice actors who wished to implement the lessons of *Gladue*, but were uncertain how to do so (Rudin, 2009)⁷⁵.

Arguably out of the ashes of this line of criticism, and in view of the wider goal of reducing the overincarceration of Indigenous peoples at the sentencing stage of the criminal justice process, emerged the creation of specialized criminal courts designed exclusively for Indigenous persons, or *Gladue Courts*. The first Gladue Court opened in Toronto's Old City Hall Courthouse in October 2001. It was created by a group of judges and other criminal justice professionals in response to the ongoing uncertainty among sentencing judges as to how the *Gladue* decision should be applied practically in their courtrooms (Clark, 2016b; Knazan, 2003; Rudin, 2009). One of this new court's objectives was to "create a setting conducive to concepts of sentencing that responds to the needs, experiences and perspectives of Aboriginal people or Aboriginal communities" (Knazan, 2003, p.13)⁷⁶. In other words, this Gladue Court was conceptualized as an alternative to mainstream (settler-centric) courtrooms and, by extension, a means to overcome potential systemic discrimination. There was also a concerted effort within this Gladue Court to contextualize an offender's personal circumstances and potential marginality within broader systemic experiences of settler colonialism.

In addition to training a group of interested judges and duty counsel, Aboriginal Legal Services of Toronto (now simply Aboriginal Legal Services (ALS)) also received funding for an entirely new position – the

⁷⁵ Rudin (2009) suggests that the lack of legislative response to *Gladue* is also partially responsible for the continuing overincarceration of Indigenous peoples. Indeed, he notes that the Court's decision did not strike down any legislation or produce any sort of legal void, such that governments could largely ignore the decision and continue with the status quo. Moreover, Rudin (2009) suggests that the status quo – that is, Indigenous overincarceration – did not lead to any widespread public demands for government response which might otherwise pressure the government to take action.

⁷⁶ While the Old City Hall Gladue Court has accepted bail cases since its inception, this court was arguably created primarily as a response to concerns of judges at sentencing. Although the court's decision to hear matters of bail was likely based on an acknowledgement that pre-trial detention can preclude later non-custodial sanctions, it is equally likely – at least during its first years of implementation – that pre-trial detention was not yet fully understood as a major contributor to Canadian incarceration rates, much less a principal mechanism of the problem of Indigenous overincarceration. In fact, bail and pre-trial detention seemingly only became a significant focus of attention by the Ontario Ministry of the Attorney General in roughly 2005/2006 when it created the *Upfront Justice Project*, designed to examine (and ultimately improve) court efficiency at the bail phase of the court process.

Gladue Caseworker⁷⁷ – to work in conjunction with the courthouse’s pre-existing Indigenous Courtworker⁷⁸ (Knazan, 2003; Rudin, 2009). The result was a courtroom in which staff were trained to apply Gladue principles, with additional resources made available to ensure that Indigenous peoples’ background factors and community alternatives to prison could be (more) fully explored⁷⁹. This courtroom initially operated two half-days a week, but soon began operating two full days a week in order to keep up with demand (Rudin, 2009). It welcomed exclusively – yet on a voluntary basis – all criminally accused adults who self-identified as Indigenous persons (Clarke, 2016b; Knazan, 2003; Rudin, 2009)⁸⁰. Clark (2016b) notes that while this court’s configuration was not unlike other courtrooms in the same courthouse, “it is the professionals working in the court, the process and the principles on which Gladue Court is based that make it unique” (p.3). Several Gladue Courts now operate in the greater Toronto area for adult criminal cases, as well as several additional Gladue Courts (sometimes called Indigenous Peoples’ Courts or Indigenous Persons Courts) in other Ontario Provincial Courthouses, as well as in British Columbia. Each Gladue Court is different and has been developed to respond to the unique needs of the communities that it serves. Each Gladue Court also has an Advisory or

⁷⁷ The Gladue Caseworker’s primary duty is to prepare Gladue Reports, which were first developed by ALS to assist this courthouse (Rudin, 2022). These reports are, in some ways, similar to pre-sentence reports, but tend to be more detailed and holistic in their approach to the offender and their unique and systemic background factors and tend to demonstrate a greater awareness of appropriate alternatives to incarceration; they also tend to take a longer period of time to prepare (Campbell Research Associates, 2008). For more information on Gladue Reports, as well as shorter Gladue Letters, see footnote 354 (for an in-depth discussion, see Rudin, 2022).

⁷⁸ In contrast to the Gladue Caseworker, Indigenous Courtworkers have existed for decades (since the 1970s) and in various courthouses and courtrooms (Rudin, 2009; 2022). Their purpose is to help explain the criminal justice system to Indigenous peoples (e.g., accused persons, their families and victims) and guide them through the process (Rudin, 2009; 2022). Courtworkers also assist by helping accused persons find counsel and making referrals to community programs and service providers (Rudin, 2009; 2022). While they are not lawyers, they may also advocate for accused persons who are involved in the court system and can explain relevant Indigenous issues to lawyers and judges (Rudin, 2022).

⁷⁹ Part of this court’s commitment to exploring community alternatives to prison includes access to diversionary programming, notably the Community Council Program, which Clark (2016b) describes as a “restorative circle of Indigenous volunteers at Aboriginal Legal Services of Toronto (ALST) [which] would link Aboriginal individuals to culturally relevant services suited to their circumstances and needs” (p.6).

⁸⁰ On the issue of self-identification and Gladue Court referral, Clark (2016b) notes that accused persons are offered the opportunity to identify as Indigenous in several ways. He explains that duty counsel or private defence counsel will generally inquire regarding Indigeneity at their first meeting (prior to appearing in court). He notes that justices of the peace in conventional bail courts are also aware of the need to recognize Indigenous status, that service providers familiar with individuals may alert appropriate court staff, and that court workers scan the list of individuals in holding cells and can sometimes identify Indigenous peoples based on their names. Once identified, an Indigenous person facing charges is then referred to the courthouse’s Indigenous Courtworker, who generally meets with the accused in court holding cells prior to first appearance, at which time they explain the option of Gladue Court and its potential benefits as well as gather further information on the accused, their circumstances and potential needs.

Operations Committee comprised of justice and support staff to advise on relevant court issues and operations.

3.1.2 – The (Limited) Success of Gladue Courts

Despite the expansion of Gladue Courts across Ontario, there has yet to be a large-scale and comprehensive evaluation of their operations and sentencing outcomes. In fact, there have been only two significant evaluations of adult Gladue Courts to date⁸¹, each with major limitations. The first study is a three-year evaluation of the Gladue Caseworker Program from 2004-2007 (which operated in Gladue Courts as well as courthouses without a Gladue Court) (Campbell Research Associates, 2006, 2007, 2008). These reports largely detail the history and development of the Gladue Caseworker Program and Gladue Courts in the greater Toronto area. They focus primarily on the role of the Gladue Caseworker and the process of requesting and writing Gladue sentencing reports. As such, they are largely descriptive and process-based studies. The first two reports include a section outlining the generally favourable opinions of criminal justice actors regarding the Gladue Caseworker program, as well as the perceived usefulness of Gladue Reports. Notably, a brief profile of 37 Gladue cases in the final report indicates that nearly three quarters (73%) of cases received sentences that were either completely or mostly consistent with Gladue Report recommendations (Campbell Research Associates, 2008). The final report within this three-year study also includes a very short analysis of the College Park Gladue Court, as compared to a court in Brantford (with a Gladue caseworker, but not yet a Gladue Court), based on three days of observation in each courtroom (Campbell Research Associates, 2008). While methodologically more sophisticated than the earlier yearly reports, the College Park analysis does not examine sentencing outcomes, nor does it attempt to compare the treatment of Indigenous peoples to that of non-Indigenous people.

The most comprehensive evaluation of Gladue Court to date is actually an evaluation of just one Gladue Courtroom – the original Gladue Court located in the Old City Hall Courthouse (Clark, 2016b). This study includes an account of this Gladue Court’s caseload, its day-to-day operations and its case processing.

⁸¹ There is also an evaluation of the Aboriginal Youth Court in Toronto (311 Jarvis Street courthouse) by Clark (2016a). However, the focus on youth criminal court falls outside of the scope of this doctoral research.

As such, it is also largely descriptive in nature. Notably, Clark (2016b) found that this Gladue Court has longer case processing times and required more appearances than other courts in Toronto and Ontario – although accused persons were reportedly not unhappy about the additional time, given the perceived benefits of attending this court. While the study does not broadly examine Gladue Court outcomes, it does include a description of outcomes specifically for a sample of charges of failure to comply with bail (N=50) and failure to comply with probation (N=112) from October 2013 to December 2015. Notably, a significant number of these charges were withdrawn (41.9% and 44.6% of charges respectively) or were stayed for diversionary measures (16.7% and 16.9% respectively). Moreover, only 12.1% of charges for a failure to comply with bail conditions and 12.5% of those for a failure to comply with probation conditions resulted in a custodial sentence in this Gladue Court (Clark, 2016b). While these findings are intriguing, the absence of any comparison group (to be able to determine whether these percentages are high or low compared to those in conventional bail courts) precludes any meaningful inferences. This shortcoming is further compounded by the fact that the study was limited to only one Gladue Courtroom over roughly two years, such that its findings cannot be generalized to other Gladue Courts.

Within the context of s.718.2(e) and related Gladue principles, these specialized courts appear to have had limited success in reducing Indigenous overincarceration. In fact, since the *Gladue* decision and the subsequent creation and expansion of Gladue Courts, rates of Indigenous incarceration have generally increased in both federal and provincial/territorial sentenced custody. While Indigenous peoples constituted 17% of admissions to federal sentenced custody in 2001/2002 (following the creation of the first Gladue Court) (Carrière, 2003), their proportion has increased significantly since that time. By 2018/2019 Indigenous peoples accounted for 29% of admissions to federal custody (Malakieh, 2020). Likewise, the proportion of Indigenous offender admissions to sentenced provincial/territorial custody has also increased substantially over this same period – from 15.8% in 2001/2002 to 29.4% in 2018/2019 (Statistics Canada, 2023e)⁸².

⁸² Again, though, caution is advised when interpreting longitudinal data on Indigenous admissions to custody. On this issue, see footnote 7 for discussion of how prisoners' self-identification as Indigenous may change over time, with individuals now seeming more likely to report Indigeneity than in the past.

While one might be tempted to interpret these data as evidence of the failure of Gladue Courts to reduce the overrepresentation of Indigenous peoples in Canadian prisons (at least through sentencing), the reality is considerably more complex. First, the number and geographic proliferation of Gladue Courts in Ontario (or similar courts across Canada) is relatively limited (compared to the number of conventional bail courts). As such, their ability to significantly impact Indigenous imprisonment rates is arguably also quite limited. While one might hope that the Supreme Court's *Gladue* (and later *Ipeelee*) decisions would have been wholly embraced in (Gladue as well as conventional) courtrooms across the country, case law and appellate court rulings would suggest considerable inter-jurisdictional variability in terms of the interpretation and application of *R. v Gladue* (Roach, 2009).

Second, a number of other determinants of imprisonment rates are virtually entirely outside of the influence of sentencing courts (Gladue or otherwise). For instance, custodial release decisions (e.g., parole, statutory release, warrant expiry) are largely outside of the purview of sentencing decisions. Within this correctional context, Indigenous prisoners appear to continue to be disadvantaged – constituting a lower proportion (in comparison to non-Indigenous prisoners) of parole releases and a higher proportion of those in these latter categories (Office of the Attorney General of Canada, 2016; Parkes, Sprott & Grant, 2022; Public Safety Canada, 2017)⁸³.

Finally, one of the more intriguing explanations for the lack of success of Gladue Courts and sentencing interventions in reducing Indigenous overincarceration may lie with the data on community corrections over the past roughly twenty years. In particular, the conditional sentence was introduced in 1996 (at the same time as s.718.2(e) and other sentencing provisions) amid calls to reduce Canadian imprisonment rates.

⁸³ On this issue, see footnote 11 for empirical support. Moreover, research by Parkes et al. (2022) on life sentences imposed in second degree murder cases found that Indigenous persons convicted of this offence tended to serve longer periods in prison beyond their initial parole ineligibility period compared to their non-Indigenous counterparts. This trend was in spite of the fact that, at sentencing, Indigenous peoples were actually more likely to receive shorter terms of parole ineligibility set by judges compared to their non-Indigenous counterparts. These scholars suggest that the practical functioning of the federal parole system therefore appears to negate Indigenous peoples' lower periods of parole ineligibility as set by judges – likely through a combination of Indigenous peoples' greater likelihood of delaying or waiving their parole hearings, as well as their lesser likelihood of being granted (full) parole compared to their non-Indigenous counterparts.

Despite challenges to its implementation (as well as amendments limiting, and later expanding eligibility – see Webster & Doob, 2019) and concerns regarding potential net-widening (see Gemmell, 1997; Roach & Rudin, 2000; Webster & Doob, 2019), this sanction was envisioned as an alternative to provincial/territorial imprisonment. Moreover, Reid (2017) notes that this sentencing option was also expected to help remedy Indigenous overincarceration⁸⁴.

And, in fact, Indigenous peoples have accounted for a growing proportion of such conditional sentences overall, as well as less serious terms of probation, both in Ontario specifically (Independent Review of Ontario Corrections, 2017) and nationally (Sprott et al., 2023). To illustrate, Indigenous peoples represented 12% of both conditional sentences and probation sentences in 1997/1998 (Reed & Roberts, 1999), while this proportion doubled (24.6%) by 2018/2019 (Statistics Canada, 2023e). This increased representation among non-custodial sanctions would seem to suggest that judges are, indeed, making efforts to craft sentences for Indigenous offenders which avoid incarceration. And yet, Indigenous peoples continue to be (increasingly) overrepresented in custody despite the apparent uptick in community-based sanctions. Hence, it would seem that sentencing judges, despite efforts to utilize non-custodial sentencing options, may simply have a limited ability to impose a greater number of these sentences in the face of decisions made much earlier in the criminal justice process. Said differently, their proverbial hands may be tied at sentencing due to prior decisions made ‘upstream’.

Within this line of thinking, it is important to recall that interventions intended to address Indigenous overincarceration have thus far focused almost exclusively on sentencing decisions. This singular focus ignores the possibility that decisions being made at sentencing have – at least in part – their origins at earlier stages in the criminal court process, particularly at bail. Arguably, a wider lens is needed when considering

⁸⁴ Seemingly in recognition of the potential for this sanction to reduce recourse to custodial sentences, the TRC (2015) has called upon the Canadian government to amend the *Criminal Code* in such a way that would allow trial judges, upon giving reasons, to depart from restrictions on the use of conditional sentences. Indeed, the TRC (2015) asserted that restrictions on the use of conditional sentences which were in place at the time would increase Indigenous overrepresentation in prison, arguing that these “developments are preventing judges from implementing community sanctions even when they are consistent with the safety of the community and even when they have a much greater potential than imprisonment to respond to the intergenerational legacy of residential schools” (p.174).

solutions to the overincarceration of Indigenous peoples in Canada. Specifically, it is possible that despite the limited success of sentencing-based interventions to date in reducing Indigenous overincarceration, Gladue Courts may still hold promise as a remedial strategy of intervention not only at sentencing, but also (and perhaps especially) at the much earlier and influential stage of bail.

3.2 – (Criminal Case) Life before Sentencing: The Need for a Shift toward Bail

The notion of widening the lens in the search for strategic points of remedial intervention is not entirely novel. In fact, Supreme Court Justices in both the *Gladue* and *Ipeelee* decisions acknowledge that sentencing, while important, should not be the sole means of addressing Indigenous overincarceration. Indeed, the focus on solutions at the sentencing phase incorrectly assumes that the overincarceration of Indigenous peoples is a problem occurring only (or at least predominantly) within the *sentenced* prison population. However, the incarceration rate is made up of not only those sentenced to a term of imprisonment, but also those yet to be found guilty who are being detained in custody while awaiting case resolution (often referred to as the “remand” population)⁸⁵. Indeed, this latter group includes not only those accused persons who are still awaiting a bail decision (i.e., to release or detain) but also those for whom a bail court justice of the peace or judge⁸⁶ has formally denied bail and those who have otherwise chosen not to pursue bail⁸⁷.

This remand population is non-trivial in size and has been generally increasing over the past several decades. In fact, since the 2004/2005 fiscal year, provincial/territorial institutions have held more remand prisoners than sentenced prisoners (Statistics Canada, 2023e). Moreover, in 2018/2019 remand prisoners accounted for, on average, 62.1% of all those imprisoned in Canada’s provincial/territorial jails, or 39.0% of

⁸⁵ Although pre-trial detention is not intended as punishment, but rather to manage individuals deemed too risky to be released into the community while awaiting case resolution, Chief Justice McLachlin of the Supreme Court of Canada acknowledged in *R. v. Hall* (2000) that “pre-trial detention has concrete and profound deleterious effects on the accused” (para 118). Similarly, Justice Rosenberg of the Ontario Court of Appeal noted in *R. v. McDonald* (1998) that “[t]o pretend that pre-sentence imprisonment does not occasion a severe deprivation and that it is not punitive would result in a triumph of form over substance” (para 47).

⁸⁶ Justices of the peace (JPs) typically preside in Ontario bail courts, while judges preside over bail in most other jurisdictions, as well as in very limited circumstances in Ontario, discussed later in this thesis. Notably, provincially appointed JPs are not required to hold a law degree (although roughly 10% are estimated to have one, see Wyant, 2016). JPs instead come from a variety of backgrounds and receive specialized training and education upon appointment. Due to their lack of formal legal education, concerns are sometimes raised regarding the suitability of JPs presiding at bail (e.g., CCLA, 2014; Wyant, 2016).

⁸⁷ See footnote 103 for discussion of those who choose not to pursue bail and the potential reasons for such a decision.

all prisoners in both federal and provincial/territorial custody (Statistics Canada, 2023e, 2023f). Actual numbers make the point even more dramatically. In 2018/2019, an average of 14,778 adults in provincial/territorial custody were in remand custody compared to an average of only 8,708 adults in sentenced provincial/territorial custody (Statistics Canada, 2023e).

Within the context of strategies to reduce Indigenous overincarceration, this funnelling process of accused persons at bail into pre-trial custody takes on additional relevance. As with the sentenced custodial population, Indigenous peoples also constitute a disproportionately large percentage of Canada's remand population (Webster, Sprott, Doob & Mitchell, 2016). Furthermore, while the number of remand admissions in Canada increased generally from the mid-1990s until roughly 2012 – at which time these figures decreased somewhat overall, amid sizeable fluctuations – the proportion of remand admissions for Indigenous peoples has increased more steadily (with modest decreases from 2012/2013 to 2015/2016 before continuing its upward trend) (Statistics Canada, 2023e). The effect is that remand admissions for Indigenous persons are generally increasing, not only in terms of raw numbers, but also as a proportion of all remand admissions. Whereas Indigenous peoples accounted for 15.4% of remand admissions in 2000/2001 (shortly after the *Gladue* decision), this proportion rose to 23.5% in 2012/2013 (following the *Ipeelee* decision) and even further to 30.3% in 2018/2019 (Statistics Canada, 2023c). In Ontario specifically, whereas the rate of overall remand admissions has decreased slightly in more recent years, this decline within the Indigenous population has been more gradual, such that the proportion of admissions for Indigenous persons has actually been increasing (Webster et al., 2016). One might therefore be tempted to suggest that neither decision by the Supreme Court was effective in reducing the overrepresentation of Indigenous peoples in pre-trial detention.

3.2.1 – Bail as a(nother) Point of Intervention

In light of the significant number and proportion of Indigenous peoples incarcerated in provincial/territorial pre-trial custody, an expansion of the search for solutions to Indigenous overincarceration – from the sentencing phase to earlier decision-making points in the criminal court process

– would seem warranted⁸⁸. Within this context, a shift in focus to include the bail phase of the court process may be important in order to not only understand the elevated rates of Indigenous peoples in remand, but also to develop effective solutions to Indigenous overincarceration. This reality is almost certainly a reflection of a number of different – albeit interrelated – mechanisms of the bail process which have the effect of funnelling Indigenous persons into custodial populations. Most obviously, bail decisions directly determine the *remand* population, including both those awaiting a determination of bail as well as those (formally or informally) denied bail who are awaiting the resolution of their charges. However, the bail process also contributes indirectly to the *sentenced* custodial population. Specifically, accused persons who are denied bail are more likely to be convicted and eventually receive a custodial sentence compared to those granted bail (Friedland, 1965; Kellough & Wortley, 2002; Koza and Doob, 1975; RCAP, 1996; *R. v. Gladue* (1999)). Indeed, Rudin (2022) contends: “[i]t 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” (p.171). Thus, any systemic discrimination at bail and barriers to release may have serious and far-reaching repercussions for Indigenous peoples, contributing to Indigenous overrepresentation in both remand and sentenced custodial populations.

3.2.2 – Bail as a Funnel into Sentenced Custody

Although more insidious – and as such, less directly visible – the criminological literature provides multiple examples of the far-reaching consequences that a denial of bail may have, including on the sentenced custody population. Notably, research also suggests that prisoners held in remand custody are more likely to enter a guilty plea than those released on bail (Edkins & Dervan, 2018; Euvrard & Leclerc, 2017; Friedland, 1965; Kellough & Wortley, 2002; National Council of Welfare (NCW), 2000; Pelvin, 2017; regarding

⁸⁸ While this doctoral research specifically addresses the bail phase of the criminal process, it will also be useful to examine even earlier criminal justice decisions. The frequency with which police have contact with Indigenous and non-Indigenous citizens, the use of police discretion in determining whether to charge Indigenous persons as well as whether to subsequently release them until trial would be obvious examples. For empirical examination of Indigenous peoples’ contact with police, see David and Mitchell (2021). For discussion of Indigenous peoples’ experiences of racial profiling, see the Ontario Human Rights Commission (2017). See also Nettlebeck and Smandych (2010) for a historical examination of discriminatory colonial policing in Canada.

Indigenous peoples specifically, see Rudin, 2006, 2022). For example, accused persons denied bail in Kellough and Wortley's (2002) study of Toronto bail court were two and a half times more likely to plead guilty than those released into the community, controlling for other legal factors (Kellough & Wortley, 2002). In fact, some detained individuals maintain their innocence while explaining that their decision to plead guilty in court is rooted in their painful experience of remand custody and their desire to no longer be subjected to the conditions there (Edkins & Dervan, 2018; Euvrard & Leclerc, 2017; Kellough & Wortley, 2002; Leclerc & Euvrard, 2019; Webster, 2022)⁸⁹.

Specifically, prisoners denied bail may plead guilty if they believe that their sentence would not involve custody and they would consequently be released (John Howard Society of Ontario (JHSO), 2007; Kellough & Wortley, 2002; NCW, 2000). Detained prisoners may also plead guilty if they believe that they would be released on 'time served' (Kellough & Wortley, 2002). Similarly, Pelvin (2017) noted, based on her study of 120 remand prisoners across four Ontario detention centres, that some remand prisoners plead guilty (and even forego bail all together) when they anticipate a short custodial sentence⁹⁰.

However, even those prisoners facing potentially lengthier terms of imprisonment may nevertheless feel pressure to plead guilty, rather than navigate what is often a confusing, time-consuming and costly court process, particularly when preparing for trial (Euvrard & Leclerc, 2017; Pelvin, 2017). Moreover, the perceived relative advantages of sentenced custody over remand custody may also induce a guilty plea (Kellough &

⁸⁹ Indeed, an experimental study by Edkins & Dervan (2018) which assigned study participants as either guilty or innocent before being presented a number of hypothetical scenarios supports this finding. These scholars found that between 24.4% and 48.7% of "innocent" participants were nevertheless willing to hypothetically plead guilty, depending on the assigned scenarios. Even more troubling, while these "innocent" participants generally felt the prospect of pleading guilty was unappealing, once they were informed that they would be facing detention in pre-trial custody, these participants became much more willing to plead guilty in order to be receive the immediate benefit of being alleviated of the harms associated with harsh remand conditions.

⁹⁰ Beyond the often harsh and unpleasant conditions inside detention facilities, time in pre-trial detention also has detrimental effects for an accused person's life outside of custody (which may persist even upon release). Repercussions on one's personal life include, among many, a potential loss of employment and loss of housing or shelter space (both of which may have trickle-down effects on family members), challenges coordinating care for pets, as well as the potential loss of custody of children (Pelvin, 2017). Hence, even a short period in pre-trial custody can have significant deleterious effects for accused persons, and especially for marginalized populations (JHSO, 2007; NCW, 2000; Pelvin, 2017). For those accused who anticipate receiving a non-custodial sentence or short term of imprisonment, a guilty plea might be considered a lesser harm to themselves and their loved ones compared to a lengthier stay in remand custody and the disruption this would have on their personal life.

Wortley, 2002; Pelvin, 2017). Indeed, Canada's detention centres are notorious for sub-standard conditions and overcrowding (e.g., Johnson, 2003; JHSO, 2007; Pelvin, 2017; *R. v. Persad* (2020)). Moreover, remand prisoners are generally ineligible for most correctional programming and other activities, and typically cannot be employed within the institution (Johnson, 2003; Pelvin, 2017). For these reasons, remand is often referred to as "dead time" and is considered to be a particularly difficult and stressful time (Euvrard & Leclerc, 2017; Kellough & Wortley, 2002; Pelvin, 2017). In contrast, a move to sentenced custody generally offers individuals increased access to programming and other activities, better living conditions and the knowledge that they are now serving what Pelvin refers to as "certain time"⁹¹. Thus, in light of the pains and challenges associated with remand, Kellough and Wortley (2002) suggest that pre-trial detention may be acting as a form of structural coercion inducing individuals (both those formally denied bail as well as those without a formal bail decision) to plead guilty to offences that they may – or may not – have committed and to which they would otherwise not plead guilty. Accordingly, time spent in remand custody may also be contributing to the sentenced custodial population.

Similarly, Webster and Doob (2012) explain that pre-trial detention also makes it more difficult for accused persons to prepare a legal defence, including such actions as retaining and instructing counsel, gathering evidence and locating witnesses for their case (see also *R. v. Antic* (2020)). Remand also poses challenges for preparing a potential bail release plan, including locating friends and/or family to act as a potential surety and communicating with one's lawyer for the purposes of bail. Indeed, timely and effective communication in remand is challenging in a number of ways. Any in-person visits in remand are generally "closed" in that they occur behind glass (versus in person for the vast majority of the sentenced prisoner population) and can be cancelled with little to no notice in the case of facility lockdowns (Pelvin, 2017). However, even telephone-based communications in remand custody pose significant barriers for those

⁹¹ On the topic of doing 'certain' and 'uncertain' time, Pelvin (2017) suggests that remand is broadly characterized by uncertainty – in the form of the constant turnover of remand prisoners as well as uncertainties about the possibility of bail release, case outcomes and the period of time one will remain in remand (and potentially sentenced) custody. In order to alleviate this uncertainty, some prisoners will plead guilty early in their detention (sometimes waiving bail entirely) in order to begin serving a finite sentence, which allows them to better anticipate their daily activities and plan for a future once released (Pelvin, 2017; see also Euvrard & Leclerc, 2017).

attempting to prepare for bail or for their court case more generally. Indeed, in Ontario until at least 2021, provincial detention centres have used an antiquated Bell phone system which requires prisoners to make collect calls that can only be made to landlines – not cellphones – and limits calls to 20 minutes (McLeod, 2021; Pelvin, 2017)⁹². Moreover, detention centre routines and procedures, including transportation to and from courthouses, as well as the possibility of facility lockdowns⁹³, can also significantly limit access to phones in these facilities (Pelvin, 2017). Even with phones that exist specifically for prisoners to contact their lawyer, remand prisoners have noted that timely counsel is often challenging⁹⁴ (Pelvin, 2017).

Perhaps symptomatically, Kellough and Wortley (2002) observed in their Toronto study that Crown prosecutors were significantly less likely to withdraw all charges for those detained in custody compared to those released on bail. Further, while those on bail often had weak or redundant charges (e.g., theft under \$5000 and possession of stolen property under \$5000) withdrawn early on, these charges were typically only dropped for detained individuals when they were willing to accept a plea bargain (Kellough & Wortley, 2002). These prosecutorial decisions are perhaps corollaries of the challenges that detained persons face in preparing their legal defence, communicating with their lawyer and plea-bargaining. Webster and Doob (2012) also note additional challenges which negatively affect one's legal case and prospects at sentencing,

⁹² Ontario correctional facilities have historically used costly and outdated telephone services provided by Bell Canada. However, when Bell's contract expired in 2020, the Ministry of the Solicitor General instead contracted with Synergy Inmate Phone Solutions, Inc.. This telecommunications company stated that it aimed to permit cellphone calls by late 2021 (McLeod, 2021). Given that landlines have become less and less common over the last decade or so, such that many individuals no longer have access to a landline and cannot be contacted from custody, this change would seem long overdue. Notably, provincial facilities in other provinces currently do allow calls to cellphones, while federal facilities continue to use Bell services which only allow for calls to landlines (McLeod, 2021). Nevertheless, collect calls from correctional facilities are often prohibitively expensive for accused persons and their loved ones, who report commonly spending hundreds of dollars a month on these calls (McLeod, 2021; Pelvin, 2017).

⁹³ On the topic of lockdowns preventing communications, Pelvin (2017) shares the following quote from one remand prisoner: "Even though we got phones, when I first came in we were on lockdown for two weeks. Not allowed to use the phone, not allowed to even get out to use the phones to call someone collect. So you're shit outta luck when it comes to that... You can't get a hold of anybody when you need to and that screws up... how do you make a bail plan when you can't even call somebody?" (p.135).

⁹⁴ On this issue, Pelvin (2017) notes that the process of using a facility's access defence lines is also cumbersome and time consuming. As one remand prisoner explained: "your lawyer's office has to call the prison and set up and say "I would like to set up an access defence with X at whatever time" and then you get a slip from the institution saying you have a call on Friday at 2 o'clock with your lawyer. So I mean that's gotta be a scheduled thing, and so that takes again a week. But if you need to call your lawyer for whatever reason, like I need to talk to my lawyer today or tomorrow or whatever, no – you're not gonna be calling your lawyer within 24 hours that's for sure" (p.135).

including the inability to engage in what might be considered ‘pro-social’ activities like employment or volunteer work as a means of demonstrating a commitment to leading a law-abiding lifestyle. As a result of the reduced ability to prepare a strong defence and/or argument for less onerous sanctions, pre-trial detention may render an individual more likely to be convicted of charges, and more likely to receive harsher sentences⁹⁵.

Finally, those formally denied bail and detained in remand custody carry with them a ‘risky’ subtext which may affect subsequent decisions at trial or sentencing (Webster, 2023). Indeed, Koza and Doob (1975) suggest that those detained in pre-trial custody are significantly more likely to receive custodial sentences, partially due to a negative ‘halo effect’. These scholars suggest that outsiders infer positive or negative characteristics about individuals based on favourable or unfavourable information provided to them. That individuals detained in custody are typically brought into the courtroom handcuffed and conspicuously placed in a prisoner box for all members of the courtroom to see casts them in an unfavourable light and may lead to them being judged as being more dangerous or culpable than those attending their trial while released in the community (Koza & Doob, 1975; see also AJI, 1991). Finally, one of the founding Gladue Court judges, Judge Knazan (2003), rightfully indicates that “there can be no sanction other than imprisonment if, because of pre-trial detention, the offender has already been imprisoned for a period proportional to the gravity of the offence and is sentenced to time served” (p.5). In these cases, a judge’s hands may be considered tied in that an individual’s time in pre-trial detention precludes the possibility of a non-custodial sentence (even if this custodial sentence is merely in the form of “time served”).

⁹⁵ Clark (2016b) similarly demonstrates the far-reaching effects of pre-trial detention on subsequent sentencing. Specifically, this scholar found that sentenced offenders in Gladue Court who did not receive bail (and were thus detained in pre-trial detention) were more likely (40.3%) than those released on bail (27.4%) to receive a custodial sentence. Having said this, it is important to note that without a comparison group (in this case, accused persons appearing in conventional courts), these figures only demonstrate a general relationship or correlation between pre-trial detention and subsequent custodial sentences. As such, it is difficult to draw any firm conclusions as to whether these Gladue Court figures – compared to non-Gladue Courts – may represent a differential effect of pre-trial detention on sentencing outcomes.

3.3 – Canada’s Bail System as a Settler-Centric Structure

Given the significant ways in which bail decisions may affect an accused person’s potential conviction, sentencing and beyond, it is important that both Indigenous and non-Indigenous accused be substantively equal before the courts. Indeed, any systemic barriers for Indigenous peoples seeking bail release may have serious and far-reaching repercussions and potentially contribute to their ongoing overincarceration in both remand and subsequent sentenced custody. And, in fact, there appears to be a number of compelling reasons to believe that Indigenous peoples may be especially disadvantaged when navigating the bail process in Canada’s settler-centric criminal justice system. In actuality, the bail system might be considered a particularly settler-centric system whose foundation in risk knowledge may be wholly inappropriate for Indigenous populations.

The wider social and cultural context of bail is an especially important consideration. As numerous scholars (e.g., Beck, 1996; Ericson & Haggerty, 1997) have argued, we are living in a risk-averse society whereby we have become preoccupied with concerns about risks (or potential dangers) which cause unease and fear among citizens. In a risk society, institutions attempt to convey a sense of security through the use of preventive measures to minimize and/or manage any perceived dangers (Beck, 1992; Ericson & Haggerty, 1997). The Canadian criminal justice system – and the bail system in particular – are no exception, having been increasingly permeated by a mentality of risk aversion (Berger & Stribopoulos, 2017; Canadian Civil Liberties Association and Education Trust (CCLA), 2014; Feeley & Simon, 1992; Mitchell, 2015; Myers, 2009, 2017, 2019; Webster, 2007, 2015, 2023; Webster, Doob & Myers, 2009). This central focus at the bail phase of court processing translates predominantly into criminal justice professionals who are generally reluctant to release accused persons into the community out of concern for their professional and/or institutional reputations. As such, decisions of whether to release are regularly delayed, avoided, and/or passed on to someone else – beginning with the police and extending to the Crown and ultimately to the judicial officer (Webster, 2007).

More importantly, this risk averse mentality is likely to disproportionately target Indigenous peoples as it is heavily rooted in risk knowledges devoid of settler colonial context. Indeed, the decision to release an accused person on bail is essentially a matter of weighing various risks. Specifically, s.515(10) of the *Criminal Code* outlines three grounds for detention. Police, Crown prosecutors and judicial officers must consider: 1) the risk that an accused may not attend scheduled court appearances; 2) the risk that they may commit a criminal offence if released into the community; and 3) the risk that their release may bring the administration of justice into disrepute^{96,97}. In deliberating these potential risks, criminal justice professionals often base their assessments on the presence of perceived risk factors. Yet, Canada's settler practices and policies have been instrumental in rendering Indigenous peoples more likely to have life circumstances that are considered risk factors for release (e.g., unstable housing, unemployment, addictions) and thus cause for detention. In other words, the bail system's fundamental grounding in considerations of risk appears to interact with the lower socio-economic standing and painful life experiences of many Indigenous peoples in ways that render them more vulnerable to detention. That is, the bail system's underlying focus on assessments of risk may render it particularly susceptible to the perpetuation of systemic discrimination.

3.3.1 – The Mechanisms of a Settler-Centric Bail Process

Within this broader risk-averse context, it would not be surprising to find that police are disproportionately sending Indigenous peoples to the formal bail system⁹⁸. Illustratively, despite the

⁹⁶ Under section 515(10)(c) of the *Criminal Code*, detention on the tertiary ground may be based on the apparent strength of the Crown's case, the seriousness of the (alleged) offence and the circumstances surrounding its (alleged) commission, including whether a firearm was involved and the potential for lengthy incarceration.

⁹⁷ Notably, the *Canadian Charter of Rights and Freedoms* guarantees Canadians, under s.11(e), the right not to be denied reasonable bail without just cause. The Supreme Court of Canada noted in *R. v. Antic* (2017) that this provision serves to entrench the presumption of innocence at the pre-trial stage of court processing. The Supreme Court has also noted that this *Charter* right encompasses two specific components: 1) bail cannot be denied without just cause; and 2) the terms of bail must be reasonable (see, for instance, *R. v. Antic* (2017); *R. v. St Cloud* (2015); *R. v. Zora* (2020)). The just cause component means that bail may only be denied under a narrow set of circumstances – specifically the three grounds for detention set out in s.515(10) of the *Criminal Code* – and only when it is deemed necessary to promote the proper functioning of the bail system. The reasonable bail component means that the specific terms of an individual's bail, including any conditions of release, as well as any imposed monetary component, must be considered reasonable. Also relevant to the matter of bail is the right to life, liberty and security of person (s.7), the right not to be arbitrarily detained or imprisoned (s.9) and the right to be presumed innocent until proven guilty (s.11(d)).

⁹⁸ While arresting officers have limited powers of release, officers-in-charge at the police station may release individuals in certain circumstances, and on a variety of forms of release, from a promise to appear to a recognizance with financial penalty for non-compliance, and – as of 2019 when police powers of release were expanded – an undertaking with a

apparent general decline in (both overall as well as violent) crime rates over the past twenty years, the police appear to be detaining a larger proportion of accused persons for a bail hearing where the determination of pre-trial release becomes the responsibility of the courts (Webster et al., 2009). For instance, the percentage of criminal court cases in Ontario that began their case processing in bail court increased substantially from 39.2% in 2001 to 50.2% in 2007 (Webster, 2009). Given the over-policing of Indigenous peoples, this generalized pattern of sending accused persons to bail court may disproportionately affect Indigenous peoples. As Rogin (2017) contends that Indigenous peoples are more likely to be arrested and more likely to be over-charged (see also AJI, 1991), but less likely to be released by police, it follows that this population may be even more likely to begin court case processing in bail compared to the non-Indigenous population⁹⁹.

Having been detained by police for a bail hearing in court, there is no shortage of challenges facing accused persons seeking bail release. Upon being held for bail, a Crown prosecutor will review the case¹⁰⁰ and either consent to release (often recommending a number of conditions to the judicial officer which the

number of specified conditions. When an officer-in-charge decides not to release an accused person, section 503(1) of the *Criminal Code* stipulates that the accused must be brought before a Justice, if one is available, within 24 hours of the arrest or as soon as otherwise possible, and without unreasonable delay. Notably, s.522 of the *Criminal Code* stipulates that those charged with serious offences under s.469 of the *Criminal Code* (e.g., murder, treason, sedition, piracy) may only be released pre-trial by a judge in a superior court of jurisdiction (and not a justice of the peace or provincial court judge).

⁹⁹ Moreover, interactions between accused persons and police may also have far-reaching consequences. There is evidence to suggest that negative moral assessments made by police in written briefs prepared for the Crown (which include a synopsis of the alleged crime(s) as well as a confidential, (subjective) assessment of the accused's character) are related to bail outcomes (Kellough & Wortley, 2002). The more negative the police assessment, the more likely the accused would be held in pre-trial custody while awaiting case resolution (Kellough and Wortley, 2002). More troubling still, these scholars found that police tended to provide more negative assessments of black accused than of white accused or those of other racial backgrounds. While data on Indigeneity was not included in this study, it is possible (if not likely) that similarly negative police assessments (potentially rooted in settler prejudice) may be affecting Indigenous peoples' likelihood of attaining bail.

¹⁰⁰ The Ontario Ministry of the Attorney General's Crown Policy Manual in effect from 2005-2016 took a particularly risk-averse approach in bail. In this manual, Crown prosecutors were reminded of past inquests in which bail and Crown conduct had come under fire (as a result of individuals on bail going on to commit serious offences) and were seemingly cautioned to take a 'better safe than sorry' approach to bail release. Notably, the Crown Prosecution Manual which came into effect in November 2017 appears to be considerably less risk-averse and emphasizes, among other things, the need to follow a ladder approach at bail – likely (at least partially) in response to the Supreme Court of Canada's *R. v. Antic* (2017) decision rendered earlier that year which reaffirmed this approach (see also footnote 109).

accused must agree to follow)¹⁰¹ or otherwise contest release¹⁰². Should a Crown contest release and express their intent to show cause as to why pre-trial detention is necessary, a contested bail hearing may be scheduled for the accused¹⁰³. However, the general process from first bail appearance to bail decision (particularly for those requiring a show cause hearing) is not always a speedy one. For instance, in Ontario in 2007, bail cases in general were taking an average of three appearances and six days to complete the bail process (Webster et al., 2009). More concerning still, in 2013/2014 more than a third (36.6%) of all Ontario bail cases required three or more appearances to complete this process, while 16.5% of cases actually

¹⁰¹ When a Crown and defence counsel submit a joint bail proposal, justices of the peace and judges are expected to respect and follow these recommendations unless they deem that such a decision would bring the administration of justice into disrepute or would be against the public interest. Yet the Supreme Court of Canada noted in *R. v. Zora* (2020) that the expeditious nature of bail leads to a “culture of consent” (para 78) in which an accused person agrees to onerous and excessive bail conditions rather than risk detention through a show cause hearing. Further, judicial officers tend to follow these recommendations (for empirical examination of this trend, see Yule & Schumann, 2019). For instance, Yule & Schumann (2019) found in their Ontario bail court study that justices of the peace imposed the exact conditions recommended by the Crown in 76% of consent release cases. Perhaps counterintuitively, Yule & Schumann (2019) also found that when Crown submissions were not followed exactly, JPs in their study were more likely to impose more restrictive versions of Crown-recommended conditions than they were to impose less restrictive versions (e.g., relating to curfew times, whether, when and where an accused must be in the presence of their surety, etc.), and were more likely to impose new conditions not recommended by the Crown than they were to strike down a Crown recommendation. Yet in cases with excessive or unrealistic conditions, a judicial officer can and should intervene (see also Myers, 2017). Illustratively, in *R. v. DA* (2012) the Ontario Superior Court upheld an earlier decision by a justice of the peace who refused to release an accused young person on the conditions jointly proposed by the Crown and defence counsel, and instead granted release without any conditions, noting that the extensive and invasive conditions which had been proposed would have been unreasonable and would have brought the administration of justice into disrepute.

¹⁰² In terms of their relative prevalence, consent releases tend to occur considerably more often than releases resulting from a contested hearing. While the proportion of each of these types of release will vary from one courthouse to another, 80.8% of bail releases in Myers’ (2019) Ontario study were consent releases, while 73.5% of bail releases in Yule & Schumann’s (2019) Ontario study were by consent release. Even in Mitchell’s (2015) study of bail cases released under the supervision of one Ontario bail program (which one might assume to represent more serious or ‘risky’ cases), 76% of these cases were released by Crown consent.

¹⁰³ Notably, not all accused whose release is contested by a Crown will choose to pursue a formal contested bail hearing. Instead, some accused will choose not to formally apply for bail, effectively waiving their right to bail and thereby remaining in detention without a formal bail decision. Reasons for foregoing bail include a belief that their release would be unlikely (Grech, 2011), or if an accused person’s circumstances in the community might make custody feel like a relative comfort. For instance, Pelvin (2017) notes that some remand prisoners use detention as an opportunity to detox (68% of her sample admitted to addictions issues; see also Webster, 2009), to receive medical care (53% of these remand prisoners noted mental health concerns, while 18% acknowledged recent hospitalization) and/or to receive simple necessities such as regular meals and shelter (33% of detainees noted experiencing homelessness or precarious housing; see also Webster, 2009). Other accused forego bail and plead guilty almost immediately, particularly if they expect a short sentence, or if they want to avoid an onerous bail release which would likely lead to breaches and further criminalization (Pelvin, 2017; Webster, 2009). Finally, historically, some accused may have foregone bail due to provisions in the *Truth in Sentencing Act* (2009) which prohibited persons who would eventually be sentenced to a term of imprisonment from receiving any enhanced credit (which from 2014 onward was generally 1.5:1) for their time in pre-trial custody if they had been formally denied bail in a number of specific circumstances (which were removed from the *Criminal Code* in 2018).

required five or more bail appearances. Indeed, adjourning bail cases to a later date is a common practice in the bail process, such that bail court is often said to exhibit a ‘culture of adjournments’ (Myers, 2015; Webster, 2015)¹⁰⁴.

Once at a contested bail hearing, the Crown is expected to show cause¹⁰⁵ as to why detention of the accused is necessary, based on the grounds for detention¹⁰⁶ (unless a reverse onus provision is in effect¹⁰⁷ which requires the accused to show cause why detention is not justified). While some bail hearings are completed reasonably expeditiously (within one to two hours), other hearings may take a half day or full day (or occasionally even longer; see Dey, forthcoming), particularly when the accused, potential sureties, or other witnesses (e.g., the investigating officer) are called to testify and be cross-examined in what Wyant (2016) has referred to as “mini trials” (p.35). Following Crown and defence arguments, a judicial officer must then decide whether to grant bail or detain the accused in custody until the case is ultimately resolved. If the accused is released, the judicial officer also stipulates the form of release and any conditions of bail. Yet, while judicial interim release is to follow a ladder approach, whereby the least onerous release option with

¹⁰⁴ While adjournments may occur for legitimate reasons, such as awaiting disclosure, preparing a bail plan or contacting potential sureties or community supports, they also sometimes occur for reasons unrelated to matters of law, including the desire to complete the court docket in a timely manner, or simply to finish the workday early (Myers, 2015).

¹⁰⁵ Despite the default Crown onus at bail ‘on the books’, Wyant (2016) notes that, in practice in Ontario, “there is really a de facto onus on the accused to show why he or she should be released” and that “if an accused wants to be released on bail and the Crown is opposed, practically speaking, it is up to them to show why they should be released and to provide a plan to satisfy the court that such a release is appropriate” (p.31). This reflection is also corroborated by my own extensive bail court observations. Defence counsel – even when there is a Crown onus – often calls the accused to the stand to express their willingness to follow any conditions imposed, as well as one or more potential sureties to indicate that they understand the responsibilities of this position and would be suitable for the role.

¹⁰⁶ Notably, court observations suggest that Crowns are by far most likely to contest bail release on the secondary grounds for detention – that is, out of concern for public safety. For instance, Myers and Ireland (2021) found in their study of Winnipeg bail courts that the secondary ground was raised by Crowns as a ground for detention in 92.9% of show cause hearings, and as the sole ground for detention in 83.3% of show cause hearings (N=42). Even more ubiquitous, Dey (forthcoming) found that 100% of show cause hearings in her Ottawa bail study had bail contested on this ground (alone or with others), and 62.5% of cases had bail contested on this ground exclusively (N=25).

¹⁰⁷ Indeed, there is a number of reverse onus bail provisions under s.515(6) of the *Criminal Code* which place the onus on the accused person to show why their detention is not justified. For instance, a reverse onus is placed on individuals who, while on bail, were charged with failing to comply with a condition of a court order, or an indictable offence if their current charges are also for an indictable offence. Reverse onus provisions have the effect of making bail release more difficult to attain and are thus another potential contributor to the significant number of individuals in remand custody.

the fewest and least onerous conditions should be given unless cause is shown as to why more restrictive forms of release are deemed necessary¹⁰⁸, this does not always appear to be the case.

i) The Expectation of Sureties

Indeed, the practice of requiring a surety is common throughout Canada generally, and in Ontario specifically (CCLA, 2014; Myers, 2009, 2017, 2019; Wyant, 2016)¹⁰⁹. A surety is a person close to the accused who is tasked with ensuring the accused's compliance with their bail order. A surety is typically required to appear personally in court at the time of bail determination and must be judged by the court to be of strong moral character and be willing to pay a specified amount of money to the court if the accused fails to comply with the conditions set out. The Supreme Court of Canada has recognized that a surety release is "one of the most onerous" forms of release (*R. v. Antic* (2017), para 67(g); see also *R. v. Tunney* (2018)). Thus, this widespread surety requirement is a potential systemic barrier to Indigenous peoples' release on bail.

Unsurprisingly, many marginalized individuals, including Indigenous peoples, struggle to locate a willing surety who is deemed suitable by the bail court (CCLA, 2014; Gallop, 2021; Rogin, 2017; Pelvin, 2017; Webster, 2015, 2023; Yule & Schumann, 2019). Given that sureties are often family members or close friends of the accused, it is likely that many Indigenous accused may have only a limited pool of potential sureties –

¹⁰⁸ Specifically, section 515(1) of the *Criminal Code* stipulates that a release order without conditions is to be given unless cause is shown as to why more restrictive release options, including an undertaking with conditions or a recognizance with or without a deposit and/or sureties, is necessary. In response to the apparent widespread use of more onerous and seemingly unwarranted forms of bail releases, the Supreme Court of Canada, in *R. v. Antic* (2017), firmly reminded criminal justice practitioners of the importance of following the ladder approach to release, both in terms of the earliest opportunity for release and the least onerous form of release. With respect to the latter, its importance was further codified into s.515(2.01) through s.515(2.03) of the *Criminal Code* in December 2019, with additional language emphasizing these principles, particularly as they relate to conditions of bail, the preference for a promise to pay over a deposit, and restraint in the use of sureties.

¹⁰⁹ To illustrate, in Myers' (2019) study of several bail courts in southern Ontario, a surety was required in 76.1% of observed bail releases (a combination of Crown consent releases and those following a contested show cause hearing (Myers, 2019)). Similarly, Yule & Schumann (2019) found in their study of three bail courts in southwestern Ontario that a surety was required in 57% of consent releases and 72% of contested show cause releases (with this difference between consent and contested releases being statistically significant). Yet there may have been a shift away from surety releases in more recent years. Indeed, Schumann & Yule (2022) examined the impact of the Supreme Court of Canada's *R. v. Antic* (2017) decision – as well as the Ontario Superior Court's *R. v. Tunney* (2018) decision and the revision of the Ontario Crown Prosecution Manual (2017) – and found that bail releases from three Ontario courthouses in the year following *Antic* became less likely to require a surety for release compared to in the year preceding this decision.

if any – who could satisfy the court¹¹⁰. Importantly, many of the factors which may limit an Indigenous person’s pool of potential sureties find their roots in settler colonialism and associated socio-economic marginalization. Notably, the requirement that a surety be willing to forfeit a sum of money should the accused breach bail – even if this figure is tailored to the surety’s means – may prevent some prospective sureties from stepping forward, while the requirement that a surety be of ‘strong moral character’ will tend to disqualify individuals with a criminal record and those with significant addictions or poor mental health¹¹¹(see also Gallop, 2021). Furthermore, the common requirement that sureties appear personally in court means that sureties often need to book time off work, arrange for childcare and/or special transportation (CCLA, 2014; Rogin, 2017), all of which may be especially challenging or burdensome for those living in poverty and/or precariously employed (Webster, 2023)¹¹². Even when a suitable surety is identified, these challenges can cause delays in the bail process, translating into a greater number of days in pre-trial custody.

Notably, community-based Bail Verification and Supervision Programs (BVSPs) have been developed to help marginalized populations overcome this barrier to release¹¹³. These programs allow for the release and community-based supervision of accused persons who are unable to produce a suitable surety and would otherwise be detained in pre-trial custody as a result of being considered either a flight risk or a danger to the public. The first bail supervision program opened in Toronto more than 40 years ago (Morris, 1981), and

¹¹⁰ Consider, for instance, those accused who spent time in the child welfare system and may have moved from one foster home or group home to another, thereby lacking the kinship networks or community roots that might be helpful in locating a suitable surety.

¹¹¹ The common requirement that an accused person reside with their surety (present in 83% of surety releases in one Ontario bail study by Schumann, 2018; present in 63.2% of all bail releases (not just surety releases) in an Ontario study by Myers, 2017; see also CCLA, 2014) may also be particularly challenging for potential sureties who are Indigenous and are more likely to have a history of homelessness, to live in crowded homes or homes requiring major repairs (see section 2.2.1).

¹¹² The challenge of locating a suitable surety becomes significantly greater for those in remote communities, where potential sureties (if they exist) may be asked to travel (at their own expense) hundreds of kilometers to urban centres where the detention centre and courthouse are located in order to personally appear before the court and testify to their willingness to supervise the accused (CCLA, 2014; Rogin, 2017). For a discussion of some of the ways in which Indigenous peoples residing in remote and/or northern communities (particularly in Manitoba) regularly have their *Charter* right to reasonable and timely bail breached, see Gallop (2021).

¹¹³ In Ontario, BVSPs exist through service agreements with the Ontario Ministry of the Attorney General and various community-based organizations.

these programs are currently widely available throughout much of the country (Porter & Calverley, 2011). Nevertheless, these bail programs often have stringent eligibility criteria (e.g., some programs will not accept clients who have a certain number of ‘failure to comply with a court order’ convictions; see Mitchell, 2015) which automatically exclude some of the more marginalized Indigenous peoples from participating. Furthermore, some bail programs may have internal regulations which are not always beneficial for all potential clients (e.g., some programs adopt mandatory police reporting policies for any breaches of bail conditions) or employ bail supervisors who have not been adequately trained to be sensitive to issues specifically facing Indigenous persons in the criminal justice system. Thus, even when a Crown is willing to release an Indigenous accused in specific circumstances, the absence of an appropriate surety or willing and suitable bail program¹¹⁴ may ultimately translate into Indigenous peoples being unable to secure bail.

ii) Excessive and/or Onerous Bail Conditions

Even for those Indigenous accused who are successful in receiving bail (and are thus released from pre-trial custody), the situation does not necessarily improve. Recall that in the context of bail, criminal justice professionals are to follow a ‘ladder approach’, whereby individuals are to be released in the least onerous manner possible (*R. v. Antic* (2017); *R. v. Tunney* (2018); Trotter, 1999). While bail conditions do not have to be imposed, they may be given – and commonly are given¹¹⁵ – in an effort to manage any perceived risks posed by an accused.

¹¹⁴ Notably, the Ontario Ministry of the Attorney General began developing Indigenous BVSPs in 2016. These bail programs are designed to better address the unique experiences, issues and barriers that many Indigenous peoples face in the bail system (Ministry of Indigenous Relations and Reconciliation, 2017). Initial programs were developed and funded by the Ministry and were operated in partnership with Indigenous organizations in 10 locations, including Ottawa, London, Barrie and Kenora.

¹¹⁵ To illustrate, Yule & Schumann (2019) found that accused released on bail in three Ontario courthouses had an average of 4.7 conditions (range = 0-9) when released by consent and an average of 6.3 conditions (range = 3-10) when released after a show cause hearing (this difference being statistically significant). Moreover, Myers (2019) found that accused released on bail in several Ontario courthouses received an even greater number of conditions – an average of 7.8 (range = 1-34). Finally, Myers and Dhillon (2013) found that an average of 9.3 bail conditions (range = 0-23) were given in their study of the Toronto youth bail court. However, it does appear that more recent developments relating to bail, and particularly bail in Ontario, may be leading to a shift away from the overuse of bail conditions and sureties. In particular, Schumann & Yule’s (2022) study of bail releases from three Ontario courthouses found an overall reduction in the average number of conditions imposed in bail releases in the year preceding *R. v. Antic* (2017) compared to the year following this decision (from 6.0 to 5.21; $p < .001$). Nevertheless, the Supreme Court of Canada’s *R. v. Zora* (2020) decision – released three years after *Antic* – noted that problems continued to exist regarding the “ongoing imposition

However, the imposition of numerous or otherwise onerous conditions of bail can render the successful completion of bail considerably more challenging¹¹⁶. Of particular concern are bail conditions that do not appear to be related to the grounds for detention or to the alleged offence but are instead seemingly imposed as a means of controlling ‘undesirable’ behaviour (CCLA, 2014; Hannah-Moffat & Maurutto, 2012; JHSO, 2013; Myers & Dhillon, 2013; Myers, 2017; Rogin, 2017; *R. v. Zora* (2020); Sprott & Doob, 2010; Wyant, 2016). Common conditions of this nature include the requirement to attend work regularly, to abstain from any drug/alcohol use, and/or to attend a specified treatment program or counselling. These conditions are particularly problematic when they appear to be unrelated to the allegations before the court¹¹⁷ or are otherwise unrealistic given an accused person’s circumstances. Indeed, the Provincial Court of Alberta ruled in *R. v. Omeasoo* (2013) that conditions with which an accused cannot or almost certainly will not comply are unreasonable in the context of bail, noting that “[r]equiring the accused to perform the impossible is simply another means of denying judicial interim release” (para 33). Also problematic are conditions which are overly vague or ambiguous, particularly the common condition that accused “keep the peace and be of good behaviour” (CCLA, 2014; *R. v. Zora* (2020); Rogin, 2017; Wyant, 2016)¹¹⁸. Given that accused persons on bail

of bail conditions which are unnecessary, unreasonable, unduly restrictive, too numerous, or which effectively set the accused up to fail” (para 26).

¹¹⁶ Moreover, living with bail conditions may be experienced as punitive and intrusive by those who abide by them. See Yule et al. (2023) for a typology of how accused individuals experience bail, ranging from “It’s Easy Man” to “It felt like Incarceration”.

¹¹⁷ For instance, Myers and Dhillon (2013) observed in their Toronto youth court study that 40.7% of the conditions imposed had no obvious connection to the alleged offence(s) or to the grounds for detention, and another 21.5% of conditions had only an ambiguous connection.

¹¹⁸ In the CCLA’s (2014) bail court observations in five Canadian jurisdictions, the condition to keep the peace and be of good behaviour was included in nearly half (43% or 74/172) of all bail releases, albeit with considerable jurisdictional variability. As an illustration of this variability, Myers (2017) found that this condition was present in only 12.4% (29/234) of bail releases in her Ontario court observation study, whereas this condition was present for 46.9% of bail releases in another Ontario study by Mitchell (2015) and in 100% of bail releases in an Ontario study by Yule et al. (2023), although these latter two studies were comprised entirely or primary of individuals released under a bail supervision program and were therefore unlikely to be representative of accused persons generally. Yet in *R. v. Zora* (2020), the Supreme Court of Canada directed that this condition should be “rigorously reviewed when proposed as a condition of bail” (para 94). Indeed, the Court stated that because this condition is generally understood to refer to any violations of federal, provincial/territorial or municipal statutes, it “adds a new layer of sanction... to everything from violation of speed limit regulations on federal lands, such as airports, to violation of dog leashing by-laws of a municipality” (*R. v. Doncaster*, 2013, para 16, quoted in *R. v. Zora*, 2020, para 94). Within this light, the court failed to see how this condition “could be reasonable, necessary, least onerous, and sufficiently linked to an accused’s flight risk, risk to public safety and protection, or risk to maintaining confidence in the administration of justice” (para 94). Moreover, Rogin (2017) notes that this condition often results in duplicative charges.

remain legally innocent, it is important that any bail conditions are not only necessary, but also realistic and reasonable. Particularly within the context of settler colonialism, courts' paternalistic efforts to rehabilitate and reform Indigenous accused through bail conditions – often with forced treatment and programming – may be especially inappropriate (Rogin, 2017; see also Rudin, 2022).

And, in fact, Indigenous peoples appear to be disproportionately affected by unnecessary and unreasonable bail conditions and corresponding charges for failure to comply with such conditions (CCLA, 2014; *R. v. Omeasoo* (2013); *R. v. Zora* (2020); Rogin, 2017). Given higher rates of drug and alcohol addiction within Indigenous communities – often resulting from experiences of settler colonialism – conditions which prohibit the use of drugs and/or alcohol would seem especially misguided for some Indigenous peoples. Indeed, the CCLA (2014) noted that, “[f]or individuals with substance addictions, abstinence conditions often do little more than set the person up for a subsequent breach charge, more pre-trial detention and a longer criminal record” (p.57)¹¹⁹. While Rudin (2022) concedes that these conditions may have some merit in a limited number of cases, he contends that they should not be applied to those experiencing alcoholism or addictions. Specifically, Rudin (2022) notes that despite ongoing addiction, these individuals do not engage in criminal behaviour every day and, as such, alcohol and/or drugs should not be considered a “proximate cause of the alleged offence” (p.185)¹²⁰.

¹¹⁹ To illustrate the scope of this issue, the JHSO (2013) analyzed bail conditions included in the release documents of 158 clients of their bail supervision programs. They found that an alcohol abstinence condition was present in 61.4% of these cases, while a drug abstinence condition was present in 62.7% of these cases. Yet this figure increased to 80% of bail supervision clients who had disclosed to the BVSP ongoing issues with alcohol – that is, those arguably most likely to struggle with, and potentially breach, such abstinence conditions. More concerning still, Ceccato (2019) found in his examination of one large Quebec bail court that abstinence conditions were significantly more common for Indigenous accused than for non-Indigenous accused (83.3% versus 67.6% for alcohol prohibitions and 83% versus 45% for drug prohibitions). Yet, it appears that some courts – at least in Ontario – have more recently recognized the issues associated with abstinence conditions and have made efforts to limit their imposition. Indeed, Schumann & Yule (2022) noted a statistically significant difference ($p < .001$) in the average number of conditions not to possess and/or consume drugs/alcohol which were imposed in bail releases from three Ontario bail courts in the year preceding and the year following *R. v. Antic* (2017) (see also footnote 115).

¹²⁰ Moreover, Hannaford (2020) asserts that abstinence conditions – in particular those prohibiting illicit substance use – may actually endanger accused persons and be counterproductive to a Court's rehabilitative goals. Indeed, those with this condition may resort to using drugs in secret and avoiding safe spaces and/or community resources (e.g., supervised injection sites and clean needle exchanges), thereby increasing the risk of overdose and decreasing the likelihood of seeking assistance when needed.

iii) Further Criminalization through Breach Charges

The way in which bail conditions are enforced – through threat of criminal charges – also appears to directly contribute to the growing remand population, as well as the overincarceration of Indigenous peoples more specifically. Ironically, although judicial officers may require accused persons on bail to follow numerous and potentially demanding conditions in an effort to minimize their likelihood of committing future criminal behaviour, these conditions may actually set up accused individuals for further criminalization (CCLA, 2014; JHSO, 2013; Myers, 2017; Pelvin, 2017; Sprott & Myers, 2011; Webster et al., 2009). Indeed, individuals who do not follow the conditions outlined on their judicial interim release order are often charged with failure to comply with a condition of an undertaking or a recognizance – colloquially referred to as a ‘breach of bail’ – a hybrid offence¹²¹ under section 145(3) of the *Criminal Code*. The greater the number of conditions, and the longer an accused must follow said conditions¹²², the more opportunities exist for them to be contravened and the greater the likelihood of bail breach charges (Mitchell, 2015; Myers, 2017; Sprott & Myers, 2011; Webster, 2023).

It is important to note that many of the behaviours which constitute a breach of bail (or breach of probation) are not inherently criminal, nor do they necessarily pose a risk to public safety¹²³. Rather, many actions that initiate breach charges are criminalized only because they were so stipulated in a release or probation order. For instance, while it is not inherently criminal – let alone unusual – to be outside of one’s

¹²¹ In Canada, criminal offences fall into three broad offence types. From least to most serious in nature, these categories are: summary conviction offences, hybrid offences and indictable offences. The maximum penalty for summary offences is generally (although not always) six months in custody and/or a \$5,000 fine. The maximum penalty for indictable offences varies and can include life imprisonment (and may sometimes include mandatory minimum sanctions). With hybrid offences, a Crown prosecutor may decide whether to prosecute an offence summarily (i.e., as a summary offence) or by indictment (i.e., as an indictable offence).

¹²² Indeed, accused persons released on bail must follow the conditions of their bail for what is often months, or even years. Consider that in 2016/2017, Canadian criminal court cases took a median of 124 days (roughly four months) to be completed (Miladinovic, 2019) – meaning that half of cases would necessarily take 124 days *or more* to complete. Thus, any issues relating to court efficiency and/or court delay may have trickle-down effects for those on bail, whose likelihood of being charged with a bail breach will necessarily increase the longer they must abide by these conditions (Sprott & Myers, 2011).

¹²³ While many breach of bail charges do not constitute a threat to the public, it is important to note that some breaches do undoubtedly reflect threats to public safety. Think, for instance, of certain no-contact conditions, in which the accused is prohibited from contact with a complainant. For charges against the person, and particularly those stemming from intimate partner violence, these conditions are important for ensuring the safety of those directly affected by the alleged offence, and any violations of these conditions would be considered serious and potentially harmful.

residence after 9:00 PM, this could constitute a breach charge as similar curfews are not uncommon in bail (and probation) orders¹²⁴. Despite many breach charges arising from behaviours which seemingly pose little risk to the public, these charges tend to be taken quite seriously by the courts. Indeed, breach of bail and breach of probation charges are often deemed to be an expression of willful noncompliance and disrespect for the justice system. Moreover, charges for failure to comply with a condition of bail place an accused in a reverse onus position at a bail hearing – meaning that it is the accused who must now demonstrate that their pre-trial detention is not necessary. Reverse onus provisions generally make a subsequent bail release significantly less likely, and if/when bail is granted again, it is generally with more stringent conditions, which then increase the chances of further breaches (which further reduce chances of bail on any subsequent charges, if convicted). Equally concerning, individuals can be found guilty of breaching a bail condition even when they are acquitted or otherwise not found guilty of the initial substantive charge(s). Consequently, there are numerous anecdotal examples of individuals in the criminal justice system with lengthy criminal records consisting entirely, or almost entirely, of breach charges¹²⁵, such that Wyant (2016) suggests that the court system is effectively manufacturing some individuals' criminal records.

¹²⁴ Data from the JHSO (2013) indicate that a curfew condition was present in the release order of 57.6% bail supervision program clients (N = 158). Similarly, Yule & Schumann (2019) found that this condition was present in 15% of consent releases and 21% of contested show cause releases in their Ontario study (though this difference was not statistically significant), while Myers (2017) found this condition to be present in 19.2% of bail releases in her Ontario study. Furthermore, interviews with defence counsel conducted by the CCLA (2014) suggest that, at least anecdotally, curfews are being imposed regularly and without regard for the timing or the nature of the alleged offence. These interviews also suggest that the vast majority of bail breach charges are for behaviours which are not inherently criminal and do not pose a risk to public safety (e.g., failing to comply with a curfew or an abstention order, failure to reside at a specified address, no-contact violations in relation to minor underlying charges).

¹²⁵ Not only do bail breach convictions sometimes occur in the absence of a conviction for the initial substantive charge(s), but they have the potential to significantly extend an individual's criminal record and even render that person more likely to receive a custodial sentence for any subsequent convictions. Illustratively, one defence counsel in Manitoba recounted to the CCLA, "I remember one accused person in particular who, on his entire record – he was about 38 to 39 [and] he'd been in and out of the system since he was about 16 or 17 – he had no substantive convictions on his record. His record was six to seven pages long, he had probably 25–30 convictions – not one was substantive. [...] But every time he got arrested and there'd either been a discharge, or he was acquitted, or the charges were stayed, he would get three or four breaches in between. The man had substance abuse problems, and when you give somebody with a chemical addiction an abstain condition . . . and when the police know these people, because it's the same people getting picked up all the time, the police are going to look for the guy, find him of course drunk because that's what he does . . . he ends up getting three convictions for breaching his bail, landing in jail for a couple of weeks at a time. The man's never actually been convicted of what I would call an actual offence." (CCLA, 2014, p.65). See also Wyant (2016, p.49) for a similar anecdote regarding a woman with a single substantive conviction relating to sex-work, followed by a dozen or more convictions for breaching probation and subsequent bail releases.

The bail process may also manufacture criminal records and contribute to Indigenous over-incarceration through the accumulation of criminal charges for failing to attend a scheduled court date. While charges for failure to attend court also tend to be treated seriously by the courts, these charges are more likely to stem from someone unintentionally missing a court date (e.g., forgetting an appearance), or doing so for arguably legitimate reasons (e.g., difficulties accessing travel or childcare, medical reasons), than they are from someone willfully absconding (Corey & Lo, 2019; see Gouldin, 2018 for in-depth discussion and taxonomy of local non-appearance versus true flight). Particularly for Indigenous peoples on bail, obstacles to appearing in court which are rooted in the ongoing legacy of settler colonialism (e.g., financial strain limiting access to transportation or childcare, precarious employment, prevalence of FASD and challenges remembering court dates) may be contributing to these charges. Indeed, Corey & Lo (2019) suggest that marginalized populations (including, and perhaps especially, Indigenous peoples) are disproportionately likely to receive charges for failing to attend court. Without considering an accused person's intentions, as well as the broader context which may have contributed to their failure to attend court, these charges risk further criminalizing Indigenous peoples and further contributing to their overincarceration.

Criminal charges for failure to comply with a condition of a court order and failure to attend court are classified as offences against the administration of justice. Charges against the administration of justice also include failure to comply with a probation order and being unlawfully at large. Charges against the administration of justice have become increasingly pervasive in the Canadian criminal justice system¹²⁶, arguably clogging the court system and potentially contributing to court inefficiency. According to data from Integrated Criminal Court Survey, administration of justice cases represented 21.2%¹²⁷ of adult court cases

¹²⁶ Indeed, the proportion of adult cases before Canadian criminal courts that included at least one offence against the administration of justice rose from 22% in 1994/1995 to 31% by 2003/2004 (Taillon, 2006). Similarly, the proportion of cases with this type of charge increased by another 6% from 2005/2006 to 2013/2014, although the raw number of these cases, and the number of criminal cases generally, actually decreased from 2011/2012 onward (Burczycka & Munch, 2015).

¹²⁷ That is, cases for which the most serious decision in a case was for a charge against the administration of justice, or when there are two or more charges in a case that received the same most serious decision, cases for which the most serious charge was one against the administration of justice (Public Safety Canada, 2020). Notably, this case definition will underestimate the number of adult criminal court cases simply containing one or more of these charges among all

completed in Canada in 2017/2018, with 8.6% of cases being for a breach of a court order and 8.4% of cases being for breach of probation specifically (Public Safety Canada, 2020). Notably, among court cases with one or more charges against the administration of justice which also included other charges, these additional charges are most often property charges (Burczycka & Munch, 2015).

As a window into the presence of these charges among Indigenous peoples, Clark's (2016b) case study of the Old City Hall Courthouse examines the prevalence of these charges among all Indigenous cases compared to all cases received in this courthouse in 2015 (that is, not only bail cases). He found that not only were Indigenous cases substantially more likely to contain charges against the administration of justice than cases generally from this courthouse (27.7% versus 18.7%) but also that this offence category represented the most common type of charge in Indigenous cases, while only constituting the fourth most common among Old City Hall cases generally. Milward (2014) suggests that the prevalence of FASD among Indigenous persons may be contributing to their greater likelihood of receiving breach-type charges and convictions. This legal scholar notes that those with FASD may have more difficulty following conditions of probation and conditional sentences (and, by extension, bail orders) and consequently cautions that judicial officers must be careful when creating such orders so as to not set up individuals with FASD for future breaches.

The pervasiveness of administrative charges generally appears to be even more pronounced among bail cases specifically. In a study of bail court in a large Ontario city, 76.6% of all adult cases before the court included at least one charge against the administration of justice (Webster, 2007). Moreover, in a study of a BVSP in a large Ontario city, 44% of bail supervision clients went on to receive one or more bail breach charges (Mitchell, 2015). Notably, however, more than half of these breach cases (52.3% or 23/44) incurred *only* breach charges while under BVSP supervision (i.e., no new substantive charges or charges for failure to attend court), while just over a quarter incurred breach and failure to attend court charges only (Mitchell, 2015). That more than three-quarters of unsuccessful bail program clients did not actually incur new substantive

charges. Indeed, slightly older data from 2013/2014 indicate that one or more charges against the administration of justice were present in 39% of adult criminal court cases in Canada (Burczycka & Munch, 2015).

charges suggests that, despite the administration of justice charges incurred in these cases, they did not likely pose a significant threat to the public or the administration of justice.

Importantly, administration of justice cases are more likely to result in a finding of guilt, as well as more likely to result in a custodial sentence, than cases without these charges. Indeed, 76% of adult criminal cases with one or more charges against the administration of justice resulted in at least one finding of guilt in 2013/2014 (compared to only 55% of cases without these charges) (Burczycka & Munch, 2015). Moreover, the most common sentence for these cases (as well as for those cases for which a charge against the administration of justice was the *most serious* charge to receive a finding of guilt) was a term of imprisonment (50% of these latter cases received a custodial sentence in 2013/2014 compared to only 36% of cases without an administration of justice charge as the most serious charge with a finding of guilt; Webster et al., 2016). The prevalence of custodial sentences among administration of justice cases is perhaps unsurprising given that these convictions might be interpreted as demonstrating noncompliance with conditional forms of release, such that less restrictive sanctions might be deemed inappropriate. Yet the prevalence of custodial sentences among administration of justice cases has significant implications for Canada's custodial population broadly, and potentially for the overincarceration of Indigenous peoples, specifically.

Indeed, the threat of further criminalization through bail breaches (and charges against the administration of justice more generally) may be particularly elevated for Indigenous accused (Clark, 2019; Dickson-Gilmore & LaPrairie, 2005). Given that this population is over-policed (particularly for minor alleged offences), it should not be surprising that their potential bail (and probation) breaches are more likely to be observed and to receive charges, leading to an increased likelihood of subsequent refusal of bail, a criminal record and eventual imprisonment. Hence, imposing numerous or unrealistic conditions on Indigenous accused may actually be contributing to their continued (and deepening) enmeshment in the criminal justice system and their overincarceration, in particular. In fact, Rogin (2014, 2017) contends that one of the ways in which Gladue principles should be applied at bail is by considering the potential role of institutional bias, including over-policing and over-charging (as well as systemic factors deriving from settler colonialism) that

may have contributed to current charges before the courts as well as previous convictions, particularly those relating to failure to comply with conditions or failure to attend court.

The little discussion and empirical research available on these systemic barriers for Indigenous accused seeking bail would appear to support their disadvantaged position in the bail system. Indeed, both Quigley (1994) and the RCAP (1996) contend that Indigenous peoples are more likely than their non-Indigenous counterparts to be denied bail and held in pre-trial detention¹²⁸. Gallop (2021) similarly argues that the Canadian bail system operates in a way which regularly breaches Indigenous peoples' *Charter* right to reasonable bail. The AJI (1991) cites its provincial court research to illustrate this phenomenon. It found that Indigenous accused were 1.34 times more likely to be held in pre-trial custody than non-Indigenous accused (55% versus 41%). The effects of systemic discrimination during the bail stage were even more pronounced for women: female Indigenous accused aged 18–34 were 2.4 times more likely to be held in pre-trial custody than non-Indigenous female accused of the same age bracket (48% versus 20%)¹²⁹. Research from Australia, where Indigenous overincarceration is also a significant problem, has similarly found Indigenous identity to be a statistically significant independent predictor of bail refusal (Snowball, Roth & Weatherburn, 2010; Weatherburn & Snowball, 2012¹³⁰). That risk knowledges, which are at the core of Canada's bail system, interact with settler colonial processes to render Indigenous peoples more likely to be denied bail, or alternatively, to be given onerous bail conditions and to be charged with breaching their bail order, constitutes systemic discrimination.

¹²⁸ An investigation by Reuters (2017) similarly uncovered significant racial disparity within the Canadian bail system. While the report focused on disparities between white and black accused – with black accused spending, on average, longer in pre-trial detention than white accused for 11 out of 16 offence categories examined – it is likely that a similar pattern would exist between Indigenous and white accused, given that both Indigenous peoples and black persons are more likely to face barriers to bail rooted in socio-economic marginality as well as criminal justice bias.

¹²⁹ While these data are admittedly dated, recall that data on accused persons' Indigenous identity are not collected in any systematic way in Canadian courts. Hence any available data on Indigenous peoples in the court system are extremely limited and tend to come from smaller scale studies which involve court observations.

¹³⁰ In Snowball & Weatherburn's (2012) Australian study, although the effect size of Indigenous identity decreased with the addition of relevant legal factors (most notably, prior convictions generally, and prior breach convictions specifically), the authors also acknowledged that these factors might reflect some degree of criminal justice bias (e.g., in terms of past policing or prosecutorial decisions), such that these previous convictions might be considered "artifacts of racial bias" (Weatherburn & Snowball, 2012, p.57).

iv) The Need for Guidance when Applying Gladue Principles to Bail

It would seem that the current Liberal federal government was likely aware of at least some of these challenges facing Indigenous peoples in the Canadian bail system when it enacted new amendments to the *Criminal Code* in December 2019. In addition to a principle of restraint regarding timing and form of release now codified in s.493(1) of the *Criminal Code*, s.493(2) stipulates that judicial officers making decisions relating to bail must “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”. This apparent recognition that Indigenous accused are disproportionately affected by bail and ought to be given particular consideration at this stage of the court process is an important step in trying to ensure substantive equity. Yet given the limited success of similar language in s.718.2(e) with regards to sentencing, it may be that these statutory changes, on their own, will have limited remedial effect on the Indigenous remand population and Indigenous overincarceration more generally. In fact, implementing these bail-related provisions may lead to new challenges, again, similar to those encountered in the wake of the s.718.2(e) sentencing provisions. That is, without clear, practical guidance and training for judicial officers regarding how one is to consider the circumstances of an Indigenous accused within the context of bail and what effect these considerations should have on bail decisions, these provisions may have a similarly limited, or worse, unintended negative effect.

Indeed, a discussion of an Indigenous accused person’s circumstances, without appropriate exploration of how these circumstances have been shaped by settler colonial processes – or too deep an exploration of circumstances irrelevant at the bail phase – might inadvertently elevate the perceived ‘riskiness’ of that person and consequently make them appear less suitable for release¹³¹. Recall that the

¹³¹ For instance, see Hannah-Moffat & Maurutto (2010) for discussion of how the legal directive embedded in s.718.2(e) has been introduced, in many jurisdictions, to risk/need oriented Pre-Sentence Reports. These scholars argue that by listing Gladue factors alongside conventional risk factors, with little guidance to probation officers in terms of how to reconcile these with the risk framework inherent in PSRs, Indigenous offenders are being inappropriately characterized as high risk: “the newly mandated focus on social and historical circumstances of Aboriginal people can escalate (rather than mitigate or contextualize) probation officers’ assessments of risk and treatment requirements” (p.275). See also Dickson & Stewart (2021), as well as Parkes (2012) for an analysis of how this exact phenomenon occurred in the Manitoba Court of the Queen’s Bench case of *R. v. Knott (J.W.)* (2012).

application of Western risk knowledges to Indigenous populations – particularly at bail – has been generally critiqued (Cunneen & Tauri, 2016; Dickson & Stewart, 2021; Gallop, 2021; Hannah-Moffat & Maurutto, 2010; Maurutto & Hannah-Moffat, 2016; Monture-Angus, 1999). Given that conventional risk knowledges have been criticized as highly gendered and racialized (Hannah-Moffat, 2005), overly narrow in scope (Hannah-Moffat & Maurutto, 2010) and inappropriately individualizing ‘risk’ and responsibility (Gallop, 2021; Hannah-Moffat & Maurutto, 2010; Maurutto & Hannah-Moffat, 2016; Monture-Angus, 1999), there is a real danger with this new *Criminal Code* provision that recognition of an Indigenous person’s circumstances might inadvertently become a recognition of perceived risk factors by the courts. Indeed, an Indigenous person’s circumstances must not be decontextualized from the broader settler colonial forces which have helped to bring them about.

In fact, Rogin (2014, 2017) is critical of the ways in which bail courts often fail to fully contextualize an Indigenous accused’s life circumstances within broader settler colonial histories. She explains that too often at the bail phase “tragic circumstances are understood to be resulting from the fact of the Aboriginal heritage as opposed to being understood as attributable to colonialism – historic and ongoing – that is the cause of the life circumstances of the accused” (Rogin, 2014, p.58). To ignore the ongoing effects of settler colonialism is thus to attribute these circumstances, and place any blame for them, entirely on the individual. Moreover, Maurutto and Hannah-Moffat (2016) contend that “the identification of Gladue factors (risk factors), devoid of any connection to histories of colonialism and race relations, often result in an escalated perception of risk” (p.459). Indeed, to ignore the settler colonial context may pathologize Indigenous peoples and cause Indigeneity to be deemed “criminogenic” (Cunneen & Tauri, 2016; Parkes, 2012; Razack, 2015; Rogin, 2014). Furthermore, this limited focus also ignores any strengths or resilience on the part of the Indigenous individual who has persevered in spite of their experiences of settler colonialism.

Within this context, it seems clear that bail processes must be re-examined in order to better account for the collective experiences and needs of Indigenous accused. Rather than continue with a risk-focused, settler-centric model of bail which arguably leads to an increased likelihood of systemic discrimination, a new

approach is needed which may better account for the ways in which Canada's settler colonial policies have directly and indirectly impacted the circumstances and experiences of Indigenous peoples in negative – if not devastating – ways.

3.4 –The Renewed Promise of Gladue Courts: Overcoming a Settler-Centric Bail System

In light of the multiple shortcomings of the current settler-centric bail process, particularly with regards to its numerous systemic barriers for Indigenous accused seeking bail release, and their contribution to Indigenous overincarceration, Gladue Courts may – once again – constitute at least a partial solution. Specifically, their more holistic, less settler-centric approach to addressing Indigenous peoples involved in the criminal court process, and their greater awareness of Gladue principles, may constitute a new way forward when addressing issues of bail. In fact, this renewed potential of Gladue Courts to reduce Indigenous overincarceration has not gone unrecognized by the higher courts. Illustratively (and long before the *Criminal Code* was eventually amended to require consideration of what are essentially Gladue principles at bail), Ontario appellate courts have repeatedly affirmed the applicability of Gladue principles to all criminal court decisions in which an individual's liberty is at stake – particularly bail decisions (Roach, 2009; Rudin, 2009, 2022; see, for example, *R. v. Bain* (2004); *R. v. Crawford* (2007); *R. v. Robinson* (2009)). Indeed, many Gladue Courts in Ontario (including those in Toronto and Ottawa) have long explicitly stated that Indigenous accused persons going through the bail process are also welcome in their courtrooms.

Within this context, Gladue Courts may hold new promise in removing systemic barriers at bail through an extension of Gladue principles to the bail processes within these courtrooms. Indeed, one of the objectives of the Old City Hall Gladue Court (as reported in Clark, 2016b) was to “[i]nterpret bail provisions liberally so that pre-trial detention is not imposed unnecessarily and does not lead more directly to custodial sanctions” (p.16). Yet despite the established applicability of Gladue principles at bail, and the commitment of Gladue Courts to implement these principles, there remains some uncertainty in terms of how this judicial guidance ought to be translated into practice. To this end, Rogin (2017) argues that the Gladue decision should be used broadly, as a “social context lens that accounts for the colonization of Aboriginal people in Canada” (p.354).

In fact, Hannah-Moffat & Maurutto (2016) suggest, based on court observations in two Gladue Courts in Toronto¹³², that Gladue Courts may be increasingly reframing Western notions of risk within broader settler colonial histories (Maurutto and Hannah-Moffat, 2016). Specifically, they noted that criminal justice actors are increasingly introducing what they call *contextualized Aboriginal knowledges* not only at sentencing but also at the bail phase. Contextualized Aboriginal knowledges are narratives and evidence which are used to “locate individual behaviour within collective racial histories and experiences of colonialism and discrimination” (Maurutto & Hannah-Moffat, 2016, p.453). Rather than make simple reference to the circumstances of an Indigenous person’s life, contextualized Aboriginal knowledges connect and reframe these circumstances within the ongoing legacy of settler colonialism¹³³ (Maurutto & Hannah-Moffat, 2016). This knowledge allows for alternative ways of evaluating an accused person’s (alleged) criminal history, their perceived risk level and appropriate forms of sentencing or bail release.

Equally promising, these courts’ unique sensitivities and resources, ongoing training of personnel and connections to Indigenous communities and service providers may enable them to further avoid (or at least remediate) settler-centric assumptions. Moreover, an ability to apply contextualized knowledges to the bail system may mean that Gladue Courts might be able to overcome the reliance on Western risk knowledge and thereby circumvent any systemic discrimination against Indigenous peoples which is otherwise present at this phase of the criminal justice process. These sensitivities may thus permit criminal justice professionals to craft more substantively equitable bail decisions, thereby detaining fewer Indigenous individuals unnecessarily and potentially leading to fewer convictions and custodial sentences downstream.

However, while the contextualization of Indigenous peoples’ circumstances in broader discussions of settler colonialism may appear promising within the context of bail, there is currently very little

¹³² Maurutto & Hannah-Moffat’s (2016) study of two Gladue Courts examines how knowledge about race and Indigenous histories is advanced and evaluated in these courts. It does not specifically examine Gladue Court outcomes, nor does it compare Gladue courts to conventional sentencing or bail courts.

¹³³ Maurutto and Hannah-Moffat (2016) explain that whereas poverty, lack of education and parental substance abuse would be considered risk factors in Western risk knowledges, contextualized Aboriginal knowledges would “document how these factors are rooted in colonial histories and discrimination (i.e., lack of education related to inadequate state investment, poverty resulting from dispossession of land, substance abuse among residential schools survivors)” (pp.454-5).

comprehensive research on the overall effectiveness of these courts and the ways in which they handle bail cases. The only examination of Gladue Courts' bail processes is a short section in Clark's (2016b) evaluation of the Old City Hall Gladue Court. In his sample of 66 randomly sampled individuals appearing in Gladue bail cases between October 2013 and December 2015, 63.6% (N=42) were granted bail, while 37.2% (N=24) were not granted bail (a combination of cases formally denied bail and cases for which a bail application was never made). The most common bail conditions given in this court were to reside at a reported address (25.7%), not to attend a certain address (22.8%), not to possess any weapons (20.8%), to attend treatment (19.8%) and not to contact a specified person (16.9%) (Clark, 2016b). Notably, alcohol or substance prohibitions were comparatively less common (the latter of which was present in only 8.4% of cases). Clark (2016b) further notes that judges in this court generally appeared willing to subsequently amend bail conditions which were proving to be impractical, or to otherwise reward accused persons' rehabilitative efforts while on bail. Finally, interviews with Indigenous peoples who had been through the bail process in this Gladue Court generally reported finding the process "fair and reasonable" (Clark, 2016b, p.34)¹³⁴. Nevertheless, a major limitation of this study – beyond the fact that it reports on only one Gladue Courtroom among many – is that it did not examine remand rates or bail conditions for non-Indigenous accused appearing in the same courthouse. Consequently, any meaningful comparisons were impossible to draw, just as the report was unable to evaluate the presence of any systemic discrimination against Indigenous peoples. In fact, Clark (2016b) acknowledges that "[c]omparative analysis between the (Old City Hall) Gladue Court and other Gladue Courts and non-Gladue Courts will provide a more thorough understanding of Gladue processes" (p. 5).

Ultimately, little is known empirically about how these Gladue Courts approach the bail process and the extent to which these processes and outcomes may differ in any significant ways from conventional, presumably more risk-centric courtrooms. In other words, the verdict is still out on the potential role of Gladue Courts in effectively reducing Indigenous overincarceration. On the one hand, their ability to address

¹³⁴ Indeed, Clark (2016b) noted that, "[t]he responses were almost universally clear that the OCH Gladue Court acts in their best interests with respect to bail, while other courts do not necessarily do that" (p.35).

the overincarceration of Indigenous peoples through bail practices seems promising. On the other hand, compelling arguments to the contrary can also be raised.

In terms of more *principled* arguments, it is possible that the notions of risk – so prevalent at bail and enshrined in the *Criminal Code* – may be too prominent to overcome (or, at least, be re-imagined or re-contextualized), even in Gladue Court. More broadly, Gladue Courts – even at the bail phase – might simply be considered ‘too little, too late’ in the sense that these courts can only intervene once an Indigenous person has come into contact with the criminal justice system. Indeed, the limited scope of bail within the greater criminal justice system may limit the effects of bail-oriented interventions in two ways. First, many of the factors which contribute to Indigenous peoples’ involvement in the court system – whether socio-economic circumstances rooted in settler colonial processes or biased over-policing and charging practices – are outside of the court’s purview and must be addressed through a wider commitment to reconciliation and, among other things, investment in social services. Second, despite the ways in which decisions at bail directly affect remand custody and indirectly affect sentenced custody, it is possible that progress made ‘upstream’ at bail may simply not be enough to counteract certain legal constraints downstream which tie judges’ hands at sentencing. Consider, for instance, the general expectation that penalties (particularly terms of imprisonment) should increase when convictions for similar offences accumulate¹³⁵, or the ways in which mandatory minimum sanctions¹³⁶ restrict sentencing options and limit a judge’s ability to recognize Gladue principles.

¹³⁵ While the so-called “jump principle” – that is, the idea that sanctions (and particularly terms of imprisonment) for similar offences should escalate in severity by moderate steps (but not “jumps”) as convictions accumulate – is not a formal principle of sentencing, Manson (2001) notes that there is some judicial acceptance of this approach. Hence, for an Indigenous person with a lengthy criminal record of bail and/or probation breaches, some judges may feel that a(n increasingly lengthy) custodial sentence is the only suitable option.

¹³⁶ Indeed, when a charge carries a mandatory minimum sanction (MMS) of imprisonment, judges’ hands are tied considerably. In these circumstances, judges have limited ability to consider an Indigenous offender’s unique circumstances and systemic background factors or potential alternatives to custody and thus limited ability to impose a sentence which respects the principle of proportionality (Department of Justice, 2017; Parkes, 2012; Rudin, 2012, 2022). Instead, a judge may be required to sentence an Indigenous person to a specified term of imprisonment when they would have crafted a non-custodial sentence, or imposed a shorter term of imprisonment, under s.718.2(e). In this regard, Rudin (2012) asserts that, in some circumstances, Crown prosecutors’ decisions regarding which charges to pursue may have the effect of limiting judicial discretion later at sentencing (see also Parkes, 2012). MMS also notably preclude eligibility for conditional sentences, such that the TRC (2015) has expressed concerns that this will contribute to Indigenous overincarceration. Consequently, the TRC (2015) has called on the federal government to amend the

More practically, the comparatively short time frames in which bail decisions are made (as compared to sentencing decisions) will necessarily affect the ways in which Gladue principles can and should be applied. While Gladue Reports might seem like a promising way of highlighting the historic and ongoing effects of settler colonialism relevant to an Indigenous accused's charges and perceived risk factors, these reports are not only impractical, but also largely inappropriate at the bail stage (Rudin, 2022). Indeed, these reports often take months to commission and are not suited for the bail process which should be completed in a relatively short time frame. More importantly, however, they also risk prejudicing the accused. As they detail the history of the individual within the context of sentencing, much of their content will be unnecessary and irrelevant to the current charges or the question of bail (at which point the accused still benefits from the presumption of innocence) (Rudin, 2022). In fact, Rudin (2022) argues that Gladue Reports for purposes of bail may "inadvertently lead the court to move toward the imposition of conditions" (p.181) that are entirely inappropriate for those without a determination of guilt. Rogin (2017) similarly cautions that extensive exploration of the accused's background (and particularly any sensitive or intimate details and/or any personal traumas) is not appropriate in any form unless it is directly relevant to the grounds for bail^{137,138}.

However, the ability of Gladue Courts to effectively address Indigenous overincarceration through bail may also be hindered by scheduling limitations. Indeed, most Gladue Courts operate only one or two (sometime half-) days a week. Depending on the timing of criminal charges and entry into custody, an accused person may thus spend several days in remand prior to having the opportunity to appear for bail in Gladue

Criminal Code in such a way that would allow judges to depart from MMS (as well as restrictions on the use of conditional sentences), upon giving reasons. Notably, several MMS have recently been removed from the *Criminal Code* and *CDSA*, with the passing of *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act* (2022). For greater discussion of these, and other, advancements, see section 6.6.4.

¹³⁷ Furthermore, Rogin (2017) contends that any in-depth inquiries into perceived *causes* of criminal behaviour are inappropriate at bail and too often lead to court-ordered treatment for legally innocent persons. The requirement of legally innocent individuals to undergo treatment not only betrays the presumption of innocence but also reflects an attitude of paternalism. Given Canada's settler colonial practices and policies, Rogin (2017) cautions that this behaviour toward Indigenous peoples risks "perpetuating a colonial encounter where Aboriginal people are overly subjected to paternalistic efforts to reform" (p.356).

¹³⁸ On this issue, see Rudin (2022) for a proposed two-step process which may help to protect against the provision of unnecessary personal details while recognizing that, sometimes, certain details may be necessary.

Court or may otherwise opt to have their bail heard in a conventional bail court in order to avoid this wait (Clark, 2016b).

And perhaps most interestingly – and problematically – Rogin (2014, 2017) contends that there is still a clear lack of direction in terms of how the *Gladue* decision is to be implemented at bail. In particular, she notes the difficulties in applying a sentencing framework to the bail phase, at which point an accused still benefits from the presumption of innocence. Indeed, the types of considerations relevant to bail are considerably different from those relevant to sentencing. Although Gladue bail decisions are being made regularly across Canada, Rogin (2017) argues that “[t]he case law is not well developed in this legal arena; it is sporadic, contradictory, and at times misguided” (p.327)¹³⁹.

My doctoral research seeks to explore the renewed, yet untested, promise of Gladue Courts as they relate to the bail process. Through an examination of bail case characteristics, bail processes and case outcomes, I investigate the extent to which Gladue Courts may be able to successfully overcome settler-centric, risk-focused approaches to bail and any systemic barriers to Indigenous peoples’ release. To the extent that Gladue Courts are able to produce bail outcomes for Indigenous peoples which are substantively equitable to those for non-Indigenous accused in conventional bail courts, these courts may have an important impact on this stage, and later stages, of the criminal court process and on the overincarceration of Indigenous peoples more generally.

¹³⁹ Notably, several more instructive court decisions relating to the appropriate application of Gladue principles at bail have been recently released (e.g., *R. v. Papequash* (2021); *R. v. Sledz* (2017); *R. v. Chocolate* (2015)). While these decisions were rendered near the end, or following, the study period for this research, they nevertheless represent useful illustrations of how Gladue principles can and should be applied at the bail phase of court processing. For more recent and pragmatic guidance for practitioners on the application of Gladue at bail, see also Rudin (2022).

4 – RESEARCH METHODOLOGY

4.1 – Methodological Overview

My doctoral research project is an examination of two Toronto Gladue Courts. It is a comparative analysis of bail case characteristics, bail processing and case outcomes for Indigenous accused in these Gladue Courts, compared to (predominantly) non-Indigenous accused whose bail was processed in conventional bail courtrooms within the same courthouses¹⁴⁰. The research is designed to explore the types of bail cases heard in Gladue Courts and the extent to which these courts may be able to overcome issues of systemic discrimination¹⁴¹ while controlling for other confounding factors.

My research is primarily a quantitative analysis of a large bail dataset created specifically to address the unique research questions related to Indigenous peoples and bail which are explored in this thesis. This longitudinal dataset consisted of 9,191,018 criminal charges completed between 2001-2017 as recorded by the Ontario Ministry of the Attorney General (MAG). However, because criminal courts do not process accused in terms of separate, individual charges, but rather in terms of cases which may encompass numerous charges, these criminal charges were aggregated in such a manner as to approximate criminal cases. In fact, two distinct case definitions were used to produce two separate, complimentary case-based datasets, each with its own strengths. The first, an *event-based* dataset, conceptualized cases as all charges against an individual stemming from a single event (or charging information). This dataset initially contained 3,708,874 adult criminal cases. The second dataset was *person-based* which conceptualized cases as all charges against a specific individual at a given courthouse which were disposed on the same date. This dataset initially contained 1,925,955 adult criminal cases. From these two case-based datasets, only adult bail cases from the Toronto Old City Hall and College Park courthouses were selected, and the study

¹⁴⁰ See footnote 150 for a more detailed discussion of their bail populations and their make-up.

¹⁴¹ These comparisons are important in the sense that one would expect that, if Gladue Courts are effective, bail outcomes would be substantively equitable for similarly situated Indigenous peoples and non-Indigenous people at bail. Particularly in the case that Indigenous peoples receive harsher bail outcomes than non-Indigenous people, this finding may reflect systemic discrimination.

timeframe was refined slightly, thus creating the datasets which formed the basis of the thesis analyses – 188,202 event cases and 141,709 person cases, respectively.

The datasets that I created for this research are novel in a number of ways. First, they are unique in that the isolation of only those criminal cases with one or more bail appearances allows for the exclusive (and, as such, targeted) focus on bail cases and their processing. Second, the creation of purposeful datasets of all adult bail cases from two specific courthouses which have dedicated Gladue Courts sets up a valuable case study in order to better understand the operation of this type of specialized court. Third, the focus on only two courts (in close proximity to one another) dramatically reduces the extent to which court culture – which influences the ways in which bail is determined from one courthouse to the next (Heath 2010; Leverick and Duff 2002) – might otherwise confound or mask trends in bail processing. Without this confounding factor, Gladue Court bail processes and outcomes for Indigenous accused can be more clearly distinguished from those in conventional bail court in these same courthouses. Fourth, the sheer size of these datasets permits more robust statistical analyses as well as an examination of trends over time, adding a longitudinal dimension to analyses. And finally, the ostensible population data contained in these datasets eliminate common concerns relating to sampling error.

Yet, what makes these new datasets particularly innovative is that they include a never-before created variable, developed specifically for this research project, which allows for the comparison of Indigenous and non-Indigenous accused processed in bail court. Recall that, to date, the problem facing researchers has been that Indigenous identity has not been – nor is it currently – recorded in court and, as such, it is unavailable in court databases in Ontario or otherwise¹⁴². As such, this lack of data has precluded direct, large-scale

¹⁴² While Kong and Beattie (2005) have suggested that the unavailability of information on Indigenous identity in court records might be overcome by linking police records to court records, they also rightfully acknowledge that this would first require improvement in police-reported information on Indigenous status, and that any linking methods would likely limit the number of records available for analysis. Indeed, while information on race or ethnicity may appear in some arrest records, these data are not regularly compiled nor are they analyzed, and what data do exist are likely to be haphazard and incomplete. Illustratively, Millar & Owusu-Bempah (2011) note that most Canadian police services in 2009 reported the race of the accused and/or victim to Statistics Canada's Canadian Centre for Justice Statistics in less than 20% of cases, and that nearly 20% of Canadian police services had an official policy against reporting the Indigenous identity of accused and victims. Said differently, Kong and Beattie's (2005) proposed solution to the lack of court data

quantitative comparisons between Indigenous and non-Indigenous accused persons who are processed in bail court. And yet the TRC (2015) has noted that compiling better data on Indigenous peoples' overrepresentation throughout the justice system is an important starting point for addressing Indigenous overrepresentation among prisoners and crime victims¹⁴³.

Within this context, these new datasets are quite ground-breaking. Specifically, they allow researchers – for the first time – to largely distinguish Indigenous accused from non-Indigenous accused persons who appear in two types of bail courts in Ontario. Indeed, those individuals appearing in Gladue Courts are necessarily Indigenous and can be compared to the largely non-Indigenous bail population appearing in conventional bail courts in these same courthouses. Recall that (limited) earlier studies which examined Gladue bail cases (which exclusively captured Indigenous accused), lacked a comparison group (of non-Indigenous accused) and could therefore not assess whether these Gladue cases and their case processing were any different from conventional bail cases. Yet these new datasets include – within the same courthouse – a comparison group composed of bail cases without any bail appearances in Gladue Court (which will capture primarily non-Indigenous accused) and consequently allow for both cross-sectional and longitudinal comparative analyses. In this way, this doctoral research significantly expands the scope and range of research questions relating to Indigenous peoples in the criminal court process which may now be explored.

Finally, although this thesis is predominantly quantitative in nature, both quantitative and qualitative methodologies have been incorporated into its design. In this sense, one might consider the project to be a variation on a more traditional mixed-methods research design. The quantitative methodologies are perhaps

on Indigenous identity is not a particularly viable one for researchers wishing to research current or historical court trends.

¹⁴³ Importantly, Phan (2021) explains that any collection of race-based data within a criminal justice context must be grounded in the purpose “to promote equity and fairness and remove systemic barriers to justice” (para 12), noting that such data should be used to understand the criminal justice system’s inequitable impacts on certain communities as well as to “inform meaningful solutions, and develop targeted programs and services to better support people” (para 33). Indeed, the current research on Indigenous peoples in Gladue Court is aligned with these anti-racism objectives. Moreover, the Government of Ontario released in 2018 the *Data Standards for the Identification and Monitoring of Systemic Racism*, specifically for government and other public-sector organizations. These data standards include steps to follow for data collection, management and reporting and were similarly established to help identify and monitor systemic racism and racial disparities and to “inform evidence-based decisions to remove systemic barriers and advance racial equity” as well as “promote public education and engagement about anti-racism” (Government of Ontario, Anti-Racism Directorate, 2018, “Support and promote anti-racism organizational change” section).

most obvious in that this research is centered around a very large quantitative dataset and includes a variety of descriptive and inferential statistical analyses. However, the qualitative methodologies were also an essential part of this research project in that they helped me to better understand and contextualize the quantitative data, almost certainly increasing the validity of the study findings. Indeed, Kraska and Neuman (2011) contend that “mixing quantitative and qualitative methods draws on the strengths of each while minimizing their weaknesses” (p.271). Without this qualitative dimension guiding the current study, I would have risked misinterpreting the quantitative data and what they reveal about the bail system.

This qualitative dimension of this study is reflected primarily in the qualitative knowledge that I gathered in the early phases of this research – including non-participant court observations and consultations with important Gladue Court stakeholders. This component helped me to develop a foundational understanding of how the law of bail was being applied in courtrooms generally and how Gladue Courts were operating, in particular. As a non-Indigenous person carrying out research relating to Indigenous peoples in the criminal justice system, it was particularly important for me to observe and engage with Indigenous peoples and those working with them directly in order to better appreciate how the bail process and Gladue Courts were affecting this unique population, as well as to identify the types of information and issues most relevant to this research. Importantly, these early qualitative strategies informed later quantitative data collection processes and ensured that quantitative analyses were performed within a contextualized understanding of how bail and Gladue Courts functioned.

4.2 – Qualitative Methodology

The qualitative elements of this research project included several different methodologies. On one hand, I engaged in non-participant observation while attending bail court. These observations included multiple days in several Gladue Courts – both in Ottawa and in Toronto. This attendance was paralleled by observations in numerous bail courts more generally. On the other hand, I engaged in multiple informal consultations with key Gladue Court informants. The knowledge and perspectives acquired through these qualitative measures allowed for a more nuanced and in-depth understanding of how these specialized

courts, and bail courts more generally, operate “on the ground” and the various ways in which these courts process Indigenous (and non-Indigenous) accused. These qualitative underpinnings guided many methodological choices early in this research project – including the selection of study sites, the specific variables to request from MAG, and how to develop parameters for the creation of a new Gladue bail variable. They also provided important context to the quantitative analyses in the later stages of this research.

4.2.1 – Non-Participant Observations

i) Understanding Bail Court Generally

As part of the exploratory phase of this research project, I attended conventional bail court in Ottawa for a period of more than a year in order to develop a solid understanding of bail court operations and how cases are processed through the bail system. On several dozen occasions over a three-month period in early 2017, and again during these same months in 2018, I attended Ottawa bail courts, where I observed approximately 350 cases in total. These cases included roughly 30 show cause hearings, hundreds of first bail appearances – comprising of both Crown consent releases and cases in which the Crown contested release – as well as many bail appearances which were adjourned with seemingly little being accomplished (e.g., the accused had yet to secure legal representation or was still assembling a release plan; both parties were awaiting police reports expected to affect a bail decision). In viewing these cases, I attended a variety of bail courtrooms, including one dedicated to first bail appearances and video remand bail, one devoted to show cause hearings, and Weekend and Statutory Holiday (WASH) Court¹⁴⁴. Indeed, one of the first steps in the

¹⁴⁴ First appearance bail courts generally process cases in which the individual has been arrested and charged within the last 24 hours (as stipulated in s.503(1) of the *Criminal Code*). During these appearances – often held by video conference from courthouse holding cells – the Crown would state to the judicial officer their position regarding release: either the Crown consents to release (often under a number of specified conditions) or they contest release, intending instead to show cause as to why detention is justified. The judicial officer in these courts will typically follow the Crown’s recommendation, with accused either being released on consent during their first bail appearance, or otherwise having their case adjourned and remaining in pre-trial custody. Video remand bail takes place through video conferencing with detention centres where accused are being held. These appearances often follow a first appearance but precede a show cause hearing (if ultimately scheduled). These appearances tend to be short in length and somewhat administrative in nature, with cases typically being adjourned again (e.g., in order to put together a bail plan; to wait for a legal aid certificate or legal representation to be retained) or scheduled for a future show cause bail hearing. Show cause bail courts hear contested show cause hearings and are typically conducted in person. Here, the Crown mounts a case as to why – based on the grounds for detention outlined in s.515(10) of the *Criminal Code* – an accused person should be

research process was to ensure that I not only understood how the law of bail is codified “on the books”, but also the ways in which it is practised “on the ground” for accused persons generally, before devoting attention to the experiences of Indigenous accused in Gladue Courts in particular. Not only did these bail court observations further familiarize me with the bail process, but this experience also allowed me to begin noting important variables for inclusion in this research. The time I spent in the Ottawa bail courts also provided insight into some of the ways in which judicial officers were attempting to apply Gladue principles, even within conventional bail courts.

ii) Understanding Gladue Bail Court Specifically

Gladue Bail Court versus Conventional (Non-Gladue) Bail Court

Following these first bail court observations in Ottawa, I subsequently travelled to Toronto, Ontario to observe Gladue Courts. Having familiarized myself with the history and development of Gladue Courts in Ontario, I understood the significance of the Old City Hall and College Park Gladue Courts as the earliest and most established Gladue Courts. Consequently, I knew that the observation of these Toronto Courts would be an important part of the learning process as I began considering how this research project would take shape. With this in mind, I attended the Old City Hall Gladue Court on both a Wednesday and Friday – the days in which this court sits each week – and the College Park Gladue Court on one occasion, witnessing several bail cases between the two locations. During Gladue Court recesses and lunch breaks, I would then attend conventional bail courts in these same courthouses.

During these observations, I made particular note of the structure and operation of these Gladue courtrooms, the types of cases and accused before these courts, the ways in which bail cases were handled and any other qualities or aspects which otherwise seemed unique to Gladue courtrooms compared to conventional bail courts. The Gladue Courts in Old City Hall and College Park courthouses largely resembled

detained until case resolution (or in the case of reverse onus provisions, the accused attempts to show cause why their detention is not necessary). These hearings end with the judicial officer either granting judicial interim release or denying bail and formally detaining the accused. Lastly, Weekend and Statutory Holiday (WASH) court operates on weekends and statutory holidays (when courthouses are otherwise closed) in order to provide first bail appearances in a timely fashion – sometimes through video conferencing from police holding cells. While WASH courts are technically capable of running same-day show-cause bail hearings, in practice, this is quite rare.

conventional courtrooms in terms of structure. Notably, judges, Crown counsel and duty counsel tended not to be Indigenous, although the courthouse's Indigenous Courtworker was often present in Gladue Court and played a seemingly important role in developing potential bail plans. Whereas in conventional bail courts bail matters were heard throughout the day, in general, contested show cause bail hearings were heard in Gladue Courts later in the morning or in the afternoon. This appeared to occur for a variety of reasons, including delays in transporting accused persons to court from the Toronto South Detention Centre, as well as the late arrival of defence counsel in court or the need for additional time to arrange tentative release plans. In other cases, there were delays due to issues with contacting and/or having potential sureties attend court as planned, or with paperwork (e.g., s.524 applications) not being produced in a timely manner. As a result of these delays, by the time that bail cases were ready to proceed, there was not always enough time to hear them all – a reality observed in both Gladue Court as well as conventional bail courts. However, whereas conventional bail courts typically had large enough dockets to proceed with some bail cases even when others were not ready to proceed, in Gladue Court, mornings tended to deal primarily with guilty plea and sentencing cases, as well as bail reporting. Indeed, both Old City Hall and College Park Gladue Courts engaged in this unique practice (which was not observed in conventional bail courts), whereby accused on bail would have to – as a condition of their release – report to Gladue Court weekly or otherwise in the early weeks of release in order to check in with the court and ensure bail compliance.

In both Gladue Courts and conventional bail courts, show cause hearings were observed for Crown onus as well as reverse onus cases, with concerns for release most often rooted in the secondary ground for detention (i.e., public safety). While some bail hearings involved calling the accused and/or a proposed surety to testify before the court, other hearings did not call witnesses and instead consisted only of a description of the charges and any criminal history, followed by counsel submissions. One practice which appeared to be unique to Gladue Courts involved offering accused persons who testified the opportunity to address the judge prior to the bail decision being rendered. In these specialized courts, accused persons who testified (as well as other witnesses) also had the option to swear an oath on an eagle feather, although this must be

requested in advance, as this feather was not stored in the courtroom¹⁴⁵. In Gladue Court, basic information on an accused person's Indigenous heritage was generally provided to the court by defence or duty counsel, with judges requesting this information if not presented otherwise. During bail hearings in Gladue Court, there appeared to be more collaboration between parties and greater dialogue back and forth regarding suitable forms of bail release compared to bail hearings in conventional bail courts. For instance, judges in Gladue Court seemed willing to have more in-depth discussions with accused persons and their counsel about the accused's ability to comply with certain conditions and seemed willing to negotiate or amend conditions to improve the chance of compliance¹⁴⁶. Judges in these courts also appeared to be especially sensitive to the struggles of Indigenous accused persons in their courtroom, as well as encouraging or supportive of accused persons' efforts to seek healing, stability, etc.¹⁴⁷. In both types of courtrooms, bail hearings tended to result in the accused being granted bail, with sureties being a common requirement in conventional bail court, while recourse to Toronto Bail Program supervision appeared to be more common in Gladue Courts. Certain problematic bail conditions, such as substance prohibitions or the requirement to keep the peace and be of good behaviour, were not imposed in Gladue Courts during court observations, whereas they were observed being imposed in conventional bail court. In contrast, however, bail conditions to attend counselling and/or treatment (e.g., for substance abuse, for mental health concerns) were not uncommon in either

¹⁴⁵ While the eagle feather may be available to accused persons in conventional bail courts (as well as other courtrooms), it was observed being used only in the Old City Hall Gladue Court.

¹⁴⁶ For example, a judge in Gladue Court granting release inquired about the feasibility of a condition restricting the accused from visiting all LCBO stores (for an accused who has been charged with stealing a bottle of liquor from an LCBO store). The defense counsel explained that the accused used alcohol as a means of self-medicating and would prefer to maintain the ability to purchase it. The judge responded by imposing a less onerous version of this condition, that the accused not attend the specific LCBO store from which they were alleged to have stolen.

¹⁴⁷ For instance, when an accused person who was testifying became upset during the Crown prosecutor's cross-examination, the Judge paused to ask the accused if they would like to take a short break or whether they might like a glass of water (the latter of which the accused accepted). Later, in giving their decision, the judge acknowledged the accused person's pain and thanked the accused for sharing their story. The judge commented that the accused's substance use appeared to be connected to feelings of loneliness and so encouraged the accused to continue seeking further connection to their community and to gain further awareness of the Indigenous services available to them in the city. In another case, the Gladue Court judge acknowledged having presided over previous cases involving the same accused and congratulated the accused on having successfully secured housing since their previous meeting. The judge then explained that they did not want the accused to lose this housing and so was prepared to release them on bail.

courtroom type. Overall, understanding these Gladue Court practices (as compared to conventional bail practices) subsequently helped me to make sense of some of the quantitative research findings.

Court observations in the Toronto Gladue Courts and conventional bail courts served another important methodological purpose beyond developing a general understanding of these courts' practices. That is, these observations were also necessary as a means of ensuring that the practices in the Old City Hall and College Park Gladue Courts shared enough similarities (as well as lacked significant differences) so as to justify combining the cases in these courts into a single "Gladue Bail" category, and likewise combining conventional bail courts in these same courthouses into a single "Non-Gladue (Conventional) Bail" category. Most importantly, court practices and bail processing in both Gladue Courts, as well as in both courthouses' conventional bail courts, were largely similar and without obvious differences in court culture¹⁴⁸. The overall similarities between courthouses were perhaps unsurprising when one considers: 1) the proximity of the courthouse locations – both courthouses are located in downtown Toronto, only roughly a kilometer apart; 2) the overlap of practitioners in these courthouses (particularly defence counsel who regularly practice in both courthouses) and the inevitable fraternization and/or networking between criminal justice professionals who might reasonably be expected to share experiences and best practices with one another; and 3) in the case of Gladue Courts specifically, the role of Aboriginal Legal Services in providing and training the Indigenous Courtworkers who provide services in these two courthouses, as well as this organization's role in providing training to judges and other court practitioners. The one relatively minor difference that I did note during court observations was that the Old City Hall courthouse appeared to be busier and to have a larger caseload than the College Park courthouse, with the Gladue Court in the former courthouse often running later into the afternoon to get through its docket than that in College Park. Overall, however, the similarities in court practices which were observed in both Gladue Court locations suggested that it would, in fact, be methodologically appropriate to combine these Gladue Court locations, as well as combine

¹⁴⁸ Court culture refers to the unique set of informal attitudes and expectations, practices and relationships that develop in each courthouse and which influence the ways in which each court operates generally and processes bail cases specifically (see, for example, Church 1982; Leverick & Duff 2002).

conventional bail courtrooms in the two courthouses, for the purpose of analyzing Gladue versus conventional (non-Gladue) bail populations. Indeed, there did not appear to be significant differences between the two study sites in terms of court culture, at least when comparing Gladue Court to Gladue Court and conventional bail courts to conventional bail courts.

Beyond the obvious advantages of observing Gladue Courts specifically, and the methodological value of assessing whether similar court types across study sites could reasonably be merged, attendance in both Gladue and conventional bail courtrooms within the same courthouse had the added benefit of assessing court culture in these courthouses more generally. That is, by observing both types of bail courts in the same courthouse – rather than having no comparison group or comparing the selected Gladue Courts to conventional bail courts in other courthouses – I could, in some ways, hold courthouse culture constant. Said differently, observing conventional bail courts in the same courthouses as the selected Gladue Courts minimized the risk of erroneously attributing certain bail practices to Gladue initiatives, when such practices might actually reflect more widespread attitudes or procedures within the entire courthouse in which the Gladue Court is located. Examining both bail court types within the same location provided a better understanding of how Gladue bail processes and practices were unique and how they differed from bail processes in the same courthouses' conventional bail courts. Hence, by attending both Gladue and conventional bail courts, I could better understand the bail options of Indigenous accused persons in these courthouses, and thereby better appreciate why an Indigenous accused might (or might not) choose Gladue Court over conventional bail court.

Toronto Gladue Courts and Gladue Courts Elsewhere

Finally, upon the opening of Ottawa's Indigenous Persons Court (IPC) in the fall of 2017, I also attended several sessions in this courtroom and observed numerous bail cases in this specialized setting. I noted similarities and differences in the ways in which this Indigenous court operated compared to the conventional bail courts in this courthouse, as well as compared to the Toronto Old City Hall and College Park Gladue Courts. I also attended a guest lecture given by an Ottawa judge who was instrumental in the development

of this IPC, Judge Célynné Dorval. The lecture provided additional insights into the lengthy, years-long process of creating the IPC, the rationale for its creation in Ottawa and the types of training offered to judges sitting in this new IPC. Learning about the process of opening the Ottawa IPC and selecting its first judges, as well as these judges' (and other IPC practitioners') commitment to Gladue principles, underlined the active role that criminal justice professionals have generally played in developing, opening and operating these courts.

While informative, Judge Dorval's presentation did raise the question of whether it would be methodologically sound to include such early data from the Ottawa IPC – as I had been considering – as part of this study, which otherwise examines two much more well-established Toronto Gladue Courts. More broadly, I considered the dedication and enthusiasm exhibited by early Ottawa IPC professionals and how this would have almost certainly been the case with other Gladue Courts and, in particular, the very first Gladue Court. Although certainly admirable, I considered the methodological implications of this enthusiasm, and whether data from the early phase of a Gladue Court's operations might not be representative of that Court's operations once it becomes more well-established.

4.2.2 – Informant Consultations

Prior to quantitative data collection, and concurrent with participant observations, I also consulted with several Gladue Court informants across many levels – from front-line Indigenous Courtworkers to the Program Director of Aboriginal Legal Services – who provided background to these courts' operations as well as feedback on my proposed research project. This qualitative aspect of this research also provided me with the opportunity to begin developing a collaborative relationship with stakeholders at Aboriginal Legal Services, to understand their research interests and ensure that this research project was well-informed and feasible. Indeed, I wanted to embrace effective knowledge mobilization strategies whereby early research consultation would help to identify and meet potential knowledge users' needs. In this way, I endeavoured to produce research that would benefit users not only in academia, but also those working on the ground and providing services in Gladue Courts, as well as criminal justice policy makers more generally (e.g., MAG) in order to maximize the positive impacts of the study. Upon developing an understanding of Gladue Court

operations, I then consulted a bail data expert who shared valuable suggestions and advice regarding the types of information available through the Ontario Ministry of the Attorney General's Integrated Courts Offences Network (ICON) database, how to construct a Business Case necessary to gain access to these data and strategies for analyzing such a large and complex dataset.

i) Consultation with Aboriginal Legal Services' Program Director

The first Gladue Court informant with whom I consulted was Jonathan Rudin, Program Director of Aboriginal Legal Services. Mr. Rudin is a leading expert in the area of Indigenous law and justice issues and played an instrumental role in the creation of Toronto's Gladue Courts and similar courts across the province (if not the country). Mr. Rudin was an indispensable contact throughout this research project and was particularly vital to the development of the research project design. I first met Mr. Rudin in Toronto in March 2017 during my visit to observe Toronto Gladue Courts. He explained that Aboriginal Legal Services was always interested in empirical research and evaluations and seemed very open to my ideas for doctoral research. Mr. Rudin shared information with me regarding which Gladue Courts in Ontario did and did not accept bail cases and the dates and times when each Toronto-area Gladue Court was in session (as they typically run only one to two days a week). He noted that Old City Hall and College Park courts tended to have a greater number of bail cases than the other Toronto area Gladue Courts and mentioned that Ottawa would soon be opening its first Indigenous Peoples Court, spearheaded by Judge Célynné Dorval. We discussed possibilities for this research project (including potential courtroom observations and my proposed analysis of MAG data) and particular variables which would be interesting to examine (for example, specific topics discussed in court, the grounds cited for detention and the forms of release order being given to accused granted bail). Mr. Rudin also remarked that research comparing the experiences of Indigenous accused in Gladue Courts to Indigenous accused in conventional bail courts would be especially useful, although more challenging in that Indigeneity is not systematically identified in courtrooms – and, indeed, data on Indigenous identity do not currently exist in the ICON database. Furthermore, he provided insight into the day-to-day operations of Gladue Courts (e.g., noting that bail cases tend to be heard later in the day as

accused tend to be transported from Toronto South Detention Centre), recommended relevant literature and studies for me to review (particularly calling my attention to the LL.M thesis of Jillian Rogin, former duty counsel at College Park Courthouse, who highlighted in her case law review various ways in which Gladue principles are often improperly applied to bail matters) and suggested contacts, including the Indigenous Courtworkers, who were most familiar with day-to-day court operations and who might be able to further assist me in understanding the operation of these courts and their perceived successes and challenges.

ii) Attendance at the National Conference on Aboriginal Justice Post-Gladue

In April 2017, I continued informal consultations when I returned to Toronto for the 6th *National Conference on Aboriginal Criminal Justice Post-Gladue*, attended primarily by lawyers, judges and other criminal justice professionals. This educational conference included presentations on case law and courtroom-specific initiatives, as well as discussion of some of the challenges of applying Gladue principles to bail (e.g., the lack of clear guidance in terms of how to apply these principles; rehabilitative efforts being at odds with the presumption of innocence and need for restraint at bail; challenges to accessing supports such as Indigenous Courtworkers and community-based Indigenous justice programs; the perceived limitations of traditionally adversarial bail courts; and the benefits of connecting with Indigenous accused on a more personal, human level). Hearing about the experiences of criminal justice professionals working with Indigenous accused on the ground in bail courts also served as a reminder that the effectiveness of bail courts could be assessed in ways beyond simple bail outcomes. Indeed, while bail outcomes are an important factor to consider when assessing the operation of Gladue Courts, they paint only a partial picture of the promise of these courts. Indeed, other factors – perhaps less tangible (or at least less quantifiable) – would also be important to consider when assessing the overall value of these courts.

iii) Consultation with Indigenous Courtworker Supervisor from Aboriginal Legal Services

In May 2017, with the assistance of Mr. Rudin, I met with two other staff members from Aboriginal Legal Services and sought their insights on what make Gladue Courts a valuable and unique option for Indigenous persons going through the bail process. Specifically, I first met with the Indigenous Courtworker

Supervisor, who shared her insights regarding Gladue Courts, their strengths and some of the challenges to their successful operation. For instance, she noted that the limited operating schedules of Gladue Courts (one or two days a week) had the potential to impede access to justice. She expressed concern that these limited schedules may lead to some Indigenous accused – who might have otherwise had their bail case heard in Gladue Court – to opt to proceed in conventional bail court so as to be seen more quickly (as opposed to waiting several days or more for the next Gladue Court sitting)¹⁴⁹. This discussion was important in that it drew attention to potential case processing challenges and the need to include such variables in any court analyses. Further, it highlighted some of the reasons why Indigenous accused would not always opt to have their bail heard in Gladue Court. The reminder of the voluntary nature of Gladue Courts also calls attention to one of the inevitable limitations of any study examining Gladue Courts and conventional bail courts: that conventional bail courts process largely, but not *exclusively*, non-Indigenous accused. Consequently, any analyses must be careful to avoid erroneously conflating comparisons between Gladue Court and conventional bail courts with comparisons of Indigenous and non-Indigenous bail cases more generally¹⁵⁰.

iv) Consultation with Indigenous Courtworker from Aboriginal Legal Services

While in Toronto, I also met with an Indigenous Courtworker who worked in one of Toronto's downtown courthouses. This Courtworker explained some of the inner workings and operations of the Toronto Gladue Courts, the role of the Indigenous Courtworker (including helping to develop a bail release plan, or *plan of care*, for any Indigenous accused in the courthouse), the types of interactions that she had with practitioners in both Gladue Court and other courtrooms, as well as general impressions and observations from her time in Gladue Court. She explained that, as an Indigenous Courtworker, she assisted

¹⁴⁹ This reality was also noted by Clarke (2016b) in his evaluation of the old City Hall Gladue Court, “depending on the timing of [an accused’s] charges and entry into custody, [their] bail hearing might take place in regular bail court” (p.9)

¹⁵⁰ While the examination of Gladue bail cases and conventional bail cases is not a perfect measure of Indigenous and non-Indigenous accused at bail, it is nevertheless likely to represent a very close approximation. Indeed, all bail cases in Gladue Courts were necessarily for Indigenous accused, and hence one may consider this group to be a perfect, if not entirely representative, measure of Indigeneity. In terms of conventional bail cases, although there would be some Indigenous accused in this group, the sheer number of non-Indigenous accused in this category would mean that the aggregate data would reflect almost exclusively trends for non-Indigenous accused. In other words, the non-Indigenous data would overwhelm any competing trends from cases with accused who were Indigenous.

accused who were preparing bail release plans, and noted that some clients she worked with faced barriers to release rooted in experiences of poverty or mental health challenges. The Indigenous Courtworker explained that, in her experience, judges in Gladue Courts tended to be more hesitant to impose drug or alcohol prohibitions as bail conditions (or, if deemed absolutely necessary, might impose a condition to not consume substances outside of the accused's place of residence). She also noted that sometimes accused would be released on bail with the condition to report regularly to Gladue Court, often with a bail variation to remove this condition after the first month or two, once the accused had demonstrated an ability to comply with conditions. In light of these insights, I hoped to examine the number and types and of bail conditions handed down in Gladue Court and conventional bail cases for this research project¹⁵¹. This Courtworker also observed that judges were seemingly more likely to issue bench warrants *with discretion* when an accused did not report to court (i.e., which would not be executed if the accused appeared at their next scheduled appearance, thereby avoiding charges of failure to appear)¹⁵² – another potential area to examine for this research project. She further noted that Indigenous persons seemed to feel more respected in these courts and tended to prefer them to conventional courts, such that a significant portion of Indigenous accused opted to have their matters heard in these specialized courts. She also added that the overall atmosphere in Gladue Courts tended to feel less adversarial, with accused persons often speaking at length when given the opportunity. While the promise of Gladue Courts might perhaps be most obviously assessed in terms of processing times and bail outcomes, discussions with the Indigenous Courtworker served as another reminder of some of the less tangible ways in which Gladue Courts may nevertheless provide value to those they serve.

¹⁵¹ Unfortunately, I was later informed that these data would not be available through the MAG ICON database.

¹⁵² The practice of issuing a bench warrant with discretion was also discussed in Clark's (2016b) study of the Old City Hall Gladue Court. On the topic of potential failures to attend court and ensuring attendance, Clark (2016b) added the court generally accepts that "people often face challenges in terms of attending appointments, whether the appointment be at court or an agency such as CAMH. The reasons for non-attendance are many; for example, other commitments such as work, inability to travel to Old City Hall, illness, sleep deprivation (sometimes associated with mental health), or simple forgetfulness" and that Court Workers "make sincere efforts to remain in communication with their clients and provide reminders to show up for court" (pp.36-37). Court observations suggest that Gladue Courts may be willing to excuse two or more consecutive non-appearances if the accused person's defence counsel has been in regular contact with them (such that concerns around absconding are minimized).

These early consultations with informants for the Toronto Gladue Courts were essential in informing my MAG dataset application, as well as subsequent quantitative analyses. Hearing from these individuals with extensive experience on the ground in Gladue Courts helped to ensure that this study's datasets reflected what stakeholders felt was most unique about bail in these specialized courts. As I provided periodic updates on this research project, Mr. Rudin continued to be supportive and helpful, including providing useful information regarding the courts' ongoing operations, as well as other Indigenous-focused initiatives being developed in other Ontario courthouses.

v) Consultation with Bail Database Expert and Criminologist

Having developed an understanding of Gladue Courts and the types of analyses which would be most pertinent for this research, I subsequently consulted extensively with Professor Anthony Doob, first in early 2018 as I began preparing to request access to MAG data and later in the data analysis stage. Professor Doob is an expert in the methodology and analysis of Ontario bail data and has worked extensively with MAG Integrated Court Offences Network (ICON) data, including a bail dataset spanning from 2001 to 2015, as well as other data sources. ICON is an electronic case tracking system managed by the Court Services Division of the Ministry of the Attorney General and is used to manage information relating to court cases in the Ontario Court of Justice and Superior Court of Justice. Court staff at local courts input information on cases and court activities within the ICON system. The information contained within ICON forms a database of all charges laid in Ontario in any of the Ontario Criminal Courts of Justice and is used by the Ontario Court of Justice and MAG to produce court dockets and monthly statistical reports. From this database, scholars may request read-only access to specific sub-sets of variables and/or data for specified, pre-approved research purposes.

Through discussions with Professor Doob, I learned about the types of data that MAG did and did not collect. In particular, I learned that I would be unable to access certain types of variables that I would have otherwise liked to analyze. Most notably, I would be unable to obtain certain data that had been identified by the various ALS informants as important factors to consider, including the number and type of bail conditions imposed, an accused's criminal record and legal representation and grounds for detention.

Nevertheless, Professor Doob helped me to identify important variables which did exist and were key indicators for any study on the bail process. Through these consultations, Professor Doob assisted me in formulating the necessary variables for this study, as well as developing strategies for producing a compelling business case. As part of my submission to MAG, I strategically requested many of the same variables which had previously been created for prior bail research. This choice reflected three primary benefits: 1) it would simplify and expedite the MAG's task of dataset production, given that the required coding for a significant number of the requested variables already existed; 2) it would provide greater confidence in the validity and reliability of these variables since other academics had already used them (e.g., Doob, Sprott & Webster, 2017; Webster 2006, 2007); and 3) it would allow for the comparison of this study's results with past findings, such that any confluence would give greater confidence in the current study's conclusions.

In addition to his recommendations regarding existing bail variables used in past research, Professor Doob also advised me about how to request the creation of a new variable which would flag the presence of one or more bail appearances in specified Gladue Courts. In this regard, consultations with both Professor Doob and Mr. Rudin were essential, as Professor Doob provided guidance in terms of the process for making such a request, while Mr. Rudin provided key on-the-ground court details. Specifically, Mr. Rudin provided crucial information regarding the dates and courtroom numbers in which Gladue Courts have operated since their inception – information which was necessary for the creation of a Gladue flag variable, and consequently, for the ability to quantitatively examine and compare – for the first time – bail cases in Gladue Court and conventional bail courts. Upon being granted access to MAG data, I continued to consult with Professor Doob who shared approaches with me for analyzing these bail data. In particular, he guided me through the lengthy process of aggregating charge-based data into cases and advised me on approaches to validating and interpreting these data.

4.3 – Quantitative Methodology

4.3.1 – Accessing Ontario Ministry of the Attorney General ICON Data

i) Business Case Application

In order to be granted access to ICON data, I completed a Business Case for Access to Electronic Court Case Tracking Information application, as well as a Statement of Purpose¹⁵³. I submitted both of them to the Ontario Ministry of the Attorney General on April 18, 2018. The dataset that I requested in the Business Case Application included 144 MAG variables across several broad categories. These variables ranged from basic case characteristics (e.g., the accused person's age and gender, the date of the alleged offence, the act and statute of the charge(s), the court location and the number of the charging information¹⁵⁴) to bail-specific variables (e.g., a bail flag¹⁵⁵ variable, the date of the first bail appearance, the number of bail appearances, the outcome of the bail phase) and process variables (e.g., the number of court appearances, a trial flag) as well as outcome and sentencing variables (e.g., the date of disposition, type(s) of sanction(s)). In addition to the above variables, I also requested access to a variable called CPS_IDENT. This was an existing variable that is used by the Canadian Centre for Justice and Community Safety Statistics (CCJCSS) to identify (or

¹⁵³ The completed Business Case application was six pages in length (not including MAG terms and conditions of access). The application encompassed a detailed description of the data requested, the specific circumstances in which the data would be accessed, the purpose of and justification for the request (including why other data sources would not be appropriate) and responses to a multitude of questions regarding data access and security. Furthermore, the Statement of Purpose was another three pages (not including references) which outlined the broad research context in terms of the overrepresentation of Indigenous peoples in custody, in general, and in remand, in particular. This Statement also described the lack of available data relating to Indigenous peoples in the bail system. It then went on to describe the proposed research, including the creation of a Gladue variable as a unique solution to the issue of Indigenous bail data, as well as a discussion of its anticipated contributions, including potential policy recommendations.

¹⁵⁴ An information is a charging document. When an individual is charged with one or more criminal offence(s), the charges are set out in a numbered document called an *information*. Most often it is police who lay an information (such that they are often called *police informations*). However, other criminal justice professionals, such as probation and parole officers, and even private citizens, may also lay charges by bringing a written information to a justice of the peace who then decides whether to formally lay the charge(s) and whether to issue a summons or a warrant. Within this context, charges that are laid at different times will generally be issued on separate informations. As information numbers are only unique within each court location (that is, different court locations may use the same information number for different cases), when I used the Information variable (CS_ORIGINAL_INFO), it was always in conjunction with the court location variable.

¹⁵⁵ The bail flag variable is a dichotomous variable which flags the presence of one or more bail-related appearances for a given charge. The ICON database contains numerous flag-type variables – for instance, a trial flag, which records whether there was one or more trial appearances for a given charge. The Gladue variable created specifically for this research was considered a Gladue bail flag, in that it indicated the presence of one or more bail appearances in the specified Gladue Courts.

approximate) an individual accused person in ICON and had been created by MAG by combining various personal identifiers on the basis of their phonetic similarities. The primary benefit of this person variable is that it recognizes when someone has several concurrent informations before the courts which are almost certainly being processed together as a single, blended case. More simply, use of this variable would ensure that these multiple informations, or events, could be treated as a single person-oriented case.

ii) Creation of Gladue Bail Flag

The most novel feature of this research is its use of a new Gladue bail flag variable which did not yet exist at the time that I requested it. This variable captures charges with at least one bail appearance in a Gladue Court in one of three Ontario courthouses¹⁵⁶ (and thus necessarily identifying an Indigenous accused). This would therefore allow for comparison of Gladue bail cases with non-Gladue (i.e., conventional) bail court cases (with few Indigenous accused) within these same courthouses. The Business Case which I submitted to MAG provided the parameters for the creation of this Gladue bail variable, namely the dates and courtroom numbers in which these Gladue Courts operated. For the Toronto Gladue Courts, this information was provided by Mr. Rudin. For the Ottawa IPC, I learned the dates and locations from talking with Court Services staff at the Ottawa Courthouse. Specifically, I indicated that a charge would be flagged as belonging to a Gladue bail case when there was one or more bail appearances in one of the following Gladue Courts (or IPC):

Old City Hall Courthouse, Toronto

Gladue Court: Courtroom 126 (Tuesdays and Fridays, October 2001 to May 2013¹⁵⁷) and Courtroom 116 (Wednesdays and Fridays, June 2013 to April 2018)

College Park Courthouse, Toronto

Gladue Court: Courtroom 506 (Thursdays, June 2006 to April 2018)

Ottawa Courthouse, Ottawa

Indigenous Persons Court: Courtroom 7 (Mondays, 14:00 to end of day, September 11, 2017 to April 2018) and Courtroom 8 (Wednesdays, 14:00 to end of day, September 13, 2017 to April 2018)

¹⁵⁶ Indeed, I had initially considered having three study sites: Old City Hall and College Park courthouses in Toronto, and the Ottawa courthouse. However, for a number of methodological reasons discussed later in this chapter, I ultimately chose to analyze only the former two Toronto courthouses.

¹⁵⁷ It later came to my attention that the Old City Hall Gladue Court initially operated only two half-days (afternoons) a week when it first opened in 2001, although the demand for this Gladue Court soon led to the court's operations being expanded to full days. As will be described in more detail later in this chapter, the decision was ultimately made to focus on data from 2006 onward, by which time this court was operating full days. Hence, this minor oversight does not affect the study results.

My Business Case was assessed through an intensive 2-stage process. This application was first reviewed, and ultimately approved, by the Ontario MAG. In the second stage of this process, this application was submitted to the Ontario Court of Justice (OCJ) to consider the merits of the proposed research given that these data have traditionally had very limited public access. The OCJ approved my Business Case on June 20, 2018 – just over two months after initial submission. Upon approval, MAG began working to produce the requested data, including the creation of the new Gladue bail flag variable. In August 2018, MAG provided me with full datasets for charges completed from 2016 to April 2018, which I supplemented with 2001-2015 charge-based bail data provided by Professor Doob. MAG also provided a dataset containing the new Gladue bail flag and the CPS_IDENT variable for all charges completed from 2001 to April 2018, which could be merged with yearly datasets using a third variable, a charge identifier called CS_CP_FKEY.

My preliminary, raw data consisted of yearly ICON data from 2001 to April 2018. These data were charge-based, meaning that the unit of analysis was individual criminal charges. Each charge was included in the data for a given year only once it had completed the entire court process. In other words, charges that had not yet been disposed, but rather were still active at the end of a given year, would not be included in the data for that year. This dataset contained 9,191,018 individual charges.

4.3.2 – Method of Analysis

i) Addition of the New Gladue Bail Variable

At the outset of analysis, I had 18 yearly charge-based datasets (from 2001-2018), each consisting of all 144 MAG variables, as well as one dataset containing only three variables: the CPS_IDENT variable, the new Gladue bail variable (later labelled Gladue Bail Status – see section 4.4.1(i)) and a variable called CS_CP_FKEY. The latter variable, which also existed in each yearly dataset, was the “key” variable that I used to merge the new CPS_IDENT and Gladue variables into each separate yearly dataset. Ultimately, I decided not to work with the 2018 data given that they included only cases completed between January and April 2018, whereas all other years contained complete data for the entire year. At that time, I also removed any

youth cases from the datasets, specifically selecting only charges for which the accused was between the ages of 18 and 98 at the time of offence¹⁵⁸.

ii) Aggregation of Charge Data into Case Data

Although the data provided by MAG were charge-based (meaning that each line of data represented an individual charge), practically speaking, courts operate less in terms of individual charges and more in terms of cases. That is, criminal courts do not necessarily process individual charges separately, with each charge as a stand-alone unit. Rather, criminal courts process charges in terms of broader cases, which might entail numerous charges and may even span several charging informations. Indeed, a substantial proportion of criminal cases which come before Ontario courts contain more than one charge (Statistics Canada, 2022d). Given the prevalence of multiple-charge cases, it was important to aggregate the charge-based data in such a way as to approximate cases and thus to more accurately reflect court caseloads and processing patterns. Case-based analyses would also be less likely to be skewed by a small number of cases that contained an unusually large number of charges¹⁵⁹. Additionally, case-based analyses would provide a more complete picture and, by extension, a better understanding of cases, as well as help to make sense of elements of case processing and outcomes which might otherwise be confusing should individual charges be examined separately¹⁶⁰.

¹⁵⁸ These ages were selected to not only remove charges against youth, but also to remove a number of charges for which there appeared to have been errors in data entry. That is, I determined that charges against an accused person aged 99 or older were highly improbable and consequently removed them from the dataset. In total, by focusing on those aged 18-98, I eliminated 1,371,247 charges of all 9,191,018 charges from 2001 to 2017.

¹⁵⁹ Imagine a single case with 75 firearms-related charges (possession, unsafe storage, etc.). Charge-based analyses would show each charge as a separate “case”, leading an unfamiliar reader to perceive firearms cases as being much more prevalent than in reality. Furthermore, if this accused was denied bail following a show cause hearing, a charge-based dataset would suggest that bail was being denied much more frequently (75x) than would a case-based dataset (1x).

¹⁶⁰ Consider, for example, an accused with three charges on a single information – theft under \$5000, possession of stolen property under \$5000 and assaulting a peace officer (which allegedly occurred while resisting arrest). Imagine that this individual was released following a show cause hearing – his fourth bail appearance – due to concerns related to the violent charge for assaulting a peace officer. If one were to consider each charge separately – without the added context of the additional charges in the case – one might be surprised to see that four bail appearances were required for what appears to be a simple ‘theft under’ charge. However, when examining the case as a whole and noting the additional presence of a violent charge, the findings would be less surprising.

In light of the many benefits of case-based analyses, this doctoral research analyses criminal cases. Moreover, this research employs two different court case definitions in order to produce two separate bail datasets – an *event-based* dataset and a *person-based* dataset – each of which shed light on different aspects of the bail system and bail case processing. The *event-based* dataset is particularly useful for exploring how individual sets of charges (generally stemming from a single event – regardless of whether these charges were later merged with others) are processed through the bail system. However, this dataset cannot account for the ways in which courts sometimes effectively merge separate sets of charges into a single criminal case (particularly when there are subsequent breach charges). In contrast, the *person-based* dataset more closely reflects the courts’ view of a complete criminal case, including those with charges spanning several events or informations. However, this case definition occasionally masks details relating to case processing and outcomes, particularly with multi-event cases, for which data relating to some charges may be overshadowed or obscured. Within this context, one should not consider one dataset to be inferior or superior to the other. Rather, each should be seen as useful in highlighting different aspects of the bail process and court system more generally. Moreover, when examined in conjunction with one another, comparisons between the event and person datasets offer additional insight into case characteristics as well as bail and case outcomes. Overall, the production of these two innovative case-based bail datasets – each with its own unique but complementary conception of a “case” – allows for a comprehensive and never-before carried out examination of bail in Gladue Courts (as compared with non-Gladue Courts).

In order to aggregate charges into cases for each dataset, I adopted a methodology similar to that first developed by Professor Anthony Doob (see Webster, 2006). Prior to aggregating the two datasets, I created several new, intermediary variables. Some of these new variables simply recoded string variables into numeric variables (e.g., Y/N into 0/1). Other intermediary variables measured time or other attributes based on a combination of other variables (e.g., the number of days between first and last appearances; whether a charge’s first bail appearance occurred within seven days of its first court appearance; the number of bail appearances). Others still re-coded or collapsed complex variables or variables with an extensive list of

possible response categories into simplified variables which were more conducive to the purposes of this study (e.g., re-grouping similar response categories together for case outcomes and sentencing variables, creating dichotomous dummy variables). These new variables temporarily expanded the dataset to 223 variables which were then used in the aggregation process when creating this study's two case-based datasets.

iii) Creation of the Event Dataset

I first created the event-based, or incident-based, case dataset. In this dataset, a case consisted of all charges laid on a single information against an individual in a particular courthouse. I aggregated each yearly charge-based dataset using three grouping variables, or *break variables*: CS_ORIGINAL_INFO, AGE and COURT LOCATION. In the aggregation process, break variables are those variables by which cases are grouped together, such that cases with the same value for each break variable will be aggregated together into a single case. In other words, I grouped together charges based primarily on whether the charges came from the same charging information, i.e., had the same information number. However, to ensure that separate individuals were not accidentally aggregated together into a case, I used two additional break variables. Specifically, charges must have been heard in the same courthouse (which was important given that each courthouse numbers informations differently) and the charged individual must have been the same age in order for charges to be aggregated. For the aggregation process, I specified how values from separate charges should be carried forward into a single case (for example, whether the minimum or maximum value should be taken, or whether the values for each charge should be summed together). Each yearly aggregated event dataset, as well as the overall longitudinal event dataset, initially contained 75 variables. Upon completion of data analyses and following the creation of numerous alternative versions of many variables (i.e., with response categories re-grouped or collapsed), this figure expanded to more than 190 variables.

The event-based dataset used the same case definition as the Ontario Court of Justice (that is, all charges on the same information against the same individual). I was therefore able to compare yearly MAG case counts with the publicly available data on the OCJ website (Table 4.1). This step was conducted in order

to verify the degree to which the case counts aligned across the two datasets, and thereby assess the accuracy of this case aggregation method. Although there were some small discrepancies between the two datasets in terms of the number of cases disposed, overall, the datasets closely resembled one another. Any differences were fairly minimal, in the same direction, and relatively consistent. In light of these findings, these discrepancies are unlikely to be cause for concern. One may therefore consider the aggregated event-based data to be validated by the OCJ data and thus reliable.

Table 4.1: Number of Adult Cases in MAG Event-based Dataset (All Ontario) versus OCJ Data

Year Disposed ¹⁶¹	MAG Event Dataset	OCJ Disposed – All Criminal Cases	OCJ Disposed – Youth	OCJ Disposed – Adult ¹⁶²	Discrepancy between Datasets ¹⁶³	Discrepancy (% of MAG Cases) ¹⁶⁴
2017	203,775	214,137	16,383	197,753	6,022	2.96
2016	196,242	207,160	16,625	190,535	5,707	2.91
2015	192,348	205,249	17,717	187,532	4,816	2.50
2014	196,251	210,098	18,450	191,648	4,602	2.34
2013	213,195	231,681	23,481	208,200	4,995	2.34
2012	223,772	247,047	28,038	219,009	4,763	2.13
2011	230,537	256,846	30,709	226,134	4,403	1.91

The event-based MAG dataset features numerous advantages. Perhaps most obviously, this dataset offers researchers considerably expanded opportunities for research and analyses compared to OCJ data. Indeed, the OCJ produces and makes publicly available only limited, Ontario-wide data which are cursory in nature and feature high level aggregation and broad variables. While the OCJ data may be of interest primarily to the judiciary, it is of limited use for researchers who wish to examine case data and event-based trends in more detail. In contrast, the MAG dataset boasts a much greater capacity for research, given the extensive number of variables and case-level data, as well as the ability to analyze them in a virtually limitless

¹⁶¹ At the time of data analyses, only OCJ data from 2011 onward were publicly available online.

¹⁶² This figure is an estimate, calculated by subtracting the number of “OCJ Disposed – Youth” cases from the total number of “OCJ Disposed – All Criminal Cases”. Indeed, the MAG event-based dataset included only accused persons who were adults.

¹⁶³ This figure indicates the difference between the number of cases in the MAG event-based dataset compared to the number in the OCJ data (adult estimate). The positive figures indicate that the yearly event-based datasets contained a slightly greater number of cases than that in the comparable OCJ data.

¹⁶⁴ This figure indicates the size of the discrepancy between datasets, in percentages. Specifically, this figure is the percent of the MAG event-based dataset that was not accounted for in the OCJ data.

number of ways. Indeed, the level of detail available in this dataset is one of its greatest strengths¹⁶⁵. Furthermore, the event dataset has the advantage of providing longitudinal information, thereby allowing for analyses of trends in bail processing and outcomes over time. Finally, because this dataset's aggregation process and charging information-based case definition have been used by scholars in the past (e.g., Doob, Sprott & Webster, 2017; Webster 2006, 2007), one can have greater confidence in the validity and reliability of its variables and study findings. The current findings can be compared to those of these previous studies, such that similar results would provide even further confidence in this study's findings.

Despite the clear benefits of producing an event-based case dataset over a charge-based dataset, this dataset is not without limitations. Most notably, its event-based case definition is unable to account for charges that are not part of the same information, but which might otherwise be considered a single case in a more practical sense. Consider, for example, an accused with a substantive charge on one charging information, who subsequently received an administration of justice charge on a new, second information for allegedly breaching a condition of bail (before the original charge(s) had been adjudicated). While these charges would be on two separate informations, the court would almost certainly address these two charges at the same time in future court appearances. Indeed, when an accused person receives a subsequent charge, particularly if related to an alleged violation of a bail condition, the original case will often be subjected to a s.524 application¹⁶⁶ which, if granted, would cancel the original release order and effectively merge these additional charge(s) with the initial charge(s) for the purposes of case processing. However, such an

¹⁶⁵ This is true for the event dataset, even compared to the person-based dataset also developed for this research, which can, at times, obscure some degree of information when multiple incidents or charging events have been combined into a single person-based case.

¹⁶⁶ This type of application is made by a Crown prosecutor under *Criminal Code* s.524 when an accused has been arrested for breaching a summons, appearance notice, undertaking or release order, or for committing an indictable offence while subject to one of these orders and the prosecutor seeks to have this order cancelled. Section 524(3) stipulates that a "judge or justice who hears the matter shall cancel a summons, appearance notice, undertaking or release order in respect of the accused if the judge or justice finds that (a) the accused has contravened or had been about to contravene [the order]; or (b) there are reasonable grounds to believe that the accused has committed an indictable offence while being subject to [the order]". Should a judicial officer cancel one of these orders, s.524(4) of the *Criminal Code* requires them to "order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why their detention in custody is not justified under subsection 515(10)". In other words, when a s.524 application is granted, the initial form of release is cancelled and the accused must (potentially re-)apply for judicial interim release, this time from a reverse onus position, having to show cause why their pre-trial detention is not justified.

amalgamation would not be reflected in the event-based case definition, which would consider these two charges as two separate cases rather than two elements of one broader case. Within this context, the event-based case definition somewhat overestimates the number of “true” bail cases while underestimating the severity of a case (as measured by variables such as the number of charges, the presence of certain types of charges, etc.)¹⁶⁷.

iv) Creation of the Person Dataset

In light of the limitations of the event-based dataset, I also produced a second MAG dataset which would better account for a person’s broader criminal case which might include charges stemming from more than one charging information, or “event”. Hence, following the creation and validation of the event dataset, a person dataset was created to supplement and expand the scope of these event-based analyses. To this end, I followed the same general process for aggregating charges into cases, but used different break variables which would reflect an approximation of specific individuals rather than specific events. As such, I aggregated each yearly charge-based dataset using three break variables: CPS_IDENT, COURT LOCATION and DATEDISPO. That is, I aggregated (or grouped together) charges based primarily on whether the charges were laid against the same (approximated) individual. In order to ensure that cases from different courthouses were not erroneously aggregated together, and to avoid cases disposed of at different times being collapsed into a single case, I used two additional break variables. Specifically, charges had to not only have the same CPS_IDENT code attributed to them, but they also had to have been processed in the same courthouse and have the same date of final disposition¹⁶⁸ in order to be aggregated. Hence, for this person-based dataset, a case was defined as all charges laid against a single individual which were disposed of in a particular courthouse on the same date. As with the event-based dataset, the yearly aggregated person dataset (as well

¹⁶⁷ For an illustration of the ways in which the event dataset (as well as the person dataset) records cases, as well as some of its strengths and limitations, see Table 4.3.

¹⁶⁸ Imagine, for instance, an accused who received two charges in January which were then resolved in April. This same accused later received a new, unrelated charge in July, to which he promptly pleaded guilty, producing an August disposition date. He then receives yet new charges in September which were disposed of in November. Adding the disposition date as a break variable for the aggregation process would ensure that these three cases would indeed be counted as three separate cases (rather than only one case).

as the overall longitudinal person-based dataset) initially contained 75 variables but was then expanded to more than 200 variables by the end of data analyses.

Unfortunately, there is no publicly available dataset with a case definition that is identical to the one used in the person-based dataset which could be used for verification purposes. However, the case definition employed in this study does, in fact, largely resemble that used with Statistics Canada CANSIM court data¹⁶⁹. Specifically, a case is defined by Statistics Canada as one or more charges against an accused person or company, which were processed by the courts at the same time (date of offence, date of initiation, date of first appearance, or date of decision/sentencing) and received a final decision. Importantly though, the CANSIM case definition groups together charges in several additional circumstances (i.e., shared date of offence, date of initiation or date of first appearance) which could not be replicated in the MAG dataset (which groups charges for a specific individual at a specific courthouse based only on a shared date of final disposition).

Hence, while the case definitions used with CANSIM data and the person-based MAG dataset are similar in many regards, the differences that do exist would mean that CANSIM data will necessarily contain fewer cases overall than the MAG dataset. Furthermore, the time periods included in CANSIM and MAG data also differ, with CANSIM data produced for fiscal years (April 1 to March 31) while MAG data are available only by calendar year. Although these datasets can be compared by matching the CANSIM fiscal year to the MAG year with the greatest overlap, the time periods being compared will not be identical, such that any differences between the datasets may be partially attributed to these measurement differences in the way that years are measured.

With these caveats in mind, I compared yearly MAG case counts with those available online in Statistics Canada Table 35-10-0027-01 (formerly CANSIM 252-0053)¹⁷⁰ in order to assess the accuracy of this second

¹⁶⁹ Canadian Socio-Economic Information Management (CANSIM) data are produced and maintained by Statistics Canada (replaced in 2018 by data tables with the same or similar content). CANSIM court data are collected using the Integrated Criminal Court Survey (ICCS) which is administered by the Canadian Centre for Justice and Community Safety Statistics (CCJCSS), in collaboration with provincial and territorial governments.

¹⁷⁰ These data are available online at <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701> (accessed August 23, 2022).

case aggregation method (Table 4.2). Although there were some reasonably small discrepancies between the two datasets in terms of the number of cases disposed and the percentage of guilty cases, the datasets – overall – resembled one another fairly closely. Any differences were relatively small – particularly in light of the slightly different case definitions – as well as reasonably consistent and in the same direction.

Table 4.2: Number of Adult Cases in MAG Person Dataset (All Ontario) versus CANSIM Ontario Data

CANSIM Year Disposed ^{171,172}	MAG Year Disposed	MAG Person Cases ¹⁷³	CANSIM Criminal Cases	Discrepancy (Percentage of MAG Cases) ¹⁷⁴	MAG % Guilty Cases ¹⁷⁵	CANSIM % Guilty Cases
2017/2018	2017	135,522	115,710	19,812 (14.6%)	50.6	52.9
2016/2017	2016	134,150	121,193	12,957 (9.7%)	51.6	54.2
2015/2016	2015	134,728	119,009	15,719 (11.7%)	51.5	54.7
2014/2015	2014	140,252	124,364	15,888 (11.3%)	50.8	53.7
2013/2014	2013	154,549	135,324	19,225 (12.4%)	51.9	54.4
2012/2013	2012	163,911	144,399	19,512 (11.9%)	52.9	55.4
2011/2012	2011	169,564	151,409	18,155 (10.7%)	52.7	55.7
2010/2011	2010	179,175	161,355	17,820 (9.9%)	53.5	55.5
2009/2010	2009	172,210	156,778	15,432 (9.0%)	55.9	57.9
2008/2009	2008	168,222	151,813	16,409 (9.8%)	57.2	59.7
2007/2008	2007	169,356	151,566	17,790 (10.5%)	56.5	59.1
2006/2007	2006	163,659	149,380	14,279 (8.7%)	57.6	59.2

In light of this, these discrepancies would be unlikely to be cause for concern, and one may consider the aggregated person-based MAG case dataset to be reliable. The person-based MAG dataset also features many strengths. Perhaps most notably, compared to the event dataset, the cases definition more closely resembles the court’s view of a “case” (which may, at times, include charges stemming from several incidents

¹⁷¹ Given that CANSIM data are produced for fiscal years (April 1 to March 31) whereas MAG data are organized by calendar year, I opted to compare these data sources by matching the MAG calendar year with the CANSIM fiscal year which had the greatest overlap. For example, the CANSIM 2010/2011 fiscal year ran from April 1, 2010 to March 31, 2011, such that three-quarters of this fiscal year was in the 2010 calendar year, making 2010 a better – albeit still imperfect – comparator. While this option allowed for rough comparison between datasets for validation purposes, caution should nevertheless be exercised, as the time periods being compared were not identical.

¹⁷² The case definition for CANSIM data changed in the 2006/2007 fiscal year. As such, data are presented here only for the 2006/2007 fiscal year onward (as data from prior years would not be comparable to more recent data).

¹⁷³ CANSIM data for Ontario do not appear to include cases that were subsequently traversed to the Superior Court of Justice for trial. For the sake of comparison, the MAG data in this table also do not include these cases (roughly 2% of each yearly caseload). Cases ultimately traversed to the Superior Court of Justice were, however, included in later analyses using this dataset.

¹⁷⁴ This figure indicates the difference between the number of cases in the MAG person dataset and that in the comparable CANSIM dataset. The percentage of the MAG person dataset that was not accounted for in the CANSIM data is presented in parentheses.

¹⁷⁵ Given that the case definition for the MAG person dataset aggregated cases based on slightly fewer shared circumstances, one would expect slightly more MAG cases than CANSIM cases, as well as a slightly smaller percentage of guilty cases. Indeed, because CANSIM cases contain a greater number of charges overall, it would make sense that this would translate into a greater likelihood of at least one of these charges ending with a finding of guilt.

or events). This broader conception of a court case is particularly useful in the context of bail processing, where the totality of active charges and other circumstances before the court would almost certainly influence any decisions regarding judicial interim release. Indeed, given that bail decisions are effectively an assessment by criminal justice professionals of an accused person's perceived risk, this broader case definition allows for a more comprehensive understanding of an accused's circumstances and charges at the time of bail (especially compared to the event-based dataset's more narrow focus on charging informations).

Compared to the event-based dataset, the person-based dataset is also quite useful for better understanding certain case processing variables – particularly for multi-information cases whose complexity might lead to lengthier case processing and additional court procedures. Within the context of comparing Gladue bail cases and conventional bail cases, this broader case definition also enables an arguably more accurate understanding of how these bail populations may be substantively different (e.g., in terms of overall number of active charges in a case, prevalence of breach or other administration of justice charges – highly relevant characteristics at bail which might be obscured for multi-incident cases in the event-based dataset). Furthermore, compared to similar CANSIM data, the MAG person-based dataset offers greater opportunities for research and analyses. Similar to the OCJ data, publicly available CANSIM data – although generally available for all provinces and territories – are also fairly superficial in nature and thus of limited use for researchers seeking to examine more detailed court data. The MAG person dataset therefore significantly expands the capacity for research given the innumerable ways in which it permits the analysis of its extensive variables at the case level. As with the event dataset, the person dataset also allows for longitudinal analyses and the ability to explore trends in bail cases, court processing and outcomes over time.

Despite the many benefits of the person-based dataset, though, this case definition does have limitations. Specifically, the aggregation of multi-event cases into a single person-based case, at times, risks obscuring important details. Indeed, through the aggregation process, each person-based case is assigned only one value for each variable, such that, occasionally, important information from one charge or charging event is masked in service of describing the broader bail case. This is particularly true for variables in which

the charge with the most serious attribute is carried forward for the entire case (e.g., offence type, bail outcome, case outcome). For these variables, this person dataset will almost certainly lack outcomes from earlier court processing. For instance, the bail outcome variable aggregates charges using the most serious outcome. This means that any earlier efforts on the part of criminal justice professionals to release accused persons on bail would likely be concealed in this dataset, as an eventual denial of bail (i.e., the most serious bail outcome, and most likely in response to an accumulation of subsequent charges) would take precedence over any release on earlier charges^{176,177}. In these instances, analyses are presented either for the event-based dataset only, or for a combination of the two datasets, in order to draw attention to different facets of bail and the criminological issues and processes at play.

v) Comparing Event and Person Datasets

The event and person datasets each have their own unique strengths and limitations when it comes to shedding light on different aspects of the bail system. Table 4.3 illustrates how a number of hypothetical cases (as processed through bail court) would be recorded in the event dataset as compared to the person dataset in terms of the number of charges in a case (as a proxy for case complexity more generally) as well as bail outcomes. Notably, bail cases appear similar in the two datasets when examining cases with charges stemming from a single charging information (or charging event). Yet differences emerge when examining more complex cases with charges originating from two or more charging informations. In particular, this table illustrates how the event dataset tends to underestimate case complexity by recording each charging information as a separate bail case, whereas the person dataset better captures the full complexity of a bail case. Yet this latter dataset also obscures some details of case processing (and case outcomes), including any earlier efforts to release an accused person on bail.

¹⁷⁶ Similarly, in the context of case outcomes and sentencing, the person-based dataset would also obscure the extent to which plea bargaining is occurring, given that the charge with the most serious case outcome (i.e., a finding of guilt) would take precedence over less serious outcomes (e.g., withdrawing or staying charges). Although this is also true to some extent for the event-based dataset, the person-based dataset's broader case definition (spanning multiple charging informations) would necessarily lead to a greater degree of "lost" information.

¹⁷⁷ For an illustration of the ways in which the person dataset (as well as the event dataset) records cases, as well as some of its strengths and limitations, see Table 4.3.

Table 4.3: Comparison of Event and Person Datasets (Hypothetical Cases)

	Event Dataset	Person Dataset
Person 1	Case 1 (1 charge; bail granted)	Case 1 (1 charge; bail granted)
January – Charge A – bail granted		
Person 2	Case 2 (3 charges; bail denied)	Case 2 (3 charges; bail denied)
February – Charges B, C, & D – bail denied		
Person 3	Case 3 (1 charge; bail granted) Case 4 (1 charge; bail granted)	Case 3 (2 charges; bail granted)
March – Charge E – bail granted		
April – Charge F (breach) – bail granted		
Person 4	Case 5 (1 charge; bail granted) Case 6 (2 charges; bail denied)	Case 4 (3 charges; bail denied)
May – Charge G – bail granted		
June – Charges H & I (breach x2) – bail denied		
Person 5	Case 7 (2 charges; bail granted) Case 8 (1 charge; bail granted) Case 9 (1 charge; bail denied)	Case 5 (4 charges; bail denied)
July – Charges J & K – bail granted		
August – Charge L (substantive) – bail granted		
September – Charge M (breach) – bail denied		
Mean Number of Charges in a Case	1.44 charges	2.60 charges
Percentage of Cases Denied Bail	33%	60%

The strengths and limitations of each case definition were therefore carefully assessed on a variable-by-variable basis in order to determine which dataset(s) was most useful for analyzing each particular topic, as well as any variable-specific caveats of which to be mindful. To this end, early in my analyses I produced two smaller “test” datasets spanning 2016-2017 (i.e., the two most recent years for which there was data) and ran numerous statistical tests on these datasets. Specifically, for each dataset, I produced frequency distributions and cross-tabulations comparing Gladue bail cases to conventional bail cases for all variables. I carefully considered how each variable’s specific syntax and aggregating process would affect case creation, what the variable was realistically capturing and any implications that this might have for each dataset. For each variable, I subsequently determined which dataset presented the most accurate or effective illustration for the particular purposes of this research – sometimes opting to use one dataset over the other, sometimes opting to use both datasets in order to highlight different aspects of bail cases and their processing. In the case of variables for which both datasets depicted similar trends and there were no specific concerns regarding aggregation or measurement issues (such that either dataset would tell a similar story), I elected to present the person-based dataset simply because its cases are a closer reflection of the way in which cases are conceptualized and processed ‘on the ground’.

This comparison process between event and person datasets also has the benefit of acting as an additional form of validation for both datasets. That is, in comparing the output from the event and person datasets, I was also able to verify that any differences in case distribution were in the direction, and of the scale, that one would expect. Table 4.4 provides two sample comparisons.

Table 4.4: Comparison of MAG Event and Person Datasets for Select Variables, Old City Hall and College Park Courthouses (2016-2017¹⁷⁸)

				Courthouse Location					
				Old City Hall	College Park	Total			
MAG Dataset Type	Event-based	Count		16341	9943	26284			
		% within Courthouse Location		62.2%	37.8%	100.0%			
	Person-based	Count		11818	7254	19072			
		% within Courthouse Location		62.0%	38.0%	100.0%			
				Number of Charges in a Case					
				1	2	3-4	5-6	7+	Total
MAG Dataset Type	Event-based	Count	10899	6189	5574	1925	1697	26284	
		% within Number of Charges	41.5%	23.5%	21.2%	7.3%	6.5%	100.0%	
	Person-based	Count	5302	4303	4845	2024	2598	19072	
		% within Number of Charges	27.8%	22.6%	25.4%	10.6%	13.6%	100.0%	

Indeed, the distribution of cases between the two case study locations was virtually identical across the event and person datasets (62.2% versus 62.0%). In terms of the number of charges in a case, the observed shift in the direction and scale is as expected. Specifically, person-based cases were more likely than event-based cases to consist of three or more charges because the former may include charges stemming from several events, whereas the latter contains only charges originating from a single charging document. Upon completing the verification process and investigative analyses with these “test” datasets, I proceeded with producing and finalizing the larger, longitudinal datasets¹⁷⁹.

Beyond the value of case-based data generally, and each of the dataset’s specific strengths, these two datasets are extraordinarily valuable due to unique data contained within them. Most notably, prior to the

¹⁷⁸ Note that this table presents the data from the early test datasets which spanned only 2016-2017. Hence, the raw figures in this table will be considerably smaller (and the percentages/distributions slightly different) than those presented in the Results chapter for the entire longitudinal dataset.

¹⁷⁹ Despite the various verification processes conducted, it is nonetheless important to remember that there are inevitably some minor errors in the data, given the administrative nature of both datasets. Indeed, the data in these datasets are only as good as the data entered by administrative court staff. In a very small proportion of cases, data for certain variables are missing. In other cases, there are some data that simply do not make logical sense – almost certainly the result of data entry error. Indeed, these types of errors are not uncommon in most administrative-type datasets. However, the number of errors appears to be generally quite small. More notably, a careful reader may notice some minor variation in the number and percentage of cases which are analyzed from one variable to the next.

creation of these datasets, there had been no way to quantitatively compare Gladue and non-Gladue bail cases in the same courthouse. To date, there has been very little research on Gladue Courts generally, with only a very limited number of small-scale case studies, and with bail-specific analyses being even more limited in size and scope. However, the creation of the Gladue Bail flag has allowed for research to be produced which was previously not possible. That is, the Gladue Bail flag created specifically for this research project allows researchers – for the very first time – to systematically compare Gladue bail cases to a comparison group of non-Gladue bail cases processed in the same courthouse (thereby largely controlling for differences in court culture from one jurisdiction to another). The inclusion of a non-Gladue comparison group within the Gladue bail datasets, coupled with the enormous scope of the data and their longitudinal nature, represents a remarkable advancement in data availability which has opened the door for important and methodologically robust analyses to be undertaken, which had not previously been possible.

4.3.3 – Study Population: Courthouses and Years of Study

i) Courthouses of Study

Upon completing case aggregations for each yearly dataset for both event and person datasets, I subsequently identified and isolated cases from Old City Hall (OCH) and College Park (CP) courthouses. Although I had also requested Gladue data for the Ottawa IPC, given that this IPC had only recently opened (September 2017) and the data provided by MAG included only cases completed up until April 2018, the number of Gladue bail cases was quite small. Given that Ottawa IPC data would need to be analysed separately from the Toronto Gladue Courts due to the Ottawa court's distinct procedures and practices, such a small number of cases risked rendering data analyses problematic and would have consequences for any inferential statistical analyses (e.g., increased likelihood of committing a type II error¹⁸⁰). The inclusion of data from only a few months in 2017 and 2018 would also preclude the possibility of examining any longitudinal

¹⁸⁰ Type II error occurs when one retains a null hypothesis (that there is no relationship) when, in reality, there is a relationship and one should have rejected the null hypothesis. Unlike type I errors which can be directly controlled by adjusting a test's level of significance, type II errors are more difficult to control directly and are instead related to factors like sample size. In particular, as the number of cases under analysis increases, the risk of type II error decreases.

trends. Moreover, using data from the early stages of any new program or initiative can be methodologically problematic in that these initial data are unlikely to be representative of the program once its operations are more established. In particular, the early stages of new programs are often associated with highly motivated and optimistic stakeholders¹⁸¹ whose enthusiasm may diminish as the program finds its footing and as practices evolve. Indeed, given that Gladue Courts are typically established at a more grassroots level by criminal justice professionals (as opposed to top-down government legislation)¹⁸², there is reason to believe that these IPC practitioners would be susceptible to the potential reliability issues associated with the early stages of program implementation. With these data limitations in mind, I decided to focus on Toronto's Old City Hall and College Park Gladue Courts, which were more established and had the additional benefit of having considerably more Gladue bail cases over the years than Ottawa.

Both of the Gladue Courts in this study are located in downtown Toronto, Ontario. The Toronto area is a particularly pertinent research site for criminal justice matters affecting Indigenous peoples as the city had the largest Indigenous population in the province during the study timeframe^{183,184}. Data from the 2016 census indicate that 23,065 Indigenous individuals were living in the city of Toronto, and 46,315 living in the greater census metropolitan area (CMA) at this time (Statistics Canada, 2017b). Importantly though, these figures are almost certainly underestimates of the Indigenous population, given that they do not include persons experiencing homelessness who would not be enumerated in the census. Indeed, a study by Our

¹⁸¹ Illustratively, Judge Dorval mentioned in her guest lecture that she had been working to develop Ottawa's IPC for nearly five years before resources finally permitted its creation. Upon finally receiving approval, she noted that, when approaching other judges to agree to sit in IPC as well as receive additional Gladue training, she carefully selected those judges who she knew were cognizant of the issues that Indigenous peoples tended to face in the court system.

¹⁸² In fact, Rudin (2009) asserts that governments have tended to be more reluctant to implement Gladue-oriented changes than other criminal justice changes, in part due to "the political baggage that being 'soft on crime' carries" (p.704). Within this context, it may be unsurprising that the Gladue Court at the Old City Hall courthouse was propelled into creation by a handful of judges and other criminal justice professionals who met over the course of a year to develop the very first Gladue Court (Knazan 2003; Rudin 2009), rather than as a result of any government-led initiative.

¹⁸³ Although the city of Toronto and the Toronto census metropolitan area had the largest Indigenous populations in Ontario in 2006, 2011 and 2016, census data from 2021 suggest that Ottawa-Gatineau has now surpassed Toronto in terms of (enumerated) Indigenous residents (Statistics Canada, 2022c).

¹⁸⁴ More broadly, the number and proportion of Indigenous peoples living in urban areas has been growing for decades, due to several factors including demographic growth, mobility and changes in self-reporting patterns (Statistics Canada 2017a). In fact, 2016 Census data suggest that more than half (51.8%) of Indigenous peoples in Canada were living in metropolitan areas of 30,000 residents or more, representing an increase by roughly 60% since 2006 (Statistics Canada, 2017a).

Health Counts, which used respondent-driven sampling and did not require that respondents reside at a fixed address, estimated the city of Toronto's Indigenous population in 2016 to be significantly larger, at 75,005 Indigenous residents, and 88,397 Indigenous residents by 2021 (Smylie et al., 2022).

As Mr. Rudin noted, the Old City Hall and College Park courthouses are the two busiest criminal courthouses in Toronto in terms of Indigenous bail caseloads¹⁸⁵. In particular, the Old City Hall courthouse includes the oldest Gladue Court in existence (created in 2001). Its well-established Gladue Court is presided over by a judge (since it accepts both bail and sentencing cases) and operates every Wednesday and Friday. This courthouse also has two conventional bail courts which are presided over by a justice of the peace, one for accused men and the other for accused women as well as all cases which include one or more drug charges. This courthouse is located in downtown Toronto, such that accused persons attending this courthouse tend to reside in the city's urban core, with some accused experiencing homelessness. There is an Indigenous Courtworker in this courthouse (available to all Indigenous accused) who is available to help develop a release plan/plan of care. Accused persons in this court also have access to the Toronto Bail Program and its Gladue Bail Supervision – a part of the larger Toronto Bail Program – which started at roughly the same time as this courthouse's Gladue Court¹⁸⁶.

Similarly, the College Park courthouse also includes a well-established Gladue Court (established in 2006) which operates on Thursdays. Its Gladue Court is also presided over by a judge, whereas its conventional bail courts are typically presided over by a justice of the peace¹⁸⁷. There are two such

¹⁸⁵ Note that, in the first half of 2023, these courthouses ceased operations and were amalgamated (along with four other Toronto-area courthouses) into a single large, 17-storey courthouse in downtown Toronto – the Toronto Courthouse. Another facility in the greater Toronto area – the Toronto Regional Bail Centre – processes all bail cases. Both court facilities include a Gladue Court. While court operations in Toronto have very recently shifted, many court personnel and practices from Old City Hall and College Park courthouses would likely persist – both in terms of Gladue Court operations in the Toronto Bail Court, as well as conventional bail operations in the Toronto Regional Bail Centre.

¹⁸⁶ However, like many bail supervision programs, Clark (2016b) notes that the Toronto Bail Program, Gladue Supervision nevertheless has fairly strict eligibility criteria. Specifically, he outlines that bail support is not available for cases in which, “in the previous four years, the accused person had been guilty of one of the following offences: failure to appear or attend court; failure to comply with a recognizance or probation; unlawfully at large; parole violation; escape custody” (p.33). Notably, several of these charges against the administration of justice which restrict eligibility are fairly common, particularly among Indigenous peoples.

¹⁸⁷ Note that the College Park courthouse was part of a limited pilot project, as of September 5, 2017, whereby its conventional bail courts were also presided over by judges. However, any possible effects of this change from justices

conventional bail courts in this courthouse, one for men arrested in three major police divisions, while the other is reserved for women (and those who are co-accused with a woman), as well as men from another particular police division. The College Park courthouse is also located in downtown Toronto, and also serves a largely urban, sometimes homeless, population. An Indigenous Courtworker as well as the Toronto Bail Program and its Gladue Bail Supervision option are similarly available to all Indigenous accused to assist with release planning and supervision.

Although analyses generally combine Old City Hall and College Park bail cases, it is nevertheless useful to understand the composition of cases in terms of courthouse location (Table 4.5). In both datasets, roughly two-thirds of all cases were from the Old City Hall courthouse – perhaps unsurprising given its status as the busiest Ontario Provincial Courthouse during this timeframe – with the remaining third of cases being from College Park. Cases are further broken down by Gladue Bail Status – that is, comparing cases flagged as Gladue bail cases to non-Gladue cases (that is conventional bail cases, or those cases for which all bail appearances occurred in conventional bail courts). In terms of Gladue bail cases specifically, the proportion processed in Old City Hall was slightly higher (72.4% and 71.1% respectively) – perhaps a reflection of the fact that Old City Hall Gladue Court runs twice weekly compared to College Park’s schedule of only one day a week.

Table 4.5: Crosstabulation of Gladue Bail Status by Courthouse Location (Event (Early Bail)¹⁸⁸ Dataset and Person Dataset; 2006-2017)

			Event Dataset			Person Dataset		
			Court ID			Court ID		
			OCH	CP	Total	OCH	CP	Total
Gladue Bail Status	Non-Gladue	Count	111054	54573	165627	88709	47086	135795
		% within Gladue Bail Status	67.1	32.9	100.0	65.3	34.7	100.0
	Gladue	Count	5756	2194	7950	4206	1708	5914
		% within Gladue Bail Status	72.4	27.6	100.0	71.1	28.9	100.0
Total		Count	116810	56767	173577	92915	48794	141709
		% within Gladue Bail Status	67.3	32.7	100.0	65.6	34.4	100.0

of the peace to judges would be extremely limited given that the datasets include only cases disposed by December 2017.

¹⁸⁸ For discussion of what is meant by “early bail” cases in the event dataset, see section 4.3.3(ii) below and Table 4.5.

ii) Bail Cases of Study

As illustrated in Table 4.5, data from Old City Hall and College Park courthouses were selected from each yearly Ontario dataset. Subsequently, data from all years (2001-2017) from both courthouses were merged to produce a single longitudinal event dataset and a single longitudinal person dataset. These datasets were then refined to exclusively reflect bail cases. These two preliminary datasets therefore consisted of all criminal court cases heard in either Old City Hall or College Park courthouses for which there was at least one bail appearance (whether in Gladue Court or conventional bail court)¹⁸⁹. Just as importantly though, I chose – after careful consideration – to further refine the event-based dataset to examine only “early bail” cases; that is, cases for which a bail appearance occurred within the first seven days of the criminal court process. As such, “later bail” cases, or those bail cases for which a bail appearance occurred only later in court processing, were purposefully excluded.

This decision reflects the fact that these two bail categories very likely represent two very different types of cases and corresponding progressions through the bail system. Specifically, early bail cases in the event dataset represent more “typical” bail cases in which the accused is charged and brought before court for a bail appearance without unreasonable delay. Conversely, in this event dataset, later bail cases will generally be those for which an accused was initially released by police (without requiring a formal determination of bail by the courts), but weeks or months later received a subsequent charge(s)¹⁹⁰ which then initiated the bail process. Given the court practice of effectively amalgamating earlier (outstanding)

¹⁸⁹ These Gladue Bail Court data are ostensibly populational data. However, based on court observations, note that Gladue Court cases would occasionally be traversed from the usual courtroom to other courtrooms in the same courthouse when another judge with Gladue training had finished their docket early and offered assistance to the Gladue Court. Any (relatively rare) bail case that might have been traversed in this manner to what would – in effect – still be Gladue Court, may not have been flagged as Gladue bail cases in this study’s datasets if they did have any other bail appearance(s) in the official Gladue courtroom. In light of this, as well as inevitable random measurement error, including potential errors in administrative data input (both of which would likely occur at random), study analyses include inferential statistics in order to be more confident that the trends and differences in the data do, in fact, reflect true patterns in the populations.

¹⁹⁰ This could include one or more new substantive charge(s), failure to appear in court charges, failure to comply with the conditions of release charges, or some combination thereof. Indeed, a study examining Ontario CANSIM data from 2013/14 noted that subsequent charges were present in 79.2% of bail cases that had their first bail appearance later in the court process. Of these later bail cases, more than half (51.4%) had only one or more administration of justice charge(s) added, while 19.2% of these cases had one or more administration of justice as well as substantive charges added to their case (Doob, Sprott and Webster 2017).

charges with new charges – particularly for charges of failing to comply with a court order or failing to attend court – and treating these as a single case, a bail appearance that applied to the new charge(s) would also have been recorded as applying to the older charge(s) in this newly amalgamated case. In this sense, later bail cases in the event dataset do not represent typical bail cases since the initial charges would generally not have initiated the bail process. Rather, it is only through subsequent charge(s) being joined with the original charge(s) that these become bail cases. Furthermore, the aggregation process used for the event dataset presents additional limitations with regard to later bail cases. Specifically, because cases in the event dataset are aggregated based primarily on charging information, any subsequent charges – which would be listed on a new charging information – would not be aggregated into the same case as the original charges for this dataset. Consequently, the charges that initiated the later bail appearance(s) would not be included as part of an aggregated event case and would instead appear as a separate (early bail) case within the dataset¹⁹¹.

¹⁹¹ To illustrate, imagine the case of John Doe. In January, Mr. Doe was charged with theft under \$5000 and released by police on an undertaking with conditions, to appear in court the following month. Later, in April, Mr. Doe was subsequently charged with failing to comply with a condition of his release. This failure to comply charge appeared on a new charging information and triggered a bail hearing. At this time, the court effectively merged these two charges into a single case, or single file. Any appearances listed in the court database for April's failure to comply charge would also have been applied to the other charges in this merged court file – in this case, January's theft under charge. However, since these two charges were on separate charging informations, they would constitute two separate cases in the event-based dataset. The first case – Mr. Doe's January theft under charge – would be labelled as a 'later bail' case in this dataset since the eventual bail appearance brought on by the subsequent breach charge did not occur within seven days of Mr. Doe's first court appearance. This later bail case would therefore be removed from the event dataset, as it does not reflect a 'true' bail case in that the initial charge did not initiate a bail appearance. The second case – Mr. Doe's April failure to comply charge – would be an early bail case in the event dataset since the bail appearance for this charge did occur within seven days of beginning case processing. This early bail case would remain in the event dataset, as the case characteristics reflect a 'true' bail case in which the accused had to go through the bail court system in order to secure release. Note that it is also possible for an early bail case to have one or more later bail appearances. Imagine the case of Jane Roe. Ms. Roe was charged in January with Theft over \$5000 and brought before a bail court where she was granted judicial interim release. In April, Ms. Roe was charged with failing to comply with a condition of her bail and was brought before a bail court a second time. The court would effectively merge her January theft over charge with her April failure to comply charge in order to form one practical case, despite these charges being laid on two separate charging informations. In the event dataset, these two charges would constitute two separate cases – both early bail cases – with the former (the theft over case), also listing a second set of bail appearances (though neither would include the other's charge information). Since cases like Ms. Roe's January theft over charge would list information for two separate bail phases, data analyses generally focused on each case's "first bail". As previously noted, due to the limitations of the aggregation process, the event dataset somewhat overestimates bail case numbers while underestimating the number of charges in a broader bail case.

Within this context, later bail cases in the event dataset generally constituted (at least initially) less serious cases (in the sense that the accused and their charges did not originally necessitate a bail hearing)¹⁹² and also generally had longer case processing times, given that subsequent charges may have prolonged the case resolution process and/or rendered it more complicated¹⁹³. Hence, because these later bail cases do not represent *true* bail cases, they were removed from the event dataset. Indeed, to keep later bail cases in this dataset would have risked distorting the bail data and rendering them less representative of typical bail cases (for which initial charges initiate a bail hearing early in case processing – within seven days of first appearance). That is, qualitatively, the inclusion of later bail cases would have distorted overall bail findings. Quantitatively, however, the exclusion of these cases had limited impact on the study results as the proportion of later bail cases was quite small – for both the overall event dataset (7.3%), as well as for Gladue Courts (5.0%) and conventional bail courts (7.4%) individually (Table 4.6)¹⁹⁴. Hence the decision to exclude these cases is unlikely to significantly distort the results of these analyses. Indeed, other scholars who have examined ICON bail data using an event-based case definition (e.g., Doob, Sprott and Webster, 2017; Webster, 2006; 2007) similarly distinguish between early and later bail cases, making the same decision to focus on early bail cases as the best approximation of “normal” bail cases. Hence, the characterization of early bail cases as “typical bail cases” is supported by other bail studies. Just as importantly, by following a

¹⁹² Indeed, later bail cases in the event dataset appeared to be less serious in nature than early bail cases – at least in terms of initial charges – and took longer to reach case resolution. As a proxy measure for case seriousness, later bail cases in the event dataset were more likely to have only one charge (68.1%) compared to early bail cases (45.5%) and were less likely to have 5+ charges (6.0%) compared to early bail cases (11.1%). Similarly, later bail cases were also slightly less likely to contain a charge against the person (25.3%) compared to early bail cases (28.2%).

¹⁹³ In terms of case processing, later bail cases in the event dataset were significantly less likely (3.6%) than early bail cases (28.0%) to receive resolution within 30 days of beginning the court process. Similarly, later bail cases were also significantly more likely (43.0%) than early bail cases (19.6%) to take a year or more to reach case resolution.

¹⁹⁴ The proportion of later bail cases in Gladue Court (5.0%) was notably slightly smaller than that for conventional bail cases (7.4%). A possible explanation for this difference is that a greater proportion of cases processed in Old City Hall and College Park’s conventional bail courts were initially considered less serious and therefore suitable for police release, making it possible for a subsequent charge(s) to trigger the case’s first bail appearance later in the case. Following this logic, if a greater proportion of cases eligible for Gladue Court (compared to the conventional bail court population) *began* their case processing in bail court, then there would be less opportunity for Gladue cases to have their first bail appearance *later* in the court process. Ultimately, the difference in the proportion of later bail cases between Gladue Court and conventional bail court was quite small. Consequently, the exclusion of these later bail cases from event dataset analyses is unlikely to significantly affect comparisons between these Gladue Court bail cases and conventional bail cases.

similar aggregation process, and likewise focusing on early bail cases, I was able to compare – in broad strokes – the results of prior research with the current study in order to further corroborate the validity of the study results.

Table 4.6: Crosstabulation of Early and Later Bail Cases by Court Type, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Gladue Bail Status		Total
			Non-Gladue	Gladue	
Timing of First Bail Appearance	First Seven Days	Count	165627	7950	173577
		% within Timing of First Bail Appearance	92.6	95.0	92.7
	Later in Court Case	Count	13209	416	13625
		% within Timing of First Bail Appearance	7.4	5.0	7.3
Total	Count		178836	8366	187202
	% within Timing of First Bail Appearance		100.0	100.0	100

Although the inclusion of later bail cases posed issues for the event MAG dataset, this was not generally the case for the person MAG dataset. That is, this latter dataset’s aggregation process and broader case definition avoided the principal limitations of event-based “later bail” cases and so have not been excluded from the person dataset. Indeed, whereas with the event dataset any subsequent charges which initiated a later bail appearance would be divorced from a(n otherwise typically less serious) “later bail” case, with the person dataset, these subsequent charges were merged with initial charges to form a single person-based case. Hence a later bail case was not simply a fragment of a larger (initially less serious) bail case. Instead, later bail cases in the person dataset reflect the broader court case and include the details of any subsequent (perhaps more serious) charges that were responsible for initiating a bail appearance later in the case¹⁹⁵. In other words, the broader later bail cases in the person dataset are not significantly different from other broader person-based bail cases (particularly other multi-event cases) in that they reflect the entirety of a

¹⁹⁵ Recall the case of John Doe, above, who was charged in January with Theft under \$5000 and released by police, then subsequently charged with failing to comply with a condition of his release in April. Despite these two charges being effectively amalgamated into a single case for court processing purposes, in the event dataset these two charges would form a later bail case (to be excluded from the dataset) followed by a separate early bail case. However, with the person dataset, these two charges would be aggregated into a single later bail case (assuming Mr. Doe had his first appearance not long after being charged, such that the bail appearance for his subsequent charge was more than seven days from the first appearance). Unlike with the event-based case (fragment), the case characteristics of this later bail case in the person dataset would reflect characteristics of the broader case, including the presence of two charges and the presence of a property charge as well as a charge against the administration of justice, etc.

bail case before the courts, including the charges which initiated the bail process. Notably, while later bail cases were generally unproblematic from a conceptual standpoint – and, in fact, beneficial to keep in most analyses – there was a small number of case processing variables for which variable creation syntax was not compatible with later bail cases¹⁹⁶. For these specific variables, later bail cases were excluded from analyses.

iii) Years of Study

In terms of longitudinal data, this study's datasets initially included cases completed between 2001 and 2017 (i.e., it did not include cases that were still before the courts in 2018 or later). I then examined the breakdown of Gladue and Non-Gladue bail cases for each year of these datasets. Although I received and aggregated data from as early as 2001 (as Gladue Court began in Old City Hall in October 2001 and in College Park in June 2006), there were fewer Gladue bail cases in these early years – a reality that is not entirely surprising given that the program was still in its infancy and may have had limited familiarity and/or reputation among accused persons and defence counsel¹⁹⁷. Furthermore, when one considers that each yearly dataset consisted only of cases that had made their way through the entire criminal court process, such that they were *completed* in a given year, it may be that a greater number of Gladue bail appearances took place in these early years, but simply had not been completed until a year or more later. More importantly, in light of the methodological concerns regarding the reliability of very early program data, I chose to exclude data from the early years of the very first Gladue Court's operation, given that these data were unlikely to be representative of operations once the Court became more widely known and established.

¹⁹⁶ For instance, both datasets contain a variable which measures the number of court appearances from the end of a case's first bail phase until the case was resolved. This variable was created by taking the total number of court appearances for a charge and subtracting from this the number of court appearances on record for the first bail phase, then aggregating charges using the maximum value. For later bail cases, this variable creation syntax would not actually measure the number of appearances following the completion of a case's first (or only) bail phase, but rather the number of appearances that were simply not part of the first (or only) bail phase. Depending on how far into case processing a later bail phase occurred, this might add anywhere from one to many artificial "post-bail" appearances for later bail cases. As later bail cases would artificially inflate the number of court appearances from the end of bail until case completion, later bail cases were excluded from analyses of this specific variable.

¹⁹⁷ To illustrate this issue more generally, Judge Dorval of the Ottawa IPC noted in her guest lecture that in the earliest days of that court's operation, the docket could be as short as 5-6 cases, but that a couple of months into operation the docket was often three pages in length (i.e., representing potentially dozens of cases). She was optimistic that plans to put up posters for the IPC in the Ottawa police station, in holding cells and at the local detention centre could lead to further growth, such that more court time may have become warranted.

Within this same context, any concern with early program data for the College Park Courthouse was largely assuaged in light of the fact that several of the criminal justice professionals who participated in the development and early days of the Old City Hall Gladue Court were also involved in the creation of the College Park Gladue Court. As such, many of the initial start-up adjustments learned in the early years of Old City Hall Gladue Court would have almost certainly transferred naturally to the nearby College Park Gladue Court, thereby greatly minimizing the instability often associated with newer programs or initiatives¹⁹⁸.

Hence, this study's analyses begin with 2006 data, with both longitudinal datasets spanning 12 years. The event dataset consisted of 173,577 adult (early) bail cases disposed in Old City Hall and College Park courthouses between 2006 and 2017, while the person dataset consisted of 141,709 bail cases from these courthouses disposed during this same time period (Table 4.7). Notably, 4.6% of event-based cases and 4.2% of person-based cases were Gladue bail cases (i.e., had at least one bail appearance in Old City Hall or College Park Gladue Courts), with the rest having had their bail processed entirely in conventional bail courts.

Longitudinally, in both datasets the percentage of Gladue bail cases for each year increased generally from 2006 to 2009, dipped briefly in 2010-2012 and then increased modestly until 2014, at which point the percentage of Gladue bail cases remained relatively stable – generally between 7.1% and 8.3% of the event caseload or 6.5% and 7.3% of the person caseload in these two courthouses.

¹⁹⁸ Indeed, analyses of College Park Gladue bail cases from 2006-2007 were not substantially different than those from the years directly following this period (i.e., 2008-2009). Most notably, the distribution of 2006-2007 College Park Gladue bail cases were reasonably aligned with those from the years immediately following this period in terms of the number of charges, number of violent charges and administration of justice charges, number of days to complete the bail process, number of bail appearances, and bail outcomes. Said differently, empirical evidence supports the supposition that the College Park Gladue Court did not experience a substantial period of instability early in its operation.

Table 4.7: Crosstabulation of Year by Gladue Bail Status for Old City Hall and College Park Bail Cases (Event (Early Bail) and Person Datasets)

Event Dataset						Person Dataset				
		Gladue Bail Status						Gladue Bail Status		
			Non-Gladue	Gladue	Total			Non-Gladue	Gladue	Total
Year	2006 ¹⁹⁹	Count	15848	607	16455	2006	Count	13122	483	13605
		% within Year	96.3	3.7	100.0		% within Year	96.4	3.6	100.0
	2007	Count	16085	668	16753	2007	Count	13612	526	14138
		% within Year	96.0	4.0	100.0		% within Year	96.3	3.7	100.0
	2008	Count	16283	709	16992	2008	Count	13503	547	14050
		% within Year	95.8	4.2	100.0		% within Year	96.1	3.9	100.0
	2009	Count	15520	745	16265	2009	Count	12908	544	13452
		% within Year	95.4	4.6	100.0		% within Year	96.0	4.0	100.0
	2010	Count	14533	430	14963	2010	Count	12136	338	12474
		% within Year	97.1	2.9	100.0		% within Year	97.3	2.7	100.0
	2011 ²⁰⁰	Count	15248	141	15389	2011	Count	12421	106	12527
		% within Year	99.1	0.9	100.0		% within Year	99.2	0.8	100.0
	2012	Count	14968	415	15383	2012	Count	12144	333	12477
		% within Year	97.3	2.7	100.0		% within Year	97.3	2.7	100.0
	2013	Count	13091	607	13698	2013	Count	10523	466	10989
		% within Year	95.6	4.4	100.0		% within Year	95.8	4.2	100.0
	2014	Count	11172	848	12020	2014	Count	9060	642	9702
		% within Year	92.9	7.1	100.0		% within Year	93.4	6.6	100.0
	2015	Count	10367	933	11300	2015	Count	8552	671	9223
		% within Year	91.7	8.3	100.0		% within Year	92.7	7.3	100.0
	2016	Count	10899	844	11743	2016	Count	8668	620	9288
		% within Year	92.8	7.2	100.0		% within Year	93.3	6.7	100.0
	2017	Count	11613	1003	12616	2017	Count	9146	638	9784
		% within Year	92.0	8.0	100.0		% within Year	93.5	6.5	100.0
Total		Count	165627	7950	173577	Total	Count	135795	5914	141709
		% within Year	95.4	4.6	100.0			% within Year	95.8	4.2

¹⁹⁹ Given that the College Park Gladue Court opened in mid-2006, with the dataset coding such cases from June 2006 onward, this may serve as a partial explanation for the smaller number of cases this year (along with the fact that this court, and to a lesser extent the Old City Hall Gladue Court, were new and still growing in popularity among potential clientele). Indeed, College Park event cases comprised only 12.2% (N = 74) of the Gladue Bail *event* caseload in 2006 compared to 27.6% of this caseload across 2006-2017, or 13.5% (N = 65) of the Gladue Bail *person* caseload in 2006, compared to 28.9% of this caseload across 2006-2017.

²⁰⁰ Although there were fewer Gladue Court cases for the year 2011 (and, to a lesser extent, 2010 and 2012) in both datasets and in both courthouses, supplemental analyses exploring this year's data suggest that the characteristics of these Gladue cases were not substantially different than those in the years directly preceding and following it (i.e., 2009 to 2013). Most notably, the distribution of 2011 cases in both datasets in terms of the number of charges, number of violent charges and administration of justice charges, number of days to complete the bail process, number of bail appearances, and outcome of bail were all reasonably aligned with preceding and subsequent years. In other words, despite the smaller number of cases in 2011 (and the possibility of some missing cases), these cases nevertheless appeared to be fairly representative of all cases resolved that year in both the event and person datasets. Furthermore, given that the number of Gladue bail cases in both datasets for 2011 is only a few hundred cases less than in 2009 and 2013, any potential distortions would occur primarily in longitudinal analyses rather than aggregate analyses of the entire dataset. Possible explanations include changes in court staff (e.g., new court clerks learning how to input data or new data inputting processes; changes in Duty Counsel such that Indigenous accused may not have been as consistently offered the opportunity to have their bail heard in Gladue Court, or even temporary courtroom changes due to building maintenance, etc.). It is also possible that any such changes to Gladue bail cases actually occurred in 2010 and – due to the fact that cases are listed for the year in which they were *completed* – the effects trickled into subsequent years.

4.4 – Data Analyses

4.4.1 – Analytical Overview

This research study is a comparative analysis of Gladue bail cases and conventional bail cases from two Toronto courthouses with established Gladue Courts – Old City Hall courthouse and College Park courthouse. The study's primary objectives are to understand the types of bail cases heard in these courts, to assess the ways in which Gladue Courts process bail cases compared to conventional bail courts, and to examine any downstream effects of bail decisions on later case and sentencing outcomes. Indeed, the specialized nature of these courts may enable them to overcome some of the barriers which Indigenous peoples otherwise face when seeking bail in a risk-focused, settler-centric bail system. To the extent that Gladue Courts are able to facilitate bail outcomes which are substantively equitable to those in conventional bail courts, these specialized Indigenous peoples' courts may have downstream effects contributing to more equitable case outcomes and sentencing. That is, this research seeks to understand whether Gladue Courts' bail functions may have an important role to play in remedying the overrepresentation of Indigenous peoples in Canadian prisons. Furthermore, while this study focuses specifically on Indigenous peoples' bail cases in Gladue Court, findings on the comparative characteristics of these cases and any factors seeming to contribute to Indigenous overincarceration likely reflect – at least partially – Indigenous peoples' bail cases and experiences in the court process more generally.

i) Independent Variable: Gladue Bail Status

As this research is primarily a comparative analysis of Gladue bail cases and conventional bail cases, the principal independent variable for this study's analyses is a case's Gladue Bail Status. This variable – which allows for the comparison of Gladue bail cases and non-Gladue bail cases in terms of a number of relevant dependent variables – was produced using the new Gladue bail flag variable created by MAG for this research. Cases coded as Gladue bail cases are defined as bail cases with at least one bail appearance occurring in one of the two Gladue Courts (although they may have also had one or more bail appearances in conventional bail courts). In contrast, non-Gladue cases, or conventional bail cases, are defined as cases with one or more bail appearances, none of which occurred in the specified Gladue Courts. Hence the Gladue Bail Status

variable is not a measure of Gladue Court participation generally and cannot account for whether cases may have also had non-bail appearances in Gladue Court later in case processing (e.g., for plea and/or sentencing).

Importantly, while the Gladue Bail Status variable in some ways sought to approximate Indigenous and non-Indigenous accused, it is not a perfectly representative measure of all Indigenous peoples' bail cases in these courthouses. Indeed, not all Indigenous accused would have had (even part of) their bail heard in a Gladue Court. First, participation in Gladue Courts is voluntary. This means that an Indigenous accused person must first have been identified and made aware of Gladue Court as an option for bail, which one might imagine does not always occur with perfect accuracy nor consistency (see Clarke, 2016b). Further, an Indigenous person facing charges would then have to actively choose to attend this court rather than conventional bail court²⁰¹. Perhaps more consequentially, the limited schedules of Gladue Courts (twice a week at Old City Hall courthouse and once a week at College Park courthouse) almost certainly contributes to some Indigenous accused choosing not to have a bail appearance in these specialized courts, despite a desire to do so. That is, although an Indigenous accused whose first bail appearance occurs on a day in which Gladue Court is sitting might have that appearance in Gladue Court, many first appearances would necessarily occur in conventional bail court, with a referral to Gladue Court occurring only afterward (should the accused not be released, want to seek bail, and wish to wait for the next Gladue Court is sitting). Hence many – if not most – Indigenous accused would have their first bail appearance in a conventional bail court.

Further, extensive court observations suggest that first bail appearances generally result in either Crown consent releases, or adjournments when the Crown contests release (which may be followed by a show cause hearing, generally at a later date, once a release plan or plan of care has been developed). If an

²⁰¹ On this issue, Clark (2016b) notes that Indigenous accused in Old City Hall courthouse overwhelmingly select this Gladue Court (generally – not only for bail) when given the option to do so. In explaining why some Indigenous accused opt not to appear in Gladue Court, he notes, “This occurs very infrequently but has happened when a person is co-accused with a non-Aboriginal person and chooses to appear in another court with the other accused. This choice is typically made on the recommendation of counsel. In other cases, an individual may not be aware that he is, in fact, Aboriginal. Again, this occurs infrequently but has happened when the accused person has had no exposure to his/her community or culture. In very rare instances, a person might choose not to identify as Aboriginal simply on the basis of a personal identity choice.” (p.26) This impression that Indigenous accused typically opt to have their cases heard in Gladue Court was shared by the Indigenous Courtworker with whom I spoke.

Indigenous accused person is released by Crown consent in conventional bail court, there would be no opportunity, nor need, to have bail heard later in Gladue Court. Similarly, some Indigenous accused whose release is initially contested by a Crown may effectively waive their right to bail and forego any future bail appearances, whether in conventional or Gladue Court. Consequently, some Indigenous accused will be included in the non-Gladue, or conventional bail, category. One should therefore be careful not to conflate Gladue bail cases with Indigenous bail cases broadly. Nevertheless, due to the sheer size of the conventional bail case population, any Indigenous accused processed entirely in these courts would represent only a very small percentage of this caseload overall. Within this context, conventional bail court cases might be considered a close proxy for the bail cases of non-Indigenous accused.

Another caveat regarding the Gladue Bail Status variable is rooted, again, in the reality that first bail appearances generally end in consent release or adjournment. Cases granted Crown consent release would likely be considered by the courts to be less serious in nature and/or posing a lesser degree of risk (such that an accused person is deemed safe to be released into the community pending case resolution and is not otherwise considered a flight risk). Given that many Indigenous accused will have a first appearance in conventional bail court, one might presume that Indigenous accused whose cases are deemed less serious would be released from these courts at this time – without the need for any subsequent bail appearances in Gladue Court. In light of this, one might expect those bail cases which do appear in Gladue Court to generally constitute somewhat more serious cases or to be associated with accused persons who are considered a greater risk for release. Said differently, Gladue Courts likely receive a smaller proportion of cases suitable for immediate Crown consent release compared to conventional bail courts. Hence, the makeup of bail cases in Gladue Courts and conventional bail courts will likely be somewhat different. One might consider this a form of *pseudo selection bias*, in that Gladue Courts would be more likely to receive more serious bail cases whereas conventional bail courts would likely receive bail cases of all degrees of severity (and thus a greater proportion of less serious cases). Several measures were taken throughout data analyses to control for these potential caseload differences. Specifically, certain analyses were performed for the entire dataset as well as

for only those cases with two or more bail appearances. These supplementary analyses had two primary advantages: 1) removing cases with a single bail appearance would remove many ostensibly less serious, same-day consent release cases, thereby rendering the cases in the Gladue bail and conventional bail groups more comparable in terms of case seriousness; 2) removed cases would include Indigenous accused who were released from conventional bail court on their first appearance, such that these supplementary analyses would also likely represent a closer (although still imperfect) approximation of Indigenous versus non-Indigenous accused (albeit for more serious, or “riskier” cases only). Importantly, these supplementary analyses are necessarily interpreted within this more restricted context and with an understanding of how the removal of these cases would affect the bail populations.

A final limitation of the Gladue Bail Status variable is that it cannot pinpoint when during case processing a Gladue bail appearance or appearances occurred. While this limitation is true for both event and person datasets, the concern is somewhat greater among person cases, as these cases could encompass a greater number of charges and lengthier case processing. One might think of a person-based bail case with one set of initial charges – on which the accused was released on bail – and a second, subsequent set of breach charges – on which the accused was detained. Given that a single bail appearance in a Gladue Court designates this case as a Gladue bail case, one cannot know whether the accused appeared in Gladue Court for both their initial and subsequent bail processes, or if they used this court for only one of these occasions, and if so, which one. Certainly, one might expect that if an Indigenous accused opts to have their bail processed in Gladue Court once (particularly since this accused will have presumably been released the first time), they may prefer to return to Gladue Court for any subsequent bail phases. However, this is unlikely to be true for 100% of cases in which an accused receives subsequent charges – particularly if the scheduling of Gladue Court is an issue and the accused is (understandably) eager to seek bail quickly. Indeed, one might expect that at least some subsequent charges which could be dealt with quickly (e.g., in a single appearance) would be processed exclusively in conventional bail court (even if simply to waive or forego bail when in a reverse onus position). Ultimately, this limitation is less relevant for many case characteristic and outcome

variables, which are not so much reflections of specific Gladue Court bail processes, but rather describe the types of bail cases which are processed (at least in part) in Gladue Courts. For the case processing variables for which this limitation may be more pertinent, analyses are presented for either the event dataset alone or for a combination of both datasets in order to explore case processing issues as accurately as possible.

ii) Dependent Variables

The dependent variables in this study are organized into four broad categories: 1) case characteristic variables (with specific attention given to charges against the administration of justice); 2) bail processing variables; 3) post-bail case processing variables; and 4) case outcome variables (including sentencing variables). First, case characteristic variables are generally those which describe the bail case itself, including the demographics of the accused as well as the charges which comprise the case. Demographic variables include the age and gender of the accused, while charge variables measure, among other things, the number of charges, the charging agency and the prevalence of different types of charges in terms of both broad categories (e.g., charges against the person) as well as very specific charges (e.g., s.145(2) charges for failure to attend court). These variables are essentially outside of the court system's control but almost certainly affect bail outcomes and may affect court processing. Second, bail processing variables include the number of appearances and days required to complete the bail process as well as bail outcomes. Third, post-bail court processing variables include the number of appearances and days between the end of the first bail phase and case resolution, as well as the presence of certain criminal procedures, such as a trial. And finally, case outcome variables measure the overall outcomes of a bail case. Outcome variables include whether there was one or more convictions in a case, as well as the presence of specific sentence types (e.g., custodial sentence, conditional sentence, etc.). Although these variables are used primarily as dependent variables in order to compare Gladue bail cases and conventional bail cases, in some instances some of these variables (particularly case characteristics) are used as independent variables for supplementary analyses in order to further explore certain findings as well as test alternative explanations.

Using these variable categories, data analyses are divided into four broad sections: 1) univariate descriptions of all bail cases in the study courthouses; 2) bivariate analyses comparing Gladue bail cases to conventional bail cases; 3) multivariate analyses exploring factors which affect bail outcomes and case outcomes; and 4) longitudinal bivariate analyses examining trends over time for both bail populations.

4.4.2 – Univariate Description

Univariate analyses for all bail cases were first performed in order to produce a general picture of bail cases and their processing in the selected courthouses. Specifically, for a selection of key variables, descriptive statistics are presented (e.g., frequency distributions, measures of central tendency, measures of dispersion). Indeed, it is helpful to first describe bail cases in general in order to establish a baseline for trends in these specific courthouses and the operation of bail “on the ground”, before focusing on specific comparisons between subgroups of cases (i.e., Gladue bail cases versus conventional bail cases).

4.4.3 – Bivariate and Multivariate Analyses

Following the general description of bail cases overall in the study sites, analyses subsequently focus on comparisons between Gladue bail cases and conventional bail cases. Bivariate analyses include both descriptive statistics (e.g., cross-tabulations, measures of central tendency and measures of dispersion) as well as inferential statistics (e.g., chi-square tests of independence and independent two-sample t-tests). Supplementary analyses are also occasionally performed in order to explore other potentially interesting relationships. These supplementary analyses most often take the form of bivariate crosstabulations and chi-square tests assessing whether one or more third variables might help to make sense of earlier bivariate analyses. Following these bivariate analyses, two logistic regression models are produced in order to explore factors which predict formal bail outcome as well as those which predict case outcomes.

4.4.4 – Longitudinal Analyses

Finally, study findings culminate with a selection of longitudinal analyses. For this section, the year in which a case was resolved becomes another independent variable, thereby permitting the exploration of bail case trends over time. The comparative focus of this research project is maintained as these longitudinal

analyses examine whether certain patterns within – and between – Gladue bail and conventional bail populations remained stable or changed throughout the study period. Indeed, as the bail climate evolved over this period (e.g., in terms of legislative amendments, guiding Supreme Court decisions, changes to Crown directives, and MAG initiatives such as Justice on Target²⁰²), one might expect case characteristics, bail processing and case outcomes to also evolve. These longitudinal analyses complement the cross-sectional analyses by adding nuance and shedding light on the extent to which any efforts to improve the bail system and/or address Indigenous overincarceration have had their intended effect.

4.5 – Ethical Considerations

My research obtained ethics approval from the University of Ottawa’s Research Ethics Board for research based on secondary use of data (see Appendix A for Ethics Certificate). Additionally, I received institutional approval for the use of these data from the Ontario Ministry of the Attorney General as well as the Ontario Court of Justice (see Appendix B). The research methods of this study posed a very low risk of causing harm or inconvenience, given that secondary analyses do not require study subjects’ active participation. In particular, the MAG dataset had already been largely anonymized through quantitative coding of information. The data did not contain directly identifiable information such as names or addresses. It would be virtually impossible to identify any individual from the dataset given its sheer size and span of more than a dozen years. Any rare combination of variables which could potentially identify a particular individual were not examined, nor presented in the research findings. Moreover, the information in the datasets is arguably not of a sensitive nature in that the information largely relates to broad case characteristics, case processing and bail and case outcomes. Equally notable, while bail and charge outcomes

²⁰² The Ontario Ministry of the Attorney General launched an initiative called *Justice on Target* (JoT) in June 2008 which was intended to reduce criminal court processing times in Ontario (Ministry of the Attorney General, 2008). This initiative came in response to a steady rise in the number of court appearances and days required to resolve criminal cases in Ontario over the previous decades. Although JoT’s initial four-year period failed to meet its stated goal of a 30% reduction in case processing (achieving less than a 10% decrease in the average number of court appearances and number of days required to complete case processing), the initiative was nevertheless renewed in 2012 for another four years (Taddese 2014) – although results from this second period have not been made publicly available. In particular, bail efficiency was one of the initiative’s primary foci, with a Bail Experts Table assembled to provide recommendations to streamline the bail process.

for all accused persons are not systematically and individually reported to the public, this information is considered public record in that Ontario criminal courtrooms are always open to the public and, except in the case of publication bans, media outlets regularly (though not systematically) report on court cases, proceedings and outcomes. More importantly, any data presented in this research are always in aggregate form – never singling out specific cases or individuals.

Ethical considerations also extend beyond these more formal requirements for ethics clearance. Notably, an ongoing ethical consideration is the wider implications of this research, given that I am examining criminal justice responses to a marginalized population – Indigenous peoples in Canada. Beyond this population's greater socio-economic marginalization and their overrepresentation in custodial facilities, Canada has a long history of exploiting Indigenous peoples and producing research that – at best – does not improve their lives and – at worst – actually exacerbates their struggles. As a non-Indigenous, settler woman, this is something about which I have been especially mindful. Indeed, during the week-long training program, Carleton University Institute on the Ethics of Research with Indigenous Peoples (CUIERIP), in which I participated in June 2017, we discussed the importance of conducting research with the collaboration of Indigenous communities (as opposed to research on Indigenous communities).

By consulting with various members of Aboriginal Legal Services in the early stages, as well as later in the research process, I attempted to ensure that this project addresses the interests and concerns of this organization and those Indigenous persons (and allies) on-the-ground in Gladue Courts. Through this collaboration, I have endeavored to ensure that this research reduces the possibility of being considered settler-centric and that its policy implications would not reasonably nor foreseeably cause harm to Indigenous peoples involved in the criminal justice system. On the contrary, I have tried to identify potential ways to promote and/or expand current attempts to address and remedy the overrepresentation of Indigenous peoples in remand custody.

5 – RESULTS

5.1– Overview of All Bail Cases

Before comparing Gladue Court bail cases and conventional bail court cases, it is helpful to first explore the dataset as a whole in order to establish the wider bail context in Old City Hall and College Park courthouses. This perspective can then act as an overall starting point against which comparisons can be drawn.

5.1.1 – Bail Case Characteristics

In particular, it is useful to understand the types of criminal cases being processed in these courthouses as well as the characteristics of accused persons in these bail cases. Tables 5.1 presents basic demographic information regarding accused persons whose bail was addressed in these courthouses while Table 5.2 presents information on the number and type of charges in a bail case.

Table 5.1: Frequency Distribution Age and Gender of the Accused, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

		Frequency	Percent	Valid Percent	Cumulative Percent
Gender of Accused	Female	26381	18.6	18.6	18.6
	Male	115266	81.4	81.4	100.0
	Total	141647 ²⁰³	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Age of Accused	18-25	38833	27.4	27.4	27.4
	26-35	42609	30.1	30.1	57.5
	36-45	34323	24.2	24.2	81.7
	46+	25944	18.3	18.3	100.0
	Total	141709	100.0	100.0	

The vast majority of accused persons – roughly four out of five – were male (81.4%). The most common age category for accused was 26–35-year-olds (30.1%), followed closely by those 18-25 (27.4%) and 36-45 (24.2%), with a non-trivial proportion of older adults aged 46 years or greater (18.3%). There was thus considerable variability in the age of accused persons in the study population (SD = 11.33 years).

²⁰³ An attentive reader will note that the total number of cases listed under the gender variable (141,647) is slightly smaller than the total number of cases in this dataset overall (141,709). This difference reflects the fact that there were 62 cases in the person dataset with no information available regarding the gender of the accused. MAG data are also limited to male and female genders, with data unavailable for other gender identities (e.g., two-spirit, non-binary, etc.). Indeed, for some variables there is a small number of cases with missing data for a variety of reasons. Consequently, total case numbers may vary slightly from one variable to the next, based on data availability.

Table 5.2: Frequency Distribution of Number of Charges, Offence Type of the Most Serious Charge in a Case²⁰⁴, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Charges in a Case	1	45701	32.2	32.2	32.2
	2	34807	24.6	24.6	56.8
	3-4	34193	24.1	24.1	80.9
	5-6	12476	8.8	8.8	89.7
	7+	14532	10.3	10.3	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Offence Type of the Most Serious Charge in a Case	Crimes Against Property ²⁰⁵	48759	34.4	34.4	34.4
	Crimes Against the Person ²⁰⁶	37790	26.7	26.7	61.1
	Administration of Justice ²⁰⁷	24518	17.3	17.3	78.4
	<i>Criminal Code</i> Traffic ²⁰⁸	2339	1.7	1.7	80.1
	Other <i>Criminal Code</i> ²⁰⁹	15413	10.9	10.9	91.0
	Federal Statute ²¹⁰	12879	9.1	9.1	100.0
	Provincial Offence ²¹¹	8	.0	.0	100.0
	Total ²¹²	141706	100.0	100.0	

²⁰⁴ Offence type for the most serious charge in a case was established by: 1) determining the most serious charge according to the weights set out in the 2011 Crime Severity Index (CSI), such that the most serious charge will have the greatest weight (assigned to each offence by Statistics Canada based on that offence's incarceration rate and average length of imprisonment); 2) then determining the offence type for this charge by cross-referencing this offence with the six broad offence categories (or seven, if including provincial offences) included in the MAG dataset. Although one might be tempted to assume that violent charges will always be deemed more serious than property charges, which would be considered more serious than administration of justice charges, etc., this is not always the case. Instead, this variable ranks specific charges, rather than broad offence categories. To illustrate, common assault (a crime against the person) has a CSI weight of 24.53, whereas trafficking in substance (a federal statute offence) was weighted at 62.51; theft (a crime against property) has a weight of 72.91 and possession of weapons for a dangerous or unauthorized purpose (an "other" *Criminal Code* offence) has a weight of 111.59. For an account of the simple presence of each offence type within cases (i.e., not only as the most serious charge in a case), as well as the presence of specific charges against the administration of justice, see Appendices C and D.

²⁰⁵ In the person dataset, the most common (most serious) charges in the "crimes against property" category were possession of stolen property (36.1%) and theft (under and over \$5000) (36.0%).

²⁰⁶ In the person dataset, the most common (most serious) charges in the "crimes against the person" category were common assault (assault level I) (25.9%) and assault with a weapon / causing bodily harm (assault level II) (15.1%).

²⁰⁷ In the person dataset, the most common (most serious) charges in the "administration of justice" category were failure to comply with a court order / failure to attend court (56.5%) and failure to comply with a probation order (39.4%).

²⁰⁸ In the person dataset, the most common (most serious) charges in the "*Criminal Code* traffic" category were impaired driving / impaired operation over 80mg (37.8%) and dangerous operation of a motor vehicle (13.5%).

²⁰⁹ In the person dataset, the most common (most serious) charges in the "other *Criminal Code*" category were possession of a weapon for a dangerous / unauthorized purpose or for trafficking (28.9%) and obstructing a peace officer (12.8%).

²¹⁰ In the person dataset, the most common (most serious) charges in the "federal statutes" category were trafficking in substance (49.1%) and possession of substance (32.0%).

²¹¹ The data provided by the Ontario MAG do not specify exact provincial charges. However, the most common provincial offences in Ontario are typically those in the *Highway Traffic Act of Ontario*, which includes speeding offences.

²¹² This is another instance in which the total number of cases for this variable (141,706) is very slightly smaller than the overall dataset size (141,709). Specifically, there were three cases for which data were unavailable for the most serious charge type. Due to these occasionally missing data, readers will continue to notice minor differences in the total number of cases from one variable to the next.

In terms of case characteristics, bail cases in Old City Hall and College Park courthouses had relatively few charges – a median of 2 charges (mean = 3.49 charges). In fact, roughly a third (32.2%) of all bail cases in these courthouses had only a single charge, and roughly a quarter had two charges (24.6%) or three to four charges (24.1%), respectively. Despite relatively low charge numbers overall, nearly one-in-five bail cases (8.8% + 10.3% = 19.1%) had five charges or more. The most common offence classifications for the most serious charge in a case were crimes against property (34.4% of cases), followed by crimes against the person (26.7%) and those against the administration of justice (17.3%).

5.1.2 – Bail Processing

Understanding overall court practices, including bail processing times and outcomes, is similarly useful for providing context to the way in which bail cases are managed in the study courthouses. Table 5.3 summarizes bail processing in terms of number of bail appearances, time required to complete the bail process and outcomes of (first) bail²¹³.

Overall, the bail process in Old City Hall and College Park courthouses appears to have been reasonably efficient – at least in terms of a significant portion of cases completing the bail process in a single bail appearance (likely predominantly Crown consent releases and some accused who chose not to pursue bail after the Crown initially contested their release). Indeed, roughly two out of five cases required only a single bail appearance (39%), with another 29.2% of cases requiring only 2 bail appearances. Nevertheless, nearly a third of cases (22.3% + 9.5% = 31.8%) required three or more bail appearances, and almost one-in-ten cases (9.5%) required five or more bail appearances. The mean number of bail appearances required to complete bail was 2.35 appearances (median = 2). Cases also appear to have been dealt with reasonably expeditiously. Again, roughly two-out-of-five cases (39.9%) had the matter of bail resolved as quickly as possible – the same day that they were brought before the court. Another 12.8% of bail cases had bail

²¹³ These data reflect the first bail phase on record in an event case's processing history. For some cases, there may be a sequence of bail appearances and a bail outcome, followed by additional bail appearances later in the case processing history for a multitude of reasons (e.g., subsequent charges laid while on bail, variations to a bail release (e.g., change in conditions or change in surety), or bail "reporting" which sometimes occurs in Gladue Court). However, the data presented here are for only this first initial bail phase. More details on variable definitions and the aggregation process for each variable are presented in the subsequent comparative analysis section of this thesis.

resolved the following day, meaning that just over half of all bail cases (39.9% + 12.8% = 52.7%) completed the bail process within a day of first appearance. The mean number of days required to complete bail was 6.21 days (median = 2). Yet not all matters of bail were resolved quickly. Indeed, 17.3% (8.4% + 8.9%) of cases took nine days or more to complete bail, with 8.9% of cases taking more than two weeks to complete this process.

Table 5.3: Frequency Distribution of the Number of Bail Appearances, Time Spent in First Bail and Bail Outcomes, Old City Hall and College Park (Early) Bail Cases (Event Dataset²¹⁴, 2006-2017)

		Frequency	Percent	Valid Percent	Cumulative Percent
Number of First Bail Appearances	1	67688	39.0	39.0	39.0
	2	50649	29.2	29.2	68.2
	3-4	38753	22.3	22.3	90.5
	5+	16474	9.5	9.5	100.0
	Total	173564	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Time Spent in First Bail	Single Day ²¹⁵	69263	39.9	39.9	39.9
	Two Days	22141	12.8	12.8	52.7
	Three to Eight Days	52269	30.1	30.1	82.8
	Nine to Fifteen Days	14501	8.4	8.4	91.1
	Sixteen Days or More	15373	8.9	8.9	100.0
	Total ²¹⁶	173547	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Outcome of First Bail	Detained	19483	11.2	11.2	11.2
	In Custody, No Formal Decision	41190	23.7	23.7	35.0
	Bail Granted	90195	52.0	52.0	86.9
	Guilty Plea	14003	8.1	8.1	95.0
	Dismissed, Stayed, Withdrawn	6012	3.5	3.5	98.5
	Other	2690	1.5	1.5	100.0
	Total	173573	100.0	100.0	

²¹⁴ Event data are presented in order to analyze a greater number of individual bail periods (i.e., the first bail period for *each* charging information compared to the person dataset in which some bail phases in multi-information cases would inevitably be masked).

²¹⁵ Note that the number of cases that completed bail in a single day was slightly larger than the number of cases that completed bail in a single appearance – a curious trend that has been noted in other reports using MAG ICON event data (e.g., Webster 2006). It is likely that, for a small number of cases, two separate bail appearances were recorded on the same day. This might happen for some cases for which Crown contested release in the morning but a separate show cause bail hearing occurred in the afternoon. Alternatively, an Indigenous accused might have two appearances on the same day if they first appeared (and were not released) in conventional bail court but, upon learning that Gladue Court was sitting, chose to have their bail heard in Gladue Court in the afternoon.

²¹⁶ Cases coded as spending more than a year in the bail process (i.e., 366 days or greater; 0.0% (N = 27) of the event dataset) were considered outliers (whether an accurate figure for an exceptional case or the result of data entry error). Such extreme scores, even when few in number, could skew mean values and inflate standard deviations and so were removed from analyses of this variable.

While the general public might assume that bail outcomes would be a straightforward dichotomous variable – that is, either someone is released on bail or detained until case resolution – there are several other possible (and, in fact, common) outcomes. Indeed, while just over half of bail cases (52.0%) in the study courthouses ended the bail process with bail being granted, the second most common outcome – representing nearly a quarter of all bail cases (23.7%) – might be considered a *lack* of formal bail outcome, in that the bail process ended without a formal determination of bail made by the courts. One might consider these cases to be a form of “consent detention”, in that the accused does not formally seek bail through a show cause hearing (which would lead to a formal decision to release or detain), but instead effectively agrees to remain in pre-trial detention until case resolution²¹⁷. Interestingly, formal detention orders were only half as common (11.2%) as these consent detentions. Together, however, these formal and informal detention categories accounted for 35% of bail case outcomes. Other bail outcomes included an accused choosing to plead guilty to their charge(s) (and typically having their case traversed to plea court – 8.1% of cases), or having their charge(s) dismissed, stayed, or withdrawn (3.5%). For an account of post-bail processing and total court processing times and appearances, see Appendices E and F.

5.1.3 – Case Outcomes

Although this study focuses primarily on the bail stage of the court process, not all cases subjected to the bail process are ultimately found guilty of any, let alone all, charges. Indeed, Table 5.4 presents the most serious case outcome of bail cases in Old City Hall and College Park courthouses. More than half (55.1%) of all bail cases ended with at least one conviction (whether through guilty plea or trial) and associated sentence²¹⁸. The second most common (most serious) outcome, representing roughly one third (32.6%) of case outcomes, was a case’s charge(s) being withdrawn²¹⁹.

²¹⁷ See footnote 103 for discussion of reasons why an accused person might decide not to formally seek bail.

²¹⁸ For an examination of the presence of specific types of sentences, see Appendix G.

²¹⁹ A charge is withdrawn when a Crown elects to no longer pursue that charge. For instance, a Crown may decide there is no reasonable prospect of conviction, or that prosecution is not in the public interest. Charges are also sometimes withdrawn or stayed as a result of the successful completion of diversionary programming. If an individual is willing to take responsibility for their behaviour through actions such as a written apology, community service, completion of a specified program and/or other reparative gestures, they may avoid criminal conviction and instead have their charge(s) withdrawn (Manson, 2001). Diversion programs are more common for first-time offenders and those with limited

Table 5.4: Frequency Distribution of the Most Serious Outcome of Charges, Old City Hall and College Park Bail Cases (Person Dataset²²⁰; 2006-2017)

		Frequency	Percent	Valid Percent	Cumulative Percent
Most Serious Outcome of the Case	To SCJ	4844	3.4	3.4	3.4
	Guilty / Sentenced	78128	55.1	55.1	58.6
	Acquitted	798	.6	.6	59.1
	Withdrawn	46201	32.6	32.6	91.7
	Dismissed	1712	1.2	1.2	92.9
	Stayed	7969	5.6	5.6	98.6
	Other	2039	1.4	1.4	100.0
	Total	141691	100.0	100.0	

All other outcomes were substantially less common. Charges being stayed²²¹ was the next most common (most serious) outcome (5.6%), followed by cases being sent to the Ontario Superior Court of Justice (SCJ) for trial (thus ending court processing in the Ontario Court of Justice²²²) (3.4%) and cases being dismissed by a judge (1.2%). Only a minute proportion of cases (0.6%) ended in acquittal – an outcome only possible for cases that went to trial in the OCJ. Indeed, trials are relatively rare in Ontario²²³.

Overall, bail cases in Old City Hall and College Park courthouses appear to be relatively minor in nature, tend to be processed in only a small number of bail appearances over a short period of time and, more often than not, result in bail being granted and in one or more convictions. The more interesting question – at least within the context of this research project – is whether (and to what extent) these overall patterns hold for both the Gladue bail and the conventional bail cases. Comparative analyses

criminal records. For instance, one might think of cases in which the accused is charged with first-time shoplifting (i.e., theft under \$5,000).

²²⁰ This variable reflects the most serious charge outcome in a case. It was produced for each charge based on a MAG disposition action variable, with these disposition actions grouped into seven broader case outcome categories (from least to most serious): other, acquitted, stayed, dismissed, withdrawn, guilty/sentenced and traversed to SCJ. Outcomes in the “other” category include the accused being found not criminally responsible for a crime or unfit to stand trial, as well as *Charter* challenges. Charges were aggregated so that the charge with the most serious case outcome would have its value carried forward for the entire case.

²²¹ A charge is stayed when a Crown decides to no longer pursue that charge but maintains the ability to resurrect the charge within a year of staying the proceedings. As with withdrawals, charges are sometimes stayed as part of diversionary programming. Clark (2016b) notes that the diversion programming available to Indigenous persons through Aboriginal Legal Services, the Community Council Program, typically results in charges being stayed.

²²² Note that the Ontario Court of Justice is the lower, or provincial, court of record for Ontario. It is separate from the Ontario Superior Court of Justice, which is Ontario’s higher-level trial court and is reserved for more serious criminal matters. The Superior Court of Justice has jurisdiction to try any indictable offence in the *Criminal Code* although, in practice, it is used primarily for trials for some of the most serious criminal offences, including murder, manslaughter, drug trafficking, offences against the security of the state, or any attempt or conspiracy to commit these offences. The Superior Court of Justice also hears appeals of cases originally heard in the Ontario Court of Justice.

²²³ For a more detailed discussion of the relative rarity of trials in the OCJ, and how study findings compare to Ontario-wide data, see section 5.2.5(vii) of this thesis.

therefore explore the types of bail cases appearing in these bail courts, the ways in which these cases are processed through bail and the court system more generally, as well as final case outcomes between the Gladue bail and conventional bail populations. More broadly, these comparative analyses allow for an exploration of the largely untested promise of Gladue Courts as they relate to bail and whether these courts may have a role to play in addressing the overincarceration of Indigenous peoples in Ontario, and perhaps Canada at large.

5.2– Comparative Bivariate Analyses between Gladue Bail and Conventional Bail Cases

5.2.1 – Case Characteristics

Comparative analyses begin with an exploration of bail case characteristics for Gladue bail cases and conventional bail cases. Indeed, before examining bail processes and outcomes, it is useful to first understand the extent to which bail cases processed in Gladue Courts resemble those processed in conventional bail courts. The analysis of case characteristics not only describes the types of bail cases processed in these two types of courts, but also provides valuable context for subsequent analyses of bail processes and case outcomes. That is, understanding the (potential differences in) composition of Gladue bail and conventional bail cases can help to make sense of potential patterns and differences in bail processing as well as court processing and case outcomes more generally.

This section begins with an examination of the demographics of accused persons in these two bail populations, followed by analyses of the number and types of charges in these bail cases, with particular attention given to charges against the administration of justice. Case characteristics are generally presented for the person dataset, which better reflects the entirety of charges and circumstances for a case before the courts (which may include charges from several charging informations merged for ease of court processing). For certain variables, however, person-based data are presented in conjunction with event-based data in order to highlight different aspects of case composition. Indeed, the juxtaposition of these two datasets sheds additional light on the differential ways in which charges from a single charging event may accumulate in broader person-based cases for the two bail populations. Tables 5.5 and 5.6 present the gender and age of accused persons whose bail cases were processed in these courts.

i) Gender of Accused

Table 5.5: Crosstabulation of Gladue Bail Status by Gender of Accused, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Gender of Accused		Total
			Female	Male	
Gladue Bail Status	Non-Gladue	Count	25326	110409	135735
		% within Gladue Bail Status	18.7%	81.3%	100.0%
	Gladue	Count	1055	4857	5912
		% within Gladue Bail Status	17.8%	82.2%	1000%
Total		Count	26381	115266	141647
		% within Gladue Bail Status	18.6%	81.4%	100.0%

Fisher's exact test²²⁴ = .117

While just over four-in-five bail cases generally had a male accused, Gladue bail cases in this dataset were marginally more likely (82.2%) to have had a male accused than conventional bail cases (81.3%), although these differences were not statistically significant.

ii) Age of Accused

Table 5.6: Crosstabulation of Gladue Bail Status by Age of Accused, Old City Hall and College Park Bail Cases (Person Dataset²²⁵; 2006-2017)

			Age of Accused				Total
			18-25	26-35	36-45	46+	
Gladue Bail Status	Non-Gladue	Count	37649	40630	32593	24923	135795
		% within Gladue Bail Status	27.7%	29.9%	24.0%	18.4%	100.0%
	Gladue	Count	1184	1979	1730	1021	5914
		% within Gladue Bail Status	20.0%	33.5%	29.3%	17.3%	100.0%
Total		Count	38833	42609	34323	25944	141709
		% within Gladue Bail Status	27.4%	30.1%	24.2%	18.3%	100.0%

Chi-square = 214.608; df = 3; $p < .001$

Accused persons from Gladue bail cases were, on average, marginally older than their conventional bail court counterparts, with a mean age of 35.20 years (median = 34; SD = 9.98) compared to 34.30 years (median = 33; SD = 11.39). While this difference was statistically significant ($t = -6.715$; df = 6601.448; $p < .001$ ²²⁶), substantively, this difference is somewhat trivial. What is perhaps more notable is the differential

²²⁴ Fisher's exact test (2-tailed) is presented for all 2x2 crosstabulations. Like a chi-square statistic, Fisher's exact test is also a non-parametric test for independence. However, whereas the chi-square test is an approximation, Fisher's exact test calculates an exact probability. While researchers have historically used the Yates Correction for Continuity when analyzing 2x2 tables, more recently statisticians have found the effect of this correction to be minimal, such that Fisher's exact test is now considered the best practice for such tables (Williams, 2009).

²²⁵ This variable measures an accused person's age at the time that a charge was laid. Cases in the person dataset were aggregated using the maximum value for a charge, such that for the occasional case in which subsequent charges were laid when the accused was (generally only a year) older, this older age was carried forward to represent the entire case.

²²⁶ These statistics were produced using an independent two-sample t-test (two-tailed).

distribution of accused persons' ages across the two bail populations²²⁷. Indeed, accused from Gladue bail cases were less likely than those from conventional bail courts to be very young (20.0% versus 27.7% had an accused aged 18-25). In contrast, accused from Gladue bail cases were more likely than their conventional bail court counterparts to be moderately young or middle-aged (33.5% versus 29.9% had an accused aged 26-35; and 29.3% versus 24.0% had an accused aged 36-45). However, Gladue bail cases were marginally less likely than conventional bail cases to have an accused aged 46 or older (17.3% versus 18.4%)²²⁸.

Case characteristics in terms of the number and types of charges included in bail cases are subsequently examined. Indeed, these traits provide insight into case complexity and perceived risk vis-à-vis bail deliberations and almost certainly influence bail decision-making as well as case outcomes downstream.

iii) Number of Charges

The number of charges included in bail cases are presented for both the event and person datasets in order to highlight different attributes of bail case composition (Tables 5.7(a) and 5.7(b)). Whereas the event dataset measures the number of charges on a single charging information, the person dataset reflects the number of charges in a broader case (i.e., against a specific individual at a particular courthouse whose charges – potentially stemming from more than one charging information – were resolved on the same date).

Table 5.7(a): Crosstabulation of Gladue Bail Status by Number of Charges in a Case, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of Charges in a Case					
			1	2	3-4	5-6	7+	Total
Gladue Bail Status	Non-Gladue	Count	75272	40085	31993	9512	8765	165627
		% within Gladue Bail Status	45.4%	24.2%	19.3%	5.7%	5.3%	100.0%
	Gladue	Count	3467	1930	1634	520	399	7950
		% within Gladue Bail Status	43.6%	24.3%	20.6%	6.5%	5.0%	100.0%
Total		Count	78739	42015	33627	10032	9164	173577
		% within Gladue Bail Status	45.4%	24.2%	19.4%	5.8%	5.3%	100.0%

Chi-square = 21.079; df=4; $p < .001$

²²⁷ The interpretations provided for the cross tabulations in this chapter describe the relationships and trends for the cases in the event and persons datasets. While one might conduct further analyses in order to infer the sample findings to the greater population of all Gladue bail and conventional bail cases in the selected courthouses, given the enormous sample size of cases in these datasets, the decision was made to focus on describing these cases in a manner which maximizes accessibility to a wider and more varied group of knowledge users.

²²⁸ This may be partially attributable to Indigenous peoples tending to be younger than non-Indigenous Canadians. Indeed, data from the 2021 Census indicate that the average age of Indigenous peoples was 8.2 years younger than that of non-Indigenous Canadians – 33.6 versus 41.8 years old (Statistics Canada, 2022c). It is also possible that the disproportionate representation of Indigenous peoples in custody generally, and particularly in federal custody (i.e., serving sentences of two years or more) may be contributing to comparatively fewer middle- to older-aged Indigenous adults in the community, where new charges might lead to a bail appearance.

Examining the event data in isolation, one might be tempted to conclude that Gladue bail cases and conventional cases are not so different from one another in terms of the number of charges in the case. That is, Gladue bail cases and conventional bail cases appear to have a similarly low number of charges on any single charging information. Indeed, Gladue bail cases had an average of 2.50 charges compared to 2.56 charges for conventional bail cases ($t = 1.735$; $df = 9411.984$; $p = .83$), although this difference was not statistically significant. Further, any differences in charge distribution in the event dataset were relatively minor. For instance, bail cases from Gladue Courts were only slightly less likely than those from conventional bail courts to have a single charge (43.6% versus 45.4%) and equally likely to have two charges (24.3% versus 24.2%). Yet despite the apparent similarities between bail populations in the event dataset, a different picture of charge numbers emerges when one examines the person dataset and its broader case definition.

Table 5.7(b): Crosstabulation of Gladue Bail Status by Number of Charges in a Case, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Number of Charges in a Case					
			1	2	3-4	5-6	7+	Total
Gladue Bail Status	Non-Gladue	Count	44076	33538	32745	11786	13650	135795
		% within Gladue Bail Status	32.5%	24.7%	24.1%	8.7%	10.1%	100.0%
	Gladue	Count	1625	1269	1448	690	882	5914
		% within Gladue Bail Status	27.5%	21.5%	24.5%	11.7%	14.9%	100.0%
Total		Count	45701	34807	34193	12476	14532	141709
		% within Gladue Bail Status	32.2%	24.6%	24.1%	8.8%	10.3%	100.0%

Chi-square = 256.234; $df=4$; $p < .001$

Indeed, when considering all charges in a wider bail case, the number of charges in a case predictably increases (since, in some person-based cases, several *events* would be amalgamated into a single broader case for court processing). Not only did charge numbers increase generally for the person dataset – in the sense that a smaller proportion of person cases had only a single charge (32.2% of person cases in Table 5.7(b) versus 45.4% of event cases in Table 5.7(a)) while a greater proportion of cases had many charges (e.g., 10.3% of person cases in Table 5.7(b) had 7+ charges compared to 5.3% of event cases in Table 5.7(a)) – but these increases were considerably more marked for Gladue bail cases. Indeed, Gladue bail cases in the person dataset contained more charges, on average, than their conventional bail counterparts – 4.01 charges (median = 3) versus 3.46 charges (median = 2) ($t = -7.843$; $df = 6668.070$; $p < .001$). Moreover, Gladue bail cases were even less likely than conventional bail cases to contain only a single charge (27.5% versus 32.5%)

or two charges (21.5% versus 24.7%). Further, Gladue bail cases were marginally more likely than conventional bail cases to contain three to four charges (24.5% versus 24.1%) and somewhat more likely to contain five to six charges (11.7% versus 8.7%) or seven or more charges (14.9% versus 10.1%).

The more substantial increases in charges between the event and person datasets among the Gladue bail caseload suggests that broader Gladue bail cases tend to contain a greater number of charging informations than conventional bail cases – most likely a reflection of subsequent breach and/or substantive charges being appended to initial charges. Hence, whereas Gladue bail and conventional bail cases may not be so different when examining single charging informations in the event dataset, the presence of subsequent charges (e.g., breach charges) appear to be a significant area of divergence between the two bail caseloads. As a result of this divergence, Gladue bail cases arguably become more complex than conventional bail cases and, in the eyes of criminal justice actors, might ultimately be deemed a greater risk for release.

iv) Charging Agency

Although the large majority of criminal charges tend to originate from police services, charges can also be laid by other agencies. Table 5.8 presents the charging agency for bail cases in the two study sites.

Table 5.8: Crosstabulation of Gladue Bail Status by Charging Agency, Old City Hall and College Park Bail Cases (Event Dataset²²⁹; 2006-2017)

			Charging Agency					
			Toronto Police Service	OPP Toronto	Probation Parole OCH	Toronto Bail Program	Other	Total
Gladue Bail Status	Non- Gladue	Count	159403	552	3749	621	1302	165627
		% within Gladue Bail Status	96.2%	0.3%	2.3%	0.4%	0.8%	100.0%
	Gladue	Count	7506	7	285	82	70	7950
		% within Gladue Bail Status	94.4%	0.1%	3.6%	1.0%	0.9%	100.0%
Total		Count	166909	559	4034	703	1372	173577
		% within Gladue Bail Status	96.2%	0.3%	2.3%	0.4%	0.8%	100.0%

Chi-square = 155.375; df = 4; $p < .001$

Perhaps unsurprising for two courts located in downtown Toronto, the vast majority of bail cases in these courthouses had their charges brought forward by the Toronto Police Service (96.2%). Perhaps more

²²⁹ The charging agency is presented for the event dataset and represents the charging agency for each separate charging information. Indeed, there did not appear to be a meaningful way in which to aggregate this variable for the person dataset, as any particular charging agency could not be (obviously) deemed any more worthy of being used to represent the whole case. In contrast, aggregation of the event dataset was straight-forward and intuitive, as all charges on a charging information would typically list the same charging agency.

noteworthy, however, was the small but significant proportion of cases that were brought forward by the Probation and Parole Office located at Old City Hall as well as the Toronto Bail Program – most likely for failure to comply with probation and failure to comply with a court order, respectively. In fact, there were important differences between Gladue bail cases and conventional bail cases, particularly in terms of these latter charging agencies. Most notably, bail cases in Gladue Court were more likely than those in conventional bail court to have received their charges from this probation and parole office (3.6% versus 2.3%) and the Toronto Bail Program (1.0% versus 0.4%). In contrast, Gladue bail cases were less likely than their conventional bail counterparts to have charges originating from the Toronto Police Service (94.4% versus 96.2%) or the Toronto area Ontario Provincial Police (0.1% versus 0.3%) and equally likely to have charges originating from other sources (0.9% versus 0.8%). This might suggest that accused in Gladue bail cases are less likely than their conventional bail counterparts to be charged with substantive-type offences and more likely than their counterparts to be charged with offences against the administration of justice, such as probation and bail breaches.

v) Offence Type for Most Serious Charge

Given the ways in which the bail system is grounded in considerations of risk, as well as the three grounds for detention specified in s.515(10) of the *Criminal Code*, the type(s) of charge(s) included in a bail case would almost certainly factor into deliberations regarding bail. For instance, charges against the person may raise concerns for Crowns and judicial officers based on the secondary ground of public safety or the tertiary ground of maintaining confidence in the administration of justice. Similarly, one might expect that cases with one or more charges against the administration of justice might be considered a risk for bail based on the tertiary ground. Within this context, any differences between Gladue bail and conventional bail cases in terms of the most serious charge in a case could have significant implications for how these cases are processed and eventual bail outcomes in these two populations. Moreover, the event and person datasets again present slightly different information in terms of the offence type of the most serious charge in a case (Tables 5.9(a) and 5.9(b)). Whereas the person data depict the offence type of the most serious charge in a

broader bail case (i.e., the most serious offence among potentially two or more charging informations merged into a single case for court processing purposes), the event data reflect the offence type of the most serious charge on a single charging information.

Table 5.9(a): Crosstabulation of Gladue Bail Status by Offence Type of Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Offence Type for Most Serious Charge						Total ¹²³⁰
			Property Offences	Person Offences	Admin. of Justice	C.C. Traffic	Other C.C.	Federal Statute	
Gladue Bail Status	Non-Gladue	Count	46509	36358	23344	2310	14735	12528	135784
		% within Gladue Bail Status	34.3%	26.8%	17.2%	1.7%	10.9%	9.2%	100.0%
	Gladue	Count	2250	1432	1174	29	678	351	5914
		% within Gladue Bail Status	38.0%	24.2%	19.9%	0.5%	11.5%	5.9%	100.0%
Total		Count	48759	37790	24518	2339	15413	12879	141698
		% within Gladue Bail Status	34.4%	26.7%	17.3%	1.7%	10.9%	9.1%	100.0%

Chi square = 180.649; df = 5; $p < .001$

Table 5.9(b): Crosstabulation of Gladue Bail Status by Offence Type of Most Serious Charge, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Offence Type for Most Serious Charge						
			Property Offences	Person Offences	Admin. of Justice	C.C. Traffic	Other C.C.	Federal Statute	Total
Gladue Bail Status	Non- Gladue	Count	50123	37996	41030	1805	15623	19026	165603
		% within Gladue Bail Status	30.3%	22.9%	24.8%	1.1%	9.4%	11.5%	100.0%
	Gladue	Count	2691	1570	2286	24	730	649	7950
		% within Gladue Bail Status	33.8%	19.7%	28.8%	0.3%	9.2%	8.2%	100.0%
Total		Count	52814	39566	43316	1829	16353	19675	173553
		% within Gladue Bail Status	30.4%	22.8%	25.0%	1.1%	9.4%	11.3%	100.0%

Chi square = 233.287; df = 5; $p < .001$

In the person dataset, property offences were the most common most serious charge in a bail case (34.4% of all cases). However, Gladue bail cases were more likely than conventional bail cases to have this type of offence as their most serious charge (38.0% compared to 34.3%). Conversely, although just over a quarter (26.7%) of bail cases had a violent offence as their most serious charge, this charge type was slightly less common among Gladue bail cases (24.2%) compared to their conventional bail counterparts (26.8%).

²³⁰ Note that cases with a provincial offence as their most serious charge have been removed from these analyses. In the person dataset there were 8 of these cases and 21 of these cases in the event dataset. Not only are these types of offences evidently quite rare as the most serious offence in bail cases but, statistically, the small number of cases in this offence category would lead to low expected frequencies which would render a chi-square statistic unreliable.

Said differently, Indigenous accused having their bail processed in Gladue Court appear to be less likely than those (primarily non-Indigenous accused) in conventional bail courts to have a violent charge as their most serious charge. Furthermore, whereas Gladue bail cases were slightly more likely to have as their most serious charge an administration of justice charge (19.9% versus 17.2%) or an “Other” *Criminal Code* charge (11.5% versus 10.9%), they were less likely to have a federal statute charge (5.9% versus 9.2%) or a *Criminal Code* traffic charge (0.5% versus 1.7%) compared to conventional bail cases.

In the event dataset, Gladue bail cases continue to be slightly more likely than conventional bail cases to have a property charge as their most serious charge (33.8% versus 30.3%) and slightly less likely to have a charge against the person as their most serious charge (19.7% versus 22.9%). One of the most notable differences between the datasets, however, is the prevalence of charges against the administration of justice for all bail cases, and for Gladue bail cases in particular. Specifically, administration of justice charges were considerably more common as the most serious charge in an event case compared to a person case, being 25.0% versus 17.3%. Moreover, this offence type as an event case’s most serious charge was more notable among Gladue bail cases than conventional bail cases (28.8% versus 24.8%).

Given that this variable measures only the most serious charge in a case, and because a person bail case may include two or more charging incidents, many of the shifts between event and person data were foreseeable. However, the juxtaposition of these datasets sheds further light on the prevalence of charges against the administration of justice in multi-information cases. Indeed, the lower prevalence of these charges in the person dataset suggests that a non-trivial number of these person-based cases likely contained other charges (e.g., breach charges) which were apparent in the event dataset but essentially hidden in the person dataset since these charges were deemed less serious than other charges in the broader bail case. Said differently, it seems that, for many person-based cases with two or more sets of charges, offences against the administration of justice would have been the most serious (if not the only) charge on at least one charging information. That the difference between datasets in terms of the presence of administration of justice charges as the most serious charge was starker for Gladue bail cases than conventional bail cases

(28.8%-19.9% = 8.9% versus 24.8%-17.2% = 7.6%) also holds potential meaning. That is, this greater difference suggests that Gladue bail cases were more likely than their conventional bail counterparts to have one or more administration of justice charges which were ultimately merged with – and obscured by – a more serious charge(s) in the broader person-based bail case.

While it is useful to examine the offence type for the most serious charge in a case, this singular focus captures only limited information regarding a case's charges, such that using this variable on its own would risk masking other important charge information. This would be particularly problematic for the 67.8% of person cases (or 54.6% of event cases) with more than one charge (Tables 4.7(b) and 4.7(a)). Indeed, for multi-charge cases, the presence and prevalence of certain categories of charges, as well as specific individual charges, also shed important light on case complexity and perceived suitability for bail. Despite some charges being eclipsed above by more serious charges (according to CSI weights), these charges may nevertheless have a significant effect on bail decisions. Hence any differences in terms of broader charge packages between Gladue bail cases and conventional bail cases may have important implications for bail outcomes. Specifically, if the cases of Indigenous accused in Gladue bail are more likely than those in the conventional bail population to contain more serious or dangerous types of charges (or charges which seemingly relate to the grounds for detention), one might expect this to translate into a lesser likelihood of release. Conversely, if Gladue bail and conventional bail cases have similar charge packages, these case characteristics would not be able to account for any potential differences in bail outcomes. To examine these possibilities, Tables 5.10 through Table 5.15(b) illustrate the presence of charges for each offence category²³¹, as well as the number of these charges in bail cases for which these charges were present. Person-based data are presented in order to show the presence of these charges for broader bail cases, and thus case seriousness overall.

²³¹ With the exception of provincial offences, which were quite rare in bail cases and are therefore not presented.

vi) Presence and Prevalence of Charges against Property²³²

Table 5.10: Crosstabulation of Gladue Bail Status by Presence and Prevalence of Charges against Property²³³, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Charges against Property		Total
			No Property Charges	Property Charge(s)	
Gladue Bail Status	Non-Gladue	Count	77413	58382	135795
		% within Gladue Bail Status	57.0%	43.0%	100.0%
	Gladue	Count	2947	2967	5914
		% within Gladue Bail Status	49.8%	50.2%	100.0%
Total	Count		80360	61349	141709
	% Gladue Bail Status		56.7%	43.3%	100.0%

Fisher's exact test < .001

			Number of Charges against Property		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	37342	21040	58382
		% within Gladue Bail Status	64.0%	36.0%	100.0%
	Gladue	Count	1660	1307	2967
		% within Gladue Bail Status	55.9%	44.1%	100.0%
Total ²³⁴	Count		39002	22347	61349
	% within Gladue Bail Status		63.6%	36.4%	100.0%

Fisher's exact test < .001

Similar to the data for the offence classification of the most serious charge, Gladue bail cases were more likely than conventional bail cases to contain at least one charge against property. In fact, Gladue bail cases had at least one property charge present in more than half (50.2%) of cases compared to only 43.0% of conventional bail cases²³⁵. Most cases with at least one property charge contained, in fact, only a single property charge (63.6%). Yet, of these cases, Gladue cases were less likely than conventional bail cases to have only a single property charge (55.9% versus 64.0%) and more likely to have two or more

²³² Recall from footnote 205 that the most common (most serious) charges in the crimes against property category for the person dataset were possession of stolen property (36.1%) and theft (under and over \$5000) (36.0%), as well as forgery/fraud (10.2%) and break and enter with intent to commit an indictable offence (9.8%).

²³³ The variables in this section measuring the presence of certain types of charges were produced by first creating a dichotomous "dummy" variable (0/1) for each offence classification in the original charge dataset. Charges were then aggregated into cases by taking the sum of this variable, such that the value for each case represented the number of charges of that particular offence type which were joined into a single case.

²³⁴ This total reflects the number of cases for which there was at least one charge against property. While the primary table measures the overall presence of property charges within the entire (person) dataset, this secondary table measures the prevalence of property charges among only those cases with one or more property charges. Indeed, this total – 61,349 cases – matches the column total in the primary table representing the number of cases with one or more property charges. This same provision applies to all subsequent secondary tables examining the prevalence of specific types of charges among cases with one or more of those charges.

²³⁵ The same analyses were performed in the event dataset with similar results ($p < .001$): Gladue bail cases in the event dataset were also somewhat more likely than conventional bail cases to have one or more property charges on a charging information.

property charges (44.1% versus 36.0%)²³⁶. Indeed, Gladue bail cases had, on average, slightly more property charges (1.27 charges; median = 1) than conventional bail cases (1.03 charges; median = 0) ($t = -5.625$; $df = 7019.300$; $p < .001$). In light of the prevalence of property charges and the fact that Gladue bail cases were more likely to contain at least one property charge and more likely to contain a greater number of property charges, this offence classification warrants further examination. These findings raise the question of whether, and to what extent, the observed differences extend across specific offences. Tables 5.10(a) and 5.10(b) explore the two most common property charges in the data – possession of stolen property and theft – in terms of their presence as the most serious charge in a case^{237,238}.

Table 5.10(a): Crosstabulation of Gladue Bail Status by Presence of Possession of Stolen Property²³⁹ Charges as Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Possession of Stolen Property Charge as Most Serious Charge		
			No Possession Stolen Property Charge	Possession Stolen Property Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	118828	16967	135795
		% within Gladue Bail Status	87.5%	12.5%	100.0%
	Gladue	Count	5302	612	5914
		% within Gladue Bail Status	89.7%	10.3%	100.0%
Total		Count	124130	17579	141709
		% within Gladue Bail Status	87.6%	12.4%	100.0%

Fisher's exact test < .001

²³⁶ Notably, among bail cases with one or more property charges in the event dataset, Gladue bail cases were only slightly more likely than conventional bail cases to have two or more property charges (33.3% versus 30.0%; $p < .001$). This suggests that person-based Gladue bail cases with at least one property charge were more likely than their conventional bail counterparts to be comprised of two or more charging informations with a property charge. Said differently, the considerable difference between Gladue and conventional bail cases in the person dataset in terms of prevalence of property charges seems to exist primarily as a result of two or more event cases with a property charge being merged into a single person case.

²³⁷ Whereas the 'presence of property charges' variable above measures the simple presence of one or more charges of this classification, these possession of stolen property and theft variables measure only when a case contained these offences as their most serious charge. Indeed, once I had aggregated charges into cases for both datasets, I was no longer able to create new variables to measure the simple presence of a specific charge. While I had anticipated wanting to examine the prevalence of common assault charges specifically and created a variable for this purpose at the charge phase of aggregation (discussed below), upon deciding to explore other specific charges, the most feasible option was to explore their prevalence as the most serious charge in a case.

²³⁸ The CSI weight assigned to possession of stolen property charges was 84.15, while the weight assigned to theft charges was 72.91. Notably, it is not uncommon theft charges to accompany possession of stolen property charges. In fact, cases with possession of stolen property as their most serious charge were slightly more common than those with theft as their most serious charge – likely a result of the former's higher CSI weight. Indeed, for cases with both theft and possession of stolen property charges (and no other, more serious, charges), the possession of stolen property charge would be recorded as the most serious charge.

²³⁹ For this table, possession of stolen property includes both possession of stolen property under \$5000 and over \$5000 (s.354(1) of the *Criminal Code*). This offence is also sometimes referred to as possession of property obtained by crime.

Table 5.10(b): Crosstabulation of Gladue Bail Status by Presence of Theft²⁴⁰ Charges as Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Theft Charge as Most Serious Charge		Total
			No Theft Charge	Theft Charge(s)	
Gladue Bail Status	Non-Gladue	Count	119134	16661	135795
		% within Gladue Bail Status	87.7%	12.3%	100.0%
	Gladue	Count	5001	913	5914
		% within Gladue Bail Status	84.6%	15.4%	100.0%
Total		Count	124135	17574	141709
		% within Gladue Bail Status	87.6%	12.4%	100.0%

Fisher's exact test < .001

Whereas Gladue bail cases were more likely to have a property charge than conventional bail cases, this trend did not extend across all specific property offences (at least in terms of the most serious offence in the case). Specifically, Gladue bail cases (10.3%) were slightly less likely than conventional bail cases (12.5%) to have possession of stolen property as their most serious charge²⁴¹. In contrast, Gladue bail cases were somewhat more likely than conventional bail cases to have theft as their most serious charge (15.4% versus 12.3%)²⁴². It is thus likely that the greater prevalence of theft charges in Gladue bail cases – notably a relatively minor charge, and the lesser of the two specific property charges examined – were contributing to this bail population's greater overall likelihood of containing at least one property charge.

vii) Presence and Prevalence of Charges against the Person²⁴³

Having explored the inclusion of charges against property within bail cases, Table 5.11 presents the presence and prevalence of charges against the person – the second most common type of (most serious) charge among bail cases. This offence category has significant implications for bail decisions given these charges' ostensible link to public safety and public confidence in the administration of justice.

²⁴⁰ For this table, theft includes both theft under \$5000 and theft over \$5000 (s.322(1) of the *Criminal Code*), as well as motor vehicle theft (s.333.1(1) of the *Criminal Code*).

²⁴¹ Since these tables examine only the most serious charge in a case, I elected to run the analyses in both the person and event datasets. I was curious whether potential differences between bail populations might be obscured in the broader person-based cases but would become apparent in the event dataset. Yet the event data produced very similar results: Gladue bail cases in this dataset were also slightly less likely than conventional bail cases to have possession of stolen property as the most serious charge on a charging information ($p < .001$).

²⁴² The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also somewhat more likely than conventional bail cases to have theft as their most serious charge ($p < .001$).

²⁴³ Recall from footnote 206 that the most common (most serious) charges in the crimes against the person category in the person dataset were (common) assault (or assault I) (25.9%) and assault with a weapon / causing bodily harm (or assault II) (15.1%), as well as uttering threats (14.9%), robbery (11.4%) and assault of a peace officer (7.2%).

Table 5.11: Crosstabulation of Gladue Bail Status by Presence and Prevalence of Charges against the Person, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Charges against the Person		
			No Charge against the Person	Charge(s) against the Person	Total
Gladue Bail Status	Non-Gladue	Count	90175	45620	135795
		% within Gladue Bail Status	66.4%	33.6%	100.0%
	Gladue	Count	3815	2099	5914
		% within Gladue Bail Status	64.5%	35.5%	100.0%
Total		Count	93990	47719	141709
		% within Gladue Bail Status	66.3%	33.7%	100.0%

Fisher's exact test = 0.03

			Number of Charges against the Person		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	23724	21896	45620
		% within Gladue Bail Status	52.0%	48.0%	100.0%
	Gladue	Count	1082	1017	2099
		% within Gladue Bail Status	51.5%	48.5%	100.0%
Total		Count	24806	22913	47719
		% within Gladue Bail Status	52.0%	48.0%	100.0%

Fisher's exact test = .688

Somewhat contrary to the findings for the most serious charge type (Table 5.9(a)), when one considers the simple presence of charges against the person, Gladue bail cases were slightly more likely (35.5%) than conventional bail cases (33.6%) to contain this type of charge^{244,245}. Moreover, of bail cases with this type of charge, Gladue bail cases were marginally more likely than their conventional bail court counterparts to have two or more of these charges (48.5% versus 48.0%) and marginally less likely to have only a single charge against the person (51.5% versus 52.0%) – differences which were not statistically significant²⁴⁶. Hence, it may not be surprising that Gladue bail cases and conventional bail cases in the

²⁴⁴ While the differences in the distribution of the offence type for the 'most serious charge' variable and the 'presence of charges against the person' variable might at first seem conflicting, they can be understood when one recalls how the former variable was created. That is, all violent crimes did not necessarily trump other offence types. Rather, charges were first ranked according to Crime Severity Index weights, then coded according to the appropriate offence category. There are many offences belonging to other categories that would be deemed more serious than the most common charge against the person – common assault. Hence, it should not be surprising to see a greater percentage of cases with at least one charge against the person than cases for which this charge type was the most serious charge in a case.

²⁴⁵ When the same analyses were performed in the event dataset, the differences between bail populations were in the same direction, but reduced to the extent that these differences fell just short of statistical significance ($p = .05$). In other words, when considering individual charging informations, there was no statistically significant relationship between the presence of charges against the person and Gladue bail status. This would suggest that broader person-based Gladue bail cases only become more likely to contain this charge type as a result of having two or more charging informations merged into a single person-based case.

²⁴⁶ In contrast, event cases in the Gladue bail population with one or more charges against the person were slightly less likely than their conventional bail counterparts to have two or more of these charges (41.5% versus 44.1%; $p = .017$). This suggests that person-based Gladue bail cases were less likely than their conventional bail counterparts to include two or more violent charges at the same time (i.e., on the same charging information). Rather, these person-based

dataset had a virtually identical average number of charges against the person – 0.71 versus 0.70 charges, with this minuscule difference, again, not being statistically significant ($t = -.578$; $df = 141707$; $p = .563$).

Although there appears to be only very minor differences in terms of the presence and prevalence of violent charges between bail populations, charges from this offence classification nevertheless warrant further exploration. While differences between Gladue bail and conventional bail cases were minimal within the broad charges against the person category, there may nevertheless be important differences in the presence of specific charges against the person. Indeed, supplementary analyses were performed in Table 5.11(a) to explore whether a relationship exists between Gladue bail status and the most common types of charge against the person – common assault (or assault I) (s.266 of the *Criminal Code*).

Table 5.11(a): Crosstabulation of Gladue Bail Status by Presence and Prevalence of Common Assault Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Common Assault Charges		
			No Common Assault Charge	Common Assault Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	111957	23838	135795
		% within Gladue Bail Status	82.4%	17.6%	100.0%
	Gladue	Count	4831	1083	5914
		% within Gladue Bail Status	81.7%	18.3%	100.0%
Total		Count	116788	24921	141709
		% within Gladue Bail Status	82.4%	17.6%	100.0%

Fisher's exact test = .133

			Number of Common Assault Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	18105	5733	23838
		% within Gladue Bail Status	76.0%	24.0%	100.0%
	Gladue	Count	821	262	1083
		% within Gladue Bail Status	75.8%	24.2%	100.0%
Total		Count	18926	5995	24921
		% within Gladue Bail Status	75.9%	24.1%	100.0%

Fisher's exact test = .915

Notably, more than half of all bail cases with one or more charges against the person appear to have had a common assault charge as at least one of those charges ($17.6\% / 33.7\% = 52.2\%$). Although Gladue bail cases in the dataset were marginally more likely than conventional bail cases to contain one

Gladue bail cases would have only become equally as likely as conventional bail cases to have two or more violent charges due to two or more separate charging informations with a violent charge being merged into a single case for bail processing purposes.

or more common assault charges (18.3% versus 17.6%), this difference was not statistically significant²⁴⁷. Moreover, Gladue bail cases had, on average, 0.25 common assault charges compared to a virtually identical 0.24 common assault charges among conventional bail cases, with this difference also not statistically significant ($t = -0.918$; $df = 141707$; $p = .358$). Any differences in the prevalence of common assault charges were also negligible. Indeed, of those cases with one or more common assault charges, Gladue bail cases were essentially just as likely as conventional bail cases to have two or more of these charges (24.2% versus 24.0%) and equally as likely to include only a single common assault charge (75.8% versus 76.0%) – with any differences, again, not statistically significant²⁴⁸.

Overall, Gladue bail cases appeared only just slightly more likely to contain one or more charges against the person, and no more likely to contain common assault charges. Within this context, Gladue cases do not appear to be significantly more violent, and therefore a greater risk for bail release, than bail cases processed entirely in conventional bail court – at least in terms of the presence and number of violent charges or the presence and number of common assault charges. Despite the relative similarities, differences between these bail populations may still exist. Indeed, the second most common charge against the person in this dataset was a more serious form of assault – assault with a weapon or assault causing bodily harm (assault II) (s.267 of the *Criminal Code*) (15.1%). Table 5.11(b) presents the presence of assault II as the most serious charge²⁴⁹ in Gladue bail and conventional bail cases.

²⁴⁷ The same analyses were also performed in the event dataset with similar results. That is, there were no statistically significant differences between bail populations in terms of the presence of common assault charge(s) on a charging information ($p = .094$).

²⁴⁸ Notably, in the event dataset, among cases with one or more common assault charges, Gladue bail cases were slightly less likely than their conventional bail counterparts to contain two or more of these charges (16.8% versus 19.8%; $p = .016$). This would suggest that, in order for Gladue bail and conventional bail person-based cases to be equally as likely to contain two or more common assault charges in a broader person case, these Gladue person cases would be more likely than their conventional bail counterparts to consist of two or more charging informations (or event cases) each with a single common assault charge (such that, once merged together into a single person case, the person case then contains two or more of these charges).

²⁴⁹ Unlike the above variable measuring the simple presence assault charge(s) in a case, this variable reflects the presence of assault II as the *most serious charge* in a case. In light of this, readers should not directly compare figures in Tables 5.11(a) and 5.11(b) as they measure charges in different ways. The CSI weight assigned to assault II was 83.36 (roughly mid-range among criminal offences).

Table 5.11(b): Crosstabulation of Gladue Bail Status by Presence of Assault with a Weapon or Causing Bodily Harm (Assault II) Charge as Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Assault with a Weapon or Causing Bodily Harm Charge as Most Serious Charge		Total
			No Assault II Charge	Assault II Charge(s)	
Gladue Bail Status	Non-Gladue	Count	130351	5444	135795
		% within Gladue Bail Status	96.0%	4.0%	100.0%
	Gladue	Count	5660	254	5914
		% within Gladue Bail Status	95.7%	4.3%	100.0%
Total	Count		136011	5698	141709
	% within Gladue Bail Status		96.0%	4.0%	100.0%

Fisher's exact test = .279

Although Gladue bail cases in the dataset were very marginally more likely to have an assault II charge as their most serious charge compared to conventional bail cases, this difference was, again, not statistically significant²⁵⁰. Hence, it appears that Gladue bail cases were only very slightly more likely to contain violent charges in general, while not being significantly more likely to contain common assault charges or to contain assault with a weapon or causing bodily harm as their most serious charge. Any significant differences in case composition between Gladue bail and conventional bail cases – should they exist – would necessarily need to exist elsewhere. Next, the presence and prevalence of charges against the administration of justice are presented in Table 5.12.

viii) Presence and Prevalence of Charges against the Administration of Justice²⁵¹

Table 5.12: Crosstabulation of Gladue Bail Status by Presence and Prevalence of Charges against the Administration of Justice, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Charges against the Administration of Justice		Total
			No Administration of Justice Charge	Administration of Justice Charge(s)	
Gladue Bail Status	Non-Gladue	Count	75794	60001	135795
		% within Gladue Bail Status	55.8%	44.2%	100.0%
	Gladue	Count	2333	3581	5914
		% within Gladue Bail Status	39.4%	60.6%	100.0%
Total	Count		78127	63582	141709
	% within Gladue Bail Status		55.1%	44.9%	100.0%

Fisher's exact test < .001

²⁵⁰ The same analyses were performed in the event dataset with similar results. The marginal differences between bail populations in terms of having assault II as the most serious charge in a case were not statistically significant ($p = .407$).

²⁵¹ Recall from footnote 207 that the most common (most serious) charges in the administration of justice category in the person dataset were failure to comply with a court order/failure to attend court (56.5%), failure to comply with a probation order (39.4%), offering/accepting a bribe or perjury (2.8%) and escape custody before expiry (1.3%).

			Number of Charges against the Administration of Justice		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	39989	20012	60001
		% within Gladue Bail Status	66.6%	33.4%	100.0%
	Gladue	Count	1942	1639	3581
		% within Gladue Bail Status	54.2%	45.8%	100.0%
Total		Count	41931	21651	63582
		% within Gladue Bail Status	65.9%	34.1%	100.0%

Fisher's exact test < .001

Notably, when considering the mere presence of an administration of justice charge (regardless of whether this charge represents the most serious charge in a case), this charge type was the most common offence classification for bail cases. Indeed, a greater proportion of bail cases contained one or more charges against the administration of justice (44.9%) than charge(s) against property (43.3% – Table 5.10) or charge(s) against the person (33.7% – Table 5.11). This trend held true for Gladue bail cases specifically – for which an administration of justice charge was present in 60.6% of cases, compared to property charges (50.2% – Table 5.10) or charges against the person (35.5% – Table 5.11).

In contrast with charges against the person, significant differences emerge between bail populations when examining charges against the administration of justice. Indeed, charges against the administration of justice were much more common in Gladue bail cases than in conventional bail cases. While Gladue bail cases were also more likely than conventional bail cases to have this type of charge as the most serious charge in a case (Table 5.9(a)), the scale of the differences between bail populations is much starker when considering the simple presence of these charges here. Considerably more than half of Gladue bail cases – roughly three-in-five (60.6%) – had at least one charge against the administration of justice, whereas less than half of conventional bail cases – just over two-in-five (44.2%) – had this type of charge. Moreover, Gladue bail cases had a considerably higher average number of administration of justice charge cases (1.28 charges; median = 1) compared to bail cases processed entirely in conventional bail courts (0.74 charges; median = 0) ($t = -20.131$; $df = 6211.725$; $p < .001$). Indeed, of those cases that contained at least one charge against the administration of justice, Gladue bail cases were considerably more likely than conventional bail cases to

have two or more of these charges (45.8% versus 33.4%) and therefore less likely to have only a single administration of justice charge (54.2% versus 66.6%)²⁵².

In view of the widespread presence of administration of justice charges, and their particularly elevated numbers among Gladue bail cases, this charge classification clearly warrants further investigation. In fact, following an examination of charges from the remaining offence classifications, a separate section of this chapter is devoted to exploring the prevalence of many of the most common charges against the administration of justice. First, however, Table 5.13 presents the presence and prevalence of *Criminal Code* traffic charges – a relatively rare offence type among bail cases, but one with significant differences between Gladue bail and conventional bail populations.

ix) Presence and Prevalence of *Criminal Code* Traffic Charges²⁵³

Table 5.13: Crosstabulation of Gladue Bail Status by Presence and Prevalence of *Criminal Code* Traffic Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of <i>Criminal Code</i> Traffic Charges		
			No Traffic Charges	Traffic Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	132427	3368	135795
		% within Gladue Bail Status	97.5%	2.5%	100.0%
	Gladue	Count	5844	70	5914
		% within Gladue Bail Status	98.8%	1.2%	100.0%
Total		Count	138271	3438	141709
		% within Gladue Bail Status	97.6%	2.4%	100.0%

Fisher's exact test < .001

			Number of <i>Criminal Code</i> Traffic Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	1492	1876	3368
		% within Gladue Bail Status	44.3%	55.7%	100.0%
	Gladue	Count	33	37	70
		% within Gladue Bail Status	47.1%	52.9%	100.0%
Total		Count	1525	1913	3438
		% within Gladue Bail Status	44.4%	55.6%	100.0%

Fisher's exact test = .630

²⁵² These same analyses were also performed in the event dataset with similar results: Gladue bail cases in this dataset were more likely than conventional bail cases to have one or more charges against the administration of justice, although this difference was slightly less marked (53.0% versus 40%; $p < .001$). Notably, even when considering individual charging informations as cases, charges against the administration of justice were still present in over half of Gladue bail cases. Of bail cases with at least one charge against the administration of justice, Gladue bail cases in this dataset were also slightly more likely than conventional bail cases to have two or more of these charges (27.3% versus 24.4%; $p < .001$), although the differences between populations were, again, less pronounced.

²⁵³ Recall in footnote 208 that the most common (most serious) charges in the *Criminal Code* traffic category in the person dataset were impaired driving / impaired operation over 80mg (37.8%) and dangerous operation of a motor vehicle (13.5%), as well as fail / refuse to provide breath sample (12.7%) and operate vehicle while disqualified (10.1%).

Notably, although traffic charges were quite rare in bail cases overall, Gladue bail cases were less likely (1.2%) to contain one or more *Criminal Code* traffic charges than conventional bail cases (2.5%)²⁵⁴. Indeed, Gladue bail cases were less than half as likely as conventional bail cases to contain at least one *Criminal Code* traffic charge. This might be explained by Indigenous accused in Old City Hall and College Park Gladue bail cases being less likely to own or drive vehicles, and therefore less likely to receive charges for impaired driving, etc., compared to the general population living or spending time in Toronto’s downtown core (i.e., those comprising the conventional bail population). Of those bail cases in the dataset with at least one traffic charge, Gladue bail cases were slightly more likely than conventional bail cases to have only a single such charge (47.1% versus 44.3%) and less likely to have two or more of these charges (52.9% versus 55.7%). These differences, however, were not statistically significant²⁵⁵. Moreover, despite differences in the prevalence of *Criminal Code* traffic charges, these charges were generally too rare to have a significant impact on the overall bail caseloads of Gladue Courts and conventional bail courts. In contrast, Table 5.14 presents the presence and prevalence of charges belonging to a more common – albeit quite broad – offence classification.

x) Presence and Prevalence of “Other” *Criminal Code* Charges²⁵⁶

Table 5.14: Crosstabulation of Gladue Bail Status by Presence and Prevalence of “Other” *Criminal Code* Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Other <i>Criminal Code</i> Charges		Total
			No Other <i>Criminal Code</i> Charge	Other <i>Criminal Code</i> Charge(s)	
Gladue Bail Status	Non-Gladue	Count	113428	22367	135795
		% within Gladue Bail Status	83.5%	16.5%	100.0%
	Gladue	Count	4808	1106	5914
		% within Gladue Bail Status	81.3%	18.7%	100.0%
Total	Count		118236	23473	141709
	% within Gladue Bail Status		83.4%	16.6%	100.0%

Fisher’s exact test < .001

²⁵⁴ Similarly, the average number of *Criminal Code* traffic charges in Gladue bail cases was 0.02 charges compared to 0.05 charges for conventional bail cases ($t = 6.714$; $df = 7003.793$; $p < .001$).

²⁵⁵ The same analyses were also performed in the event dataset with similar results. Gladue bail cases in this dataset were also less likely to have *Criminal Code* traffic charges than their conventional bail counterparts ($p < .001$). Moreover, of those cases with one or more of these traffic offences, there were no statistically significant differences between bail populations in terms of having only one versus two or more of these charges ($p = .480$).

²⁵⁶ Recall from footnote 209 that the most common (most serious) charges in the other *Criminal Code* category for the person dataset were possession of weapon for dangerous purpose/unauthorized possession/possession for trafficking (28.9%) and obstruct peace officer (12.8%), as well as fraudulently take/hold/deface (8.8%), attempt/accessory to an indictable offence (7.7%) and use of a firearm in the commission of an offence (7.6%).

			Number of Other <i>Criminal Code</i> Charges		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	14815	7552	22367
		% within Gladue Bail Status	66.2%	33.8%	100.0%
	Gladue	Count	764	342	1106
		% within Gladue Bail Status	69.1%	30.9%	100.0%
Total	Count		15579	7894	23473
	% within Gladue Bail Status		66.4%	33.6%	100.0%

Fisher's exact test = .055

The likelihood of cases having “other” *Criminal Code* charges was slightly greater for Gladue bail cases (18.7%) compared to conventional bail cases (16.5%)²⁵⁷. Of those cases in the dataset with one or more of these charges, Gladue bail cases were slightly more likely than conventional bail cases to have only a single “other” *Criminal Code* charge (69.1% versus 66.2%) and less likely to have two or more of these charges (30.9% versus 33.8%) – although these differences fell just short of statistical significance ($p = 0.55$)²⁵⁸. While these differences were not significant as a dichotomous variable, they may have nevertheless contributed to Gladue bail cases having slightly fewer “other” *Criminal Code* charges average compared to conventional bail cases (0.33 versus 0.39 charges; $t = 2.470$; $df = 6752.416$; $p = .014$).

Given that the “other” *Criminal Code* offence classification is rather wide-reaching and contains a broad range of charges, it is worth taking a closer look at the most common offences in this category. That is, this broad “other” *Criminal Code* category may be obscuring significant differences between Gladue bail and conventional bail cases for specific “other” offences. Within this context, Tables 5.14(a) and 5.14(b) present the presence of the two most common charges in this offence category – possession of weapons and obstruction of a peace officer – as the most serious charge in a case^{259,260}.

²⁵⁷ There were also no statistically significant differences between bail populations in the event dataset in terms of the presence of other *Criminal Code* charges ($p = .650$).

²⁵⁸ In the event dataset, among cases with one or more “other” *Criminal Code* charges, Gladue bail cases were also less likely than conventional bail cases to contain two or more other *Criminal Code* charges on a charging information. However, whereas these differences were not statistically significant in the person dataset, these differences were statistically significant in the event dataset (23.4% versus 29.9%; $p < .001$).

²⁵⁹ As with earlier tables examining possession of stolen property and theft charges, these tables measure possession of weapons and obstructing a peace officer charges as the *most serious charge* in a case. Readers should therefore remain mindful that these tables measure the presence of specific charges differently than tables examining the mere presence of charges within the broad offence categories.

²⁶⁰ The CSI weight assigned to possession of weapons charges was 111.59 (roughly mid-range among CSI weights) whereas the weight assigned to obstruction of peace officer charges was 28.48 (low within the range of CSI weights). Given that these tables present the presence of these charges as a case's most serious charge, charges with lower CSI weights are more likely to be trumped by charges with higher weights. Hence the presence of lower CSI offences, such

Table 5.14(a): Crosstabulation of Gladue Bail Status by Presence of Weapon Possession Charges²⁶¹ as Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Weapon Possession Charge	Possession Charges Weapon Possession Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	131562	4233	135795
		% within Gladue Bail Status	96.9%	3.1%	100.0%
	Gladue	Count	5699	215	5914
		% within Gladue Bail Status	96.4%	3.6%	100.0%
Total		Count	137261	4448	141709
		% within Gladue Bail Status	96.9%	3.1%	100.0%

Fisher's exact test = .026

Table 5.14(b): Crosstabulation of Gladue Bail Status by Presence of Obstructing a Peace Officer Charges²⁶² as Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Obstruction of a Peace Officer Charges		
			No Obstruction of Peace Officer Charge	Obstruction of Peace Officer Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	133909	1886	135795
		% within Gladue Bail Status	98.6%	1.4%	100.0%
	Gladue	Count	5823	91	5914
		% within Gladue Bail Status	98.5%	1.5%	100.0%
Total		Count	139732	1977	141709
		% within Gladue Bail Status	98.6%	1.4%	100.0%

Fisher's exact test = .336

In terms of these specific "other" *Criminal Code* offences – possession of weapons and obstruction of a peace officer – Gladue bail and conventional bail cases continue to have these charges (as a case's most serious charge) at a similar rate. Indeed, Gladue bail cases were effectively just as likely as conventional bail cases to have obstruction of a peace officer as their most serious charge (1.5% versus 1.4% – differences not statistically significant)²⁶³. However, Gladue bail cases were slightly more likely than conventional bail cases to have a weapons possession charge as their most serious charge (3.6% versus

as obstructing a peace officer, would likely be underestimated to a greater degree than more serious charges, like possession of weapons.

²⁶¹ For the purposes of this table, weapons possession charges refer to charges for possession of a weapon for a dangerous purpose (s.88(1) of the *Criminal Code*) and possession for the purpose of weapons trafficking (s.100(1) of the *Criminal Code*), as well as unauthorized possession of a firearm and unauthorized possession of a prohibited weapon or restricted weapon (s.91(1) and 91(2) of the *Criminal Code*).

²⁶² Obstructing a peace officer (s.129 of the *Criminal Code*) refers to someone allegedly interfering with a peace officer during the execution of the officer's duties or when someone deliberately lies to police (including about one's identity).

²⁶³ The same analyses were performed in the event dataset with similar results. Although Gladue bail cases in this dataset were also marginally more likely than conventional bail cases to have obstruction of a peace officer as their most serious charge, these differences were again not statistically significant ($p = .201$).

3.1%)²⁶⁴. Yet these charges were uncommon in both populations, such that these marginal differences would have a very limited impact on caseloads overall. Hence, there were very limited differences between Gladue bail and conventional bail cases in terms of the presence of the two most common “other” *Criminal Code* offences as the most serious charge in a case. Lastly, one remaining offence category is explored as a potential source of differences between Gladue bail and conventional bail populations. Table 5.15 presents the presence and prevalence of federal statute charges.

xi) Presence and Prevalence of Federal Statute Charges²⁶⁵

Table 5.15: Crosstabulation of Gladue Bail Status by Presence and Prevalence of Federal Statute Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Federal Statute Charges		Total
			No Federal Charges	Federal Charge(s)	
Gladue Bail Status	Non-Gladue	Count	104428	31367	135795
		% within Gladue Bail Status	76.9%	23.1%	100.0%
	Gladue	Count	4841	1073	5914
		% within Gladue Bail Status	81.9%	18.1%	100.0%
Total		Count	109269	32440	141709
		% within Gladue Bail Status	77.1%	22.9%	100.0%

Fisher’s exact test < .001

			Number of Federal Statute Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	13958	17409	31367
		% within Gladue Bail Status	44.5%	55.5%	100.0%
	Gladue	Count	568	505	1073
		% within Gladue Bail Status	52.9%	47.1%	100.0%
Total		Count	14526	17914	32440
		% within Gladue Bail Status	44.8%	55.2%	100.0%

Fisher’s exact test < .001

Just over one-in-five bail cases contained at least one federal statute charge. Gladue bail cases were somewhat less likely than conventional bail cases to have at least one federal statute charge (18.1% versus 23.1%) and had fewer federal charges, on average, than conventional bail cases (0.40 versus 0.55 charges; $t = 9.127$; $df = 6847.434$; $p < .001$). Moreover, of those cases with one or more federal statute charges, Gladue bail cases were also less likely than their conventional bail counterparts to have two or more of these charges

²⁶⁴ The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also marginally more likely to have weapon possession as the most serious charge, with these differences not being statistically significant ($p = .277$).

²⁶⁵ Recall from footnote 210 that the most common (most serious) charges in the federal statute category for the person dataset were trafficking in substance (49.1%) and possession of substance (32.0%), as well as possession of other drugs (9.2%) and production of substance (7.8%).

(47.1% versus 55.5%) and more likely to have only a single federal statute charge (52.9% versus 44.5%)²⁶⁶.

Given that two specific offences make up over 80% of federal statute charges in this dataset – trafficking in substance and possession of substance – it is worth examining these individually in order to pinpoint the source of these modest differences between Gladue bail and conventional bail cases. Tables 5.15(a) and 5.15(b) present the prevalence of these charges as the most serious charge in a case^{267,268}.

Table 5.15(a): Crosstabulation of Gladue Bail Status by Presence of Trafficking in Substance Charge²⁶⁹ as Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Trafficking in Substance Charges		
			No Trafficking Substance Charge	Trafficking Substance Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	129674	6121	135795
		% within Gladue Bail Status	95.5%	4.5%	100.0%
	Gladue	Count	5709	205	5914
		% within Gladue Bail Status	96.5%	3.5%	100.0%
Total		Count	135383	6326	141709
		% within Gladue Bail Status	95.5%	4.5%	100.0%

Fisher's exact test < .001

Table 5.15(b): Crosstabulation of Gladue Bail Status by Presence of Possession of Substance²⁷⁰ as Most Serious Charge, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Possession of Substance Charges		
			No Possession of Substance Charge	Possession of Substance Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	131771	4024	135795
		% within Gladue Bail Status	97.0%	3.0%	100.0%
	Gladue	Count	5816	98	5914
		% within Gladue Bail Status	98.3%	1.7%	100.0%
Total		Count	137587	4122	141709
		% within Gladue Bail Status	97.1%	2.9%	100.0%

Fisher's exact test < .001

²⁶⁶ The same analyses were also performed in the event dataset with similar results. Gladue bail cases in this dataset were also less likely to have federal statute charges compared to their conventional bail counterparts ($p < .001$). Moreover, of those cases with one or more federal statute charges, Gladue bail cases were also less likely to have two or more of these charges than conventional bail cases ($p < .001$).

²⁶⁷ As with earlier tables examining specific charges, these tables measure the presence of trafficking in substance and possession of substance as the most serious charge in a case. That is, these tables do not measure the mere presence of charges (as with the broad offence classification charges above), but rather the presence of specific charges as a case's most serious charge.

²⁶⁸ The CSI weight assigned to trafficking in substance is 62.51 while the weight assigned to possession of substance charges is notably lower, at 24.26. Recall that these weights affect the perceived prevalence of these charges when examining most serious charge variables.

²⁶⁹ Trafficking in substance charges are outlined in s.5(1) of the *Controlled Drugs and Substances Act*. This charge applies to substances included in Schedules I, II, III, IV and V.

²⁷⁰ Possession of substance charges are outlined in s.4(1) of the *Controlled Drugs and Substances Act*. This charge applies to substances included in Schedules I, II, III, and IV. Given that the dataset consists of cases resolved between 2006-2017, possession charges may include possession of cannabis, which would have still been illegal during this time.

Notably, Gladue bail cases were less likely than conventional bail cases to contain either a trafficking in substance or a possession of substance charge as their most serious charge. Specifically, only 3.5% of Gladue bail cases had trafficking in substance as their most serious charge compared to 4.5% of their conventional bail counterparts²⁷¹. Similarly, only 1.7% of Gladue bail cases had a possession of substance charge as their most serious charge compared to 3.0% of conventional bail cases²⁷². Nevertheless, these specific federal statute charges were generally rare as a case's most serious charge, and thus any differences in the prevalence of these charges would likely have only a limited effect on Gladue bail and conventional bail caseloads.

As an overall picture of charging practices, there were many similarities as well as several important differences between Gladue bail and conventional bail populations in terms of their charge packages. Notably, despite these populations having a similar number of charges on any given charging information (Table 5.7(a)), when informations are combined in the person dataset, Gladue bail cases were less likely than their conventional bail counterparts to contain only a single charge and more likely to contain many charges (Table 5.7(b)). Moreover, while the vast majority of charges for both bail populations originated from the Toronto Police Service, Gladue bail cases were more likely than their conventional bail counterparts to have charges stemming from non-police agencies with surveillance responsibilities – the local probation and parole office and bail program (Table 5.8).

Comparative analyses of Gladue bail and conventional bail cases challenged racist stereotypes which might suggest that Indigenous peoples have more violent charges or are somehow more dangerous

²⁷¹ The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also less likely to have trafficking in substance as their most serious charge ($p < .001$).

²⁷² The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also less likely to have possession of substance as their most serious charge, although the scale of this difference was somewhat reduced (3.3% versus 3.8%) ($p < .001$). That the differences between bail populations shrank in the event dataset in terms of possession of substance charges as a case's most serious charge suggests that Gladue bail cases in the person dataset were more likely than their conventional bail counterparts to contain charges stemming from two or more charging informations. Indeed, a greater prevalence of multi-event cases among the Gladue bail population would lead to a more serious charge in a person-based case taking precedence and masking a less serious possession charge. Notably, the CSI weight for possession of substance charges was rather low, meaning that even other "less serious" charges like theft or mischief could still trump a possession of substance charge in a broader person-based case.

than the general population. Indeed, Gladue bail cases were less likely than their conventional bail counterparts to have a violent charge as their most serious charge and more likely than their counterparts to have a property charge or a charge against the administration of justice as their most serious charge.

Even when considering the simple presence of charges belonging to various offence classifications, Indigenous accused whose bail was processed in Gladue Court did not appear to be substantially more ‘dangerous’ (as measured by violent charges or charges whose CSI weights indicate seriousness) than those in conventional bail court. While Gladue bail cases were marginally more likely to have a charge against the person compared to conventional bail cases, there were no statistically significant differences between bail populations in terms of the likelihood of cases having a single versus two or more of these charges (Table 5.11). Nor was there a statistically significant difference in the likelihood of these populations having a common assault charge (Table 5.11(a)), nor in the likelihood of having an assault II charge as the most common charge in their case (Table 5.11(b)). While Gladue bail cases were marginally more likely than conventional bail cases to have certain serious charges, such as weapons possession (Table 5.14(a)), these tended to be for low-incidence charges²⁷³. For other reasonably serious charges, such as trafficking in illegal substance, Gladue bail cases were less likely to contain these than their conventional bail counterparts. Hence, any potential differences which may exist between these bail populations in terms of bail processing and bail outcomes would be unlikely to be rooted in a differential presence or prevalence of violent or otherwise serious charges. Yet Gladue bail cases may be more complex than conventional bail cases in another important way.

Indeed, charges against the administration of justice may be playing a significant role at bail, in terms of their presence overall, as well as the significant differences which exist in terms of their presence in Gladue bail and conventional bail cases. Indeed, while Gladue bail cases were slightly more likely than conventional

²⁷³ Although charges for weapons possession were quite uncommon among bail cases overall, these types of charges might be considered influential in another sense. That is, while bail cases involving weapons charges (or charges for serious forms of violence) do not reflect a ‘typical’ bail case, they are sometimes used politically (and in the media) to rally the general public toward a more ‘tough on crime’ stance regarding bail. Yet the politicization of these relatively uncommon bail cases distorts the realities of bail while stoking the public’s fears about community safety, sometimes leading to efforts to ‘get tough on bail’, for instance, through legislative amendments expanding reverse onus provisions.

bail cases to have an offence against the administration of justice as their most serious charge, the disparities were even more apparent when examining the simple presence of these charges in a case – an important consideration given that these charges tend to have relatively low CSI weights²⁷⁴ and are therefore easily obscured by more serious charges in a case. To illustrate the probable significance of charges against the administration of justice in bail cases, Table 5.16 presents a summary of the number and percentage of cases that had one or more of each charge type for bail cases generally, as well as for Gladue bail cases and conventional bail cases specifically.

Table 5.16: Summary Table of the Presence of Specific Charge Types, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)²⁷⁵

Type of Charge Present in Bail Population	All Bail Cases		Conventional Bail Cases		Gladue Bail Cases	
	Count	%	Count	%	Count	%
Charges against Property	61,349	43.3%	58,382	43.0%	2,967	50.2%
Charges against the Person	47,719	33.7%	45,620	33.6%	2,099	35.5%
Charges against the Administration of Justice	63,582	44.9%	60,001	44.2%	3,581	60.6%
<i>Criminal Code</i> Traffic Charges	3,438	2.4%	3,368	2.5%	70	1.2%
“Other” <i>Criminal Code</i> Offence Charges	23,473	16.6%	22,367	16.5%	1,106	18.7%
Federal Statute Charges	32,440	22.9%	31,367	23.1%	1,073	18.1%

Charges against the administration of justice were the most common charge type for all bail cases (44.9%), as well as for both bail populations individually. The importance of administration of justice charges is further highlighted by the fact that the greatest differences between bail populations were specifically for the presence of charges against the administration of justice (60.6% of Gladue bail cases versus 44.2% of conventional bail cases). Moreover, Gladue bail cases with at least one charge against the administration of justice were also more likely than their conventional bail counterparts to have two or more of these charges (Table 5.12) Further examination of the offence category is clearly warranted.

²⁷⁴ Charges of failure to comply with a court order and failure to attend court have a very low CSI weight of 16.19 while failure to comply with a probation order has a weight of 24.97. These low CSI weights mean that the presence of these charges in a case can easily be eclipsed by a more serious charge with a greater CSI weight.

²⁷⁵ This table presents a summary of the simple presence of each type of charge in a case (i.e., regardless of the charge’s seriousness). Recall that the presence of each type of charge is not mutually exclusive, such that a single bail case could have charges belonging to more than one of these offence classifications.

5.2.3 – Charges Against the Administration of Justice: A Closer Look

i) Presence and Prevalence of Any s.145 Charges²⁷⁶

While charges against the administration of justice were the most common type of charge among bail cases overall, their presence in Gladue bail cases compared to conventional bail cases is especially notable. Not only were Gladue bail cases significantly more likely to have this type of charge compared to conventional bail cases (60.6% versus 44.2% = 16.4%), the difference between these two bail populations is much greater for this charge type than for any other (e.g., 50.2% versus 43.0% = 7.2% for charges against property; 35.5% versus 33.6% = 1.9% for charges against the person; Table 5.16). It is important, however, to understand the most common specific administration of justice charges in these bail cases and whether the differences between bail populations extend across all (or at least the most common) administration of justice charges. Tables 5.17(a) through 5.24(b) therefore present an overview of some of the most common offences against the administration of justice. Specifically, these tables present those charges listed (during the study period) under s.145 of the *Criminal Code* relating to failure to comply with various types of interim release, as well as 733.1(1) for failure to comply with a probation order.

Table 5.17(a): Crosstabulation of Gladue Bail Status by Presence of Any s.145 Charges²⁷⁷, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Any s.145 Charges		Total
			No s.145 Charges	s.145 Charge(s)	
Gladue Bail Status	Non-Gladue	Count	100804	34991	135795
		% within Gladue Bail Status	74.2%	25.8%	100.0%
	Gladue	Count	3849	2065	5914
		% within Gladue Bail Status	65.1%	34.9%	100.0%
Total	Count		104653	37056	141709
	% within Gladue Bail Status		73.9%	26.1%	100.0%

Fisher's exact test < .001

²⁷⁶ Charges under s.145 of the *Criminal Code* relate to the failure to comply with various forms of interim release. These offences, as outlined in the versions of the *Criminal Code* which were in effect from January 1, 2003 to May 28, 2008 and May 29, 2008 to December 12, 2018, were: 145(1) escape and being at large without excuse; 145(2) failure to attend court; 145(3) failure to comply with condition of undertaking or recognizance; 145(4) failure to appear or to comply with summons; 145(5) failure to comply with appearance notice or promise to appear; and s.145(5.1) failure to comply with conditions of undertaking pursuant to s.499(2) or 503(2.1).

²⁷⁷ The administration of justice variables in this section were produced by first creating a dichotomous “dummy” variable (0/1) for each offence classification in the charge dataset. Charges were then aggregated into cases by taking the sum of the value of this variable, such that the value for each case represented the number of charges of that particular offence which were joined into a single case. Note that the presence of each type of charge against the administration of justice is not mutually exclusive, as a single bail case could have more than one type of administration of justice charge. For this reason, if one were to sum the percentage of cases with each specific s.145 charge, this figure (29.0% – Table 5.25.) would slightly exceed the 26.1% of cases listed as having any s.145 charge (Table 5.17(a)).

Table 5.17(b): Crosstabulation of Gladue Bail Status by Presence of Any s.145 Charges, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Presence of Any s.145 Charges		Total
			No s.145 Charges	s.145 Charge(s)	
Gladue Bail Status	Non-Gladue	Count	125146	40481	165627
		% within Gladue Bail Status	75.6%	24.4%	100.0%
	Gladue	Count	5713	2237	7950
		% within Gladue Bail Status	71.9%	28.1%	100.0%
Total	Count		130859	42718	173577
	% within Gladue Bail Status		75.4%	24.6%	100.0%

Fisher's exact test < .001

Overall, s.145 charges were relatively common – present in roughly one quarter of all bail cases (26.1% of person cases or 24.6% of event cases)²⁷⁸. However, Gladue bail cases were considerably more likely than conventional bail cases to have at least one s.145 charge in their overall case. In fact, more than one third (34.9%) of Gladue bail cases in the person dataset contained one or more s.145 charges, compared to only roughly a quarter (25.8%) of conventional bail cases.

The juxtaposition of the person and event datasets provides further insight into the overwhelming presence of s.145 charges in bail cases, particularly among Gladue bail cases. Indeed, s.145 charges were also widespread in the event dataset – only slightly less common on any given charging information (24.6%) than they were in broader bail cases (26.1%). What is more notable, however, is that the differences between Gladue bail and conventional bail cases were considerably more marked in the person data (34.9%-25.8% = 9.1%) than the event data (28.1%-24.4% = 3.7%). This suggests that Gladue bail cases – while only slightly more likely than conventional cases to have at least one s.145 charge on an individual charging information – were more likely than their counterparts to have two or more informations merged into a single, broader bail case as reflected in the person dataset. It therefore appears that Gladue bail cases were more likely than conventional bail cases to receive one or more subsequent set(s) of charges which contained one or more s.145 charges against the administration of justice.

²⁷⁸ To illustrate how the presence of s.145 charges would be greater in the person dataset compared to the event dataset, consider the following example. Seven individuals were charged with theft. Three of these individuals subsequently received a s.145 charge before the resolution of their theft charge. In the event dataset, there would be 10 cases in total: seven without a s.145 charge (70% of cases) and three with a s.145 charge (30% of cases). In contrast, in the person dataset there would be seven cases in total: four without s.145 charges (57% of cases) and three with a s.145 charge (43% of cases). Hence, when measuring the presence of a specific charge, one would expect to see a greater percentage of cases in the person dataset with this charge than in the event dataset.

While it appears that Gladue bail cases were more likely to contain s.145 charges overall, in the context of bail it is also important to examine the prevalence of these charges, as a lengthy charge sheet with numerous s.145 charges – particularly if those charges are for failing to attend court (s.145(2)) or failing to comply with a conditions of an undertaking or recognizance (s.145(3)) – might be expected to pose concerns for Crowns assessing the suitability for an accused person for bail release. Tables 5.17(c) and 5.17(d) present the prevalence of s.145 charges for both datasets.

Table 5.17(c): Crosstabulation of Gladue Bail Status by Prevalence of Any s.145 Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Number of (All) s.145 Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	24549	10442	34991
		% within Gladue Bail Status	70.2%	29.8%	100.0%
	Gladue	Count	1314	751	2065
		% within Gladue Bail Status	63.6%	36.4%	100.0%
Total		Count	25863	11193	37056
		% within Gladue Bail Status	69.8%	30.2%	100.0%

Fisher's exact test < .001

Table 5.17(d): Crosstabulation of Gladue Bail Status by Prevalence of Any s.145 Charges, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of (All) s.145 Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	32576	7905	40481
		% within Gladue Bail Status	80.5%	19.5%	100.0%
	Gladue	Count	1824	413	2237
		% within Gladue Bail Status	81.5%	18.5%	100.0%
Total		Count	34400	8318	42718
		% within Gladue Bail Status	80.5%	19.5%	100.0%

Fisher's exact test = .228

Of bail cases with at least one s.145 charge, Gladue bail cases in the person dataset were less likely to have only a single s.145 charge (63.6% versus 70.2%) and more likely to have two or more s.145 charges (36.4% versus 29.8%) compared to their conventional bail counterparts. Similarly, Gladue cases in this dataset had, on average, roughly 50% more s.145 charges than conventional bail cases (0.61 versus 0.40 charges; $t = -12.711$; $df = 6195.962$; $p < .001$). However, running the same analyses in the event dataset produced no statistically significant differences ($p = .228$). In other words, although Gladue bail cases in the event dataset were more likely than their conventional bail counterparts to have at least one s.145 charge (Table 5.17(b)), there was essentially no difference in terms of the number of s.145 charges in a single charging event.

Juxtaposing the event and person datasets provides yet further information. Indeed, the similarities in the prevalence of s.145 charges between bail populations in the event dataset suggests that the differences which exist in the person dataset are likely rooted in the number of charging events which are ultimately merged into a single person case. In other words, it is likely that person-based Gladue cases are more likely than their conventional bail counterparts to include two or more s.145 charges as a result of these Gladue bail cases being more likely to consist of two or more charging informations with a s.145 charge. This supports the theory that Gladue bail cases are more likely than conventional bail cases to include charges originating from two or more charging informations, as well as more likely to specifically contain two or more informations with a single s.145 charge.

In light of the substantial presence of s.145 charges in bail cases and Gladue bail cases especially, each specific charge under s.145 is examined further in order to pinpoint the greatest differences between bail populations. Table 5.18 depicts the presence and prevalence of s.145(1) charges for being unlawfully at large.

ii) Prevalence of s.145(1) Escape and Being at Large without Excuse Charges²⁷⁹

Table 5.18: Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.145(1) Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of s.145(1) Charges for being Unlawfully at Large		
			No s.145(1) Charges	s.145(1) Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	134654	1141	135795
		% within Gladue Bail Status	99.2%	0.8%	100.0%
	Gladue	Count	5819	95	5914
		% within Gladue Bail Status	98.4%	1.6%	100.0%
Total		Count	140473	1236	141709
		% within Gladue Bail Status	99.1%	0.9%	100.0%

Fisher's exact test < .001

			Number of s.145(1) Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	1082	59	1141
		% within Gladue Bail Status	94.8%	5.2%	100.0%
	Gladue	Count	89	6	95
		% within Gladue Bail Status	93.7%	6.3%	100.0%
Total		Count	1171	65	1236
		% within Gladue Bail Status	94.7%	5.3%	100.0%

Fisher's exact test = .630

²⁷⁹ The offence of s.145(1) escape and being at large without excuse (i.e., being unlawfully at large) is a hybrid offence which occurs when someone escapes from custody or is at large in or outside of Canada without lawful excuse before the expiration of a term of imprisonment.

Charges for being unlawfully at large were quite rare among bail cases overall (0.9%) – perhaps unsurprising when one considers that an accused must have first been in custody in order for these charges to become possible. Despite the overall rarity of these charges, though, Gladue bail cases were notably twice as likely as conventional bail cases (1.6% versus 0.8%) to include at least one s.145(1) charge for being unlawfully at large²⁸⁰. This difference may be partially explained by the overrepresentation of Indigenous peoples in Canadian correctional facilities. That is, since Indigenous peoples are disproportionately represented in Ontario’s correctional institutions, their opportunity to escape custody would also be greater than that of the general population (whose potential bail would be processed in conventional bail courts). Among cases with one or more s.145(1) charges in the dataset, Gladue bail cases were marginally more likely than conventional bail cases to contain two or more of these charges (6.3% versus 5.2%) and less likely than their counterparts to include only a single s.145(1) charge (93.7% versus 94.8%) – although these differences were not statistically significant²⁸¹. Next, Table 5.19(a) presents the presence and prevalence of another type of s.145 charge – that of failure to attend court, also referred to as failure to appear charges (s.145(2)).

iii) **Prevalence of s.145(2) Failure to Attend Court Charges²⁸²**

Table 5.19(a): Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.145(2) Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of s.145(2) Charges (Failure to Attend Court)		
			No s.145(2) Charge	s.145(2) Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	126252	9543	135795
		% within Gladue Bail Status	93.0%	7.0%	100.0%
	Gladue	Count	5162	752	5914
		% within Gladue Bail Status	87.3%	12.7%	100.0%
Total		Count	131414	10295	141709
		% within Gladue Bail Status	92.7%	7.3%	100.0%

Fisher’s exact test < .001

²⁸⁰ The same analyses were performed in the event dataset with very similar results: Gladue bail cases in the event dataset were also more likely to have at least one s.145(1) charge on a charging information compared to conventional bail cases ($p < .001$), although the difference was slightly less marked (1.1% versus 0.7%).

²⁸¹ Similarly, the mean number of unlawfully at large charges was very marginally higher for Gladue bail cases than conventional bail cases (0.02 versus 0.01), although this miniscule difference was, in fact, statistically significant ($t = -4.529$; $df = 6165.543$; $p < .001$).

²⁸² The offence of s.145(2) – failure to attend court – is a hybrid offence which occurs when someone does not attend court as directed in an undertaking or recognizance or as directed by a court, judge or justice, and does so without lawful excuse.

			Number of s.145(2) Charges		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	8170	1373	9543
		% within Gladue Bail Status	85.6%	14.4%	100.0%
	Gladue	Count	588	164	752
		% within Gladue Bail Status	78.2%	21.8%	100.0%
Total	Count		8758	1537	10295
	% within Gladue Bail Status		85.1%	14.9%	100.0%

Fisher's exact test < .001

Charges for failure to attend court were somewhat more common than those for being unlawfully at large (present in 7.3% of all bail cases in the person dataset). Notably, bail cases in Gladue Court were more likely (12.7%) than conventional bail court cases (7.0%) to include at least one s.145(2) charge for failure to attend court²⁸³. Specifically, roughly one-in-eight Gladue bail cases (12.7%) included one or more charges for failure to appear in court whereas this charge was present in only roughly one-in-fourteen conventional bail cases (7.0%). Among bail cases with at least one s.145(2) charge, it was not uncommon for these cases to have two or more such charges (14.9%). Furthermore, of those cases with at least one s.145(2) charge, Gladue bail cases (21.8%) were considerably more likely than their conventional bail counterparts (14.4%) to have two or more charges for failing to attend court and less likely to have only a single such charge (85.6% versus 78.2%). Indeed, Gladue Court cases had, on average, 0.17 s.145(2) charges compared to their conventional bail court counterparts which had only half as many, on average – 0.08 s.145(2) charges ($t = -12.393$; $df = 6141.858$; $p < .001$).

In contrast to the significant differences between bail populations in the person dataset, the differences in the prevalence of s.145(2) charges in the event dataset were reduced significantly (Table 5.19(b)). Indeed, in terms of charging informations with at least one s.145(2) charge, while Gladue bail cases (5.5%) in this dataset were still marginally more likely than conventional bail cases (4.3%) to contain two or more s.145(2) charges, this difference was not statistically significant.

²⁸³ The same analysis was performed in the event dataset with similar results: Gladue bail cases in this dataset were also more likely to have at least one s.145(2) charge ($p < .001$) compared to conventional bail cases, although the difference was less marked (8.8% versus 6.4%).

Table 5.19(b): Crosstabulation of Gladue Bail Status by Prevalence of s.145(2) Charges, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of s.145(2) Charges		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	10168	458	10626
		% within Gladue Bail Status	95.7%	4.3%	100.0%
	Gladue	Count	664	39	703
		% within Gladue Bail Status	94.5%	5.5%	100.0%
Total	Count		10832	497	11329
	% within Gladue Bail Status		95.6%	4.4%	100.0%

Fisher's exact test = .124

Overall, it was uncommon (4.4%) for an accused to receive more than one failure to attend court charge on a single charging information. Hence, the greater occurrence of multiple s.145(2) charges in the person dataset is likely the result of accused persons receiving a s.145(2) charge on two or more separate charging informations (i.e., separate event cases) which were merged into a single person-based case. The differences between datasets in terms of cases having two or more s.145(2) charges and the fact that Gladue bail cases were significantly more likely to be among this group suggests that Gladue bail cases were more likely than conventional bail cases to receive a separate s.145(2) charge on two or more occasions. Said differently, among those cases that receive failure to appear charges, this may be more of a chronic issue among Indigenous accused who had their bail heard in Gladue Court.

Next, Table 5.20(a) presents the presence and prevalence of s.145(3) charges for failure to comply with a condition of an undertaking or recognizance. These charges are generally bail breaches and are one of the most common types of charges against the administration of justice. Given that these charges are a direct result of the conditions imposed on individuals who are granted bail, as well as the relatively high incidence of this charge within bail cases, this type of administration of justice charge clearly warrants closer examination. Indeed, what is perhaps most striking about these data is that charges for this type of administration of justice offence were substantially more common than the previous s.145 charges and, as one will see, more common than any other s.145 charge.

iv) Prevalence of s.145(3) Failure to Comply with a Condition of Undertaking or Recognizance Charges²⁸⁴

Table 5.20(a): Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.145(3) Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of s.145(3) Charges (FTC Condition of Undertaking or Recognizance)		
			No s.145(3) Charges	s.145(3) Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	114616	21179	135795
		% within Gladue Bail Status	84.4%	15.6%	100.0%
	Gladue	Count	4536	1378	5914
		% within Gladue Bail Status	76.7%	23.3%	100.0%
Total		Count	119152	22557	141709
		% within Gladue Bail Status	84.1%	15.9%	100.0%

Fisher's exact test < .001

			Number of s.145(3) Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	14941	6238	21179
		% within Gladue Bail Status	70.5%	29.5%	100.0%
	Gladue	Count	948	430	1378
		% within Gladue Bail Status	68.8%	31.2%	100.0%
Total		Count	15889	6668	22557
		% within Gladue Bail Status	70.4%	29.6%	100.0%

Fisher's exact test = .170

Bail breach charges appear to constitute a significant issue or concern within the bail population. Indeed, s.145(3) charges for failure to comply with a condition of a court order (15.9%) were more than twice as likely to be included in a bail case than s.145(2) charges for failure to attend court (7.3% – see Table 5.19(a)). What is more, Gladue bail cases were significantly more likely than their conventional bail counterparts to include one or more s.145(3) charges (23.3% versus 15.6%)²⁸⁵. In other words, almost one-in-four Gladue bail cases contained at least one charge for breaching a condition of bail.

Among cases with bail breach charges, it was fairly common for cases to contain more than a single such breach charge. Yet despite a greater percentage of Gladue bail cases containing at least one s.145(3)

²⁸⁴ During the study timeframe, the offence under s.145(3) of failure to comply with a condition of undertaking or recognizance was a hybrid offence that occurred when someone at large on an undertaking or recognizance failed to comply with (i.e., breached) a condition of that court order without lawful excuse. While nearly all these charges are breaches of bail, this offence also applies when an accused person detained in custody fails to comply with a no-contact order (e.g., for an alleged victim or witness) that was imposed by a judge at the time of detention. Failure to comply with a condition of a release order continues to be an offence, but this offence was revised and moved to s.145(5) of the *Criminal Code* as part of several s.145 amendments in 2019.

²⁸⁵ The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also more likely to have at least one s.145(3) charge compared to conventional bail cases, although the difference between bail populations was smaller (16.9% versus 14.0%; $p < .001$).

charge, among cases with this type of charge, Gladue and conventional bail cases were essentially equally as likely to contain a single s.145(3) charge versus two or more of these charges, as the differences between bail populations were not statistically significant ($p = .170$). However, Gladue bail cases had, on average, 0.37 s.145(3) charges compared to only 0.24 of such charges for conventional bail cases ($t = -10.134$; $df = 6236.030$; $p < .001$). Indeed, the dichotomous prevalence of the s.145(3) variable presented above, with its “2+ charges” category, can be potentially deceptive at times. That is, this broadly-defined, catch-all category risks masking statistically significant differences that exist between bail populations in terms of cases with a moderate or high number of s.145(3) charges²⁸⁶. Finally, the juxtaposition of person and event datasets highlights another important trend regarding the prevalence of failure to comply with a condition of an undertaking or recognizance charges (Table 5.20(b)).

Table 5.20(b): Crosstabulation of Gladue Bail Status by Prevalence of s.145(3) Charges, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of s.145(3) Charges		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	17914	5350	23264
		% within Gladue Bail Status	77.0%	23.0%	100.0%
	Gladue	Count	1090	252	1342
		% within Gladue Bail Status	81.2%	18.8%	100.0%
Total		Count	19004	5602	24606
		% within Gladue Bail Status	77.2%	22.8%	100.0%

Fisher’s exact test < .001

Although among person-based bail cases, Gladue and conventional bail cases were just as likely to have two or more s.145(3) charges, among event-based bail cases, Gladue bail cases were actually less likely than conventional bail cases to have two or more of these charges (18.8% versus 23.0%). Within this context, in order for Gladue bail and conventional bail cases to ultimately have a similar likelihood of two or more s.145(3) charges in the person dataset, these Gladue bail cases would need to have been more likely than their conventional bail counterparts to consist of two or more charging informations (i.e., event cases) with

²⁸⁶ Although somewhat counterintuitive given the differences in the mean number of s.145(3) charges, conventional bail cases had a higher maximum number of bail breach charges (45) compared to Gladue bail cases (29). However, there were differences (in the person dataset) in terms of cases with a single s.145(3) charge, 2-4, and 5+ s.145(3) charges. Indeed, Gladue bail cases in this dataset were not only more likely than conventional bail cases to have 2-4 s.145(3) charges (28.0% versus 26.9%), but also more likely to contain 5+ of these charges (3.2% versus 2.5%). While these differences in this secondary crosstabulation were ultimately not statistically significant ($p = .197$), they may nevertheless help to explain the differences between bail populations in terms of the mean number of s.145(3) charges.

a single s.145(3) charge which were merged into a single person case. Said differently, the juxtaposition of datasets suggests that Gladue bail cases in the person dataset were more likely than their conventional bail counterparts to contain two or more charging informations with a single bail breach charge. As such, while these bail populations may have a similar overall likelihood of having two or more bail breach charges, it seems that conventional bail cases tended to receive two or more charges on the same charging information, whereas Gladue bail cases tended to receive a single breach charge at a time, but on more than one occasion.

While the next several s.145 charges were not as common as bail breach or failure to attend court charges, they nevertheless call attention to interesting trends between bail populations. Tables 5.21 through 5.23 present the presence and prevalence of s.145(4), s.145(5) and s.145(5.1) charges among Gladue bail and conventional bail cases.

v) Prevalence of s.145(4) Failure to Appear or to Comply with a Summons Charges²⁸⁷

Table 5.21: Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.145(4) Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of s.145(4) Charges (FTC Summons)		Total
			No s.145(4) Charges	s.145(4) Charge(s)	
Gladue Bail Status	Non-Gladue	Count	135558	237	135795
		% within Gladue Bail Status	99.8%	0.2%	100.0%
	Gladue	Count	5895	19	5914
		% within Gladue Bail Status	99.7%	0.3%	100.0%
Total		Count	141453	256	141709
		% within Gladue Bail Status	99.8%	0.2%	100.0%

Fisher's exact test = .017

			Number of s.145(4) Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	215	22	237
		% within Gladue Bail Status	90.7%	9.3%	100.0%
	Gladue	Count	17	2	19
		% within Gladue Bail Status	89.5%	10.5%	100.0%
Total		Count	232	24	256
		% within Gladue Bail Status	90.6%	9.4%	100.0%

Fisher's exact test = .695

²⁸⁷The offence of failure to comply with a summons under s.145(4) occurs when someone who has been served a summons under the *Identification of Criminals Act* fails, without lawful excuse, to appear at a specified date and location for the purposes of identification, or to attend court in accordance therewith. The *Identification of Criminals Act* allows peace officers to summon accused or convicted individuals in specific circumstances to attend an appointment for the purpose of identification (namely, fingerprinting and photographing). Failure to comply with this summons continues to be an offence in the *Criminal Code*, although in 2019 this offence was amended to include failure to comply with an appearance notice for the purpose of the *Identification of Criminals Act* (previously a separate offence under s.145(5)).

Charges under s.145(4) for failure to comply with a summons were quite rare. This is perhaps unsurprising given that a prerequisite for this charge is to have been summoned for identification purposes under the *Identification of Criminals Act*. Although rare, Gladue bail cases in the dataset were very marginally more likely than conventional bail court cases to have one or more s.145(4) charges (0.3% versus 0.2%)²⁸⁸. Although these miniscule differences were statistically significant, the scale of these (non-) differences would suggest that they are not very meaningful in practice. Further, the average number of these charges in a case were not only miniscule, but virtually identical – 0.004 charges compared to 0.002 charges – with this difference not statistically significant ($t = -1.907$; $df = 6197.359$; $p = .057$). Of cases with one or more 145(4) charges, roughly one-in-ten (9.4%) contained two or more of these charges. Of these cases, Gladue bail cases were marginally more likely to have two or more s.145(4) charges than conventional bail cases (10.5% versus 9.3%), although the differences were, again, not statistically significant²⁸⁹.

vi) Prevalence of s.145(5) Failure to Comply with Appearance Notice or Promise to Appear Charges²⁹⁰

Table 5.22: Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.145(5) Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of s.145(5) Charges (FTC Appearance Notice or Promise to Appear)		
			No s.145(5) Charges	s.145(5) Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	132062	3733	135795
		% within Gladue Bail Status	97.3%	2.7%	100.0%
	Gladue	Count	5783	131	5914
		% within Gladue Bail Status	97.8%	2.2%	100.0%
Total		Count	137845	3864	141709
		% within Gladue Bail Status	97.3%	2.7%	100.0%

Fisher's exact test = .014

²⁸⁸ The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also marginally more likely to have at least one s.145(4) charge ($p = .034$) compared to conventional bail cases.

²⁸⁹ Although there was one low expected frequency in this table (minimum value 1.8), the Fisher's exact test used for this analysis was specifically designed to function with small cell counts. Thus, the concern with an expected count of less than five which applies to chi-square analyses does not apply to the Fisher's exact test (Williams, 2009).

²⁹⁰ The hybrid offence under s.145(5) for failure to comply with an appearance notice or promise to appear occurs when someone who has been named in an appearance notice, promise to appear or police recognizance fails, without lawful excuse, to appear at a specified date and location for the purposes of identification under the *Identification of Criminals Act*, or to attend court in accordance therewith. This offence is similar to s.145(4) in that they both relate to failing to appear for identification purposes laid out in the *Identification of Criminal Act*. Failure to comply with an appearance notice continues to be an offence in the *Criminal Code*, although in 2019 it was combined with failure to comply with a summons for the purpose of the *Identification of Criminals Act*.

			Number of s.145(5) Charges		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	3014	719	3733
		% within Gladue Bail Status	80.7%	19.3%	100.0%
	Gladue	Count	93	38	131
		% within Gladue Bail Status	71.0%	29.0%	100.0%
Total	Count		3107	757	3864
	% within Gladue Bail Status		80.4%	19.6%	100.0%

Fisher's exact test = .010

Charges for s.145(5) failure to comply with an appearance notice or promise to appear were another uncommon charge against the administration of justice (present in only 2.7% of all bail cases). However, this is notably the first time that a specific s.145 charge has had a lower – albeit only marginally lower – probability of being included in Gladue bail cases compared to conventional bail cases (2.2% versus 2.7%)²⁹¹. However, of cases with one or more s.145(5) charges, Gladue bail cases were somewhat more likely to contain two or more of these charges compared to conventional bail cases (29.0% versus 19.3%)²⁹². The different direction of these trends appears to combine in such a way that Gladue bail cases and conventional bail cases had a virtually identical average number of s.145(5) charges (0.030 versus 0.034; $t = -1.142$; $df = 141707$; $p = .253$).

vii) Prevalence of s.145(5.1) Failure to Comply with Undertaking (s.499(2) or 503(2.1)) Charges²⁹³

Table 5.23: Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.145(5.1) Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of s.145(5.1) Charges (FTC Undertaking s.499(2) or 503(2.1))		Total
			No s.145(5.1) Charges	s.145(5.1) Charge(s)	
Gladue Bail Status	Non-Gladue	Count	132999	2796	135795
		% within Gladue Bail Status	97.9%	2.1%	100.0%
	Gladue	Count	5837	77	5914
		% within Gladue Bail Status	98.7%	1.3%	100.0%
Total	Count		138836	2873	141709
	% within Gladue Bail Status		98.0%	2.0%	100.0%

Fisher's exact test < .001

²⁹¹ The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also marginally less likely than conventional bail cases to have at least one s.145(5) charge ($p < .001$).

²⁹² Notably, when this analysis was performed in the event dataset there were no statistically significant differences between bail populations in terms of cases with one versus two or more such charges ($p = .129$). This suggests that, of person cases with at least one s.145(5) charge, Gladue bail cases were more likely than conventional bail cases to have these charges originating from two or more charging informations – such that the differences between bail populations only became statistically significant in the person dataset.

²⁹³ The hybrid offence under s.145(5.1) of failure to comply with undertaking (s.499(2) or 503(2.1)) occurs when someone fails, without lawful excuse, to comply with an undertaking entered into pursuant to s.499(2) or 503(1) of the *Criminal Code*. An undertaking under s.499(2) can be given to an individual who is released from police custody following an arrest with a warrant, whereas an undertaking under s.503(1) applies more broadly to arrested individuals who are released by police. This specific offence was repealed in 2019 (i.e., following the study timeframe).

			Number of s.145(5.1) Charges		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	2326	470	2796
		% within Gladue Bail Status	83.2%	16.8%	100.0%
	Gladue	Count	60	17	77
		% within Gladue Bail Status	77.9%	22.1%	100.0%
Total	Count		2386	487	2873
	% within Gladue Bail Status		83.0%	17.0%	100.0%

Fisher's exact test = .219

Similar to s.145(5) charges above, charges for s.145(5.1) were also quite uncommon among bail cases in general (2.0%) and even less common among Gladue bail cases. Indeed, Gladue Court bail cases were – for only the second time in this examination of administration of justice charges – less likely than conventional bail court cases (1.3% versus 2.1%) to have at least one s.145(5.1) charge for failure to comply with an undertaking pursuant to s.499(2) or 503(2.1). Moreover, Gladue bail cases had an average of 0.02 s.145(5.1) charges compared to conventional bail cases with 0.03 of these charges – a rather trivial, albeit statistically significant, difference ($t = 4.452$; $df = 6860.569$; $p < .001$). Of cases with at least one s.145(5.1) charge, Gladue bail cases in the dataset were more likely to have two or more of these charges compared to conventional bail cases (22.1% versus 16.8%), however these differences were not statistically significant²⁹⁴.

The final charge against the administration of justice examined in this section is failure to comply with a probation order – or breach of probation – an offence under s.733.(1) of the *Criminal Code*. Table 5.24(a) presents the presence and prevalence of breach of probation charges.

viii) Prevalence of s.733.1(1) Failure to Comply with Probation Charges²⁹⁵

Notably, s.733.1(1) charges for failing to comply with a probation order were actually the most common specific charge against the administration of justice, present in 18.6% of all bail cases and therefore exceeding the presence of s.145(3) bail breach charges (15.9%) (although still less common than all s.145

²⁹⁴ The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also very marginally less likely than conventional bail cases to have at least one s.145(5) charge ($p < .001$). Of cases with one or more s.145(5.1) charges, there were also no statistically significant differences between bail populations in terms of cases with only a single versus two or more s.145(5.1) charges ($p = .486$).

²⁹⁵ The offence of s.733.1(1) for failure to comply with a probation order is a hybrid offence that occurs when someone who is bound by a probation order fails to comply with that order without lawful excuse. Hence a criminal history is necessarily a prerequisite for this charge, as an accused must have been convicted of a previous offence and sentenced to a term of probation in order for this charge to be laid.

charges combined). The prevalence of breach of probation charges compared to other administration of justice charges may be partially explained by the fact that individuals can be subject to the conditions of a probation order for up to three years, whereas accused on bail tend to be subject to bail conditions for a shorter period of time (e.g., only 30.3% of accused granted bail were still awaiting case resolution a year after completing the bail process – see Table 5.31(b) below).

Table 5.24(a): Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.733.1(1) Charges, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of s.733.1(1) Charges (Failure to Comply with Probation)		
			No s.733.1(1) Charges	s.733.1(1) Charge(s)	Total
Gladue Bail Status	Non-Gladue	Count	111437	24358	135795
		% within Gladue Bail Status	82.1%	17.9%	100.0%
	Gladue	Count	3960	1954	5914
		% within Gladue Bail Status	67.0%	33.0%	100.0%
Total		Count	115397	26312	141709
		% within Gladue Bail Status	81.4%	18.6%	100.0%

Fisher's exact test < .001

			Number of s.733.1(1) Charges		
			1	2+	Total
Gladue Bail Status	Non-Gladue	Count	17248	7110	24358
		% within Gladue Bail Status	70.8%	29.2%	100.0%
	Gladue	Count	1184	770	1954
		% within Gladue Bail Status	60.6%	39.4%	100.0%
Total		Count	18432	7880	26312
		% within Gladue Bail Status	70.1%	29.9%	100.0%

Fisher's exact test < .001

More importantly for this study's purposes, bail cases from Gladue Court were significantly more likely – in fact, almost twice as likely – to include at least one s.733(1) charge for failure to comply with probation compared to cases processed entirely in conventional bail courts (33.0% versus 17.9%)²⁹⁶. In other words, almost a full third of Gladue bail cases contained one or more charges for breaching probation, whereas just over a sixth of conventional bail cases contained this charge. As with the bail population generally, s.733.1(1) charges were also the most common administration of justice charge among Gladue bail cases specifically (and only slightly less common than all s.145 charges combined – Table 5.17(a)). Additionally, Gladue bail

²⁹⁶ The same analyses were performed in the event dataset with similar results: Gladue bail cases in the event dataset were also considerably more likely than conventional bail cases to have at least one s.733.1(1) charge on a charging information ($p < .001$), although the differences between bail populations were slightly less marked (26.9% versus 15.8%). This change in the degree of divergence would suggest that, in terms of broader person-based bail cases, Gladue cases were more likely than conventional bail cases to consist of charges from two or more charging informations (at least one of which included one or more s.733.1(1) charges).

cases had an average of 0.63 breach of probation charges compared to conventional bail cases with less than half as many – 0.29 – of these charges on average ($t = -17.631$; $df = 6213.300$; $p < .001$). Notably, this mean – while reasonably small – reflects the greatest occurrence of any specific administration of justice charge among Gladue bail cases. In fact, the average number of probation breach charges for Gladue bail cases was slightly greater than that for all s.145 charges combined (0.63 versus 0.61 charges).

Moreover, of bail cases with at least one breach of probation charge, close to one third (29.9%) received two or more of these charges. Of these cases, Gladue bail cases were, again, considerably more likely than conventional bail cases to have two or more of these charges (39.4% versus 29.2%) and less likely to have only a single breach of probation charge (60.6% versus 70.8%). When one considers that this is the most frequently occurring charge against the administration of justice, the large difference in prevalence between Gladue and conventional bail cases takes on even greater relevance.

Notably, the differences between these bail populations in terms of the prevalence of s.733.1(1) charges were considerably larger in the person dataset (39.4%-29.2% = 10.2%) than in the event dataset (26.8%-22.8% = 4.0%; Table 5.24(b)). Indeed, when one considers cases with one or more breach of probation charges in the event dataset, Gladue bail cases were only slightly more likely than conventional bail cases to have two or more of these charges²⁹⁷. This suggests that Gladue bail cases in the person dataset were more likely than conventional bail cases to be comprised of multiple charging informations with a s.733.1(1) charge.

Table 5.24(b): Crosstabulation of Gladue Bail Status by Presence and Prevalence of s.733.1(1) Charges, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of s.733.1(1) Charges		Total
			1	2+	
Gladue Bail Status	Non-Gladue	Count	20145	5951	26096
		% within Gladue Bail Status	77.2%	22.8%	100.0%
	Gladue	Count	1569	573	2142
		% within Gladue Bail Status	73.2%	26.8%	100.0%
Total	Count		21714	6524	28238
	% within Gladue Bail Status		76.9%	23.1%	100.0%

Fisher's exact test < .001

²⁹⁷ Note that for cases with two or more probation breaches on a charging information, this would likely reflect the alleged breach of two or more distinct conditions of probation.

Breach of probation charges seem to be a significant issue among bail cases generally and Gladue bail cases, in particular. Although these charges stem from a previously imposed sentence rather than directly from interim release (such as with s.145 charges), they nevertheless appear to be quite relevant to bail. That is, a charge of failure to comply with a probation order might be considered analogous to one for failure to comply with a bail order, such that these charges may be viewed as indicative of an accused person's willingness or ability to comply with any conditions that might be imposed on them as part of a potential bail order. Indeed, *any* charge against the administration of justice might be construed by judicial officers and legal practitioners as a sign of future compliance, or rather defiance (although perhaps more accurately a reflection of genuine difficulties in complying), and consequently a potential risk for bail release. Within this context, Table 5.25 presents a summary of the number and percentage of bail cases with each specific type of administration of justice charge explored in this section for bail cases generally, as well as Gladue bail and conventional bail cases separately.

Table 5.25: Summary Table of the Presence of Specific Charges against the Administration of Justice, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)²⁹⁸

Type of Charge against the Administration of Justice	All Bail Cases		Conventional Bail Cases		Gladue Bail Cases	
	Count	%	Count	%	Count	%
s.145(1) – Unlawfully at Large	1,236	0.9%	1,141	0.8%	95	1.6%
s.145(2) – FTA Court	10,295	7.3%	9,543	7.0%	752	12.7%
s.145(3) – FTC Condition of Release	22,557	15.9%	21,179	15.6%	1,378	23.3%
s.145(4) – FTA/FTC Summons	256	0.2%	237	0.2%	19	0.3%
s.145(5) – FTC Appearance Notice or Promise to Appear	3,864	2.7%	3,733	2.7%	131	2.2%
s.145(5.1) – FTC Undertaking (s.499(2) or 502(2.1))	2,873	2.0%	2,796	2.1%	77	1.3%
s.733.1(1) – FTC Probation	26,312	18.6%	24,358	17.9%	1954	33.0%

²⁹⁸ This table presents the percentage of bail cases that contained at least one charge for each of these specific administration of justice offences. Recall that the presence of each charge against the administration of justice in this table is not mutually exclusive. That is, a single bail case could have more than one of these types of administration of justice charges. Hence, if one were to sum the percentage of cases from each bail population that included at least one of each type of charge, these figures would exceed the percentage of cases with one or more administration of justice charge from Table 5.12. Illustratively, the Gladue bail and conventional bail figures in this table sum 74.5% (versus 60.6% in Table 5.12) and to 46.4% (versus 44.2% in Table 5.12). Notably, the much greater disparity between Tables 5.12 and 5.25 for the Gladue bail population (74.5%-60.6% = 13.9%) compared to the conventional bail population (46.4%-44.2% = 2.2%) suggests that Gladue bail cases are considerably more likely than the latter to contain charges from two or more of the specific types of administration of justice offences included in these analyses.

Overall, among bail cases in Old City Hall and College Park courthouses, the most common types of charges against the administration of justice were failure to comply with probation (26,312 cases or 18.6% of the total caseload), failure to comply with a condition of a release order/bail (22,557 cases or 15.9% of the total caseload) and, to a lesser extent, failure to attend court (10,295 cases or 7.3% of the total caseload)²⁹⁹. While these charges were common in the bail population generally, they were even more common among Gladue bail cases in particular (although their ranking remained the same). Specifically, in the Gladue bail population, roughly one third of cases (33.0%) included breach of probation charges, nearly one quarter of cases (23.3%) included breach of bail charges and about one eighth of cases (12.7%) included failure to attend court charges. Given the frequency of these charges, it is likely that criminal justice professionals are regularly deliberating the implications and perceived risks associated with these types of charges when contemplating issues of bail.

Notably, two of the three most common types of administration of justice charges – breaching a condition of a court order and failing to attend court – are charges which often stem from the bail process, as well as court processing more generally. Indeed, charges for breaching a condition of bail may only be laid when someone is alleged to have failed to comply with a condition of their judicial interim release order. Hence, the number and types of conditions imposed at bail, as well as the length of time for which someone is subject to bail conditions (while their case is being processed), will necessarily affect the occurrence of these charges. Furthermore, charges for failing to attend court are only possible while there is an active court case against someone, with the likelihood of these charges arguably increasing as the number of required court appearances increases. Said differently, some of the most common types of administration of justice charges not only pose a challenge to bail release, but actually stem (directly and indirectly) from the bail process and court process more generally. Given the greater prevalence of administration of justice charges among Gladue bail cases than conventional bail cases, these charges may represent a particularly important area for intervention when seeking to reduce the overincarceration of Indigenous peoples in Canadian

²⁹⁹ Notably, all other types of s.145 charges examined were relatively rare – present in less than 3.0% of total bail cases as well as both Gladue bail and conventional bail sub-groups.

remand and sentenced custody. In light of the potential role that bail processes and post-bail court procedures may be playing in the production of charges against the administration of justice, a thorough examination of case processing variables – both at the bail stage and following bail – is warranted.

5.2.4 – Bail Processing

Case processing variables offer valuable insights into court operations. These variables provide important information about how courts manage their caseloads as well as the time and resources required to move court cases through the various phases of the criminal court process. Moreover, case processing variables are often used as a means of assessing court efficiency and examining whether there are parts of the court process which may be contributing to issues of court delay. Particularly for bail cases, for which the accused is generally either detained in remand custody or, if released, typically subjected to (potentially onerous) bail conditions while awaiting case resolution, these types of factors take on particular significance. That is, extensive or lengthy bail processing, or case processing more generally, run the risk of exacerbating the challenges that accused persons often experience while awaiting case resolution and further increase the likelihood of subsequent administration of justice charges (e.g., for breaching bail or failing to attend court). This section analyzes bail processing variables, including measures of bail efficiency as well as bail outcomes. Data are presented primarily for the event dataset, which is comprised of the greatest number of distinct bail phases (compared to the person dataset in which some bail phases in multi-information cases would inevitably be masked).

One common method of assessing the effectiveness of bail courts is to examine the number of bail appearances and time required for a case to complete the bail process. Tables 5.26(a) and 5.26(b) therefore present the number of (first) bail appearances required for cases to complete the bail process while Tables 5.27(a) and 5.27(b) present the time required for bail cases to complete the (first) bail process³⁰⁰.

³⁰⁰ Recall that the bail data presented in this thesis are generally for the first bail phase on record in a case's processing history (see footnote 213), unless noted otherwise.

i) Number of Appearances in (First) Bail³⁰¹

Table 5.26(a): Crosstabulation of Gladue Bail Status by Number of (First) Bail Appearances, Old City Hall and College Park Bail Cases (Event Dataset³⁰²; 2006-2017)

			Number of (First) Bail Appearances					
			1	2	3-4	5-7	8+	Total
Gladue Bail Status	Non- Gladue	Count	66426	47673	36051	11946	3518	165614
		% within Gladue Bail Status	40.1%	28.8%	21.8%	7.2%	2.1%	100.0%
	Gladue	Count	1262	2976	2702	772	238	7950
		% within Gladue Bail Status	15.9%	37.4%	34.0%	9.7%	3.0%	100.0%
Total		Count	67688	50649	38753	12718	3756	173564
		% within Gladue Bail Status	39.0%	29.2%	22.3%	7.3%	2.2%	100.0%

Chi-square = 1935.219; df = 4; $p < .001$

Gladue bail cases notably required more court appearances to complete the bail process than cases processed in conventional bail courts. Indeed, Gladue cases took an average of 2.91 appearances (median = 2; SD = 2.02) to complete the bail process compared to conventional bail cases which took an average of 2.33 appearances (median = 2; SD = 1.84) ($t = -25.415$; df = 8593.390; $p < .001$)³⁰³. Examining the distribution of bail appearances sheds additional light on these differences. Most notably, bail cases from Gladue court were much less likely than those from conventional bail court to complete the bail process in only a single bail

³⁰¹ This variable measures the number of bail appearances on record for the first – and often only – bail phase for a charge or set of charges. It is based on a MAG variable which measures the number of bail appearances for a charge's first bail, with a minor modification (recommended by Professor Anthony Doob) to cases that had a first bail appearance recorded one to seven days after the first court appearance on record. Specifically, these cases were likely to undercount bail appearances, as the first appearance on record would have almost certainly also been a bail appearance, but due to administrative constraints on court clerks' inputting options, this appearance was recorded as a 'first court appearance' rather than a bail appearance. For this specific group of cases, an additional bail appearance was added.

³⁰² Data are presented for the event dataset, for which all charges on a charging information would almost certainly have the same number of bail appearances for the first bail phase in case processing. Indeed, this variable becomes considerably more complex for the person dataset, for which each charging information would have likely initiated a separate bail process. In these instances, the charge with the greatest number of (first) bail appearances would have had its value carried forward for the entire person case, such that the person dataset would somewhat overestimate the length of bail processing. Further, recall that for person cases (and to a lesser extent event cases), it was not possible to pinpoint which bail appearances occurred in Gladue Court. Within this context, one could not know with certainty that the number of appearances on record for multi-information cases would reflect a bail phase that was, in fact, carried out at least partly in Gladue Court. Given the limitations of the person dataset with regard to the Number of (First) Bail Appearances variable, findings are presented only for the event dataset.

³⁰³ Notably, while the average number of bail appearances for Gladue bail cases was greater than that for conventional bail appearances, the medians were identical, at 2 appearances. In other words, at least 50% of cases in both bail populations completed the bail process in two appearances or fewer. The differences between Gladue bail and conventional bail cases, then, reside primarily in the 'top half' of each population. Indeed, the fact that Gladue bail cases were more likely than conventional bail cases to have eight or more bail appearances suggests that a relatively small number of cases with many bail appearances in the Gladue bail population may be contributing to the differences in the average (but not median) number of bail appearances required for each bail population to complete the bail process.

appearance (15.9% versus 40.1%). Furthermore, Gladue bail cases were considerably more likely than their conventional bail counterparts to require multiple bail appearances.

Despite these initial findings, recall that many Indigenous accused will have had their first bail appearance in conventional bail court, often as a result of limited Gladue Court schedules. Combined with the knowledge that first bail appearances often result in Crown consent releases, some Indigenous accused would almost certainly be released from conventional bail courts before referral to Gladue Court could be practically carried out. This suggestion appears to be supported by the finding that 40.1% of cases in conventional bail court required only one bail appearance compared to only 15.9% of Gladue bail cases. Since some Indigenous accused would inevitably appear in the dataset as conventional bail cases released in a single appearance, some of the apparent differences above may be reflective of the Gladue Court scheduling and referral processes, rather than an individual's choice of bail setting. While the sheer number of cases in the conventional bail population means that the presence of a comparatively small number of Indigenous cases would almost certainly not change these findings in any meaningful way, one might expect the much smaller Gladue bail population to be more affected by the absence of these prospective cases (which might have been heard in Gladue Court if it was available). In this sense, some of the differences in this single appearance category might be considered partially constructed by court structure and processes. Nevertheless, the size of this difference is large enough that it is unlikely to be entirely artificially created, but instead, is likely to reflect a real difference between Gladue bail and conventional bail cases (albeit on a smaller scale).

In light of the possibility that Table 5.26(a) may obfuscate differences between Gladue bail cases and conventional bail cases, additional analyses were carried out. Table 5.26(b) largely overcomes this earlier limitation by examining the number of bail appearances for only those cases that required two or more bail appearances. This approach has both advantages and limitations. Focusing on cases with two or more bail appearances has the advantages of: 1) examining more comparable groups (in that the least serious cases,

which would have likely been deemed suitable for same day release³⁰⁴, have been removed from both populations); and 2) being a closer approximation of Indigenous and non-Indigenous accused (in that the potentially non-trivial number of Indigenous accused appearing as non-Gladue cases in the single bail appearance category have been removed)³⁰⁵. Consequently, any differences between Gladue bail and conventional bail cases in Table 5.26(b) would be unlikely to be artificially constructed due to court structure and scheduling. Instead, any differences in this table would be more likely to reflect genuine differences between cases heard exclusively in conventional bail court and comparable cases whose accused person *chose* to have their bail heard in Gladue Court.

However, these supplementary analyses are not without limitations. Notably, these findings describe what might be generally considered more serious cases and/or ‘riskier’ accused (given that single bail appearance cases were most often bail releases, primarily by Crown consent). Hence the cases in these supplementary analyses, while more comparable, are not representative of all bail cases processed in the selected courthouses. While these analyses are useful for the examination of case processing variables in that they shed light on how Gladue Courts and conventional bail courts process what are arguably non-simple, more complex bail cases, they are less suitable for other variables. It is important that any analyses of cases with two or more bail appearances be interpreted within this more restricted context and with an understanding of how caseloads for both bail populations would be affected by the removal of single bail appearance cases.

³⁰⁴ Indeed, study findings from Table 5.28(d) show that 41,462 bail releases occurred in a single bail appearance. This figure represents 61.25% of all 67,688 single bail appearance cases (Table 5.26(a)) and indicates that same day bail releases are by far the most common outcome of single bail appearance cases. Yet the second most common bail outcome for cases with only a single bail appearance was informal remand (for accused who effectively waive their right to bail) – which represented 21.96% of these cases (14,864/67,688*100 – see Appendix J). This suggests that while the majority of single bail appearance cases would likely be considered a low risk for release, this is not necessarily the case for all single bail appearance cases.

³⁰⁵ While Table 5.26(b) reflects a closer approximation to cases with Indigenous and non-Indigenous accused, it is important to remember that these and subsequent analyses focus primarily on the ways in which bail cases are processed in two different *court settings*. In other words, these bail analyses are less comparisons of Indigenous and non-Indigenous accused than they are comparisons between two types of bail courts (albeit each with largely unique caseloads). Hence, one should remain mindful that a greater number of factors are at play in these analyses than simply the Indigeneity of an accused person.

Table 5.26(b): Crosstabulation of Gladue Bail Status by Number of (First) Bail Appearances, Old City Hall and College Park Bail Cases (2+ Bail Appearances Only; Event Dataset; 2006-2017)

			Number of (First) Bail Appearances				Total
			2	3-4	5-7	8+	
Gladue Bail Status	Non-Gladue	Count	47673	36051	11946	3518	99188
		% within Gladue Bail Status	48.1%	36.3%	12.0%	3.5%	100.0%
	Gladue	Count	2976	2702	772	238	6688
		% within Gladue Bail Status	44.5%	40.4%	11.5%	3.6%	100.0%
Total	Count		50649	38753	12718	3756	105876
	% within Gladue Bail Status		47.8%	36.6%	12.0%	3.5%	100.0%

Chi-square = 46.104; df = 3; $p < .001$

Notably, differences between Gladue bail and conventional bail cases in terms of the number of bail appearances were reduced almost entirely when examining only those cases with two or more bail appearances³⁰⁶. Indeed, these Gladue cases took an average of 3.27 appearances (median = 3; SD = 2.01) to complete bail compared to their conventional bail counterparts whose average was only marginally smaller, at 3.21 appearances (median = 3; SD = 1.92) ($t = -2.489$; $df = 105874$; $p = .013$). In terms of case distribution, although differences between Gladue bail and conventional bail cases remained statistically significant, they also shrank considerably and are no longer trending in any one direction. Specifically, Gladue bail cases became slightly less likely than conventional bail cases to complete the bail process in only two bail appearances (44.5% versus 48.1%)³⁰⁷ but somewhat more likely than their counterparts to complete the bail

³⁰⁶ In light of the significant impact that the elimination of single bail appearance cases had on the distribution of cases in terms of the number of required bail appearances, similar analyses were performed for all case characteristic variables explored above. However, the removal of single bail appearance cases had a very limited effect on the case composition of Gladue and conventional bail cases. Generally, any changes in case distributions were less than 3.0%, with differences between bail populations remaining in the same direction and with no changes to statistical significance. While there were a few variables that were slightly more affected by the elimination of single bail appearance cases – notably for the presence of certain charges against the administration of justice and/or against the person – these changes were still quite modest (< 5.0%). For these variables, differences between the two bail populations generally diminished, with the greatest changes occurring in the conventional bail group. Specifically, the marginal differences that existed between bail populations in terms of the presence of violent charges (Table 5.11) and the presence of a weapons possession charge as the most serious charge in a case (Table 5.14(a)) were no longer statistically significant while the differences between bail groups in terms of the presence of any s.145 charges (Table 5.17(a)) and the presence of s.145(3) charges (Table 5.20(a)) diminished somewhat, but remained statistically significant. These modest changes support the theory that seemingly less complex cases (i.e., those without certain violent charges or administration of justice charges) were being released on same-day consent from conventional bail courts (potentially including some Indigenous accused). These changes also highlight the fact that differences the charge packages of Gladue bail and conventional bail cases seem to be rooted less in charges of violence or weapons, and more in charges against the administration of justice.

³⁰⁷ It is nevertheless possible that this minor difference might still be constructed – at least in some small way – as a result of the limited Gladue sitting schedule. Although one would expect court scheduling to have the greatest effect on single-appearance cases, it is possible that a limited number of two-appearance cases in the conventional bail group

process in three to four bail appearances (40.4% versus 36.3%). Gladue bail cases were also marginally less likely than their conventional bail counterparts to require five to seven bail appearances (11.5% versus 12.0%) but essentially just as likely to require eight or more bail appearances (3.6% versus 3.5%).

In sum, the differences between court types diminished substantially when examining only those (likely more complex) bail cases with two or more appearances, with remaining differences existing primarily among cases with shorter case processing. The similarly small proportion of cases requiring lengthy bail processing in both Gladue and conventional courts may reflect similarly complex or serious cases, such that bail preparations are necessarily lengthy, regardless of court type. Hence, bail court type does not appear to have a notable impact on cases requiring numerous court appearances. In contrast, it seems that bail court type does make some small difference for what one might presume to be less complex (although not same-day consent release) cases. For these cases, a slightly greater number of appearances were required to complete bail in Gladue Court than in conventional bail court, perhaps owing to additional efforts being made to develop appropriate release plans and liaise with community supports.

While examining the number of bail appearances is one method of assessing the efficiency and effectiveness of bail court, this variable is often explored in conjunction with the length of time required to complete this process. Indeed, a case might complete the bail process in relatively few bail appearances, but could have taken considerable time between appearances, such that bail processing was actually quite lengthy. Particularly within the context of Gladue Courts and their limited schedules, it would be especially important to assess whether bail cases in these courts were taking a greater number of days to complete the bail process compared to those processed entirely in conventional bail courts. Indeed, Tables 5.27(a) and 5.27(b) present the time that Gladue bail and conventional bail cases spent completing their (first) bail phase. Overall, these analyses reveal similar trends to those for the number of bail appearances – as well as some notable differences.

had an Indigenous accused who might have preferred to have their bail heard in Gladue Court, but who chose to proceed with a second appearance in conventional bail court rather than wait one or more days for Gladue Court to sit next.

ii) Time Spent in (First) Bail^{308,309}

Table 5.27(a): Crosstabulation of Gladue Bail Status by Time Spent in (First) Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Time Spent in (First) Bail					Total
			Single Day	2 Days	3-8 Days	9-15 Days	16+ Days	
Gladue Bail Status	Non-Gladue	Count	67922	21268	48819	13357	14231	165597
		% within Gladue Bail Status	41.0%	12.8%	29.5%	8.1%	8.6%	100.0%
	Gladue	Count	1341	873	3450	1144	1142	7950
		% within Gladue Bail Status	16.9%	11.0%	43.4%	14.4%	14.4%	100.0%
Total	Count		69263 ³¹⁰	22141	52269	14501	15373	173547
	% within Gladue Bail Status		39.9%	12.8%	30.1%	8.4%	8.9%	100.0%

Chi-square = 2265.046; df = 4; $p < .001$

Most notably, bail cases appearing in Gladue Court tended to take longer to complete the bail process than conventional bail cases. Indeed, bail cases that appeared in Gladue Court took an average of 9.42 days (median = 5; SD = 16.77 days) to complete bail compared to only 6.05 days on average (median = 2; SD = 12.80 days) for cases processed in conventional bail court ($t = -17.647$; $df = 8399.596$; $p < .001$). Furthermore, Gladue bail cases were substantially less likely than conventional bail court cases to complete the bail process in a single day (16.9% versus 41.0%)³¹¹ and, to a lesser extent, even in two days (11.0% versus 12.8%). Instead,

³⁰⁸ This variable measures the number of days that elapsed during the first (and often only) bail phase for a charge or set of charges. It was produced by calculating the difference, in days, between the date of the first court appearance and the end date of the first bail phase, then adding one so that same day bail cases = 1 day in bail, etc. Charges were aggregated using the maximum value for a case. Although charges on the same charging information would generally have the same value for this variable, should there be any instances of different bail end dates (imagining, for instance, that one charge on an information was dropped before the rest of the charges had been dealt with in bail), the maximum value (i.e., greatest difference in days) was carried forward to represent the entire case. Methodological issues exist for this variable in the person dataset (similar to those outlined for the number of appearances in (first) bail variable above) and, consequently, results are presented only for the event dataset.

³⁰⁹ Recall that cases coded as spending more than a year in the bail process (i.e., 366 days or greater; 0.0% (N = 27) of the event dataset) were considered outliers. Even just a few extreme scores could easily skew mean values and inflate standard deviations and, as such, these scores were removed from all analyses of this variable.

³¹⁰ An attentive reader might again note that the number of cases that completed bail in a single day is slightly larger than the number of cases completed in a single appearance. See footnote 215 for discussion and possible explanations for this curious general trend. That differences are greater in the Gladue bail population (1262 “1 appearance” cases / 1341 “single day” cases = 94.1% versus 66426/67922 = 97.8%) suggests that some single-day Gladue bail cases would have likely had a first bail appearance in conventional bail court, followed by a second bail appearance in Gladue Court (potentially after learning about Gladue Court during or after their conventional bail appearance).

³¹¹ Note, however, that some of these apparent differences in time spent in bail are, again, likely to be a partial reflection of Gladue Court scheduling and referral processes (rather than an individual’s choice of bail setting). As with the number of bail appearances, some of the differences in the “single day” category might be considered partially artificially constructed by court structure and processes, in that some Indigenous accused would almost certainly be released from conventional bail court in a single day (prior to a potential referral to Gladue Court).

bail cases in Gladue Court were more likely than their conventional bail counterparts to take three to eight days (43.4% versus 29.5%), nine to 15 days (14.4% versus 8.1%) or 16 or more days (14.4% versus 8.6%) to complete bail. However, given the limited availability of Gladue Court and the processes through which bail cases are referred to this court, these results are not entirely surprising. Yet it is worth re-examining this variable for only those cases which took two or more days to complete bail such that single day consent releases (and Indigenous accused who were released in conventional bail court on their first and only day in bail) are eliminated (Table 5.27(b)).

Table 5.27(b): Crosstabulation of Gladue Bail Status by Time Spent in (First) Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Days in Bail; 2006-2017)

			Time Spent in (First) Bail				Total
			2 Days	3-8 Days	9-15 Days	16+ Days	
Gladue Bail Status	Non-Gladue	Count	21268	48819	13357	14231	97675
		% within Gladue Bail Status	21.8%	50.0%	13.7%	14.6%	100.0%
	Gladue	Count	873	3450	1144	1142	6609
		% within Gladue Bail Status	13.2%	52.2%	17.3%	17.3%	100.0%
Total		Count	22141	52269	14501	15373	104284
		% within Gladue Bail Status	21.2%	50.1%	13.9%	14.7%	100.0%

Chi-square = 309.618; df = 3; $p < .001$

When considering only cases which took two or more days to complete the bail process, the scale of the differences between Gladue bail and conventional bail decreased – an expected shift given that the greatest differences were located in the single category. Indeed, Gladue bail cases whose bail process took two or more days required an average of 11.12 days (median = 6; SD = 17.92) compared to their conventional bail counterparts which required an average of 9.56 days (median = 5; SD = 15.74) ($t = -6.905$; df = 7314.774; $p < .001$). Yet, the overall pattern in case distribution remained similar. Indeed, Gladue bail cases continued to be considerably less likely than conventional bail cases (13.2% versus 21.8%) to complete the bail process in two days. In contrast, these Gladue bail cases were slightly more likely than their conventional bail counterparts to complete bail in three to eight days (52.2% versus 50.0%) and somewhat more likely to complete bail in nine to 15 days (17.3% versus 13.7%) or 16 days or greater (17.3% versus 14.6%). Hence, even after removing single day cases, Gladue bail cases continued to take longer to resolve bail.

Interestingly, although the differences in the number of bail *appearances* between Gladue bail and conventional bail cases disappeared almost entirely once single appearance cases were removed (although

minor differences were still statistically significant – see Table 5.26(b)), the differences in the *time* spent to complete the bail process were only somewhat reduced after single day bail cases were removed (Tables 5.27(a) and 5.27(b)). This suggests that – among more comparable cases with two or more bail appearances and/or days in the bail process – Gladue bail cases tended to require a similar number of bail appearances as conventional cases, but that these appearances took slightly more time to be scheduled and/or held compared to conventional bail cases. Hence the limited schedules of Gladue Court were likely affecting the amount of time that Gladue bail cases required to complete bail. Indeed, an Indigenous accused wishing to have their bail heard in Gladue Court might need to wait several additional days (or even a week) for the next sitting of Gladue Court, whereas conventional bail courts are in session Monday through Friday.

The number of bail appearances and time spent completing the bail process are especially important measures for assessing bail court effectiveness within the broader context of the overrepresentation of Indigenous peoples in prisons, and their overrepresentation in remand custody, in particular. Indeed, bail court processing – in terms of appearances and time in the bail process – will necessarily affect Ontario’s remand population. The longer that a bail case takes to complete the bail process, the longer an accused spends in pre-trial custody. As such, lengthy bail case processing times for Indigenous accused in Gladue Courts (compared to conventional bail cases) will contribute to this population’s overrepresentation in custody generally, and remand custody specifically (although these contributions to the remand population could potentially be counteracted if Gladue Courts grant bail to these Indigenous accused more often than would be expected in conventional bail courts). Another important means of assessing bail court effectiveness is to examine bail outcomes. Indeed, these bail outcomes will have a similarly important and direct impact on Ontario’s remand population as well as its custodial population more generally.

iii) Outcome of (First) Bail³¹²

Outcomes of the bail process are a common area of investigation within bail research. Bail outcomes are a high-visibility facet of the bail system, such that decisions to release or detain are often publicized in

³¹² This variable reflects the bail outcome for the first bail phase on record for a charge or set of charges on a single charging information. It was produced by first grouping several MAG action codes into six broad bail outcome categories.

the media, particularly in high-profile cases, or when someone has been charged with new, serious offences while on bail. Although certainly not the only method of assessing bail court effectiveness, bail outcomes are a useful litmus test for the general state and functioning of bail courts and their adherence to the laws of bail. Recall that detention ought to be reserved for only those accused individuals whose perceived risks – rooted in *Criminal Code* s.515(10) – cannot be reasonably managed with a suitable bail plan. In light of the non-trivial proportion of bail cases with non-violent and seemingly minor charges, and considering the ladder principle and the presumption of release which underpin the Canadian bail system³¹³, one might expect detention to be a relatively uncommon bail outcome. That is, given the characteristics of bail cases (while, admittedly, lacking information on other relevant factors such as perceived flight risk, criminal history, etc.), one might expect that many of these accused could be managed effectively in the community.

Moreover, bail outcomes have a direct impact on the remand population, as well as an indirect effect on the sentenced custodial population. An examination of bail outcomes is particularly important within the context of Indigenous peoples' overincarceration, as any elevated levels of detention among Indigenous accused in Gladue Court would necessarily contribute to their overrepresentation in remand custody. Yet given the specialized nature of Gladue Courts and their potential to overcome systemic barriers to release for Indigenous accused, bail outcomes might be substantively equitable between Gladue bail and conventional bail cases.

Analyses of bail outcomes are presented primarily for the event dataset, with a selection of person-based analyses presented later in this section to highlight supplementary trends relating to bail outcomes. The focus on event cases not only permits the analysis of the greatest number of individual bail outcomes, but also avoids having certain types of less serious bail outcomes masked by more serious bail outcomes³¹⁴.

Largely in order from most to least serious bail outcome, these categories are: detained; in custody without real decision; bail granted; charges dismissed, stayed or withdrawn; guilty plea; and other. Charges were then aggregated into cases in such a way that the most serious bail outcome for a charge was carried forward to represent the case.

³¹³ See the Supreme Court of Canada's firm reminder of these principles in *R. v. Antic* (2017).

³¹⁴ For event cases, all charges on a single charging information would typically – though not always – have the same bail outcome (e.g., consider a case for which one charge was immediately withdrawn but other charges proceeded through the bail process). Hence, very limited details were “lost” in the aggregation process for this variable. In contrast, person cases with multiple charging informations lose more detail in the aggregation process and may appear more

In this sense, an examination of event cases may be considered a more accurate reflection of the decisions being made in bail court on any given day. Indeed, this dataset allows one to see any efforts being made by criminal justice professionals to release accused persons at bail, when possible, before the possibility that charges and circumstances accumulate in such a way as to render bail release virtually impossible. In contrast, the person data that are presented at the end of this section – which include the potential accumulation of several sets of charges for an individual – offer a more complex and nuanced understanding of bail outcomes and the decisions made by criminal justice professionals. Given the importance of bail outcomes in assessing bail court functioning, Tables 5.28(a) through 5.28(h) present bail outcomes in Gladue bail and conventional bail cases³¹⁵ in several different ways.

Table 5.28(a): Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Outcome of First Bail						Total
			Formally Detained	In Custody, No Formal Decision	Bail Granted	Guilty Plea	Dismissed Stayed, Withdrawn	Other	
Gladue Bail Status	Non-Gladue	Count	18828	39056	86885	12715	5536	2603	165623
		% within Gladue Bail Status	11.4%	23.6%	52.5%	7.7%	3.3%	1.6%	100.0%
	Gladue	Count	655	2134	3310	1288	476	87	7950
		% within Gladue Bail Status	8.2%	26.8%	41.6%	16.2%	6.0%	1.1%	100.0%
Total		Count	19483	41190	90195	14003	6012	2690	173573
		% within Gladue Bail Status	11.2%	23.7%	52.0%	8.1%	3.5%	1.5%	100.0%

Chi-square = 1118.812; df = 5; $p < .001$

Despite the granting of bail being the most common bail outcome overall, Gladue bail cases were less likely than conventional bail cases to receive this outcome (41.6% versus 52.5%). Perhaps counterintuitively, Gladue cases were *also* less likely than conventional bail cases to be formally denied bail and formally

serious overall. To illustrate, consider a case with a robbery charge and subsequent charge for failure to comply with a condition of bail. Imagine that the accused in this case was granted bail on the initial robbery charge, but upon being returned to bail court for the breach charge, the accused was denied bail (the first bail outcome on record for this new charge). In the person dataset, this scenario would appear as a single bail case with a bail outcome of “detained”. In contrast, in the event dataset (which better preserves all bail phases), this scenario would appear as one bail case with a bail outcome of “bail granted” and another case with a bail outcome of “formally detained”.

³¹⁵ Recall that Gladue bail cases are presided over by a judge, whereas conventional bail courts in Ontario are generally presided over by justices of the peace who are not required to have formal legal training (apart from College Park bail courts which were part of a pilot project that placed judges in these courts starting in late 2017). Given the suggestion that these judicial officers may handle bail differently (e.g., CCLA, 2014; Wyant, 2016), it is possible that the difference in adjudicators in Gladue Court and conventional bail courts may also affect the bail outcomes occurring in these courts.

detained in remand until case resolution (8.2% versus 11.4%). Instead, bail cases in Gladue Court were more likely than conventional bail cases to remain informally detained in custody without a formal determination of bail (26.8% versus 23.6%). Nevertheless, when cases that were formally and informally detained are combined (given that both ultimately await case resolution in pre-trial detention), the probability of this grouped outcome is identical for Gladue and conventional bail cases ($8.2\% + 26.8\% = 35.0\%$ versus $11.4\% + 23.6\% = 35.0\%$). In other words, the same proportion of Gladue bail and conventional bail cases ultimately remained in remand custody until case resolution. While bail is often considered to be a question of release or detention, recall that other outcomes of this process are also possible. Notably, Gladue bail cases were considerably more likely than conventional bail cases to end the bail process by pleading guilty to one or more charges (16.2% versus 7.7%). Gladue bail cases were also more likely than their conventional bail counterparts to end the bail process by having charges dismissed, stayed or withdrawn (6.0% versus 3.3%)³¹⁶.

Although Table 5.28(a) presents the overall bail outcomes for cases in Old City Hall and College Park courthouses, several of these possible outcomes are notably largely outside of the control of the adjudicators presiding in Gladue Courts and conventional bail courts (e.g., pleading guilty, having charges withdrawn or stayed by the Crown, etc.). Thus, in order to assess whether judicial officers were making efforts to release accused persons on bail – when possible and appropriate – it is important to examine separately only those

³¹⁶ Given earlier concerns regarding pseudo-selection bias and the possibility that a non-trivial number of Indigenous accused completed bail in a single conventional bail court appearance, the analyses in Table 5.28(a) were also performed for only those cases with two or more bail appearances (see Appendix H). Overall trends remained similar. However, there were some modest changes in the distribution of bail outcomes (e.g., cases became less likely to be granted bail and more likely to be denied bail; differences between Gladue bail and conventional bail cases diminished somewhat). Yet these shifts were largely expected given that the most common bail outcome for single bail appearance cases was bail being granted (which was disproportionately common among conventional bail cases). Symptomatically, the differences between bail populations in terms of the likelihood of being granted bail became considerably smaller (40.4% versus 46.6%), suggesting that much of the differences in terms of bail outcomes between Gladue bail and conventional bail cases in Table 5.28(a) occur in single bail appearance cases. Notably, when formal and informal detentions were combined in these supplementary analyses, the bail populations were no longer equally likely to have this grouped outcome. Rather, Gladue bail cases actually became somewhat less likely than their conventional bail counterparts to remain in remand ($9.2\% + 24.1\% = 33.3\%$ versus $13.9\% + 24.9\% = 38.8\%$). Finally, while Gladue bail cases continued to be more likely than conventional bail cases to end the bail process with a guilty plea, the differences between bail populations also diminished (18.8% versus 10.0%). However, while these analyses are for technically more comparable groups which more closely approximate Indigenous versus non-Indigenous accused, recall that these findings are not representative of all bail cases (e.g., they exclude same-day consent releases) and should therefore be interpreted within this more restricted context.

cases for which a judicial officer made a formal determination of bail. Table 5.28(b) therefore presents bail outcomes for cases with a formal determination of bail – that is, either a decision by a judge or a justice of the peace to deny bail and formally detain an accused or release them on bail until case resolution³¹⁷.

Table 5.28(b): Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Event Dataset; Cases with a Formal Bail Decision; 2006-2017)

		Formally Detained	Bail Granted	Total
Gladue Bail Status	Non-Gladue	Count	18828	86885
		% within Gladue Bail Status	17.8%	82.2%
	Gladue	Count	655	3310
		% within Gladue Bail Status	16.5%	83.5%
Total		Count	19483	90195
		% within Gladue Bail Status	17.8%	82.2%

Fisher's exact test = .039

Indeed, when one considers only those cases for which there was a formal determination of bail, differences between Gladue and conventional bail populations diminish almost entirely. In fact, among cases with a formal bail decision, Gladue bail cases were actually slightly more likely than conventional bail cases to be released on bail (83.5% versus 82.2%). Similarly, Gladue bail cases were slightly less likely than conventional bail cases to be formally detained (16.5% versus 17.8%). While these differences were statistically significant ($p < .05$), the scale of these differences suggests that Gladue bail cases and conventional bail cases with a formal bail decision were not so different from one another. That is, formal bail outcomes in these two bail populations were substantively equitable³¹⁸.

³¹⁷ Note that decisions to release an accused person on bail might also be considered a reflection of a Crown's position on bail. Indeed, if a Crown is willing to consent to bail release (and the defence accepts the terms of the Crown's recommendation), a judicial officer is expected not overrule this joint bail submission unless the release and/or its conditions are deemed unlawful and/or would bring the administration of justice into disrepute (although, in practice, this may not always be the case). Within this context, this variable might be considered a reflection of not only the judicial officer's position on bail, but also that of court professionals more generally. However, in contrast to decisions to release an accused on bail, a formal denial of bail and associated detention order can only be granted by a judge or justice or the peace (generally following a show cause hearing).

³¹⁸ In light of earlier concerns regarding pseudo-selection bias and the possibility that a non-trivial number of Indigenous accused completed bail in a single conventional bail court appearance, the analyses in Table 5.28(b) were also performed for only those bail cases with two or more bail appearances (see Appendix H). Similar to the trends outlined in footnote 316 above, the removal of single bail appearance cases caused cases in both bail populations to become less likely to receive bail and more likely to be formally refused bail. Most notably, differences between Gladue bail and conventional bail cases being granted bail increased (81.4% versus 76.9%) and met a higher threshold of statistical significance ($p < .001$). Hence, despite Indigenous accused in Gladue bail cases having arguably more complex event cases (in terms of charges against the administration of justice charges and bail breach charges in particular – see footnotes 252 and 285) and requiring lengthier periods to complete the bail process (Tables 5.27(a) and 5.27(b)), judges in Gladue Court nevertheless appear to be making significant efforts, when appropriate, to release Indigenous accused on bail.

While these analyses examine cases with a formal determination of bail as a means of assessing judicial decision-making at bail and the largely untested promise of Gladue Courts, it is nevertheless important to remember that these figures do not reflect *all* cases for which the accused remained in remand awaiting case resolution. Indeed, recall that the bail outcome of “in custody, no formal decision” was the second most common bail outcome overall, and an outcome that was more common among Gladue bail cases than conventional bail cases (26.8% versus 23.6% – Table 5.28(a)). However, while many of these informal detentions were likely cases for which the accused and/or their defence counsel considered bail release to be unlikely, for others, bail may have been a possibility which was not pursued for a variety of reasons (e.g., to avoid the possibility of bail breach charges, using remand as an opportunity to detox or receive medical care³¹⁹; see Pelvin, 2017). Given this study’s focus on the promise of Gladue Courts as they relate to bail, and because one cannot know what type of formal determination of bail a judicial officer would have made in these cases, they were not included in these analyses which explicitly examine the decision-making of judicial officers and, to a lesser extent, Crown counsel at bail³²⁰.

Another important factor to consider when examining bail outcomes is the amount of time required in order to receive a particular bail outcome. Indeed, accused persons awaiting a bail decision are held in pre-trial detention and (at least temporarily) deprived of their liberty, such that court efficiency in reaching a bail decision would have important implications for remand custody. Tables 5.28(c) through 5.28(f) present the

³¹⁹ See footnote 103 for a reminder of some of the reasons why an accused person might decide not to formally seek bail. Recall that a first bail appearance generally involved a Crown advising a judicial officer of their decision to consent to or contest an accused person’s release. Although judicial officers may ask a Crown probing questions regarding the rationale for this decision, judges and justices of the peace have a limited direct impact on the bail outcome of these informally detained cases. While Crowns in Gladue Court also generally receive specialized Gladue training, such that one might expect their release decisions to appropriately consider Gladue principles, it is not possible to know the circumstances around why a Crown was initially unwilling to consent to bail (e.g., whether a release plan was fully explored and proposed) or the point in which the bail process was effectively abandoned.

³²⁰ Nevertheless, analyses of combined remand outcomes versus bail releases are presented for the curious reader in Appendix I. As expected, grouped remand became a much more common bail outcome (40.2% versus only 17.8% formal remand outcomes in Table 5.28(b)). Yet in these supplementary analyses, Gladue bail cases were somewhat more likely than their conventional bail counterparts to have this grouped remand outcome (45.7% versus 40.0%; $p < .001$), rather than slightly *less* likely than their counterparts to be formally detained (Table 5.28(b)). Hence while judges (and Crowns) in Gladue Court appeared to be releasing Indigenous accused on bail at a similar frequency to those in conventional bail cases when examining formal bail decisions only, the prevalence of bail cases remaining in remand without a formal bail decision – particularly in the Gladue bail population – ultimately translates into a greater proportion of Gladue bail cases awaiting case resolution in remand.

number of appearances and time spent in (first) bail for cases with several specific bail outcomes: those formally denied bail, those granted bail, those whose bail ended in dismissal, stay or withdrawal of charges and those that ended the bail process by pleading guilty.

Table 5.28(c): Crosstabulation of Gladue Bail Status by Number of Bail Appearances and Time Spent in (First) Bail for Those Formally Denied Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of (First) Bail Appearances					
			1	2	3-4	5-7	8+	Total
Cases Denied Bail	Non-Gladue	Count	5007	4888	5600	2469	864	18828
		% within Gladue Bail Status	26.6%	26.0%	29.7%	13.1%	4.6%	100.0%
	Gladue	Count	38	171	295	117	34	655
		% within Gladue Bail Status	5.8%	26.1%	45.0%	17.9%	5.2%	100.0%
Total		Count	5045	5059	5895	2586	898	19483
		% within Gladue Bail Status	25.9%	26.0%	30.3%	13.3%	4.6%	100.0%

Chi-square = 165.874; df = 4; $p < .001$

			Time Spent in (First) Bail					
			Single Day	2 Days	3-8 Days	9-15 Days	16+ Days	Total
Cases Denied Bail	Non-Gladue	Count	5106	1336	5993	3077	3315	18827
		% within Gladue Bail Status	27.1%	7.1%	31.8%	16.3%	17.6%	100.0%
	Gladue	Count	39	29	262	160	165	655
		% within Gladue Bail Status	6.0%	4.4%	40.0%	24.4%	25.2%	100.0%
Total		Count	5145	1365	6255	3237	3480	19482
		% within Gladue Bail Status	26.4%	7.0%	32.1%	16.6%	17.9%	100.0%

Chi-square = 172.242; df = 4; $p < .001$

Bail cases that ended in a refusal of bail and formal detention – while a reasonably small group overall (11.2% – Table 5.28(a)) – tended to take a greater number of appearances and days compared to cases that were granted bail (Table 5.28(d)). Specifically, only about a quarter of all bail denials happened on the first bail appearance (25.9%) or first day in bail (26.4%)³²¹. Given that detention generally occurs following a show cause hearing, it makes sense that this outcome would take a greater number of appearances and days to be reached. Indeed, accused and defence or duty counsel typically need time to prepare tentative release plans, including potentially searching for suitable sureties who would then typically need to arrange to attend court in person.

³²¹ Note that the roughly one quarter of bail detentions which occurred almost immediately in the bail process are unlikely to be primarily detentions following a show cause hearing. Indeed, same day show cause hearings are relatively uncommon in most Ontario courthouses, as defence or duty counsel typically require time to arrange a bail plan, contact potential sureties, etc. Instead, it is likely that most of these cases represent de facto detention orders. This might occur when defence counsel indicates right away that they do not plan to pursue a show cause hearing, likely at least sometimes in reverse onus situations, at which point the judicial officer may formally detain the accused.

Notably, the proportion of Gladue bail cases that were refused bail in a single appearance or single day was substantially smaller than that for conventional bail cases (5.8% versus 26.6% and 6.0% versus 27.1%, respectively)³²². In contrast, formally detained Gladue bail cases and conventional bail cases were equally likely to be detained following two bail appearances (26.1% versus 26.0%). However, the most common number of bail appearances required by Gladue bail cases in order to be formally denied bail was three to four – which were required in nearly half (45.0%) of all detained Gladue bail cases (compared to only 29.7% of conventional bail cases). Similarly, Gladue cases were most likely to require three to eight days in the bail process before being formally denied bail (40.0% versus 31.8% of conventional bail cases). These Gladue bail cases required more bail appearances on average than comparable conventional bail cases – 3.67 versus 3.01 appearances ($t = -7.008$; $df = 19481$; $p < .001$) – and had a higher median number of appearances (3 versus 2) to reach this outcome despite having similar degrees of variability ($SD = 2.32$ versus 2.37 appearances)³²³.

Differences were even starker when considering time spent in the bail process prior to having bail formally denied. Gladue bail cases spent more days in bail, on average, than conventional bail cases – 12.49 versus 9.62 days ($t = -4.907$; $df = 19480$; $p < .001$) – and had a significantly higher median number of days following first appearance to reach this outcome (8 versus 5), although they had less variability ($SD = 13.49$ versus 14.75). Indeed, Gladue bail cases were more likely than conventional bail cases to take a greater number of bail appearances and a greater number of days to be denied bail. Importantly, the proportion of Gladue bail cases which required a lengthier bail process only to have bail ultimately denied was non-trivial. Specifically, roughly one quarter of formally detained Gladue bail cases took 9-15 days (24.4%) or 16 or more days (25.2%) to reach this outcome³²⁴. This finding perhaps again points to Gladue Court availability or to the amount of time required to coordinate a release plan (e.g., locating and ensuring attendance of potential

³²² Recall, however, that these differences are likely to be at least partially artificially constructed as a result of Gladue Court availability and referral processes.

³²³ Note, however, that some caution should be exercised when interpreting the standard deviation of this variable, given that it is somewhat skewed ($skew = 3.25$ within the entire event dataset).

³²⁴ In contrast, only about a sixth of conventional bail cases took 9-15 days (16.3%) or 16+ days (17.6%) to reach this bail outcome. Hence the proportion of detained Gladue bail cases which received this outcome only after lengthy case processing is considerably higher than that for the conventional bail population.

sureties, meeting with the Toronto Bail Program regarding potential supervision, liaising with community service providers) and prepare for a show-cause hearing for Indigenous accused in these courts³²⁵.

For those cases formally denied bail, it is overall case processing times (rather than bail processing times) that would arguably have the greatest effect on the accused, as this would determine how long the accused is subjected to the well-documented harsh conditions in Ontario remand centres (e.g., Johnson, 2003; JHSO, 2007; Pelvin, 2017; *R. v. Summers* (2014); *R. v. Persad* (2020)). In contrast, the effects of a lengthy and drawn-out bail process (rather than court processes more generally) may have a more acute effect on accused with other bail outcomes – particularly those which do not require the accused to remain in remand custody. Specifically, for cases that were ultimately granted bail, even a short stay in remand custody – let alone a lengthy stay – can still have considerable deleterious consequences for an accused. Indeed, even for cases in which an accused was ultimately deemed suitable for community release pending case resolution, any time in remand would nevertheless be expected to have negative effects such that one might suppose that these outcomes would occur expeditiously in order to minimize any unnecessary harms associated with remand custody. Table 5.28(d) explores this issue by presenting the number of bail appearances and days in the bail process required for Gladue bail and conventional bail cases to be granted bail.

³²⁵ Interestingly, trends in bail processing for cases that remained in remand without a formal determination of bail (Appendix J) differed from those that were formally detained (Table 5.28(c)). Informal detention cases were more likely than formal detention cases to have only one or two bail appearances, and less likely to have three bail appearances or more. Moreover, the sizeable disparities between Gladue bail and conventional bail populations – particularly for single bail appearance cases – were generally smaller among informal detentions (24.5% versus 36.7% single bail-appearance cases) compared to formal detention cases (5.8% versus 26.6% – Table 5.28(c)). Similarly, bail cases that were informally detained were also more likely than cases that were formally detained to be in the bail process for only one or two days, and less likely to be in the bail process for three days or more (Appendix J). Disparities between bail populations were, again, smaller among informal detention cases (e.g., 25.4% versus 37.5% single-day in bail cases) than formal detentions (compared to 6.0% versus 27.1%). Cases that remained in remand without a formal determination of bail therefore ended to make the decision to waive or abandon bail relatively early in the court process whereas those formally detained tended to take more time and more bail appearances to reach this outcome (presumably to coordinate a release plan and prepare for a show cause hearing).

Table 5.28(d): Crosstabulation of Gladue Bail Status by Number of Bail Appearances and Time Spent in (First) Bail for Those Ultimately Granted Release, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of (First) Bail Appearances					
			1	2	3-4	5-7	8+	Total
Cases Granted Bail	Non- Gladue	Count	40852	24262	16370	4510	881	86875
		% within Gladue Bail Status	47.0%	27.9%	18.8%	5.2%	1.0%	100.0%
	Gladue	Count	610	1318	1087	255	40	3310
		% within Gladue Bail Status	18.4%	39.8%	32.8%	7.7%	1.2%	100.0%
Total		Count	41462	25580	17457	4765	921	90185
		% within Gladue Bail Status	46.0%	28.4%	19.4%	5.3%	1.0%	100.0%

Chi-square = 1088.024; df = 4; $p < .001$

			Time Spent in (First) Bail					
			Single Day	2 Days	3-8 Days	9-15 Days	16+ Days	Total
Cases Granted Bail	Non- Gladue	Count	41785	13055	24151	4311	3570	86872
		% within Gladue Bail Status	48.1%	15.0%	27.8%	5.0%	4.1%	100.0%
	Gladue	Count	667	454	1532	413	244	3310
		% within Gladue Bail Status	20.2%	13.7%	46.3%	12.5%	7.4%	100.0%
Total	Count		42452	13509	25683	4724	3814	90182
	% within Gladue Bail Status		47.1%	15.0%	28.5%	5.2%	4.2%	100.0%

Chi-square = 1339.215; df = 4; $p < .001$

Overall, these tables tell largely similar stories. Almost half of all cases granted bail received this outcome in a single bail appearance (46.0%) or in a single day (47.1%). These expeditious releases likely reflect primarily Crown consent releases and a much smaller number of same-day show cause hearings. Notably, in both tables the proportion of released Gladue bail cases that received this outcome in a single appearance (18.4%) or single day (20.2%) was less than half of that for released conventional bail cases (47.0% and 48.1%, respectively)³²⁶.

Gladue bail cases that were granted bail tended to receive this outcome in two or three-to-four bail appearances (39.8% and 32.8% respectively) and were more likely to require this number of appearances than released conventional bail cases (27.9% and 18.8% respectively). In contrast, Gladue bail cases were slightly less likely than conventional bail cases to be released in two days (13.7% versus 15.0%). Instead, Gladue bail cases tended to require three to eight days to be released (46.3%) and were considerably more likely than conventional bail cases (27.8%) to require this number of days. This suggests that for released

³²⁶ Recall, however, that some of these differences are likely to be at least partially artificially constructed by Gladue Court availability. Indeed, when these analyses were performed for only those bail cases with two or more bail appearances, the relationship generally remained in the same direction but was substantially attenuated. For instance, released Gladue bail cases with at least two bail appearances were only somewhat less likely than their conventional bail counterparts to receive this outcome in two bail appearances (48.8% versus 52.7%) and again only somewhat more likely than their counterparts to receive this outcome in three to four bail appearances (40.3% versus 35.6%) ($p < .001$).

Gladue bail cases, second bail appearances, as well as third and fourth appearances, tend to take place only several days into the bail process, whereas with released conventional bail cases, these second appearances happened more expeditiously.

Indeed, released Gladue bail cases took, on average, more appearances and more time to be granted bail than did their conventional bail counterparts. Specifically, Gladue bail cases took an average of 2.63 appearances to be released (median = 2; SD = 1.53) compared to an average of 2.04 appearances for conventional bail cases (median = 2; SD = 1.48) ($t = -21.597$; $df = 3546.725$; $p < .001$). Even more noteworthy, Gladue bail cases required, on average, 6.45 days to reach this outcome (median = 4; SD = 11.42) compared to only 3.86 such days, on average, for conventional bail cases (median = 2; SD = 7.53) ($t = -12.936$; $df = 3419.634$; $p < .001$). Perhaps unsurprisingly, Gladue bail cases that were granted bail were slightly more likely than their conventional bail counterparts to require the greatest number of bail appearances and the lengthiest bail processing times. Indeed, compared to released conventional bail cases, Gladue bail cases were more likely to require five to seven bail appearances (7.7% versus 5.2%) and very marginally more likely to require eight or more bail appearances (1.2% versus 1.0%) to reach this outcome – although the proportion of cases requiring this many appearances was generally small.

Similarly, compared to conventional bail courts, Gladue bail cases that were released were considerably more likely to require nine to 15 days (12.5% versus 5.0% – more than double) or 16 or more days (7.4% versus 4.1%) to reach this outcome. Notably, a greater proportion of cases required 16 or more days than did eight or more appearances to be granted bail, suggesting that bail appearances tended to be spread out, particularly for those Gladue bail cases. These lengthier bail processing times among Gladue bail cases may reflect not only the scheduling limitations of Gladue Court, but also the possibility that the types of release plans arranged in these courts – which may involve greater involvement of community agencies and service providers, including the Toronto Bail Program – may take longer to coordinate than bail releases in conventional bail court. Regardless of the underlying reasons for these differences, these findings

nevertheless mean that Indigenous accused in Gladue bail cases were spending longer periods of time in remand custody prior to ultimately being deemed suitable for community release and granted bail.

Next, bail cases that end the bail process by having their charge(s) dismissed, stayed or withdrawn are investigated further. Indeed, accused persons in these cases would be deprived of their liberty – for a potentially significant period of time – despite these charges ultimately not being pursued. Table 5.28(e) presents the number of bail appearances and days in the bail process required by cases that ultimately ended this process by having their charge(s) dropped in some way. While bail cases with this grouped bail outcome tended to reach this outcome reasonably quickly – most commonly following a single bail appearance (37.5%) or a single day in the bail process (38.2%) – these trends were less favourable for Gladue bail cases.

Table 5.28(e): Crosstabulation of Gladue Bail Status by Number of Bail Appearances and Time Spent in (First) Bail for Those whose Bail Ended with Dismissal, Stay or Withdrawal of Charges, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of (First) Bail Appearances					Total
			1	2	3-4	5-7	8+	
Cases Ending Bail with Dismissal, Stay or Withdrawal	Non-Gladue	Count	2220	1772	1077	337	130	5536
		% within Gladue Bail Status	40.1%	32.0%	19.5%	6.1%	2.3%	100.0%
	Gladue	Count	36	230	167	30	13	476
		% within Gladue Bail Status	7.6%	48.3%	35.1%	6.3%	2.7%	100.0%
Total		Count	2256	2002	1244	367	143	6012
		% within Gladue Bail Status	37.5%	33.3%	20.7%	6.1%	2.4%	100.0%

Chi-square = 210.732; df = 4; $p < .001$

			Time Spent in (First) Bail					
			Single Day	2 Days	3-8 Days	9-15 Days	16+ Days	Total
Cases Ending Bail with Dismissal, Stay or Withdrawal	Non-Gladue	Count	2257	856	1569	389	464	5535
		% within Gladue Bail Status	40.8%	15.5%	28.3%	7.0%	8.4%	100.0%
	Gladue	Count	38	63	277	47	51	476
		% within Gladue Bail Status	8.0%	13.2%	58.2%	9.9%	10.7%	100.0%
Total		Count	2295	919	1846	436	515	6011
		% within Gladue Bail Status	38.2%	15.3%	30.7%	7.3%	8.6%	100.0%

Chi-square = 259.697; df = 4; $p < .001$

Indeed, Gladue bail cases were – again – substantially less likely than their conventional bail counterparts to have their charge(s) dismissed, stayed or withdrawn following a single bail appearance (7.6% versus 40.1%) or single day in the bail phase (8.0% versus 40.8%). Of course, the differences in these early categories are likely, yet again, to be at least partially a reflection court structure and scheduling constraints. In particular, if a Crown was willing to stay or withdraw charges almost immediately (for

instance, if a complainant or witness retracted their allegations), there would be little opportunity, let alone need, for an Indigenous accused to be referred to Gladue Court only to have these charges dropped almost instantly. Hence one might suppose that there is a (potentially non-trivial) number of Indigenous accused in the conventional bail court population whose charges were dropped after only a single bail appearance and/or taking a single day in the bail process³²⁷.

For those bail cases that required two or more bail appearances or days in the bail process in order for their charge(s) to be dismissed, stayed or withdrawn, the most common number of bail appearances was either two (33.3%) or three to four appearances (20.7%) and three to eight days in the bail process (30.7%). In other words, when charges were dropped during the bail process, this outcome tended to occur relatively early on, likely as disclosure documents were being made available and the Crown realized that there was a low chance of conviction, or that proceeding with prosecution would not be in the public interest.

Nevertheless, differences did exist between bail populations in terms of this bail outcome. In particular, Gladue bail cases that had their charge(s) dropped were more likely than their conventional bail counterparts to reach this bail outcome later in the bail process. Indeed, Gladue bail cases required 2.84 bail appearances on average (median = 2; SD = 1.81) compared to only 2.27 appearances on average for conventional bail cases (median = 2; SD = 1.84) ($t = -6.488$; $df = 6010$; $p < .001$) to have their charges dismissed, withdrawn or stayed.

Moreover, in terms of time spent in bail prior to charges being dropped, Gladue bail cases took an average of 8.17 days following first appearance to reach this outcome (median = 5; SD = 13.9) compared to conventional bail cases which reached this same outcome in only 6.54 days on average (median = 2; SD = 15.19) ($t = -2.467$; $df = 6009$; $p = .014$). Admittedly though, there was considerable variability within both

³²⁷ Indeed, when these analyses were performed for only those bail cases with two or more bail appearances, the relationship generally remained in the same direction but was substantially attenuated. For instance, Gladue bail cases whose charges were dismissed, stayed or withdrawn were only very marginally less likely than their conventional bail counterparts to receive this outcome in two appearances (52.3% versus 53.4%) and somewhat more likely than conventional bail cases to receive this outcome in 3-4 appearances (38.0% versus 32.5%) ($p = .029$).

populations. Indeed, Gladue bail cases that ended bail by having their charges dropped were more likely than their conventional bail counterparts to have charges dropped only following three to four appearances, or to a lesser extent, five to seven or eight or more bail appearances. Likewise, these Gladue bail cases were also more likely than comparable conventional bail cases to have charges dropped after three to eight days, or to a lesser extent, nine to 15, or 16 or more days in the bail process. Notably, just over one-in-ten (10.7%) Gladue bail cases with charges dropped at bail received this outcome only 16 or more days into the bail process (versus 8.4% of conventional bail cases) and thus after spending in excess of two weeks in pre-trial.

Finally, when an accused person anticipates challenges or obstacles to obtaining bail – or otherwise expects a sentence to be preferable to time spent in pre-trial custody or even on bail under potentially onerous conditions – the accused might forego a formal determination of bail and instead end the bail process by pleading guilty to their charge(s). Table 5.28(f) presents the number of bail appearances and days spent in the bail process prior to an accused person’s decision to plead guilty to their charge(s).

Table 5.28(f): Crosstabulation of Gladue Bail Status by Number of Bail Appearances and Time Spent in (First) Bail for Those who Ended Bail by Pleading Guilty, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of (First) Bail Appearances					
			1	2	3-4	5-7	8+	Total
Cases Ending Bail with Plea	Non- Gladue	Count	2753	5177	3610	931	244	12715
		% within Gladue Bail Status	21.7%	40.7%	28.4%	7.3%	1.9%	100.0%
	Gladue	Count	33	599	493	109	54	1288
		% within Gladue Bail Status	2.6%	46.5%	38.3%	8.5%	4.2%	100.0%
Total		Count	2786	5776	4103	1040	298	14003
		% within Gladue Bail Status	19.9%	41.2%	29.3%	7.4%	2.1%	100.0%

Chi-square = 293.172; df = 4; $p < .001$

			Time Spent in (First) Bail					
			Single Day	2 Days	3-8 Days	9-15 Days	16+ Days	Total
Cases Ending Bail with Plea	Non-Gladue	Count	2859	1992	5136	1547	1181	12715
		% within Gladue Bail Status	22.5%	15.7%	40.4%	12.2%	9.3%	100.0%
	Gladue	Count	33	140	663	231	221	1288
		% within Gladue Bail Status	2.6%	10.9%	51.5%	17.9%	17.2%	100.0%
Total		Count	2892	2132	5799	1778	1402	14003
		% within Gladue Bail Status	20.7%	15.2%	41.4%	12.7%	10.0%	100.0%

Chi-square = 380.131; df = 4; $p < .001$

The decision to end the bail process by pleading guilty to all charges was the third most common bail outcome overall. Roughly one-in-five of these bail cases took only one bail appearance (19.9%) or one day in the bail process (20.7%) to reach this bail outcome. That is, accused in these cases decided almost

immediately – likely in many cases following a Crown’s initial decision to not consent to release – to forego the bail process (and subsequent criminal court processing) to instead plead guilty to their charge(s). Notably though, Gladue bail cases that ended in a guilty plea were significantly less likely than their conventional bail counterparts to do so immediately (2.6% versus 21.7% taking a single bail appearance or 2.6% versus 22.5% with a single day in bail). This difference might reflect the fact that if an accused (who likely had their first bail appearance in conventional bail court) intended to plead to charges rather than pursue bail, there would be little reason for the accused person to appear in Gladue Court for bail. Within this context, there is likely to be a potentially non-trivial number of Indigenous accused appearing in conventional bail court who plead guilty after only a single bail appearance or single day in bail³²⁸. This might be considered another type of pseudo-selection bias and, consequently, the stark differences between bail groups when pleading guilty in one appearance or one day are likely to be at least partially constructed³²⁹.

Overall, bail cases that ended the bail process by pleading guilty to charges most commonly did so following two bail appearances (41.2%) or three to four bail appearances (29.3%) and after spending three to eight days in the bail process (41.4%). This suggests that accused tend to plead guilty fairly early in the bail process. This outcome may occur early for a number of reasons, including situations in which an accused quickly recognizes that their prospects for bail are low and they do not wish to spend (a potentially lengthy period of) time in remand custody when a guilty plea is expected to result in a non-custodial sentence or a sentence that would either be shorter than their anticipated stay in remand or served in the comparatively better conditions of sentenced custody. Similarly, an accused might plead guilty promptly if they feel that their ability to fight the charge(s) against them is limited, such that they believe a finding of guilt is inevitable (even if factually innocent).

³²⁸ Notably, an Indigenous person wishing to plead guilty after only a single bail appearance in conventional court may nevertheless appear in Gladue Court to plead guilty and be sentenced.

³²⁹ Indeed, when these analyses were performed for only those bail cases with two or more bail appearances, Gladue bail cases that ended bail with a guilty plea were slightly less likely than their conventional bail counterparts to plead guilty in only two bail appearances (47.7% versus 52.0%) and more likely than their counterparts to plead guilty in three to four bail appearances (39.3% versus 36.2%) ($p < .001$).

Yet Gladue bail cases that ended bail with a plea were more likely than their conventional bail counterparts to make this decision somewhat later in the bail process. Indeed, these Gladue bail cases required, on average, 3.17 appearances (median = 3; SD = 2.26) compared to conventional bail cases that took only 2.57 appearances on average (median = 2; SD = 1.65) ($t = -9.326$; $df = 1429.318$; $p < .001$). Moreover, differences between Gladue and conventional bail populations were considerably starker when one considers the number of *days* that passed before accused ended the bail process by pleading guilty. Specifically, Gladue bail cases took an average of 11.84 days (median = 6; SD = 21.87) compared to only 7.03 days on average for conventional bail cases to receive this bail outcome (median = 3; SD = 12.28) ($t = -7.774$; $df = 1370.359$; $p < .001$). Although there was considerable variability for both bail groups in terms of the number of days that passed before pleading guilty, this variability was considerably greater for Gladue bail cases. This finding suggests that some of these cases likely chose to end bail with a guilty plea very early in the bail process whereas others made this decision quite late in the bail process.

Further, Gladue bail cases were more likely to plead guilty following three to four, five to seven, or eight or more bail appearances, or following three to eight, nine to 15, or 16 or more days, compared to their conventional bail counterparts. It is possible that Indigenous accused in Gladue bail courts take more time to conclude that their other options (at bail or defending themselves broadly) are limited (e.g., no suitable surety, potentially ineligible for the Toronto Bail Program). Hence, these differences might be partially explained by the circumstances of the accused and their case before the courts, such that pleading guilty may lead to time in sentenced custody, being released on time-served (potentially receiving 2:1 or 1.5:1 credit for time served in pre-trial custody³³⁰) or may result in a non-custodial sentence.

³³⁰Individuals sentenced to custody typically receive credit for time spent in pre-trial custody, which is deducted from any custodial sentence that might be handed down. Prior to 2010, it was common practice for judges to give two days credit for every one day spent in pre-trial custody, based on the lack of access to programming and often onerous conditions of remand custody, as well as statutory release considerations (Doob & Webster, 2013). However, the *Truth in Sentencing Act* (2009), which came into effect in February 2010, limited the extent and circumstances under which enhanced credit could be given for time served. Under this Act, *Criminal Code* s.719(3.1) was amended in such a way that the standard time served credit was set to only one day for every day in pre-sentence custody. While enhanced credit, now capped at 1.5:1 days, was available, per the legislation, “if the circumstances justify it”, this was not available for those formally detained primarily because of a previous conviction, for breaching a bail condition or committing an indictable offence while on bail. While the Supreme Court, in *R. v. Summers* (2014), interpreted these circumstances

As a final point of investigation when exploring bail outcomes, analyzing the person dataset and juxtaposing these data with the event data offer an additional layer of insight. In particular, although the event dataset arguably presents a more accurate reflection of all bail outcomes, these data are not without shortcomings. Certainly, it is important to explore bail outcomes resulting from all sets of charges – particularly if one wishes to explore any efforts on the part of criminal justice professionals to release accused persons, when appropriate. Yet, the figures from the event dataset paint a potentially incomplete – and, as such, misleading – picture of the overall proportion of bail cases (broadly defined) which were ultimately detained or otherwise awaited case resolution in custody. That is, the event data do not necessarily (or at least, exclusively) present the final bail outcome for broader bail cases. Indeed, one might reasonably expect subsequent bail outcomes in multi-information cases to become progressively more serious (read: more likely to lead to detention) as charges and alleged breaches accumulate. As these bail cases become more complex, accused would likely be deemed more “risky” and additional legislative provisions would come into effect (most notably, reverse onus requirements). Given that the bail outcome variable for the person dataset records the most serious bail outcome in a broader bail case (due to the specific case aggregation syntax), one might think of these data as – more often than not – the final bail outcome. Tables 5.28(g) and 5.28(h) present the most serious overall bail outcomes overall and formal bail outcomes for Gladue bail and conventional bail cases in the person dataset.

generously and in such a way that 1.5:1 credit effectively became standard, the specified exceptions continued to apply. The first exception was later deemed unconstitutional by the Supreme Court in *R. v. Safarzadeh-Markhali* (2016) and all three exceptions were finally removed from the *Criminal Code* in December 2018 (i.e., after the study period).

Table 5.28(g): Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Outcome of the First Bail						
			Formally Detained	In Custody, No Formal Decision	Bail Granted	Guilty Plea	Dismissed Stayed, Withdrawn	Other	Total
Gladue Bail Status	Non- Gladue	Count	15608	33540	69516	10974	4105	2046	135789
		% within Gladue Bail Status	11.5%	24.7%	51.2%	8.1%	3.0%	1.5%	100.0%
	Gladue	Count	598	1774	2162	1043	291	46	5914
		% within Gladue Bail Status	10.1%	30.0%	36.6%	17.6%	4.9%	0.8%	100.0%
Total		Count	16206	35314	71678	12017	4396	2092	141703
		% within Gladue Bail Status	11.4%	24.9%	50.6%	8.5%	3.1%	1.5%	100.0%

Chi-square = 1009.504; df = 5; $p < .001$

Notably, the person data present a somewhat modified understanding of bail outcomes. Indeed, compared to the event data in Table 5.28(a), overall bail cases in the person dataset became slightly more likely to be detained (11.4% versus 11.2% in the event dataset). This shift occurred in both the Gladue bail (10.1% versus 8.2% in the event dataset) and conventional bail (11.5% versus 11.4% in the event dataset) populations. Hence when multiple charging informations are combined into a single, broader bail case (as in the person dataset), the accumulation of charges and other circumstances relevant to bail appear to render a case more likely to be denied bail. However, the differences between the event and person datasets were notably more marked among Gladue bail cases. As has been the case throughout much of these comparative analyses, this pattern whereby Gladue bail cases were more affected by the change from event to person datasets suggests that Gladue bail cases in the person dataset were more likely than their conventional bail

counterparts to have numerous sets of charges merged into a single case and of such a nature as to render the case no longer suitable for bail^{331,332}.

Similarly, compared to the event data, person-based bail cases also became slightly more likely to remain in custody without a formal bail decision. This was true for bail cases overall (from 23.7% to 24.9%), as well as for both Gladue bail cases (from 26.8% to 30.0%) and conventional bail cases (from 23.6% to 24.7%). This result is largely unsurprising, as the merging of multiple sets of charges into a single, person-based bail case would almost certainly cause these cases to be considered more complex and potentially less suitable for bail, such that an accused in these cases might ultimately abandon the bail process if the prospect of release appears to be low. However, the differences between the event and person datasets were, again, more marked among Gladue bail cases. This distinction further supports the theory that Gladue bail cases are more likely than conventional bail cases to have numerous sets of charges which are merged into a single person case and, by extension, render bail unlikely and influence the accused to simply relinquish any efforts to attain bail³³³.

³³¹ Recall that this pattern was first identified when examining the number of charges in event cases as compared to that in person cases (see Tables 4.7(a) and 4.7(b)). The greater increase in the number of charges in the Gladue bail caseload (compared to the conventional bail caseload) when moving from the event to person datasets suggests that person cases in the Gladue bail population were more likely than their counterparts to consist of several event cases merged into a single person case. Furthermore, examination of the presence and prevalence of various types of charges in the two datasets has similar implications in terms of Gladue bail cases in the person dataset being more likely to consist of numerous charging informations. Indeed, the juxtaposition of these datasets suggests that person-based Gladue bail cases were more likely to have a violent charge on two or more separate charging informations (footnote 245) and more likely to have breach charges stemming from two or more charging informations (Tables 5.20(a) and 5.20(b)). Finally, the findings related to the most serious charge in a case (Tables 5.9(a) and 5.9(b)) also highlight this pattern, with person-based Gladue bail cases being more likely than their conventional bail counterparts to include a charging information with one or more administration of justice charges which had been merged with – and obscured by – a more serious charge(s).

³³² Notwithstanding the consistent generalized trend above supporting the notion that Gladue bail cases accumulate subsequent charges at a rate that is disproportionate to their conventional bail counterparts, recall that bail outcomes in the person dataset are also slightly more susceptible to a methodological caveat rooted in the inability to pinpoint when during case processing a bail appearance occurred in Gladue Court. The Gladue Bail Status variable flags any case with at least one bail appearance in the specified Gladue Courts. While it is presumed that bail outcomes for Gladue bail cases will generally reflect decisions made in Gladue Court, for person-based cases there is the additional layer of possibility that the most serious bail outcome for a subsequent charge might have actually occurred in conventional bail court. Nevertheless, one might generally expect that an Indigenous accused who was initially released from Gladue Court would be likely to return to this court when seeking bail for any subsequent charges (see also section 4.4.1(i)). Furthermore, this limitation has little effect on case characteristic or case outcome variables.

³³³ When one combines formal and informal detentions, person cases are also necessarily more likely than event cases to have this grouped outcome (36.3% versus 34.9%), including in both the Gladue bail (40.1% versus 35.0% in the event dataset) and conventional bail (36.2% versus 35% in the event dataset) populations. Notably, whereas in the event

Given the increase in formal as well as informal detention bail outcomes, it follows that cases in the person dataset became less likely than those in the event dataset to be granted bail. Moreover, Gladue bail cases in the person dataset became even less likely than their conventional bail counterparts to be granted bail (36.6% versus 51.2% compared to 41.6% versus 52.5% in the event dataset). Again, it seems that Gladue bail cases were not only more likely to contain charges stemming from multiple charging informations, but that the totality of charges and circumstances for Gladue bail cases ultimately rendered them even less likely to receive bail as a final bail outcome³³⁴. Next, Table 5.28(h) presents formal determinations of bail³³⁵ in the person dataset as a means of more directly assessing judicial decision-making in Gladue bail and conventional bail cases.

Table 5.28(h): Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Person Dataset; Formal Determinations of Bail Only; 2006-2017)

			Formally Detained	Bail Granted	Total
Gladue Bail Status	Non-Gladue	Count	15608	69516	85124
		% within Gladue Bail Status	18.3%	81.7%	100.0%
	Gladue	Count	598	2162	2760
		% within Gladue Bail Status	21.7%	78.3%	100.0%
Total		Count	16206	71678	87884
		% within Gladue Bail Status	18.4%	81.6%	100.0%

Fisher's exact test < .001

dataset this combined remand outcome was equally likely in both bail populations, in the person dataset this grouped outcome was somewhat more common among Gladue bail cases than conventional bail cases.

³³⁴ In light of earlier concerns regarding pseudo-selection bias, the same analyses were also performed with single bail appearance cases removed (see Appendix K). As anticipated, and similar to the trends in the event data from Tables 5.28(a) compared to Appendix H, person-based cases with 2+ bail appearances were less likely to be granted bail (44.9% compared to 50.6% when considering all cases – Table 5.28(g)) and slightly more likely to be detained (13.9% compared to 11.4% when considering all cases – Table 5.28(g)) compared to all cases in this same dataset. Moreover, the differences between bail populations in terms of likelihood of being granted bail diminished (35.8% versus 45.5% = 9.7% difference among 2+ appearance cases; 36.6% versus 51.2% = 14.6% difference among all cases – Table 5.28(g)), with the greatest change occurring in the conventional bail population (as expected). In terms of formally detained cases, the differences between bail populations increased slightly (10.8% versus 14.1% = 3.3% difference among 2+ appearance cases compared to 10.1% versus 11.5% = 1.4% difference when considering all cases – Table 5.28(g)). Again, the greatest change occurred in the conventional bail population – a logical finding when one recalls that conventional bail cases were more likely to complete bail in a single bail appearance than Gladue bail cases (Table 5.26(a)).

³³⁵ While formal determinations of bail are examined here in order to explore judicial decision-making and assess the promise of Gladue Courts, these data notably do not include cases for which the accused remained in pre-trial custody without a formal bail decision. In fact, those informally detained were more than twice as common as those formally detained by a judicial officer (24.9% versus 11.4% – Table 5.28(g)). Hence while cases that remain in remand without a formal denial of bail are not a direct reflection of judicial decision-making, they nevertheless represent a non-trivial portion of bail outcomes and will consequently have a significant impact on the remand population.

When one considers only cases for which the most serious bail outcome was a formal bail decision made by a judicial officer, bail cases overall, as well as Gladue bail and conventional bail cases individually, all became more likely to be denied bail in the person dataset than in the event dataset. The differences between the event and person datasets continue to reflect the same trend whereby differences between datasets were starker in the Gladue bail population. Specifically, among cases with a formal determination of bail, the percentage of the Gladue bail population detained went from 16.5% of event cases to 21.7% of person cases (a difference of 5.2%) compared to conventional bail cases which went from 17.8% of event cases to 18.3% of person cases (a difference of only 0.5%). Perhaps most notably, these changes have led to Gladue bail cases actually becoming slightly more likely than their conventional bail counterparts to have as their final bail outcome a formal denial of bail (21.7% versus 18.3%)^{336,337}. In contrast, when considering individual charging informations in the event dataset, Gladue bail cases were slightly less likely to be denied bail. It therefore seems that subsequent charges while on bail not only affect Gladue bail cases more than conventional bail cases, but also in such a way as to cause them to be viewed as less suitable for bail release and more likely to be formally detained by a judicial officer.

Indeed, as bail cases accumulate subsequent charges which initiate additional bail hearings, it appears that a judicial officer's ability to continue granting bail may become more restricted. This shift toward bail refusal may be rooted in case complexity. That is, one might expect that as bail cases become increasingly more complex – and arguably more serious – as a result of additional charges, or perhaps certain types of

³³⁶ In light of earlier concerns regarding pseudo-selection bias, the same analyses (i.e., formal determinations of bail only) were also performed with single bail appearance cases removed (see Appendix K). Notably, in these supplementary analyses, formal detention became more common overall (23.7% versus 18.4% when examining all bail cases) – a predictable shift when one considers the substantial proportion of single bail appearance cases which are same-day consent releases. Furthermore, the removal of single bail appearance cases had a greater effect on the Gladue bail population than the conventional bail population – again, foreseeable when one recalls that cases granted bail in Gladue Court were substantially less likely to receive this outcome in a single day than those granted bail in conventional bail court (15.9% versus 40.1% – Table 5.28(d)). As a result, the differences between Gladue bail and conventional bail cases in terms of bail denial were no longer statistically significant (23.2% versus 23.7%; $p = .575$) – an attenuation mirrored in other findings (see footnote 331). Recall, however, that these findings are not representative of all bail cases (e.g., they exclude same-day consent releases) and should therefore be interpreted within this more restricted context.

³³⁷ These same analyses were also performed for formally and informally detained cases combined versus those released on bail (Appendix L). As expected, this grouped remand outcome was more common overall. Differences between bail populations remained in the same direction, with Gladue bail cases becoming even more likely than their conventional bail counterparts to have this grouped outcome (52.3% versus 41.4%; $p < .001$).

charges (e.g., charges against the administration of justice) being laid while on bail, judicial officers would be less willing to grant judicial interim release. This hypothesis is explored in Tables 5.28(i) and 5.28(j), which examine whether formal bail decisions made by a judicial officer (i.e., to release or detain) might be related to the number of charges in a case as well as the presence of specific types of charges.

Table 5.28(i): Crosstabulation of Number of Charges by Formal Determination of Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Formally Detained ³³⁸	Bail Granted	Total
Number of Charges	1	Count	3202	22745	25947
		% within # Charges	12.3%	87.7%	100.0%
	2	Count	3045	18807	21852
		% within # Charges	13.9%	86.1%	100.0%
	3-4	Count	4055	18478	22533
		% within # Charges	18.0%	82.0%	100.0%
	5-6	Count	2220	5949	8169
		% within # Charges	27.2%	72.8%	100.0%
	7+	Count	3684	5699	9383
		% within # Charges	39.3%	60.7%	100.0%
	Total	Count	16206	71678	87884
		% within # Charges	18.4%	81.6%	100.0%

Chi-square = 4059.223; df = 4; $p < .001$

These data do, in fact, appear to support the hypothesis that bail refusal is related to case complexity (as measured by the number of charges and presence of certain types of charges in a case). Indeed, among bail cases with a formal determination of bail, those with a greater number of charges were more likely to be detained than those with fewer charges. In fact, with every additional charge, cases became more likely to be formally denied bail. For instance, only 12.3% of single-charge cases were denied bail, compared to 18.0% of cases with three to four charges and 39.3% of cases with seven charges or more.

³³⁸ The same analyses were performed for all remand cases (both informally and formally detained) versus cases granted bail (Appendix M). While remand outcomes expectedly became more common, the same general trend remained, whereby a greater proportion of bail cases awaited case resolution in remand as the number of charges in a case increased (with the minor exception of single-charge cases being marginally more likely than two-charge cases to remain in remand – 38.9% versus 37.3%).

Table 5.28(j): Crosstabulation of Presence of Specific Offence by Formal Determination of Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Presence of Charges by Offence Type ^{339,340}	Formally Detained ³⁴¹		Bail Granted		Total	
	Count	%	Count	%	Count	%
Crimes Against Property	8,007	22.5%	27,600	77.5%	35,607	100.0%
Crimes Against the Person	6,638	19.4%	27,500	80.6%	34,138	100.0%
Administration of Justice	8,161	24.5%	25,094	75.5%	33,255	100.0%
<i>Criminal Code</i> Traffic	461	18.3%	2,052	81.7%	2,513	100.0%
Other <i>Criminal Code</i>	4,400	30.0%	10,261	70.0%	14,661	100.0%
Federal Statute	3,611	15.1%	20,288	84.9%	23,899	100.0%

In terms of offence type, bail cases with at least one federal statute charge were least likely to be denied bail (15.1%), followed by those with one or more *Criminal Code* traffic charges (18.3%). In contrast, cases with at least one “other” *Criminal Code* charge were most likely to be denied bail (30.0%), followed by those with one or more charges against the administration of justice (24.5%). The fact that these two offence categories lead in terms of the likelihood of formal detention is perhaps not surprising when one considers that the former includes weapons offences – including some reverse onus offences under *Criminal Code*

³³⁹ This table presents the likelihood of having bail granted or formally denied based on the presence of one or more charges belonging to a specific offence classification (rather than whether a charge from this offence category was the most serious charge in a case). Given that cases commonly have more than one charge and these charges may belong to different offence classifications, the presence of a specific type of charge does not mean that this charge was necessarily decisive in a judicial officer’s determination of bail. Indeed, given the grounds for detention which govern bail decisions, offence type will sometimes play very little role in a judicial officer’s decision to grant or deny bail.

³⁴⁰ While this table examining the presence of charges for each offence type is descriptive in nature, a similar inferential analysis was performed to examine the relationship between the offence type for the most serious charge in a case and formal determinations of bail. Results of these analyses were similar (e.g., cases for which the most serious charge was an “other” *Criminal Code* offence were least likely to be released while federal statute charges were most likely to be released) and statistically significant ($p < .001$).

³⁴¹ The same analyses were also performed for all remand cases (both informally and formally detained) versus cases granted bail (Appendix M). Trends in terms of the types of offences most and least likely to be (informally or formally) detained were largely similar. Notably, however, cases with one or more charges against the administration of justice became most likely to remain in remand (52.5%), with cases with one or more “other” *Criminal Code* charges being second most likely to remain in remand (51.8%). This finding suggests that a significant proportion of bail cases with one or more administration of justice charges do not seek a formal determination of bail, perhaps feeling that the likelihood of release from a reverse onus position is so low as to not be worth pursuing, or wishing to avoid the possibility of further administration of justice charges if released on similar or more stringent bail conditions.

s.515(6)(a)³⁴² – and the latter includes reverse onus offences under s.515(6)(c), such as bail breaches and failures to attend court³⁴³.

These trends in judicial officers' formal bail decisions based on charge packages shed further light on the finding from Table 5.28(h) that Gladue bail cases in the person dataset ultimately become slightly more likely to be formally denied bail than conventional bail cases. Indeed, Gladue bail cases in this dataset were less likely than conventional bail cases to have only a single charge or two charges in a case and were more likely to have five to six or seven or more charges in a case (Table 5.7(b)). Furthermore, Gladue bail cases were more likely than their conventional bail counterparts to contain the types of charges whose presence is most likely to be denied bail (18.7% versus 16.5% with one or more “other” *Criminal Code* charges (Table 5.14) and 60.6% versus 44.2% with one or more administration of justice charges (Table 5.12)). Similarly, Gladue bail cases were also less likely than their conventional bail counterparts to contain the types of charges whose presence is least likely to be denied bail (18.1% versus 23.1% with one or more federal statute charges (Table 5.15) and 1.2% versus 2.5% with one or more traffic charges (Table 5.13)). Hence, it seems that an accumulation of charges, and perhaps especially charges against the administration of justice, appear to be contributing to Gladue bail cases ultimately being slightly more likely to be denied bail.

Another measure that can shed light on Gladue bail and conventional bail caseloads and processes is the presence of bail appearances following the completion of the first bail phase (Table 5.29). Traditionally, this variable would be used as a proxy for whether cases received additional charges while on bail (which would have initiated a second – or third, etc. – bail phase following the completion of the first). However,

³⁴² Specifically, an accused is placed in a reverse onus position at bail if they are charged with (among others): an indictable offence related to weapons trafficking (s.515(6)(a)(vi)); discharging a firearm or allegedly using a firearm in the commission of a number of serious offences (e.g., attempted murder, sexual assault II and III, kidnapping, robbery, etc.) (s.515(6)(a)(vii)); or an indictable offence that is alleged to involve a weapon while the accused was subject to a weapon prohibition order (s.515(6)(a)(viii)).

³⁴³ Interestingly, and somewhat counterintuitively, cases with one or more charges for an offence against the person were the third *least* likely to be formally denied bail. Given that common assault is the most frequent offence in this category, it may be that a non-trivial proportion of these more minor assaults were deemed suitable for release based on the specific circumstances of the accused and the alleged offence (and perhaps the inclusion of reasonable release conditions to mitigate concerns, particularly those rooted in public safety).

within the context of Gladue Courts and some of the unique bail processes within these courts (e.g., bail court “reporting”, bail variations, etc.), this variable may require a more contextualized interpretation.

iv) Presence of Subsequent Bail Appearances³⁴⁴

Table 5.29: Crosstabulation of Gladue Bail Status by Presence of Subsequent Bail Appearances, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Subsequent Bail Appearances		Total
			No Subsequent Bail Appearances	Subsequent Bail Appearances	
Gladue Bail Status	Non-Gladue	Count	103459	32268	135727
		% within Gladue Bail Status	76.2%	23.8%	100.0%
	Gladue	Count	3258	2654	5912
		% within Gladue Bail Status	55.1%	44.9%	100.0%
Total	Count		106717	34922	141639
	% within Gladue Bail Status		75.3%	24.7%	100.0%

Fisher’s exact test < .001

Gladue bail cases were considerably more likely (44.9%) than conventional bail cases (23.8%) to include bail appearances beyond the first completed bail phase³⁴⁵. While such a finding may be easily interpreted as evidence that Gladue bail cases are more likely than conventional bail cases to have received subsequent charges while on bail, this may not be necessarily – or at least not entirely – responsible for the sizeable differences between bail populations. Indeed, it is possible that some of the greater prevalence of additional bail appearances among Gladue cases might be attributable to other court processing factors, especially

³⁴⁴ This variable measures the presence of additional bail appearances following the end of the first bail phase. Traditionally, it might be considered a crude approximation of whether accused persons released on bail received subsequent charges which initiated an additional bail process while released in the community. However, subsequent bail appearances can also occur for other reasons, such as applications for bail variations (i.e., requests to change bail conditions), when a surety revokes their support and a new bail plan and/or surety must be proposed for a judicial officer’s consideration, or, in the context of Gladue Court, the sort of ad hoc bail reporting that sometimes occurs in these courts in the early weeks or months of an accused’s release. This variable was produced by taking the total number of (all) bail appearances on file for a charge and subtracting from this the number of first bail phase appearances on record. If the resulting figure is one or greater, this charge was coded as having one or more subsequent bail appearances (that is, if the total number of all bail appearances is greater than the number of first bail appearances). If the resulting figure is 0, this charge was coded as having only one bail phase (since the total number of bail appearances matches the number of first bail appearances). Finally, a small portion of these resulting figures that are negative were simply coded as missing, as these data would suggest some level of human error when inputting case data. Charges were then aggregated into cases using the maximum value, so that if even a single charge in a case contained subsequent bail appearances, the entire case would be coded as such. Given that cases in the event dataset reflect individual charging informations and, in multi-information cases, might be considered only “pieces” of broader bail cases, person data are presented as a more accurate reflection of this variable.

³⁴⁵ The same analyses were performed in the event dataset with similar results: Gladue bail cases in this dataset were also considerably more likely than conventional bail cases to include bail appearances beyond the first completed bail phase ($p < .001$).

those used predominantly (if not exclusively) in Gladue Courts. Indeed, both Gladue Courts in this study sometimes engaged in a practice of bail court reporting, whereby an accused who was granted bail would be required to report to the Gladue Court on a weekly (or otherwise) basis in the early weeks or months of release as a means of demonstrating their willingness and ability to comply with their conditions of release. It is also possible that the greater prevalence of additional bail appearances among Gladue bail cases is indicative of Gladue bail cases being more likely to receive bail variations (as suggested by Clark, 2016b). That is, Gladue bail cases may be more likely to have release conditions amended, and in particular, relaxed once the accused has demonstrated a commitment to bail compliance. Hence the greater prevalence of subsequent bail appearances within the Gladue bail population may not be an exclusive reflection of subsequent charges, but rather a reflection of continued, and seemingly supportive, engagement with the bail system more generally. Indeed, the practices and procedures which are unique to Gladue Courts' bail processing are likely to be playing an important role in the ability of these courts to release accused persons who might have not otherwise been deemed suitable for bail release.

Overall, Gladue bail and conventional bail cases appear to share several similarities, as well as some important differences, when it comes to bail processing. Notably, when considering all bail cases, Gladue bail cases tended to take more bail appearances and a greater number of days to complete the bail process than did conventional bail cases (Tables 5.26(a) and 5.27(a)). Yet while the number of bail appearances became fairly similar between bail populations when single bail appearance cases were removed (Table 5.26(b)), the differences in the time required to complete bail were less affected by a similar removal of single day in bail cases (Table 5.27(b)). Hence bail cases processed in Gladue Court appeared to take somewhat longer to complete the bail process than those from conventional bail court. This is likely a reflection of Gladue Courts' limited sitting schedule, as well as the work that goes into preparing bail plans for accused persons whose circumstances or current charges might otherwise make them appear unsuitable for bail release. However, given the largely equitable formal bail outcomes between these groups, this additional time may nevertheless be viewed as worthwhile by Indigenous accused persons in Gladue Court.

Indeed, despite the bail system being a particularly settler-centric and discriminatory system, bail outcomes in Gladue Court and conventional bail court were similar in several regards. For instance, these two bail populations were equally likely to remain in remand when examining all bail outcomes in the event dataset (Table 5.28(a)). Yet Gladue bail cases were less likely than conventional bail cases to be granted bail and considerably more likely than their counterparts to plead guilty at this stage (Table 5.28(a)). However, when examining only those cases with a formal bail decision, Gladue bail cases were actually marginally more likely than their conventional bail counterparts to be granted bail (Table 5.28(b)), suggesting that judicial officers and criminal justice practitioners in Gladue Court are striving to release Indigenous accused on bail, when possible.

Although these findings are promising overall, this optimism is perhaps attenuated somewhat when one considers the person dataset. That is, when examining broader, person-based cases which may encompass multiple charging informations and, as such, represent more complex cases, bail outcomes shift overall toward detention. Moreover, when considering all bail outcomes, Gladue bail cases in this dataset became more likely than conventional bail cases to remain in remand and the disparity between bail populations in the likelihood of being granted bail increased (Table 5.28(g)). Even when considering only those cases with a formal determination of bail, Gladue bail cases in the person dataset became less likely than conventional bail cases to be granted bail – although these differences were relatively small (Table 5.28(h)). It therefore appears that, although criminal justice professionals in Gladue Court have been making efforts to release accused persons on bail at similar rates to their conventional bail counterparts (see the event dataset), an accumulation of subsequent charges (and perhaps especially charges against the administration of justice) among Gladue bail cases may ultimately render these accused persons unsuitable for bail release (see the person dataset).

5.2.5 – Post-Bail Case Processing

This section explores post-bail court processing. While the number of appearances and amount of time required to complete the bail process are certainly important when assessing bail court practices, the number

of appearances and amount of time required to reach case resolution following bail is also an important consideration. Indeed, for cases released on bail, accused are subjected to (potentially numerous and onerous) bail conditions which tend to restrict their liberty until the case is resolved. Moreover, accused persons on bail also risk accumulating further charges in the form of failure to comply with a release order or failure to attend court charges, which in turn increase the likelihood of remand custody and, eventually, being convicted and sentenced for one or more of these charges. For those cases awaiting case completion in remand, lengthy post-bail court processing would lead to extended time in a detention centre, with its associated deprivations of liberty and negative effects on accused persons' housing, employment and family obligations and relationships. Hence, efficient case processing following the completion of bail would generally be desired by accused regardless of bail outcome.

Moreover, any differences between Gladue bail and conventional bail cases in terms of processing may have important downstream effects. Indeed, differential case processing may lead to the differential accumulation of administration of justice charges while on bail (and associated likelihood of remand, convictions, and sentenced custody) as well as the differential effects on one's circumstances, which might later be viewed as 'risky' at bail (e.g., unemployment, lack of stable housing). This section first explores several measures of court efficiency, before examining the presence of several court procedures which might reasonably affect post-bail court processing. Analyses are presented primarily for the person dataset, which better captures the entirety of a case's processing through the court system³⁴⁶. Tables 5.30 through 5.31(c) present the number of court appearances and length of time between the end of the first bail phase and case resolution.

³⁴⁶ Indeed, for variables assessing the length and number of appearances required for case processing, the fact that some event cases represent only portions of a broader criminal court case means that the event dataset risks underestimating these measures.

i) Number of Appearances between End of (First) Bail and Case Resolution^{347,348}

Table 5.30: Crosstabulation of Gladue Bail Status by Number of Appearances between End of (First) Bail and Case Resolution, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Number of Appearances between End of (First) Bail and Case Resolution				
			0-2	3-8	9-15	16+	Total
Gladue Bail Status	Non- Gladue	Count	39133	38477	29682	21759	129051
		% within Gladue Bail Status	30.3%	29.8%	23.0%	16.9%	100.0%
	Gladue	Count	1961	1397	1099	1294	5751
		% within Gladue Bail Status	34.1%	24.3%	19.1%	22.5%	100.0%
Total ³⁴⁹		Count	41094	39874	30781	23053	134802
		% within Gladue Bail Status	30.5%	29.6%	22.8%	17.1%	100.0%

Chi-square = 221.419; df =3; $p < .001$

Gladue bail cases generally took more appearances to reach case resolution following the completion of bail than did conventional bail cases – requiring an average of 9.88 appearances (median = 6; SD = 11.98) compared to 8.77 appearances (median = 6; SD = 9.65) ($t = -6.959$; $df = 6086.917$; $p < .001$). Notably, though, Gladue bail cases were somewhat more likely than bail cases in conventional bail court to reach case resolution in zero or very few appearances following the end of the bail process. That is, 34.1% of Gladue bail

³⁴⁷ This variable measures the number of court appearances required from the time that a charge completed first bail until that charge was resolved. It was produced by taking the number of total court appearances for a charge and subtracting from it the number of court appearances on record for the first bail phase. Charges were then aggregated into cases by taking the maximum value for a charge to represent the entire case. Data are presented for the person dataset, which better reflects the maximum number of appearances that an accused required following the completion of a charge or set of charges' (first) bail phase. For this dataset, the maximum value for a case will almost certainly reflect the number of appearances between (first) bail completion and case resolution for the charge(s) laid earliest in the case. Notably for this variable, data are presented only for early bail cases. This is because later bail cases ($N=6658$ or 4.7%) – that is, those whose first bail appearance did not occur within the first seven days of case processing – would have one or more non-bail court appearances which occurred prior to commencing the bail process. Within this context, this variable for later bail cases would risk becoming a measure of “non-(first) bail court appearances” (either pre- or post-bail) rather than a measure of post (first) bail court appearances specifically. For this reason, these cases were removed from analyses. Note also that the later bail variable, when used with the person dataset, is not a perfect measure of these later bail cases. Indeed, the person-based aggregation process means that this dataset will slightly underestimate the true number of later bail cases.

³⁴⁸ This variable should not be considered a reflection of conventional court case processing compared to Gladue Court case processing, as the latter is generally reserved for bail cases and for pleas and/or sentencing. That is, once a case has completed the bail process in Gladue Court, any subsequent court appearances will generally take place in conventional courtrooms (e.g., for additional disclosure, to schedule or hold a potential trial, etc.) until the accused is either found guilty at trial or is ready to enter a guilty plea, at which time they may do so in Gladue Court. In light of this, comparisons between Gladue bail cases and conventional bail cases for this variable are less a reflection of case processing in these two types of courts and more a reflection of how the Indigenous accused and the largely non-Indigenous accused from these cases are processed through the study courthouses more generally.

³⁴⁹ Cases coded as having more than 100 appearances between the end of first bail and the final disposition (i.e., 101 appearances or greater; representing 0.2% ($N=242$) of the person dataset) were considered outliers (whether an accurate figure for an exceptional case or the result of data entry error). Such extreme scores, even when few in number, can easily skew mean values and inflate standard deviations and have thus been removed from this and subsequent analyses of this variable.

cases required between zero and two additional court appearances compared to only 30.3% of conventional bail cases. This is likely at least partially a reflection of Gladue bail cases being more likely than conventional cases to have bail outcomes which immediately resolve a case (e.g., guilty plea or having charges dismissed, stayed or withdrawn – Table 5.28(g)). Having said this, this trend appears to be driven less by the cases ending with dismissal, stay or withdrawal of charges (constituting only 4.9% of Gladue bail outcomes in the person dataset³⁵⁰ – Table 5.28(g)) and more by guilty pleas, which were more than three times as common (17.6% of Gladue bail outcomes in this same dataset – Table 5.28(g)).

However, aside from those cases which were resolved in very few appearances following the bail process, bail cases in Gladue court were actually less likely than those in conventional court to require only a small to moderate number of appearances. Indeed, Gladue bail cases were less likely than their conventional bail counterparts to have three to eight appearances (24.3% versus 29.8%) or nine to 15 appearances (19.1% versus 23.0%) from the end of bail to reach case completion. In contrast, Gladue bail cases were more likely than conventional bail cases to require a very high number of appearances – 16 appearances or more – to reach case resolution following completion of the bail process (22.5% compared to 16.9%), thus contributing to the higher mean for this group. Overall, it appears that if Gladue bail cases were not resolved within a couple of appearances following bail, they would be less likely to be resolved in a modest number of appearances and more likely to require many appearances to complete case processing. Within the context of the overincarceration of Indigenous peoples, such extensive and potentially onerous case processing for the Indigenous accused in these Gladue bail cases (in terms of number of required court appearances to reach case resolution) may be contributing not only to elevated levels of pre-trial incarceration for those denied bail, but also to an increased risk of charges – following a bail release – for a breach of bail or failure to appear in court and subsequent remand custody (as well as potential conviction and sentenced custody).

³⁵⁰ While these types of outcomes were rare at bail (constituting only 3.1% of all bail outcomes – Table 5.28(g)), they were considerably more common as final case outcomes (constituting the most serious case outcome in 34.4% of person cases (Table 5.34(a))).

While the number of post-bail appearances until case resolution is a useful measure of case processing and court efficiency, the time from the end of a case's first bail phase until case resolution is perhaps an even more compelling explanatory factor for the high incarceration figures for Indigenous peoples. Indeed, many court appearances do not necessarily translate into a lengthy period of time (as they might occur in quick succession rather than spread out over an extended period of time). As such, Table 5.31(a) presents for both Gladue bail and conventional bail cases the amount of time that passed between the end of a case's first bail and that case being resolved.

ii) Time between End of (First) Bail and Case Resolution^{351,352}

Table 5.31(a): Crosstabulation of Gladue Bail Status by Time between End of (First) Bail and Case Resolution, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Time between End of (First) Bail and Case Resolution				
			One Month or Less	More than One Month to Six Months	More than Six Months to a Year	More than One Year	Total
Gladue Bail Status	Non-Gladue	Count	39300	36654	27597	24499	128050
		% within Gladue Bail Status	30.7%	28.6%	21.6%	19.1%	100.0%
	Gladue	Count	2135	1763	985	853	5736
		% within Gladue Bail Status	37.2%	30.7%	17.2%	14.9%	100.0%
Total ³⁵³		Count	41435	38417	28582	25352	133786
		% within Gladue Bail Status	31.0%	28.7%	21.4%	18.9%	100.0%

Chi-square = 186.004; df = 3; $p < .001$

³⁵¹ This variable measures the time that passed from the end of (first) bail until case resolution. It was produced by calculating the difference, in days, between the date of final disposition (i.e., case resolution) and the end date for the first bail phase. Charges were then aggregated into cases by taking the maximum value for a charge to represent the entire case. Data are presented for the person dataset, which better reflects the maximum amount of time that passed between the completion of (first) bail and case resolution. In this dataset, the maximum value for a case would almost certainly reflect the post-bail time spent awaiting case resolution for the first (or only) charge(s) laid in a case (since this would have the greatest number of days). Data for this variable are again presented only for early bail cases. Given concerns raised above with the syntax for later bail cases relative to the number of post-bail appearances as well as the desire to be able to draw comparisons between these two variables, the decision was made to exclude later bail cases (N=6658 or 4.7%). Finally, recall that due to the person-based aggregation process, these later bail cases are a slight underestimate the true number of bail cases whose bail began more than a week after their first court appearance.

³⁵² As with the number of post-bail appearances, this variable should also not be considered a reflection of case processing in conventional courts and Gladue Courts, given that the latter are generally reserved for bail and guilty pleas and/or sentencing phases. Rather, this variable measures the amount of time post-bail which was required for Indigenous accused whose bail was processed in Gladue Courts and the largely non-Indigenous population whose bail was processed in conventional bail courts to have their cases processed through the study courthouses more generally.

³⁵³ Cases coded as taking more than four years between end of first bail and final disposition (i.e., 1461 days or greater) were considered outliers (whether an accurate figure for an exceptional case or the result of data entry error). Such extreme scores, even when few in number, can easily skew mean values and inflate standard deviations, and thus these scores were removed from this and subsequent analyses of this variable. There were 1227 outliers among early bail cases for the person dataset (0.9% of early bail person cases).

Overall, nearly a third of all bail cases were resolved within a month of completing the bail process, and roughly three-in-five bail cases were resolved within six months ($31.0\% + 28.7\% = 59.7\%$). While most bail cases were resolved reasonably following the completion of bail, roughly two-in-five cases took more than six months to be completed ($21.4\% + 18.9\% = 40.3\%$) and close to one-in-five cases took more than a year after bail in order to be completed (18.9%). Gladue bail cases took somewhat less time overall to reach case resolution following bail completion – on average 163.75 days or a little over five months (median = 77.5; SD = 218.89 days) compared to 192.30 days or a little more than six months (median = 119; SD = 217.17 days) for conventional bail cases ($t = 9.667$; $df = 6251.380$; $p < .001$), although standard deviations suggest considerable variability within both bail populations.

An examination of the distribution of cases across post-bail processing times shed further light on these findings. Notably, Gladue bail cases were more likely than conventional bail cases to be resolved within a month of bail completion (37.2% versus 30.7%) – again, likely a reflection of Gladue cases being more likely to end the bail process by pleading guilty or having charges dismissed, stayed or withdrawn. Gladue bail cases were also slightly more likely than conventional bail cases to be resolved moderately quickly following bail, with 30.7% (versus 28.6%) of these cases being resolved in more than one month to six months. In contrast, Gladue bail cases were less likely than their conventional bail counterparts to take lengthy or very lengthy periods of time to be resolved following bail. Indeed, only 17.2% of Gladue bail cases (versus 21.6%) required more than six months to a year following bail to be resolved. Further, 14.9% of Gladue cases (versus 19.17%) required more than a year following the completion of the bail process to reach case resolution.

This finding might seem counterintuitive – at least at first – when one considers that in Table 5.30 above, Gladue bail cases were more likely than their conventional bail counterparts to require 16 or more post-bail appearances to complete case processing. However, the fact that 1,294 Gladue bail cases required 16 or more appearances, but only 853 of these cases took more than a year following bail to reach resolution suggests that a non-trivial number of cases with many appearances were, in fact, resolved in a year or less.

Said differently, although cases that had their bail processed in Gladue Court took more court appearances following bail to be resolved, this did not necessarily translate into lengthier case processing³⁵⁴.

However, while most bail cases were completed within a year of completing bail, those cases that were not resolved expeditiously are particularly relevant when one considers the deprivations of liberty associated with both bail release and remand custody. For those accused granted bail, these individuals are nearly always required to abide by (often rather onerous) bail conditions for lengthy periods. These individuals are also faced with an increased likelihood of being charged for allegedly breaching their bail order, being returned to bail court, and – due to reverse onus provisions for breach charges – ultimately being denied bail and spending the remainder of their case processing time in custody. For those accused who were denied bail, these individuals are deprived of their liberty and held in detention centres where they are often subjected to very harsh conditions. Given the serious implications of lengthy case processing following the bail process – particularly for the one-in-five cases taking more than a year to be resolved following bail – it is worth examining this variable for only for those granted bail as well as only those remaining in remand (either formally or informally detained) (Tables 5.31(b) and 5.31(c)).

³⁵⁴ Interestingly, it does not appear that the time required to commission Gladue Reports or Gladue Letters for Indigenous persons with a finding of guilt has a significant effect on court processing and efficiency overall. Although eligibility varies by jurisdiction, in Ontario, Gladue Reports may be requested for Indigenous offenders for whom the Crown is seeking a custodial sentence of more than three months, and shorter Gladue Letters may be requested when the Crown position is a custodial sentence of less than three months. In order to facilitate the level of detail generally required of these Gladue pre-sentencing materials, Aboriginal Legal Services (2022) estimates that Gladue Reports generally take six to eight weeks to prepare, while Gladue Letters take roughly four to five weeks (although this can be expedited for individuals already in custody). In contrast, Legal Aid Ontario (2023) estimates that a more generic pre-sentence report requires 2-6 weeks to prepare. Given that Gladue Reports tend to take longer to prepare than pre-sentence reports, one might expect Gladue bail cases (as a proxy for cases with Indigenous accused) to have longer mean case processing times and a greater proportion of lengthy processing compared to the largely non-Indigenous persons in conventional bail cases (who would primarily be eligible for pre-sentence reports instead). The fact that cases processed in Gladue Court did not have lengthier case processing times overall might suggest that the number of Gladue bail cases having a new Gladue Report commissioned is relatively modest. Indeed, Gladue Reports/Letters and pre-sentence reports are commonly commissioned for first-time offenders, or individuals for whom the courts have little background information. Hence it is possible that a non-trivial proportion of Indigenous accused have previously had a Gladue Report commissioned, such that a new Gladue Report was not deemed necessary at the time of sentencing (this proportion being potentially greater than that for non-Indigenous accused with an existing pre-sentence report). However, it should be noted that, among cases *remaining in remand* (Table 5.31(c)), Gladue bail cases did, in fact, tend to take longer than conventional bail cases to reach resolution. As such, it is possible that the commissioning of Gladue Reports/Letters may be contributing to this more restricted trend among remand cases. Indeed, the shorter case processing times overall for remand cases (and for conventional bail cases in remand, in particular) compared to released cases may combine with the necessary Gladue Report/Letter preparation times to ultimately extend case processing times for Gladue bail cases in remand, specifically.

Table 5.31(b): Crosstabulation of Gladue Bail Status by Time between End of (First) Bail and Case Resolution, Bail Release Cases Only, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Time between End of (First) Bail and Case Resolution				Total
			One Month or Less	More than One Month to Six Months	More than Six Months to a Year	More than One Year	
Gladue Bail Status	Non-Gladue	Count	2584	21445	20931	19731	64691
		% within Gladue Bail Status	4.0%	33.1%	32.4%	30.5%	100.0%
	Gladue	Count	169	830	565	509	2073
		% within Gladue Bail Status	8.2%	40.0%	27.3%	24.6%	100.0%
Total		Count	2753	22275	21496	20240	66764 ³⁵⁵
		% within Gladue Bail Status	4.1%	33.4%	32.2%	30.3%	100.0%

Chi-square = 152.447; df = 3; $p < .001$

Overall, accused who were granted bail were unlikely to have their case completed within a month of release (4.1%). Roughly a third of these cases overall were completed in either more than one month and six months (33.4%), more than six months to a year (32.2%), or more than a year (30.3%). Importantly, more than 3 in 5 accused ($32.2\% + 30.3\% = 62.5\%$) who were granted judicial interim release were on bail (and almost certainly subject to bail conditions) for greater than six months³⁵⁶.

Despite these overall trends, released Gladue bail cases tended to be completed more quickly than their conventional bail court counterparts. Indeed, released Gladue bail cases took, on average, 257.14 days (or roughly 8.5 months; median = 189; SD = 235.35) compared to 288.63 days (or roughly 9.5 months) on average (median = 248; SD = 215.90) for released conventional bail cases ($t = 6.012$; df = 2185.212; $p < .001$). More specifically, Gladue bail cases were much more likely than conventional bail cases to be resolved within a month of receiving bail (8.2% versus 4.0%), or in more than a month to six months (40.0% versus 33.1%). Conversely, Gladue bail cases were less likely than those from conventional bail court to require more than six months to a year (27.3% versus 32.4%) or more than a year post-bail to be resolved (24.6% versus

³⁵⁵ An attentive reader may note that the number of released person cases in this dataset (N=66,764) is somewhat smaller than the number presented in Table 5.28(g) (N=71,678). This discrepancy is almost certainly a reflection of the data in this table excluding later bail cases, as well as excluding cases considered outliers (i.e., those cases which took greater than four years following the completion of bail to be resolved).

³⁵⁶ For those individuals granted bail, 51.6% required nine or more court appearances to reach resolution, while 20.2% required sixteen or more court appearances to reach resolution. On average, cases granted bail required 10.76 (median = 9) additional court appearances post-bail to be resolved (12.65 versus 10.69 appearances for Gladue bail and conventional bail cases, respectively). The greater average number of post-bail court appearances for Gladue bail cases compared to conventional bail cases might be partly explained by the practice of bail court reporting described in section 5.2.4(iv) above.

30.5%)³⁵⁷. Given that Gladue bail cases were more likely than conventional bail cases to end the bail process with guilty pleas, one might expect this group to also be more likely to plead guilty to charges at relatively early points in (post-bail) case processing, particularly if the accused in these cases were finding conditions of bail to be onerous or otherwise challenging.

Interestingly, when one examines the time post-bail until case completion for cases that awaited resolution in remand (i.e., both formally and informally detained), significantly different patterns emerge.

Table 5.31(c): Crosstabulation of Gladue Bail Status by Time between End of (First) Bail and Case Resolution, Remand Cases Only, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Time between End of (First) Bail and Case Resolution				
			One Month or Less	More than One Month to Six Months	More than Six Months to a Year	More than One Year	Total
Gladue Bail Status	Non-Gladue	Count	20882	14854	6479	4626	46841
		% within Gladue Bail Status	44.6%	31.7%	13.8%	9.9%	100.0%
	Gladue	Count	637	921	415	340	2313
		% within Gladue Bail Status	27.5%	39.8%	17.9%	14.7%	100.0%
Total		Count	21519	15775	6894	4966	49154
		% within Gladue Bail Status	43.8%	32.1%	14.0%	10.1%	100.0%

Chi-square = 268.649; df = 3; $p < .001$

Indeed, these data stand in stark contrast to those in Table 5.31(b) which examined the time between bail and case completion for cases granted bail. Specifically, cases that were denied bail or remained in custody without a formal bail decision were most likely to have their case resolved in one month or less (43.8%) and were substantially more likely – indeed, more than ten times more likely – to be resolved in this timeframe compared to cases granted bail release (4.1%). Remand cases tended to be resolved quickly overall, with only 10.1% of these cases taking more than a year to be completed. It seems that the deprivation of liberty and the conditions specific to many detention centres may have been of such a nature as to compel

³⁵⁷ Of released Gladue bail cases that were resolved within one month of completing the bail process, the most common (most serious) case outcome was a finding of guilt and associated sentence (47.3%), followed by a stay of charges (27.8%) – which would almost certainly be associated with completion of diversionary programming offered through the Community Council program – and a withdrawal of charges (24.9%). In contrast, released conventional bail cases resolved within a month of completing the bail process were slightly less likely to plead guilty (44.4%), more likely to have charges withdrawn (42.2%) and less likely to have charges stayed (9.0%). In terms of those released Gladue bail cases that took more than a year to be resolved the most common (most serious) case outcomes were a finding of guilt and associated sentence (52.7%), a withdrawal of charges (31.0%) and a staying of charges (7.9%), whereas comparable conventional bail cases were, again, slightly less likely to have a finding of guilt (39.0%) and more likely to have charges withdrawn (36.5%), although they were also very marginally more likely to have charges stayed (8.3%). On the matter of most serious case outcomes and their rankings, see footnote 378.

(or perhaps coerce) accused persons remaining in custody to plead to charges as a means of being released from remand custody or otherwise improving conditions of incarceration (as sentenced custody is widely recognized as having better conditions than remand).

Yet, this general pattern of post-bail case processing did not hold entirely true for Gladue bail cases awaiting resolution in pre-trial custody. Indeed, these Gladue bail cases were actually most likely to be completed in a period of more than a month to six months from the end of the bail (39.8% versus 31.7% of conventional bail cases). Moreover, Gladue bail cases were less likely than their conventional bail counterparts to have their cases resolved in one month or less (27.5% versus 44.6%), but more likely to require more than six months to a year (17.9% versus 13.8%) and more than one year (14.7% versus 9.9%) to complete the criminal court process³⁵⁸. Not surprisingly within this context, Gladue bail cases awaiting case completion in remand took, on average, 173.51 days (median = 96; SD = 213.19) post-bail to be resolved compared to their conventional bail counterparts which required an average of 123.69 days (median = 47; SD = 184.47) ($t = -11.035$; $df = 2485.949$; $p < .001$).

Overall, once Gladue bail cases completed the bail process, these cases tended to take a greater number of appearances, though a shorter amount of time, than conventional bail cases to reach case resolution. Yet the trends between Gladue and conventional bail cases, in terms of case processing, differ depending on bail outcomes. Specifically, Gladue bail cases that were released on bail took less time to be

³⁵⁸ Of Gladue bail cases remaining in remand which were resolved within one month of completing the bail process, the vast majority – more than four in five (83.5%) – had a finding of guilt and associated sentence as their most serious outcome, while having charges withdrawn (10.5%) or stayed (5.0%) were considerably less common. In contrast, conventional bail cases remaining in remand and resolved within a month of bail were actually even more likely to have a finding of guilt and sentence as their most serious case outcome (89.7%) and less likely to have charges withdrawn (7.0%) or stayed (1.9%). Notably, remand cases resolved within a month of bail were substantially more likely to end in conviction than cases granted bail (83.5% versus 47.3% for Gladue bail cases; 89.7% versus 44.4% – or more than twice as likely – for conventional bail cases). This finding may be a reflection of the harsh conditions of remand which might act to induce guilty pleas (Euvrard & Leclerc, 2017; Kellough & Wortley, 2002; Pelvin, 2017). Interestingly, it appears that Indigenous accused in Gladue bail cases may be less influenced to plead guilty as a result of remand than conventional bail cases. Among Gladue bail cases remaining in remand which took more than a year to be resolved, the most common case outcome was still a finding of guilt and sentence – although less common at 71.5% of cases – followed by charges being withdrawn (14.1%), stayed (6.2%) or sent to Superior Court for trial (5.6%). However, for comparable conventional bail cases, a finding of guilt and sentence was significantly less common as a case's most serious outcome (52.5%) which was followed by charges being withdrawn (24.3%), sent to Superior Court for trial (11.6%) or stayed (7.0%).

resolved than their conventional bail counterparts, while Gladue bail cases that were denied bail actually took longer to be resolved compared to conventional bail cases.

While analyses examining case processing from the point of bail outcome to case resolution are important – particularly as a means of understanding how issues of court efficiency may combine with bail outcomes to increase the likelihood of eventual bail breaches or induce guilty pleas – court efficiency can also be measured in terms of the overall number of appearances and time required to reach case resolution. Within the context of this study and its two distinct datasets – with bail processing variables having been examined using primarily the event dataset and post-bail processing variables examined using the person dataset – overall court efficiency variables have the benefit of measuring court processing using a singular dataset for ease of interpretation. These variables are presented for the person dataset which offers a more accurate representation of court processing from first court appearance to last. Tables 5.32 and 5.33 present the total number of appearances and total time required for a bail case to complete the entire court process.

iii) Total Number of Court Appearances until Case Resolution³⁵⁹

Table 5.32: Crosstabulation of Gladue Bail Status by Total Number of Court Appearances, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Total Number of Court Appearances until Case Resolution				
			1-3	4-8	9-14	15+	Total
Gladue Bail Status	Non-Gladue	Count	28556	34381	31849	34251	129037
		% within Gladue Bail Status	22.1%	26.6%	24.7%	26.5%	100.0%
	Gladue	Count	1264	1425	1154	1906	5749
		% within Gladue Bail Status	22.0%	24.8%	20.1%	33.2%	100.0%
Total ³⁶⁰		Count	29820	35806	33003	36157	134786
		% within Gladue Bail Status	22.1%	26.6%	24.5%	26.8%	100.0%

Chi-square = 144.593; df = 3; $p < .001$

³⁵⁹ This variable measures the total number of court appearances in a bail case's entire court processing, from first court appearance to last court appearance. It was produced based on a MAG variable that captures the appearance number for the final court appearance on record for a charge. Charges were aggregated into cases using the maximum value for a charge to represent the entire case. Data are presented for the person dataset, which better reflects the maximum number of appearances required for a court case to be resolved (since the event dataset would measure only how many appearances a charging information required to be resolved and would therefore underestimate the case processing of broader, multi-information bail cases). In the person dataset, the maximum value for a charge would almost certainly reflect the total number of court appearances for the first (or only) charge(s) on record. Data are again presented only for early bail cases in order to maintain consistency and comparability with other case processing variables which necessarily excluded late bail cases from analyses for methodological reasons.

³⁶⁰ Cases coded as having more than 100 appearances to reach resolution (i.e., 101 appearances; 0.2% (N=276) of the person dataset) were considered outliers (whether an accurate figure for an exceptional case or the result of data entry error). Such extreme scores, even when few in number, can easily skew mean values and inflate standard deviations, and thus these scores were removed from analyses of this variable.

Overall, Gladue bail cases took slightly more court appearances on average to complete case processing compared to conventional bail cases – 12.86 appearances³⁶¹ (median = 9; SD = 12.03) compared to 11.17 appearances (median = 9; SD = 9.96) ($t = -10.487$; $df = 6104.175$; $p < .001$). That being said, Gladue bail and conventional bail cases were equally likely to have their cases resolved quickly, in one to three court appearances (22.0% versus 22.1%). However, Gladue bail cases were slightly less likely than their conventional bail counterparts to be resolved in a moderate four to eight appearances (24.8% versus 26.6%) or nine to 14 appearances (20.1% versus 24.7%). In contrast, Gladue bail cases were considerably more likely than conventional bail cases to require many court appearances, defined as 15 or more appearances (33.2% versus 26.5%). While this variable depicts the number of overall court appearances for bail cases, recall that this descriptor cannot account for whether appearances occurred close together in time or were more spread out. Accordingly, Table 5.33 presents the total time required for a bail case to reach case resolution.

iv) Total Time Required to Reach Case Resolution^{362,363}

Overall, Gladue bail cases took considerably less time on average to reach case resolution compared to conventional bail cases. Indeed, bail cases heard in Gladue Courts required an average of 182.47 days from first to last appearance, or roughly six months (median = 95; SD = 236.57) compared to an average

³⁶¹ An attentive reader might compare these average total number of appearances to the sum of the average number of bail appearances and the average number of post-bail appearances. For example, Gladue bail cases took an average of 2.91 appearances to complete the bail process + 9.88 court appearances following bail to reach case completion = 12.79 appearances. This figure is very close – although not identical to – the average total number of court appearances for Gladue bail cases expressed by this variable (12.86). Indeed, the small discrepancy between these calculations and the total court appearances variable likely reflects the fact that the average number of bail appearances was calculated using event data, whereas the average number of post-bail appearances and average total number of appearances were produced using person.

³⁶² This variable measures the total time taken for a bail case to be resolved. It was produced based on a MAG variable that records the number of days between first appearance and final disposition (that is, case resolution), to which an extra day was added, so that a case that ended the same day as first appearance would list 1 day (rather than 0 days), etc. Charges were aggregated into cases using the maximum value for a charge to represent the entire case. Data are, again, presented for the person dataset, which better reflects the full time spent processing broader bail cases through the court system (whereas the event dataset would measure only how long a charging information took to be resolved and would therefore underestimate the processing times of multi-information bail cases). In the person dataset, the maximum value for a charge would almost certainly reflect the case processing time for the first (or only) charge(s) laid in a case. For ease of comparability with other post-bail processing variables, these data also exclude later bail cases.

³⁶³ Cases coded as taking more than five years to be completed (i.e., 1826 days or greater; 0.9% (N=1154) of the early bail person dataset) were considered outliers, whether an accurate figure for an exceptional case (perhaps reflecting accused persons who absconded) or the result of data entry error. Such extreme scores, even when few in number, can easily skew mean values and inflate standard deviations. These scores were this removed from analyses of this variable.

of 208.34 days, or just under seven months (median = 134; SD = 232.37) for those cases heard entirely in conventional bail court ($t = 8.117$; $df = 6255.825$; $p < .001$)³⁶⁴.

Table 5.33: Crosstabulation of Gladue Bail Status by Total Time to Reach Case Resolution, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Total Time Required to Reach Case Resolution				
			One Month or Less	Greater Than One Month to Six Months	Greater than Six Months to One Year	Greater than a Year	Total
Gladue Bail Status	Non-Gladue	Count	35185	37944	28491	26527	128149
		% within Gladue Bail Status	27.5%	29.6%	22.2%	20.7%	100.0%
	Gladue	Count	1833	1917	1058	941	5749
		% within Gladue Bail Status	31.9%	33.3%	18.4%	16.4%	100.0%
Total		Count	37018	39861	29549	27468	133896
		% within Gladue Bail Status	27.6%	29.8%	22.1%	20.5%	100.0%

Chi-square = 151.702 df = 3; $p < .001$

Specifically, Gladue bail cases were more likely than conventional bail cases to be completed very quickly, in one month or less (31.9% versus 27.5%) or moderately quickly, in more than one month to six months (33.3% versus 29.6%). However, these cases were less likely than conventional bail cases to have lengthy or very lengthy case processing times – 18.4% versus 22.2% taking more than six months to a year and 16.4% versus 20.7% taking more than a year to be resolved. Overall, Gladue bail cases seem to be resolved more expeditiously and use fewer court resources (as measured by court appearances) compared to conventional bail cases.

While the case processing variables above are helpful in understanding general court processing and court efficiency, Tables 5.34 through 5.38 present a number of variables which might assist in explaining some of the differences in case processing between Gladue bail and conventional bail cases. These variables are also presented for the person dataset which better accounts for broader court cases as processed by the courts. To this end, Table 5.34 presents the presence of a bench warrant having been laid during the court processing of Gladue bail and conventional bail cases.

³⁶⁴ Again, an attentive reader might compare these average total processing times to the sum of the average time to complete bail and the average post-bail time until case resolution. For example, Gladue bail cases took an average of 9.42 days to complete the bail process + 163.75 days following bail to reach case completion = 173.17. The minor discrepancy between these calculations and the total time to reach case resolution (182.47) likely reflects the fact that the average number of bail appearances was calculated using the event dataset, whereas the average number of post-bail appearances and the average total number of appearances were produced for the person dataset.

v) Presence of a Bench Warrant³⁶⁵

Table 5.34: Crosstabulation of Gladue Bail Status by Presence of a Bench Warrant, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Bench Warrant(s) Issued During Case Processing		Total
			No Bench Warrant	Bench Warrant	
Gladue Bail Status	Non-Gladue	Count	135701	94	135795
		% within Gladue Bail Status	99.9%	0.1%	100.0%
	Gladue	Count	5904	10	5914
		% within Gladue Bail Status	99.8%	0.2%	100.0%
Total	Count		141605	104	141709 ³⁶⁶
	% within Gladue Bail Status		99.9%	0.1%	100.0%

Fisher's exact test = .012

Notably, although bench warrants were extremely rare among all bail cases, they were marginally more common in Gladue bail cases than conventional bail cases (0.2% versus 0.1%). That is, despite the reported efforts of Gladue Court judges to avoid laying bench warrants when an accused misses an appearance but has not necessarily absconded (instead issuing bench warrants *with discretion*), Gladue bail cases were nevertheless more likely than conventional bail cases to have a bench warrant issued during case processing. However, it is important to recall that a bench warrant can be issued at any point during case processing, including during stages when an Indigenous accused would not be in these specialized courts. As such, this variable is not necessarily a reflection of Gladue Court versus conventional bail court practices. Beyond bench warrants, Table 5.35 presents the presence of a preliminary inquiry³⁶⁷ in the case processing of Gladue bail and conventional bail cases.

³⁶⁵ This variable reflects whether a bench warrant was issued on one or more charges during case processing. It was produced based on a MAG bench warrant flag variable. Charges were aggregated into cases by taking the sum of this variable for each charge (where 0 = no bench warrant; 1 = bench warrant). Subsequently, this variable was recoded into a dichotomous variable in order to measure the simple presence/absence of a bench warrant in a case.

³⁶⁶ Note that the total number of person cases for this variable (and subsequent variables) has returned to the entire person dataset (N=141,709) as it includes person cases for which the first bail appearance was later in case processing (which had been excluded from analyses of the previous post-bail processing variables for methodological reasons).

³⁶⁷ A preliminary inquiry is available only for cases with one or more indictable offence charges that are liable for 14 years of imprisonment or more (or hybrid offence charges for which the Crown elects to proceed by indictment), and only when an accused elects to have a trial in Superior Court. A preliminary inquiry is a hearing in which a judge reviews the evidence in a court case in order to determine if there is sufficient evidence to justify proceeding with a SCJ trial.

vi) Presence of a Preliminary Inquiry³⁶⁸

Table 5.35: Crosstabulation of Gladue Bail Status by Presence of a Preliminary Inquiry, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Preliminary Inquiry		
			No Preliminary Inquiry	Preliminary Inquiry	Total
Gladue Bail Status	Non-Gladue	Count	127617	8178	135795
		% within Gladue Bail Status	94.0%	6.0%	100.0%
	Gladue	Count	5729	185	5914
		% within Gladue Bail Status	96.9%	3.1%	100.0%
Total		Count	133346	8363	141709
		% within Gladue Bail Status	94.1%	5.9%	100.0%

Fisher's exact test < .001

Gladue bail cases were less likely than conventional bail cases – in fact, only half as likely – to have a preliminary inquiry (3.1% versus 6.0%). This may be, at least partially, a reflection of the types of charges in Gladue bail cases compared to those in conventional bail cases. Indeed, Gladue bail cases were more likely than conventional bail cases to have a property charge or charge against the administration of justice as the most serious charge and less likely than their counterparts to have a charge against the person as their most serious charge. As such, one might expect a smaller percentage of Gladue bail cases to have even been eligible for a preliminary inquiry. Although data on legal representation were not available, it is also very possible that accused in Gladue bail cases were less likely than those in conventional bail cases to have privately-retained counsel willing and able to prepare for and hold a preliminary inquiry (let alone potential trial), rather than defence counsel acquired through a legal aid certificate.

Another criminal procedure which would almost certainly affect a case's processing is recourse to trial, which often must be scheduled many months in advance and requires considerable time for preparations. Tables 5.34 presents data on the presence of one or more trial appearances in the Ontario Court of Justice in a case, while Tables 5.34(a) and 5.34(b) present the number of trial appearances and time between first and last trial appearance for those cases with these trials.

³⁶⁸ This variable measures whether a preliminary inquiry was held for at least one charge in a case. It was produced based on a MAG preliminary hearing flag variable. Charges were aggregated into cases by taking the sum of this variable for each charge (where 0 = no preliminary inquiry; 1 = preliminary inquiry). This new variable was subsequently recoded into a dichotomous variable which measures the simple presence/absence of a preliminary inquiry in a case.

vii) Presence of a Trial in the Ontario Court of Justice^{369,370}

Table 5.36: Crosstabulation of Gladue Bail Status by Presence of a Trial Appearance(s) in OCJ, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Trial Appearance		
			No Trial	Trial	Total
Gladue Bail Status	Non-Gladue	Count	112460	23335	135795
		% within Gladue Bail Status	82.8%	17.2%	100.0%
	Gladue	Count	5213	701	5914
		% within Gladue Bail Status	88.1%	11.9%	100.0%
Total		Count	117673	24036	141709
		% within Gladue Bail Status	83.0%	17.0%	100.0%

Fisher's exact test < .001

Overall, almost one-in-five bail cases had at least one trial appearance in their case processing record. Notably, this trial rate is higher than that of criminal cases in Ontario generally. Indeed, publicly available OCJ data have typically shown the trial rate to be around 5%³⁷¹. It is likely, however, that bail cases have a greater likelihood of going to trial than the general population of all criminal court cases. That is, there is likely to be a greater proportion of more serious cases in the bail population than in court cases more generally (e.g., in terms of number of charges, types of charges), such that the accused in these cases may be more motivated to fight charges in trial rather than accept a plea deal.

Differences in recourse to trial also exist between the Gladue bail and conventional bail populations. Specifically, Gladue bail cases were considerably less likely than conventional bail cases to include one or more trial appearances (11.9% versus 17.2%). As with preliminary inquiries, it appears that Gladue bail cases were not taking advantage of criminal court procedures that were potentially at their disposal with the same

³⁶⁹ Note that these variables measure only those criminal trials that occurred within the Ontario Court of Justice. Although the vast majority of criminal cases are dealt with entirely in the OCJ, a small proportion of cases – generally those with the most serious charges – do eventually move to the Ontario Superior Court of Justice for trial. The OCJ notably has sole jurisdiction over all summary conviction offences. Whether an indictable offence would be tried in provincial or superior court depends on several factors, including the seriousness of the charge, whether the trial is a jury trial and, sometimes the choice of the accused.

³⁷⁰ This variable reflects whether there was one or more trial appearances in the Ontario Court of Justice for at least one charge in a case. It was produced based on a MAG trial flag variable. Charges were aggregated by taking the sum of this variable for each charge (where 0 = no trial; 1 = trial). This new variable was subsequently recoded as a dichotomous variable in order to measure the simple presence/absence of one or more trial appearances in a case.

³⁷¹ For instance, in 2012, 5.1% of all criminal cases in Ontario had a trial while this percentage decreased to 4.3% by 2017. Admittedly, these OCJ data use a case definition more similar to that of the event dataset. However, the trial rate in the event dataset was also considerably higher than the OCJ data; 14.5% of all event cases included at least one trial appearance. As in the person dataset, Gladue bail cases in the event dataset were also less likely to include a trial appearance compared to conventional bail cases (9.0% versus 14.7%; $p < .001$).

frequency as were conventional bail cases. Again, this might be related to the types of charges in Gladue and conventional bail cases (with some being less likely to go to trial)³⁷². Moreover, considering the additional hours (and money) required for trial preparations, it is likely that the types of legal representation available to these bail populations also contribute to these differences. Indeed, due to legal aid funding limitations, defence counsel acquired through a legal aid certificate may be more likely to encourage a guilty plea rather than go to trial (see Bressan & Coady, 2017; Carling, 2017) compared to private counsel who may be more willing to represent an accused person in a trial, but whose lawyer fees for a trial would be cost-prohibitive for many. Additionally, the finding that Gladue bail cases were more likely than their conventional bail counterparts to plead guilty at the bail phase (17.6% versus 8.1% in Table 5.26(g)) might also reasonably extend beyond bail to case processing more generally – particularly for those accused who have little faith in the system’s ability to dispense justice. Moreover, Gladue bail cases’ greater likelihood of ultimately remaining in remand (in the person dataset) may also contribute to this finding, as the pains of pre-trial detention might render the prospect of spending many more months (if not longer) in remand while preparing for and awaiting trial to be especially unappealing compared to those on bail living in the relative comforts of the community³⁷³. Overall, this finding may also act as another partial explanation for why Gladue bail cases were less likely than conventional bail cases to have lengthy case processing times.

³⁷² In the person dataset, cases with one or more trial appearances were most likely to have as their most serious charge a crime against the person (44.3%), followed by a property charge (18.3%) or a charge against the administration of justice (13.4%) ($p < .001$; see Appendix N). The largest proportions of cases with a trial were, perhaps unsurprisingly, some of the more common (most serious) charges: common assault (11.4% of trials; 6.9% of caseload overall); failure to comply with a court order and/or failure to appear in court (9.0% of trials; 9.8% of caseload overall); assault II (8.6% of trials; 4.0% of caseload overall) and possession of stolen property (7.5% of trials; 12.4% of caseload overall). Yet in terms of likelihood of each charge category including one or more trial appearances, cases whose most serious charge was for a *Criminal Code* traffic offence (e.g., impaired driving, dangerous operation of a motor vehicle) were actually most likely to include a trial appearance (47.5%). However, given the small number of *Criminal Code* traffic cases in the bail population, these cases did not make up a large proportion of cases with one or more trial appearances overall.

³⁷³ Indeed, supplemental analyses support the theory of a relationship between bail outcomes and presence of a trial. Specifically, bail cases detained in remand (whether formally or informally) were considerably less likely to include a trial than cases granted bail (13.0% versus 23.8%; $p < .001$). Again, this almost certainly speaks the harsh conditions of remand custody which act to induce guilty pleas and pose a barrier to the preparation of a legal defence.

viii) Number of Trial Appearances^{374,375}

Table 5.37: Crosstabulation of Gladue Bail Status by Number of OCJ Trial Appearances, Old City Hall and College Park Bail Cases (Person Dataset; Cases with 1+ Trial Appearances; 2006-2017)

			Total Number of Trial Appearances for the Case				Total
			1	2-3	4-5	6+	
Gladue Bail Status	Non-Gladue	Count	12303	4838	2111	4072	23324
		% within Gladue Bail Status	52.7%	20.7%	9.1%	17.5%	100.0%
	Gladue	Count	318	142	54	186	700
		% within Gladue Bail Status	45.4%	20.3%	7.7%	26.6%	100.0%
Total		Count	12621	4980	2165	4258	24024
		% within Gladue Bail Status	52.5%	20.7%	9.0%	17.7%	100.0%

Chi-square = 40.190; df = 3; $p < .001$

Overall, Gladue bail cases with at least one trial appearance in the Ontario Court of Justice had a greater average number of trial appearances compared to their conventional bail court counterparts – 4.76 trial appearances (median = 2; SD = 7.00) versus 3.66 trial appearances (median = 1; SD = 5.88) ($t = -4.129$; df = 728.819; $p < .001$). In particular, Gladue bail cases were less likely than their conventional bail counterparts to have only a small number of trial appearances. Indeed, only 45.4% of Gladue bail cases had a single trial appearance compared to 52.7% of conventional bail cases. The differences between bail populations were somewhat smaller for relatively short trials, with 20.3% of Gladue bail cases having had two to three trial appearances compared to 20.7% of conventional bail cases. Similarly, 7.7% of Gladue bail cases had four to five trial appearances compared to 9.1% of conventional bail cases. In contrast, Gladue bail cases with at least one trial appearance were significantly more likely than their conventional bail counterparts to have six or more trial appearances (26.6% compared to 17.5%). These findings suggest that Indigenous accused from Gladue bail cases may go to trial in the OCJ with more complex cases than those from conventional bail court (e.g., in terms of number and types of charges as well as amount of evidence, legal issues, etc.) such that these cases may necessitate lengthier trials.

³⁷⁴ This variable measures the total number of OCJ trial appearances on record for a case and is based on a similar MAG variable. Charges were aggregated into cases using the maximum value for this variable (although charges in a case would be unlikely to have a different number of trial appearances from one charge to the next).

³⁷⁵ Cases coded as taking more than 100 trial appearances (i.e., 101 appearances or greater; 0.0% (N=10) of the person dataset) were considered outliers, whether an accurate figure for an exceptional case or the result of data entry error. Such extreme scores, even when few in number, can easily skew mean values and inflate standard deviations, and thus these scores were removed from analyses of this variable.

ix) Trial Length^{376,377}

Table 5.38: Crosstabulation of Gladue Bail Status by Time Spent between First and Last Appearance Labelled as Trial, Old City Hall and College Park Bail Cases (Person Dataset; Cases with 1+ Trial Appearances; 2006-2017)

			Time between First and Last Court Trial Appearance			
			Single Day	Two Days to One Month	More than a Month	Total
Gladue Bail Status	Non-Gladue	Count	12742	2225	6800	21767
		% within Gladue Bail Status	58.5%	10.2%	31.2%	100.0%
	Gladue	Count	323	89	243	655
		% within Gladue Bail Status	49.3%	13.6%	37.1%	100.0%
Total		Count	13065	2314	7043	22422
		% within Gladue Bail Status	58.3%	10.3%	31.4%	100.0%

Chi-Square = 23.217; df = 2; $p < .001$

For bail cases generally, most trials in the OCJ were over in a single day (58.3%). However, for those trials that take more than one day, they tend to actually take more than a month (31.4%). Moreover, Gladue bail cases with a trial had longer trial periods than conventional bail cases. Specifically, these Gladue bail cases took, on average, about one week longer to be completed than their conventional bail counterparts – 54.25 days, or a little shy of eight weeks (median = 2; SD = 85.19) compared to 47.58 days, or a little shy of seven weeks (median = 1; SD = 82.97) ($t = -2.027$; $df = 22420$; $p = .043$), although these differences only just met the conventional threshold for statistical significance ($p < .05$). Indeed, Gladue bail cases with one or more trial appearances were more likely than their conventional bail counterparts to have trial appearances spanning more than one month (37.1% compared to 31.2%). Moreover, Gladue bail cases with trials were considerably less likely than their conventional bail counterparts to have only a single day trial (49.3% versus

³⁷⁶ This variable reflects the time that passed between the first OCJ trial appearance and the final OCJ trial appearance in a case. It was produced by calculating the difference, in days, between the last trial date and the trial start date and then adding one to this figure so trials that ended on the same day they began = 1 day, etc. Charges were aggregated using the maximum value for this variable (although charges in a case would be unlikely to have a different time between first and last trial appearances from one charge to the next).

³⁷⁷ Cases coded as taking more than one year between first and last trial appearances (i.e., 366 days or greater; 6.7% (N=1614) of person cases with a trial) were considered outliers (whether an accurate figure for an exceptional case or the result of data entry error). Such extreme scores, even when few in number, can easily skew mean values and inflate standard deviations, and thus these scores were removed from analyses of this variable. While one year between a first and last trial appearance may seem long, for a multitude of reasons trials sometimes exceed the number of days for which they were scheduled. In particular, when additional days must be scheduled in order to complete the trial, they are sometimes weeks, or even months, later due to challenges in finding shared availability for the judge, Crown and defence counsel. Hence, while potential scheduling issues mean that cases with a first and last trial appearance more than a year apart were not entirely anomalous, these cases were nevertheless removed from data analyses as their inclusion – particularly for measures of central tendency and dispersion which describe the ‘typical’ trial – could render the statistics somewhat misleading.

58.5%). Yet despite the modest differences between Gladue bail and conventional bail cases in terms of trial length, both groups followed the same overall pattern of primarily very short trials or fairly lengthy trials.

Overall, Gladue bail and conventional bail cases appeared to share a number of similarities, as well as some important differences, when it comes to post-bail processing. Notably, Gladue bail cases were more likely than conventional bail cases to be resolved in only a very small number of appearances following the completion of bail (perhaps a reflection of these cases being more likely to end bail with a guilty plea), but also more likely to take a very large number of appearances (Table 5.30). While Gladue bail cases were more likely than conventional bail cases to take many court appearances post-bail to be resolved, this group was actually less likely than their counterparts to take a very lengthy *period of time* post-bail to be resolved (Table 5.31(a)), with similar trends for total court appearances (Table 5.32) and total time to reach case resolution (Table 5.33). Indeed, the finding that Gladue bail cases were less likely than conventional bail cases to include a preliminary inquiry (Table 5.35) or a trial (Table 5.36) may partially explain why the former is less likely to require extensive case processing.

Finally, once bail cases have been processed through the entirety of the criminal court system, these cases can be resolved in a number of ways. For those cases that receive one or more convictions (whether through guilty plea or as a result of a trial), one or more sanctions are then handed down by a judge. This next section explores the case outcomes and sentences of Gladue bail cases and conventional bail cases, with particular attention paid to the prevalence of custodial sentences among these two groups.

5.2.6 – Case Outcomes

Despite the overall focus of this research being bail, an examination of case outcomes for bail cases is nevertheless important. Given that legally innocent persons experience deprivations of liberty as a result of bail decisions, one might be concerned if a significant portion of these cases concluded without a finding of guilt. This is particularly true for those accused who are subjected to the greatest deprivations of their liberty – denial of bail and pre-trial custody pending case resolution. More broadly, case outcomes for Gladue bail and conventional bail cases are especially pertinent within the context of Indigenous overincarceration.

Indeed, examining case outcomes for these populations offers additional insight into (potentially differential) trends in conviction rates and sentence types. In particular, exploring sentence types can elucidate any efforts being made by the judiciary to apply Gladue principles and craft sentences that avoid custody, when possible.

To this end, this section first examines case outcomes broadly before analyzing the prevalence of specific types of sentences, with particular attention given to exploring trends in the use of custodial sentences. Data are presented primarily for the person dataset which better reflects the entirety of an individual's case before the courts. While some case outcome details are lost or masked in this dataset (given that certain variables measure only the most serious outcome), this dataset nevertheless provides a better picture of final case decisions. However, event data are also analyzed for a small selection of variables, as an examination of the charging events in this dataset more clearly illustrated that many charges do not end in conviction. Indeed, juxtaposition of the person and event datasets provide additional insights relating to Crown negotiations and plea bargaining. Within this context, Table 5.39(a) presents the most serious outcome of a case for Gladue bail and conventional bail cases.

i) Outcome of the Case³⁷⁸

Table 5.39(a): Crosstabulation of Gladue Bail Status by Most Serious Case Outcome, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Most Serious Outcome of One or More Charges							Total
			To SCJ	Guilty/ sentenced	Acquitted	Withdrawn	Dismissed	Stayed	Other	
Gladue Bail Status	Non- Gladue	Count	4756	74194	782	44997	1675	7371	2002	135777
		% within Gladue Bail Status	3.5%	54.6%	0.6%	33.1%	1.2%	5.4%	1.5%	100.0%
	Gladue	Count	88	3934	16	1204	37	598	37	5914
		% within Gladue Bail Status	1.5%	66.5%	0.3%	20.4%	0.6%	10.1%	0.6%	100.0%
Total	Count		4844	78128	798	46201	1712	7969	2039	141691
	% within Gladue Bail Status		3.4%	55.1%	0.6%	32.6%	1.2%	5.6%	1.4%	100.0%

Chi-square = 772.271; df=6; $p < .001$

³⁷⁸ This variable reflects the most serious case outcome for one or more charges in a case. It was produced for each charge based on a MAG disposition action variable, with these disposition actions grouped into seven broader case outcome categories (from least to most serious): other, acquitted, stayed, dismissed, withdrawn, guilty/sentenced and traversed to SCJ. "Other" outcomes include the accused being found not criminally responsible for a crime or unfit to stand trial, as well as *Charter* challenges. Charges were aggregated so that the charge with the most serious case outcome would have its value carried forward for the entire case.

Notably, more than half (55.1%) of all person-based bail cases ended with at least one finding of guilt and associated sentence. The next most common case outcome was a withdrawal of charges, which was the most serious outcome in just under one third (32.6%) of bail cases³⁷⁹. Hence, the vast majority of bail cases have as their most serious outcome either a conviction or a withdrawal of charges (55.1% + 32.6% = 87.7%). While these general trends mostly hold true for both Gladue bail and conventional bail cases, the proportions of cases with these various case outcomes varied considerably between these two bail populations. In particular, Gladue bail cases were much more likely to have a finding of guilt and associated sentence as the most serious outcome in their case compared to conventional bail cases (66.5% versus 54.6%). Part of this difference may be rooted in the possibility that Indigenous accused in Gladue bail cases may be more willing to plead guilty. Recall that at the bail phase, Gladue bail cases were more likely than conventional bail cases to end this phase with a guilty plea. In fact, just over a quarter of all Gladue bail cases with a case outcome of guilty/sentenced appear to have entered a guilty plea while still at the bail phase³⁸⁰.

Although resolving a case through the withdrawal of one or more charge(s) was the second most common (most serious) outcome for both bail groups, this outcome was much less common among Gladue bail cases compared to conventional bail cases (20.4% versus 33.1%). Yet despite being less likely than conventional bail cases to have charges withdrawn, Gladue bail cases were more likely than their counterparts to have charge(s) stayed (10.1% versus 5.4%) as the most serious case outcome. This may be partially explained by the fact that this outcome is often associated with diversionary programming available in Gladue Court, the Community Council program (Clark, 2016b). Unlike with guilty pleas, a comparatively smaller proportion of withdrawals, stays and/or dismissals of charges occurred at the bail phase for Gladue

³⁷⁹ The prevalence of withdrawals might signify that police are laying inappropriate or extraneous charges which Crowns feel do not have a reasonable likelihood of conviction or would not be in the public interest to pursue. Yet Crowns might also consider these charges to be useful for purposes of plea bargaining, whereby a Crown might offer to withdraw one or more charges in return for the accused pleading guilty to one or more charges. Finally, the presence of withdrawn charges as a case's most serious outcome might also indicate that Crowns are engaging in diversionary mechanisms whereby a charge is withdrawn following the completion of programming, community service hours, etc.

³⁸⁰ That is, consider the number of Gladue bail cases presented in Table 5.28(g) that had a guilty plea for their most serious bail outcome as a percentage of the total number of Gladue bail cases with a finding of guilt as the (most serious) case outcome, as presented in Table 5.39(a): $1043/3934 \times 100 = 26.51\%$.

bail cases³⁸¹. Instead, most of these outcomes tended to occur later in case processing for both Gladue bail cases and conventional bail cases.

Among the less common (most serious) case outcomes, Gladue bail cases were less likely than conventional bail cases to have a charge(s) sent to the Ontario Superior Court of Justice for trial (1.5% versus 3.5%) or to have a charge(s) dismissed by a judge (0.6% versus 1.2%). Notably, although acquittals were understandably quite rare (given that they occur only when someone is found not guilty at trial, in this case, within the OCJ), Gladue bail cases were also less likely than conventional bail cases to have this outcome as their most serious outcome (0.3% versus 0.6%). This result is unsurprising given that Gladue bail cases were considerably less likely than conventional bail cases to have one or more trial appearances in the OCJ, and therefore did not have the same opportunity to be formally acquitted of their charge(s).

While the person dataset is useful for exploring the most serious case outcome in a broader bail case, this dataset also obscures important information relating to case outcomes. Indeed, cases in the person dataset – which may contain charges stemming from multiple charging informations – were reduced to a single case outcome. Since case outcomes were aggregated based on the most serious outcome for a case, the person data cannot account for less serious outcomes in a case. Although the event dataset used the same aggregation rules for this variable, its case definition based on charging informations means that more detail is preserved, including information relating to less serious case outcomes. Indeed, juxtaposing data from the two datasets sheds light on case outcomes more generally, as well as the practice of Crown negotiations of plea bargaining in particular (e.g., a Crown agrees to withdraw a less serious charge if the accused agrees to plead guilty to a more serious charge). To this end, Table 5.39(b) presents the most serious case outcome for Gladue bail and conventional bail cases in the event dataset.

³⁸¹ That is, consider the number of Gladue bail cases presented in Table 5.28(g) that ended the bail phase with one of these bail outcomes as a percentage of the total number of Gladue bail cases with one of these outcomes as their most serious overall case outcome, as presented in Table 5.39(a): $291/(1204+37+598)*100 = 15.82\%$. Indeed, empirical evidence suggests that case outcomes of dismissal, stay or withdrawal tend to require significant court resources (as measured by court appearances) to be completed (e.g., Doob, Sprott & Webster, 2017; Webster & Doob, 2004).

Table 5.39(b): Crosstabulation of Gladue Bail Status by Most Serious Case Outcome, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Most Serious Outcome of One or More Charge							
			To SCJ	Guilty, sentenced	Acquitted	Withdrawn	Dismissed	Stayed	Other	Total
Gladue Bail Status	Non- Gladue	Count	5397	82577	773	63775	1818	9127	2138	165605
		% within Gladue Bail Status	3.3%	49.9%	0.5%	38.5%	1.1%	5.5%	1.3%	100.0%
	Gladue	Count	96	4848	14	2150	33	780	29	7950
		% within Gladue Bail Status	1.2%	61.0%	0.2%	27.0%	0.4%	9.8%	0.4%	100.0%
Total		Count	5493	87425	787	65925	1851	9907	2167	173555
		% within Gladue Bail Status	3.2%	50.4%	0.5%	38.0%	1.1%	5.7%	1.2%	100.0%

Chi-square = 894.680; df=6; $p < .001$

While the person and event datasets present similar case outcomes overall (that is, the ordering of the most to the least common outcomes remains), the most notable differences between these datasets are located in the response categories for withdrawn charges and guilty/sentenced charges. In the event dataset, 38.0% of cases had one or more charges withdrawn as its most serious outcome compared to only 32.6% of person cases. Furthermore, while 50.4% of event cases had a finding of guilt as the most serious outcome, a larger proportion of person cases – 55.1% – has this outcome. Hence when considering individual charging informations in the event dataset, the practice of withdrawing charges becomes more apparent.

That the prevalence of withdrawn charges was greater in the event dataset than the person dataset, while the presence of convicted charges was less, suggests that a non-trivial number of person cases contained two or more charging informations (i.e. event cases) merged into a single person case, with at least one of these informations having a withdrawn charge as its most serious outcome. These patterns may reflect plea bargaining within these broader person cases, as the juxtaposition of datasets highlights that it was not uncommon for some charges in a bail case to be dropped at the same time that other charges are resolved with a finding of guilt. Notably, differences between bail populations appeared similarly in both datasets. This might suggest that plea bargaining is happening to a similar extent across bail populations; however due to this variable measuring only the *most serious* outcome in a case, it is difficult to draw firm conclusions on the extent to which this practice might be occurring in these populations.

Whereas Tables 5.39(a) and 5.39(b) presented detailed information regarding the most serious outcome in a case, Table 5.40(a) presents a more simplified approach to understanding case outcomes. Moreover, the data in Table 5.40(a) form the basis for subsequent analyses examining the presence of specific types of sanctions presented in Tables 5.40(a) through 5.46.

ii) Presence of a Sentence³⁸²

Table 5.40(a): Crosstabulation of Gladue Bail Status by Presence of Sentence, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Sentence		Total
			Not Sentenced	Sentenced	
Gladue Bail Status	Non-Gladue	Count	62570	73225	135795
		% within Gladue Bail Status	46.1%	53.9%	100.0%
	Gladue	Count	1980	3934	5914
		% within Gladue Bail Status	33.5%	66.5%	100.0%
Total	Count		64550	77159	141709
	% within Gladue Bail Status		45.6%	54.4%	100.0%

Fisher's exact test < .001

Indeed, one has already seen that more than half of all bail cases ultimately received a sentence and that Gladue bail cases were considerably more likely than conventional bail cases to receive a sentence for at least one charge in a case³⁸³. What is perhaps more interesting when using this simplified sentence variable, is how overall case outcomes might be related to a case's earlier bail outcome. That is, might bail

³⁸² This variable captures whether a case included at least one finding of guilt and associated sentence (with other types of outcomes grouped into the 'not sentenced' response category). While this variable captures very similar – albeit simplified – information compared to the case outcome variable above, an attentive reader may notice that the number of cases with at least one sentence here is slightly smaller than those in the guilty/sentenced category of Table 5.39(a): 78,128-77,159 = 969 person cases. Indeed, this 'presence of sentence' variable (which is the basis of forthcoming analyses examining specific sentence types) was produced in a different manner than the variable in Table 5.39(a) above. This variable is based on MAG sentence codes assigned to each charge. Intermediary variables were first produced which grouped sentence codes into several broader sentence type categories. From these, a dichotomous variable was created which measured whether each charge had one or more of *any* of these sentence types on record (no sentence = 0; sentence = 1). Charges were then aggregated into cases using the maximum value, so that if even a single charge had a sentence, this value would be carried forward for the entire case. The small discrepancy between case outcomes and presence of a sentence almost certainly reflects human discretion (or error) on the part of court clerks when inputting one of the many disposition actions (as the basis for the case outcome variable) and sentence codes (as the basis for the presence of a sentence variable). Indeed, within this context it would not be surprising for a small number of cases to have had these codes assigned in a manner that seems inconsistent for the purposes of these two specific variables.

³⁸³ For an examination of the relationship between the most serious charge in a case and that case receiving a sentence, see Appendix O. Notably, cases for which the most serious charge was a *Criminal Code* traffic offence were the most likely to receive a sentence (69.6%), followed by those cases for which the most serious charge was a crime against property (62.9%) or a crime against the administration of justice (57.1%) ($p < .001$). Note, however, that the presence of one or more sentences in a case does not necessarily mean that there was a finding of guilt and sentence imposed for that case's most serious charge. In fact, with plea bargaining, one might expect that the most serious charge in a case might sometimes be withdrawn if an accused was willing to plead guilty to one or more less serious charges.

decisions (or a lack thereof) have an effect on a bail case's likelihood of being sentenced? To explore this question, Tables 5.40(b) and 5.40(c) present the simplified sentence variable for only those cases granted bail as well as only remand cases (either denied bail or remaining in remand without a formal bail decision).

Table 5.40(b): Crosstabulation of Gladue Bail Status by Presence of Sentence for those Granted Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Sentence		Total
			Not Sentenced	Sentenced	
Gladue Bail Status	Non-Gladue	Count	44309	25207	69516
		% within Gladue Bail Status	63.7%	36.3%	100.0%
	Gladue	Count	1127	1035	2162
		% within Gladue Bail Status	52.1%	47.9%	100.0%
Total		Count	45436	26242	71678
		% within Gladue Bail Status	63.4%	36.6%	100.0%

Fisher's exact test < .001

Table 5.40(c): Crosstabulation of Gladue Bail Status by Presence of Sentence for those awaiting Case Resolution in Remand, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Sentence		Total
			Not Sentenced	Sentenced	
Gladue Bail Status	Non-Gladue	Count	12803	36345	49148
		% within Gladue Bail Status	26.0%	74.0%	100.0%
	Gladue	Count	548	1824	2372
		% within Gladue Bail Status	23.1%	76.9%	100.0%
Total		Count	13351	38169	51520
		% within Gladue Bail Status	25.9%	74.1%	100.0%

Fisher's exact test < .001

The data in Tables 5.40(b) and 5.40(c) stand in stark contrast with one another. Among those bail cases that were granted bail, just over a third (36.6%) received at least one sentence (and thus conviction). Notably, the proportion of released bail cases that were sentenced was considerably lower than the proportion for bail cases overall (54.4% – Table 5.40(a)). This pattern held true for both Gladue bail and conventional bail populations. However, considerable disparities existed between released Gladue bail cases and released conventional bail cases in terms of the likelihood of being sentenced. In particular, nearly half of Gladue bail cases granted bail (47.9%) received at least one sentence compared to only 36.3% of their conventional bail counterparts.

Conversely, among those bail cases that were either denied bail or awaited case resolution in remand without a formal determination of bail, almost three quarters (74.1%) received at least one sentence (and thus conviction). This proportion of remand bail cases that were sentenced was considerably higher than that

of bail cases overall (54.4%) and substantially higher than that of cases granted bail (36.6%). Interestingly, the disparities between Gladue bail and conventional bail cases – which were so stark for cases granted bail – were much smaller among cases remaining in remand. Indeed, while Gladue bail cases in remand were slightly more likely than their conventional bail counterparts to receive at least one sentence (76.9% versus 74.0%), this difference was rather small overall. Furthermore, while remand bail outcomes only rendered Gladue bail cases somewhat more likely to be sentenced than Gladue cases generally (76.9% versus 66.5%), these outcomes rendered conventional bail cases significantly more likely to be sentenced than conventional bail cases generally (74.0% versus 53.9%).

Overall, bail cases that were granted bail and awaited case resolution in the community were not only less likely to be sentenced than bail cases generally, but considerably less likely to be sentenced than bail cases awaiting case resolution in custody. This may be related to the relative comfort or discomfort that accused persons experience while awaiting case resolution. Indeed, accused who were granted bail may feel considerably less pressure to plead guilty or accept a plea bargain compared to accused who were deprived of their liberty and likely experiencing unpleasant or harsh conditions in remand custody.

While Gladue bail cases were generally more likely to be sentenced compared to conventional bail cases, it is unclear so far whether these differences extend across all types of sentences, or perhaps only certain sentence types. The specific types of sentences handed down to bail cases therefore warrant further investigation. Tables 5.41(a) through 5.46 explore the presence of some of the most common types of sentences for both Gladue bail and conventional bail cases³⁸⁴.

³⁸⁴ Note that while some criminal justice statistics tend to focus on the most serious sanction handed down in a criminal case (e.g., Statistics Canada tables, formerly CANSIM), I have chosen to examine the simple presence of each type of sanction that was imposed in a case. Indeed, given that roughly two-thirds of bail cases in this study contained more than one charge (Table 5.7(b)), and considering that more than one sanction may be handed down for a single charge (e.g., probation and a fine), to focus on the most serious sanction only would risk losing important data on less serious sanctions. This decision also resembles the earlier choice to examine the presence of charges from each offence classification (rather than most serious charge only), given similar concerns about information loss.

iii) Presence of a Custodial Sentence^{385,386}

Custodial sentences are the most serious type of sanction which can be handed down in a criminal case. Particularly within the context of the overincarceration of Indigenous peoples, it is important to examine the ways in which Indigenous peoples in Gladue bail cases may be differentially sentenced to terms of imprisonment. To this end, Table 5.41(a) first presents the presence of a custodial sentence among all bail cases (i.e., with any case outcome). This depicts the prevalence of this type of sentence among bail cases generally. Table 5.41(b) then presents the presence of a custodial sentence among only those cases which received one or more sentences. Given that cases that go through the bail process tend to be perceived as at least somewhat serious in nature (e.g., in terms of charge type, presence of administration of justice charges), it may be unsurprising that custodial sentences were the most common type of sentence (compared to other types of sentences discussed below).

Table 5.41(a): Crosstabulation of Gladue Bail Status by Presence of Custodial Sentence, All Old City Hall and College Park Bail Cases, (Person Dataset; 2006-2017)

			Presence of a Custodial Sentence		Total
			No Custodial Sentence	Custodial Sentence	
Gladue Bail Status	Non-Gladue	Count	81747	54048	135795
		% within Gladue Bail Status	60.2%	39.8%	100.0%
	Gladue ³⁸⁷	Count	2672	3242	5914
		% within Gladue Bail Status	45.2%	54.8%	100.0%
Total		Count	84419	57290	141709
		% within Gladue Bail Status	59.6%	40.4%	100.0%

Fisher's exact test < .001

³⁸⁵ This variable measures whether there was one or more charges in a case that received a custodial sentence. It was produced using the intermediary sentence type variables outlined in the creation of Table 5.40(a), and subsequently recoded to create a dichotomous variable to measure simple presence of this specific sentence type. Charges were aggregated such that if a custodial sentence was recorded for even a single charge, this value would be carried forward for the entire case. Importantly, this variable – as well as the other specific sentence variables below – measure the simple presence of this sentence type in a case. Note also that sentence types are not necessarily mutually exclusive (i.e., some cases may receive more than one type of sanction).

³⁸⁶ This sentence category includes a variety of custodial sentence types, including provincial jail sentences (two years less a day), federal prison sentences (two years or more), intermittent sentences in provincial jail as well as custodial sentences in which the offender was released on time served.

³⁸⁷ Although an Indigenous accused who opted to have their bail heard in Gladue Court might be expected to similarly choose to be sentenced in Gladue Court, data are not available to confirm this hypothesis. While it is likely that many – if not most – Gladue bail cases were also sentenced in Gladue Court, this is unlikely to always be the case. Nevertheless, when considering case outcomes, one should remain mindful that many of the sentences handed down to Gladue bail cases will have been crafted by Gladue Court judges who have received specialized training in the application of Gladue sentencing principles and consideration of an Indigenous person's background and systemic factors. Hence these case outcomes may be more in line with Gladue principles than those in other courthouses (i.e., without a Gladue Court).

Table 5.41(b): Crosstabulation of Gladue Bail Status by Presence of Custodial Sentence(s), Old City Hall and College Park Bail Cases – Sentenced Only (Person Dataset; 2006-2017)

			Presence of a Custodial Sentence		Total
			No Custodial Sentence	Custodial Sentence	
Gladue Bail Status	Non-Gladue	Count	19177	54048	73225
		% within Gladue Bail Status	26.2%	73.8%	100.0%
	Gladue	Count	692	3242	3934
		% within Gladue Bail Status	17.6%	82.4%	100.0%
Total		Count	19869	57290	77159
		% within Gladue Bail Status	25.8%	74.2%	100.0%

Fisher's exact test <.001

Of sentenced bail cases (Table 5.41(b)), nearly three-quarters (74.2%) received at least one custodial sentence. However, there is more to this story. Indeed, when one considers all bail cases, regardless of case outcome (Table 5.41(a)), the likelihood of a case including a custodial sentence decreases considerably (40.4%) – as expected, given that these data include a group of cases which, by their very nature, would obviously not include a custodial sentence. Among all bail cases, however, Gladue bail cases were substantially more likely than their conventional bail counterparts to receive at least one custodial sentence (54.8% versus 39.8%).

This sizeable difference between bail populations vis-à-vis the presence of custodial sentences is almost certainly a reflection – at least partially – of the disparities that exist one step earlier in the court process, in terms of the likelihood of these bail populations being found guilty and sentenced (that is, 66.5% versus 53.9% – Table 5.40(a)), which are, in turn, a reflection of many factors, including willingness to plead guilty to charges. For instance, recall that Gladue bail cases were more likely than their conventional bail counterparts to end the bail phase by pleading guilty (17.6% versus 8.1% of person cases; Table 5.28(g)) and also less likely to include one or more trial appearances (11.9% versus 17.2% of person cases; Table 5.36). Indeed, disparities in an accused's likelihood of pleading guilty would appear to be contributing to Gladue bail cases being more likely than conventional bail cases to receive a sentence, and a custodial one, at that.

To add further complexity to this story, the differences between Gladue bail and conventional bail cases diminish notably when one considers only sentenced bail cases. That is, while the overall likelihood of a custodial sentence increases for both groups, sentenced Gladue bail cases were only somewhat more likely

than sentenced conventional bail cases to receive a custodial sentence (82.4% versus 73.8%). Indeed, although the differences in the presence of custodial sentences for these two bail populations did not disappear, they were reduced by almost half ($54.8\% - 39.8\% = 15.0\%$ in Table 5.41(a) compared to $82.4\% - 73.8\% = 8.6\%$ in Table 5.41(b)). The remaining disparity that does exist might be attributed to a combination of many (potentially legitimate) factors, including charge type and severity³⁸⁸, number of concurrent convictions and criminal record, as well as past correctional contact and past compliance with any terms of probation or conditional sentences³⁸⁹. Notably, these data also do not account for the length of custodial sentence handed down, for which there is likely to be considerable variability (e.g., sentences could range from time served to life imprisonment).

The second most serious sentencing option at a judge's disposal is the conditional sentence. This sentencing option was developed as an alternative to custody for cases which would otherwise warrant imprisonment. If sentencing judges are diligently applying Gladue principles, one might expect to see Gladue bail cases at least as likely, or even more likely, than conventional bail cases to receive this type of sentence. To explore this issue, Table 5.42 presents the presence of conditional sentences among sentenced Gladue bail and conventional bail cases.

³⁸⁸ For an examination of the relationship between sentenced cases receiving a custodial sentence and the most serious charge in a case (as well as the presence of the various types of charges in a case) see Appendix P. Notably, sentenced cases for which the most serious charge was against the administration of justice were more likely than other types of cases to receive a custodial sentence (79.2%), followed closely by those cases for which the most serious charge was an offence against property (78.2%) or an "other" *Criminal Code* offence (76.9%) ($p < .001$). Findings were similar when examining the simple presence of various charge types in a case. Indeed, sentenced cases with one or more charges against the administration of justice present continued to be more likely than cases with other types of charges to receive a custodial sentence. Note, however, that the presence of one or more custodial sentences in a case does not necessarily mean that there was a conviction and custodial sentence imposed for that case's most serious charge or a specific charge type included in a case.

³⁸⁹ Consider Snowball and Weatherburn's (2007) study of sentencing in New South Wales, Australia, where similar issues around Indigenous overincarceration exist. In this study, Indigenous identity was found to predict the presence of a prison sentence when examining basic demographic variables. Yet once other relevant legal factors were added to subsequent regression models – including the presence of *serious* violent charges, the presence of three or more concurrent convictions, a history of at least one prior conviction and a history of prior custodial sentence(s) – the residual effect of Indigenous identity diminished considerably. Moreover, Sprott et al. (2023) found in their study of Ontario corrections that Indigenous offenders were more likely than non-Indigenous offenders to exhibit a number of case characteristics (i.e., at least one administration of justice conviction, at least one conviction for a violent offence) and/or correctional characteristics (i.e., previous time in remand custody, previous probation, conditional sentences and/or custodial sentences) which might reasonably contribute to their greater likelihood of receiving a custodial sentence.

iv) Presence of a Conditional Sentence^{390,391}

Table 5.42: Crosstabulation of Gladue Bail Status by Presence of Conditional Sentence(s) for Sentenced Cases Only, Old City Hall and College Park Bail Cases (2006-2017)

			Presence of a Conditional Sentence		
			No Conditional Sentence	Conditional Sentence	Total
Gladue Bail Status	Non-Gladue	Count	68906	4319	73225
		% within Gladue Bail Status	94.1%	5.9%	100.0%
	Gladue	Count	3595	339	3934
		% within Gladue Bail Status	91.4%	8.6%	100.0%
Total		Count	72501	4658	77159
		% within Gladue Bail Status	94.0%	6.0%	100.0%

Fisher's exact test < .001

Overall, conditional sentences were relatively uncommon – present in only 6.0% of all sentenced bail cases³⁹². However, this type of sentence was somewhat more common among sentenced Gladue bail

³⁹⁰ This variable measures whether there was one or more charges in a case that received a conditional sentence. It was produced using the intermediary sentence type variables outlined in Table 5.40(a) above, before creating a dichotomous variable to measure the simple presence of this specific sentence type. Charges were aggregated such that if a conditional sentence was recorded for even a single charge, this value would be carried forward for the entire case. Recall that all sentence type variables simply measure the presence of a specific sentence type (and not necessarily the most serious sentence in a case) and are also not mutually exclusive.

³⁹¹ Recall that the conditional sentence was introduced as a sentencing option in 1996 to be used as an alternative to imprisonment, amid calls to reduce Canadian imprisonment rates. Under s.742.1 of the *Criminal Code*, a judge who has decided that a term of imprisonment of less than two years is appropriate may direct this sentence to be served in the community, if consistent with the principles of sentencing. Initially there were few limitations to imposing this sanction (e.g., an offence could not carry a mandatory minimum sentence). However amendments restricting eligibility came into effect in 2007 (e.g., no longer available for personal injury, terrorism or criminal organization offences with a maximum sentence of 10 years imprisonment or more) and again, more sweepingly, in 2012 with the so-called *Safe Streets and Communities Act* (e.g., no longer available for any offence punishable by 14 years imprisonment or more; for drug production and trafficking offences and offences involving use of a weapon which are punishable by 10 years imprisonment or more; and for 11 specific offences, including sexual assault, theft over \$5000 and certain types of break and enter offences) – although many of these restrictions were repealed in 2022 (i.e., after the timeframe of the current study). Individuals given a conditional sentence must comply with the conditions of a conditional sentence order, which are generally more restrictive than those of a probation order and typically limit the offender's liberty (e.g., house arrest or strict curfews). Hence, conditional sentences are typically considered to be between imprisonment and probation in terms of severity. Notably, whereas an alleged breach of probation would generally lead to a new criminal charge of failure to comply with a condition of a probation order, conditional sentences are enforced differently. If a court is satisfied, on the balance of probabilities, that a conditional sentence was breached, the court has several options, including doing nothing, changing the optional conditions of this order, requiring that a portion of this order be served in custody with the remainder served back in the community, or terminating the conditional sentence order completely and requiring the offender to serve the remainder of the sentence in custody. For a more detailed discussion of conditional sentences, their enforcement and early case law, see Manson (2001). For a more recent analysis of conditional sentences, including challenges to their implementation and use, as well as potential adverse outcomes such as net widening, see Webster and Doob (2019).

³⁹² The relative rarity of conditional sentences is consistent with other studies examining these sentences (e.g., Webster & Doob, 2019). Furthermore, CANSIM data from a comparable timeframe (2006/2007 to 2017/2018) for all adult criminal cases in Ontario show that a conditional sentence was the *most serious component of a sentence* in only 4.9% of all sentenced cases, on average, during this timeframe. The fact that the cases in Table 5.42 are exclusively bail cases (and are thus likely to be at least somewhat more serious compared to the general population of sentenced criminal cases) and that they come from two specific courthouses may help to explain the minor differences between this study's

cases compared to conventional bail cases (8.6% versus 5.9%). This suggests that judges were, in fact, making use of this newer sentencing provision for Indigenous persons. Given that this sentencing option was introduced as an alternative to imprisonment, and within the context of Indigenous peoples' overincarceration, one might imagine that the greater prevalence among Gladue bail cases means that sentencing judges were, in fact, specifically using this sentencing option as a means of avoiding unnecessary imprisonment, particularly for Indigenous offenders.

However, there is also real danger that this sanction may facilitate net-widening, whereby it is used inappropriately for cases which would have otherwise been sentenced to non-custodial sanctions, such as a term of probation and/or a fine, rather than incarceration (see Gemmell, 1997; Webster and Doob 2019). Given that any breaches of a conditional sentence may lead to imprisonment, there is also the risk that these sanctions may, for some individuals, lead to an increase in imprisonment. Indeed, Roach and Rudin (2000) have suggested that, within the context of s.718(e) and the Supreme Court's *R. v. Gladue* case, one might expect to see judges embracing this sentencing option but imposing onerous "healing" or treatment-oriented conditions on Indigenous offenders. These legal scholars caution that by imposing such onerous conditions on Indigenous offenders, these individuals may be disproportionately breached and returned to custody – potentially for longer than if they had been given a custodial sentence at the outset. Hence, while the extent to which the use of conditional sentences may (or may not) be reducing recourse to custodial sentences is beyond the scope of this study, some caution should nevertheless be exercised when interpreting these data³⁹³.

Beyond conditional sentences, Table 5.43 presents the presence of what would generally be considered the third most serious sanction at a judge's disposal – probation.

data and CANSIM data. For longitudinal analyses of the presence of the conditional sentence in Gladue bail and conventional bail cases, see section 5.4.3(iii).

³⁹³ Indeed, a study by Gutierrez and Chadwick (2020) which examined conditional sentence orders issued between 1996-2015 in British Columbia found that – despite receiving similar numbers and types of optional conditions – Indigenous individuals were more likely to be breached than Caucasian individuals, were also more likely to receive two or more breaches and were more likely to spend longer periods in custody as a result of a breach compared to their Caucasian counterparts.

v) Presence of a Probation Order^{394,395}

Table 5.43: Crosstabulation of Gladue Bail Status by Presence of a Probation Order for Sentenced Cases Only, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

		Presence of a Probation Order		Total
		No Probation Order	Probation Order	
Gladue Bail Status	Non-Gladue	Count	35305	73225
		% within Gladue Bail Status	48.2%	100.0%
	Gladue	Count	1773	3934
		% within Gladue Bail Status	45.1%	100.0%
Total		Count	37078	77159
		% within Gladue Bail Status	48.1%	100.0%

Fisher's exact test < .001

Overall, probation was the second most common type of sanction among sentenced bail cases, with a probation order present in more than half (51.9%) of these cases generally. However, sentenced Gladue bail cases were, again, slightly more likely than conventional bail counterparts to receive a term of probation (54.9% versus 51.8%). This finding might suggest that judges in Old City Hall and College Park courthouses were sentencing Indigenous accused to this serious, but non-custodial, sentencing option in an effort to avoid sentences which include imprisonment, when possible.

In contrast to the serious types of sanctions presented above, Table 5.44 illustrates the presence of the least serious sanction available to sentencing judges – discharges – among sentenced Gladue bail and conventional bail cases. This type of sentence is generally (although not exclusively) given in less serious cases, and in particular (although, again, not exclusively) for those in which the accused does not already have a record of criminal conviction (Manson, 2001). Hence, although data on criminal history were

³⁹⁴ This variable measures whether there was one or more charges in a case that received a probation order. It was produced using the intermediary sentence type variables outlined in Table 5.40(a), before creating a dichotomous variable to measure the simple presence of this specific sentence type. Charges were aggregated such that if a probation order was recorded for even a single charge, this value would be carried forward for the entire case. Recall, however, that sentence type variables simply measure the presence of a specific sentence type (and not necessarily the most serious sentence in a case) and are also not mutually exclusive.

³⁹⁵ A probation order is a sentencing option under s.731 of the *Criminal Code*. Most commonly, a probation order is handed down under 731(1)(a), whereby the passing of sentence is suspended, permitting an offender to be released on conditions set out in a probation order (generally referred to as a suspended sentence). Probation may also be imposed under s.731(1)(b), in addition to a fine or in addition to a term of imprisonment of no more than two years (to be served following imprisonment), or under s.732(1)(b), in conjunction with an intermittent custodial sentence, or as part of a conditional discharge (discussed below). A probation order includes compulsory conditions and nearly always optional conditions and may be prescribed for a period of up to three years. While not mandatory, probation orders often include a supervision component, whereby an offender must report to a probation officer at the probation officer's discretion. While probation is considered less severe than custodial or conditional sentences, it is nevertheless a serious sanction.

unavailable for this study, one might nevertheless expect discharges to be relatively uncommon among the bail cases in this study given the findings that: 1) nearly one fifth (18.6%) of accused persons in person-based bail cases were subject to a probation order at or around the time of charges being laid, thus indicating the existence of a relatively recent criminal conviction (Table 5.24(a)); and 2) at least one violent charge was present in more than a third (33.7%) of person-based cases (Table 5.11).

vi) Presence of a Discharge^{396,397}

Table 5.44: Crosstabulation of Gladue Bail Status by Presence of Discharge(s) for Sentenced Cases Only, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Discharge		Total
			No Discharge	Discharge	
Gladue Bail Status	Non-Gladue	Count	64955	8270	73225
		% within Gladue Bail Status	88.7%	11.3%	100.0%
	Gladue	Count	3843	91	3934
		% within Gladue Bail Status	97.7%	2.3%	100.0%
Total		Count	68798	8361	77159
		% within Gladue Bail Status	89.2%	10.8%	100.0%

Fisher's exact test < .001

Indeed, as anticipated, discharges were relatively uncommon – present in only 10.8% of sentenced bail cases. In contrast to the previous, more serious sentence types which were more common among Gladue bail cases, sentenced Gladue bail cases were considerably less likely to receive a discharge compared their conventional bail counterparts (2.3% versus 11.3%). Given that discharges are most often given in cases for which the offender does not have a criminal record, this finding suggests that those in sentenced Gladue bail cases may have been more likely to have a criminal history than those in conventional bail cases. Should this

³⁹⁶ This variable measures whether there was one or more charges in a case that received an absolute or conditional discharge at sentencing. It was produced using the intermediary sentence type variables outlined in Table 5.38(a), before creating a dichotomous variable to measure the simple presence of this specific sentence type. Charges were aggregated such that if a discharge was recorded for even one charge, this value would be carried forward for the entire case. Recall that all sentence type variables simply measure the presence of a specific sentence type (and not necessarily the most serious sentence in a case) and are also not mutually exclusive.

³⁹⁷ A discharge is a sentencing option under s.730(3) of the *Criminal Code* whereby, notwithstanding a finding of guilt, the offender is “deemed not to have been convicted” and therefore does not receive a record of criminal conviction and associated stigma. A discharge may be absolute or conditional. In the latter case, the offender must successfully complete a period of probation, or else is returned to court at which time a conviction would be entered. A discharge must be deemed to be in the offender’s best interest and not contrary to the public interest and may not be imposed for offences that carry a minimum sentence or those that are punishable by 14 years of imprisonment or more. Although this sentence type is not explicitly reserved for first-time offenders, in practice, it is often given to those without a record of criminal conviction, particularly if such a conviction were to negatively impact the offender’s immigration status, professional qualifications or employment (Manson, 2001).

be the case, a discharge may not be considered by a sentencing judge to be an appropriate sentence for many Gladue bail cases. The disproportionate presence of charges against the administration of justice in Gladue bail cases (Table 5.12) may also be contributing to this population being less likely to receive a discharge.

Finally, Table 5.45 presents the presence of fines as a criminal sanction, while Table 5.46 examines the presence of the victim fine surcharge (which is not a stand-alone sanction, but rather, is applied in addition to other sanctions, except in specific circumstances). These tables are presented concurrently as court observations suggest there is an interesting – and perhaps unexpected – relationship between the use of fines as sanctions and the victim fine surcharge.

vii) Presence of a Fine^{398,399} and Victim Fine Surcharge^{400,401}

Among sentenced bail cases, one or more fines were handed down in 16.2% of cases overall (Table 5.45). However, this sanction was more commonly handed down among sentenced Gladue bail cases than their conventional bail counterparts (26.7% versus 15.6%). That is, Gladue bail cases were not only more

³⁹⁸ This variable measures whether there was one or more charges in a case that received a fine. It was produced using the intermediary sentence type variables outlined in Table 5.40(a), before creating a dichotomous variable to measure the simple presence of this specific sentence type. Charges were aggregated such that if a fine sentence was recorded for even a single charge, this value would be carried forward for the entire case. Recall that all sentence type variables simply measure the presence of a specific sentence type (and not necessarily the most serious sentence in a case) and are not mutually exclusive.

³⁹⁹ A fine is a monetary penalty under s.734 of the *Criminal Code* which may be imposed by itself (unless there is a mandatory minimum sentence) or – since the sweeping sentencing amendments of 1996 – in addition to any other sanction. There is generally no maximum fine that may be imposed, but this amount must be considered proportionate and within the offender's ability to pay over a specified period of time.

⁴⁰⁰ This variable measures whether there was one or more charges in a case that received a victim fine surcharge. It was produced using the intermediary sentence type variables outlined in Table 5.40(a), before creating a dichotomous variable to measure the simple presence of this specific sentence type. Charges were aggregated such that if a victim fine surcharge was recorded for even a single charge, this value would be carried forward for the entire case. Recall that all sentence type variables simply measure the presence of a specific sentence type (and not necessarily the most serious sentence in a case) and are not mutually exclusive.

⁴⁰¹ A victim fine surcharge (or victim surcharge) is levied under s.737 of the *Criminal Code* when there is a finding of guilt under the *Criminal Code* or the *Controlled Drugs and Substances Act*, requiring the guilty party to pay money to the state to fund victims' services. While the amount of the surcharge has changed over the years, from 2003 to October 2013 it was 15% of any fine imposed, or, where there was no fine imposed, \$50 for every summary conviction and \$100 for every indictable offence. Since October 2013, it was 30 percent of any fine imposed, or, where there was no fine, \$100 for every summary conviction and \$200 for every indictable offence conviction. From its inception in 1988 until 2013, the surcharge could be waived if a judge was satisfied that it would cause undue hardship to an offender. However, legislative amendments in 2013 (see *Increasing Offenders' Accountability for Victims Act*) removed judicial discretion to waive the victim surcharge. This surcharge remained mandatory until December 2018 when the Supreme Court of Canada ruled in *R. v. Boudreault* (2018) that a mandatory victim surcharge was unconstitutional in that it infringed s.12 of the *Canadian Charter of Rights and Freedoms* as it constituted cruel and unusual punishment.

likely to receive the more serious types of sentences, but also some of the least serious sentencing options. While it might seem surprising – within the context of Indigenous peoples’ greater overall socio-economic marginalization – that judges were more likely to give fines to Indigenous offenders from Gladue bail case than the largely non-Indigenous conventional bail population, this finding may be partially explained by sentencing practices which were common in the Old City Hall and College Park courthouses.

Table 5.45: Crosstabulation of Gladue Bail Status by Presence of Fine(s) for Sentenced Cases Only, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Fine		Total
			No Fine	Fine	
Gladue Bail Status	Non-Gladue	Count	61798	11427	73225
		% within Gladue Bail Status	84.4%	15.6%	100.0%
	Gladue	Count	2883	1051	3934
		% within Gladue Bail Status	73.3%	26.7%	100.0%
Total		Count	64681	12478	77159
		% within Gladue Bail Status	83.8%	16.2%	100.0%

Fisher’s exact test < .001

Table 5.46: Crosstabulation of Gladue Bail Status by Presence of Victim Fine Surcharge for Sentenced Cases Only, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Victim Fine Surcharge		Total
			No VFS	VFS	
Gladue Bail Status	Non-Gladue	Count	53281	19944	73225
		% within Gladue Bail Status	72.8%	27.2%	100.0%
	Gladue	Count	2253	1681	3934
		% within Gladue Bail Status	57.3%	42.7%	100.0%
Total		Count	55534	21625	77159
		% within Gladue Bail Status	72.0%	28.0%	100.0%

Fisher’s exact test < .001

Indeed, while one might be tempted to conclude that the greater presence of fines in the Gladue bail population means that this group is being disproportionately set up to fail (in terms of fine default), there is an alternative explanation for this finding. Specifically, some judges, including those sitting in these Gladue Courts, developed creative sentencing practices in an attempt to mitigate the potential financial challenges posed by the victim fine surcharge while it was mandatory and could not be waived, even in cases of undue financial hardship (October 2013 to December 2018)⁴⁰². Indeed, the amount of the victim fine surcharge

⁴⁰² For instance, in *R. v. Cloud* (2014 QCCQ), Judge Healy of the Court of Quebec questioned the constitutionality of a mandatory victim fine surcharge and considered a number of creative options to minimize the financial hardship that this surcharge would pose for the unemployed and homeless Indigenous man convicted in this case. Judge Healy ultimately imposed a \$5.00 fine for each of the two charges, such that the victim surcharge was reduced from \$200.00 to \$1.50 for each count – although his decision was later overturned by the Quebec Court of Appeal (albeit on the basis that this issue could not be raised on appeal since it had not been raised at sentencing; *R. c. Cloud* (2014 QCCA)). Taking an even firmer stance, Judge Paciocco asserted in *R. v. Michael* (2014) – a case involving an Inuk man with a history of

during this time was 30 percent of any fine imposed, or, where there is no fine, \$100 for every summary conviction and \$200 for every indictable conviction. However, judges in Gladue Court were observed during court observations in 2017 to be imposing sentences which would include a \$10 fine and would therefore reduce the victim fine surcharge from \$100.00 (for a summary conviction) to \$3.00 (that is, 30% of the fine imposed), or \$13.00 to be paid in total. Within the context of a mandatory victim fine surcharge, very small fines actually allowed judges to minimize this surcharge in such a way that significantly decreased the overall financial burden imposed on convicted persons. If Indigenous individuals convicted in Gladue bail cases were deemed more likely to experience hardships in paying the standard victim fine surcharges (during the time of its mandatory imposition), this may explain – at least partially – this group’s greater likelihood of receiving a fine compared to their conventional bail counterparts. In terms of the victim fine surcharge specifically, just over one quarter (28.0%) of all sentenced bail cases had this surcharge levied (Table 5.46)⁴⁰³. Despite its reasonably low prevalence overall, Gladue bail cases were more likely than conventional bail cases to have a victim fine surcharge imposed (42.7% versus 27.2%).

Overall, more than half of all bail cases resulted in at least one finding of guilt, with this outcome considerably more likely for Gladue bail cases than conventional ones (Table 5.39(a)). Table 5.47 provides an overview of the presence of specific types of sanctions among sentenced bail cases. Custodial sentences (74.25%) and probation orders (51.9%) were by far the most common sanctions, with all other sentencing options considerably less common. Yet sentenced Gladue bail cases were more likely than their counterparts to receive all sentence types except for discharges – the least serious sentencing option available^{404,405}.

homelessness who was convicted on nine summary offences and would have been subjected to \$900.00 in victim surcharges – that the mandatory nature of victim surcharge regulations was, in fact, unconstitutional. Indeed, Judge Paciocco argued that the mandatory imposition of this victim surcharge violated s.12 of the *Canadian Charter of Rights and Freedoms*, that is, the right not to be subjected to cruel and unusual treatment or punishment.

⁴⁰³ While this figure may seem low overall, recall that the victim fine surcharge was essentially discretionary until October 2013. Given that the dataset spans 2006-2017, this means that the victim fine surcharge could be waived during eight of these twelve years, or for roughly two-thirds of cases. For longitudinal analyses of the presence of fines and the victim fine surcharge in these bail cases, see section 5.4.3(v) and 5.4.3(vi).

⁴⁰⁴ In fact, whereas for Gladue bail cases a discharge was the least common type of sentence (2.3%) followed by a conditional sentence (8.6%), this ranking was inverted for conventional bail cases, which were least likely to have a conditional sentence (5.9%) followed by a discharge sentence (11.3%).

⁴⁰⁵ For a summary of key findings from the bivariate analyses presented in section 5.2, see Appendix Q.

Table 5.47: Summary Table of the Presence of Specific Sentence Types for Sentenced Cases Only, Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)⁴⁰⁶

Type of Sentence	All Bail Cases		Conventional Bail Cases		Gladue Bail Cases	
	Count	%	Count	%	Count	%
Custodial Sentence	57,290	74.2%	54,048	73.8%	3,242	82.4%
Conditional Sentence	4,658	6.0%	4,319	5.9%	339	8.6%
Probation Order	40,081	51.9%	37,920	51.8%	2,161	54.9%
Discharge	8,361	10.8%	8,270	11.3%	91	2.3%
Fine	12,478	16.2%	11,427	15.6%	1,051	26.7%

Within the context of the overrepresentation of Indigenous peoples in custody, as well as s718.2(e) and remedial efforts to reduce this troubling phenomenon – including the creation of Gladue Courts – one might have expected to see more comparable rates of imprisonment as judges strive to craft non-custodial, culturally informed sentences, where appropriate. However, sentenced Gladue bail cases were considerably more likely than sentenced conventional bail cases to receive a custodial sentence (82.4% versus 73.8%). Yet the sentencing option developed explicitly as an alternative to imprisonment – the conditional sentences – was also slightly more common among sentenced Gladue bail cases than their conventional bail counterparts (8.6% versus 5.9%). Hence it is possible that sentencing judges are, indeed, making efforts to craft non-custodial sentences by making use of the conditional sentence.

5.3 – Multivariate Inferential Analyses

The previous section explored bivariate relationships between Gladue Bail Status and numerous case characteristics, case processing measures and case outcome variables. This next section, however, considers the extent to which several important variables – including Gladue Bail Status – may independently predict formal bail outcomes and case outcomes. Table 5.48 presents a logistic regression analysis of several important variables that might be expected to affect judicial officers' formal bail decisions, namely: a case's Gladue Bail Status, the number of charges in a case, and the presence of the three most common types of

⁴⁰⁶ Recall that these variables measure the presence of each type of sentence (and not necessarily the most serious sentence) and are not mutually exclusive. Indeed, a single sentenced bail case could have received more than one type of sentence. For this reason, if one were to sum the percentage of cases with each specific type of sentence, this figure (159.1%) would far exceed 100%, indicating that a non-trivial proportion of bail cases received two or more sanctions. The victim fine surcharge is not included in this list as its mandatory nature from 2013-2018 means that its automatic imposition was not fully within judicial purview. Finally, while this table includes what are generally the most common sentence types, it is not exhaustive and does not include all sentencing options available to a judge (i.e., a stand-alone restitution order, a stand-alone community service order, etc.).

charges: charges against property, charges against the person and charges against the administration of justice. Analyses are presented for the person dataset in order to reflect the (most serious) bail outcome for broader bail cases.

5.3.1 – Bail Outcomes

Table 5.48 – Logistic Regression of Key Variables on Outcome of (First) Bail (Formal Determinations of Bail Only), Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

		B	S.E.	Wald	df	Sig.	Exp(B)	95% CI for Exp(B)	
								Lower	Upper
Step 1 ^a	Gladue Bail Status	.030	.049	.390	1	.532	1.031	.937	1.134
	Number of Charges	.064	.002	1062.234	1	<.001	1.066	1.062	1.071
	Presence of Charges against Property	.434	.020	478.689	1	<.001	1.544	1.485	1.605
	Presence of Charges against the Person	.319	.019	273.696	1	<.001	1.376	1.325	1.429
	Presence of Charges against the Administration of Justice	.674	.018	1359.778	1	<.001	1.962	1.893	2.033
	Constant	-2.342	.020	14289.717	1	.000	.096		

a. Variable(s) entered on step 1: Gladue Bail Status, Number of Charges, Presence of Charges Against Property, Presence of Charges against the Person, Presence of Charges against the Administration of Justice⁴⁰⁷.

Notably, of the five variables included in this statistical model, only one – Gladue Bail Status – was unable to independently predict bail outcomes ($p = .532$), controlling for the effects of the other factors in the multivariate equation. This means that whether a case had its bail processed in Gladue bail court or conventional bail court had no effect on the case's likelihood of being granted or denied bail by a judicial officer, once the other case characteristics in the model were taken into account. If we consider Gladue bail and conventional bail populations as rough proxies for Indigenous and non-Indigenous accused, it appears that Indigeneity alone does not affect the likelihood of an accused person being formally granted or denied bail. Hence, although in Table 5.28(h) Gladue bail cases were marginally more likely than conventional bail cases to be formally denied bail and detained in remand, these minor differences can be partially explained by differences in terms of the number or types of charges in a case.

⁴⁰⁷ Where Outcome of (First) Bail (Formal Determinations of Bail Only) is coded: 0 = Bail Granted, 1 = Bail Formally Denied; where Gladue Bail Status is coded: 0 = Non-Gladue, 1 = Gladue; where Number of Charges is continuous; where Presence of Charges against Property is coded: 0 = No Property Charges, 1 = Property Charge(s); where Presence of Charges against the Person is coded: 0 = No Charges against the Person, 1 = Charge(s) against the Person; where Presence of Administration of Justice Charges is coded: 0 = No Administration of Justice Charges, 1 = Administration of Justice Charge(s).

In terms of factors that do affect bail decisions, the strongest predictor of formal bail outcomes by a judicial officer was the presence of charges against the administration of justice ($\text{Exp}(B) = 1.962$). Specifically, the presence of this type of charge was associated with an increase in the likelihood of being denied bail. The factors with the next greatest predictive power were the presence of charges against property ($\text{Exp}(B) = 1.485$) and the presence of charges against the person ($\text{Exp}(B) = 1.376$), while the number of charges in a case had the weakest ability to predict formal bail outcomes ($\text{Exp}(B) = 1.062$). Hence, each of these four factors appear to help to predict bail outcomes independently of one another. Notably, the importance of charges against the administration of justice and their relationship with bail outcomes is once again highlighted. This relationship is perhaps unsurprising when one considers the reverse onus provisions which apply to many of these charges and which necessarily render bail release more difficult to attain. More broadly, it seems, once again, that the accumulation of charges – and perhaps especially charges against the administration of justice – in person-based bail cases render cases increasingly complex, such that formal refusal of bail becomes increasingly likely.

Overall, it appears that several characteristics of a bail case can help to predict whether a case will be denied or granted bail (Table 5.48). In particular, the presence of one or more charges against the administration of justice was most strongly related to formal bail outcomes and the decision to formally deny someone bail. Yet Gladue Bail Status was not a statistically significant predictor of bail outcomes. This suggests that criminal justice practitioners in Gladue bail courts have been able to overcome – at least to some extent – any issues of systemic discrimination inherent in the bail system at large, in order to produce formal bail outcomes for Indigenous accused which were similar (at least in terms of broad decisions to release or detain) to those in conventional bail courts. Said differently, it appears that Gladue bail courts are having success in terms of facilitating more substantively equitable bail outcomes and perhaps reducing the number of Indigenous accused who would otherwise be in the remand population.

5.3.2 – Case Outcomes

While the presence of various charge types had a significant effect on the bail outcome of a case, Table 5.49 explores whether these same factors may help to predict whether a case receives at least one finding of guilt and associated sentence. Furthermore, this logistic regression model considers whether bail outcomes might also affect case outcomes – this time examining remand cases (i.e., those formally and informally detained) compared to cases granted bail, in order to account for the effects of remand more generally. Notably, all six variables in the regression model were significantly related to the presence of a sentence (i.e., at least one finding of guilt). That is, each of these factors independently helps to predicts whether a case will receive at least one sentence or not, controlling for the effects of other factors in the multivariate equation.

Table 5.49 – Logistic Regression of Key Variables on Presence of 1+ Sentences; Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

							95% CI for Exp(B)		
							Lower	Upper	
Step 1 ^a	Gladue Bail Status	.216	.034	39.722	1	<.001	1.241	1.160	1.327
	Number of Charges	.009	.001	45.625	1	<.001	1.009	1.006	1.011
	Presence of Charges against Property	.598	.014	1853.961	1	.000	1.818	1.769	1.868
	Presence of Charges against the Person	.082	.014	34.730	1	<.001	1.085	1.056	1.115
	Presence of Charges against the Administration of Justice	.590	.013	2010.512	1	.000	1.804	1.758	1.851
	Outcome of (First) Bail (Grouped Remand versus Release)	1.477	.013	12934.906	1	.000	4.382	4.271	4.495
	Constant	-1.068	.014	6208.474	1	.000	.344		

a. Variable(s) entered on step 1: Gladue Bail Status, Number of Charges, Presence of Charges against the Person, Presence of Charges against the Administration of Justice, Presence of Charges Against Property, Outcome of (First) Bail (Grouped Remand versus Release).⁴⁰⁸

Within the context of this bail study, it is quite notable that the strongest predictor of whether a case would include one or more sentences was whether the case remained in remand while awaiting case resolution or was granted bail (Exp(B) = 4.382). Indeed, decisions made upstream at the bail phase appear to have significant downstream effects on case outcomes (see Mitchell & Webster, 2023).

⁴⁰⁸ Where Presence of a Sentence is coded as: 0 = No Sentence, 1 = Sentence(s); where Gladue Bail Status is coded: 0 = Non-Gladue, 1 = Gladue; where Number of Charges is continuous; where Presence of Charges against the Person is coded: 0 = No Charges against the Person, 1 = Charge(s) against the Person; where Presence of Charges against Property is coded: 0 = No Property Charges, 1 = Property Charge(s); where Presence of Administration of Justice Charges is coded: 0 = No Administration of Justice Charges, 1 = Administration of Justice Charge(s); where Outcome of (First) Bail (Grouped Remand versus Release) is coded: 0 = Bail Granted, 1 = Informal/Formal Detention.

The next strongest predictors of the presence of a sentence (although considerably weaker than bail outcome) were the presence of charges against property ($\text{Exp(B)} = 1.818$) and the presence of charges against the administration of justice ($\text{Exp(B)} = 1.804$), suggesting that certain types of charges are more likely to lead to a sentence than others⁴⁰⁹. Less predictive factors included Gladue bail status ($\text{Exp(B)} = 1.241$), followed by the presence of charges against the person ($\text{Exp(B)} = 1.085$) and the number of charges in a case ($\text{Exp(B)} = 1.009$), for which the predictive power was fairly negligible. Notably, Gladue bail status – which was not a significant predictor of bail outcomes above – now emerges as a significant positive predictor of whether a case will include one or more sentences, independent of other factors in the regression model⁴¹⁰. In other words, although knowing whether a bail case was processed in Gladue bail court or conventional bail court does not help to predict whether that case will be released on bail or detained by a judicial officer, this information does help to predict whether that case will ultimately include one or more findings of guilt and associated sentences, with Gladue bail cases being more likely to have this case outcome⁴¹¹.

The finding that bail outcomes were the strongest predictor of case outcomes is perhaps unsurprising given earlier discussion of the potential downstream effects of bail decisions. Moreover, the findings that cases granted bail were significantly less likely to include a finding of guilt than those cases which awaited resolution in remand custody (36.6% versus 74.1%; Tables 5.40(b) and 5.40(c)) also support this relationship.

⁴⁰⁹ Note, however, that the presence of a certain type of charge in a bail case does not necessarily mean that the finding(s) of guilt and related sentence(s) are for this same type of charge. For instance, consider the possibility that someone is charged with both theft under \$5000 and a breach of probation, but subsequently pleads guilty only to the theft charge while the breach charge was withdrawn as a result of plea-bargaining.

⁴¹⁰ Nevertheless, it is possible that other, legitimate, legal factors may also be causing Gladue bail cases to appear to be related to the presence of a sentence. Indeed, while the regression model in Table 5.48 includes a selection of potentially important variables, the variables included in this model are not exhaustive. See footnote 389 for a discussion of some additional factors from previous research which may help to explain Gladue bail cases' greater likelihood of conviction.

⁴¹¹ For the curious reader, a similar logistic regression using only formal determinations of bail (i.e., bail formally denied or granted by a judicial officer) is presented in Appendix R. All factors remained statistically significant predictors for the presence of one or more sentences in a bail case. The predictive power of formal determinations of bail was only very marginally greater ($\text{Exp(B)} = 4.431$; $p < .001$) than that of bail outcomes with formal and informal detentions combined ($\text{Exp(B)} = 4.382$; $p < .000$), suggesting that these measures are similarly predictive of the presence of a sentence, independent of other factors in the regression model. Notably, with formal determinations of bail only, Gladue Bail Status became a slightly stronger predictor of the presence of a sentence (independent of other factors in this model) ($\text{Exp(B)} = 1.414$; $p < .001$). There was also a modest decrease in the predictive power of the presence of charges against property ($\text{Exp(B)} = 1.668$; $p < .001$) and the presence of charges against the administration of justice ($\text{Exp(B)} = 1.602$; $p < .001$).

Yet while Table 5.48 arguably produced an optimistic view of Gladue bail courts and their ability to address Indigenous overincarceration at the bail phase, Table 5.49 perhaps attenuates this optimism. Indeed, despite the apparent successes of Gladue Court at the bail stage – which one might reasonably expect to have downstream effects in terms of reducing the likelihood of these cases ending in conviction and sentencing – Table 5.49 suggests that a case being a Gladue bail case was nevertheless a statistically significant predictor (albeit one of the weaker predictors) for whether that case would include one or more findings of guilt and associated sentences. Hence, despite efforts to intervene upstream at bail, Indigenous accused who had their bail processed (at least in part) in Gladue bail court were nevertheless more likely than the largely non-Indigenous population processed entirely in conventional bail courts to be found guilty and sentenced. While it is possible that Gladue Court interventions at bail have reduced the proportion of cases which would have otherwise been resolved with a finding of guilt, the end result is nevertheless that Indigenous peoples continue to be disproportionately sentenced, and likely contribute disproportionately to the sentenced custody population.

5.4 – Longitudinal (Comparative) Analyses

While the preceding sections have explored cross-sectional trends in bail case characteristics, processing and outcomes among Gladue bail and conventional bail cases during a combined 12-year timeframe, these overall trends cannot be assumed to necessarily remain static over time. Rather, as the bail climate and criminal justice system evolved – in terms of court operations, *Criminal Code* legislation and amendments, relevant guiding case law, MAG direction to Crowns, political leadership and foci of media attention – trends in bail case characteristics, processing and outcomes would also be impacted. Indeed, cross-sectional patterns may conceal important trends over time, not only in terms of case composition, but also in terms of how Gladue bail courts and conventional bail courts have been processing cases, whether they altered their bail practices during the study period and whether changes in the former areas may have led to changes in the types of bail outcomes and sentences that cases ultimately received. That is, the cross-sectional analyses may obscure promising developments in one or both types of bail court, such that

longitudinal analyses may illuminate important advancements (or setbacks) in terms of court processing and outcomes. Particularly when one considers Gladue Courts' more recent development and the potential for these courts to modify their practices, one might expect to see significant and meaningful trends in the Gladue bail population, in particular, over time. Within the context of the overrepresentation of Indigenous peoples in Canadian prisons, such longitudinal trends – especially if they differ for Gladue bail and conventional bail cases – might have important implications for the Indigenous and non-Indigenous remand and sentenced custody populations.

Continuing this study's comparative focus, this final section of analyses explores longitudinal trends in selected variables in order to assess how Gladue bail and conventional bail cases, their processing and their outcomes have (or have not) changed over the study period (2006-2017). These longitudinal analyses are discussed in terms of the temporal patterns for each bail population and how they compare to one another⁴¹². Longitudinal analyses also consider how trends may have affected within-year differences between bail groups, with chi-square statistics performed to determine when these differences are statistically significant. Data are generally presented for the person dataset, as these cases reflect broader bail cases and the many sets of charges that some bail cases accumulate. Notably, there was some variability in the data from one year to the next, particularly with the Gladue bail data for which the smaller number of cases renders them more susceptible to modest fluctuations year over year⁴¹³.

In the first part of this section, case characteristics are examined over time in order to determine whether there were any (differential) changes in bail case complexity during the study period. Indeed, any

⁴¹² Logistic regression analyses were performed for each dependent variable, with predictor variables of Year and Gladue Bail Status, as well as an interaction term of Year by Gladue Bail Status, in order to assess whether the relationship between each dependent variable and Year differs for Gladue bail and conventional bail cases. For the occasional dependent variable with three or more response categories, a number of modified dummy-variables (0/1) were produced. Specifically for the number of charges in a case, dummy variables were produced in order to preserve some of the specific response categories examined in cross-tabulations earlier in this chapter. These dummy variables facilitated the continued use of logistic regression analyses for the sake of consistency and have the added benefit of having fewer assumptions which must be met compared to multiple linear regression analyses.

⁴¹³ Also note that, for certain variables, the data are slightly irregular around 2010-2012 (as noted in the Methods chapter). In particular, the smaller number of Gladue bail cases during this period may (artificially) magnify small changes over time. Hence analyses do not necessarily place much weight on any short-term changes during this period, but rather focus on more general trends and longitudinal patterns in the data.

increases in case complexity (as measured by the number of charges in a case and the presence of violent charges and administration of justice charges) would likely translate to greater perceived risk at bail and difficulties in securing release. In light of these anticipated effects, bail processing and bail outcomes are then explored in order to assess whether changes in case complexity affect how Gladue bail and conventional bail cases were treated during the bail phase⁴¹⁴. Finally, case outcomes are examined over time (in terms of both the presence of one or more findings of guilt as well as the presence of specific types of sentences) in order to understand whether the potential upstream changes in case complexity and bail processing had downstream effects on convictions and sentencing. Longitudinal analyses of bail outcomes and sentence types also have the benefit of shedding additional light on judicial efforts to reduce the overrepresentation of Indigenous peoples in correctional facilities.

5.4.1 – Case Characteristics

Case characteristics are an important starting point for longitudinal analyses⁴¹⁵. Indeed, any changes over time in case composition would almost certainly have a number of consequences on case processing and outcomes. Of particular concern are any increases in case complexity which might complicate bail deliberations and cause criminal justice actors to consider a bail case to be a greater risk for release. Specifically, greater case complexity might be associated with concerns relating to perceived risk and the grounds for detention – especially the secondary ground of public safety and the tertiary ground of confidence in the administration of justice. Hence any shifts, and particularly any increases, in case complexity might be expected to have significant downstream effects, not only on bail outcomes, but also on the likelihood of cases receiving one or more findings of guilt, and even sentence types. More importantly, if patterns in case complexity change differently over time for Gladue bail and conventional bail cases, one

⁴¹⁴ Indeed, the juxtaposition of the event dataset (Tables 5.28(a) and 5.28(b)) and person dataset (Tables 5.28(g) and 5.28(h)) suggests that case complexity (in terms of the accumulation of charges generally and the presence of specific types of charges) likely affects bail outcomes. The relationship between case complexity and bail outcomes (and case outcomes more broadly) is further supported by the logistic regression analyses in Tables 5.48 and 5.49.

⁴¹⁵ Recall, however, that case characteristics are not a direct reflection of Gladue Court and conventional bail court operations. Rather, they are primarily related to (police) charging practices in the catchment area of the courthouses (although some administration of justice charges may be indirectly related to court operations such as the conditions imposed in bail and probation orders and the periods of time under which individuals are bound by these conditions).

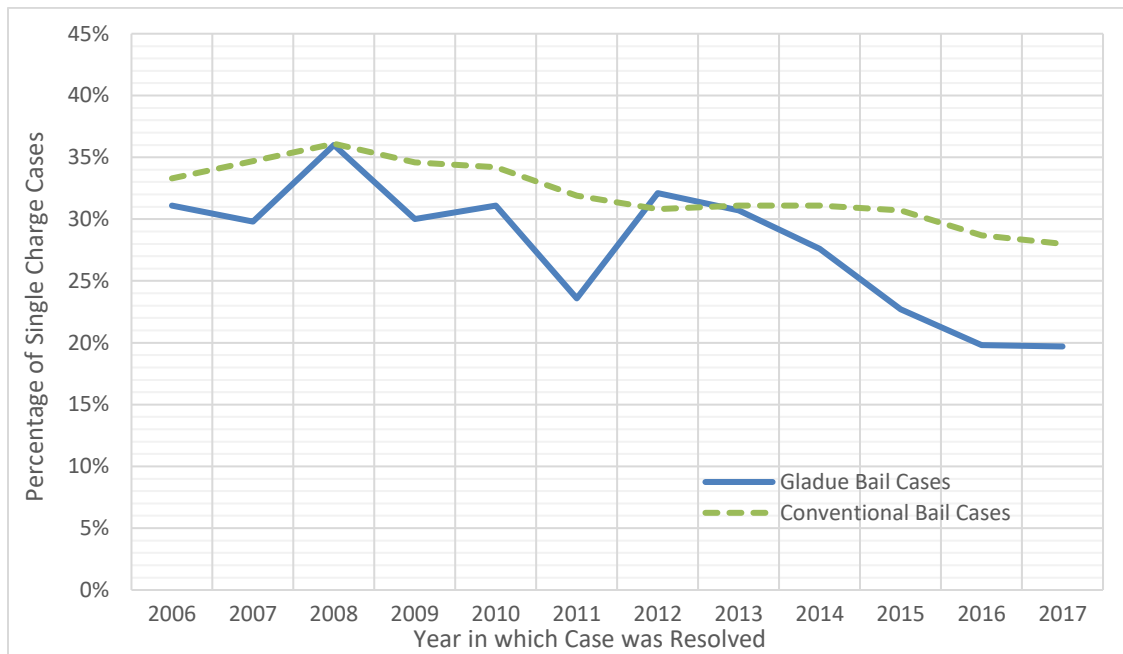
might also expect differential impacts downstream. Symptomatically, longitudinal trends in case complexity might impact both remand and sentenced prison populations for Indigenous and non-Indigenous individuals and shed additional light on the issue of Indigenous overincarceration. This section examines three types of case characteristics which would almost certainly affect a case's perceived complexity, particularly in the context of bail. Specifically, longitudinal analyses are presented for the number of charges in a bail case, followed by trends relating to the presence of charges against the person and the presence of charges against the administration of justice, as well as for specific types of administration of justice charges.

i) Number of Charges

One of the primary factors that affect case complexity is the number of charges in a bail case. Indeed, cases with a greater number of charges would generally be considered more complicated and consequently would likely be considered a greater risk for bail release. That is, the greater the number of charges in a bail case, the more details and potential risks for release which a Crown and judicial officer must consider, as well as defence counsel when preparing potential release plans. Cases with more charges might also be viewed as more dangerous or more likely to be associated with the commission of future offences while on bail, thus potentially raising concerns rooted in either the public safety ground or the public confidence in the administration of justice ground for detention.

Cross-sectionally, Gladue bail cases from 2006 to 2017 were less likely than conventional bail cases to have only a single charge (27.5% versus 32.5%) and more likely to have 5 or more charges ($11.7\% + 14.9\% = 26.6\%$ versus $8.7\% + 10.1\% = 18.8\%$ – Table 5.7(b)). To explore whether bail cases have changed in complexity as measured by the number of charges in Gladue bail cases and conventional bail cases over time, Figures 5.1 and 5.2 present these data longitudinally for bail cases with only a single charge and bail cases with five or more charges (for a crosstabulation of these same data, see Appendix S).

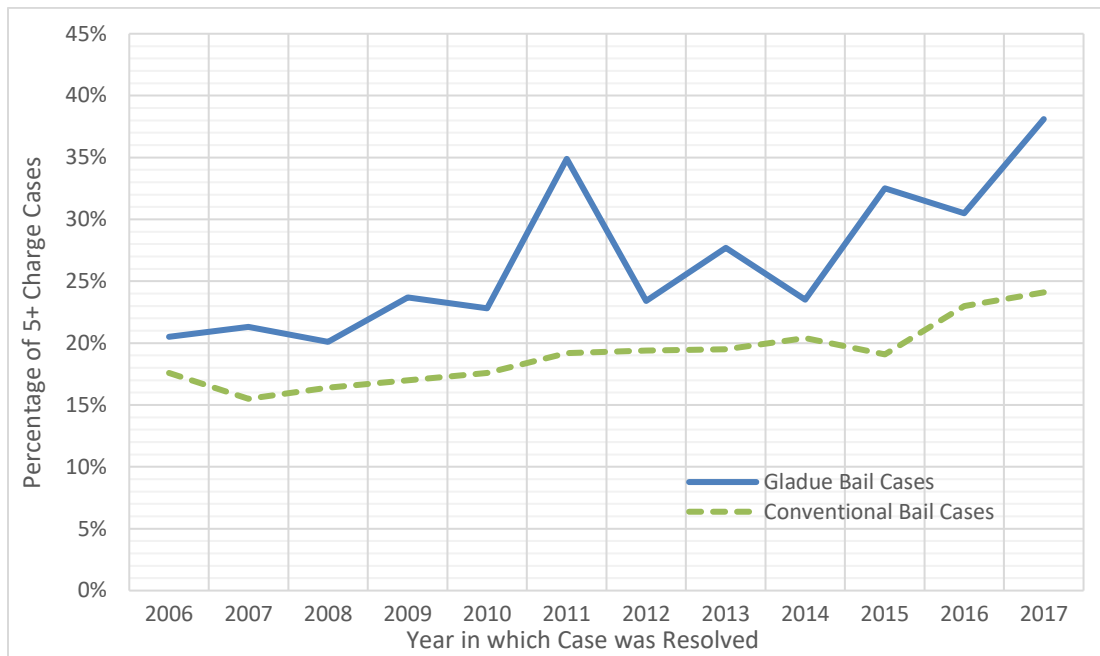
Figure 5.1: Line Chart of Gladue Bail Cases and Conventional Bail Cases with One Charge over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Overall, trends in the proportion of single charge cases in the Gladue bail and conventional bail populations were largely similar over time. For both groups, there was an overall decrease in the proportion of single charge bail cases from 2006 to 2017. However, the interaction term (between Year and Gladue Bail Status) was statistically significant ($p < .001$) for the presence of a single-charge in a case, meaning that the relationship between Year and the presence of a single-charge in a case was dependent upon on whether that case was a Gladue bail case or conventional bail case. For Gladue bail cases, the decline in single charge cases was considerably steeper (from 31.1% to 19.7% = 11.4%) than for conventional bail cases (33.5% to 28.0% = 5.5%) and was particularly steep from 2013-2016 (Appendix S).

Within each year, Gladue bail cases were virtually always – with the exception of 2012 – less likely than conventional bail cases to have a single charge (although these yearly differences were not always statistically significant – see Appendix S). In fact, the disparity between bail groups seemed to increase somewhat over time, particularly from 2015-2017 (e.g., in 2017, single charge cases represented 19.7% of the Gladue bail caseload compared to 28.0% of the conventional bail caseload – see Appendix S).

Figure 5.2: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 5+ Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



In terms of the proportion of cases with five or more charges, the overall trends in the Gladue bail and conventional bail populations were, again, similar overall. That is, there was a relatively steady increase in the proportion of Gladue bail and conventional bail cases with many (i.e., five or more) charges. From 2006-2017 there was actually a shift away from single-charge cases toward many-charge cases⁴¹⁶. However, the interaction term between Year and Gladue Bail Status was, once again, statistically significant ($p < .001$) for cases with many charges, indicating that Year affected the presence of 5+ charge cases differently for Gladue bail cases compared to conventional bail cases. Specifically, the increase in many-charge cases was, again, more notable in the Gladue bail population (from 20.5% to 38.1% = 17.6%) than in conventional bail cases (17.6% to 24.1 = 6.5%) (Appendix S).

Within each year, the proportion of Gladue bail cases with five or more charges was always greater than that of conventional bail cases. Given the steeper increase in the Gladue bail population, the disparities between bail groups also appeared to increase over the study timeframe, particularly from 2015-2017 (e.g., 38.1% of Gladue bail cases versus 24.1% of conventional bail cases in 2017 – see Appendix S). Notably, while

⁴¹⁶ See Appendix S for a table depicting the relative stability in the proportion of cases with 2-4 charges, for which Year ($p = .939$), Gladue Bail Status ($p = .351$) and their interaction term ($p = .347$) were not statistically significant.

there was a smaller proportion of many-charge cases compared to single-charge cases for both bail populations throughout most of the study timeframe, since 2015, the proportion of many-charge cases has actually exceeded that of single-charge cases – but *only* in the Gladue bail population (e.g., 38.1% many-charge cases versus 19.7% single-charge cases in 2017 – see Appendix S).

Overall, bail cases in Old City Hall and College Park courthouses appeared to become increasingly complex during the study timeframe – at least in terms of the number of charges in a case. For both Gladue bail and conventional bail cases, the proportion of single-charge cases decreased while the proportion of cases with five or more charges increased, although these trends were felt more acutely in the Gladue bail population. The next section explores whether bail cases became increasingly complex in other important ways during this same period. In particular, the presence of charges against the person and charges against the administration of justice is examined. This focus reflects the ways in which these types of charges add to case complexity and complicate deliberations of bail. Indeed, both of these types of charges arguably render cases ‘riskier’ in the eyes of criminal justice professionals. These types of charges also have significant implications for bail in terms of raising concerns associated with public safety and public confidence in the administration of justice, as well as sometimes invoking a reverse onus which would then reduce the likelihood of release⁴¹⁷. Recall that any differential trends between Gladue bail and conventional bail cases in terms of the presence of these types of charges would also likely have differential effects of the bail outcomes and subsequent case outcomes for these groups.

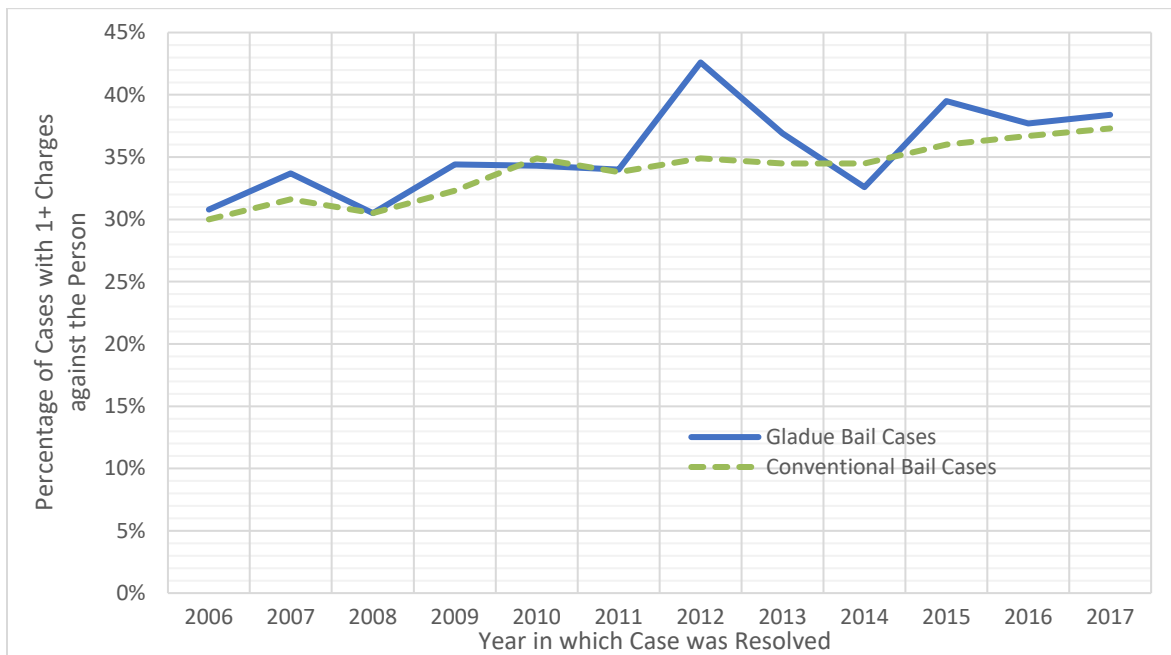
ii) Presence of Charges against the Person

The presence of charges against the person not only contribute to case complexity generally, but also carry significant weight at bail, where allegations of violence are considered especially risky (particularly on the public safety ground) and therefore challenging to release. Any differences in the longitudinal trends in the presence of these charges would seem especially important when one considers that their presence was

⁴¹⁷ Accused persons are placed in a reverse onus position in certain circumstances relating to the use of a weapon during the commission of an alleged serious violent offence under 515(6)(a)(vii) and 515(6)(a)(viii). Furthermore, nearly all administration of justice charges under the s.145 umbrella also carry a reverse onus under s.515(6)(c) – specifically charges under s.145(2) through s.145(5).

a significant predictor of bail outcomes in Table 5.48 as well as case outcomes in Table 5.49. Overall, charges against the person were present in more than a third (33.7%) of all bail cases, with Gladue bail cases being just marginally more likely than conventional bail cases to have at least one violent charge (35.5% versus 33.6% – see Table 5.11). While the differences between bail groups were quite limited in the cross-sectional analyses, examining the presence of violent charges over time may uncover diverging trends. Figure 5.3 therefore explores this relationship between bail court type and presence of charges against the person over time (see Appendix T for a crosstabulation of these data).

Figure 5.3: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Charges against the Person, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Similar to the cross-sectional analyses, the overall trends in the proportion of bail cases with at least one charge against the person were very similar for the Gladue bail and conventional bail populations. Indeed, only Year was a statistically significant predictor for the presence of one or more charges against the person ($p < .001$) in the regression model, with neither Gladue Bail Status nor the interaction of Year by Gladue Bail Status being statistically significant ($p = .964$ and $p = .961$, respectively). This suggests that longitudinal trends relative to the presence of charges for violent offences were not dependent on the Gladue

Bail Status of a case. Specifically, in both bail populations there was gradual increase⁴¹⁸ in the proportion of cases with one or more violent charges. While Gladue bail cases appeared to be slightly more likely than conventional bail cases to have this type of charge most years (with the exception of 2010 and 2014), these within-year differences were also generally not statistically significant (see Appendix T).

Hence, while there was a modest increase in the proportion of bail cases with one or more charges against the person, the similar rate of growth for both the Gladue bail and conventional bail populations means that these changes had a similar effect on both bail populations. Hence while bail cases became increasingly complex – or increasingly ‘risky’ in the context of bail – in terms of the presence of violent charges during the study timeframe, the potential effects of this increase (e.g., in terms of bail or case outcomes) would likely not differ significantly for the Gladue bail or conventional bail populations⁴¹⁹. Yet, this may not necessarily be the case with charges against the administration of justice which are subsequently examined in order to determine whether they have also contributed to changes in bail case complexity.

iii) Presence of Charges against the Administration of Justice

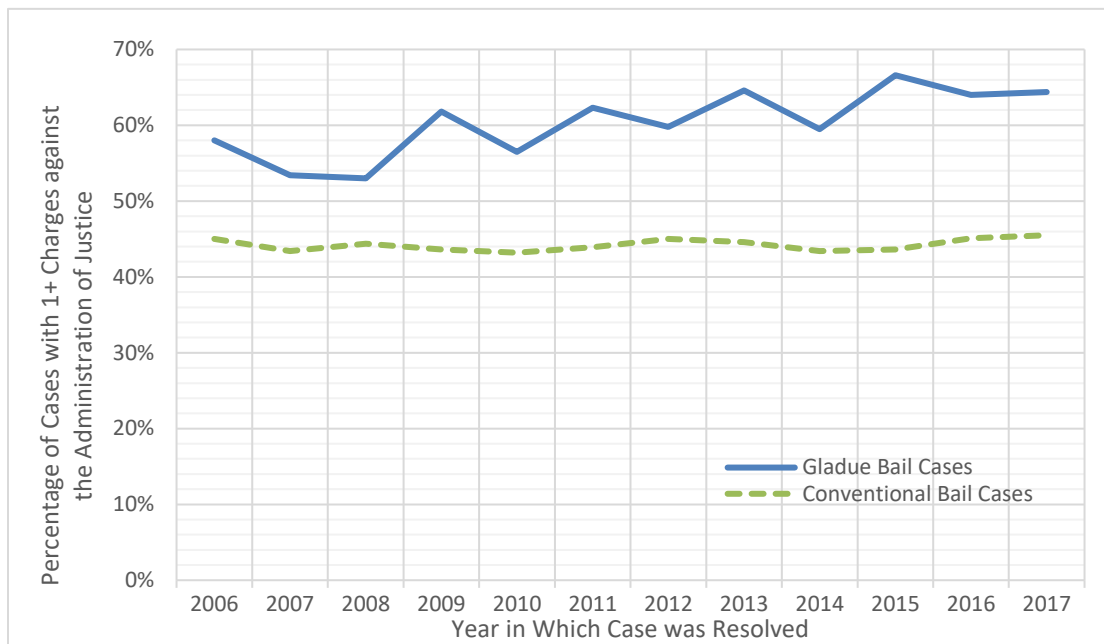
The presence of charges against the administration of justice has important implications for case complexity and the likelihood of being granted bail. Given that these charges are often laid in addition to, or subsequent to, substantive charges, their presence in bail cases would almost certainly increase a case’s perceived complexity, particularly as these charges are generally considered to reflect an accused’s willingness to comply with future conditions of potential bail release. Moreover, the presence of one or more charges against the administration of justice was the strongest independent predictor of bail outcomes in Table 5.48 and was also a significant predictor of case outcomes in Table 5.49. Just as importantly, charges against the administration of justice were quite common in bail cases generally, and Gladue bail cases in particular (Table 5.12). In fact, Gladue bail cases were substantially more likely than conventional bail cases

⁴¹⁸ While there appear to be more fluctuations in the Gladue bail population, recall that the smaller number of cases in this population makes these data more susceptible to the appearance of modest fluctuations from one year to the next.

⁴¹⁹ While, on the surface, the increase in the presence of violent charges alone might be expected to affect both bail populations similarly, it is important to note that this trend could also interact with other legal factors in ways which would affect these populations differently (e.g., an accused person’s criminal record, type of legal representation, or even prejudiced attitudes among criminal justice actors).

to have one or more charges against the administration of justice (60.6% versus 44.2%). Figure 5.4 explores the trends in the presence of administration of justice charges for both Gladue bail cases and conventional bail cases in order to identify any changes over time (see Appendix V for a crosstabulation of these data).

Figure 5.4: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Charges against the Administration of Justice Over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Notably, the trends in the proportion of cases with one or more charges against the administration of justice differ somewhat over time. Indeed, the interaction term between Year and Gladue Bail Status in the regression model was statistically significant ($p < .001$), indicating that Year affects Gladue bail cases and conventional bail cases differently in terms of the likelihood of these bail populations having one or more charges against the administration of justice. Whereas the proportion of Gladue bail cases with this type of charge increased from 2006-2017 (from 58.5% in 2006 to 64.4% by 2017), the proportion of conventional bail cases with this type of charge was relatively stable, hovering around 43%-45% (Appendix V). For each year of the study timeframe, Gladue bail cases were more likely than their conventional bail counterparts to contain at least one charge against the administration of justice ($p < .001$). In fact, whereas the proportion of Gladue bail cases with this type of charge was always greater than 50%, this figure consistently remained under 50%

for conventional bail cases. Finally, the difference between populations in terms of the presence of charges against the administration of justice seems to have increased over the study period.

Hence, it appears that Gladue bail cases became increasingly complex over the study timeframe in terms of their inclusion of charges against the administration of justice⁴²⁰. Given that this sizeable increase seems to have affected the Gladue bail population exclusively, one might expect this population to experience disproportionate and negative downstream effects at bail (and by extension, remand custody)⁴²¹ and sentencing (and by extension, sentenced custody)⁴²². Charges belonging to this broad offence classification therefore warrant further investigation. Indeed, it is important to identify the specific types of charges that are contributing to this disparate trend. Particularly within the context of the overincarceration of Indigenous peoples, any (differential) changes in the presence of specific charges against the administration of justice might be expected to either contribute to (or reduce) this longstanding issue.

iv) Presence of Any s.145 Charges

Perhaps an obvious starting point in the examination of charges against the administration of justice would be the sizeable group of offences codified under s.145 of the *Criminal Code*. These charges would likely be considered particularly ‘risky’ within the context of bail given that they largely relate to failing to comply

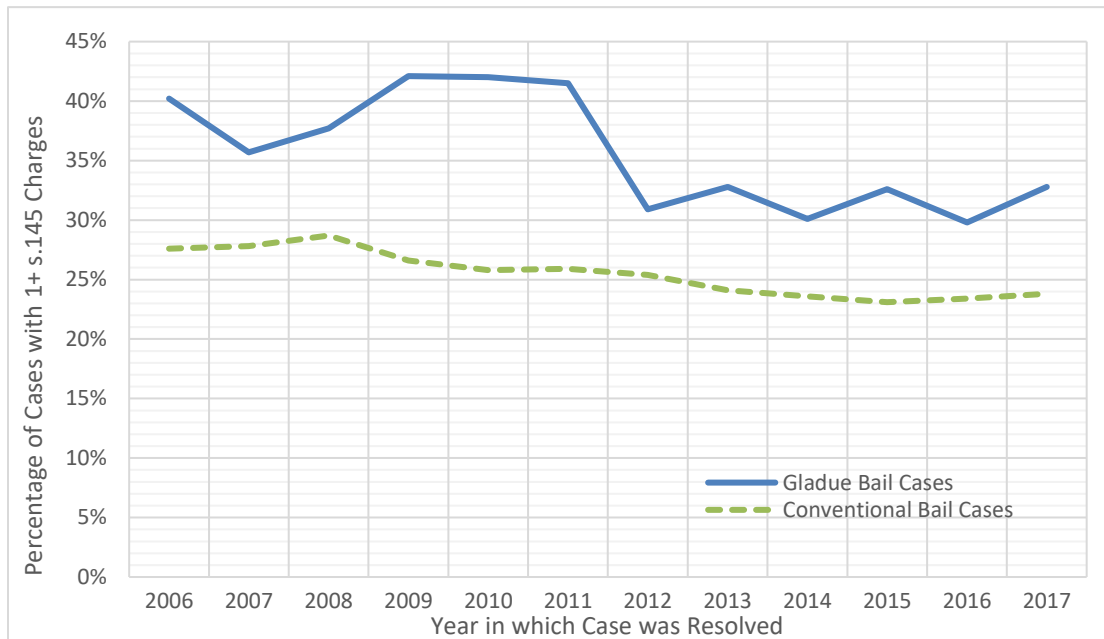
⁴²⁰Longitudinal analyses were also performed for charges against property (see Appendix U) – another common offence type at bail, albeit one with less obvious implications for perceived riskiness and related bail outcomes. Overall, the proportion of charges against property did increase moderately during the study period for both Gladue bail and conventional bail cases. The interaction between Year and Gladue Bail Status was also statistically significant ($p < .001$), meaning that the effect of time on the presence of property charges depended on whether a case was a Gladue bail case or conventional bail case. In particular, the increase in the proportion of cases with one or more property charges was steeper for Gladue bail cases (44.9% in 2006 to 59.1% by 2017 = 14.2%) compared to conventional bail cases (42.3% to 47.4% = 5.1% over the same years), with the effect that the marginal disparities between bail populations at the beginning of the study period increased and became statistically significant later in the study period ($p < .05$ from 2011-2012; $p < .001$ from 2014-2017). Hence, this general increase in property charges may, in some circumstances, have also contributed to increased perceptions of case complexity. However, in the context of bail, it is unclear what an increase in property charges – such as shoplifting and possession of stolen property, which are generally considered less serious offences and, as such, pose less threat to public safety – might mean in terms of bail or case outcomes.

⁴²¹ Indeed, cases with at least one charge against the administration of justice (compared to cases with charges from the other offence classifications) were the second most likely type of case to be formally refused bail (Table 5.28(j)). Hence one might expect an increase in the presence of charges against the administration of justice to lead to a corresponding increase in the remand population.

⁴²² Recall that bail cases that remained in remand were substantially more likely than those that were released on bail to receive one or more findings of guilt (Tables 5.40(b) and 5.40(c)). Given that a history of administration of justice convictions may also reduce the likelihood of receiving less serious, non-custodial sanctions, an increase in cases with this type of charge might also be expected to indirectly contribute to the sentenced correctional population.

with various forms of (mostly interim) release⁴²³. Indeed, criminal justice actors may be particularly reluctant to (re-)release an individual on bail when they are alleged to have been noncompliant with similar forms of release. Furthermore, the reverse onus that applies to most s.145 charges would also likely complicate deliberations of bail and to make release more difficult to attain⁴²⁴. Charges under s.145 of the *Criminal Code* were somewhat common in bail cases overall. More importantly for this study, considerable differences existed in their presence among Gladue bail and conventional bail populations (34.9% versus 25.8% – see Table 17(a)). Figure 5.5 presents the presence of any s.145 charges in a case longitudinally in order to explore their relationship with bail court type over time (for a crosstabulation of these data, see Appendix W).

Figure 5.5: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ s.145 Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



⁴²³ Specifically, s.145 offences (as outlined in the versions of the *Criminal Code* which were in effect from January 1, 2003 to May 28, 2008 and May 29, 2008 to December 12, 2018) were: 145(1) escape and being at large without excuse; 145(2) failure to attend court; 145(3) failure to comply with condition of undertaking or recognizance; 145(4) failure to appear or to comply with summons (relating to the *Identification of Criminals Act*); 145(5) failure to comply with appearance notice or promise to appear (relating to the *Identification of Criminals Act*); and s.145(5.1) failure to comply with conditions of undertaking pursuant to s.499(2) or 503(2.1) (relating to interim release by police).

⁴²⁴ The only s.145 charge to which a reverse onus did not apply was s.145(1) for escape custody – unlawfully at large. Yet in cases in which an individual is alleged to have escaped custody, the accused would generally be returned to custody upon arrest, such that a bail appearance would only occur if the charges were not resolved by the time that the individual had completed the remainder of their existing sentence.

Overall, the Gladue bail and conventional bail populations experienced a similar modest decrease in the proportion of cases with at least one s.145 charge from 2006-2017 – notably a timeframe during which the overuse of administration of justice charges began receiving significant scholarly attention (e.g., Sprott, 2004; Taillon, 2006; Webster, 2007). Indeed, while Year was statistically significant in the regression model ($p < .001$), Gladue Bail Status and the interaction term between Year and Gladue Bail Status were not statistically significant ($p = .080$ and $p = .085$, respectively). This suggests that Year affected both Gladue bail and conventional bail cases similarly in terms of the presence of one or more s.145 charges. Yet despite the overall similarities in longitudinal trends across bail populations, the decline in s.145 charges in the Gladue bail population appears to have begun slightly later than in the conventional bail population (around roughly 2012 and 2009, respectively). Furthermore, for every year in the study timeframe, Gladue bail cases were consistently more likely than their conventional bail counterparts to contain at least one s.145 charge ($p < .001$ in 2006-2011 and 2013-2017; $p < .05$ in 2012; see Appendix W). Nevertheless, given the overall downward trend in s.145 charges, it appears that trends in this broad charge category cannot account for the overall upward longitudinal trends in the presence of charges against the administration of justice more generally.

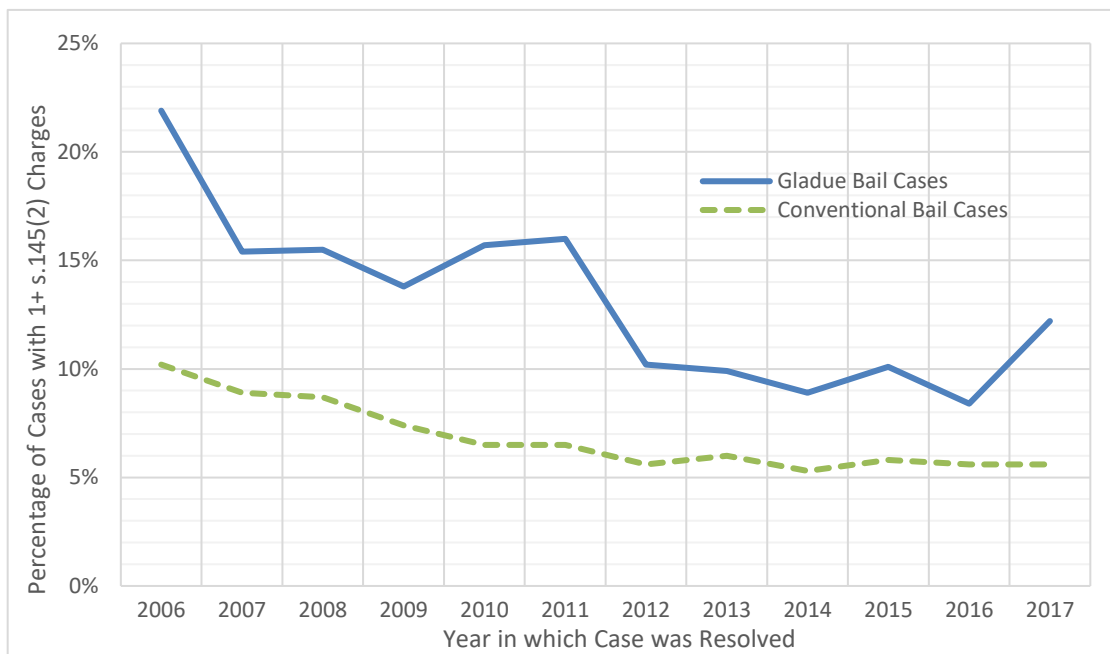
Yet this large sub-category of charges against the administration of justice includes a number of specific charges which would benefit from further investigation. That is, does the overall downward trend in s.145 charges extend to all of the most common charges under the s.145 umbrella? Particularly if subsequent analyses demonstrate an increase in bail refusal during this same period, understanding the specific driving factors behind such trends would be imperative in order to implement targeted and effective interventions. Within this context, the two most common s.145 charges are examined: failure to attend court and failure to comply with a condition of an undertaking or recognizance. The most common specific charge against the administration of justice overall is then examined: failure to comply with a probation order (Table 5.25).

v) Presence of s.145(2) Failure to Attend Court Charges

The presence of s.145(2) charges for failure to attend court would almost certainly add complexity to bail deliberations, even beyond reverse onus provisions. Indeed, the presence of this charge would be

expected to raise concerns related to the primary ground for detention and cause criminal justice actors to carefully assess the risk of future non-appearance. Cross-sectional analyses suggest that Gladue bail cases were more likely than conventional bail cases to include at least one charge for failure to attend court (12.7% versus 7.0% – Table 5.19(a)). Figure 5.6 illustrates whether the presence of s.145(2) charges has changed over time and whether any trends in s.145(2) charges apply similarly to both the Gladue bail and conventional bail populations (see Appendix X for a crosstabulation of these data).

Figure 5.6: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ s.145(2) Charges for Failure to Attend Court, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



The longitudinal trends in the proportion of cases with a charge for failure to attend court are similar for both the Gladue bail and conventional bail populations. Specifically, this type of charge – similar to s.145 charges generally – became less common overall in both Gladue bail and conventional bail cases from 2006-2017. Moreover, while Year was a statistically significant ($p < .001$) predictor of the presence of one or more s.145(2) charges in the regression model, Gladue bail Status and the interaction between Year and Gladue Bail Status were not statistically significant ($p = .360$ and $p = .377$, respectively). It may be that judges in the Old City Hall and College Park courthouses (generally) have become increasingly sensitive to the issues surrounding inadvertent non-attendance versus willful absconding (see Gouldin, 2018). Nevertheless, Gladue

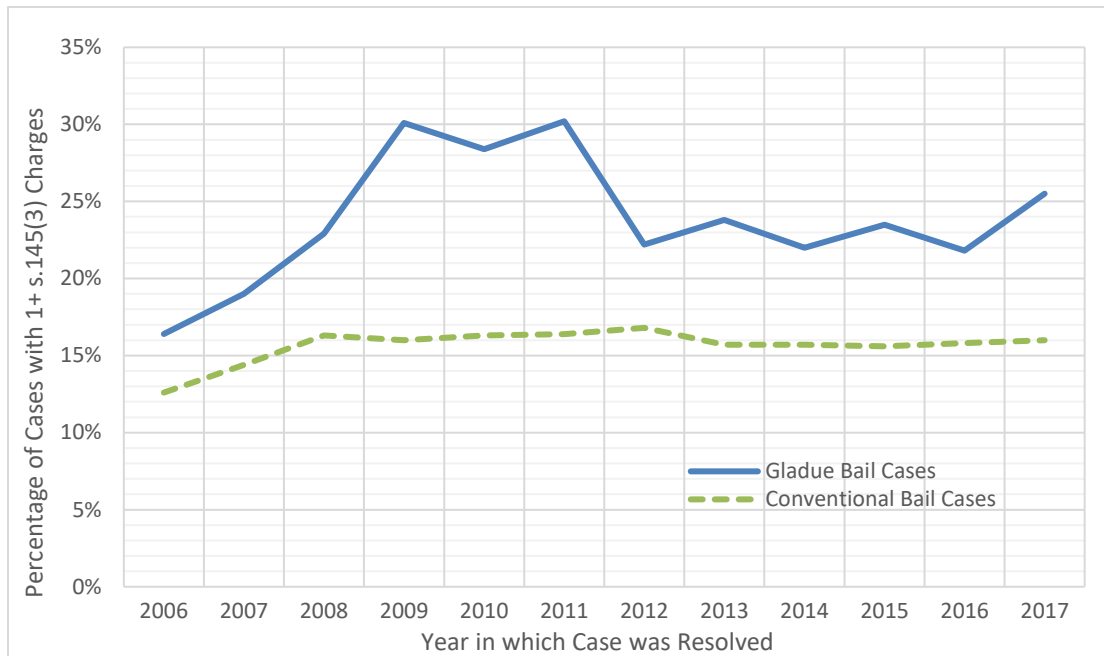
bail cases were more likely than conventional bail cases to contain at least one charge for failure to attend court in every year of the study period ($p < .001$, see Appendix X), although the disparity between bail populations appears to have decreased slightly overall. Taken together, then, it seems that trends in the presence of s.145(2) charges are not contributing to an increase in case complexity.

vi) Presence of s.145(3) Failure to Comply with a Condition of Undertaking or Recognizance Charges

The presence of s.145(3) charges – which consist primarily of bail breaches – might also be expected to add complexity to bail deliberations, even beyond its reverse onus provisions. Indeed, if an accused is charged with failing to comply with the conditions of their bail, criminal justice actors might reasonably be concerned with future non-compliance, particularly if that non-compliance might pose a risk to public safety or the public's confidence in the administration of justice. Cross-sectional analyses indicated that charges under s.145(3) were the most common type of s.145 charge among bail cases. Further, the presence of these charges was considerably more common in the Gladue bail population compared to the conventional bail population (23.3% versus 15.6% – see Table 5.20(a)).

Figure 5.7 examines whether the presence of s.145(3) charges has changed during the study period and whether these changes have affected both bail populations similarly (for a crosstabulation of these data, see Appendix Y). Notably, the longitudinal trends for Gladue bail and conventional bail cases in terms of the presence of one or more charges for failure to comply with a condition of an undertaking or recognizance were similar overall. In fact, the interaction between Year and Gladue Bail Status in the regression model was not statistically significant ($p = .989$), meaning that Gladue Bail Status did not appear to significantly affect the relationship between Year and the presence of s.145(3) charges. Yet, on its own, Year was a statistically significant predictor of the presence of one or more s.145(3) charges in a case. Hence, while the proportion of cases with at least one s.145(3) charge for failing to comply with a condition of a court order did vary significantly over time, these changes were similar for both Gladue bail and conventional bail cases.

Figure 5.7: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ s.145(3) Charges for Failure to Comply with a Condition of Undertaking or Recognizance, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Specifically, the proportion of bail cases with one or more s.145(3) charges – unlike for s.145 charges generally, and s.145(2) charges specifically – did not decline for either bail population overall from 2006-2017. Rather, the proportion of Gladue bail and conventional bail cases with this type of charge increased somewhat over the first half of the study timeframe (until 2011 or 2012 for the Gladue bail and conventional bail populations, respectively), before decreasing somewhat, albeit to levels still above those of 2006. Yet, for every year, Gladue bail cases were more likely than their conventional bail counterparts to contain at least one s.145(3) charge ($p < .001$ for 2008-2011 and 2013-2017; $p < .01$ for 2007; $p < .05$ for 2006 and 2012 – see Appendix Y), with this difference between bail groups appearing to be slightly greater for the latter three-quarters of the study period than at the beginning.

Overall, however, this early increase in the proportion of bail cases with one or more charges for breaching a condition of a court order followed by a slight decrease offers limited insight into the overall shift toward increasingly more complex bail cases from 2006-2017. Indeed, the general shift toward cases containing five or more charges (Figure 5.2) and the increase in the proportion of Gladue bail cases having one or more charges against the administration of justice (Figure 5.4) did not occur exclusively in the first half

of the study period, but rather, throughout the entire 2006-2017 timeframe. Moreover, given the similarities between the longitudinal trends for Gladue bail and conventional bail cases in terms of s.145(3) charges, these trends cannot account for the differential trends in case complexity (in terms of administration of justice charges and many-charge cases) in the two bail populations.

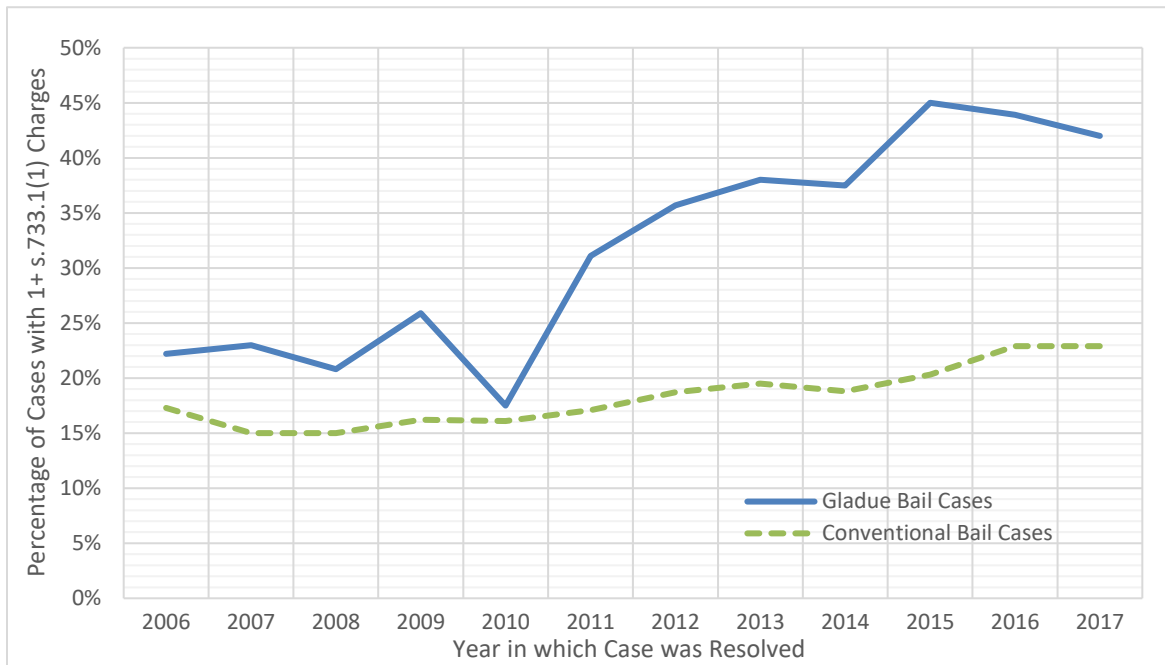
vii) Presence of s.733.1(1) Failure to Comply with Probation Charges

Breach of probation charges – an administration of justice charge located outside the s.145 umbrella – might also be expected to affect case complexity in such a way as to render bail release more difficult. Similar to s.145(3) charges above, allegations of non-compliance with a probation order may raise concerns regarding future compliance with conditions of bail, particularly if non-compliance would then raise concerns on the secondary or tertiary grounds. These charges were, in fact, the most common specific charge against the administration of justice (Table 5.25)⁴²⁵. Moreover, these charges were substantially more common in Gladue bail cases than conventional bail cases (33.0% versus 17.9% – see Table 5.24(a)).

Figure 5.8 presents the proportion of Gladue bail and conventional bail cases with at least one s.733.1(1) breach of probation charge during the study period (see Appendix Z for a crosstabulation of these data). While the proportion of cases with at least one breach of probation charge increased in both the Gladue bail and conventional bail populations from 2006-2017, this trend was significantly more marked among Gladue bail cases. Indeed, the interaction term between Year and Gladue Bail Status was statistically significant ($p < .001$), indicating that the relationship between Year and the presence of s.733.1(1) charges is dependent on whether cases were Gladue bail or conventional bail cases.

⁴²⁵ Given the prevalence of breach of probation charges, any increases in their presence over time, particularly for Gladue bail cases, might also help to explain the earlier pattern of Gladue bail cases becoming increasingly likely to have one or more charges against the administration of justice generally.

Figure 5.8: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ s.733.1(1) Charges for Failure to Comply with Probation, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Specifically, the Gladue bail population experienced a substantial increase – particularly from 2010-2017 – in the proportion of cases having one or more s.733.1(1) charges (from 22.2% in 2006 to 42.0% by 2017 = 19.8%; see Appendix Z). In other words, the proportion of Gladue bail cases with this charge virtually doubled during the study timeframe. In contrast, the conventional bail population experienced a much more modest increase during this same period (from 17.3% in 2006 to 22.9% by 2017 = 5.6%; see Appendix Z). In fact, Gladue bail cases were more likely than their conventional bail counterparts to include at least one s.733.1(1) charge in every year of the study period. Moreover, given the sizeable increase in s.733.1(1) charges for Gladue bail cases, the differences between bail populations also increased considerably over time ($p < .001$ for all years except 2006 ($p < .01$) and 2010 ($p > .05$) – see Appendix Z). Illustratively, Gladue bail cases in 2006 were only somewhat more likely than conventional bail cases to have at least one s.733.1(1) charge (22.2% versus 17.3%), whereas by 2017 these cases were substantially more likely than their conventional bail counterparts – almost twice as likely – to have this type of charge (42.0% versus 22.9%).

Notably, the prevalence of breach of probation charges is perhaps not entirely surprising when one considers that more than half (51.9%) of all sentenced cases, and 54.9% of Gladue bail cases, included a

probation order (Table 5.43). The disproportionate presence of probation orders among Gladue bail cases is thus likely (at least partially) contributing to this population's disproportionate likelihood of receiving breach of probation charges which, in turn, may be contributing to their disproportionate presence in remand and sentenced custody. Indeed, probation orders – and particularly those that contain numerous or onerous conditions (which can apply for up to three years) – may set individuals up for failure in the form of probation breaches and trigger a number of downstream consequences, including decreased likelihood of bail and associated time in remand as well as increased likelihood of being found guilty and subsequently receiving a custodial sentence. Hence strict probation orders might inadvertently create a sort of feedback mechanism through which custodial sentences become increasingly more likely.

Overall, the substantial increase in the proportion of cases with breach of probation charges, and the proportion of Gladue bail cases in particular, likely contributed to a general increase in bail case complexity during the study period. In particular, this increase is likely to be a strong contributing factor to the Gladue bail population's increase in the presence of charges against the administration of justice generally^{426,427}.

More broadly, there appears to have been a general increase in case complexity from 2006-2017 for all bail cases and Gladue bail cases in particular. This shift toward increasingly complex, or 'risky', cases seems to be partially rooted in a combination of (largely differential) changes in the number of charges in a case, the presence of charges against the person and the presence of certain charges against the administration of justice generally – and in particular breach of probation charges, as well as an increase in breach of bail

⁴²⁶ This more gradual increase in breach of probation charges in the conventional bail population also likely counteracted some of the downward trends in other specific administration of justice charges in this population at this time.

⁴²⁷ It is also possible that the rise in cases with probation breach charges may also be contributing to greater case complexity in terms of the shift toward many-charge cases. Indeed, it is not uncommon for multiple probation breaches to be laid at the same time (e.g., breaching several different conditions), and sometimes in conjunction with other substantive charges. Consider that nearly one third (29.9%) of all bail cases with at least one breach of probation charge actually had two or more of these charges (Table 5.24(a)). In fact, in the Gladue bail population, this figure was considerably higher at 39.4%. Notably, this percentage of cases with multiple breach of probation charges was the highest of any specific administration of justice charge examined for the Gladue bail population. For the conventional bail population, the corresponding figure (29.2%) was surpassed only slightly by that for cases with at least one s.145(3) charges for failure to comply with an undertaking or recognizance that actually had two or more of these charges (29.5%) (Table 5.20(a)). Further, supplementary cross-sectional analyses indicate that bail cases with at least one breach of probation charge in the person dataset had an average of 4.31 charges (median = 3 charges), compared to cases without breach of probation charges which had a lower average of only 3.30 charges (median = 2 charges).

charges in the first quarter of the study period. In light of the ways in which these particular case characteristics may be associated with perceived risk at the bail phase of court processing, these (largely differential) upward trends in case complexity have concerning implications for custodial populations, as well as for the overrepresentation of Indigenous peoples in Canadian penal institutions. Should these trends affect bail processing and outcomes – and particularly if they are associated with differential and/or greater refusal of bail – they may have downstream effects on time spent in remand custody, the likelihood of being found guilty as well as the likelihood of being sentenced to a term of imprisonment. Given these potentially worrisome changes in bail case composition and complexity, as well as their implications for the bail system, a longitudinal examination of bail processing and outcomes would seem warranted.

5.4.2 – Bail Processing

Indeed, as the characteristics of bail cases changed and became more complex over the study period, one would expect trends in bail processing and bail outcomes to have also been impacted. As bail cases shifted toward having more charges (particularly in the Gladue bail population – Figure 5.2), more violent charges (Figure 5.3), more administration of justice charges (broadly defined) in the Gladue bail population (Figure 5.4) and more breach-type charges specifically (Figure 5.7, but to a much greater extent Figure 5.8 – especially for the Gladue bail population), the bail process may have necessarily become lengthier – with significant implications for the remand population. And yet, there did not appear to be any meaningful trends in the number of bail appearances and time required to complete the bail process between 2006-2017 for either bail population (see Appendices AA and AB)⁴²⁸. Bail outcomes, on the other hand, did change significantly throughout the study period.

⁴²⁸ It is possible that other factors may have also influenced bail processing and outcomes during the study period. Notably, several reports critiquing aspects of the bail system, including lengthy bail processing and the imposition of numerous and onerous bail conditions, were published during this time (e.g., CCLA, 2014; JHSO, 2013; Webster, 2015; Wyant, 2016) and might have (begun to) counter or mitigate any trends associated with the rise in bail case complexity. Furthermore, the Ontario Ministry of the Attorney General implemented its *Justice on Target* initiative in 2008 (renewed in 2012) with the objective of reducing criminal court processing and increasing bail efficiency specifically – albeit with limited Ontario-wide results. Nearer to the end of the study period, one might also point to the Supreme Court’s influential *R. v. Antic* decision, rendered in June 2017, that re-iterated the principles of bail, or to the revision of the Ontario Crown Manual in November 2017 as other factors which might be expected to affect bail processing and outcomes and potentially attenuate any trends associated with the increasing complexity of bail cases during this time.

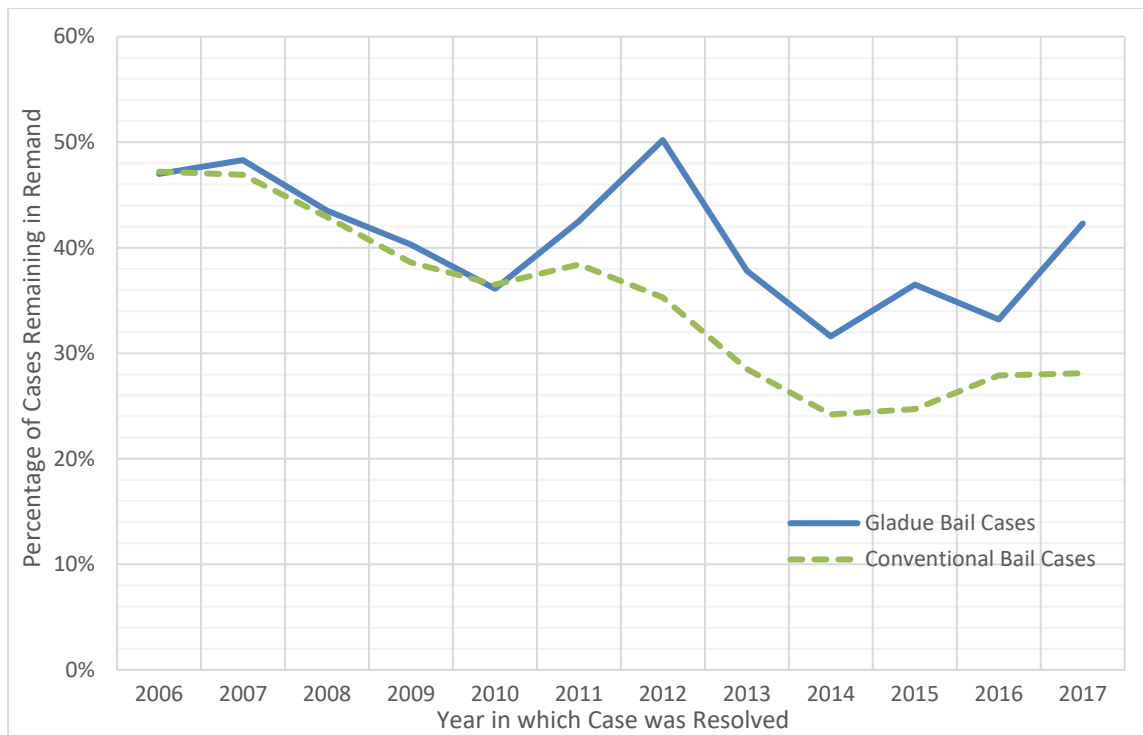
i) Outcome of (First) Bail – All Cases

Given the shift toward increasingly complex bail cases during the study timeframe – particularly in the Gladue bail population – one might expect that bail outcomes would have shifted toward detention. Indeed, recall that the number of charges in a case and the presence of violent charges and charges against the administration of justice were all statistically significant independent predictors of bail being formally denied (Table 5.48). When considering all bail outcomes in the person dataset, cross-sectional analyses indicated that Gladue bail cases were less likely than conventional bail cases to be granted bail (36.6% versus 51.2%), slightly more likely to remain in remand (whether formally or informally detained) (40.1% versus 36.2%) and more likely to end the bail process by pleading guilty (17.6% versus 8.1%) (Table 5.28(g)).

To explore whether changes in bail case composition and complexity may be related to bail outcomes over time, Figures 5.9 through 5.11 examine select bail outcomes longitudinally for Gladue bail and conventional bail cases (see Appendix AC for a crosstabulation of these data, in which – for ease of interpretation – the bail outcomes of “withdrawn, stayed or dismissed” were collapsed into the “other” bail outcome category)⁴²⁹. Note also that cases that were formally denied bail and those that remained in custody without a formal determination of bail have also been combined into a single “remand” category.

⁴²⁹ These same analyses were also performed for only those bail cases that required 2 or more bail appearances (i.e., for those data presented in Appendix K) with similar results ($p < .001$).

Figure 5.9: Line Chart of Gladue Bail Cases and Conventional Bail Cases Formally and Informally Detained in Remand, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Overall, there were some similarities between the longitudinal trends of Gladue bail and conventional bail cases in terms of the proportion of cases remaining in remand at the end of the bail phase of case processing – whether as a result of a formal denial of bail or informal waiving of bail when a contested show cause bail hearing is not pursued. Yet there are also differences between these two bail populations, particularly in the latter half of the study timeframe. Indeed, the interaction between Year and Gladue Bail Status was a statistically significant ($p < .001$) predictor of bail cases remaining in remand, indicating that longitudinal trends in remand are different for Gladue bail and conventional bail cases.

Specifically, while the proportion of Gladue bail cases remaining in remand decreased somewhat overall from 2006-2017 (from 47.0% to 42.3%), and particularly from 2006-2010 (36.1%), there were some fluctuations (from 31.1% to 49.8%) (Appendix AC) which render the overall trends somewhat less clear. In contrast, the proportion of conventional bail cases remaining in remand decreased more substantially during the study period (despite a modest increase year over year from 2014 to 2017), declining from 47.2% in 2006 to 28.1% by 2017 (Appendix AC). In terms of yearly comparisons between bail populations, for roughly the

first half of the study period (i.e., 2006-2010), Gladue bail cases were similarly or just slightly more likely than conventional bail cases to remain in remand awaiting case resolution. However, from 2011 to 2017 – partly as a result of the greater decrease in remand within the conventional bail population – Gladue bail cases became considerably more likely than their counterparts to await case resolution in remand.

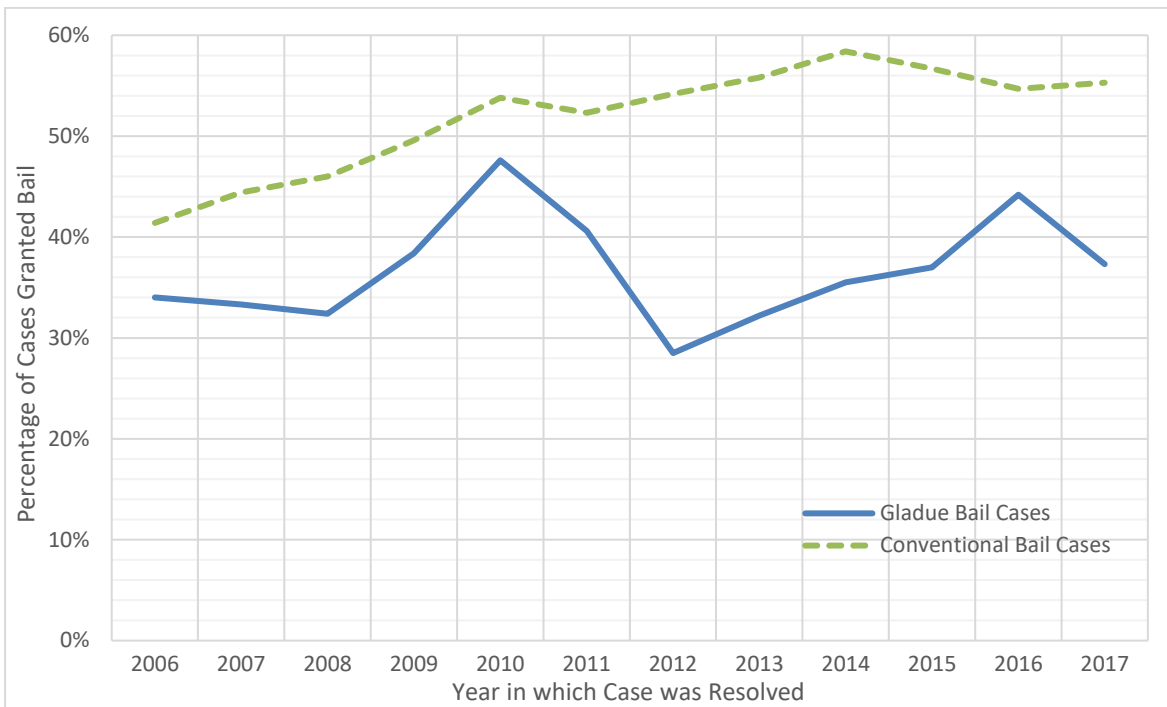
While the overall downward trend in remand bail outcomes may seem unexpected given the overall increase in the *proportion* of provincial/territorial prisoners who were in remand custody during the study timeframe⁴³⁰, note that, in Ontario, remand *counts* actually decreased modestly from 2009/2010 until 2014/2015⁴³¹ before increasing somewhat in 2015/2016 and 2016/2017 (Statistics Canada, 2023e). Hence within the context of these Ontario-specific data, the downward trends in Figure 5.9 – and particularly those for the conventional bail population – are not as incongruent as they may first appear. Furthermore, the considerable intra-jurisdictional variability across Ontario in terms of bail processing (see, for example, Doob et al., 2017; Webster, 2005; Webster & Doob, 2003) – often associated with court culture – may also help to make sense of why the bail trends in these two Toronto courthouses differ from trends in Ontario more broadly⁴³². To continue the investigation into bail outcomes over time, Figure 5.10 next examines the longitudinal trends in the proportion of cases granted bail.

⁴³⁰ While the proportion of remand prisoners in Ontario provincial correctional facilities increased overall from 2006/2007 to 2017/2018, note that this proportion actually decreased from 2009/2010 until 2012/2013 before increasing again gradually and eventually exceeding 2009/2010 levels in 2015/2016. Part of this decrease in the proportion of remand prisoners in Ontario corresponds to a decrease in remand counts from 2009/2010 until 2014/2015 and an increase in sentenced counts from 2009/2010 to 2012/2013 (see Statistics Canada, 2023e).

⁴³¹ This decrease notably coincides with the Ontario MAG's *Justice on Target* initiative launched in 2008 and renewed in 2012. While the primary focus of this initiative was court efficiency, the efforts to address bail efficiency may have affected bail functioning and bail outcomes, including the proportion of cases denied bail. For instance, part of the work on bail efficiency included a Bail Experts Table comprised of community agencies, stakeholders and experts which provided recommendations to improve bail efficiency as well as overall effectiveness.

⁴³² Note also that these data indicate only whether a bail case ended the bail phase with remand and do not speak to the length of stay in remand. Indeed, given the harsh conditions of remand custody, it is not uncommon for accused persons in pre-trial detention to plead guilty early in case processing (see Table 5.31(c) and footnote 358) and therefore spend only a short period in this type of custody, having a more limited impact on average remand counts.

Figure 5.10: Line Chart of Gladue Bail Cases and Conventional Bail Cases Granted Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



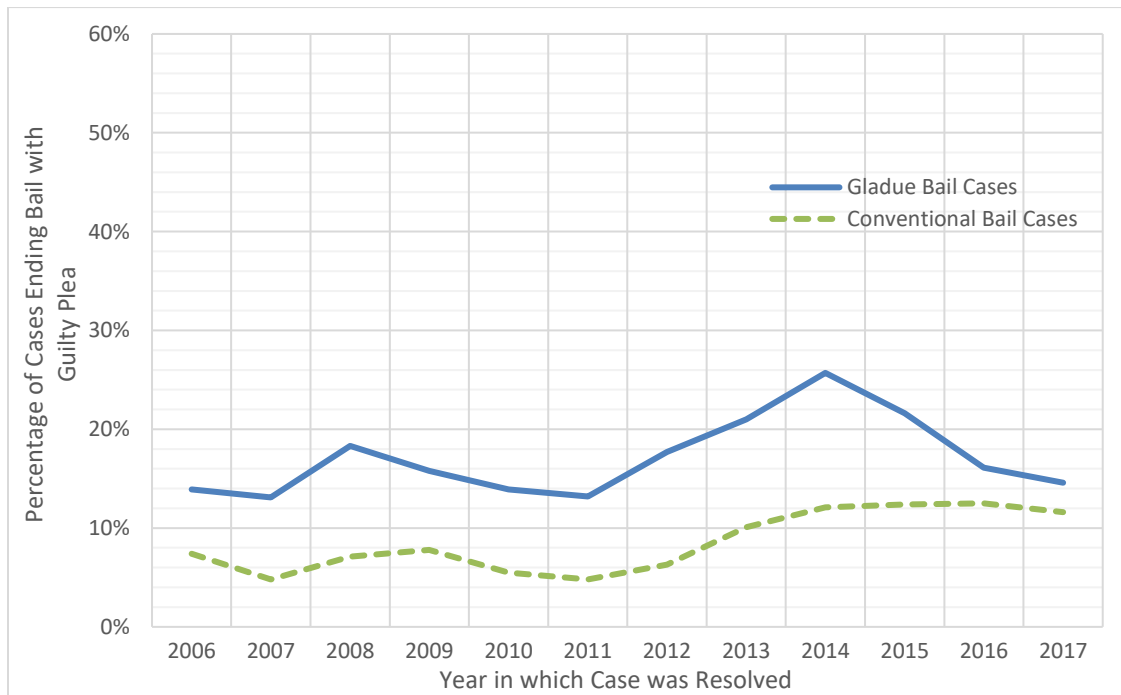
Again, there were some (minor) similarities between Gladue bail and conventional bail cases in terms of the proportion being granted bail over the study period. That is, the proportion of both Gladue bail and conventional bail cases being granted bail increased overall from 2006 to 2017. However, the longitudinal trends of Gladue bail and conventional bail populations in terms of bail release also differ in important ways, as suggested by the statistically significant interaction term ($p < .001$) between Year and Gladue Bail Status in the regression model. Indeed, the general upward trend in bail release for the Gladue bail population was considerably more subdued overall and less consistent (increasing only slightly from 34.0% in 2006 to 37.3% by 2017), whereas the increase was much sharper and more consistent in the conventional bail population (from 41.4% in 2006 to 55.3% by 2017).

Within each year, Gladue bail cases were also consistently less likely than conventional bail cases to be granted bail. Partially the result of the differential rate of increase in bail release between bail populations, the difference between these groups increased generally over the study timeframe. Hence, while bail outcomes trended away from remand and toward release for both bail populations (albeit much more gradually and inconsistently for Gladue bail cases), it would appear that the differential rates of change

between these populations led Indigenous accused in Gladue bail cases to actually have increasingly less favourable bail outcomes compared to their conventional bail counterparts.

An attentive reader may have noted that the percentage of cases ending in detention and in release does not sum to 100%. Rather, there is another reasonably common outcome for bail cases. The longitudinal trends for cases ending the bail process with a guilty plea are presented in Figure 5.11.

Figure 5.11: Line Chart of Gladue Bail Cases and Conventional Bail Cases Ending Bail with a Guilty Plea, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Overall, the longitudinal trends in the proportion of bail cases ending the bail phase with a guilty plea were largely similar. Both bail populations appeared to experience an overall modest increase in the proportion of cases ending bail with a guilty plea. Yet, the statistically significant ($p < .001$) interaction between Year and Gladue Bail Status when predicting these guilty pleas suggests that there were also important differences in their longitudinal trends. Whereas the proportion of Gladue bail cases ending bail by pleading guilty generally increased from 2006-2014 (e.g., from 13.9% to 25.7%), this figure then decreased fairly substantially from 2014-2017 (e.g., 14.6% in 2017) to levels only marginally greater than those at the beginning of the study timeframe (Appendix AC). In contrast, the increase in guilty pleas at bail was more

consistent for conventional bail cases (at least until 2014 when this figure largely stabilized), such that the proportion of these cases rose from 7.4% in 2006 to 11.6% by 2017 (Appendix AC).

Although guilty pleas were fairly uncommon at bail for both populations, Gladue bail cases were consistently more likely to end bail with a guilty plea than conventional bail cases. However, the difference between Gladue bail and conventional bail cases in terms of this outcome decreased somewhat over the study period, particularly in their final years. Throughout most of the study timeframe, Gladue bail cases were roughly twice as likely (or more) to have this bail outcome compared to their conventional bail counterparts (e.g., 13.9% versus 7.4% in 2006; see Appendix AC). However, the differences between these groups began diminishing around 2015 with the result that Gladue bail cases were only slightly more likely to end bail with a guilty plea compared to conventional bail cases (e.g., 14.6% versus 11.6% by 2017; see Appendix AC).

Overall, despite bail cases becoming increasingly more complex from 2006-2017, there did not appear to be a shift away from bail and toward remand. Instead – and perhaps counterintuitively – there appeared to be an overall shift *away* from remand during the study period – although this trend was less pronounced in the Gladue bail population. This shift away from remand corresponded to a general increase in the likelihood of cases being granted bail – with this trend, again, being considerably less marked in the Gladue bail population. In contrast, the shift away from remand also corresponded to cases becoming more likely to end the bail process with a guilty plea (see Appendix AC for all three trends in bail outcomes presented in a single line chart in order to see how they intersect over time).

Although it seems that there was a strong push to avoid remand outcomes during the study period (largely through increased release, but to a lesser extent through early guilty plea), Gladue bail cases appear to have benefited from this movement less than conventional bail cases (particularly from 2011 onward). Indeed, while the proportion of Gladue bail cases granted bail increased overall during the timeframe, the speed of growth was seemingly slower (and with considerably more variability than for conventional bail cases), such that the disparities between populations grew beginning around 2011 and with the Gladue bail population faring increasingly worse compared to the conventional bail population. While guilty pleas at bail

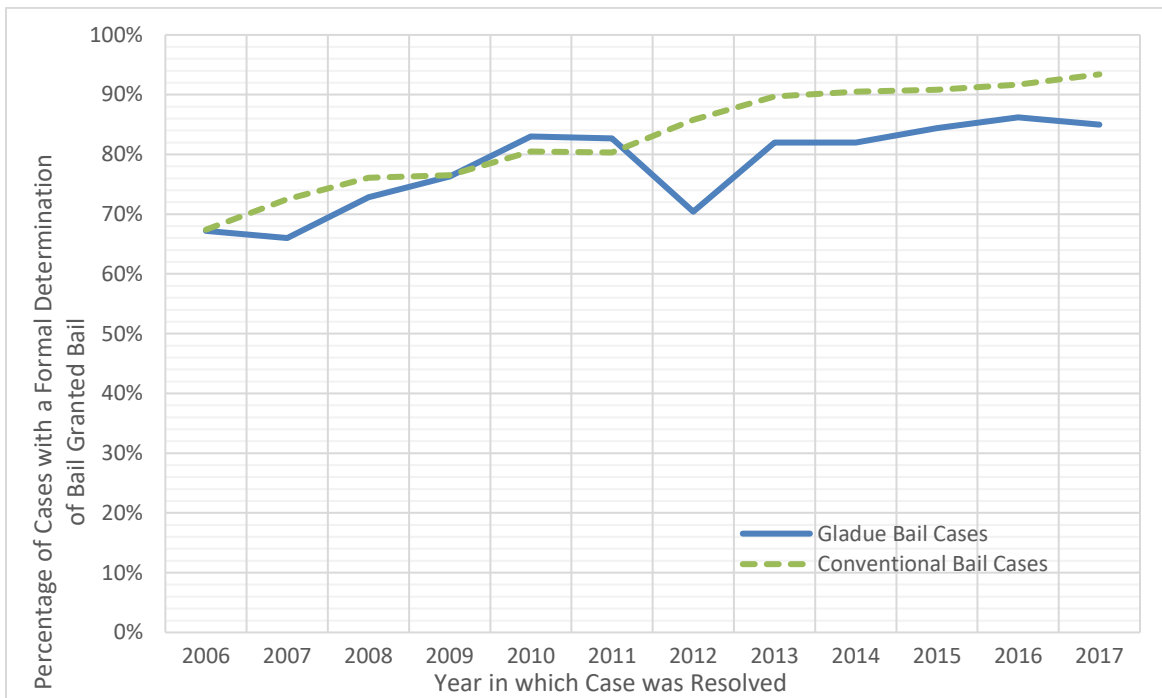
remained reasonably uncommon for both bail populations, Gladue bail cases were consistently (and non-trivially) more likely to have this bail outcome than conventional bail cases until at least 2014, when this disparity appeared to narrow. While one might expect the overall shift toward bail release to lead to a reduction in the remand population, the coinciding increase in early guilty pleas might arguably lead to an increase in the sentenced custodial population. Yet all of these figures include bail outcomes that are outside of the direct control of judicial officers (i.e., those cases for which the accused does not formally seek bail, those that plead guilty at the bail phase, and those with “other” bail outcomes, including having charges withdrawn) and thus are not necessarily a reflection of bail court practices.

ii) Outcome of (First) Bail – Formal Determinations of Bail Only

Indeed, in order to assess the potential of Gladue bail courts, one should also examine those bail outcomes specifically within the purview of criminal justice professionals in these courts, and judicial officers in particular. That is, by examining only those bail cases with a formal determination of bail – bail denied or bail granted – one can better understand the role of judges and justices of the peace, and to a lesser extent Crown and defence counsel (particularly for release outcomes), in producing these bail decisions. Figure 5.12 thus presents the proportion of Gladue Bail and conventional bail cases over time which was formally denied or granted bail by a judicial officer (for a crosstabulation of these data, see Appendix AD)⁴³³. While Gladue bail cases with a formal determination of bail were only slightly less likely than their conventional bail counterparts to be granted bail (78.3% versus 81.7%; $p < .001$; see Table 5.28(h)), longitudinal analyses reveal a somewhat more complex story.

⁴³³ The same analyses were also performed for only those bail cases that required 2 or more bail appearances (i.e., for those data presented in Appendix K) with similar results.

Figure 5.12: Line Chart of Gladue Bail Cases and Conventional Bail Cases Granted Bail, Old City Hall and College Park Bail Cases (Person Dataset; Cases with a Formal Bail Decision; 2006-2017)



The longitudinal trends for Gladue bail and conventional bail cases were quite similar, overall. For both bail populations, the proportion of cases with a formal determination of bail which were granted bail increased fairly steadily from 2006 to 2017. However, the interaction between Year and Gladue Bail Status in the regression model was statistically significant ($p < .001$), suggesting that these longitudinal trends differ for Gladue bail cases compared to conventional bail cases. Indeed, the overall increase in the proportion of Gladue bail cases granted bail was less pronounced compared to that of their conventional bail counterparts (67.2% in 2006 to 85.0% in 2017 = 17.8% compared to 67.4% to 93.4% = 26%; see Appendix AD). It is also notable that, despite the overall likelihood of bail release during the latter half of the study timeframe (from 2012-2017), Gladue bail cases were consistently less likely to be released on bail than their conventional bail counterparts ($p < .001$ from 2012-2017; see Appendix AD).

When considering all bail outcomes (Figures 5.10 through 5.12), despite only modest overall changes in the likelihood of cases remaining in remand or being granted bail over time, Gladue bail cases were generally more likely than their conventional bail counterparts to remain in remand or end bail with a guilty plea and less likely than their counterparts to be granted bail. When considering only bail outcomes within

the control of a judicial officer (and to an extent, other criminal court actors), the likelihood of bail being granted increased for both Gladue bail and conventional bail cases but did so at a slower pace for the Gladue bail population. Importantly, the difference in this rate of change toward bail release caused Gladue bail cases to become less likely than conventional bail cases – consistently since 2012 – to be granted bail. In other words, despite the overall trend toward bail release, since 2012, Gladue bail cases that received a formal bail decision were less likely to be granted bail than their conventional bail counterparts.

Overall, the increases in case complexity noted earlier – specifically in terms of many-charge bail cases, violent charge cases and breach-based charges – do not appear to have led to a decrease in cases being granted bail overall. Hence these changes in case composition have likely not had a significant impact on the remand population. However, because these increases in many-charge, violent and breach charge cases were most acutely felt in the Gladue bail population, these trends might arguably have contributed to the slower pace in which Gladue bail cases became more likely to be granted bail. Thus, these changes in case composition may have contributed indirectly to Indigenous peoples processed in Gladue bail court being increasingly more likely than the largely non-Indigenous population in conventional bail court to remain in remand awaiting case resolution – even if the proportion of Indigenous individuals in remand post-bail was decreasing overall. Finally, due to these changes in bail case complexity and bail outcomes, and in light of the relationship between bail decisions and subsequent case outcomes (see Table 5.49) and sentences, a longitudinal examination of these case outcomes is warranted.

5.4.3 – Case Outcomes

Indeed, one might expect that case outcomes and sentence types would be affected by changes in case complexity⁴³⁴ as well as shifts in bail outcomes⁴³⁵. In the regression model in Table 5.49, bail outcomes were the strongest independent predictor of whether a case will receive one or more convictions and

⁴³⁴ Recall that cases with one or more charges against the administration of justice were more likely than cases with other types of charges – with the exception of traffic charges – to receive a sentence for at least one charge (Appendix O) and, among sentenced cases, were more likely than cases with all other types of charges to receive a custodial sentence (Appendix P).

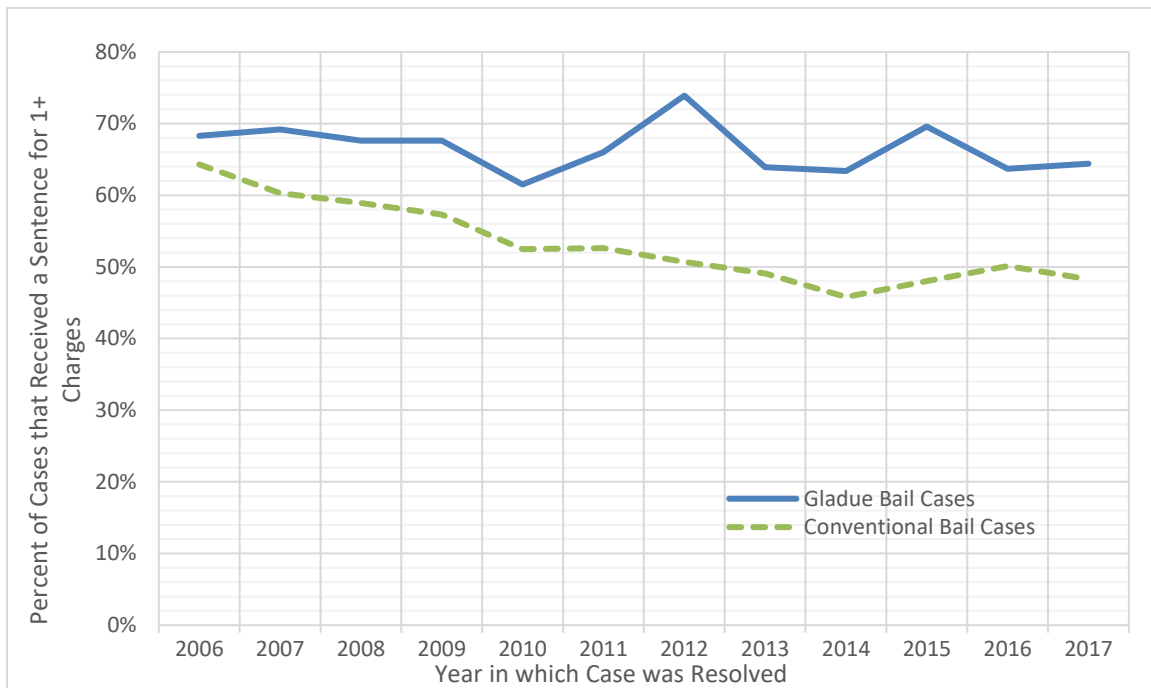
⁴³⁵ Recall that cases awaiting resolution in remand were substantially more likely than those granted bail to receive a sentence (74.1% versus 36.6% – see Tables 5.40(b) and 5.40(c)).

associated sentences, while the presence of administration of justice charges was the second strongest independent predictor, and the presence of violent charges and number of charges in a case were also statistically significant predictors (albeit weaker). Hence, as bail cases – and Gladue bail cases in particular – became increasingly complex (particularly in terms of breach of probation charges) and Gladue bail cases with a formal determination of bail become less likely than their conventional bail counterparts to be granted bail, one might expect to see a corresponding increase in the proportion of Gladue bail cases receiving a sentence (at least compared to conventional bail cases). This possibility is explored first, before investigating whether the presence of specific types of sentences within the sentenced bail population have also changed over the study period and how these potential changes may be affecting the sentenced custodial population and the overincarceration of Indigenous peoples.

i) Presence of Sentence

Overall, Gladue bail cases were considerably more likely to have been handed down a sentence for at least one charge compared to conventional bail cases (66.5% versus 53.9% – see Table 5.40(a)). To explore whether trends in sentencing have differed over time for Gladue bail and conventional bail cases, Figure 5.13 presents the presence of one or more sentences in these two bail populations longitudinally (see Appendix AE for a crosstabulation of these data). Although the proportion of cases that received at least one finding of guilt and associated sentence generally decreased for both bail populations from 2006-2017, there were notable differences in these longitudinal trends. Indeed, the interaction between Year and Gladue Bail Status was statistically significant ($p < .001$), meaning that the longitudinal trends for the presence of a sentence differed for Gladue bail cases compared to conventional bail cases.

Figure 5.13: Line Chart of Gladue Bail Cases and Conventional Bail Cases with a Sentence on 1+ Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



More precisely, the proportion of sentenced Gladue bail cases was somewhat inconsistent, such that the overall decrease in the proportion of cases being sentenced was only quite minor (from 68.3% in 2006 to 64.4% by 2017; see Appendix AE). It would therefore seem that the upstream efforts in Gladue Court to increasingly release Indigenous accused on bail (Figures 5.10 and 5.12) have had limited downstream effects on the likelihood of these cases subsequently receiving one or more convictions⁴³⁶. In contrast, the downward trend in the proportion of conventional bail cases receiving one or more sentences was fairly consistent and much more substantial (from 64.3% in 2006 to 48.3% by 2017; see Appendix AE).

⁴³⁶ Notably, there are several potential legal explanations which may help to account for this finding. Indeed, despite longitudinal shifts away from remand, the increasing complexity of bail cases – and Gladue bail cases in particular – likely contributed to these differential trends in case outcomes. For instance, given the relationship between administration of justice charges and case outcomes (Table 5.49; Appendices O and P), the increasingly disproportionate presence of administration of justice charges in the Gladue bail population also likely contributed to this population’s greater likelihood of being found guilty and sentenced. Moreover, the increasing proportion of bail cases with 5+ charges (especially in the Gladue bail population) would also likely translate to these cases having a greater probability of receiving a conviction for at least one of these charges. Indeed, this increase in case complexity (and the number of charges, in particular) may reduce a case’s likelihood of having *all* of its charges withdrawn, stayed or dismissed or of being acquitted on *all* charges. Furthermore, the pattern whereby Gladue bail cases were more likely to plead guilty at bail than conventional bail cases (Table 5.28(a) and 5.28(h)) very likely also extends to guilty pleas generally.

Moreover, when comparing bail populations each year, Gladue bail cases were always more likely than conventional bail cases to result in one or more findings of guilt and associated sentence ($p < .001$ 2007-2017). In fact, as the proportion of conventional bail cases receiving a sentence decreased over time, the disparity between these bail groups increased. While it does not appear that shifts in case complexity or bail outcomes explored earlier in this chapter led to an increase in the proportion of bail cases being sentenced, it is possible that they have contributed to the lack of meaningful movement away from findings of guilt and sentencing for Gladue bail cases, particularly in comparison to conventional bail cases.

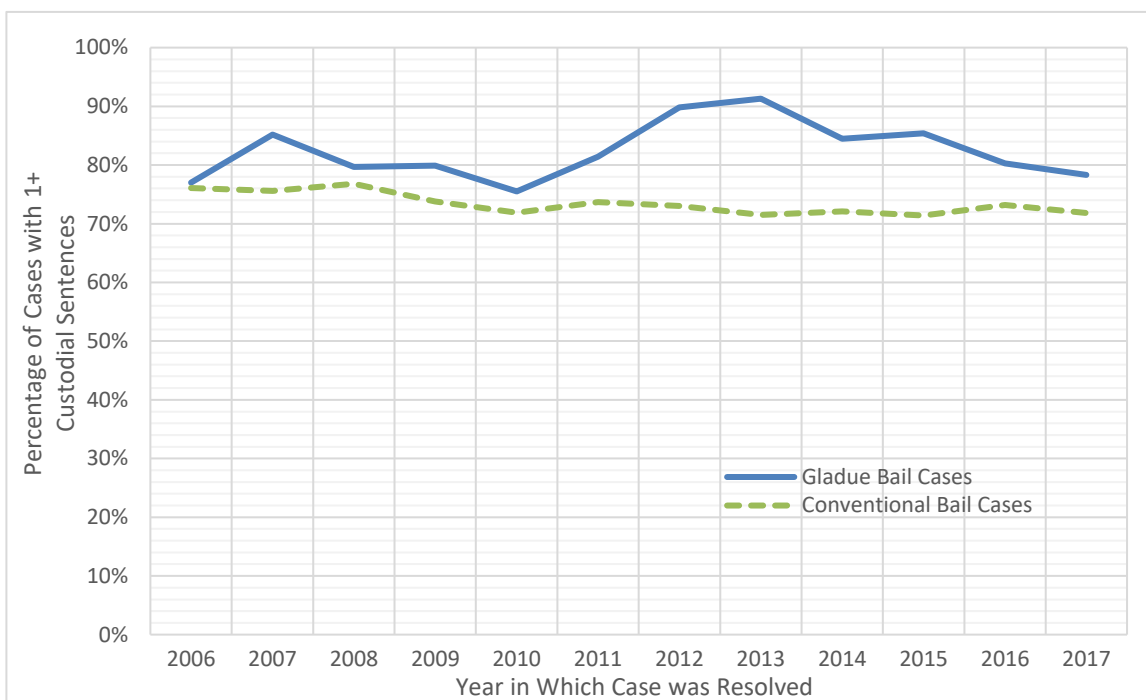
Notably, the steeper reduction in sentenced cases in the conventional bail population than in the Gladue bail population might be playing some role in the increasing overrepresentation of Indigenous peoples in custodial facilities – depending on the types of sentences being imposed. That is, even if Gladue bail and conventional bail cases were equally likely to receive a custodial sentence throughout the entire study period, the fact that Gladue bail cases were increasingly more likely than conventional bail cases to receive a sentence (despite the overall downward trend) would translate to a greater proportion of (Indigenous) individuals from Gladue bail cases receiving a term of imprisonment compared to (largely non-Indigenous) individuals from conventional bail cases. As the disparity grows in the proportion of Gladue bail and conventional cases receiving a sentence, so too would the disparity in terms of the proportion of overall bail cases receiving a custodial sentence. Given the implications of these trends for the overincarceration of Indigenous peoples in Canada, empirical examination of this issue would seem merited.

ii) Presence of a Custodial Sentence – Sentenced Cases Only

In reality, Gladue bail cases and conventional bail cases were not equally likely to receive a custodial sentence. Rather, among sentenced cases, Gladue bail cases were more likely than their conventional bail counterparts to receive a sentence of a term of imprisonment (82.4% versus 73.8% – see Table 5.41(b)). However, one might expect – within the context of s.718.2(e) and its call for restraint in the use of imprisonment generally, and for Indigenous offenders in particular – that custodial sentences would become less common overall among sentenced cases during the study period, and particularly so for Gladue bail

cases. Yet it is also possible that the increase in case complexity during this time (in terms of the number of charges in a case and the presence of violent charges and especially breach of probation charges) effectively tied judges' hands such that these characteristics ultimately neutralized any judicial efforts to avoid imprisonment. To explore these possibilities, Figure 5.14 presents the presence of one or more custodial sentences for Gladue bail and conventional bail cases over time (for a crosstabulation of these data, see Appendix AF).

Figure 5.14: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Custodial Sentences over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)



Although the proportion of sentenced cases receiving a custodial sentence did not change substantially during the overall study timeframe for either Gladue bail or conventional bail cases, the longitudinal trends for these populations nevertheless differed. Indeed, the interaction between Year and Gladue Bail Status was a statistically significant ($p < .001$) predictor for the presence of a custodial sentence, meaning that these longitudinal trends differed depending on the bail population. While the proportion of sentenced Gladue bail cases that received a custodial sentence increased generally (although not consistently) from 2006-2013 (from 77.0% to 91.3%), this figure then decreased from 2013-2017, returning to a level only marginally greater than that of 2006 (78.3%) (see Appendix AF). Notably, the Supreme Court's *R. v. Ipeelee* decision –

which clarified that Gladue principles continued to apply in cases of serious violence and was largely seen as a call to action in terms of the need to apply these principles – was rendered in 2012, not long before this substantial and steady decrease in the Gladue bail population. This important court decision may have therefore contributed to this downward trend in the use of imprisonment for this population. In contrast, the proportion of sentenced conventional bail cases that received one or more custodial sentences decreased slightly from 2006 (76.1%) until 2010 (71.9%) and then remained largely stable for the remainder of the study period (generally between 71.4% and 73.7%; see Appendix AF).

In every year of this study, sentenced Gladue bail cases were more likely than sentenced conventional bail cases to receive a sentence of at least one term of imprisonment. What is more, the slight overall increase in custodial sentences among sentenced Gladue bail cases, paired with the slight overall decrease in custodial sentences for their conventional bail counterparts, produced considerable disparity in the likelihood of a custodial sentence for these two bail populations. This disparity was especially notable from 2012 to 2015 (peaking at 19.8% in 2013), after which time these differences diminished considerably (e.g., to 6.5% by 2017). Thus, despite s.718.2(e) of the *Criminal Code* and the specialized nature of Gladue Court, recourse to custodial sentences for Indigenous peoples in the Gladue bail population did not decrease overall. This trend may reflect the increasingly complex nature of bail cases as well as broader legislative changes associated with the then-conservative government's "tough on crime" agenda under Stephen Harper⁴³⁷. Yet, while early evidence of restraint is more apparent (albeit rather modest) in the conventional bail population, there nevertheless does appear to have been some more recent success in reducing recourse to imprisonment in the Gladue bail population from 2014-2017⁴³⁸.

⁴³⁷ For instance, the so-called *Safe Streets and Communities Act* was an omnibus bill passed in early 2012 that imposed sweeping "tough on crime" amendments. For instance, this legislation created a number of new mandatory minimum sanctions and increased the mandatory minimum penalties for other offences. This same legislation also significantly restricted eligibility for the conditional sentence and in ways which almost certainly disproportionately and negatively affected Indigenous peoples (discussed in more detail in the next section; see also footnote 391). These types of amendments reduce judicial discretion and have the effect of making custody the only available sentencing option for many, regardless of Gladue principles.

⁴³⁸ Although a custodial sentence can be given in conjunction with a probation order (or a fine), it is important to note that this decrease in the presence of custodial sentences for conventional bail cases and for Gladue bail cases in the latter half of the study period (Figure 5.14) should not necessarily be interpreted as a reflection of an overall shift away

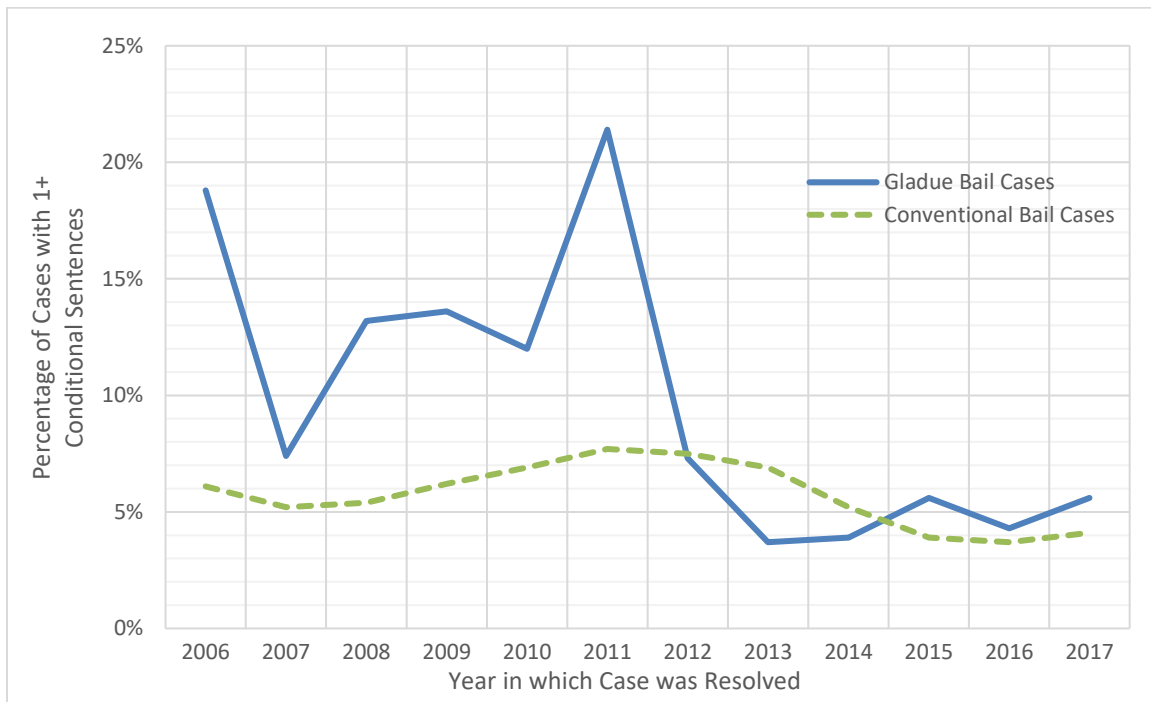
iii) Presence of a Conditional Sentence – Sentenced Cases Only

As custodial sentences became slightly more common among sentenced Gladue bail cases and slightly less common among their conventional bail counterparts from 2006 to 2017, one might expect these longitudinal changes to affect recourse to conditional sentences. Indeed, given that this sentencing option was introduced as an alternative to custodial sentences, one might expect changes in the prevalence of custodial sentences to have an impact on the prevalence of conditional sentences. Even for sentenced Gladue bail cases, for which there was a marginal increase in the proportion of cases with at least one term of imprisonment, a coinciding increase in the presence of conditional sentences might nevertheless suggest that sentencing judges are making efforts to craft sentences which avoid imprisonment, when possible. Indeed, cross-sectional analyses suggested that sentenced Gladue bail cases were – overall – more likely than their conventional bail counterparts to receive a conditional sentence for at least one charge (8.6% versus 5.9% – see Table 5.42).

To explore how the presence of conditional sentences may have changed over the study timeframe, Figure 5.15 examines these trends for both Gladue bail and conventional bail cases (see Appendix AG for a crosstabulation of these data). The longitudinal trends in the presence of one or more conditional sentences among sentenced Gladue bail and conventional bail cases differed in many ways, but also shared some similarities. Indeed, the statistically significant interaction term ($p < .001$) between Year and Gladue Bail Status in the regression model suggests that time affected the presence of conditional sentences differently for Gladue bail and conventional bail cases.

from more severe sentences. Indeed, if one adds the percentage of sentenced cases with a custodial sentence to those with a probation order, this figure exceeds 100% ($74.2\% + 51.9\% = 126.1\%$ – see Table 5.47) and thus indicates that a non-trivial proportion of sentenced cases would have received a ‘blended sentence’ of both custody and probation. Should longitudinal analyses later in this chapter demonstrate an increase in the proportion of cases receiving probation which is disproportionate to the modest decreases in recourse to imprisonment, this might suggest that custodial sentences which are given are actually becoming even more severe (potentially as a result of the increasing complexity of bail cases during this timeframe).

Figure 5.15: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Conditional Sentences over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)



For sentenced Gladue bail cases, the proportion with at least one conditional sentence fluctuated somewhat from 2006-2011, although generally trended upward from 2007-2011, before experiencing a dramatic decrease in 2012 and, to a lesser extent, 2013 (i.e., from 21.4% in 2011, to 7.3% in 2012 and 3.7% in 2013; see Appendix AG). This substantial decrease in recourse to conditional sentences among sentenced Gladue bail cases was followed by a period of relative stability – albeit at low levels – in the latter years of the study timeframe. Conversely, the proportion of sentenced conventional bail cases that received a conditional sentence increased marginally from 2006-2011 (i.e., from 6.1% to 7.7%), but experienced a similar – albeit less steep – decrease from 2012-2017 (e.g., this proportion was 4.1% in 2017) (see Appendix AG). Indeed, legislative amendments came into effect in 2007, and more sweepingly in 2012, which significantly reduced the types of cases eligible for this somewhat controversial sentence type and almost certainly disproportionately and negatively affected Indigenous peoples⁴³⁹. These legislative amendments may

⁴³⁹ For a discussion of these amendments limiting conditional sentence eligibility, see footnote 391.

therefore help to explain this general downward trend for both bail groups starting in 2012 (as well as the apparent decrease from 2006-2007).

In terms of yearly comparisons between bail populations, sentenced Gladue bail cases were more likely to receive a conditional sentence than their conventional bail counterparts for all years except 2012-2014. It therefore appears likely that the legislative amendments which went into effect in 2012 had a more significant impact (at least initially) on Gladue bail cases than conventional ones⁴⁴⁰. Indeed, despite this population being considerably more likely than conventional bail cases to receive a conditional sentence from 2006-2011, by the end of the study timeframe, the two populations had very similar levels of conditional sentences (albeit marginally higher in the Gladue bail population). Indeed, the differences in the presence of this sentence type were not statistically significant from 2014 onward.

Overall, despite increasing case complexity, it seems that sentencing judges were likely making use of the conditional sentence as an alternative to imprisonment for all bail cases, and Gladue bail cases in particular, in the first half of the study period. However, it would appear that legislative amendments introduced in 2012 diminished judges' ability to employ this sentencing option as an alternative to imprisonment. In particular, these longitudinal trends suggest that the Indigenous peoples in Gladue bail cases were disproportionately negatively affected by these legislative amendments. Consequently, this sentencing option was unlikely to be playing a meaningful role in efforts to reduce recourse to imprisonment generally, and Indigenous peoples' overincarceration in particular from 2012 until the end of the study timeframe (although eligibility for this sentencing option has since been re-expanded)⁴⁴¹.

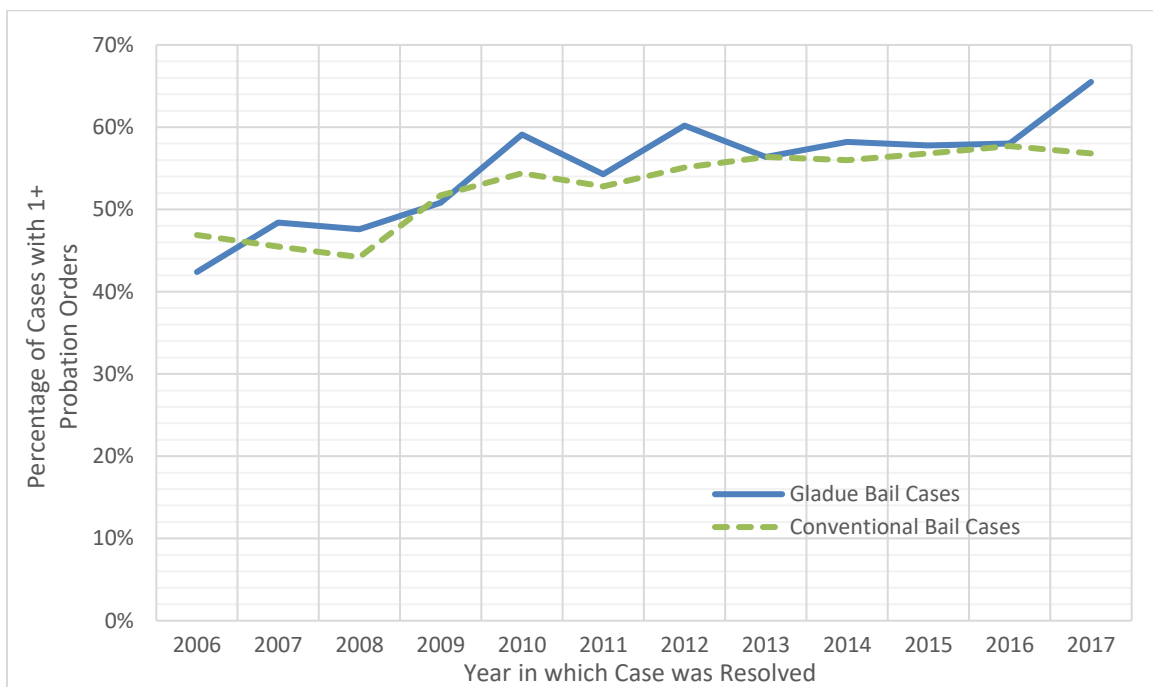
⁴⁴⁰ That is, it is possible that the Gladue bail population had been receiving conditional sentences for different types of offences overall compared to conventional bail cases. Specifically, if Gladue bail cases had been more likely than conventional bail cases to receive a conditional sentence for offences which were subsequently made ineligible for this sentence type (e.g., offences punishable by 14+ years imprisonment; offences involving use of a weapon which were punishable by 10+ years imprisonment; sexual assault, theft over \$5000, etc.), these amendments would have a greater effect on the Gladue bail population. Such differential use of conditional sentences could help to explain the starker decrease in the proportion of sentenced Gladue bail cases receiving this sentence type compared to their conventional bail counterparts.

⁴⁴¹ Notably, the *Act to Amend the Criminal Code and Controlled Substances Act*, which received royal assent in November 2022 (e.g., after the study timeframe), lifted many of the limitations imposed in 2012. Specifically, conditional sentences are once more available to those convicted of offences for which the maximum sentence is a term of imprisonment of 14 years or more, for personal injury, terrorism or criminal organization offences with a maximum sentence of 10 years imprisonment or more, as well as the specific offences listed under s.742.1(f) of the *Criminal Code*. Hence, with this

iv) Presence of a Probation Order – Sentenced Cases Only

As the proportion of all sentenced bail cases with a custodial sentence or a conditional sentence generally decreased (albeit inconsistently) during the study period, one might expect to see a corresponding increase in the presence of other types of sentences. In particular, one might expect to see shifts in the presence of probation orders, which – despite being rooted in different sentencing principles than imprisonment – are generally considered to be the third most serious type of criminal sanction, behind custodial and conditional sentences. Given that cross-sectional analyses indicated that probation was more common among sentenced Gladue bail cases than sentenced conventional bail cases (54.9% versus 51.8% – see Table 5.43), any changes in the presence of a probation order, and particularly differential changes, may have significant implications for the sentencing of this population. Thus, to understand whether recourse to probation has changed over time, Figure 5.16 displays the longitudinal trends in the presence of a probation order for Gladue bail and conventional bail cases (see Appendix AH for a crosstabulation of these data).

Figure 5.16: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Probation Orders over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)



recent expansion of eligibility, it is possible that the conditional sentence may – again – have a role to play in reducing the imprisonment and the overrepresentation of Indigenous peoples in Canadian correctional facilities in the future.

The longitudinal trends in the proportion of sentenced Gladue bail and conventional bail cases that received a probation order were very similar. Indeed, the interaction term between Year and Gladue Bail Status was not statistically significant ($p = .132$) in the regression model, suggesting that these two bail populations did not differ significantly in terms of the presence of a probation order over time. However, for both bail populations, the proportion of cases with a probation order increased considerably throughout the study period. Moreover, while the proportion of sentenced Gladue bail cases with a probation order tended to be marginally greater than that for conventional bail cases in most years in the study timeframe, these differences were, again, not statistically significant, except for in 2017 ($p < .001$) (Appendix AH).

When one combines the trends in custodial sentences and probation sentences, it seems that sentences have become increasingly severe overall for Gladue bail cases compared to conventional bail cases. Indeed, the considerable increase in the presence of a probation order did not coincide with a meaningful overall decrease in the presence of custodial sentences. To illustrate, the percentage of sentenced Gladue bail cases with a custodial sentence and/or a probation order in 2006 was 119.4% (77.0% + 42.4%), compared to a much greater 143.8% (78.3% + 65.5%) in 2017 (Appendix AH). Yet in the conventional bail population, this increase in recourse to probation coincided with a gradual decrease in custodial sentences. Hence, this combined figure for the conventional bail population was 123.0% (76.1% + 46.9%) in 2006 but only slightly greater in 2017 at 128.6% (71.8% + 56.8%) (Appendix AH). These data therefore highlight the growing disparities between Gladue bail and conventional bail cases in terms of overall sentences. In fact, this increase in the presence of probation suggests – perhaps somewhat counterintuitively when one considers that probation is typically considered a less severe sanction – that sentences, and particularly those for Gladue bail cases, may have actually become more severe overall throughout the study timeframe.

However, it is important to remember that these sentencing trends did not occur in a vacuum. Rather, these changes in sentencing occurred at a time when bail cases became increasingly more complex. Indeed, these bail cases increasingly contained five or more charges (particularly for Gladue bail cases), one or more charges against the person, and/or one or more charges against the administration of justice – particularly

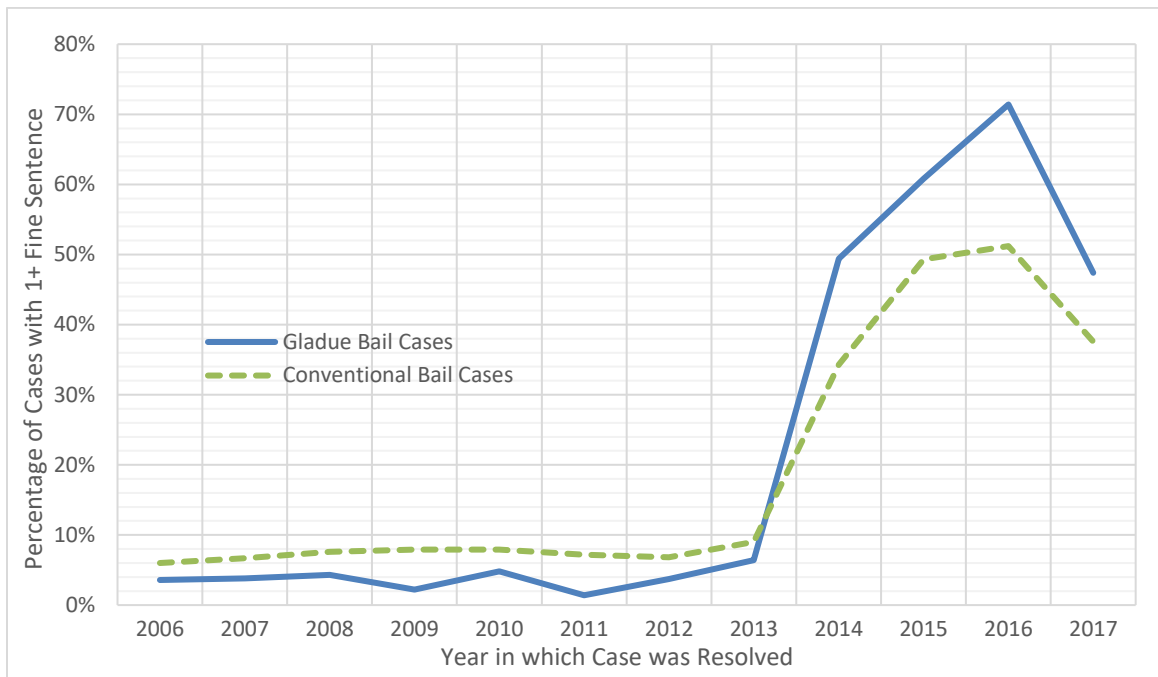
breach of probation charges (in the Gladue bail population in particular). Hence, it is possible that these changes in case characteristics affected available sentencing options and contributed to this potential shift in overall sentence severity. For instance, because bail cases during the study period – and Gladue bail cases, in particular – became more likely to include many (i.e., 5+) charges, this might reasonably lead to a greater number of convictions. This, in turn, might then arguably warrant a more severe sentence, or otherwise a sentence that reflects several different sentencing principles, such that custody and probation are both considered appropriate and necessary. In other words, the trends among the three most serious sanctions should not necessarily be interpreted as evidence that judges are disregarding the principles of restraint – generally or for Indigenous peoples specifically – nor the need to consider non-custodial sentences, when appropriate. The finding that Gladue bail cases experienced greater increases in case complexity would also help to explain the disparities between groups in terms of blended sentences and overall sentence severity.

v) Presence of a Fine – Sentenced Cases Only

Having examined the three most serious sanctions, the prevalence of a less serious sanction, the fine, is subsequently examined. Recall that Gladue bail cases were more likely than their conventional bail counterparts to receive a fine for at least one charge (26.7% versus 15.6% – see Table 5.45). While this finding was initially surprising – given that Gladue bail cases were also more likely than their conventional bail counterparts to receive some of the most serious types of sanctions – a theory regarding the use of fines in response to the mandatory victim fine surcharge soon emerged. Indeed, it was hypothesized that the greater presence of fines in the sentenced Gladue bail population may be related to judicial innovation whereby sentencing judges, in response to the victim fine surcharge being rendered mandatory in 2013, began imposing small fines as a means of circumventing this potentially costly surcharge for this marginalized population⁴⁴². Figures 5.17 and 5.18 test this theory by examining the presence of fines and this surcharge among sentenced bail cases over time (for crosstabulations of these data, see Appendices AI and AJ).

⁴⁴² Recall that fines can be handed down on their own or imposed in addition to any other sanction. While any increases in their presence which does not coincide with similar decreases in other sanctions might be considered a reflection of increasing sentence severity, analyses of these longitudinal trends combined with analyses of the victim fine surcharge suggest otherwise.

Figure 5.17: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Fines over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)



The theory that recourse to fines increased in response to the victim fine surcharge being made mandatory (as of October 2013) finds strong support in the data. Whereas many types of sanctions experienced reasonably modest changes in terms of their presence in sentenced bail cases throughout the study period, this was not the case with fines. For both Gladue bail and conventional bail cases, fines were relatively uncommon early in the study period. However, the proportion of sentenced cases with one or more fines rose quite suddenly and in a similar fashion for both Gladue bail and conventional bail cases from 2014-2016 before decreasing somewhat in 2017. These changes appear to coincide with the victim fine surcharge being made mandatory. The sudden uptick in fines for sentenced bail cases likely reflects a form of judicial ‘circumvention’ in terms of imposing small fines in order to minimize the surcharge and thus the financial hardship that this surcharge might impose on many individuals (Indigenous or otherwise) whose cases were processed in these downtown Toronto courthouses. Indeed, this sudden – and dramatic – increase in the

handing down of fines to sentenced bail cases applied to both Gladue bail cases as well as conventional bail cases⁴⁴³.

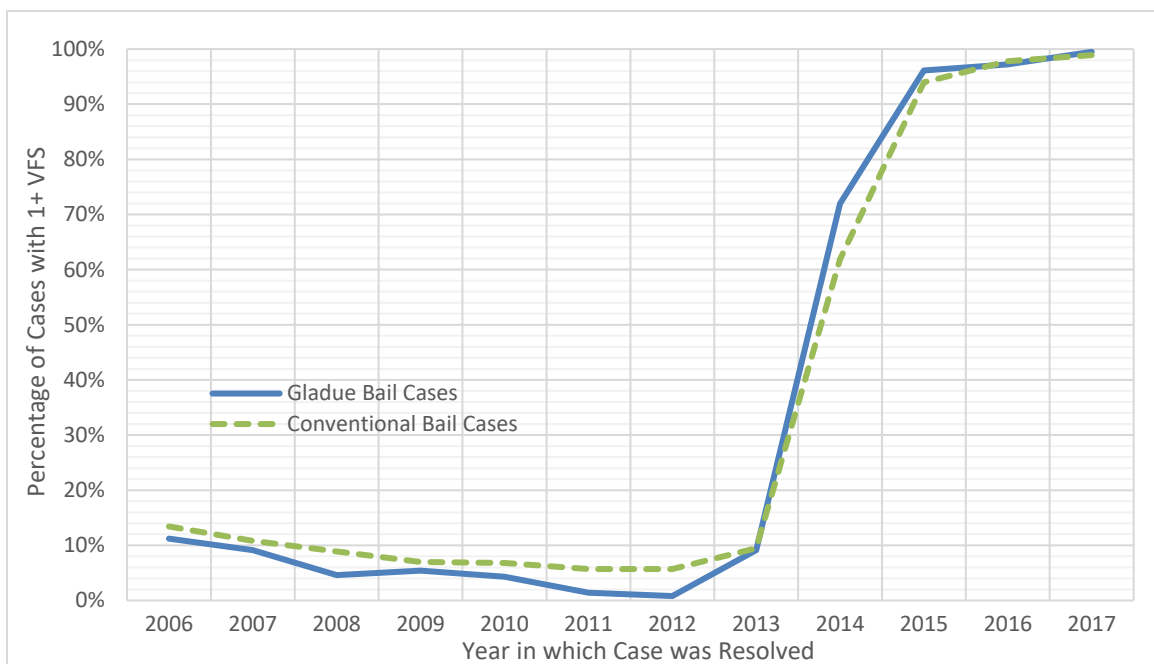
Yet there were also important differences between Gladue bail and conventional bail cases in terms of the presence of fines, as suggested by the statistically significant ($p < .001$) interaction term between Year and Gladue Bail Status in the regression model. Notably, the increase in the proportion of sentenced cases with fines was more substantial for Gladue bail cases (from 3.6% in 2006 to 47.4% by 2017 = 43.8%) than for conventional bail cases (6.0% in 2006 to 37.6% by 2017 = 31.6%) (see Appendix AI). The differences in the longitudinal trends between bail populations in terms of the presence of fines also affected within-year differences between these groups. Indeed, from 2006-2013, sentenced Gladue bail cases were consistently less likely than their conventional bail counterparts to receive a fine (although these differences were not always statistically significant). However, Gladue bail cases became substantially more likely than their conventional bail counterparts to receive a fine from 2014-2017 ($p < .001$; see Appendix AI) – that is, once the victim fine surcharge was made mandatory and the associated judicial innovations were seemingly developed to reduce its deleterious effects for those experiencing financial hardship. Thus, despite the limited decreases in recourse to imprisonment and the potential that sentences become more severe overall when one considers the prevalence of blended sentences (potentially rooted in changes in case complexity), the longitudinal data on fines and the victim fine surcharge (Figure 5.18 below) nevertheless suggest that judges are mindful of offenders' circumstances and struggles and that they make efforts to craft sentences accordingly and in ways that do not impose undue hardship on these individuals.

⁴⁴³ While justices of the peace typically preside over bail matters in conventional bail courts, judges have exclusive jurisdiction over sentencing. Moreover, judges that sit in Gladue Court (for sentencing and bail) do not sit exclusively in these specialized courts. One might reasonably expect that judicial innovations developed by judges in one courtroom would come to the attention of – and be implemented by – judges in other courtrooms in that courthouse (and potentially judges in neighbouring courthouses). Indeed, given the location of Old City Hall and College Park courthouses in downtown Toronto, a considerable proportion of accused from the caseloads of these courts may be experiencing homelessness or otherwise living in poverty. In light of these financial circumstances, some judges might be reluctant to impose a substantial surcharge, and instead engage in the sentencing practice described above.

vi) Presence of a Victim Fine Surcharge – Sentenced Cases Only

Given the ostensible role of the victim fine surcharge in the sharp increase in the use of fines, this surcharge is examined separately in order to corroborate this theory. Recall that in cross-sectional analyses, sentenced Gladue bail cases were more likely than conventional bail cases to have a victim fine surcharge imposed for at least one charge (42.7% versus 27.2% – see Table 5.46). However, one would expect to see the use of the victim fine surcharge increase substantially for both bail groups, given that this surcharge was made mandatory in late 2013. To examine this possibility, Figure 5.18 presents the presence of the victim fine surcharge in sentenced bail cases from 2006 to 2017.

Figure 5.18: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Victim Fine Surcharges over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)



The longitudinal trends for Gladue bail and conventional bail cases in terms of the presence of a victim surcharge are largely similar. Indeed, the proportion of sentenced Gladue bail and conventional bail cases that received one or more victim fine surcharges decreased slightly from 2006-2012 before this figure increased in 2013 – when the surcharge was made mandatory – and then skyrocketed in 2014, following

which the victim surcharge was present in virtually all sentenced cases from 2015 to 2017⁴⁴⁴. However, there were notable differences between the longitudinal trends for Gladue bail and conventional bail cases, as indicated by the statistically significant ($p < .001$) interaction term between Year and Gladue Bail Status. The victim fine surcharge was marginally less likely to be imposed on sentenced Gladue bail cases compared to conventional bail cases from 2006 to 2013 (although this difference was statistically significant only in 2012 – Appendix AJ), suggesting that judges were more likely to deem this surcharge a financial hardship for individuals in Gladue bail cases than in conventional bail cases. However, given that the victim surcharge was less common among Gladue bail cases than conventional bail cases at the beginning of the study period, the sudden increase toward all cases having this surcharge means that the increase for Gladue bail cases was necessarily slightly greater than for conventional bail cases (e.g., 11.2% to 99.5% = 88.3% compared to 13.4% to 98.9% = 85.5% – Appendix AJ).

Thus, in terms of sentencing overall, the proportion of both Gladue bail and conventional bail cases that received a finding of guilt and related sentence for at least one charge decreased in Old City Hall and College Park courthouses from 2006 to 2017 – despite the concurrent rise in case complexity. However, this decrease was much more gradual among Gladue bail cases, which were more likely than conventional bail cases to receive a sentence in every year of the study period. Regarding specific types of sanctions, the proportion of Gladue bail cases that received a term of imprisonment – the most serious sentencing option – decreased slightly in the latter portion of the study period, whereas the proportion receiving a conditional sentence – conceived as an alternative to a provincial term of imprisonment – decreased more substantially, particularly in response to 2012 legislative amendments. While the proportion of Gladue bail cases receiving probation increased over the study period, the lack of a similar corresponding decrease in terms of

⁴⁴⁴ Given the newly mandatory nature of the victim fine surcharge in late 2013, one might have expected the percentage of sentenced cases with this surcharge to become 100.0%. However, in the first full year in which this was in effect – 2014 – the surcharge was imposed in only 62.8% of sentenced cases, perhaps suggesting some creativity – or resistance – on the part of sentencing judges in the early days of this amendment (at least until the judicial workaround using small fines was developed). While this figure approached 100% in 2015 to 2017, this small disparity may reflect a reasonably small number of cases with charges that pre-dated the victim surcharge being made mandatory, such that the new sentencing provisions did not apply, as well as the possibility of data issues related to human error when inputting administrative data.

imprisonment means that this trend is unlikely to reflect an overall shift toward non-custodial sentences. In contrast, conventional bail cases experienced a decrease in the proportion of cases receiving custodial and conditional sentences while the proportion of these cases receiving a probation order increased. That is, the sentences received by conventional bail cases have arguably become less severe over time compared to Gladue bail cases – although these differences may be at least partially rooted in differences in case complexity. Yet the overall increase in the presence of fines, seemingly in response to the victim fine surcharge being made mandatory and particularly prevalent among Gladue bail cases, suggests that judges in Old City Hall and College Park courthouses are mindful of offenders’ circumstances and are not unreasonably and rigidly punitive.

More generally, these longitudinal analyses highlight the ways in which trends in case complexity, bail outcomes and sentences may change in different ways for Gladue bail and conventional bail cases over time. Notably, from 2006-2017, bail cases – and particularly Gladue bail cases – became more likely to contain many charges as well as more likely to contain at least one charge against the administration of justice, particularly for a breach of probation charge. Yet this increase in case complexity did not coincide with a shift away from bail release, nor with an increase in the proportion of cases being sentenced. Nevertheless, while judicial officers in Old City Hall and College Park courthouses were becoming more likely to grant bail in cases generally, this increase was more gradual within the Gladue bail population. The effect was that Gladue bail cases which received a bail decision from a judicial officer became less likely than their conventional bail counterparts to be granted bail from 2012-2017. Moreover, despite the overall decrease in the proportion of cases being sentenced, this decrease was again much more gradual within the Gladue bail population, which remained consistently – and increasingly – more likely than their conventional bail counterparts to receive a sentence, and more likely to receive a custodial sentence specifically.

6 – DISCUSSION

The current study of Toronto Gladue Courts provides important insights into some of the sources of the longstanding overrepresentation of Indigenous peoples in Canadian prisons – in both remand and sentenced custodial populations – and highlights areas for remedial intervention. Given the limited impact of interventions which have focused almost exclusively on (the late stage of) sentencing, this research sheds light on the extent to which Gladue Courts’ processing of Indigenous peoples’ bail cases may be able to help remedy Indigenous overincarceration through upstream interventions at the bail phase of criminal court processing. The new Gladue Bail Status variable created for this research and included in both longitudinal datasets has allowed for analyses of Indigenous persons’ bail cases which were not previously possible. That is, these datasets make possible comparative analyses between bail cases processed in Gladue Court (i.e., an entirely Indigenous caseload) compared to those processed only in conventional bail courts (i.e., an almost entirely non-Indigenous caseload). This chapter explores key themes which emerged in the study findings. Analyses not only shed light on bail processing in this specialized court setting and the ability of these courts to overcome systemic barriers for Indigenous accused in accessing bail. Rather, they also provide a broadened understanding of the case characteristics and sentencing patterns of Indigenous bail cases more generally. As such, it is possible to highlight potential contributors to Indigenous overincarceration which are rooted both inside and outside of the bail system.

This chapter first examines *bail case composition* of Gladue bail cases (6.1), and challenges negative stereotypes rooted in a belief that Indigenous accused are considerably more dangerous than accused persons generally. The *ubiquity of charges against the administration of justice at bail* (6.2) is then explored, with particular attention given to their disproportionate presence among Gladue bail cases, as well as their implications for the overrepresentation of Indigenous peoples in custody. This chapter subsequently turns its attention to *the search for substantive equity in bail processing* in Gladue Courts (6.3) and the largely untested promise of these courts in the context of upstream interventions at bail. Specifically, consideration is given to whether the Old City Hall and College Park Gladue Courts appear to be able to minimize settler-centric and

Western notions of risk at bail in ways that allow these courts to produce bail outcomes which are substantively equitable to those in conventional bail courts. Moreover, certain remaining barriers to addressing Indigenous overincarceration through bail are also discussed, most notably *Indigenous peoples' disproportionate guilty pleas* (6.4) at this early stage in case processing. This chapter then explores *the downstream effects of bail outcomes* (6.5) on both court processing and case outcomes, highlighting the overall detrimental impacts of remand outcomes, while also calling attention to the ways in which bail outcomes appear to affect Gladue bail and conventional bail cases differently. Finally, this chapter considers *the limitations of upstream interventions* (6.6), *that is*, whether interventions at bail in Gladue Court have had the anticipated downstream effects on sentencing, and further considers some of the remaining barriers when addressing Indigenous overincarceration at this final stage of court processing.

6.1 – Gladue Bail Case Composition: Challenging Stereotypes of Risk

In the context of the overincarceration of Indigenous peoples, and despite its sometimes-assumed implication that Indigenous peoples must therefore be more criminal or else riskier than other populations, study findings on Indigenous peoples whose bail was processed in Gladue Court suggest otherwise. That is, prejudicial stereotypes of Indigenous peoples' dangerousness appear to be just that. Indeed, the bail cases of Indigenous peoples processed in Gladue Court and those of the overwhelmingly non-Indigenous population processed in conventional bail courts were more similar than they were different⁴⁴⁵.

6.1.1 – Similar Presence of Violent Charges

Perhaps most notably, and not withstanding common assumptions about Indigenous peoples' perceived dangerousness, Indigenous accused whose bail cases were processed in Gladue Court presented with violent charges in a generally similar fashion to those in conventional bail court. In fact, Gladue bail cases were actually marginally less likely than conventional bail cases to have a violent offence as the most serious charge in their case⁴⁴⁶. This was true when considering individual charging informations in the event dataset as well as for broader bail cases in the person dataset (Tables 4.9(a) and 4.9(b)). Furthermore, when

⁴⁴⁵ Findings regarding bail case composition are discussed in terms of the person dataset, unless otherwise specified.

⁴⁴⁶ Ranked according to CSI weights. See footnote 204 for a discussion of the method used to identify this charge.

considering the simple presence of charges against the person (regardless of the seriousness of these charges in relation to others) in these broader bail cases, differences between groups remained negligible, albeit with Gladue bail cases now marginally more likely than conventional bail cases to include this type of charge (Table 5.11)⁴⁴⁷. Yet the average number of charges against the person included in cases from these two bail populations was virtually identical. Even among cases with this type of charge, there were no statistically significant differences between the proportion of Gladue bail and conventional bail cases with a single violent charge versus two or more of these charges (Table 5.11).

Moreover, an examination of the two most common specific charges in this offence classification continued the trend of relative similarity. Indeed, there were no statistically significant differences between Gladue bail cases and conventional bail cases when it came to having any common assault charges present in a case, nor in the proportion of cases with this charge type present which actually had two or more of these charges (Table 5.11(a)). Similarly, differences in the likelihood of these bail populations having one or more assault II charges (i.e., assault with a weapon or assault causing bodily harm) as their most serious charge were also not statistically significant (Table 5.11(b)). Finally, despite violent charges becoming increasingly common in both Gladue bail and conventional bail populations from 2006-2017, the longitudinal trends for these populations were again similar throughout this period (Figure 5.3). Indeed, across measures and across time, Indigenous peoples whose bail cases were processed in Gladue Court had an overall similar likelihood of having violent charges as the largely non-Indigenous population in conventional bail court. Based on these data, one would expect that violent charges would be unlikely to disproportionately affect Gladue bail processing compared to that of conventional bail cases. That is, Indigenous peoples' bail cases did not appear to reflect any greater danger to the public (as measured by these charges), and thus no greater risk for release rooted in the secondary ground for detention, compared to those from conventional bail court.

⁴⁴⁷ While the different direction of this relationship might seem conflicting at first, see footnote 244 for a discussion of how this might reasonably occur.

6.1.2 – Limited Differences in the Presence of “Serious” Charges

Despite stereotypes of risk, Gladue bail cases also did not appear to be significantly more likely than conventional bail cases to include charges considered serious in nature. The types of charges which were less common in Gladue bail cases than conventional bail cases were federal charges or *Criminal Code* traffic charges (Table 5.16). In contrast, the types of charges which were more common in Gladue bail cases than conventional bail cases included charges from offence classifications generally considered less serious in nature. Specifically, Gladue bail cases were substantially more likely than conventional bail cases to have charges against the administration of justice (see section 6.2 below for an in-depth discussion) and property charges, as well as very marginally more likely to contain “other” *Criminal Code* charges (Table 5.16).

In terms of property charges – the second most common type of offence present overall – Gladue bail cases were more likely than their conventional bail counterparts to have a property charge as the most serious charge in a case (Table 5.9(a)), to have this type of charge present in general (Table 5.10), and among bail cases with this type of charge, more likely to have two or more of these charges (Table 5.10). While property charges are generally considered less serious than many other types of offences, patterns relating to specific property charges further highlight the typically non-serious nature of Gladue bail cases. When examining the two most common (most serious) charges against property in this study’s datasets, Gladue bail cases were marginally less likely than conventional bail cases to have the more serious possession of stolen property charge while they were slightly more likely than their counterparts to have the lesser theft charge (Tables 5.10(a) and 5.10(b)). That is, while Indigenous peoples’ Gladue bail cases were more likely to have at least one property charge compared to conventional bail cases, the most serious property charge in their cases tended to be less serious (as measured by the CSI) than in conventional bail cases.

Overall, “other” *Criminal Code* charges⁴⁴⁸, while generally more serious in nature than property charges, were much less common than property charges. Specifically, this charge type was the third least common offence type for Gladue bail cases and second least common for conventional bail cases (Table 5.16).

⁴⁴⁸ See footnote 209 for the most common types of charges in this offence category.

Nevertheless, Gladue bail cases were marginally more likely than conventional bail cases to have this type of charge as their most serious charge in a case (Table 5.9(a)) and to have this type of charge present in general (Table 5.14)⁴⁴⁹. When examining the most common (most serious) charges in this offence classification, there were no statistically significant differences between bail populations having a charge for obstructing a peace officer, while Gladue bail cases were very marginally more likely than conventional bail cases to have at least one charge for possessing a weapon (Table 5.14(a)). Notably, though, this admittedly fairly serious charge was quite uncommon overall (despite being the most common charge in the “other” *Criminal Code* category) and was present in only 3.6% of Gladue bail cases and 3.1% of conventional bail cases. Hence, even when Indigenous peoples’ Gladue bail cases appeared to be more serious than those from conventional bail court (in terms of specific serious charges), the relative rarity of these charges would have limited effect on their caseloads overall.

Broadly, there appears to have been limited differences between Gladue bail cases and conventional bail cases in terms of several of the types of charges which might be expected to raise concerns for bail release. Indeed, while one might expect violent charges, or charges otherwise considered more serious in nature to raise concerns at bail which are rooted in public safety or public confidence in the administration of justice grounds, Gladue bail and conventional bail cases were largely similar in these regards. Even when Gladue bail cases were more likely than their conventional bail counterparts to have certain more serious charges (e.g., for possession of a weapon), these differences were minimal and tended to apply to relatively low occurrence charges. Yet while Gladue bail cases do not appear to be significantly more dangerous or to pose greater risk to public safety than conventional bail cases (in terms of their current charges), important differences emerge when one considers case complexity more broadly.

6.1.3 – Similar Number of Charges Accumulate Disproportionately with Subsequent Charges

When examining individual charging informations in the event dataset, Gladue bail and conventional bail cases also appeared quite similar in terms of the number of charges (Table 5.7(a)). In fact, the average

⁴⁴⁹ Notably, however, among bail cases with this type of charge, Gladue bail cases were actually marginally less likely than conventional bail cases to have two or more of these charges (Table 5.14).

number of charges on an information were virtually identical for these populations and their distribution of charges was also quite similar. However, looking at individual charging informations paints only a partial picture of bail cases and case characteristics relevant to bail deliberations. Recall that it is not uncommon for bail cases to include one or more subsequent sets of charges – often, but not always, including breach charges – which are then appended to an individual’s initial set of charges for the purposes of case processing.

Examination of these broader, person-based cases paints a less positive image of Indigenous peoples’ bail cases in Gladue Court (Table 5.7(b)). Indeed, when considering all charges in these broader cases, Gladue bail cases fared significantly less well compared to conventional bail cases. While the average number of charges increased for both bail populations, the increase was greater in the Gladue bail population – 4.01 versus 3.36 charges, on average. Gladue bail cases also became less likely than their conventional bail counterparts to include only a single charge and more likely than their counterparts to include five or more charges. To make matters worse, these differences between bail populations actually increased over the study period (Figures 5.1 and 5.2).

Gladue bail cases may therefore be considered (increasingly) more complex than conventional bail cases in terms of the overall number of charges in a case, despite similarities elsewhere. While no variable in this study was able to directly measure the number of charging informations in broader person-based cases, the juxtaposition of event and person datasets repeatedly suggested that Gladue bail cases were more likely than their conventional bail counterparts to have charges stemming from two or more charging informations⁴⁵⁰. While subsequent charges may be substantive in nature, it is likely that many of these charges include – or are exclusively – charges against the administration of justice⁴⁵¹.

⁴⁵⁰ See footnote 331 for a reminder of some of the many ways in which the juxtaposition of datasets repeatedly demonstrates this pattern.

⁴⁵¹ To illustrate, consider the juxtaposition of datasets when examining the offence type for the most serious charge in a case (Tables 4.9(a) and 4.9(b)). The decrease in the prevalence of administration of justice charges when moving from the event dataset to the person dataset suggests that some person cases likely contained administration of justice charges which were evident in the event dataset but then obscured by more serious charges in the person dataset. In other words, it is likely that for many bail cases with two or more sets of charges, an offence against the administration of justice was the most serious (if not the only) charge on at least one charging information. More importantly for this research, the difference between datasets in terms of the presence of this type of charge was greater for Gladue bail cases. This suggests that administration of justice charges (often laid subsequent to an initial bail release) are a greater

6.2 – The Ubiquity of Charges against the Administration of Justice

Offences against the administration of law and justice (listed primarily under Part IV of the *Criminal Code*) are acts or omissions which are generally considered to offend the integrity of the administration of justice and which occur after an earlier offence has been committed or is alleged to have been committed. Some of the most common offences against the administration of justice include breaching a bail order or a probation order and failing to appear in court. Charges relating to a failure to comply with conditions often criminalize behaviours that are otherwise non-criminal and can lead to conviction even when initial substantive charges did not end in a finding of guilt. Given that these charges tend to be taken seriously by the courts (in that they are perceived to demonstrate disrespect for the criminal justice system), concerns are often expressed that these charges essentially fabricate crime and set individuals up for further criminalization (e.g., CCLA, 2014; Wyant, 2016).

Notably, charges against the administration of justice were the most common type of charge present in bail cases overall – present in nearly half of all bail cases in the Old City Hall and College Park courthouses. They were also the most common charge type in both Gladue bail and conventional bail cases specifically. These study findings are consistent with the broader literature on administration of justice charges which indicates that these charges are widespread and increasingly pervasive (e.g., Burczycka & Munch, 2015; Mitchell, 2015; Public Safety Canada, 2020; Taillon, 2006; Webster, 2007).

More importantly for this study, though, the greatest disparity between bail populations occurs relative to this offence category (present in 60.6% versus 44.2% of Gladue bail and conventional bail cases, respectively – Table 5.16). More concerning still, this disparity actually increased gradually – but considerably – during the study period (Figure 5.4). This growing gap is primarily due to increases in the Gladue bail population in contrast with the relative stability over time in the conventional bail court population. Finally, among cases with this type of charge, Gladue bail cases were also substantially more likely than their

issue in the Gladue bail population than in the conventional bail population. Indeed, despite the overall similarities between Gladue bail and conventional bail cases in terms of offence types, Gladue bail cases appear to be more complex than conventional bail cases when it comes to the number of charges in a case – a finding that is seemingly fueled by the enormous and disproportionate prevalence of charges against the administration of justice in these cases.

conventional bail counterparts to have two or more of these charges (45.8% versus 33.4% with two or more administration of justice charges – Table 5.12). The greater presence of charges against the administration of justice in Gladue bail cases is also consistent with Clark’s (2016b) research on the Old City Hall courthouse. This scholar similarly found that criminal court cases of Indigenous accused were substantially more likely to include this type of charge compared to cases from this courthouse generally, and that these charge(s) were the most common type among Indigenous cases⁴⁵². These study findings combine to highlight the problematic nature of these charges generally, and for Indigenous peoples in Gladue bail cases especially.

The ubiquitous presence of charges against the administration of justice will almost certainly have significant consequences for not only bail processing and bail outcomes (and, by extension, remand custody), but also for overall case outcomes (and, by extension, sentenced custody). Indeed, these charges at the bail phase of court processing frequently raise concerns regarding release and often carry a reverse onus which work together to reduce the likelihood of subsequent bail release and thus contribute to the remand population. Study findings corroborate this relationship. Specifically, the presence of one or more charges against the administration of justice in a case was the second most likely offence category to lead to formal refusal of bail (Table 5.28(j)). Perhaps symptomatically, of those bail cases with a formal determination of bail, cases with this type of charge were more likely to be formally detained than bail cases generally (24.5% versus 18.4% – Tables 5.28(j) and 5.28(h)).

Furthermore, the criminological literature contends that there is a powerful relationship between pre-trial detention and a greater likelihood of conviction (e.g., through pressure to plead guilty, see Euvrard & Leclerc, 2017; Kellough & Wortley, 2002; Webster, 2022) as well as a greater likelihood of custodial sentences (Burczycka & Munch, 2015; Webster et al, 2016), thus emphasizing the likely impact of charges against the administration of justice on sentenced custody. Study findings also support this relationship, as bail cases

⁴⁵² While Clark’s study on the Old City Hall courthouse found that charges against the administration of justice were only the fourth most common type of charge for cases in this courthouse generally, these differences may be partially attributed to Clark’s research methodology which: 1) examined court cases broadly (i.e., not specifically bail cases, which tend to be at least somewhat more serious in nature); 2) analysed data from a single year (2015); and 3) evaluated data from only one of the two courthouses examined in the current study.

with an administration of justice offence as their most serious charge were slightly more likely to be resolved with at least one conviction compared to bail cases generally (57.1% versus 54.4%)⁴⁵³. Further highlighting the relationship between administration of justice charges and court outcomes, multiple regression analyses indicated that the presence of these charges was the strongest predictor of bail refusal (Table 5.48), as well as a significant predictor of conviction (Table 5.49). Moreover, study findings show that sentenced cases with an offence against the administration of justice as their most serious charge (as well as those with this type of charge present generally) were also more likely to receive one or more custodial sentences than cases with any other types of charge (Appendix P). Indeed, charges against the administration of justice have often been associated with a revolving door phenomenon through which criminalized individuals accumulate further charges and convictions, becoming increasingly entrenched in the criminal justice system and spending greater periods of time in both remand and sentenced custody (e.g., CCLA, 2014; Myers, 2017; *R. v. Zora* (2020); Webster, 2015). This relationship is particularly concerning when one recalls that most bail cases in this study did not appear to be especially serious or dangerous in nature (e.g., only roughly one third contained one or more charges of violence – Table 5.11; more than half of all cases contained only one or two charges – Table 5.7(b)).

While the prevalence of charges against the administration of justice is concerning, the disproportionate presence of these charges in Gladue bail cases has especially important implications for the overrepresentation of Indigenous peoples in correctional facilities. Study findings appear to support the assertion made by many scholars (e.g., Clarke, 2019; Dickson-Gilmore & LaPrairie, 2005; Webster, 2023) that Indigenous peoples are particularly susceptible to further criminalization through the (over-)use of charges against the administration of justice. Symptomatically, while any interventions targeting charges against the administration of justice would be expected to address issues at bail broadly, one might expect these interventions to have an even greater impact for Indigenous peoples, with downstream effects for both

⁴⁵³ Note that this finding is almost certainly an underestimate of the overall effect of charges against the administration of justice on the likelihood of cases ending in conviction. Indeed, the most serious charge measure tends to mask the presence of charges against the administration of justice in bail cases since these charges tend to have relatively low CSI weights which would often be overridden by more serious charges in a case.

remand and sentenced custody. Given the importance of this issue and the scope of these charges, this section explores the presence of the three most common charges against the administration of justice – all of which were more common in Gladue bail cases than conventional bail cases. Specifically, this section explores the presence, implications, and potential solutions for charges of failure to appear in court, failure to comply with a condition of an undertaking or recognizance, and failure to comply with a condition of a probation order.

However, before discussing each specific charge against the administration of justice and targeted strategies for intervention, it is worth noting that legislative amendments were enacted in 2019 (that is, following the study period) which aim (among other things) to reduce the incidence of charges against the administration of justice⁴⁵⁴. In fact, this legislation explicitly recognized the disproportionate resources used to address these largely non-dangerous charges, their contribution to the growing remand population generally as well as their role in the overrepresentation of Indigenous persons in the criminal justice system specifically (Department of Justice Canada, 2019). Broadly, these amendments expand the discretionary powers of police and Crown prosecutors. These criminal justice actors are now provided the option to refer any alleged violation(s) which have not caused harm to a victim (including failures to appear in court) to a *judicial referral hearing* as an alternative to laying additional criminal charges. At these hearings, judicial officers consider the conditions imposed on the accused person and may elect to take no action, to release the accused on revised conditions or to detain the individual, and must consider the individual's personal circumstances (e.g., poor mental health, FASD, substance use, homelessness) when making this decision⁴⁵⁵. While these legislative amendments targeting administration of justice charges may appear at least somewhat promising, there has notably been limited comprehensive research on their effectiveness in

⁴⁵⁴ See *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (2019) and Department of Justice Canada (2019) for background and rationale.

⁴⁵⁵ This ladder approach is similar to that outlined in *The Bail Act* (2013) of New South Wales. Indeed, this international approach was explored as a potential model for addressing Canadian over-use of administration of justice charges in a report by Webster, Spratt, Doob & Mitchell (2016).

reducing charges against the administration of justice⁴⁵⁶. Moreover, there is some preliminary, jurisdiction-specific data which indicates very little (if not virtually no) uptake of this new pre-charge court procedure, which notably is available only at the discretion of police and Crown prosecutors (Spratt & Richards, 2021)⁴⁵⁷. While the verdict is still out on the effectiveness of these new provisions, it is possible that the discretionary nature of these new provisions may ultimately prevent widespread and equitable use of this hearing option, such that any effects may vary from region to region and/or otherwise be negligible (and potentially discriminatory). The following sections include consideration of potential interventions which might be implemented in addition to these already enacted changes to the justice process.

6.2.1 – The Disproportionate Presence of Charges for Failure to Appear in Court

Charges for failure to appear in court were a non-trivial issue among bail cases in both Old City Hall and College Park courthouses. Yet this charge appears to be a greater issue in the Gladue bail population, as considerable disparities in its presence exist between this population and the conventional bail population. Indeed, Indigenous peoples in Gladue bail court were nearly twice as likely as their conventional bail counterparts to have one or more of these charges (12.7% versus 7.0% – Table 5.19(a)). Furthermore, of cases with at least one failure to appear charge, Gladue bail cases were also considerably more likely than their counterparts to have two or more of these charges (21.8% versus 14.4% – Table 5.19(a)). In fact, the juxtaposition of the event and person datasets suggests that Gladue bail cases with two or more failure to

⁴⁵⁶ One of the obvious difficulties in assessing the impact of this new legislative change is the confounding effect rooted in complications and changes to the administration of justice resulting from the Covid-19 pandemic and lockdown conditions. For instance, while the Canadian Centre for Justice and Community Safety Statistics noted a significant reduction in the number of administration of justice charges Canada-wide in 2020, it was noted that, “[l]ockdown conditions meant fewer opportunities to breach conditions and the reduction of court processes and in-person hearings would impact the possibility to fail to appear” (Moreau, 2021, p.4).

⁴⁵⁷ For instance, an access to information request submitted to the Ottawa Police Service revealed that this court procedure occurred only four times in this jurisdiction in the nearly two years since its implementation (2019-2021) (Spratt & Richards, 2021). Spratt and Richards (2021) point to the discretionary nature of this law as inherently inadequate, suggesting that judicial referral hearings should, instead, be mandatory. Moreover, these legal scholars note the dissonance of expecting traditionally at least somewhat ‘tough on crime’ oriented police and prosecutors to take the lead in addressing administration of justice charges, particularly as this issue disproportionately affects poor, racialized and marginalized populations who may not receive equal access to this procedure. Specifically, they noted that: “[g]ranting more discretionary powers to police and prosecutors – the same individuals routinely imposing overly strict bail conditions on accused persons and over-prosecuting minor offences – was never going to be a solution to Canada’s bail problem” (para 13).

appear charges were more likely than their conventional bail counterparts to have accumulated these charges on two or more separate charging informations – suggesting that these charges may be a more chronic issue for Gladue bail cases (Tables 5.19(a) and 5.19(b)).

The good news, however, is that the proportion of cases with at least one of these charges decreased over the study period for both Gladue bail and conventional bail populations (Figure 5.6). Even more encouraging, the rate of decrease appears to be similar for both bail populations, if not perhaps slightly greater for the Gladue bail population. In other words, despite the modest prevalence of charges for failure to appear in court among bail cases overall, the proportion of cases with this charge has been decreasing in recent years and in such a way that benefits Gladue bail cases similarly to conventional bail cases. Indeed, longitudinal findings suggest that Old City Hall and College Park courthouses have begun to recognize the problematic nature of these charges and have responded by taking steps to reduce their prevalence.

It could be that judicial officers are now trying to better distinguish between instances of non-appearance and willful absconding, as has been recommended by Corey and Lo (2019) and Gouldin (2018). Part of these efforts to avoid penalizing individuals for unintentional non-appearances might include the greater use of bench warrants with discretion. Indeed, this practice was described to me by the Old City Hall Indigenous Courtworker and was outlined in Clark’s (2016b) study of the Old City Hall Gladue Court as a method of avoiding unnecessary failure to appear charges, since it allows judicial officers to withdraw a discretionary bench warrant if the accused person reports to the courthouse on a certain date or within a specified period of time. While the downward trend in failure to appear charges was not experienced exclusively in Gladue Courts, it is likely that practices such as this which were adopted primarily in Gladue Court might then reasonably come to the attention of, and be implemented by, other judicial officers and criminal justice professionals working in the same courthouse (recall that judges who sit in Gladue Court also necessarily sit in other, non-specialized, courtrooms).

Nevertheless, there remains room for improvement – particularly as this type of charge remained present in roughly 8-12% of Gladue bail cases (versus 5-6% of conventional bail cases) from 2012-2017. In

order to continue this downward trend and close the gap between bail populations, policymakers and court administrators should consider implementing some of the other promising, more pragmatic and on-the-ground practices which have been adopted to address this issue elsewhere. For instance, court date reminder programs introduced in several pilot studies in the United States have repeatedly been demonstrated to reduce the rate of failure to appear in court and consequently reduce court processing costs⁴⁵⁸ (e.g., Fishbane, Ouss & Shah, 2020; Rosenbaum et al., 2012; for an overview of some of these studies, see Doyle, Bains & Hopkins, 2019; Bechtel, Holsinger, Lowenkamp & Warren, 2017). These court date notification programs can take many forms, from mailed letters or postcards to staffed or automated phone calls, text messages and/or emails. Messaging also varies by program, with some including only the date, time and location of the scheduled court appearance, while others also include an explanation of the possible consequences of failing to appear in court or the importance of procedural justice and the benefits of appearing in court. Policymakers might also consider redesigning bail orders to emphasize the importance of future attendance in court. Indeed, Fishbane et al. (2020) found that a redesign of New York State's summons forms to highlight the importance of court attendance and the possible consequences of non-attendance, as well as the courthouse location and contact information, led to a reduction in non-appearance rates. These types of strategies might be particularly useful for those whose non-appearance is the result of forgetfulness, disorganization or simply a lack of understanding of the importance of court attendance. In fact, these practices might be especially helpful for individuals with FASD who may be more prone to unintentional non-appearances, such that these types of modifications may disproportionately benefit Indigenous peoples (who appear to be disproportionately affected by FASD; see Milward, 2014; Rudin, 2022; TRC, 2015).

Additionally, strategies to reduce failure to appear charges should also attempt to reduce common barriers to court attendance (which are likely to be especially prevalent among Indigenous peoples in the court system due to experiences of settler colonialism). For instance, programs which fund or subsidize transportation to court (e.g., free or low-cost bus and/or subway fares) should be considered, as well as

⁴⁵⁸ For a detailed cost-savings analysis of one postcard reminder program in Nebraska, see Rosenbaum et al. (2012).

potential no-cost or low-cost childcare options in or near the courthouse to be used specifically by accused persons with children (see also Doyle et al., 2019).

Finally, improvements in (post-bail) court efficiency – in terms of reducing the average number of court appearances – would also necessarily reduce the opportunity for an accused person to fail to appear for a scheduled court appearance. Indeed, recall that two in five (39.9%) bail cases overall in this study required nine or more court appearances following bail in order to reach resolution (Table 5.30). Notably, among all those accused persons granted bail (that is, those who are generally at risk of failing to attend court), this figure rises to more than half (51.6%) of cases which go on to require 9 or more appearances and, in fact, 20.2% of these cases actually requiring 16 or more court appearances to be resolved (with released Gladue bail cases and their conventional bail counterparts taking an average of 12.65 versus 10.69 post-bail appearances, respectively).

6.2.2 – The Disproportionate Presence of Charges for Failure to Comply with a Condition of Bail

Charges for failure to comply with a condition of an undertaking or recognizance (read: bail breaches) were widespread among bail cases in Old City Hall and College Park courthouses and were even more common than charges for failure to appear in court (Table 5.25). As with the former charges, Indigenous accused in Gladue bail cases were also considerably more likely to include one or more bail breach charges than accused in conventional bail cases (23.3% versus 15.6%). That is, nearly one quarter of Gladue bail cases included at least one s.145(3) charge for failure to comply with a condition of a court order. On a small positive note, among person-based cases with at least one bail breach charge, these bail populations were similarly likely to have two or more of these charges (Table 5.20(a)). However, the juxtaposition of the person and event datasets suggests that Gladue bail cases with two or more bail breach charges were more likely to have accumulated these breach charges on two or more separate charging informations compared to their conventional bail counterparts, suggesting that these charges may, again, be more of a chronic issue within the Gladue bail population (Tables 5.20(a) and 5.20(b)).

Yet despite the pervasiveness of charges for failure to comply with a condition of bail, longitudinal trends leave some (limited) room for optimism. While the presence of one or more bail breach charges increased very early in the study period (and appeared to increase more substantially in the Gladue bail population), the presence of these charges in both the Gladue bail and conventional bail populations was relatively stable from 2012-2017 – albeit still much higher in the former than the latter. Hence, it appears that courts and criminal justice professionals may have begun to recognize the problems associated with these charges and to heed the advice of community organizations and scholars to attempt to remedy the situation (e.g., CCLA 2014; JHSO 2013; Webster, 2015; Webster et al., 2016). Yet much work remains to be done in order to not just stabilize, but actually decrease, the presence of these charges in bail cases generally and for Gladue bail cases in particular⁴⁵⁹.

The widespread and disproportionate presence of bail breach charges has concerning implications for remand and sentenced custody populations. However, in order to target these charges broadly and in such a way that would reduce their presence in Gladue bail cases especially, one must first consider the underlying causes for their disproportionate presence in these cases. Perhaps most obviously – given that bail breaches are made possible only through the existence of bail conditions – one might wonder whether Gladue bail and conventional bail cases are granted similar releases in terms of the number and types of conditions imposed. If Gladue bail cases were more likely to be given certain more problematic conditions which tend to be

⁴⁵⁹ Notably, there is some reason to believe that these trends may have begun decreasing in the period following this study. Although the Supreme Court’s influential *R. v. Antic* decision reiterating the ladder approach to bail was rendered near the end of the study period (June 2017), its effects may have taken some time to be realized and may have been more pronounced in these courthouses following the Ontario’s Court of Appeal’s reaffirmation of *Antic* in *R. v. Tunney* (2018), as well as after the more recent Supreme Court case *R. v. Zora* (2020) which explicitly criticized the overuse of onerous and inappropriate bail conditions. Furthermore, the revisions to the Ontario Crown Prosecution Manual in November 2017 (which now emphasizes the ladder approach to bail), as well as some of the statutory bail amendments which came into force in December 2019 (including, again, reaffirmation of the ladder approach to bail as well as the instruction that judicial officers consider the circumstances of Indigenous accused) may also be expected to lead to forms of release which reduce the opportunity and likelihood of bail breach charges. In fact, research by Schumann & Yule (2022) would seem to support this hypothesis. These scholars found that the number of bail conditions imposed in bail releases from three Ontario courthouses in the year preceding *Antic* and the year following this court decision did, in fact, decrease, such that one might expect there to be possible downstream consequences in the presence of charges for failing to comply with a bail condition.

difficult for accused persons to follow⁴⁶⁰, or more conditions generally, this might reasonably lead to a greater incidence of breach charges. Yet data from Clarke's (2016b) study of the Old City Hall Gladue Court suggests that the types of bail conditions which are most often critiqued in the bail literature were not especially common among Gladue bail cases in this courthouse⁴⁶¹, and interviews suggested that Indigenous accused from this court felt their bail experience was largely fair and reasonable. Indeed, one might expect criminal justice actors in Gladue Court to be more attuned to the issues relating to numerous and/or onerous conditions than professionals elsewhere⁴⁶² – although without data on bail conditions available in the MAG ICON database, this study cannot speak to this matter in any definitive way.

Yet, while information on bail conditions was unavailable in this study, efforts to limit the use of particularly problematic conditions, as well as the number of bail conditions imposed more generally, must continue, as they are essential in any efforts to reduce the prevalence of bail breach charges (see CCLA, 2014; JHSO, 2013; Rogin, 2017; Wyant, 2016; in terms of court guidance, see *R. v. Antic* (2017); *R. v. Omeasoo* (2013); *R. v. Zora* (2020)). Indeed, accused persons cannot be charged with breaching a condition of bail to which they were never subjected. Certain bail conditions which seem especially likely to lead to breaches ought to also be used very sparingly, such as alcohol or drug prohibitions (see CCLA, 2014; Hannaford, 2020; *R. v. Omeasoo* (2013); Rudin, 2022), mandatory treatment or counselling (see Rogin, 2017) and the broad requirement that accused persons “keep the peace and be of good behaviour” (see CCLA, 2014; *R. v. Zora* (2020); Rogin, 2017; Wyant, 2016). Furthermore, careful consideration of necessary bail conditions, if any, might also be expected to reduce breach charges among those with FASD, in particular, which may

⁴⁶⁰ For example, drug and/or alcohol prohibitions, mandatory treatment and the requirement to keep the peace and be of good behaviour.

⁴⁶¹ Although nearly one-in-five cases granted bail in Clark's (2016b) study did have a condition to attend treatment. While it is not possible to draw any firm conclusions on the meaning of these data without a comparison group from this courthouse, the moderate prevalence of this bail condition might be contributing in some way to the prevalence of bail breaches overall.

⁴⁶² For instance, Ceccato (2019) found in his observational study of one Quebec court that Indigenous accused tended to have more bail conditions than non-Indigenous accused and were also more likely to have some of the more problematic conditions such as alcohol and drug abstentions and mandatory treatment or counselling – although these findings notably relate to bail cases from another province which inevitably administers the bail process somewhat differently than in Ontario.

consequently produce a greater reduction in the Indigenous Gladue bail population, given the apparent disproportionate presence of this disability among Indigenous peoples. While interventions targeting potentially discriminatory or racist policing and charging practices toward Indigenous peoples upstream may be challenging to implement, criminal justice practitioners can nevertheless limit the types of behaviours (which do not pose a serious risk of harm to the public) which can constitute breaches and can therefore lead to further entrenchment in the criminal justice system.

Indeed, it is also possible that the elevated presence of breach charges among Gladue bail cases is rooted – at least partially – in discriminatory or racist practices upstream, particularly at the police level. Over-policing of Indigenous peoples is well-documented in Canada (e.g., AJI, 1991; Comack, 2012; David & Mitchell, 2021; Ontario Human Rights Commission, 2017; Quigley, 1994; Rogin, 2017; Rudin, 2006). Some police officers may have prejudicial beliefs which erroneously conflate Indigeneity with criminality or with the need for “correction”, such that they surveille Indigenous peoples more closely than others in the community. In a sort of self-fulfilling prophecy, this heightened attention then leads to greater detection of Indigenous peoples’ alleged breaches of bail (or otherwise to the exercise of police discretion in ways which may lead to greater arrest and charges). Indeed, Rogin (2017) contends that institutional bias, including the over-policing and over-charging of Indigenous peoples, almost certainly contributes to Indigenous peoples’ criminal records⁴⁶³, and in particular, to convictions relating to failure to comply with conditions and failure to attend court. Similarly, other forms of community supervision might also be contributing to the prevalence of bail breach charges generally, and for Gladue bail cases in particular. Most notably, it is possible that the use of BVSPs – in this case the Toronto Bail Program – may have unintended negative consequences stemming from the increased level of supervision associated with these programs (see Mitchell, 2015). While these types of programs may increase the likelihood of breach charges generally (compared to those released without community supervision), these programs might also have the potential to disproportionately and

⁴⁶³ Weatherburn & Snowball (2012) similarly noted that the longer criminal records which characterized Indigenous accused in their Australian bail study are likely to be “artefacts of racial bias” in terms of prior policing and prosecutorial decisions (p.57).

negatively impact Indigenous accused⁴⁶⁴ (especially if program staff have not received appropriate training on issues relating to cultural competency, unconscious bias, etc.).

Similar to the need for judicial restraint in the imposition of conditions, judicial officers and practitioners should also use restraint when considering the need for bail supervision programs. Indeed, care must be taken to ensure that bail releases under the supervision of community bail programs are used sparingly and only when other forms of release are not possible. Indeed, it is important to avoid potential net-widening and the heightened supervision associated with these programs which, although well-intentioned, may increase the likelihood of (alleged) breaches being detected and charged (see Mitchell, 2015) or occurring through non-appearance to supervision appointments⁴⁶⁵.

In light of the over-policing of Indigenous peoples and discriminatory charge practices, it is also important to mandate ongoing training for all actors in the criminal justice system on a variety of issues affecting Indigenous peoples' experiences in this system⁴⁶⁶. For instance, training might be rooted in the issue of the overrepresentation of Indigenous peoples in correctional facilities, and include discussion of settler colonialism and associated harms, Indigenous law and the ways in which Indigenous concepts of social harm

⁴⁶⁴ Indeed, the findings related to charging agency may reflect a differential likelihood of bail breaches. While charges stemming from the Toronto Bail Program were quite uncommon overall, Gladue bail cases were more likely than conventional bail cases (1.0% versus 0.4% – Table 5.8) to have charges originating from this agency. While this finding potentially raises concerns regarding the use of community-based bail programs and the possibility that bail supervision leads to a greater number of breach charges for Gladue bail cases, it is also possible that this finding might more simply be a reflection of Gladue bail cases being disproportionately released under the supervision of the Bail Program (although data on bail program admissions for these bail populations was not available). Notably, however, even if Indigenous peoples have a similar likelihood to non-Indigenous people in terms of receiving charges originating from the Toronto Bail program, if they are disproportionately likely to be released into these bail programs, this may nevertheless have secondary, knock-on effects which lead to disproportionate bail breach charges.

⁴⁶⁵ Indeed, there is an entire body of literature on heightened, enhanced, or intensive supervision (albeit usually in the context of probation) which has repeatedly demonstrated that increased supervision and surveillance lead to a substantially greater likelihood of breaches or technical violations, while generally not having any significant effects on the commission of new substantive offences (e.g., Erwin, 1986; Giblin, 2002; Hyatt & Barnes, 2017; Lowenkamp & Latessa, 2004).

⁴⁶⁶ On this issue, the TRC (2015) has called on the Federation of Law Societies of Canada to ensure that all lawyers "receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relation" as well as skills-based training in "intercultural competency, conflict resolution, human rights, and anti-racism" (p.168; Call to Action #27). Such training should be extended to all criminal justice actors. Similarly, the TRC (2015) also calls upon Canadian law schools to require all law students to take a course on Indigenous peoples and the law, with the same proposed areas of study as listed above (p.175; Call to Action #28). The need for mandatory training for criminal justice actors on issues relating to Indigenous cultures and histories, and the experiences of Indigenous women and girls, was echoed by the MMIWG (2019).

and approaches to justice may differ from Western approaches, as well as skills training relating to cultural competency, recognizing and mitigating unconscious biases and conflict resolution. One might think of trainings programs such as the Indigenous cultural competency program *The Path: Your Journey Through Indigenous Canada*, which addresses many of these topics and has been mandated by several provincial law societies⁴⁶⁷. Similar types of training should be provided not only to police, lawyers, judges and justices of the peace (as is already the case to varying degrees), but also to bail program supervisors and any other professionals affiliated with the legal system who may have some (even indirect) influence on the prevalence of bail breach charges and administration of justice charges more generally.

In addition to explanations for disproportionate breach charges rooted in potentially discriminatory or racist criminal justice practices, the ongoing effects of settler colonialism have also led to Indigenous peoples being more likely to experience certain socio-economic circumstances which may contribute to their greater probability of receiving these charges⁴⁶⁸. In particular, Indigenous peoples' greater likelihood of experiencing homelessness (Boyce, 2016) may be contributing to these bail breach patterns⁴⁶⁹. Perhaps most obviously, Indigenous peoples' greater experience of homelessness may lead them to spend more time in public spaces in downtown Toronto compared to the largely non-Indigenous caseload from conventional bail courts. This greater visibility may then increase the likelihood of police detection of any potential breaches (e.g., alcohol consumption in violation of a prohibition condition, disorderly conduct). Moreover, navigating the shelter system, in particular, may further increase the risk of bail breaches⁴⁷⁰ and the detection and laying of charges

⁴⁶⁷ In terms of more practical, on-the-ground advice for judges, lawyers and others working with Indigenous peoples in the criminal justice system, one might look to Rudin's 2022 comprehensive guide: *Indigenous Peoples and the Criminal Justice System*, which provides guidance and recommendations to practitioners, including how to inquire about individual's identity, how to provide (only as much as is needed) relevant Gladue information to the courts, as well as guidance for working specifically with FASD-affected individuals in courts.

⁴⁶⁸ Indeed, the Supreme Court noted in *R. v. Zora* (2020) that "breach charges often accumulate quickly [...] People with addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits" (para 57).

⁴⁶⁹ Indeed, a study of one Ontario bail supervision program found that accused persons experiencing unstable housing were significantly less likely to successfully complete bail supervision than those with stable housing (Mitchell, 2015).

⁴⁷⁰ Notably, living in the shelter system can increase the probability of interpersonal conflicts with other residents or shelter staff, which might lead to breach charges for failure to keep the peace and be of good behaviour. Those staying in the shelter system may also encounter challenges in following certain types of conditions. For instance, bail conditions which restrict an accused person's geographical location may (unintentionally) prevent access to certain shelters or community resources (Mitchell, 2015). Similarly, conditions prohibiting contact with other individuals living in the

for these violations⁴⁷¹. Other circumstances which are more common among Indigenous populations and are rooted in Canadian settler colonial practices may also predispose Indigenous accused persons to charges for breach of bail. One might think, for instance, of the greater prevalence of mental health challenges among Indigenous peoples (Boyce, 2016) that have also been linked to the unsuccessful completion of bail and subsequent charges (Mitchell, 2015)⁴⁷². Moreover, Indigenous peoples' greater likelihood of experiencing addictions or having issues with substance abuse (First Nations Centre, 2005; Perreault, 2022) may also be contributing to the disproportionate presence of bail breach charges in the Gladue bail population⁴⁷³.

Interventions reducing bail breach charges for Gladue bail cases might therefore seek to provide increased access to voluntary and culturally appropriate community supports and services (both for those already involved in the court system, but also for Indigenous peoples more generally). Indeed, given the association between bail breaches and certain life circumstances more common among Indigenous peoples (e.g., unstable housing, substance use and poor mental health), funding and access to community-based, culturally appropriate support services should be continued and expanded⁴⁷⁴. Yet it is important that any

shelter system may lead to certain shelters effectively becoming off-limits (Mitchell, 2015). The requirement to receive prior (or near immediate) approval for any address changes is also often unrealistic for individuals in these circumstances, who can be banned from a specific shelter, or otherwise asked to leave others' homes where they were staying with little to no notice (Mitchell, 2015). For similar reasons, living in a shelter, and unstable housing more generally, might also be associated with greater difficulty abiding by a curfew (Mitchell, 2015).

⁴⁷¹ Indeed, shelter staff can sometimes take on an additional supervisory or reporting role (e.g., responding to inquiries from police or bail program staff regarding an accused person's attendance at the shelter) (Mitchell, 2015).

⁴⁷² The association between mental health issues and subsequent charges on bail is particularly notable for those who do not have any community supports (which often require formal mental health diagnoses). Furthermore, the likely elevated prevalence of FASD among Indigenous peoples (Milward, 2014; Rudin, 2022; TRC, 2015) has also been theorized as contributing to a greater incidence of breaches of conditions (e.g., Milward, 2014) as well as failure to attend court charges (e.g., Webster, 2023) within this population.

⁴⁷³ Indeed, research also suggests that there is a link between substance abuse and receiving new charges while on bail (Mitchell, 2015). Even with an apparent move away from drug and/or alcohol prohibitions for Gladue bail cases (Clark, 2016), greater addictions in this population may nevertheless contribute to bail breach charges as accused persons either forget or disregard bail conditions while under the influence of substances, or potentially (allegedly) contravene conditions in order to obtain drugs and/or alcohol.

⁴⁷⁴ In particular, Mitchell (2015) found that the presence of mental health supports and support workers (primarily from the Canadian Mental Health Association (CMHA)) seemed to be associated with the successful completion of bail supervision. Indeed, accused persons on bail who were receiving support from the CMHA appeared to be able to access treatment which allowed them to better manage their conditions and thereby better focus their attention on court requirements to abide by conditions of bail and attend court as required. Moreover, support workers were also able to assist accused persons in addressing other life circumstances which may have increased their likelihood of breach charges, such as securing housing and employment and, in many cases, actually providing transportation not only to healthcare related appointments, but also to the bail supervision program.

community supports remain largely voluntary in nature, as court-mandated treatment offends the presumption of innocence and may be considered particularly paternalistic (see Rogin, 2017). Just as relevant, it creates the possibility of breach charges for non-attendance (see Doyle et al., 2019), thereby potentially exacerbating the issue of disproportionate breaches. Consideration should also be given to ensure that support services are geographically accessible for those persons interested in accessing services (e.g., centrally located, located inside or near the courthouses, located in “hubs” with other support services, or with public transportation fares available to those in need).

Finally, the extent to which the factors above may contribute to the disproportionate presence of bail breach charges for Indigenous accused would necessarily be affected by criminal court case processing efficiency. That is, the more time that someone is on bail, the more opportunity that is created for that individual to breach their conditions of bail (see Sprott & Myers, 2011; Mitchell, 2015; Myers, 2017; Webster, 2023). Indeed, the juxtaposition of the event and person datasets demonstrates how subsequent (often administration of justice) charges accumulate over time and render bail cases increasingly complex. Furthermore, more than half of Gladue bail cases released on bail required more than six months to reach case resolution following the completion of bail, while nearly a quarter of cases in this population actually required more than a year to complete this process (Table 5.31(b)). Although Gladue bail cases were actually less likely than their conventional bail counterparts to require these longer post-bail periods to reach case resolution, these periods nevertheless represent a significant amount of time to be subjected to (potentially numerous or onerous) bail conditions. Indeed, the average number of days between the completion of bail and case resolution for Gladue bail cases was roughly 8.5 months (and roughly 9.5 months for conventional bail cases). To the extent that Indigenous peoples from Gladue bail cases may be more likely than those from conventional bail cases to be subjected to a greater number of conditions of bail, greater surveillance and supervision, and are more likely to have life circumstances which further elevate the chance of bail breach charges, the amount of time that individuals spend on bail might have a greater negative effect on the likelihood of bail breach charges for Indigenous accused compared to non-Indigenous accused.

Hence efforts to increase court efficiency (in terms of the time required to resolve criminal court cases) may also reduce the likelihood of bail breach charges. The more quickly and efficiently that court cases reach case resolution, the less opportunity for breaches to occur (or be alleged to occur). One might also consider the use of new judicial referral hearings as a potential avenue for reducing breach charges and increasing court efficiency more generally (as subsequent bail breach charges would not be appended to earlier charges in ways which add complexity to a case and almost certainly extend court processing times). Yet in order for judicial referral hearings to effectively reduce bail breach charges (and other charges against the administration of justice), these hearings must be widely (and equitably) embraced as an alternative to laying breach charges – an outcome which has yet to be realized.

6.2.3 – The Disproportionate Presence of Charges for Failure to Comply with a Probation Order

While discussion of charges against the administration of justice in the context of bail tends to focus on those charges rooted in the bail system (i.e., failure to comply with a condition of bail and, to a lesser extent, failure to appear in court), charges of failure to comply with probation were actually the most common administration of justice charge for the bail population of Old City Hall and College Park courthouses (Table 5.25). This finding is rather concerning when one recalls that only accused persons convicted of a previous offence and currently (or recently) subject to a probation order are at risk of these charges, suggesting that probation non-compliance is a particularly prominent issue.

Moreover, these charges have significant implications for both remand and sentenced custody. While breach of probation charges do not carry a reverse onus, these charges (and any criminal history of convictions for these charges) may be interpreted similarly to breach of bail charges. Specifically, these charges may be viewed as an expression of disrespect for the justice system, an unwillingness to abide by court-mandated conditions and a general reflection of “riskiness” which would almost certainly increase the likelihood of bail refusal. With bail refusal (or the waiving of bail) comes time in remand. If someone is subsequently convicted of one or more probation charges, one might expect this to increase the likelihood

of eventually receiving a custodial sentence⁴⁷⁵, and upon any subsequent convictions for similar offences may lead to increasingly lengthy terms of imprisonment as members of the judiciary follow the jump principle (Manson, 2001; see footnote 135)⁴⁷⁶. There appears to be a sort of sick irony to the fact that conditions which are meant to rehabilitate offenders and keep the public safe may actually further criminalize these individuals and place them in greater anti-social positions (i.e., prison) such that the court's goals are much less likely to be met (if not utterly thwarted).

Continuing the pattern apparent across virtually all charges against the administration of justice, Indigenous peoples in Gladue bail cases were substantially more likely to include at least one charge for breaching a condition of probation compared to those in conventional bail cases (Table 5.24(a)). In fact, Gladue bail cases were almost twice as likely as conventional bail cases to include one or more probation breach charges (33.0% versus 17.9%). Indeed, roughly one third of Gladue bail cases contained this type of charge. While this difference might be partially explained by Gladue bail cases being more likely than their conventional bail counterparts to receive a probation order (Table 5.43), and thus to be subject to the conditions of such an order, it is equally notable that among cases with at least one probation breach charge, Gladue bail cases were also more likely than their conventional bail counterparts to have two or more of these charges. Moreover, the juxtaposition of event and person datasets suggests that person-based Gladue bail cases were, yet again, more likely than their conventional bail counterparts to be comprised of two or more charging informations with a breach of probation charge (Tables 5.24(a) and 5.24(b)), suggesting that breach of probation charges are a persistent issue for Indigenous persons whose bail was heard in Gladue Court.

More concerning still, the presence of charges for failure to comply with a condition of a probation order became increasingly common over the study period. Not only that, but whereas the increase in the

⁴⁷⁵ See Sprott et al. (2023) for a discussion of the relationship between previous probation sentences and current custodial sentences.

⁴⁷⁶ Rudin (2022) makes this point even more succinctly in his discussion of why Gladue considerations continue to be relevant even when custody is off the table, particularly with respect to conditions of probation: "a history of administration of justice offences also makes it more likely that a person will not be released on a subsequent offence, and denial of bail often leads to guilty pleas and more onerous outcomes." (p.167).

presence of these charges was reasonably gradual for the conventional bail population, this increase was substantially greater within the Gladue bail population (Figure 5.8). Illustratively, the percentage of Gladue bail cases with at least one probation breach charge increased from 22.2% to 42.0% (a difference of 19.8%) during the study timeframe, compared to conventional bail cases for which this figure increased only from 17.3% to 22.9% (a difference of 5.6%). It would therefore seem that breach of probation charges were not only common among bail cases, and Gladue bail cases in particular, but these charges were also increasingly and disproportionately problematic for Gladue bail cases. This phenomenon must be reversed.

Many potential explanations for – and, by extension, possible solutions to – the disproportionate presence of breach of probation charges among Gladue bail cases are similar to those for bail breach charges. Indeed, probation and bail breach charges both represent an alleged violation of a condition of a court order – the former being a post-conviction court order for a specified period of time with conditions meant to address the purposes of sentencing (e.g., rehabilitation), while the latter is an interim court order that is imposed prior to any convictions(s), with conditions (if any) intended to manage risks on the three grounds for detention. While the conditions set out in these court orders might be expected to differ, given that these orders serve different purposes (and in light of the fact that those on bail still benefit – in theory – from the presumption of innocence), this does not always appear to be the case.

Given the similarities between these types of court orders, it may not be surprising that Indigenous peoples seem to be overrepresented among both types of breach offences. Moreover, the similarities between bail and probations orders (at least in practice) would suggest that many of the causes for Gladue bail cases' disproportionate inclusion of breach of probation charges will be similar to those for breach of bail charges. Potential solutions to the overwhelming and disproportionate presence of these charges will therefore also share similarities to those proposed above with regard to bail breaches. Indeed, despite this study's broad focus on bail, we must also extend a remedial gaze to probation, using bail conditions and enforcement as a parallel for understanding and remedying issues rooted in probation conditions and enforcement.

Furthermore, just as the inclusion of excessive or onerous bail conditions increases the possibility of bail breach charges, the inclusion of many excessive or onerous probation conditions also necessarily increases the possibility of probation breach charges (see also Rudin, 2022). Notably, however, whereas bail orders can be given without conditions, probation orders must include three mandatory conditions codified under s.732.1(2) of the *Criminal Code*⁴⁷⁷ which might consequently render probation compliance comparatively more difficult than bail compliance⁴⁷⁸.

Perhaps most obviously then, just as with bail orders, there must be a shift away from excessive, onerous and/or overly broad probation conditions. In keeping in line with the rehabilitative nature of probation, optional conditions should be related to the circumstances of an offence(s) and should not be imposed for punitive purposes only (Manson, 2001). Conditions should also not be imposed if they are of such a nature as to make compliance so unlikely that the individual is effectively being set up for failure. That is, conditions of probation (like conditions of bail) should serve their legislative purpose(s), but in order to serve these purposes effectively, conditions must be limited, as least restrictive as necessary and must be reasonable in the offender's circumstances. More broadly, policymakers should also weigh the costs and benefits of continuing to include the three mandatory conditions of probation on all probation orders⁴⁷⁹.

⁴⁷⁷ These mandatory conditions of probation under s.732.1(2) are to (a) keep the peace and be of good behaviour; (b) appear before the court when required to do so by the court; and (c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation; as well as a variety of optional specific conditions and the possibility of conditions otherwise deemed reasonable and desirable.

⁴⁷⁸ Consider also the possibility that these mandatory probation conditions may have a disproportionately negative effect on Indigenous offenders, given this population's greater overall experiences of homelessness, mental health and substance abuse issues, as well as be affected by FASD – all realities rooted in settler colonialism – which may render compliance with these conditions more challenging. Illustratively, an Indigenous person living in a crowded and sometimes chaotic shelter system may have a greater likelihood of interpersonal conflicts with other shelter residents (or shelter staff), which could technically lead to charges for failure to keep the peace and be of good behaviour. Similarly, an Indigenous person experiencing homelessness or unstable housing might struggle to provide advanced notice for a change of address if they are unexpectedly kicked out of a friend or family member's home or a homeless shelter. Indigenous peoples affected by FASD, other mental health challenges, or substance use issues may struggle to remember court dates and so be at greater risk of failing to attend court as required by the court.

⁴⁷⁹ Perhaps most importantly among these mandatory conditions, policymakers and stakeholders should reassess the value of the mandatory 'keep the peace and be of good behaviour' condition – a condition that has notably received significant attention and criticism in the context of bail (e.g., Mitchell, 2015; Rogin, 2017, *R. v. Zora* (2020); Wyant, 2016). That is, the central question becomes whether the benefits of this condition (in terms of public safety, rehabilitation, etc.) outweigh the costs (in terms of producing breach charges for behaviours which are not otherwise criminalized

Finally, in light of s.732.1(3) of the *Criminal Code* allowing for the optional conditions in a probation order to be varied on application by the offender, the probation officer or the Crown, this option should be given greater consideration⁴⁸⁰.

As with bail orders, the disproportionate presence of probation breach charges might also be partially explained by potentially racist or discriminatory policing and charging practices, as well as the greater visibility and scrutiny associated with those experiencing homelessness who must pass a greater proportion of their days in public spaces. It is also possible that probation and parole officers responsible for supervising individuals on probation may espouse prejudicial beliefs which negatively affect Indigenous people's likelihood of being breached⁴⁸¹.

In light of the probable link between community supervision and the disproportionate presence of breach of probation charges among the Gladue bail population, criminal justice practitioners should also carefully consider the need to require probation supervision (versus unsupervised probation) as well as the period for which a probation order applies. Indeed, the *Criminal Code* does not require those who are subject to a probation order to report to a probation officer. Rather, probation reporting is optional, whereby a judge who wants some form of probation supervision must specify this as a separate condition of probation (Manson, 2001). However, once the condition to report to a probation officer is made, decisions regarding the frequency of reporting becomes an administrative matter delegated to the probation officer, such that the reporting frequency and intensity are largely outside of the control of a sentencing judge (Manson, 2001).

and/or potentially producing duplicate charges when this breach is laid in addition to other specific breach or substantive charges).

⁴⁸⁰ For instance, conditions might be varied if they are proving to be especially onerous for an individual due to their life circumstances, as well as for offenders who have demonstrated a strong commitment to following the conditions of their probation order (in both cases reducing the probability of subsequent probation breach charges for individuals who demonstrate a genuine desire to comply with the courts).

⁴⁸¹ Indeed, the study findings related to the charging agency for individual charging informations may also reflect Indigenous accused persons' greater likelihood of probation breaches. While charges stemming from the Old City Hall Probation and Parole Office were uncommon overall, Gladue bail cases were more likely than conventional bail cases to have charges stemming from this agency (3.6% versus 2.3% – Table 5.8). Notably, while the differential proportion of Gladue bail and conventional bail cases with charges from this office might suggest discriminatory supervision and charging practices, it is important to recall that Gladue bail cases were slightly more likely than conventional bail cases to receive a probation order upon conviction (Table 5.43), such that these differences in charging agency may simply reflect upstream differences in the likelihood of these groups being given a probation order in the first place.

Given that research on intensive probation supervision has repeatedly shown that increased supervision does not generally affect future criminal activity but does lead to an increase in breaches and technical violations (e.g., Erwin, 1986; Giblin, 2002; Hyatt & Barnes, 2017; Lowenkamp & Latessa, 2004), the costs and benefits of any supervision requirement should be carefully considered.

Finally, the disproportionate prevalence of breach of probation charges among Gladue bail cases may also be rooted in the duration of a term of probation. That is, the comparatively lengthier terms for which probation orders may be imposed – that is, up to three years (in most cases) – compared to bail orders might also be contributing to the elevated presence of probation breach charges generally, and for Gladue bail cases in particular. While three years is a long time for anyone to abide by conditions which restrict their liberty, given the ways in which Indigenous peoples may be over-policed and more likely than non-Indigenous persons to struggle with certain types of probation conditions, lengthier terms of probation may pose an especially high risk of breach charges for Indigenous peoples (see also Rudin, 2022). Practitioners should therefore assess whether shorter periods of probation might, in some cases, better serve the purposes of sentencing and reduce the likelihood of breaches compared to longer terms of probation.

Broadly, one might therefore consider a sort of ladder approach to probation orders similar to that which applies to deliberations of bail and judicial interim release orders. Under such an approach, practitioners and judges would then consider only the shortest term of probation necessary to meet the purposes of sentencing, would only impose probation supervision if there was reason to believe unsupervised probation would be inadequate, and would impose as few conditions as possible, and only when they are relevant to the commission of the offence, are reasonable in the offender's circumstances and are not solely punitive in nature. Once a probation order is given, enforcement largely falls to police and probation officers. While police officers and probation officers should be mandated to receive training on issues relating to Indigenous peoples, settler colonialism and unconscious bias, these types of small-scale changes alone are unlikely to lead to large-scale changes in the disproportionate prevalence of breach of probation charges among Indigenous peoples. While the recent addition of judicial referral hearings as an alternative to laying

new breach charges – if embraced widely and equitably – may reduce recourse to breach of probation charges, the verdict is still out on the effectiveness of this legislative amendment. Hence, if there is a chance for discriminatory enforcement of probation orders, there is all the more reason to reduce opportunities and ways in which individuals can be charged with breaching such orders. Indeed, given the likelihood of over-policing and the discriminatory enforcement of probation orders for Indigenous peoples, steps which reduce the opportunities for apparent probation breaches would be expected to not only benefit all offenders, but Indigenous offenders in particular.

Overall, charges against the administration of justice were ubiquitous in Old City Hall and College Park bail cases, and Gladue bail cases in particular. In fact, given other similarities between Gladue and conventional bail cases, administration of justice charges represent one of the greatest distinguishing features of Gladue bail courts. These charges tend to criminalize otherwise legal behaviours and render cases more complex in ways which trigger a series of downstream consequences for bail deliberations (and thus remand custody) as well as sentencing (and thus sentenced custody). The greater presence of administration of justice charges among Gladue bail cases (compared to conventional bail cases) therefore has significant implications for the overincarceration of Indigenous peoples. And yet, it is important to remember that these charges are essentially fabricated by the criminal justice system. Indeed, the mechanisms of this predicament are largely rooted in what the Supreme Court has referred to as “conditions which are unnecessary, unreasonable, unduly restrictive, too numerous, or which effectively set the accused up to fail” (*R. v. Zora* (2020), para 26), as well as in rigid and likely discriminatory enforcement which do not account for individuals’ circumstances. Given the ways in which the justice system effectively produces these charges, this system must now make a concerted effort to limit their proliferation among Indigenous peoples. Any potential solutions should include efforts to significantly limit the imposition of conditions of a court order (which make breach charges possible), address and limit the potential for discriminatory enforcement of court orders and other legislative provisions, and invest in voluntary, culturally-informed community supports which may address certain underlying barriers to the successful completion of probation.

6.3 – Bail in Gladue Court: The Search for Substantive Equity

Despite the disproportionate presence of charges against the administration of justice among Gladue bail cases and the challenges one might expect this reality to pose for bail deliberation, bail processing in Old City Hall and College Park Gladue Courts appeared promising overall. Indeed, study findings suggest that although bail processing in these courts took somewhat longer than in conventional bail courts (as measured by days), these specialized courts did not appear to use substantially more court resources (as measured by court appearances) than conventional bail cases. Findings further suggest that criminal justice actors in these Gladue Courts have been making admirable efforts to produce bail outcomes which are more or less substantively equitable, although the disproportionate accumulation of subsequent (administration of justice) charges among Gladue bail cases (and the associated increases in case complexity) did appear to eventually restrict the extent to which equitable outcomes between bail populations were possible.

6.3.1 – Similar Use of Court Resources Despite Longer Bail Processing Times in Gladue Court

Efficiency in bail processing is generally measured in two different ways: the number of days, as well as the number of court appearances, required for a bail case to complete the bail process. In terms of the former, Gladue bail cases took longer than conventional bail cases to complete the bail process when considering all bail cases (Table 5.27(a)). Even when cases which spent only a single day in the bail process were removed from analyses⁴⁸², Gladue bail cases continued to take somewhat longer than conventional bail cases to complete the bail process, although differences became narrower (Table 5.27(b)). Notably, among bail cases which required two or more days to complete the bail process, Gladue bail cases took an average of 11.12 days (median = 6) while conventional bail cases took an average of 9.56 days (median = 5). However, in terms of the latter measure of bail efficiency – that is, the number of bail court appearances required to complete the bail process – Gladue bail cases and conventional bail cases were not so different. Indeed,

⁴⁸² Recall that supplemental analyses were performed on bail processing variables in order to remove cases which spent only a single day in the bail process, which were disproportionately same-day consent release cases (and which might therefore include a non-trivial number of Indigenous accused persons in the conventional bail population, due to the process of Gladue Court referral and these courts' more limited schedules). As such, these supplemental analyses consider more comparable bail cases in both bail populations which were not considered suitable for immediate Crown release.

although there were initially modest differences between bail populations in terms of the number of bail appearances required when considering all bail cases (Table 5.26(a)), supplementary analyses which removed single bail appearances reduced these differences almost entirely (Table 5.26(b)). Illustratively, among bail cases which required two or more bail appearances, Gladue bail cases took an average of 3.27 appearances (median = 3) compared to 3.21 appearances (median = 3) for conventional bail cases.

Hence it seems that the Old City Hall and College Park Gladue Courts were essentially just as efficient as conventional bail courts in these courthouses when it comes to the average number of bail *appearances* required by (more complex, non-single day) bail cases to complete bail, despite this process taking somewhat longer overall. The similar (average) number of court appearances required by both bail populations would suggest that Gladue bail cases do not take significantly more court resources than conventional bail cases (e.g., in terms of courtroom time and courthouse staff), which is likely welcome news for court administrators and the Ministry of the Attorney General. And yet, the greater number of *days* required for Gladue bail cases to complete the bail process would translate into a greater use of remand resources (at least in the short-term) and represent non-trivial costs for the Ontario Solicitor General. Nevertheless, any short-term costs in terms of time spent in remand while awaiting a bail outcome might later be offset in the case that Indigenous peoples going through the bail process in these Gladue Courts are more likely to eventually be released, thus reducing the remand population which is formally detained (and potentially having downstream effects on the sentenced custody population).

Study findings on the greater number of days required to complete bail in Gladue Court are consistent with Clark's (2016b) research on the Old City Hall Gladue Court, which similarly reported that case processing times in this court (generally, not limited to bail) tended to be somewhat longer than in other Toronto courts or Ontario courts generally⁴⁸³. Importantly, Clark (2016b) also noted that accused persons using this court

⁴⁸³ Notably, Clark (2016b) also reported that cases processed in the Old City Hall Gladue Court tended to take more court appearances than cases in Toronto courthouses, or Ontario courthouses generally, which stands in contrast to the current study's findings. These differences, however, might be at least partially explained by several differences between the two studies, with the current study: 1) focusing on both Old City Hall and College Park courthouses; 2) including cases over the span of twelve years; and 3) examining case processing of bail cases only (versus all criminal court cases).

were generally not unhappy with the greater processing times, as they considered the experience and potential benefits of this court to be worthwhile. That is, the somewhat greater (bail) processing times associated with Gladue Court might simply be considered the cost of entry into an otherwise worthwhile process.

The greater bail processing times associated with Gladue Court are perhaps unsurprising when one considers the limited schedules during which these courts operate. Indeed, with the Old City Hall Gladue Court operating only two days a week and the College Park courthouse operating only a single day each week, accused persons wishing to have their bail case heard in these Gladue Courts may need to wait several days (in remand custody) for this opportunity. The additional time that these individuals spend waiting for the next Gladue Court sitting might therefore partially contribute to the greater bail processing times for these cases. Moreover, it is possible that Gladue bail cases are more likely than conventional bail cases to require additional time to prepare a plan of release (or *plan of care*) which would be expected to satisfy the court. Indeed, given the greater overall complexity⁴⁸⁴ of Gladue bail cases, as well as the greater likelihood of some of these accused persons having circumstances which might be expected to raise concerns for release (e.g., addictions, unstable housing), developing an appropriate bail plan might be a somewhat more involved and time-consuming process for some.

In particular, coordinating back and forth with community support services, such as the Toronto Bail program, Indigenous health and/or cultural centres, and even housing services, may necessarily add time to this process. While securing community supports might add to bail processing, this may nevertheless be an important part of Gladue Court functioning and a key to its apparent success (making bail release possible at all). Moreover, any assistance that Indigenous peoples receive from the Indigenous Courtworker and/or this court's duty counsel may be particularly valuable when one considers the ways in which remand poses significant challenges to communication and thus the preparation of bail plans (see Pelvin, 2017; Webster &

⁴⁸⁴ For example, in terms of the number of charges in these cases, their greater likelihood of containing charges stemming from two or more charging incidents, and the presence of charges against the administration of justice in these cases compared to conventional bail cases.

Doob, 2012). Hence any added time (and notably not added court appearances) necessary for Gladue bail case release planning might simply be considered a worthwhile tradeoff for the added support, fair consideration and seemingly more probable release.

Although Clark (2016b) reports that Indigenous persons who had their bail heard in Gladue Court generally found this court's processes to be "fair and reasonable" (p.34), efforts should nevertheless be made to seek greater and more equitable bail processing and efficiency for these cases. While the time required to develop an appropriate plan of care might be deemed largely necessary and worthwhile, the unproductive or dead time spent waiting in remand for the next Gladue Court sitting should be targeted. Policymakers should consider providing additional funding to Gladue Courts across the province to allow these courts to sit additional days each week (or even half-days, if the Indigenous caseload size and interest do not warrant full days)⁴⁸⁵. Should additional Gladue Court days be approved, careful consideration should be given to select days and times which would minimize unnecessary and unproductive wait times. For instance, it would likely be useful for Gladue Courts to also sit earlier in the week (e.g., Monday or Tuesday) in order to be a more attractive and readily available option for individuals charged the previous Friday evening or over the weekend who may not otherwise be willing to wait for Gladue Court later in the week. For courthouses in which only half-days are possible, afternoons might be selected in order to provide defence counsel, duty counsel and Indigenous Courtworkers more time to meet with their clients in courthouse holding cells in the morning, discuss bail options with the Gladue Court Crown and potentially liaise with community service providers to develop a potential plan of care. An increase in Gladue Court availability would not only be expected to increase bail efficiency and allow for greater equity in access to justice, but such changes would also be expected to reduce the number of Indigenous remand prisoners. Indeed, increased access to Gladue

⁴⁸⁵ While Gladue Courts should likely be considered the "gold standard" to which courthouses with non-trivial Indigenous caseload should aspire, these specialized courts may admittedly not be a realistic option for courthouses with smaller Indigenous caseloads. Nevertheless, these courthouses must also embrace Gladue principles at bail and should equally strive to produce substantively equitable bail outcomes. These courthouses might consider implementing a sort of "enhanced bail court" in which Crowns, justices of the peace and other court staff receive extended training on issues relating to Indigenous peoples in the criminal justice system as well as how Gladue principles should be applied in the context of bail, specifically.

Courts would likely lead to Indigenous accused persons completing the bail process more quickly, such that those persons who are granted bail would spend fewer days overall in pre-trial custody (and thus potentially reducing – albeit perhaps only modestly – the number of Indigenous peoples in remand custody overall)⁴⁸⁶. In sum, there may need to be more equity in *access* to Gladue Courts in order to achieve equity in bail processing and bail *outcomes*.

6.3.2 – Partial Success in Producing Equitable Bail Outcomes

Despite the foregoing, study findings on bail outcomes in Gladue Court nevertheless appear promising. Despite the Canadian bail system being an especially settler-centric structure that is rooted in Western risk knowledges (Mitchell & Webster, 2023; Webster, 2023), it would appear that Old City Hall and College Park Gladue Courts have nevertheless achieved some success in producing bail outcomes which are largely similar to those in conventional bail courts. Whereas the broader literature on Indigenous peoples and bail suggests that Indigenous accused are disadvantaged at bail and more likely to be denied judicial interim release (e.g., AJI, 1991; Quigley, 1994; RCAP, 1996; Weatherburn & Snowball, 2012), this study’s findings suggest that bail outcomes – and especially those which result from a formal determination of bail – are not substantially worse for Gladue bail cases than for conventional bail cases in these courthouses. Indeed, an important method for assessing the effectiveness of Gladue Courts’ bail processes is to compare bail outcomes in these courts to those in conventional bail courts. If bail outcomes are notably worse in Gladue Court, this finding would suggest that systemic discrimination is likely at play. That is, in the search for substantive equity (see Abella, 1984; *Andrews v. Law Society of British Columbia*, 1989; Rudin & Roach, 2002), one would expect that any differences or disadvantages experienced within the Indigenous population would be accommodated in Gladue Courts in such a way as to provide equal access and opportunity to bail for all accused.

⁴⁸⁶ To the extent that greater Gladue Court availability might also lead to a greater number of Indigenous peoples opting to have their bail heard in these courts (versus conventional bail courts which operate daily), expanded access to these courts might further affect remand (and sentenced) custodial populations. Particularly as Gladue Courts appear to be having some success in producing substantively equitable bail outcomes (as will be discussed in the next section), greater access to Gladue Court may lead to even more Indigenous accused opting to have their bail heard in these courts, where their release is arguably more likely and formal detention in remand is less likely.

Hence, to the extent that bail outcomes for Gladue and conventional bail populations are similar, this would suggest that Gladue Court practitioners are finding ways to effectively overcome systemic barriers to release and consequently provide essentially equal access to bail⁴⁸⁷. Rather than allow the Western risk knowledges which underline the bail system to disadvantage Indigenous accused through a shallow assessment of “risk factors”, Gladue Courts are seemingly making a concerted effort to contextualize these circumstances within the broader context of settler colonialism (see Maurutto & Hannah-Moffat, 2016; Rogin, 2014, 2017) and in ways which make bail accessible. Indeed, it appears that these courts are largely meeting their bail objective, as reported by Clark (2016b), to “[i]nterpret bail provisions liberally so that pre-trial detention is not imposed unnecessarily and does not lead more directly to custodial sanctions” (p.16)⁴⁸⁸. Discussion of Gladue bail outcomes is presented in two parts. First, event-based bail outcomes are presented to highlight the overall similarities between bail populations when examining individual charging informations. Second, person-based outcomes are discussed to demonstrate how bail deliberations become increasingly complex and shift toward detention as charges accumulate disproportionately for Gladue bail cases.

i) Event-based Bail Cases: Similarities in Bail Outcomes

Bail outcomes in Gladue Courts and conventional bail courts were analyzed first in terms of all possible bail phase outcomes (e.g., including no bail decision, guilty pleas and charges being dismissed, stayed or withdrawn), then in terms of formal bail decision outcomes specifically. When examining all possible bail outcomes, Gladue bail cases and conventional bail cases in the event dataset were equally likely to remain in

⁴⁸⁷ While it would be interesting and informative to compare bail outcomes for Indigenous accused in Gladue Courts with outcomes from Indigenous accused in conventional bail courts, this was not possible in the current study due to data limitations. Indeed, there is currently no way of identifying this latter population using the Ministry of the Attorney General’s ICON data.

⁴⁸⁸ Recall, however, the important caveat that this study does not include data on the specific forms of bail release granted in Gladue Courts and conventional bail courts. That is, this study cannot speak to any similarities or differences between bail populations in terms of type of release order (e.g., undertaking or recognizance), the presence of a surety or bail program supervision, the requirement for any financial deposit and the number and types of conditions imposed. It is therefore possible that meaningful differences do, in fact, exist in these regards which would affect perceived “reasonableness” of bail as well as the potential for subsequent bail breach charges. If this is the case, additional work would be needed to address any disparities.

remand (whether formally or informally detained) at the end of the bail phase (both 35.0% – Table 5.28(a)). In fact, Gladue bail cases were actually slightly less likely to be formally detained by a judicial officer than conventional bail cases (and thus slightly more likely to be informally detained or to waive bail). However, Gladue bail cases were also less likely than conventional bail cases to be granted bail, as well as more likely than their counterparts to end bail with a guilty plea or by having charges dismissed, stayed or withdrawn (Table 5.28(a))⁴⁸⁹.

Given the broad scope of these numerous possible bail outcomes – some of which are largely outside the purview of Gladue Court professionals – subsequent analyses were also performed that examined only formal determinations of bail (that is, formal detentions and releases only – Table 5.28(b)). Indeed, these more restricted analyses better assess the effectiveness of Gladue Court in terms of the efforts and decisions being made by judicial officers and other practitioners in these courts – and the findings are promising. Of event cases with a formal determination of bail, Gladue bail cases were very marginally more likely than conventional bail cases to be granted bail and correspondingly less likely than their counterparts to be formally denied bail and detained in pre-trial custody.

These study findings therefore support the effectiveness of Gladue Courts in crafting substantively equitable bail outcomes (at least in terms of broad bail decisions to release or detain). That is, on any given charging information which received a formal determination of bail, Gladue bail cases were effectively just as likely as – in fact, very marginally more likely than – conventional bail cases to be released by a judicial officer. Overall, it would seem that criminal justice professionals in Gladue Court are making significant efforts to apply Gladue principles to bail and to provide equal access to bail release. And yet these event data on individual charging informations do not tell the full story. Indeed, these figures produce an incomplete narrative about the overall proportion of accused persons who are ultimately detained or who otherwise await case resolution in remand custody. In particular, study findings consistently pointed to Gladue bail

⁴⁸⁹ Notably, Gladue bail cases' lesser probability of bail release, and greater probability of guilty plea (when considering all bail outcomes in the event dataset) both have significant implications for the overincarceration of Indigenous peoples.

cases being more likely than conventional bail cases to accumulate charges over several charging informations, which are then treated as a single person-based case for the purposes of court processing. Indeed, these person-based cases are disproportionately and considerably more complex – with knock-on effects for bail deliberations and bail outcomes.

ii) Person-based Bail Cases: The Narrative (and the Cases) Become More Complex

As charges accumulate in a case, bail outcomes tend to shift toward detention (both formal and informal). Indeed, as subsequent sets of charges are combined into a single bail case, these cases become increasingly complex (in terms of the number and types of charges), accused may be considered “riskier” by court practitioners, and for many administration of justice charges, reverse onus provisions come into effect – all of which might be expected to favour detention outcomes. Because the person dataset generally records the most serious bail outcome in these broader bail cases, one might consider these data to be, more often than not, the final bail outcome in a case⁴⁹⁰. As with the event dataset, analyses were conducted first for all possible outcomes of the bail process, followed by formal determinations of bail only.

Perhaps unsurprising within this context, among all possible bail outcomes, both bail populations shifted toward remand-based bail outcomes (Table 5.28(g)). Yet this shift was more marked in the Gladue bail population. No longer were the two bail groups similarly likely to end the bail process in remand. Rather, person-based Gladue bail cases were slightly more likely than their conventional bail counterparts to remain in remand (40.1% versus 36.2%). Yet, Gladue bail cases were still marginally less likely than conventional bail cases to be formally detained – just as they were in the event dataset. Indeed, the difference between bail populations in this broad remand category is rooted in the informal detention category (30.0% versus 24.7%). Hence, as charges accumulate – and when considering all possible bail outcomes – Indigenous accused in Gladue bail court are still less likely than conventional bail cases to be formally detained but are more likely than their counterparts to simply waive bail all together and remain in pre-trial detention without a formal bail decision. Gladue bail cases were also more likely than conventional bail cases – in fact, more than twice

⁴⁹⁰ See footnote 312 for a reminder of how this variable was produced and aggregated and footnote 314 for a practical illustration of the aggregation process for a hypothetical case in both the event and person datasets.

as likely – to end the bail phase with a guilty plea and, correspondingly, were considerably less likely to be granted bail than conventional bail cases.

While longitudinal trends showed some progress in terms of both bail populations moving away from remand outcomes (Figure 5.9) and toward bail being granted (Figure 5.10)⁴⁹¹, these trends were considerably steeper and more consistent in the conventional bail population than in the Gladue bail population. Hence, while changes in bail practices and court culture during the study period benefitted bail cases overall, these shifts were less strongly realized in the Gladue bail population, despite the specialized nature of these courts. The result is that – despite this apparent progress in terms of bail outcomes – the disparity between bail populations actually increased in terms of the likelihood of remaining in remand or being granted bail.

Among cases with a formal determination of bail only, bail outcomes in the person dataset again shifted toward detention and more markedly for Gladue bail cases than conventional bail cases (Table 5.28(h)). This, yet again, supports the assertion that these broader Gladue bail cases are more likely than conventional bail cases to include charges stemming from two or more charging informations. Perhaps unsurprisingly, the disproportionate presence of subsequent charges and greater complexity of Gladue bail cases seem to have significant and detrimental consequences for bail outcomes in this group. Person-based Gladue bail cases were slightly more likely than their conventional bail counterparts to be denied bail (21.7% versus 18.3%) and less likely than their counterparts to be granted bail (78.3% versus 81.7%).

Overall, it appears that judges and practitioners in Gladue Court continued to be making concerted efforts to release Gladue bail cases, when reasonable and feasible. However, it also appears that judges' hands become increasingly tied as bail cases accumulate charges and become more and more complex. Indeed, study results also found that the greater the number of charges in bail cases, the more likely these cases are to be denied bail (e.g., only 12.3% of single-charge cases were formally denied bail compared to

⁴⁹¹ These longitudinal trends might be considered “progress” in that study findings demonstrate that bail cases in Old City Hall and College Park Courthouses are generally not especially serious in nature (e.g., in terms of the presence of violent charges or other serious charges, the number of charges in a case, etc.). Furthermore, the fact that there were more remand prisoners than sentenced prisoners in provincial/territorial correctional facilities throughout the entire study period clearly suggests that efforts must be made to reduce recourse to remand and remedy this confounding reality.

39.3% of cases with seven or more charges – Table 5.28(i)). To the extent that subsequent charges are commonly administration of justice charges, this would also reduce the likelihood of bail (recall that bail cases with this offence type were more likely to be formally detained than bail cases generally – Table 5.28(j)). Indeed, regression analyses show that these factors – as well as the presence of violent charges and property charges – were statistically significant predictors of formal bail outcomes (Table 5.48). Importantly, however, these same analyses found that Gladue Bail Status was not a statistically significant independent predictor of bail outcomes. Hence, while Gladue bail cases in the person dataset were slightly more likely than conventional bail cases to be refused bail, these differences cannot be explained by bail court type (and by extension, Indigenous identity), but rather by the case characteristics outlined above. That is, it seems that the disproportionate accrual of charges among Gladue bail cases renders bail deliberations more complex, with the consequence that judges may no longer be able to reasonably grant bail under these circumstances.

And yet, among cases with a formal bail decision, the differences between bail populations were notably somewhat more limited than they were when considering all possible bail outcomes. This is true even within the longitudinal trends, in which Gladue bail cases tend to be less likely than conventional bail cases to be granted bail, but with the disparities between populations increasing only slightly over time (as both groups became increasingly likely to be granted bail – Figure 5.12). These findings suggest that, although Gladue Court professionals are slightly more likely to deny bail as charges are added to a case, the accumulation of charges in the person dataset actually has a greater effect on bail outcomes which are considered largely outside of judicial officers' direct control (e.g., waiving bail or pleading guilty).

The finding that Indigenous accused in Gladue bail cases are disproportionately likely to ultimately waive bail and remain in remand custody until case resolution, as well as end the bail process with a guilty plea, finds support in the literature. Indeed, while Clark's (2016b) Old City Hall Gladue Court study did not have a non-Indigenous comparison group, this author nevertheless observed that "[t]here is a fundamental question that should be addressed [...]: why are some Aboriginal accused persons not applying for bail and not entering a not-guilty plea when, in many cases, they should be doing both?" (p.4). This scholar suggests

that this tendency might be explained by many Indigenous peoples' mistrust and cynicism toward the criminal justice system. As such, Indigenous accused in Gladue court may be particularly likely to simply "give up" on the prospect of bail or a fair trial. This mindset appears to be especially true as charges accumulate and release seems less probable. Indeed, accused persons from Gladue Court may have such little faith in the court process that they resign themselves to what they feel is inevitable: (informal) detention and/or a finding of guilt. While this rationale for waiving bail and pleading guilty has been documented among accused persons generally (e.g., Grech, 2011; Pelvin, 2017), these feelings may be especially prevalent among Indigenous accused in light of their experiences of settler colonialism and the many ways in which Canadian institutions have and continue to mistreat and discriminate against them (see Carling, 2019).

In terms of those who do not formally seek bail, another explanation might be rooted in the issue of enhanced credit for time served. Indeed, under the *Truth in Sentencing Act* (2009), individuals who were formally denied bail in several specific circumstances (e.g., for having breached a condition of bail or committed an indictable offence while on bail), were ineligible for any enhanced credit beyond 1:1 credit for their time served in pre-trial custody. Although this Act also set the default credit for time served as 1:1, unless the circumstances justified the new 1.5:1 cap, the Supreme Court in *R. v. Summers* (2014) later interpreted these circumstances generously and in such a way that 1.5:1 credit for time served effectively became the standard credit, except in the specified circumstances above. In light of these *Truth in Sentencing Act* provisions – and particularly from 2014 onward – some accused persons would opt not to apply for bail so as to not risk formal detention. In this way, they would remain eligible for enhanced credit for time served in the case that they expected to eventually be convicted and sentenced to a term of imprisonment.

Since Indigenous accused in Gladue bail cases were more likely than their conventional bail counterparts to have charges for breaching bail (see section 6.2.2 above), this population might be especially susceptible to waiving bail for this reason. Notably, however, these exceptions to eligibility for enhanced credit for time served (e.g., if denied bail for breaching a bail condition, etc.) were removed from the *Criminal Code* in 2018, such that this potential contributor to the disparities between Gladue bail and conventional

bail populations in terms of informal remand outcomes may no longer apply. Regardless of the various possible explanations for this trend, their consequences for Indigenous overincarceration are significant. Not only does the greater tendency of Gladue bail cases to waive bail lead to their disproportionate presence in remand custody, but given the relationship between remand, guilty pleas, convictions and custodial sentences (see Euvrard & Leclerc, 2017; Kellough & Wortley, 2002; Webster, 2022; see also section 6.5.2 below), one would expect this bail outcome to have trickle down effects on the sentenced custodial population, as well.

Importantly, just because an accused person feels that bail release is unlikely does not mean that release is not possible – recall the more modest differences between bail populations when examining cases with a formal bail decision. Yet by choosing not to seek bail, criminal justice professionals are not afforded the opportunity to consider possible release options. That is, practitioners cannot attempt to produce more equitable formal bail outcomes – a task in which they have notably demonstrated some success – for cases which do not apply for bail and come before them for a formal bail decision. Potential interventions must therefore be considered to not only continue to find ways of releasing Indigenous accused persons on bail, but also to encourage Indigenous accused in Gladue Court to seek bail in the first place, so that these specialized courts have a potential opportunity to make a difference in bail outcomes and beyond.

In particular, the study findings juxtaposing event and person datasets further highlight the problematic nature and disproportionate presence of charges against the administration of justice as well as the need for targeted interventions to reduce the prevalence of these charges. Indeed, administration of justice charges almost certainly represent a non-trivial proportion of the subsequent charges disproportionately present among Gladue bail cases and thus contribute to their reduced likelihood of being granted bail. In terms of expanding the ability of Gladue Court (and conventional bail court) to release accused on bail, measures must be taken to reduce the presence of these types of charges (see section 6.2 above). Perhaps an even more challenging task, however, is how to target those accused persons who simply do not apply for bail and encourage them to do so. To the extent that Gladue bail cases were more likely than

conventional bail cases to waive bail due to eligibility for enhanced credit for time served included in the since-removed *Truth in Sentencing* legislation, some progress may have already occurred. In order to sufficiently target these individuals, though, more research is needed. Interviews with Indigenous peoples who have chosen not to pursue bail should be conducted in order to explore the particular reasons why this population is disproportionately making these choices and therefore the types of changes or supports which might lead them to seek bail.

Overall, it seems that Gladue Courts are trying to release Indigenous accused persons on bail when possible. Yet, differences in case complexity eventually limit their ability to do so. These findings have important downstream effects on case processing and case outcomes, with significant implications for both remand and sentenced custody, which will be discussed in section 6.5 below. Yet before examining these downstream effects, more attention must be given to the concerning finding that Indigenous accused in Gladue Court were significantly more likely than conventional bail cases to end the bail phase with a guilty plea – a finding which almost certainly contributes to Indigenous overincarceration in the sentenced custody population and one which may be especially challenging to remedy.

6.4 – Disproportionate Guilty Pleas among Gladue Bail Cases

Gladue bail cases from Old City Hall and College Park courthouses were more than twice as likely as cases from conventional bail courts to end the bail process with a guilty plea, although this bail outcome was reasonably uncommon overall (Tables 5.28(a) and 5.28(g)). This finding is again consistent with Clark's (2016b) research on the Old City Hall Gladue Court specifically. It is also in line with the broader literature on guilty pleas (and false guilty pleas) which contends that Indigenous peoples plead guilty to charges at rates which are disproportionate to those of other Canadians (e.g., AJI, 1991; Bressan & Coady, 2017; Carling, 2017; *R. v. CK* (2021); RCAP, 1996; Rudin, 2006, 2022). Moreover, just over one quarter of all Gladue bail cases that resulted in at least one finding of guilt (either as a guilty plea or a finding of guilt following trial) appear to have entered a guilty plea while still at the bail phase (see footnote 377). This indicates that a fairly significant portion of Indigenous persons actually plead guilty quite early in the court process.

These early guilty pleas are especially concerning as their timing suggests little opportunity for negotiations with the Crown (although there may be some degree of sentencing discount offered for an early guilty plea). Limited occasion for plea bargaining may therefore mean that those pleading guilty very soon after charges are laid are pleading to more charges, or more serious charges, than those who plead later in court processing following greater opportunity for discussions and negotiations with the Crown. These findings relating to bail outcomes might also reasonably extend beyond bail to case processing more generally. Indeed, Gladue bail cases were more likely than conventional bail cases to be resolved with at least one finding of guilt (Tables 5.39(a) and 5.40(a)). Although case outcomes in this study did not distinguish between guilty pleas versus findings of guilt following a trial, given the relatively low prevalence of trials (Table 5.36), it is likely that these differences in case outcomes are rooted at least partially in Gladue bail cases' disproportionate guilty plea rates overall.

Certainly, the greater likelihood of guilty pleas among Gladue bail cases at the bail phase complicates this study's premise that the overincarceration of Indigenous peoples may be addressed through interventions upstream at bail. Indeed, when Indigenous accused plead guilty so early in the court process, and before applying for bail, Gladue Court professionals have limited opportunity to intervene at this stage. However, there are any number of explanations as to why Indigenous peoples in Gladue bail court (and in the court literature generally) appear to be more likely than others to plead guilty, and to do so early. One must also consider the possibility that a non-trivial proportion of these guilty pleas actually represent false guilty pleas. Broadly, false guilty pleas are guilty pleas which occur despite factual innocence. False guilty pleas are often induced as a result of systemic pressures within the criminal justice system (e.g., deplorable conditions of remand custody, exorbitant financial costs associated with trials) which render a guilty plea the least objectionable option for an accused person, despite their innocence (see Carling, 2017; Roach, forthcoming; Webster, 2022; see also Euvrard & Leclerc, 2017; Gallop, 2021; Leclerc & Euvrard, 2019). Indeed, many of the potential explanations explored in this section run a significant risk of encouraging false guilty pleas.

First, some of the differences between Gladue bail and conventional bail cases in terms of their likelihood of ending the bail phase in a guilty plea may be rooted in Canada's settler-centric legal system and the cultural differences which exist between many Indigenous and Western conceptions of harm, responsibility and justice (see Cariboo-Chilcotin Justice Inquiry, 1993; Milward, 2008; Monchalin, 2016; Sinclair, 1994; Rudin, 2022). For instance, the emphasis in many Indigenous cultures on taking responsibility for one's actions may lead Indigenous peoples to claim responsibility and plead guilty to offences for which they are not legally culpable (Carling, 2017; Rudin, 2006, 2022). Similarly, Indigenous accused may simply not be fully aware of their due process rights in the Canadian legal system, such as the right to silence, the right to counsel and the right to a fair trial (Carling, 2017; RCAP, 1996).

Second, Indigenous peoples' lack of trust in the court process and feelings that the legal system is unfair and/or discriminatory (Cariboo-Chilcotin Justice Inquiry, 1993; Carling, 2017; Clark, 2016b; Milward, 2008; *R. v. CK* (2021); Task Force of Alberta, 1991; TRC, 2015) might lead them to plead guilty at greater rates in order to expedite what they consider to be an inevitable outcome (see Carling, 2017). Third, when faced with the possibility of excessive or onerous bail conditions which may be experienced as punitive (see Schumann et al., 2013) and/or which would be difficult to follow, some accused persons may prefer to plead guilty rather than risk accruing breach charges and becoming further entangled in the criminal justice system. If Indigenous accused are more likely to be facing these types of conditions, this distinction might therefore contribute to their disproportionate guilty pleas.

Fourth, it is also likely that the conditions of remand are contributing to the prevalence of guilty pleas overall. Indeed, it is not uncommon for remand prisoners to plead guilty in order to escape the harsh conditions of remand for the comparatively better conditions of sentenced custody, or an anticipated non-custodial sentence (see Euvrard & Leclerc, 2017, Kellough & Wortley, 2002; Pelvin, 2017). Particularly for those who already have a criminal record, there may be little to lose from a guilty plea and short sentence (Gallop, 2021). Yet as section 6.5 will demonstrate, this general explanation for guilty pleas may not be able

to account for much – if any – of the greater prevalence of guilty pleas in Gladue bail versus conventional bail cases.

Finally, a fifth potential explanation which may partially account for the differences in guilty pleas for Gladue bail and conventional bail cases is rooted in access and types of legal representation. To the extent that these Indigenous accused are less likely than accused from conventional bail courts to have (i.e., afford) private legal counsel, they may not receive the same degree of attention or level of representation. By extension, this population may be more encouraged toward (or perhaps, less discouraged from) pleading guilty than cases with privately-retained defence counsel (see Bressan & Coady, 2017; Carling, 2017; see Pelvin, 2017 for discussion of this relationship generally)⁴⁹².

Notably, Carling (2017) has proposed extensive amendments to the *Criminal Code* provisions governing guilty pleas which she feels would help to safeguard against false guilty pleas in particular, with specific attention to preventing false guilty pleas among innocent Indigenous peoples. This scholar suggests numerous thoughtful and innovative amendments to guilty plea provisions, along with detailed rationale for how these provisions would reduce false guilty pleas generally, and for Indigenous peoples in particular. Among these suggestions is the requirement that judges be satisfied that the facts of a case support the charge, that an interpreter *must* be provided where there is any indication of language struggles, that judges must specifically consider known causes of wrongful convictions, and – perhaps most radically – that a plea amicus must be appointed for all self-identified Indigenous peoples and others considered vulnerable to false guilty pleas, who would meet with the accused in order to prepare a report addressing the validity of the guilty plea.

Disproportionate guilty pleas among Indigenous accused in Gladue bail court have serious implications for sentenced custody and the overrepresentation of Indigenous peoples in correctional facilities. Moreover, this study finding also has concerning implications for Indigenous peoples' criminal records, which may accumulate at a greater pace than similarly charged individuals from conventional bail courts. This is

⁴⁹² The data on preliminary inquiries (Table 5.35) and trials (Table 5.36) – both of which were less common among Gladue bail cases – might be interpreted as supporting this theory.

particularly true for Indigenous accused who are more likely than their conventional bail counterparts to plead guilty early at the bail phase and who therefore may not benefit to the same extent from Crown negotiations and the potential withdrawal of some charges. Importantly, any differential increase in criminal convictions – and perhaps especially convictions for offences against the administration of justice – would also be expected to reduce the likelihood of bail release for any future charges (Snowball, Roth & Weatherburn, 2010; Weatherburn & Snowball, 2012), potentially increasing the probability of subsequent conviction, as well as limiting sentencing options which could be handed down for any future convictions.

Yet there may be a small sign of progress in this regard. Longitudinal analyses of bail outcomes suggest that, despite some moderate increases in the proportion of guilty plea outcomes among Gladue bail cases from 2006-2014, this figure actually decreased from 2014-2017 (Figure 5.11). Moreover, the difference between Gladue bail cases and conventional bail cases in terms of this bail outcome consequently narrowed over these latter years of the study period. However, these changes are relatively modest and may be short-lived (and notably apply only to guilty pleas at the bail phase). Indeed, additional targeted efforts are needed to continue and expand this more recent downward trend in the Gladue bail population.

However, interventions to address disproportionate (and, to some extent, likely false) guilty pleas among Indigenous peoples (in Gladue Court and beyond) are complicated. Indeed, there are almost certainly many – likely overlapping – causes. A first step would be to conduct further research on this topic, particularly interviews with Indigenous peoples who have pleaded guilty (particularly those who have pleaded guilty at the bail phase) and are willing to share their thought processes and reasons for this choice. To the extent that Indigenous peoples are disproportionately pleading guilty in order to avoid excessive, onerous, or otherwise unreasonable bail conditions, many of the recommendations made earlier in this chapter may prove to be somewhat effective. Increased funding for legal aid services might also be expected to improve access to justice and quality of legal representation for Indigenous peoples.

Yet the question remains as to whether discouraging guilty pleas at this point in court processing would likely have an effect on final case outcomes. That is, if an Indigenous accused person was encouraged to seek

bail rather than plead guilty right away, would that person then want and/or have the time and the means to fight their charges (especially if they are living in poverty and unable to retain private counsel)? One might imagine the answers to these questions would also depend on whether the individual was granted or denied bail. These considerations in regard to whether someone would even consider the process of preparing a legal defence and potentially going to trial to be a worthwhile endeavour echo Feeley's (1979) classic work: *the process is the punishment*. Indeed, for many persons preparing their criminal cases for adjudication, the court process is taxing and onerous, full of costs of many kinds – lawyer fees, but also lost wages, seemingly unproductive time spent in court and stress. In the face of these various punishing costs, many accused persons will simply choose the least painful (or at least the most expedient) path. Certainly, policymakers and practitioners will need to be cautious when attempting to address this issue. It is important to avoid delaying early guilty pleas in such a way that they simply become later guilty pleas. Even more crucially, we must ensure that we do not discourage early guilty pleas for Indigenous accused persons only for these individuals to be released on bail with excessive and/or onerous conditions which might reasonably lead to breach charges, such that these individuals arguably end up worse off than if they had pleaded guilty initially. Indeed, any remedies to the greater likelihood of pleading guilty among Gladue bail cases (and Indigenous accused more generally) must consider the proverbial 'big picture' in order to avoid creating greater (or even similar) problems downstream.

6.5 – The Downstream Effects of Bail Outcomes on Court Processing and Case Outcomes

Study results find support for the literature on the downstream effects of bail outcomes on subsequent court processing and case outcomes. In particular, bail decisions appear to have an effect on both case processing times as well as the likelihood of conviction. These downstream effects have significant implications for both remand and sentenced custodial populations and are likely contributing to the overrepresentation of Indigenous peoples in Canadian prisons (see also Mitchell & Webster, 2023).

6.5.1 – Bail Outcomes and Downstream Case Processing

Study findings on post-bail court processing in Old City Hall and College Park courthouses suggest a significant relationship between bail outcomes and case processing times. Overall, bail cases that remained

in remand at the end of the bail phase (encompassing both formal and informal detentions) were resolved considerably faster than those released on bail (Tables 5.31(b) and 5.31(c)). Indeed, whereas 43.8% of bail cases that remained in remand were resolved within a month of bail, only 4.1% of bail cases granted bail were resolved in this short timeframe. There are several possible explanations for this general relationship. Some of the differences in processing times for these two types of bail cases might simply be explained by the pragmatic directive that practitioners prioritize in-custody cases over out-of-custody cases due to the deprivations of liberty and greater harmful effects associated with the latter. On the surface, the shorter processing times for cases remaining in remand suggest that many of these cases are resolved with a guilty plea (which may be given at virtually any time in case processing and may reflect various degrees of Crown negotiations and plea bargaining)⁴⁹³. In contrast, the longer processing times for cases granted bail likely reflect, at least to some extent, greater use of certain more time-consuming court procedures, such as preliminary inquiries and trials⁴⁹⁴, as well as the possibility of more aggressive plea bargaining for accused persons who are released into the relative comfort of the community.

Although detained cases tended to be resolved more quickly than released cases within both bail populations, the moderating effect of bail outcomes on post-bail processing times appeared to be weaker for Gladue bail cases than for conventional bail cases⁴⁹⁵. That is, although cases awaiting resolution in remand

⁴⁹³ This supposition is corroborated by study findings. Notably, remand cases that were resolved in less than a month were overwhelmingly resolved with at least one finding of guilt and associated sentence (83.5% of these Gladue bail cases being resolved with a finding of guilt or 89.7% of conventional bail cases – footnote 358). Given this early stage in court processing, these cases would almost certainly be the result of a guilty plea. Indeed, case completion occurring less than one month following the completion of bail would virtually always mean that there would not be sufficient time to schedule or prepare for a trial. This supposition is further supported by the findings that 0% of these remand cases resolved in less than a month ended in an acquittal (an outcome only available following the completion of a trial). In contrast, of the small proportion of released bail cases resolved in less than a month, less than half of these cases in either bail population ended with a finding of guilt and associated sentence (with charges otherwise likely stayed or withdrawn).

⁴⁹⁴ While a trial is obviously available to *all* accused persons, and not just those released on bail, findings showed that remand cases were considerably less likely to include a trial in the OCJ compared to cases granted bail (see footnote 373). Indeed, it is likely that the harsh conditions of remand (as well as barriers to preparing a legal defence) would reduce the number of accused persons comfortable in pursuing this option, as trials may take place many months (if not longer) after the completion of bail due to the required legal preparations and scheduling constraints. These types of delays may be comparatively more tolerable for those individuals who have been released on bail and are living in the relative comforts of the community, where they likely also have better access to any legal representation.

⁴⁹⁵ To illustrate the differential effect of remand on Gladue and conventional bail cases, consider that Gladue bail cases remaining in remand required an average of 173.51 days (median = 96) to reach resolution whereas Gladue bail cases

required less time to be resolved overall, Gladue bail cases in remand tended to require *more* time to be resolved than conventional bail cases in remand (e.g., on average 173.51 versus 123.69 days, see also Table 5.31(c)). In contrast, whereas cases granted bail required longer to be resolved overall, Gladue bail cases granted bail tended to require *less* time to be resolved than conventional bail cases granted bail (e.g., 257.14 versus 288.63 days, see also Table 5.31(b))⁴⁹⁶.

To the extent that longer resolution times among released bail cases may be partially attributable to the presence of certain criminal court procedures, the shorter post-bail processing times for released Gladue bail cases compared to conventional bail cases may be attributable to the differential presence of these court processes. Indeed, Gladue bail cases overall were less likely than their conventional bail counterparts to include a preliminary inquiry (Table 5.35), to include at least one trial appearance in the Ontario Court of Justice (Table 5.36) and to have their case eventually traversed to the Superior Court of Justice for trial (Table 5.39(a)). These trends also suggest that accused persons in Gladue bail cases may not fight charges as vigorously as those from conventional bail courts. This could be due to a general lack of faith in the criminal justice system, a desire to end potentially onerous conditions of bail or more limited access to legal representation (on these issues, see section 6.4 above). Whatever the reason, these findings may have concerning consequences on case outcomes and be contributing to Gladue bail cases' greater likelihood of ending in at least one conviction (54.6% – Table 5.39(a)).

Yet in the context of the overincarceration of Indigenous peoples, understanding the reasons for the apparent differential effect of remand on Gladue bail cases versus conventional bail cases would seem

granted bail required an average of 257.14 days (median = 189) to reach resolution – reflecting a difference of 83.63 days for Gladue bail cases depending on their bail outcome. In contrast, this figure was substantially higher for conventional bail cases. Specifically, conventional bail cases remaining in remand required an average of 123.69 days (median = 47) to reach resolution whereas conventional bail cases granted bail required an average of 288.63 days (median = 248) to reach resolution – reflecting a difference of 164.94 days for conventional bail cases depending on bail outcome.

⁴⁹⁶ While one might be tempted to assume that the shorter post-bail processing times of released Gladue bail cases compared to released conventional bail cases would translate into this group being less likely to receive bail breach charges (given the shorter window of opportunity), study findings demonstrated that this was clearly not the case. That is, despite Gladue bail cases being on bail for somewhat shorter periods of time than conventional bail cases, they were nevertheless more likely to include bail breach charges. This further underscores the need to urgently address the overwhelming and disproportionate prevalence of bail breach charges and other charges against the administration of justice, with interventions targeted specifically at reducing these charges within Indigenous peoples' cases.

especially important. Specifically, how can we explain the finding that (formally and informally) detained Gladue bail cases spend more time in remand while awaiting case resolution than do their conventional bail counterparts? It is possible that the more complex charge packages of Gladue bail cases (in terms of ultimately having a greater number of charges, and specifically, administration of justice charges) compared to their conventional bail counterparts might require more time to be resolved. One might also consider whether persons facing charges in Gladue bail cases may experience greater challenges in retaining and advising legal counsel compared to those in conventional bail cases (perhaps rooted in a greater use of legal aid), as well as the likelihood that the commissioning of Gladue Reports (which take longer to prepare than more generic Pre-Sentence Reports) may be extending the period of time required for Indigenous persons in remand to be sentenced. Whatever the reasons, this finding that detained Gladue bail cases spend longer in remand custody than conventional bail cases has significant implications for the overincarceration of Indigenous peoples. Indeed, not only were Indigenous accused from Gladue bail cases more likely than their conventional bail counterparts to remain in remand until case resolution (Table 5.28(g)), their time in remand also tended to be longer than that of their counterparts.

6.5.2 – Bail Outcomes and Downstream Case Outcomes

Study findings also demonstrate the relationship between bail outcomes and case outcomes. Indeed, whether a bail case was detained (formally or informally) or granted bail affected their likelihood of conviction. Overall, bail cases that remained in remand were substantially more likely than those that were released to ultimately be resolved with at least one finding of guilt and associated sentence (Tables 5.40(b) and 5.40(c)). Whereas 74.1% of all bail cases that remained in remand ended in at least one sentence, only 36.6% of cases that were released on bail had this outcome. This relationship was observed in both Gladue bail and conventional bail populations. Logistic regression analyses also found support for this general relationship between bail outcomes and case outcomes (Table 5.49). In fact, a remand bail outcome (versus release outcome) was – by far – the strongest independent predictor of a case ending in one or more convictions.

This relationship between bail outcomes and case outcomes was generally anticipated, given the considerable literature exploring this topic. In particular, the differences between remand and released bail cases in terms of the likelihood of conviction are almost certain to be at least a partial reflection of the coercive power of remand custody to extract guilty pleas. Reflecting this, remand cases – and particularly those remand cases which were resolved in a relatively short period of time – were overwhelmingly likely to end in a finding of guilt (see footnote 355). Indeed, there is a considerable body of literature which asserts that the often harsh and deleterious conditions of remand custody induce (potentially false) guilty pleas (e.g., Edkins & Dervan, 2018; Friedland, 1965; Euvrard & Leclerc, 2017; Kellough & Wortley, 2002; Leclerc & Euvrard, 2019; NCW, 2000; Pelvin, 2017; Rudin, 2006; Webster, 2022). For instance, accused persons in remand may plead guilty, and often fairly early in court processing, in order to escape the harsh conditions of remand custody and limit the collateral consequences of imprisonment (e.g., deleterious effects on family, employment, housing, etc.), whether through an anticipated non-custodial sentence or a move to the anticipated better living conditions of sentenced custody (see Euvrard & Leclerc, 2017; Leclerc & Euvrard, 2019; Kellough & Wortley, 2002; Pelvin, 2017; Webster, 2022). Others in remand might abandon any plans to defend themselves due to challenges associated with preparing a legal defence while in custody (e.g., retaining and communicating with a lawyer, gathering evidence or locating witnesses; see Pelvin, 2017; Webster & Doob, 2012).

Yet, as with case processing times above, study findings suggest that bail outcomes have a differential effect on Gladue bail cases and conventional bail cases – at least in Old City Hall and College Park courthouses. Although the Gladue bail population – for both remand and released cases – was more likely than the conventional bail population to be resolved with at least one finding of guilt, the moderating effect of bail outcomes again appeared to be weaker within the Gladue bail population (Tables 5.40(a), 5.40(b) and 5.40(c)). To help illustrate, 76.9% of detained and 47.9% of released Gladue bail cases were sentenced, reflecting a difference of 29.0%, whereas 74.0% of detained and 36.3% of released conventional bail cases were sentenced, reflecting a greater difference of 37.7%. In particular, the experience of formal or informal

detention appears to adversely affect the likelihood of conviction similarly in both bail populations (76.9% versus 74.0%). However, the experience of being granted bail seems to benefit Gladue bail cases less than conventional bail cases, as released Gladue bail cases were nevertheless considerably more likely than conventional bail cases to receive a sentence (47.9% versus 36.3%).

The fact that Gladue and conventional bail cases were similarly affected by remand in terms of likelihood of conviction may speak to the tremendous power of remand to induce guilty pleas. That is, whatever underlying factors may be contributing to the greater disparities between released Gladue bail and conventional bail cases in terms of conviction rates, these factors may simply be overridden by the experience of pre-trial detention (see Edkins & Dervan, 2018 for an empirical examination of how considerations of pre-trial detention tend to outweigh many other factors which would have otherwise made a guilty plea unappealing). Said differently, for accused persons in remand custody, concerns relating to harsh living conditions, collateral consequences (in terms of employment, housing, family, etc.) and barriers to accessing justice may weigh similarly heavily on all those in remand. While the minor differences in the likelihood of conviction for Gladue bail and conventional bail cases awaiting resolution in remand would nevertheless have some downstream effects on Indigenous overincarceration, it is the greater disparities among released bail cases (compared to detained cases) which arguably warrant greater attention.

Indeed, even though released cases were less likely to be convicted overall, the greater disparity in conviction rates between bail populations on this measure would likely have a more substantial impact on Indigenous overincarceration (at least in terms of sentenced custody) than those disparities among detained cases⁴⁹⁷. While a finding of guilt does not necessarily lead to a custodial sentence, it is clearly the direct gateway to it. Further, recall that this sentence type was not only the most common sentence given in this study, but also considerably more common among sentenced Gladue bail cases than their conventional bail

⁴⁹⁷ Furthermore, when one combines the considerable disparities between bail populations with the overall occurrence of this bail outcome, the sheer number of cases granted bail would also be expected to have a significant effect on the overrepresentation of Indigenous peoples in custody. Indeed, this bail outcome was the most common outcome for bail cases overall. Moreover, this outcome was more common than (combined) remand outcomes in the conventional bail population, and only slightly less common than (combined) remand outcomes in the Gladue bail population (Table 5.28(g)).

counterparts (Table 5.41(b)). These findings notably have potentially troubling implications for Canada's efforts to remedy Indigenous overincarceration. Indeed, even when Gladue Court judges are able to release Indigenous accused on bail, these accused persons are nevertheless significantly more likely than those from conventional bail cases to ultimately receive one or more findings of guilt and associated sentence. Said differently, any successes in producing substantively equitable bail outcomes in Gladue Court will not necessarily translate into substantively equitable downstream effects⁴⁹⁸.

There are two general pathways which are likely to be contributing to this phenomenon among released bail cases. The first is that Indigenous accused released on bail in Gladue Court are almost certainly more likely than their conventional bail counterparts to be convicted as a result of a guilty plea. Indeed, the finding that Gladue bail cases were disproportionately likely to end the bail phase with a guilty plea, and very probably more likely to plead guilty overall, has been discussed in section 6.4 of this Chapter. While this discussion was not limited to only those individuals granted bail, many of the possible explanations offered for this occurrence would certainly apply to this released population.

The second pathway through which released Gladue bail cases may disproportionately receive a finding of guilt is at trial⁴⁹⁹. While trials were less common among Gladue bail cases (Table 5.36), this procedure was nevertheless present in nearly 12% of these cases and could therefore still have a non-trivial effect on case outcomes. Indeed, some judges and juries⁵⁰⁰ may have unconscious biases which are reflected

⁴⁹⁸ In principle, bail decisions are rooted in deliberations of risk, while case outcomes reflect considerations of guilt. Hence, most considerations which are relevant to bail would not be expected to factor into deliberations of guilt. Within this context, it is – in theory – not inherently problematic that released Gladue bail cases are more likely to be convicted than released conventional bail cases, as the factors which affect bail are generally different than those which affect guilt. A notable exception, however, may be related to the tertiary ground for detention, which seeks to maintain public confidence in the administration of justice. Specifically, s.515(10)(c)(i) of the *Criminal Code* instructs judicial officers deliberating bail and considering this ground to have regard for “the apparent strength of the prosecution’s case”, which one might expect to be correlated (at least to some degree) with case outcomes. Yet it is equally relevant to this argument that trials in which guilt is carefully considered are relatively uncommon (Table 5.36) and most convictions are the result of guilty pleas, which may not always involve the same level of deliberation.

⁴⁹⁹ See footnote 373 for a discussion of how cases remaining in remand were considerably less likely than those granted bail to include a trial in the OCJ.

⁵⁰⁰ While trials are fairly uncommon in Canada generally, jury trials are especially rare (with most trials instead being tried by a judge sitting alone). Indeed, Dufraimont (2008) estimates that there are only roughly 4000-5000 jury trials across the country annually, such that these trials occur in less than 1.0% of all criminal court cases. Notably, however, jury trials tend to be used for some of the most serious criminal cases (e.g., trials for murder, treason and other indictable offences of under s.469 of the *Criminal Code* are generally required to be tried by a jury) (Dufraimont, 2008).

in (and contribute to) the finding that released Gladue Court cases are more likely than their conventional bail counterparts to receive one or more convictions. While one might suggest that such biases may find their root in continuing racist settler notions of Indigenous people's perceived dangerousness on the part of some court actors, an arguably even more common cause of unconscious biases against Indigenous peoples may be rooted in the nation's settler-centric Western justice system specifically. Indeed, Indigenous defendants may not always behave in ways which conform to Western expectations of how innocent or remorseful people should behave such that they may fare less well at trial (see Ross, 1991; Sinclair, 1994; Rudin, 2022). Indeed, recall Sinclair's (1994) observation that those "who do not behave 'appropriately' or who show little emotion may find that they are 'dealt with' differently or achieve different results than those who react in ways expected by the system" (p.14). Moreover, language barriers – for accused as well as any witnesses (who one might reasonably expect to also be more likely to be Indigenous) – may affect an Indigenous accused person's ability to defend themselves and may therefore contribute to their greater likelihood of conviction (AJI, 1991; Currie, 2003; Task Force of Alberta, 1991; Razack, 2015; Rudin, 2022). It is also possible that certain case characteristics more common among Gladue bail cases (e.g., greater number of charges, greater presence of charges against the administration of justice) may predispose judges or juries to view these individuals as more risky, more dangerous or more culpable (Rudin, 2022; see also Webster, 2023; for general discussion of the 'halo effect' broadly, see Koza & Doob, 1976).

In terms of policy recommendations, many of the potential interventions which might be expected to reduce Gladue bail cases' greater likelihood of conviction overall – for cases in remand custody as well as those granted bail – would be the same as those discussed in section 6.4 above which address disproportionate guilty pleas specifically. To the extent that Indigenous persons in Gladue bail cases may be disproportionately likely to be convicted at trial, the mandating of additional training for judges and other criminal justice professionals (e.g., issues affecting Indigenous peoples at bail, broader issues of cultural competency and unconscious bias and how to avoid it) would, again, seem important (see also section 6.2 above). While such training would have a limited effect on jury trials (which are admittedly very rare),

policymakers might consider requiring additional directions be added to a judge's instructions to the jury which might call attention to the issue of unconscious bias and how to prevent any biases from affecting deliberations of guilt (see also Rudin, 2022)⁵⁰¹. Efforts should also be taken to ensure greater representation of Indigenous peoples on juries, who have long been underrepresented as jurors (AJI, 1991; *R. v. Chouhan* (2021))⁵⁰². Finally, given that the differential effects of bail outcomes on both case processing and case outcomes were somewhat unanticipated, more research is needed to understand the sources of these differences so that more targeted interventions may be developed.

Overall, study findings highlight the important and influential role of bail decisions on court processes occurring downstream. Bail cases that are detained (whether formally or informally) are resolved more quickly than cases granted bail and largely through guilty pleas. Moreover, many of the findings in this section interact in ways which contribute to the overrepresentation of Indigenous peoples in custody. Indeed, not only were Gladue bail cases more likely than conventional bail cases to have a remand outcome, but detained Gladue bail cases stayed in remand for longer than their conventional bail counterparts and were ultimately more likely than their counterparts to end in at least one conviction, which would increase the likelihood of then disproportionately affecting the sentenced custodial population. Even when Gladue bail cases are released on bail and spared longer stays in remand, this population was considerably more likely than the conventional bail population to be resolved with at least one finding of guilt, with likely knock-on effects for sentenced custody. In light of these relationships, it is not difficult to understand how the overincarceration of Indigenous peoples has come to proliferate in both remand and sentenced custody.

⁵⁰¹ For a broader discussion of the application of Gladue principles at trial, see Rudin (2022).

⁵⁰² This phenomenon has been partially attributed to the discriminatory use of peremptory challenges to exclude Indigenous jurors – a practice which was abolished by the federal government in 2018. For a more detailed discussion of this practice, its effect on Indigenous juror representation and the rationale for removing peremptory challenges, see *R. v. Chouhan* (2021). For a discussion of some of the specific barriers (and potential solutions) to the representation of First Nations peoples from northern Ontario on juries in this province, see the Independent Review Conducted by the Honourable Frank Iacobucci (2013).

6.6 – The Limitations of Upstream Interventions at Bail on Sentencing

Notwithstanding the admirable and fairly successful efforts of Gladue Court professionals to produce substantively equitable bail outcomes – particularly in the face of extensive and disproportionate charges against the administration of justice and increasingly complex cases – and despite the substantiated downstream effects of bail outcomes, these bail-oriented interventions in Toronto Gladue Courts appear to have limited effect on later case outcomes and sentencing decisions. While differences in bail outcomes between Gladue bail cases and conventional bail cases were relatively minor, differences between these bail populations were considerably starker when considering case outcomes and sentence types, including custodial sentences.

6.6.1 – Greater likelihood of Conviction among Gladue Bail Cases

Nearly two thirds of all Gladue bail cases in Old City Hall and College Park courthouses ended with at least one finding of guilt. More importantly, these cases were considerably more likely than conventional bail cases to be resolved in this way (66.5% versus 54.6% – Table 5.39(a)). Moreover, regression analyses indicated that Gladue bail status was a statistically significant independent predictor of case outcomes (Table 5.49). These findings have concerning implications for the overrepresentation of Indigenous peoples in correctional facilities. Even if sentencing judges are handing down custodial sentences equally to Gladue bail cases and conventional bail cases, the greater prevalence of Gladue bail cases being convicted would necessarily lead to a greater proportion of Gladue bail cases being sentenced to custody. More concerning still, while the percentage of Gladue bail cases ending the court process with at least one sentence actually decreased very slightly over the study period, this figure decreased more consistently and much more substantially in the conventional bail population. The effect is that the disparities between bail populations actually grew wider during this period (Figure 5.13). That is, while trends over time were ostensibly benefitting both Indigenous peoples in Gladue bail cases and largely non-Indigenous people in conventional bail cases, these trends were less pronounced in the Gladue population and actually led to this population faring comparatively worse than conventional bail cases over time.

Notably, these broad case outcomes are, in some ways, only within limited control of judges. Indeed, trials were relatively uncommon overall, and even less common for Gladue bail cases. This means that only a relatively small proportion of cases with a finding of guilt would have been convicted by a judge following a trial. A much greater proportion of these cases would have been convicted as a result of a guilty plea (with or without any plea bargaining). While the judiciary ultimately determines whether to accept a guilty plea, judges are generally encouraged not to reject a joint submission unless it is deemed to be contrary to the public interest and/or would bring the administration of justice into disrepute (Manson, 2001)⁵⁰³. The apparent role of guilty pleas in producing Gladue bail cases' greater likelihood of conviction therefore highlights, yet again, the need to consider targeted interventions to reduce Indigenous peoples' recourse to pleading guilty (particularly at the bail phase) and to safeguard against the possibility of false guilty pleas (see section 6.4 above).

Aside from convictions, the next most common (most serious)⁵⁰⁴ case outcomes were to have charges withdrawn, followed by having charges stayed. Notably, Gladue bail cases were less likely than conventional bail cases to have a withdrawn charge as their most serious case outcome (20.4% versus 33.1%) but were more likely than conventional bail cases to have a stayed charge as their most serious case outcome (10.1% versus 5.4% – Table 5.39(a)). However, when one combines these outcomes, Gladue bail cases benefit less overall from these outcomes than conventional bail cases (30.5% versus 38.5%).

The prevalence of charge withdrawals and stays as the most serious outcome in a case is notably fairly substantial – representing nearly a third of all (most serious) case outcomes for Gladue bail cases and just over a third of case outcomes for conventional bail cases. One might suggest that this prevalence may be explained – at least partially – by police simply laying inappropriate charges (e.g., not just redundant charges,

⁵⁰³ Although on this issue, recall the recommendations of Carling (2019) discussed in section 6.4 within the context of Indigenous peoples' disproportionate guilty pleas and efforts to prevent false guilty pleas.

⁵⁰⁴ Note that these case outcomes reflect the *most serious outcomes* in person cases and are thus not likely to simply be evidence of plea bargaining whereby one might expect one or more charges to be stayed or withdrawn in exchange for one or more guilty pleas and associated sentence. Furthermore, having a charge withdrawn was considered a more serious case outcome than having a charge stayed (in that stayed charges can technically be reopened; see footnote 378 for the complete ranking of outcomes). Consequently, it is technically possible that some cases that have a withdrawn charge as their most serious case outcome may have also had one or more charges stayed.

but charges that are just not supported by the facts of the case) at the outset of a case. Another potential explanation might be that some cases have their (primarily less serious) charge(s) stayed or withdrawn by a Crown in recognition of an already lengthy period of remand custody which would exceed the length of any anticipated sentence (such that the Crown has already effectively extracted the sanction).

More importantly for the comparative purposes of this study, explanations for these disparate case outcomes must also be considered. Perhaps most obviously, Gladue bail cases' greater likelihood of having charges stayed compared to that of conventional bail cases is almost certainly (at least partially) a reflection of the specific practices associated with the diversionary Community Council program offered to Indigenous peoples in the Toronto area through Aboriginal Legal Services (recall that completion of this programming typically results in charges being stayed; see Clark, 2016b). This finding is encouraging as it suggests that a non-trivial percentage of Indigenous peoples' criminal cases are being diverted out of the criminal justice system⁵⁰⁵. Diversionary programming such as the Community Council program ought to continue to be made available to accused persons in the criminal justice system, and to Indigenous accused in particular. Consideration should also be given to providing additional funding to support expanded access and eligibility to diversionary programming. Given the many collateral consequences of a criminal conviction, and in light of Indigenous peoples' overincarceration, significant efforts should be made to divert Indigenous peoples from the formal, settler-centric justice system as often and as expeditiously as possible.

In contrast, the reasons for Gladue bail cases' lesser likelihood of having charges withdrawn (as the most serious case outcome) compared to conventional bail cases are perhaps less obvious. This finding may quite simply be a partial reflection of Indigenous accused from Gladue bail cases being more willing to plead guilty to charges than those from conventional bail cases. Gladue bail cases' slightly greater likelihood of ultimately remaining in remand while awaiting resolution might also reasonably be expected to pose barriers to preparing a legal case which may also disadvantage them when it comes to withdrawals. Indeed, Kellough

⁵⁰⁵ Note that one might expect this figure to be even higher among the more general court population (i.e., not just bail cases, which may be deemed more serious or otherwise more risky than criminal cases which do not begin court processing in bail court).

and Wortley (2002) found that bail cases detained in remand custody were significantly less likely to have all charges dropped compared to those released on bail. Furthermore, the difference in withdrawals might also be related to unequal access to legal representation, whereby accused in Gladue bail cases may be less likely to have a privately-retained lawyer willing and able to negotiate vigorously with the Crown. Similarly, this difference might be partially explained by the accused person's ability and willingness to engage fully in the court and plea bargaining process, which can be costly and time-consuming as well as mentally exhausting.

Broadly, the prevalence of so many withdrawals and stays (as the most serious outcome in a case) also raises concerns regarding the use of court resources as well as remand and detention centre resources. To give a sense of the court and remand resources used by these cases, consider that among cases that ended the bail process with all charge(s) being withdrawn, stayed or dismissed, more than one-in-five reached this bail outcome only after nine or more days in the court process (Table 5.28(e)). Notably, cases that receive these outcomes at bail would have spent all of their time up until this decision was made in remand custody. Yet these cases whose charge(s) were dropped at bail are not even representative of all cases with these outcomes. That is, only a relatively small proportion of cases for which the most serious outcome was having charges dismissed, stayed or withdrawn received this outcome at the bail phase (see footnote 378). Indeed, Doob et al. (2017) and Webster & Doob (2004) have noted that these outcomes generally require significant court resources (in terms of appearances) before they are resolved. Furthermore, at least some of these cases would be expected to have been detained in pre-trial custody for non-trivial periods until this decision was made, with significant implications for not only remand custody counts, but also in terms of the resources (and costs) associated with operating these facilities.

Consideration should be given to ways of reducing charge withdrawals (as the most serious outcome in a case) by avoiding the laying of inappropriate or unnecessary charges at the outset. Indeed, if police are laying too many charges with little likelihood of conviction, unfounded deprivations of liberty could be avoided, and court and remand resources could be saved by avoiding these charges all together. One might therefore consider some type of pre-charge screening which could be performed by Crown counsel in certain

circumstances in order to ensure that charges are largely appropriate (e.g., in terms of being supported by the facts of the case as available at the time, not risking the criminal justice system falling into disrepute) – currently a reality in only three Canadian jurisdictions. Even without adopting a full-fledged charge screening requirement, any Crown screening provisions might be tailored to only specific types of charges which most often lead to stays or withdrawals. In terms of withdrawn charges more generally (i.e., not necessarily as the most common case outcome), the more recent *Criminal Code* amendments which created the possibility of judicial referral hearings as an alternative to laying new charges for many alleged offences against the administration of justice might also be expected to reduce cases that end with charges being dropped in some way (if embraced widely and equitably). Indeed, recall that these amendments now allow for individuals who are alleged to have breached bail or probation, or not appeared for a scheduled court date, to avoid subsequent charges – which might have otherwise been laid only to later be dropped.

6.6.2 – Continued Disproportionate Prevalence of Custodial Sentences

Despite s.718.2(e) of the *Criminal Code*, the applicability of Gladue principles, and other efforts to reduce recourse to imprisonment for Indigenous peoples, those Indigenous peoples from sentenced Gladue bail cases were considerably more likely than their largely non-Indigenous conventional bail counterparts to be handed down a sentence that included one or more terms of imprisonment (Table 5.41(a))^{506,507}. In fact,

⁵⁰⁶ Note that many (if not most) of the Indigenous accused who opted to have their bail case processed in Gladue Court would also likely opt to be sentenced in Gladue Court. Hence, one might expect the differential rates of custodial sentences between bail populations to be more similar here than these figures might be in other courthouses where Gladue Courts and their specially trained criminal justice actors are not available. Indeed, in courtrooms and courthouses where legal practitioners have less training and less experience applying Gladue principles (often because of the lower proportion of Indigenous persons that make up their caseloads), the differences between bail populations in terms of the presence of a custodial sentence may be even greater. In this sense, the figures in this study may actually represent some level of success in reducing recourse to custodial sentences for Indigenous peoples compared to that found in courthouses broadly.

⁵⁰⁷ While custodial sentences were more common within the Gladue bail population than the conventional bail population, note that data were not available on the length of these sentences. Some research suggests that Indigenous peoples' custodial sentences tend to be shorter than those of non-Indigenous people (see Weatherburn & Snowball, 2007; Sprott et al., 2023). However, some of these differences may be attributable to issues such as Indigenous peoples' greater presence in remand, such that (enhanced) credit for time served may cause this population's time in sentenced custody to appear shorter. Moreover, some of these custodial sentences may represent sentences served entirely in pre-trial detention (such that an offender was sentenced to "time served"). Indeed, recall Knazan's (2003) reminder that "there can be no sanction other than imprisonment if, because of pre-trial detention, the offender has already been imprisoned for a period proportional to the gravity of the offence and is sentenced to time served" (p.5). See also Rudin

more than four-in-five Gladue bail cases that were sentenced on at least one charge received a term of imprisonment. These findings are compounded by the earlier finding that Gladue bail cases were also more likely than conventional bail cases to be resolved with at least one finding of guilt. Indeed, when considering sentenced bail cases only, the difference between Gladue bail and conventional bail cases in terms of the presence of a custodial sentence was only moderate, and notably for a smaller number of cases (82.4% versus 73.8% = 8.6%; N = 77,159). In contrast, these differential rates of recourse to custodial sentences combine with the disproportionate conviction rates above (section 6.6.1) to produce a much greater disparity between bail populations when considering all bail cases (54.8% versus 39.8% = 15.0%; N = 141,709; Table 5.41(b)). Hence, study findings highlight the ways in which disproportionate findings of guilt (and especially guilty pleas) help to fuel the phenomenon of Indigenous overincarceration. Indeed, Gladue bail cases' greater likelihood of conviction compared to conventional bail cases appears to be a powerful pathway to Gladue bail cases' greater likelihood of imprisonment. This finding further highlights the need to research and develop targeted interventions to address disproportionate guilty pleas within the Indigenous population. One might consider some of the interventions proposed earlier in this chapter, including the need to mandate additional training for criminal justice professionals which addresses issues facing Indigenous peoples in the justice system and ways of recognizing and safeguarding against unconscious bias.

Study findings showed that custodial sentences were by far the most common sanction handed down for Old City Hall and College Park bail cases overall, and in both bail populations specifically (Table 5.47)⁵⁰⁸. The next most common type of sanction – a probation order – was considerably less common in both bail populations, with the third most common sanction – a fine – being even less common. In light of the

& Roach (2002) for a broader discussion of how general patterns in length of imprisonment for Indigenous and non-Indigenous offenders may be misleading at first glance.

⁵⁰⁸ Notably, the overwhelming prevalence of custodial sentences generally among sentenced bail cases should not necessarily be interpreted as judges being 'tough' on offenders. This trend might also suggest that courts are striving to (and having some success in) diverting less serious cases out of the justice system and thereby avoiding a finding of guilt and associated sentence for these cases. In the case that courts are, in fact, diverting a significant proportion of less serious cases out of the justice system (which might have received non-custodial sentences, if found guilty), this would potentially translate into the cases remaining in the system – and by extension those eventually convicted on one or more charges – being of a more serious nature, such that they are deemed less suitable for non-custodial sanctions.

pervasiveness of custodial sentences among the bail population, any efforts to move away from these sanctions in order to remedy the overrepresentation of Indigenous peoples in custodial facilities will be especially difficult. Indeed, the majority – 54.8% – of Indigenous peoples who had their bail processed in Gladue Court (versus only 39.8% of conventional bail cases) ended up not only being convicted but also sentenced to a term of imprisonment (Table 5.41(a)). It looks as if once Indigenous peoples enter the bail process, and perhaps the court process more generally, all roads seem to lead to custody⁵⁰⁹.

Notably, longitudinal analyses showed a modest decrease in the proportion of sentenced Gladue bail cases that included a custodial sentence from 2013-2017 (after earlier overall increases from the beginning of the study period). While at first glance this trend would appear promising, sentenced conventional bail cases actually experienced a consistent, albeit gradual, decline in recourse to imprisonment during the entire study period (Figure 5.14). The effect is that the difference between bail populations in terms of the proportion of sentenced bail cases with a custodial sentence was actually greater in the final years of the study than it was in the early years. While the more recent downward trends in recourse to custody for sentenced Gladue bail cases are encouraging, more work must be done to close the growing gap between Gladue bail and conventional bail cases.

These longitudinal findings mirror other longitudinal trends between Gladue bail and conventional bail cases, such as those relating to bail outcomes (Figures 5.9 through 5.12) and the presence of one or more convictions and associated sentences in a case (Figure 5.13). Namely, even when situations are trending in a direction that benefits Indigenous peoples in Gladue bail cases (e.g., fewer denials of bail, fewer cases with one or more convictions, fewer custodial sentences), these beneficial trends seem to be even more pronounced among conventional bail cases, such that Indigenous peoples actually become comparatively worse off over time. This generalized pattern has, in fact, been observed in many criminal justice contexts,

⁵⁰⁹ It is important to note that some of these differences in recourse to imprisonment are likely to be at least partially explained by circumstances which are considered to be legitimate legal factors, such as a case's charge package, the offender's criminal history and any history of previous correctional contact (see Weatherburn & Snowball, 2007; Sprott et al., 2023). See section 6.6.4 for greater discussion of how these and other factors might be effectively tying judges' hands in ways which arguably restrict their ability to hand down non-custodial sentences generally, and for Indigenous peoples specifically.

including youth imprisonment data (Campbell, Rudin & Webster, forthcoming; Statistics Canada, 2023b)⁵¹⁰. These patterns further highlight the need to develop and implement more targeted measures of addressing Indigenous overincarceration which are specific to the unique realities of Indigenous peoples and their imprisonment.

6.6.3 – Promising Sentencing Trends

Admittedly, the study findings on case outcomes and custodial sentences do not appear promising. In fact, sentenced Gladue bail cases were more likely than their conventional bail counterparts to include at least one of all of the most serious sentencing options – that is, custodial sentences, conditional sentences and probation orders (Table 5.47). Moreover, these Gladue bail cases were also substantially less likely than their conventional bail counterparts to receive the least serious sentencing option – (absolute and conditional) discharge (2.3% versus 11.3%)⁵¹¹. Despite some of these more troubling findings, there is nevertheless evidence which suggests that judges are, in fact, making efforts to craft non-custodial sentences, and avoiding imposing sentences which would cause undue hardship, when possible and where appropriate.

i) Judicial Support for the Conditional Sentence as an Alternative to Custody

Recall that the conditional sentence is a sentencing option that was introduced to the *Criminal Code* in 1996 (at the same time as s.718.2(e)) as an alternative to custody and amid calls to reduce Canadian imprisonment rates. This sentencing option was expected to be used to a greater extent with Indigenous offenders (Roach & Rudin, 2000) and was anticipated to be a tool to help address Indigenous

⁵¹⁰ Indeed, youth imprisonment rates have decreased substantially overall since the introduction of the Youth Criminal Justice Act (YCJA) in 2003 (Campbell, Rudin & Webster, forthcoming; Webster, Sprott & Doob, 2019). While the average counts of youth in custodial facilities have been decreasing in both the Indigenous and non-Indigenous populations, this decrease is fairly modest in the Indigenous population whereas it is very steep in the non-Indigenous population (Campbell, Rudin & Webster, forthcoming; Statistics Canada, 2023b). Hence, Indigenous youth are accounting for an increasingly larger proportion of youth in (both sentenced and remand) custody, despite the actual decrease in these raw numbers. While the YCJA had a decarcerative effect on youth imprisonment in both populations, it would seem that this legislation's mechanisms are more generalized in nature than specifically constructed in a way that benefits Indigenous youth in particular.

⁵¹¹ This finding is likely to be at least partially related to the probable differences between these bail populations in terms of criminal records. Another possible (partial) explanation is that the use of the Community Council diversion program among Gladue bail cases (which typically results in a staying of charges) may lead to fewer less serious Gladue bail cases receiving one or more findings of guilt, such that there would be fewer candidates deemed suitable for discharges downstream at sentencing.

overincarceration (Reid, 2017). In fact, in Old City Hall and College Park courthouses, Indigenous accused in Gladue bail cases were more likely than those in conventional bail courts to receive this sanction (Table 5.42). Moreover, longitudinal trends demonstrate that judges actually became increasingly more likely to hand down this sanction to Gladue bail cases compared to conventional bail cases up until 2012, at which time the presence of this sentence decreased for both populations – albeit at a greater rate for Gladue bail cases (Figure 5.15). The sudden, but much more marked, decrease in the presence of conditional sentences for Gladue bail cases than conventional bail cases notably coincided with the passing of legislative amendments which significantly limited eligibility for this sentencing option (see Webster and Doob, 2019) in ways which seem to have disproportionately and negatively affected Indigenous offenders⁵¹².

Hence, it would seem that judges were largely embracing conditional sentences as a way of breathing life into s.718.2(e) provisions and attempting to reduce Indigenous overincarceration, at least until their hands became tied by legislative amendments and their discretion correspondingly restricted. In fact, the greater decrease in this sentence among the Gladue bail population than the conventional bail population at this time suggests that judges had been disproportionately utilizing this sentencing option for what might be considered more serious cases⁵¹³. This again lends credit to the idea that – despite the broader trends in custodial sentences – sentencing judges have, in fact, been trying to craft non-custodial sentences, when possible and where appropriate, for Indigenous offenders.

Notably, eligibility for the conditional sentence has once again been re-expanded, albeit only since 2022⁵¹⁴ after the study timeframe. Hence, this sentencing option may still have a role to play in addressing

⁵¹² Indeed, the TRC (2015) seemed to recognize the disproportionate and deleterious effects that these restrictions on eligibility for the conditional sentence were likely to have on Indigenous offenders when they issued their 32nd call to action: “We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences”.

⁵¹³ Recall that these 2012 amendments made many offences which are considered more serious in nature ineligible for this sentencing option, including any offence punishable by 14 years imprisonment or more; drug production and trafficking offences and offences involving use of a weapon which are punishable by 10 years imprisonment or more; and 11 specific offences, including sexual assault, theft over \$5000 and certain types of break and enter offences. That these 2012 amendments seemingly led to a greater decrease in the use of the conditional sentence for Gladue bail cases suggests that this sentencing option had previously been used for these more serious offences to a greater extent in the Gladue bail population than in the conventional bail population.

⁵¹⁴ See Bill C-5: *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 2022

Indigenous peoples' overrepresentation in penal institutions. Yet judges and practitioners must be careful to safeguard against the possibility of net-widening (see Gemmell, 1997; Roach & Rudin, 2000; Webster and Doob, 2019). In the context of conditional sentences, net-widening (or expanding the punitive reach of the criminal justice system) might happen in a couple of different ways.

First, Webster and Doob (2019) warn that criminal justice professionals must be careful not to impose a conditional sentence on cases which would have otherwise received a non-custodial sanction such as a term of probation and/or a fine. The second avenue for net-widening relates to how conditional sentences are enforced. Breach mechanisms for a conditional sentence order allow for (among other options) the conditional sentence order to be terminated and the offender to be committed to custody for the remainder of the sentence in the case that the court is satisfied, on a balance of probabilities, that the offender has breached a condition of their order. However, the length of a conditional sentence is importantly not determined by the term of the custodial sentence which might have otherwise been imposed, such that conditional sentences are often imposed for a term that is longer than that which might have been imposed for a custodial sentence (Manson, 2001). Hence, an offender who breaches a condition of their conditional sentence order may end up spending a longer period in custody than had they been handed down a custodial sentence in the first place (Roach & Rudin, 2000). Indeed, just as this research has repeatedly advised against imposing conditions of bail or conditions of probation which are unreasonable and/or might set someone up for failure, restraint must also be used when crafting conditional sentence orders. In particular, Roach & Rudin (2000) have explicitly cautioned against the imposition of onerous treatment or "healing" conditions on Indigenous offenders, who may be more likely to be caught allegedly in breach them and, by extension, spend the remainder of their sentence in custody.

ii) Judicial Creativity in the face of Undue Hardship and the Victim Fine Surcharge

Despite the continued disproportionate presence of custodial sentences among Gladue bail cases, the longitudinal data on the presence of fines (Figure 5.17) and the victim fine surcharge (Figure 5.18) support the notion that judges nevertheless appear to consider the circumstances of an offender and make efforts to

avoid imposing sentences which would be likely to cause undue hardship. Indeed, while the cross-sectional data showing that sentenced Gladue bail cases were more likely than their conventional bail counterparts to be handed down at least one fine (Table 5.45) were initially somewhat surprising, examination of the data on the victim fine surcharge (Table 5.46) soon shed important light on this finding. In fact, the longitudinal trends were particularly illuminating.

Indeed, the presence of a fine at sentencing was quite low from 2006 to 2013 (for both bail populations, but especially Gladue bail cases), after which time it skyrocketed⁵¹⁵. These trends largely mirror those relative to the presence of the victim fine surcharge, with a similar sudden increase in prevalence from 2013 onward. Indeed, these longitudinal trends almost certainly reflect the creative sentencing practices embraced by judges in Old City Hall and College Park courthouses in response to the victim fine surcharge being made mandatory in late 2013 (whereas it could previously be waived in cases of financial hardship)⁵¹⁶. Indeed, as the presence of the victim fine surcharge climbed to near 100%, judges developed and embraced strategies which involved the imposition of small fines in order to minimize the financial burden of this surcharge on offenders who may not realistically be able to pay (see also *R. v. Michael* (2014)). Specifically, for cases in which it was expected that the standard statutory surcharge of \$100 for every summary conviction or \$200 for every indictable conviction would cause financial hardship, judges would instead impose a small fine (for example \$10) for each conviction, such that the surcharge would then be reduced to 30% of that fine. Hence a single conviction with a \$10 fine would lead to a \$3 victim surcharge (for a total of \$13), compared to \$100 or \$200 otherwise.

These practices – once again – imply that sentencing judges are mindful of offenders’ circumstances and potential struggles (both generally, but seemingly for Indigenous offenders, in particular) and wish to avoid imposing undue burdens or punishment on those of limited financial means⁵¹⁷. Taken together, the

⁵¹⁵ In fact, fines were less common in the sentenced Gladue bail population compared to the sentenced conventional bail population prior to 2013, whereas this relationship noticeably reversed after this point.

⁵¹⁶ For a discussion of the victim fine surcharge, its history and relevant caselaw, see footnotes 400 and 401.

⁵¹⁷ These findings which demonstrate judicial commitment to notions of fairness are arguably in spite of the demonstrably “tough on crime” orientation of this legislation (which was, in fact, deemed unconstitutional by the Ontario Court of Justice in *R. v. Michael* (2014), and later by the Supreme Court in *R. v. Boudreault* (2018)). Given that

findings on conditional sentences as well as fines and the victim fine surcharge seem to suggest that judges are making efforts to craft sentences which can be considered fair vis-à-vis the offenders' circumstances, which are not excessively punitive, and – when possible – are non-custodial. Hence the limited reduction in custodial sentences for Gladue bail cases should not be viewed as a failure rooted in judges' unwillingness to embrace the principles of restraint which underlie s.718.2(e) of the *Criminal Code* and associated Gladue principles. Instead, these trends in custodial sentences are almost certainly a reflection of the limited ability of judges to craft non-custodial sentences on a larger scale.

6.6.4 – Are Judges' Hands Tied at Sentencing?

In light of the limited successes of sentencing-based interventions in remedying the overrepresentation of Indigenous peoples in Canadian prisons, this study turned its attention upstream to the bail phase of the court process. Given the multitude of ways in which decisions at bail may have far-reaching consequences for both case processing and case outcomes, this research sought to explore whether interventions at bail – and particularly in Gladue Court – could have important impacts downstream on sentencing decisions which have contributed to the disproportionate use of custody for Indigenous offenders. In fact, findings suggest that Gladue Courts are having some success in overcoming some of the settler-centric and discriminatory underpinnings of the bail system in order to produce bail outcomes which are substantively equitable to those produced in conventional bail courts. Yet in spite of the apparent successes of Old City Hall and College Park Gladue Courts when intervening at bail, Gladue bail cases were nevertheless considerably more likely than conventional bail cases to end in conviction and to receive a custodial sentence.

Even so, analyses of other sentencing options such as conditional sentences and fines indicate that there does appear to be judicial motivation to craft sentences which, when possible, avoid custody as well as undue hardship. While one might expect the successes upstream at bail to combine with this judicial

the provisions in s.718.2(e) arguably better align with these principles of fairness, one might expect judges to be especially willing to take steps to ensure that they are crafting sentences which are fair and do not cause undue hardship, and to the extent possible, avoid recourse to imprisonment.

motivation in order to reduce the number of Gladue bail cases with a custodial sentence (such that the proportion of Gladue bail cases with this sentence would be substantively equal to conventional bail cases), this did not, in fact, materialize. As such, one might suggest that other legal factors are (also) at play during sentencing deliberations which are limiting judicial ability to impose non-custodial sentences, even in the face of s.718.2(e) and Gladue principles.

A number of studies examining individuals who have been sentenced to custody would suggest that there are, in fact, several important and seemingly legitimate legal factors which not only predispose Indigenous offenders to custodial sentences but may also be difficult to overcome in that they are widely accepted as relevant to sentencing decisions (e.g., Sprott et al., 2023; Snowball & Weatherburn, 2007). For instance, Snowball & Weatherburn (2007) produced several regression models in their study of the sentencing decisions in New South Wales, Australia which demonstrated that while Indigenous identity was a significant predictor of imprisonment, the effect of this factor diminished in each subsequent model as relevant legal factors were added. In particular, legal factors relating to the current case (e.g., conviction for a serious violent offence, the presence of three or more concurrent convictions), the presence of previous convictions and the presence of previous custodial sentences all reduced the predictor effect of Indigenous identity, indicating that these factors largely accounted for the initial predictive power of Indigenous identity. Additionally, Sprott et al.'s (2023) study of prisoners in Ontario correctional facilities identified many of the same factors as almost certainly contributing to Indigenous people's disproportionate presence in provincial sentenced custody. Specifically, Indigenous prisoners were more likely than their non-Indigenous counterparts to have had previous contact with corrections (in terms of previous time in remand custody, previous probation sentences, conditional sentences and custodial sentences), to have at least one administration of justice conviction and at least one violent conviction. Importantly, these factors are generally considered to be legitimate considerations when crafting a sentence.

The disproportionate presence of these ostensibly legitimate legal factors among Indigenous offenders may therefore arguably tie a judge's hands at sentencing and limit the types of sentencing options deemed appropriate in these circumstances⁵¹⁸. Indeed, Sprott et al. (2023) arrive at this same conclusion:

It may simply be that at this (late) stage in the criminal justice process, [judges'] proverbial hands may be tied – at least to some extent – by many Indigenous offenders' previous correctional background and/or contact as well as in the characteristics of their offence history and background to bring about any significant reduction in Indigenous imprisonment rates. (p.24)

In an effort to untie judges' proverbial hands, remedies that reduce disparities between Indigenous and non-Indigenous offenders in these areas – which notably are almost entirely rooted in differential histories of conviction and correctional contact – should be explored. Indeed, steps must be taken to give Indigenous peoples a more equal footing when it comes to available sentencing options. In fact, many of the policy recommendations already offered in this chapter would be expected to narrow the gaps between these populations when it comes to the likelihood of conviction (and its downstream effects on correctional contact). Specifically, recommendations for reducing disparities between Gladue bail and conventional bail cases in terms of the presence of charges against the administration of justice – which are likely to have downstream effects on convictions and sentencing – are offered in sections 6.2.1, 6.2.2 and 6.2.3. Recommendations addressing how we might reduce Indigenous peoples' greater likelihood of convictions overall (for those in remand custody as well as those granted bail) – which would likely impact correctional contacts – are offered in sections 6.5.2 and 6.6.1.

⁵¹⁸ And yet the present study has demonstrated that many of these factors – as well as their disproportionate presence among Indigenous offenders – appear to be at least partially produced through the bail process as well as the criminal justice system more broadly. Indeed, many of these factors are rooted in disproportionate criminal records. Consider the greater presence of charges against the administration of justice for Indigenous accused in Gladue bail cases (see section 6.2) and the fact that many of these charges are essentially fabricated by the courts through the imposition of often unreasonable conditions of bail and probation. These charges also notably reduce the likelihood of bail release, while the greater likelihood of pre-trial detention is associated with increased pressure to plead guilty (see section 6.5.2). Indeed, Gladue bail cases were more likely than their conventional bail counterparts to be resolved with at least one finding of guilt, which might be expected to contribute over time to disproportionate criminal records as well as previous types of correctional contact (see section 6.6.1). Within this context, the fact that charge packages and criminal and correctional histories are limiting judges' abilities to impose non-custodial sanctions – and therefore to address the overincarceration of Indigenous peoples – further reinforces the importance of addressing these disparities upstream.

However, policymakers and practitioners should also consider whether criminal records – particularly convictions for charges against the administration of justice – as well as past correctional contacts can be re-interpreted in such a way that does not effectively leave imprisonment as the only available sentencing option^{519,520}. Indeed, Maurutto & Hannah-Moffat (2016) have noted that sentencing policies which place heavy consideration on prior criminal record and may appear to be race-neutral actually result in significantly higher incarceration rates for racial minorities. Rogin’s (2017) suggestion that judicial officers deliberating bail ought to interpret any prior convictions within the broader context of Indigenous overrepresentation and settler colonial histories might therefore be extended to judges’ sentencing deliberations⁵²¹. That is, criminal records should not be taken at face value, particularly for Indigenous peoples. Rather, judges should consider the possibility that institutional bias, including the over-policing and over-charging of Indigenous peoples, may have contributed to any previous convictions, particularly those for failure to comply with conditions or failure to attend court. Moreover, criminal records must also be interpreted with an understanding of how settler colonial policies and practices have harmed Indigenous populations (and continue to do so) such that they are more likely to experience life circumstances which are associated with criminalized behaviours. In fact, research from Australia suggests that this is possible. Indeed, Snowball & Weatherburn (2007) found in their study of factors affecting imprisonment that judges appeared to place less weight on the extensive criminal records of Indigenous offenders compared to those of non-Indigenous offenders when determining a fit sentence.

⁵¹⁹ As part of this reconsideration, there may need to be a shift away from the unofficial jump principle (see Manson, 2001), which suggests that once an offender receives a custodial sentence, subsequent convictions for similar offences ought to receive lengthier terms of imprisonment.

⁵²⁰ Despite the push for the use of restraint in the use of custodial sentences, judges and practitioners should also remain mindful of the ways in which some non-custodial sanctions might actually contribute to the issue of Indigenous overincarceration, if not used carefully. For instance, while a probation sentence is ostensibly preferable to a custodial sentence, excessive or onerous conditions of probation, a lengthy term, and/or a requirement for reporting would all be expected to increase the probability of a breach charge and thus further entrenchment in the criminal justice system.

⁵²¹ Notably, this guidance has since been cited (and heeded) by the Ontario Superior Court of Justice in *R. v. EB* (2020). Albeit still in the context of bail, this decision addressed the need for contextualized consideration of offenders’ antecedents when weighing a criminal record in the context of bail and the secondary (and tertiary) grounds for detention. Specifically, this court argued that judges must consider the role of institutional bias and over-policing broadly, as well as that excessive and onerous conditions for any convictions of failing to comply with a court order, and that of addictions in convictions for drug offences.

Finally, judges' hands might also be tied at sentencing as a result of certain legislative provisions which have disproportionately and negatively affected Indigenous peoples. In fact, this chapter has already explored the ways in which legislative amendments that significantly restricted eligibility for the conditional sentence had a greater impact on Indigenous offenders than non-Indigenous offenders (see section 6.6.3(ii)). But even this example fails to capture other laws that also limit judges' ability to fully embrace s.718.2(e) and Gladue principles. The presence of statutory mandatory minimum sentencing provisions immediately comes to mind. This option is particularly worrisome, as mandatory minimum sanctions (MMS) (sometimes called mandatory minimum penalties) have proliferated in the *Criminal Code* over the last several decades, particularly under the Harper government's push for greater "tough on crime" laws. Broadly, MMS are legislated minimum sanctions which are determined by lawmakers and which set the base or minimum sanction ("the sentencing floor") for a particular offence and may specify the type of sanction as well as the term and severity of that sanction (Glynes Elliott & Coady, 2016). MMS can apply to specific offences, or to specific repeat offenders. Parkes (2012) has previously estimated there to be roughly 100 offences under the *Criminal Code* and *CDSA* which carry an MMS. This number is almost certainly an underestimate for the current decade.

Importantly, Parkes (2012) contends that mandatory minimum sentencing provisions have a disproportionately negative effect on racialized minorities. This legal scholar also argues that these provisions are greatly at odds with Gladue principles, as well as those expressed more explicitly in *R. v. Ipeelee* which emphasize the need for sentencing to be highly individualized in order to ensure proportionality (see also Department of Justice, 2017; MMIWG, 2019; Rudin, 2012, 2022). Indeed, MMS limit the extent to which judges are able to fulfill their duty to consider an Indigenous offender's unique circumstances and systemic background factors, as well as (in many cases) give consideration to any suitable alternatives to custody which might otherwise be deemed appropriate. Hence these provisions may require a judge to sentence an Indigenous person to a specified term of imprisonment when, under s.718.2(e), they would have crafted a

non-custodial sentence, or imposed a shorter term of imprisonment. MMS also notably preclude eligibility for conditional sentences.

Given the prevalence of MMS and the various ways in which these provisions reduce judicial discretion and limit the extent to which s.718.2(e) and Gladue factors may be applied, these provisions are almost certainly also contributing to Indigenous peoples' overincarceration in Canada. In fact, the TRC (2015) has echoed this statement. Policymakers must therefore take steps to repeal or otherwise remove mandatory minimum sentencing provisions from the *Criminal Code* and *CDSA* altogether. In this regard, there has been some (more recent) progress, including *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act* (2022) which removed 14 MMS from the *Criminal Code* (relating to firearms and other weapons) and all six MMS from the *CDSA* (relating to the unauthorized sale of tobacco products). In fact, in the Library of Parliament's (2022) legislative summary for this Act, which provided rationale for these amendments, MMS were explicitly recognized as disproportionately impacting Indigenous peoples and other racialized persons – and in such a way that likely contributes to their overincarceration. Despite this (limited) achievement, targeting all remaining MMS through legislative amendments would, by no means, be an easy task (both logistically and for political reasons).

However, both Parkes (2012) and Rudin (2012) have notably suggested that *Charter* challenges against MMS provisions might be effectively raised by Indigenous offenders in light of their disproportionate impact on this population. Within this context, *Charter* challenges may be yet another avenue for removing these provisions, albeit one that is likely more gradual than what might be needed. Parkes (2012) has specifically suggested that challenges under s.7 (life, liberty, and security of person), s.12 (not to be subjected to cruel or unusual treatment or punishment) and s.15 (equality before and under the law and equal protection and benefit of law) may be relevant to the provisions. Rudin (2012), in particular, has focused on the possibility of *Charter* challenges rooted in s.15, as MMS provisions arguably require judges to contribute to the ways in which Indigenous peoples are discriminated (for examples of successful s. 15 *Charter* challenges of MMS, see *R. v. Sharma* (2022) and *R. v. Turtle* (2020)). In addition to this admittedly slower approach, the TRC (2015)

has issued a call to action which might mitigate the disproportionate negative effects of these provisions on Indigenous offenders generally. Specifically, the TRC (2015) has called upon the federal government to amend the *Criminal Code* in such a way that would allow judges to depart from MMS (as well as restrictions on the use of conditional sentences) upon giving reasons (Call to Action #32). The TRC (2015) has also called for statutory exemptions from mandatory minimum sentences of imprisonment specifically for offenders with FASD (Call to Action #34). These might therefore be considered potential interim solutions (which might be justified under s.718.2(e) provisions or otherwise various sections of the *Charter*) to the much larger-scale problem of MMS in the Canadian legal landscape.

7 – CONCLUSION

7.1 – Where Do We Go from Here?

This dissertation finds its impetus in the longstanding overrepresentation of Indigenous peoples in Canadian penal institutions. As sentencing-based interventions have largely failed to improve this increasingly dire reality, this research project shifted its focus “upstream” in the criminal court process to the highly influential bail phase. Decisions made at bail not only affect the remand population, but also have been argued to significantly impact downstream case outcomes and sentencing, and so indirectly contribute to the sentenced population, as well. In particular, it was posited that specialized Gladue Courts may hold particular promise in the search for bail-oriented solutions to Indigenous peoples’ overincarceration. Indeed, these courts appear well-positioned to overcome (at least some of) the barriers to Indigenous peoples’ judicial interim release which are inherent in Canada’s settler-centric bail system. It was theorized that, to the extent that these courts are able to produce bail outcomes which are substantively equitable to those in conventional bail courts, these specialized Indigenous peoples’ courts may also contribute to more substantively equitable case outcomes and sentencing. That is, Gladue Courts’ bail functions may have a role to play in remedying the overrepresentation of Indigenous peoples in criminal custody.

This case study of two Toronto courthouses reveals both the successes and limitations of bail-oriented interventions in Gladue Courts. The good news is that analyses of two new longitudinal datasets suggest that Gladue Courts are finding success in facilitating largely equitable bail outcomes, particularly for those who formally seek bail. While this is likely to have a positive effect on remand counts for Indigenous peoples, the bad news is that several barriers to addressing overincarceration through bail nevertheless continue to exist. Notably, among Gladue bail cases the disproportionate presence of charges against the administration of justice and the disproportionate number of accused who plead guilty at bail, or otherwise do not apply for bail, all limit the potential impact that these specialized courts can have at bail.

Importantly, bail cases in Gladue Court did not generally require more court appearances (read: court resources) than those in conventional bail courts. And while these cases took slightly longer to complete the

bail process than those in conventional bail courts (almost certainly a partial reflection of more limited Gladue Court schedules), previous research suggests that accused persons from Gladue Courts typically felt that any additional processing time (and their more general experience in Gladue Court) was worthwhile (Clark, 2016b). It would seem, then, that the availability of Gladue Courts for bail processing is valuable and fulfilling a need. Funding of these courts should be continued and expansion to other courthouses should be considered.

However, despite the successes of Gladue Courts in terms of producing largely equitable bail outcomes, Indigenous accused in these bail cases remained significantly more likely than those in conventional bail cases to receive a sentence of imprisonment – a finding which is further exacerbated by Gladue bail cases also being more likely to be convicted in the first place. In other words, it would seem that upstream interventions at bail are not enough to completely overcome sentencing disparities for Indigenous peoples downstream – not even in courthouses in which most Indigenous accused are also sentenced in Gladue Court. And yet, there is evidence that judges are embracing s.718.2(e) provisions and Gladue principles. Study findings suggest that judges are attempting, when possible, to craft non-custodial sentences for Indigenous offenders, as well as considering individuals' circumstances in order to avoid causing undue hardship when sentencing. It seems likely, then, that there are other elements limiting the ability of sentencing judges to impose non-custodial sentences on Indigenous peoples. Indeed, judges' hands may be tied at sentencing by factors which are beyond the scope of bail (albeit potentially rooted in factors related to bail, such as breach charges) and largely outside of judges' control (at least at the time of sentencing).

First, Indigenous peoples in Gladue Courts are more likely than those in conventional bail courts to plead guilty to their charges, and often do not formally apply for bail. This not only limits the ability of Gladue Courts to intervene upstream, but also almost certainly contributes to this population's greater likelihood of conviction and overrepresentation in sentenced custody⁵²². More research is needed to explore the reasons

⁵²² While any move from remand custody to sentenced custody would technically reduce *remand counts*, the exchange of one form of custody to another can hardly be considered real progress, particularly when the latter involves criminal conviction and the downstream consequences associated with a criminal record (in terms of any future bail and sentencing decisions).

for this phenomenon and how policymakers and practitioners might encourage Indigenous peoples to delay or avoid pleading guilty and more fully exercising their due process rights.

Second, Indigenous peoples in Gladue bail cases are substantially more likely than their conventional bail counterparts to have charges against the administration of justice included in their case – charges which are associated with bail refusal (and thus remand custody) as well as conviction (and thus sentenced custody). Efforts must be taken to reduce these types of charges, particularly those for breaching bail and – perhaps especially – for breaching probation. These types of interventions would not only be important for Indigenous accused but would also likely benefit bail cases generally. The usefulness of imposing many conditions (including the mandatory probation condition to keep the peace and be of good behaviour) should be widely re-assessed and the need for unnecessary or extended periods of reporting and/or supervision should be reconsidered in view of the likelihood of discriminatory enforcement. The recent creation of judicial referral hearings should also be embraced as a mechanism to avoid laying additional charges for non-dangerous behaviour and to prevent further enmeshment in the legal system.

Third, the court system must find ways of reconceptualizing Indigenous peoples' criminal records in such a way that a history of convictions – and especially a history which consists primarily (or entirely) of offences against the administration of justice – does not automatically disqualify them from non-custodial sentencing (or, for that matter, release on bail). To the extent that a criminal record is traditionally considered to reflect dangerousness, risk, or disrespect for authority, Indigenous peoples are likely to be sentenced disproportionately to imprisonment. Instead, criminal records should be viewed within the broader context of settler colonialism. That is, judges should consider the extent to which any prior convictions may have stemmed, at least partially, from institutional biases or the devastating impacts of settler colonial practices on their life circumstances more broadly. Judges should also consider what effect, if any, Indigenous peoples' greater likelihood of pleading guilty may have had on the accumulation of convictions on an Indigenous person's criminal record.

Beyond these general areas for intervention, there are arguably two broad pathways forward in the search for remedies to the overrepresentation of Indigenous peoples in Canadian custodial facilities. One is to continue studying the criminal justice system and seeking targeted reforms. In addition to expanding the apparent success of Gladue Courts in processing bail cases and addressing some of the barriers to sentencing outlined above, one must also look even further upstream in the criminal justice system. Indeed, once many Indigenous individuals arrive in bail court (particularly if they have a criminal record and prior breach convictions), there may be little ability or opportunity to avoid eventual imprisonment. Said differently, by the time an Indigenous person enters the bail system, it may already be too late to effectively address Indigenous overincarceration.

Steps must therefore be taken further upstream, right at the watershed, to prevent Indigenous peoples from entering unnecessarily into the system, and so as to limit the number of cases which can eventually trickle down into remand and sentenced custody. That watershed (at least within the purview of the criminal justice system) is the police. Indeed, police patrolling and charging practices, as well as their release policies and practices, must be examined and reformed as efforts are taken to reduce institutional biases and the potential for over- (as well as under-) policing. Yet one's proverbial gaze should also be extended even further upstream – and outside of the direct scope of the justice system. Specifically, governments should also be investing broadly to address issues (rooted in settler colonial policies and practices) which disproportionately affect Indigenous peoples and almost certainly predispose them to involvement in the legal system (e.g., educational attainment, housing inequality, economic development, employment opportunities, substance abuse, etc.).

The second pathway might be considered a more radical one. However, we ought to also strive for more transformative solutions to Indigenous mass incarceration which empower Indigenous communities to take back control of their justice matters. Indeed, the *United Nations Declaration on the Rights of Indigenous*

Peoples (UNDRIP), which Canada has endorsed⁵²³, repeatedly affirms Indigenous peoples' right to self-determination, as well as their right to maintain their own juridical systems or customs (article 34). The TRC (2015) has also specifically called on the federal, provincial and territorial governments to recognize and implement (a diversity of) Indigenous justice systems in a manner that is consistent with Treaty and Aboriginal Rights, the *Constitution Act* and UNDRIP (Call to Action #42)⁵²⁴. The TRC (2015) also calls on the federal government to collaborate with Indigenous organizations to fund the creation of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice (Call to Action #50). While almost certainly a more complex and complicated pathway, requiring considerable thought, collaboration and time, it is an important one. In terms of starting points, one might turn to Cunneen and Tauri (2016), who offer a number of questions that settler colonial governments should discuss with Indigenous communities when seeking to enhance Indigenous authority and self-determination over justice matters.

Admittedly, the types of changes which may be implemented through the reform pathway may simply modify or tweak what would remain an essentially settler-centric legal system which is forcefully imposed on Indigenous peoples. Thus, this pathway alone will not be able to eliminate the very complex problem that is Indigenous overincarceration (and almost certainly overrepresentation throughout the justice system broadly). Indeed, one need only consider Canada's limited success in remedying this issue, so far, to realize this this pathway alone can only be a partial solution. Hence the need to tread the second pathway, to explore solutions outside of the Western justice system and seek to respect Indigenous peoples' rights to self-determination.

And yet, these types of transformations will not be straightforward, nor will they be quick or easy to implement. In the more immediate term, then, criminal justice reforms remain a reasonable and practicable

⁵²³ In fact, despite initial reluctance to fully endorse this resolution, Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* in 2021 which reaffirms the government's commitment to UNDRIP and provides a roadmap for its implementation.

⁵²⁴ These calls for the development of distinct Indigenous justice systems largely echoes similar calls to action made in earlier commissions and inquiries, including the Osnaburgh/Windigo Tribal Justice Review (1990), the Aboriginal Justice Inquiry of Manitoba (1991) and the Royal Commission on Aboriginal Peoples (1996).

option. Indeed, so long as reforms are rooted in an understanding of the complexity of Indigenous overincarceration, the role of settler colonialism and the nation's settler-centric justice system in producing this phenomenon, and are developed in collaboration with Indigenous communities, these actions can nevertheless have positive – and more immediate – impacts.

7.2 – Limitations of the Research

While several specific limitations of this study have been noted throughout this dissertation (e.g., lack of data on bail conditions, on legal representation, etc.), there are also a number of more general limitations to this research. Notably, this case study examines Gladue Courts and conventional bail courts in only two downtown Toronto courthouses. Study findings may therefore have limited generalizability to other Gladue Courts and courthouses. Indeed, each Gladue Court tends to be unique, with distinct policies and practices which are tailored to the community's particular needs (e.g., in terms of the referral process, accepted norms regarding the use of conditions, the availability of support workers and/or community service providers, etc.). Symptomatically, the features of Old City Hall and College Park Gladue Courts which have contributed to their success may not necessarily exist within all Gladue Courts. Furthermore, there tends to be considerable intra-jurisdictional variability when it comes to bail (e.g., Doob et al., 2017), even just across Ontario, such that the trends in conventional bail courts should also not be assumed to apply to all Ontario courthouses. Indeed, the types of cases and accused persons appearing in downtown Toronto courthouses, and the court culture within these courthouses, may be distinct and not comparable to many other court populations.

Another limitation of this research is the unavailability of MAG ICON data which could reasonably identify Indigenous peoples in conventional bail courts. These data would have been beneficial in that they would have allowed for valuable comparison of Indigenous accused persons processing in Gladue Court versus in conventional bail court. Strictly speaking, without these data one cannot technically conclude definitively that Indigenous peoples in Gladue Court are treated any better or receive more favourable outcomes at bail than they would in conventional bail court. And yet, in the absence of these data, the focus on the notion of substantively equitable bail processing and outcomes is a suitable alternative measure for

assessing Gladue Court success at bail. That is, given the literature on Indigenous peoples' negative experiences in the bail system, the presence of bail processing and bail outcomes in Gladue Courts which are largely equitable to those in conventional bail court can be considered indicative of these specialized courts' success.

Some limitations also exist with how Gladue bail cases have been identified in the dataset. Recall that while this variable specifically captures bail appearances in Gladue Court, there is no variable to independently measure sentencing appearances in these specialized courts. Certainly, one might expect that many, if not most, Indigenous peoples who opt to have their bail heard in Gladue Court would also opt to be sentenced in this court. However, this may not be the case for all individuals. Yet one might presume that the case outcomes for Gladue Bail Cases are largely a reflection of sentencing decisions made by Gladue Court judges. In this sense, despite the disproportionate presence of prison sentences among Gladue bail cases, one might expect these sentencing outcomes to be more progressive than they might be in other courthouses in which Gladue Courts are not available. That significant differences exist in the recourse to imprisonment for Indigenous peoples in these courthouses also speaks to the likelihood of, and extent to which, barriers exist which are restricting judges' ability to impose non-custodial sentences.

7.3 – Areas for Future Research

This research points to a number of important areas for future research. They can be broken down into two broad areas: research relating to Gladue Court operations and research into some of the apparent contributors to the overincarceration of Indigenous peoples in Canada. Given the unique qualities of each Gladue Court, research should be undertaken to examine Gladue Court operations in other locations (which would be expected to have different court practices and court cultures). To the extent that study findings continue to demonstrate the successes of Gladue Courts, this would provide further support for their creation, funding and potential expansion. Notably, in the first half of 2023, criminal court operations in Toronto shifted significantly, such that court operations from six Ontario Courts of Justice (including Old City Hall and College Park) have now been amalgamated into a single very large courthouse in downtown Toronto

– the Toronto Courthouse – which houses a specially designed Gladue Court which is equipped for Indigenous practices such as healing circles and smudging ceremonies. Another facility elsewhere in Toronto has begun processing the region's bail cases – the Toronto Regional Bail Centre – and also includes a Gladue Court for hearing Indigenous peoples' bail cases. Hence future research might specifically examine the functioning of bail within Gladue Court and conventional bail courts in this new context, recognizing that operations will almost certainly differ.

Several types of complementary research programs might also be conducted to provide additional depth and nuance to the current understanding of Gladue Courts and the overincarceration of Indigenous peoples. Notably, future research might combine quantitative analyses of ICON data with court observations in order to identify some of the specific practices which might be contributing to Gladue Court successes at bail (or otherwise limiting the extent to which criminal justice professionals may be able to effectively intervene). Indeed, court observations could identify important atmospheric and processual variables which would not appear in the administrative data (e.g., tone of voice used by criminal justice professionals; opportunity for accused person to address the court; efforts made to commend or reward accused persons for any successes, etc.). Furthermore, court observations could allow for the collection of other important data not available in the current study, including legal representation, as well as the types of release, the presence of one or more sureties and the number and type of bail conditions which are imposed when individuals are released on bail.

Interviews should also be carried out with Indigenous peoples who have previously used Gladue Courts for the bail process in order to explore their time in these courts from their own perspectives and whether, on a more personal and subjective level, these courts are improving the experiences of Indigenous peoples at bail and so fulfilling an important need. Interviews exploring the perceived successes and limitations of these courts, as well as ideas for other types of interventions or reforms addressing Indigenous overincarceration should also be carried out with Indigenous stakeholders, including community Elders as well as leaders from Indigenous organizations or cultural centres and individuals working 'on the ground'

with community-based programs and organizations that provide services to Indigenous peoples. Interviews might also be carried out with other criminal justice professionals who work in the Gladue Courts and may therefore also be able to reflect on the successes and potential limitations of these courts.

In terms of justice system factors seeming to contribute to Indigenous overincarceration, research should be undertaken to better understand the reasons for Indigenous peoples' greater likelihood of incurring charges against the administration of justice. For instance, research might examine the types of conditions most often breached so as to target these conditions for removal, modification or substitution by other requirements that may serve the same purpose(s) but produce fewer breaches. Research might also examine the thought processes and considerations made by police, as well as probation officers, when deciding to lay one or more breach charges. Just as importantly, investigation into the degree of success of the more recent legislative amendments which were proposed – in part – to address such charges would also be valuable. In particular, the uptake and effectiveness of the new judicial referral hearing as an alternative to laying new charges should be evaluated in terms of the frequency of its use, the degree to which it constitutes an efficient use of court resources, its most common outcomes and whether this hearing effectively reduces the number of administration of justice charges being laid.

Research is also needed to explore the reasons why Indigenous accused appear to be more likely to plead guilty to charges than accused in conventional bail courts. Similar study is also needed to better understand the reasons why this population does not always apply for bail. Interviews with Indigenous accused would be essential in illuminating these reasons, although interviews with defence counsel may also provide important insights. Through better understanding of these phenomena, we can hope to better target their underlying causes and so better address some of the many factors contributing to the overrepresentation of Indigenous peoples in Canadian penal institutions.

7.4 – Contributions of the Research

This dissertation offers a multitude of scholarly contributions, including those of a conceptual, criminological, methodological, and criminal justice policy nature. First, this research further develops the

appropriateness and usefulness of settler colonialism as an important conceptual framework for understanding the overincarceration of Indigenous peoples in Canada. It joins what has to-date been a relatively limited body of criminological and legal literature which contextualizes current issues in criminology and law within this broader context (e.g., Cunneen & Tauri, 2016; Chartrand, 2019; Razack, 2015, Rogin, 2017). Indeed, this study has emphasized that all research relating to the overrepresentation of Indigenous peoples in the Canadian criminal justice system must be rooted in an understanding of how Canada's ongoing settler colonial policies and practices, as well as the nation's settler-centric justice system, have largely produced this phenomenon. Any efforts to remedy this situation must therefore also be rooted in an understanding of these deeper underlying forces, since targeting the apparent surface-level causes alone will almost certainly be futile.

In terms of the criminological literature, this dissertation also makes several important contributions. In particular, it expands the literature on risk by examining how the bail system is deeply rooted in Western risk knowledges and how deliberations of risk at bail disproportionately affect Indigenous peoples. Specifically, this research adds to the limited but growing criminological literature which suggests that the use of Western risk knowledges may be entirely inappropriate for Indigenous populations, particularly when conventional criminogenic risk factors individualize risk and are divorced from an understanding of broader settler colonial forces. In terms of far-reaching consequences of bail, this research also provides strong empirical support for the assertion that decisions made at bail have significant downstream effects on case processing and case outcomes.

Methodologically, this research is also arguably groundbreaking. Indeed, there has long been very limited availability of data on Indigenous peoples in any court processing capacity (Kong & Beattie, 2005; Millar & Owusu-Bempah, 2011; TRC, 2015). This study developed an innovative strategy that used detailed data from the Ministry of the Attorney General's ICON database in such a way as to be able to identify – for the first time – Indigenous peoples in specified Gladue Courts. This novel empirical approach therefore provides important insights into the bail processing of Indigenous peoples' cases in Gladue Courts specifically.

However, this research also elucidates the comparative characteristics of Indigenous peoples' bail cases as well as factors which appear to be contributing to Indigenous overincarceration – which are likely to be (at least somewhat) generalizable to Indigenous peoples' experiences in the bail system and court process more broadly. In terms of methodology, this research was also made stronger by the creation of two complementary datasets, each with its own strengths, which also allowed for novel juxtapositions of (event and person) data in ways which facilitated further comparison. Similarly, the ability to compare Gladue bail cases to conventional bail cases is another important methodological contribution which has been identified as largely lacking in previous research (Clark, 2016b). More broadly, the scale of the datasets used in this research – which spans 12 years – is also important as it allows for longitudinal analyses which help to shed light on the ways in which changes in legislation and the broader criminal justice climate can have on-the-ground effects – both good and bad – for Gladue bail and conventional bail cases.

Finally, the research makes important contributions to criminal justice policy. Indeed, in many ways this dissertation is an evaluation of the largely untested promise of Gladue Courts at bail and the extent to which these courts are able to overcome traditional conceptions of risk in order to produce more equitable bail outcomes. Policy contributions include highlighting the overwhelming and disproportionate presence of charges against the administration of justice in Indigenous peoples' Gladue bail cases as well as some of the many ways in which these charges can be reduced. The study findings that a disproportionate and non-trivial proportion of Indigenous peoples plead guilty at the bail phase, and that many do not formally apply for bail, also raise important considerations for policymakers. Importantly, empirical evidence demonstrating that Indigenous peoples from Gladue bail cases continue to be sentenced disproportionately to terms of imprisonment also have important policy implications. Indeed, these findings highlight the need to look even further upstream in the criminal justice process and to expand the search for solutions to the overincarceration of Indigenous peoples in Canada. While this study examined Gladue bail cases and conventional bail cases in two Toronto courthouses, many of the lessons learned from this research can also be applied in other conventional bail courts (and Gladue Courts) as we continue efforts to remedy Indigenous

peoples' overincarceration and develop strategies for more equitable treatment of Indigenous peoples once they become involved in the criminal justice system.

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APPENDICES

Appendix A – University of Ottawa Ethics Certificate

Université d'Ottawa
Bureau d'éthique et d'intégrité de la recherche

07/06/2022
University of Ottawa
Office of Research Ethics and Integrity

CERTIFICAT D'APPROBATION ÉTHIQUE | CERTIFICATE OF ETHICS APPROVAL

Numéro du dossier / Ethics File Number
Titre du projet / Project Title

S-05-18-784
The Overincarceration of
Indigenous Peoples in Canada:
A Comparative Analysis of
Gladue Processes and
Outcomes in the Bail Setting
Thèse de doctorat / Doctoral
thesis

Type de projet / Project Type

Renouvelé / Renewed

Statut du projet / Project Status

Date d'approbation (jj/mm/aaaa) / Approval Date (dd/mm/yyyy)

04/06/2018

Date d'expiration (jj/mm/aaaa) / Expiry Date (dd/mm/yyyy)

03/06/2023

Équipe de recherche / Research Team

Chercheur /
Researcher

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Role

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Conditions spéciales ou commentaires / Special conditions or comments

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Université d'Ottawa

Bureau d'éthique et d'intégrité de la recherche

University of Ottawa

Office of Research Ethics and Integrity

Le Comité d'éthique de la recherche (CÉR) de l'Université d'Ottawa, opérant conformément à l'*Énoncé de politique des Trois conseils* (2014) et toutes autres lois et tous règlements applicables, a examiné et approuvé la demande d'éthique du projet de recherche ci-nommé.

L'approbation est valide pour la durée indiquée plus haut et est sujette aux conditions énumérées dans la section intitulée "Conditions Spéciales ou Commentaires". Le formulaire « Renouvellement ou Fermeture de Projet » doit être complété quatre semaines avant la date d'échéance indiquée ci-haut afin de demander un renouvellement de cette approbation éthique ou afin de fermer le dossier.

Toutes modifications apportées au projet doivent être approuvées par le CÉR avant leur mise en place, sauf si le participant doit être retiré en raison d'un danger immédiat ou s'il s'agit d'un changement ayant trait à des éléments administratifs ou logistiques du projet. Les chercheurs doivent aviser le CÉR dans les plus brefs délais de tout changement pouvant augmenter le niveau de risque aux participants ou pouvant affecter considérablement le déroulement du projet, rapporter tout événement imprévu ou indésirable et soumettre toute nouvelle information pouvant nuire à la conduite du projet ou à la sécurité des participants.

The University of Ottawa Research Ethics Board, which operates in accordance with the *Tri-Council Policy Statement* (2014) and other applicable laws and regulations, has examined and approved the ethics application for the above-named research project.

Ethics approval is valid for the period indicated above and is subject to the conditions listed in the section entitled "Special Conditions or Comments". The "Renewal/Project Closure" form must be completed four weeks before the above-referenced expiry date to request a renewal of this ethics approval or closure of the file.

Any changes made to the project must be approved by the REB before being implemented, except when necessary to remove participants from immediate endangerment or when the modification(s) only pertain to administrative or logistical components of the project. Investigators must also promptly alert the REB of any changes that increase the risk to participant(s), any changes that considerably affect the conduct of the project, all unanticipated and harmful events that occur, and new information that may negatively affect the conduct of the project or the safety of the participant(s).

Safaa LAMHOUEB

Coordonnateur de l'éthique / Ethics Coordinator

Pour/For **Barbara GRAVES** Président(e) du/ Chair of the Comité d'éthique de la recherche en sciences sociales et humanités / Social Sciences and Humanities Research Ethics Board

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Appendix B – Ontario Court of Justice Approval

RE: Business Case for Access to Electronic Court Case Tracking System Information

Andersen, Jim (MAG) [REDACTED]

Wed 6/20/2018 4:08 PM

To: Megan Mitchell [REDACTED]

Cc: Cheryl Webster [REDACTED]; Dias, Ana Filipa (MAG) [REDACTED]

Megan,

This has been approved by the Court. I will sit down with the programmer tomorrow and discuss the Gladue court portion and get back to you if there are any questions.

Jim

Jim Andersen

Senior Business Project Coordinator

Analytics Branch



MAG Analytics
Modernization Division

Appendix C – Charges by Offence Type, All Bail Cases

Table C.1: Frequency Distribution of the Number of Charges per Offence Type, Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Charges against Property	0	80360	56.7	56.7	56.7
	1	39002	27.5	27.5	84.2
	2+	22347	15.8	15.8	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Charges against the Person	0	93990	66.3	66.3	66.3
	1	24806	17.5	17.5	83.8
	2+	22913	16.2	16.2	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Administration of Justice Charges	0	78127	55.1	55.1	55.1
	1	41931	29.6	29.6	84.7
	2+	21651	15.3	15.3	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Number of <i>Criminal Code</i> Traffic Charges	0	138271	97.6	97.6	97.6
	1	1525	1.1	1.1	98.7
	2+	1913	1.3	1.3	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Other <i>Criminal Code</i> Charges	0	118236	83.4	83.4	83.4
	1	15579	11.0	11.0	94.4
	2+	7894	5.6	5.6	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Federal Charges	0	109269	77.1	77.1	77.1
	1	14526	10.3	10.3	87.4
	2+	17914	12.6	12.6	100.0
	Total	141709	100.0	100.0	

Appendix D – Common Administrative Charges, All Bail Cases

Table D.1: Frequency Distribution of the Presence⁵²⁵ of Common Administration of Justice Charges, Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of ANY s.145 Charges	No s.145 Charges	104653	73.9	73.9	73.9
	s.145 Charge(s)	37056	26.1	26.1	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of s.145.1 Charges (Unlawfully at Large)	No s.145.1 Charges	140473	99.1	99.1	99.1
	s.145.1 Charge(s)	1236	.9	.9	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of s.145.2 Charges (Failure to Attend Court)	No s.145.2 Charges	131414	92.7	92.7	92.7
	s.145.2 Charge(s)	10295	7.3	7.3	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of s.145.3 Charges (FTC Condition of Undertaking or Recognizance)	No s.145.3 Charges	119152	84.1	84.1	84.1
	s.145.3 Charge(s)	22557	15.9	15.9	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of s.145.4 Charges (FTC Summons)	No s.145.4 Charges	141453	99.8	99.8	99.8
	s.145.4 Charge(s)	256	.2	.2	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of s.145.5 Charges (FTC Appearance Notice or Promise to Appear)	No s.145.5 Charges	137845	97.3	97.3	97.3
	s.145.5 Charge(s)	3864	2.7	2.7	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of s.145.51 Charges (FTC Undertaking s.499(2) or 503(2.1))	No s.145.51 Charges	138836	98.0	98.0	98.0
	s.145.51 Charge(s)	2873	2.0	2.0	100.0
	Total	141709	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of s.733.1 Charges (FTC Probation)	No s.733.1 Charges	115397	81.4	81.4	81.4
	s.733.1 Charge(s)	26312	18.6	18.6	100.0
	Total	141709	100.0	100.0	

⁵²⁵ Note that these variables reflect the *presence* of particular types of charges against the administration of justice. Hence, these types of administration of justice charges are not mutually exclusive – a bail case could include two or more different types of charges against the administration of justice. If one were to sum the percentage of cases with each *specific* type of s.145 charge, this figure (29.0%) would unsurprisingly slightly exceed the 26.1% of cases listed as having *any* s.145 charge.

Appendix E – Number of Appearances and Time between End of (First) Bail and Case Resolution, All Bail Cases

Table E.1: Frequency Distribution of Number of Court Appearances and Time between end of First Bail and Case Resolution, Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Post-Bail Court Appearances between End of First Bail and Case Resolution	0-2	41094	30.5	30.5	30.5
	3-8	39874	29.5	29.5	60.1
	9-15	30781	22.8	22.8	82.9
	16+	23295	17.2	17.2	100.0
	Total ⁵²⁶	135044	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Time between End of First Bail and Case Resolution	One Month or Less	41435	31.0	31.0	31.0
	More than One Month to Six Months	38417	28.7	28.7	59.7
	More than Six Months to a Year	28582	21.4	21.4	81.1
	More than One Year	25352	18.9	18.9	100.0
	Total ⁵²⁷	133786	100.0	100.0	

⁵²⁶ Cases coded as having more than 100 appearances between the end of first bail and the final disposition (i.e., 101 appearances or greater; representing 0.2% (N=242) of the person dataset) were considered outliers and were removed from analyses of this variable. Further, 6658 “later bail” person cases (i.e., for which the first bail appearance was more than seven days after first court appearance) were also removed from these analyses as variable creation syntax was deemed unsuitable for these cases (see 342 for further discussion of these later bail cases).

⁵²⁷ Cases coded as taking more than four years between end of early bail and final disposition (i.e., 1461 days or greater; representing 0.9% (N=1227) of the person dataset) were considered outliers and were removed from analyses of this variable. Further, 6658 “later bail” person cases (i.e., for which the first bail appearance was more than seven days after first court appearance) were also removed from these analyses as variable creation syntax was deemed unsuitable for these cases (see footnote 351 for further discussion of these later bail cases).

Appendix F – Total Number of Appearances and Time for Case Resolution, All Bail Cases

Table F.1: Frequency Distribution of Number of Court Appearances and Time from First Appearance to Case Resolution, Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

		Frequency	Percent	Valid Percent	Cumulative Percent
Number of Court Appearances until Disposition	1-3	30074	21.3	21.3	21.3
	4-8	37854	26.8	26.8	48.0
	9-14	34948	24.7	24.7	72.7
	15+	38557	27.3	27.3	100.0
	Total ⁵²⁸	141433	99.8	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Time between First and Last Court Appearances	One Month or Less	37560	26.8	26.8	26.8
	Greater than One Month to Six Months	41676	29.7	29.7	56.5
	Greater than Six Month to One Year	30961	22.1	22.1	78.6
	Greater than One Year	30005	21.4	21.4	100.0
	Total ⁵²⁹	140202	100.0	100.0	

⁵²⁸ Cases coded as having more than 100 appearances to reach final disposition (i.e., 101 appearances; representing 0.2% (N=276) of the person dataset) were considered outliers and were removed from analyses of this variable.

⁵²⁹ Cases coded as taking more than five years to reach case resolution (i.e., 1826 days or greater; representing 1.1% (N=1506) of the person dataset) were considered outliers and were removed from analyses of this variable.

Appendix G – Presence of Sentence Types, All Bail Cases

Table G.1: Frequency Distribution for the Presence of Sentence Type⁵³⁰, Sentenced Cases Only⁵³¹, Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of Custodial Sentence for 1+ Charge	No Prison Sentence	19869	25.8	25.8	25.8
	Prison Sentence	57290	74.2	74.2	100.0
	Total	77159	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of Conditional Sentence for 1+ Charge	No Conditional Sentence	72501	94.0	94.0	94.0
	Conditional Sentence	4658	6.0	6.0	100.0
	Total	77159	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of Probation Sentence for 1+ Charge	No Probation Sentence	37078	48.1	48.1	48.1
	Probation Sentence	40081	51.9	51.9	100.0
	Total	77159	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of Fine Sentence for 1+ Charge	No Fine Sentence	64681	83.8	83.8	83.8
	Fine Sentence	12478	16.2	16.2	100.0
	Total	77159	100.0	100.0	
		Frequency	Percent	Valid Percent	Cumulative Percent
Presence of (Absolute, Conditional) Discharge for 1+ Charge	No Discharge	68798	89.2	89.2	89.2
	Discharge	8361	10.8	10.8	100.0
	Total	77159	100.0	100.0	

⁵³⁰ Note that these variables reflect the *presence* of particular types of sentences. Sentence types are not mutually exclusive – a case could contain several charges each with a different sentence, or a charge could receive two different sanctions at sentencing. For example, a single case could contain a charge that received a custodial sentence to be followed by a term of probation (to be served upon release), as well as another charge (on the same or separate charging information) that received a fine – three different types of sentences for a single, hypothetical case. In light of this, if one were to sum the percentage of each type of sentence present in a case, this figure would well exceed 100%.

⁵³¹ These figures reflect only those cases for which there was at least one finding of guilt and associated sentence (77,159 sentenced person cases versus 141,709 person cases total).

Appendix H – Gladue Bail Status by Bail Outcomes (2+ Appearances in Bail)

Table H.1: Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Appearances in Bail⁵³²; 2006-2017)

			Outcome of the First Bail						
			Formally Detained	In Custody, No Formal Decision	Bail Granted	Guilty Plea	Dismissed, Stayed, Withdrawn	Other	Total
Gladue Bail Status	Non- Gladue	Count	13821	24715	46033	9962	3316	1351	99198
		% within Gladue Bail Status	13.9%	24.9%	46.4%	10.0%	3.3%	1.4%	100.0%
	Gladue	Count	617	1611	2700	1255	440	65	6688
		% within Gladue Bail Status	9.2%	24.1%	40.4%	18.8%	6.6%	1.0%	100.0%
Total		Count	14438	26326	48733	11217	3756	1416	105886
		% within Gladue Bail Status	13.6%	24.9%	46.0%	10.6%	3.5%	1.3%	100.0%

Chi-square = 795.205; df = 5; $p < .001$

Table H.2: Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Event Dataset; Cases with a Formal Determination of Bail Only⁵³³; 2+ Appearances in Bail; 2006-2017)

			Formally Detained	Bail Granted	Total
Gladue	Non-	Count	13821	46033	59854
Bail Status	Gladue	% within Gladue Bail Status	23.1%	76.9%	100.0%
	Gladue	Count	617	2700	3317
		% within Gladue Bail Status	18.6%	81.4%	100.0%
Total		Count	14438	48733	63171
		% within Gladue Bail Status	22.9%	77.1%	100.0%

Fisher's exact test $< .001$

⁵³² The same analyses were also performed for cases which required two or more *days* to complete the bail process (as an alternative to two or more appearances). Overall trends, as well as trends between Gladue bail and conventional bail cases, were virtually identical and remained statistically significant ($p < .001$).

⁵³³ Recall that while formal determinations of bail made by a judicial officer are examined here in order to explore judicial (and Crown) decision-making in Gladue Courts, these data do not include all bail outcomes, such as remaining in pre-trial custody without a formal bail decision. Indeed, informal detention was nearly twice as common a bail outcome than formal detention (24.9% versus 13.6% – see Table H.1 above). While cases remaining in remand without a formal refusal of bail are not a reflection of judicial decision-making, they are nevertheless non-trivial and have a significant impact on the remand population.

Appendix I – Gladue Bail Status by Bail Outcomes (Formally and Informally Detained Combined)

Table I.1: Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Event Dataset; Cases with a Formal Bail Decision; 2006-2017)

		Detained (Informal/Formal)	Bail Granted	Total
Gladue Bail Non- Status	Count	57884	86885	144769
	% within Gladue Bail Status	40.0%	60.0%	100.0%
	Count	2789	3310	6099
	% within Gladue Bail Status	45.7%	54.3%	100.0%
Total	Count	60673	90195	150868
	% within Gladue Bail Status	40.2%	59.8%	100.0%

Fisher's exact test < .001

Appendix J – Gladue Bail Status by Bail Processing, Remand Cases without a Formal Bail Decision

Table J.1: Crosstabulation of Gladue Bail Status by Number of Bail Appearances in (First) Bail for Those in Remand without a Formal Determination of Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Number of (First) Bail Appearances					
			1	2	3-4	5-7	8+	Total
Cases Denied Bail	Non-Gladue	Count	14341	11010	8908	3480	1317	39056
		% within Gladue Bail Status	36.7%	28.2%	22.8%	8.9%	3.4%	100.0%
	Gladue	Count	523	625	634	255	97	2134
		% within Gladue Bail Status	24.5%	29.3%	29.7%	11.9%	4.5%	100.0%
Total		Count	14864	11635	9542	3735	1414	41190
		% within Gladue Bail Status	36.1%	28.2%	23.2%	9.1%	3.4%	100.0%

Chi-square = 154.798 df = 4; $p < .001$

	Gladue Bail Cases	Conventional Bail Cases
Mean***	3.00	2.55
Median	2	2
SD	2.38	2.14

*** $t = -8.587$; df = 2325.637; $p < .001$

Table J.2: Crosstabulation of Gladue Bail Status by Time Spent in (First) Bail for Those in Remand without a Formal Determination of Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2006-2017)

			Time Spent in (First) Bail					
			Same Day	Next Day	3-8 Days	9-15 Days	16+ Days	Total
Cases Denied Bail	Non-Gladue	Count	14637	3824	11381	3856	5347	39045
		% within Gladue Bail Status	37.5%	9.8%	29.1%	9.9%	13.7%	100.0%
	Gladue	Count	542	175	682	286	449	2134
		% within Gladue Bail Status	25.4%	8.2%	32.0%	13.4%	21.0%	100.0%
Total		Count	15179	3999	12063	4142	5796	41179
		% within Gladue Bail Status	36.9%	9.7%	29.3%	10.1%	14.1%	100.0%

Chi-square = 193.558 df = 4; $p < .001$

	Gladue Bail Cases	Conventional Bail Cases
Mean***	10.97	7.66
Median	4	2
SD	20.77	18.18

*** $t = -7.222$; df = 2315.137; $p < .001$

Appendix K – Gladue Bail Status by Bail Outcomes (2+ Appearances in Bail)

Table K.1: Crosstabulation of Gladue Bail Status by Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2+ Appearances in Bail; 2006-2017)

			Outcome of the First Bail						Total
			Formally Detained	In Custody, No Formal Decision	Bail Granted	Guilty Plea	Dismissed, Stayed, Withdrawn	Other	
Gladue Bail Status	Non-Gladue	Count	11909	22305	38375	8496	2221	1065	84371
		% within Gladue Bail Status	14.1%	26.4%	45.5%	10.1%	2.6%	1.3%	100.0%
	Gladue	Count	570	1513	1890	1022	262	28	5285
		% within Gladue Bail Status	10.8%	28.6%	35.8%	19.3%	5.0%	0.5%	100.0%
Total		Count	12479	23818	40265	9518	2483	1093	89656
		% within Gladue Bail Status	13.9%	26.6%	44.9%	10.6%	2.8%	1.2%	100.0%

Chi-square = 795.205; df = 5; $p < .001$

Table K.2: Crosstabulation of Gladue Bail Status by Outcome of (First) Bail, Old City Hall and College Park Bail Cases (2006-2017; Formal Determinations of Bail Only⁵³⁴; 2+ Appearances in Bail; Person Dataset)

			Formally Detained	Bail Granted	Total
Gladue Bail Status	Non-Gladue	Count	11909	38375	50284
		% within Gladue Bail Status	23.7%	76.3%	100.0%
	Gladue	Count	570	1890	2460
		% within Gladue Bail Status	23.2%	76.8%	100.0%
Total		Count	12479	40265	52744
		% within Gladue Bail Status	23.7%	76.3%	100.0%

Fisher's exact test = .575

⁵³⁴ Recall that while formal determinations of bail made by a judicial officer are examined here in order to explore judicial (and Crown) decision-making in Gladue Courts, these data do not include all bail outcomes, such as remaining in pre-trial custody without a formal bail decision. Indeed, informal detention was nearly twice as common a bail outcome than formal detention (24.9% versus 13.6% – see Table H.1 above). While cases remaining in remand without a formal refusal of bail are not a reflection of judicial decision-making, they are nevertheless non-trivial and have a significant impact on the remand population.

Appendix L – Gladue Bail Status by Bail Outcomes (Formally and Informally Detained Combined)

Table L.1: Crosstabulation of Gladue Bail Status by Most Serious Outcome of (First) Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Detained (Formal/Informal)	Bail Granted	Total
Gladue Bail Status	Non-	Count	49148	69516	118664
	Gladue	% within Gladue Bail Status	41.4%	58.6%	100.0%
	Gladue	Count	2372	2162	4534
		% within Gladue Bail Status	52.3%	47.7%	100.0%
Total		Count	51520	71678	123198
		% within Gladue Bail Status	41.8%	58.2%	100.0%

Fisher's exact test < .001

Appendix M – Number and Type of Charges by Bail Outcome, Informal/Formal Remand Combined

Table M.1: Crosstabulation of Number of Charges by Formal Determination of Bail, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Number of Charges			Detained (Informal/Formal)	Bail Granted	Total
1	Count		14457	22745	37202
	% within # Charges		38.9%	61.1%	100.0%
2	Count		11183	18807	29990
	% within # Charges		37.3%	62.7%	100.0%
3-4	Count		12160	18478	30638
	% within # Charges		39.7%	60.3%	100.0%
5-6	Count		5613	5949	11562
	% within # Charges		48.5%	51.5%	100.0%
7+	Count		8107	5699	13806
	% within # Charges		58.7%	41.3%	100.0%
Total	Count		51520	71678	123198
	% within # Charges		41.8%	58.2%	100.0%

Chi-square = 2279.945; df = 4; $p < .001$

Table M.2: Crosstabulation of Presence of Specific Offence by Bail Outcome, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Presence of Charges by Offence Type ⁵³⁵	Detained (Informal/Formal)		Bail Granted		Total	
	Count	%	Count	%	Count	%
Crimes Against Property	24,969	47.5%	27,600	52.5%	52,569	100.0%
Crimes Against the Person	16,825	38.0%	27,500	62.0%	44,325	100.0%
Administration of Justice	27,746	52.5%	25,094	47.5%	52,840	100.0%
<i>Criminal Code</i> Traffic	1,185	36.6%	2,052	63.4%	3,237	100.0%
Other <i>Criminal Code</i>	11,037	51.8%	10,261	48.2%	21,298	100.0%
Federal Statute	10,425	33.9%	20,288	66.1%	30,713	100.0%

⁵³⁵ While this table examining the presence charges for each offence type is descriptive in nature, a similar inferential analysis was also performed to examine the relationship between the offence type for the most serious charge in a case and formal determinations of bail. Results were similar overall (e.g., cases for which the most serious charge was an administration of justice charge or an “other” *Criminal Code* offence were least likely to be released while federal statute and *Criminal Code* traffic charges were most likely to be released) and statistically significant (chi-square = 2243.678; df = 5; $p < .001$).

Appendix N – Offence Type for Most Serious Charge by Presence of Trial

Table N.1: Presence of Trial by Offence Type for Most Serious Charge; Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

Offence Type for Most Serious Charge			Presence of 1+ Trial Appearances		Total
			No Trial	Trial	
Offence Type for Most Serious Charge	Crimes Against Property	Count	44350	4409	48759
		% within Trial	37.7%	18.3%	34.4%
	Crimes Against the Person	Count	27145	10645	37790
		% within Trial	23.1%	44.3%	26.7%
	Administration of Justice	Count	21301	3217	24518
		% within Trial	18.1%	13.4%	17.3%
	<i>Criminal Code</i> Traffic	Count	1229	1110	2339
		% within Trial	1.0%	4.6%	1.7%
	Other <i>Criminal Code</i>	Count	12591	2822	15413
		% within Trial	10.7%	11.7%	10.9%
	Federal Statute	Count	11049	1830	12879
		% within Trial	9.4%	7.6%	9.1%
	Total	Count	117665	24033	141698
		% within Trial	100.0%	100.0%	100.0%

Chi-square = 7431.539; df = 5; $p < .001$

Table N.2: Offence Type for Most Serious Charge by Presence of Trial; Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

Offence Type for Most Serious Charge			Presence of 1+ Trial Appearances		Total
			No Trial	Trial	
Offence Type for Most Serious Charge	Crimes Against Property	Count	21301	3217	24518
		% within MSO Type	86.9%	13.1%	100.0%
	Crimes Against the Person	Count	1229	1110	2339
		% within MSO Type	52.5%	47.5%	100.0%
	Administration of Justice	Count	44350	4409	48759
		% within MSO Type	91.0%	9.0%	100.0%
	<i>Criminal Code</i> Traffic	Count	27145	10645	37790
		% within MSO Type	71.8%	28.2%	100.0%
	Other <i>Criminal Code</i>	Count	11049	1830	12879
		% within MSO Type	85.8%	14.2%	100.0%
	Federal Statute	Count	12591	2822	15413
		% within MSO Type	81.7%	18.3%	100.0%
	Total	Count	117665	24033	141698
		% within MSO Type	83.0%	17.0%	100.0%

Chi-square = 7431.539; df = 5; $p < .001$

Appendix O – Presence of Sentence by Offence Type for Most Serious Charge

Table O.1: Presence of Sentence by Offence Type for Most Serious Charge; Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)

Offence Type for Most Serious Charge			Presence of a Sentence		Total
			Not Sentenced	Sentenced	
	Crimes Against Property	Count	18067	30692	48759
		% within MSO Type	37.1%	62.9%	100.0%
	Crimes Against the Person	Count	20340	17450	37790
		% within MSO Type	53.8%	46.2%	100.0%
	Administration of Justice	Count	10529	13989	24518
		% within MSO Type	42.9%	57.1%	100.0%
	<i>Criminal Code</i> Traffic	Count	712	1627	2339
		% within MSO Type	30.4%	69.6%	100.0%
	Other <i>Criminal Code</i>	Count	6888	8525	15413
		% within MSO Type	44.7%	55.3%	100.0%
	Federal Statute	Count	8005	4874	12879
		% within MSO Type	62.2%	37.8%	100.0%
	Total	Count	64541	77157	141698
		% within MSO Type	45.5%	54.5%	100.0%

Chi-square = 4181.105; df = 5; $p < .001$

Table O.2: Summary Table of Presence of Sentence by Presence of Charge Type; Old City Hall and College Park Bail Cases (2006-2017; Person Dataset)⁵³⁶

Presence of Each Charge Type	Not Sentenced		Sentenced		Total	
	Count	%	Count	%	Count	%
Crimes Against Property	22,455	36.6%	38,894	63.4%	61,349	100.0%
Crimes Against the Person	23,860	50.0%	23,859	50.0%	47,719	100.0%
Administration of Justice	22,853	35.9%	40,729	64.1%	63,582	100.0%
<i>Criminal Code</i> Traffic	992	28.9%	2,446	71.1%	3,438	100.0%
Other <i>Criminal Code</i>	9,620	41.0%	13,853	59.0%	23,473	100.0%
Federal Statute	17,328	53.4%	15,112	46.6%	32,440	100.0%

⁵³⁶ This table presents the probability of a case receiving a sentence (for at least one charge) based on the presence of various types of charges in a case (rather than whether this offence category reflected the most serious charge in a case). Given that cases commonly have more than one charge, and the fact that these charges may belong to different offence classifications, the presence of a specific type of charge in a case does not necessarily mean that there was a finding of guilt and associated sentence imposed for this type of charge.

Appendix P – Presence of Custodial Sentence by Offence Type for Most Serious Charge

Table P.1: Presence of Sentence by Offence Type for Most Serious Charge; Old City Hall and College Park Bail Cases – Sentenced Only (2006-2017; Person Dataset)

Offence Type for Most Serious Charge			Presence of a Custodial Sentence		Total
			No Custodial Sentence	Custodial Sentence	
Offence Type for Most Serious Charge	Crimes Against Property	Count	6699	23993	30692
		% within MSO Type	21.8%	78.2%	100.0%
	Crimes Against the Person	Count	5366	12084	17450
		% within MSO Type	30.8%	69.2%	100.0%
	Administration of Justice	Count	2916	11073	13989
		% within MSO Type	20.8%	79.2%	100.0%
	<i>Criminal Code</i> Traffic	Count	881	746	1627
		% within MSO Type	54.1%	45.9%	100.0%
	Other <i>Criminal Code</i>	Count	1971	6554	8525
		% within MSO Type	23.1%	76.9%	100.0%
	Federal Statute	Count	2035	2839	4874
		% within MSO Type	41.8%	58.2%	100.0%
	Total	Count	19868	57289	77157
		% within MSO Type	25.8%	74.2%	100.0%

Chi-square = 2021.294; df = 5; $p < .001$

Table P.2: Summary Table of Presence of Sentence by Presence of Charge Type; Old City Hall and College Park Bail Cases – Sentenced Only (2006-2017; Person Dataset)⁵³⁷

Presence of Each Charge Type	No Custodial Sentence		Custodial Sentence		Total	
	Count	%	Count	%	Count	%
Crimes Against Property	8,500	21.9%	30,394	78.1%	38,894	100.0%
Crimes Against the Person	6,860	28.8%	16,999	71.2%	23,859	100.0%
Administration of Justice	7,895	19.4%	32,834	80.6%	40,729	100.0%
<i>Criminal Code</i> Traffic	1,174	48.0%	1,272	52.0%	2,446	100.0%
Other <i>Criminal Code</i>	2,992	21.6%	10,861	78.4%	13,853	100.0%
Federal Statute	5,151	34.1%	9,961	65.9%	15,112	100.0%

⁵³⁷ This table presents the probability of a case with one or more sentences receiving a custodial sentence (for at least one charge) based on the presence of various types of charges in a case (rather than whether this offence category reflected the most serious charge in a case). Given that cases commonly have more than one charge, and the fact that these charges may belong to different offence classifications, the presence of a specific type of charge in a case does not necessarily mean that there was a finding of guilt and associated sentence imposed for this type of charge.

Appendix Q: Summary of Key Bivariate Findings

Table Q.1: Summary Table of Key Bivariate Findings, Old City Hall and College Park Bail Cases (Person Dataset unless Otherwise Specified; 2006-2017)

	Non-Gladue Bail Cases	Gladue Bail Cases
CASE CHARACTERISTICS		
Gender		
% Male	81.3%	82.2%
Average Age of Accused***	34.30 years	35.20 years
Average # of Charges		
Event Dataset	2.56 charges	2.50 charges
Person Dataset***	3.46 charges	4.01 charges
Charging Agency (Event Dataset)***		
% Toronto Police Service	96.2%	94.4%
% Probation and Parole OCH	2.3%	3.6%
% Toronto Bail Program	0.4%	1.0%
Charge Types Present		
% Cases with Charge(s) against Property***	43.0%	50.2%
% Cases with Charge(s) against the Person**	33.6%	35.5%
% Cases with Charge(s) against the Administration of Justice***	44.2%	60.6%
% Cases with CC Traffic Charge(s)***	2.5%	1.2%
% Cases with "Other" CC Charge(s)***	16.5%	18.7%
% Cases with Federal Charge(s)***	23.1%	18.1%
Charges against the Administration of Justice		
% Cases with s.145(1) – Unlawfully at Large Charge(s)***	0.8%	1.6%
% Cases with s.145(2) – FTA Court Charge(s)***	7.0%	12.7%
% Cases with s.145(3) – FTC Condition of Court Order Charge(s)***	15.6%	23.3%
% Cases with s.733.1(1) – FTC Probation Charge(s)***	17.9%	33.0%
BAIL PROCESSING		
Average # of Appearances in (First) Bail (Event Dataset)		
All Bail Cases***	2.33 appearances	2.91 appearances
Only Cases with 2+ Bail Appearances*	3.21 appearances	3.27 appearances
Average # Days in (First) Bail (Event Dataset)		
All Bail Cases***	6.05 days	9.42 days
Only Cases with 2+ Days in Bail***	9.56 days	11.12 days
All Outcomes of (First) Bail (Event Dataset)***		
% Formally Detained	11.4%	8.2%
% Informal Remand (No Decision)	23.6%	26.8%
% Bail Granted	52.5%	41.6%
% Guilty Plea	7.7%	16.2%
Formal Outcomes Only – % Bail Granted*	82.2%	83.5%
All Outcomes of (First) Bail (Person Dataset)***		
% Formally Detained	11.5%	10.1%
% Informal Remand (No Decision)	24.7%	30.0%
% Bail Granted	51.2%	36.6%
% Guilty Plea	8.1%	17.6%
Formal Outcomes Only – % Bail Granted***	81.7%	78.3%
Subsequent Bail Appearances		
% Cases with Subsequent Bail Appearances***	23.8%	44.9%
POST-BAIL PROCESSING		
Average # of Appearances Post-Bail until Resolution		
All Bail Cases***	8.77 appearances	9.88 appearances
Average # of Days Post-Bail until Resolution		
All Bail Cases***	192.30 days	163.75 days
Released Bail Cases***	288.63 days	257.14 days
Combined Remand Bail Cases***	123.69 days	173.51 days

Average Total # of Appearances All Bail Cases***	11.17 appearances	12.86 appearances
Average Total # of Days until Resolution All Bail Cases***	208.34 days	182.47 days
Bench Warrant % Cases with 1+ Bench Warrants Present*	0.1%	0.2%
Preliminary Inquiry % Cases with 1+ Bench Warrants Present***	6.0%	3.1%
OCJ Trial % Cases with 1+ Trial Appearance(s)***	17.2%	11.9%
Average # of Trial Appearances***	3.66 appearances	4.76 appearances
Average # Days between First & Last Trial Appearance*	47.58 days	54.25 days
CASE OUTCOMES		
Presence of a Sentence % All Bail Cases with 1+ Convictions (and Associated Sentence)***	53.9%	66.5%
% Combined Remand Cases with 1+ Convictions (and Associated Sentence)***	74.0%	76.9%
% Released Bail Cases with 1+ Convictions (and Associated Sentence)***	36.3%	47.9%
Sentence Types All Cases – % with 1+ Custodial Sentence(s)***	39.8%	54.8%
Sentenced Cases – % with 1+ Custodial Sentence(s)***	73.8%	82.4%
Sentenced Cases – % with 1+ Conditional Sentence(s)***	5.9%	8.6%
Sentenced Cases – % with 1+ Probation Order(s)***	51.8%	54.9%
Sentenced Cases – % with 1+ Discharge(s)***	11.3%	2.3%
Sentenced Cases – % with 1+ Fine(s)***	15.6%	26.7%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix R – Logistic Regression of Key Variables on Presence of 1+ Sentences, Formal Determinations of Bail Only

Table R.1 – Logistic Regression of Key Variables on Presence of 1+ Sentences; Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

								95% CI for Exp(B)	
		B	S.E.	Wald	df	Sig.	Exp(B)	Lower	Upper
Step 1 ^a	Gladue Bail Status	.346	.041	70.565	1	<.001	1.414	1.304	1.533
	Number of Charges	.023	.002	159.052	1	<.001	1.023	1.019	1.027
	Presence of Charges against Property	.512	.016	985.382	1	<.001	1.668	1.615	1.722
	Presence of Charges against the Person	.124	.016	61.131	1	<.001	1.132	1.098	1.168
	Presence of Charges against the Administration of Justice	.471	.015	944.670	1	<.001	1.602	1.554	1.650
	Outcome of (First) Bail (Formal Detention versus Release)	1.489	.020	5494.543	1	.000	4.431	4.260	4.609
	Constant	-1.053	.015	4804.235	1	.000	.349		

a. Variable(s) entered on step 1: Gladue Bail Status, Number of Charges, Presence of Charges against the Person, Presence of Charges against the Administration of Justice, Presence of Charges Against Property, Outcome of (First) Bail (Formal Determinations of Bail Only)⁵³⁸

⁵³⁸ Where Presence of 1+ Sentences is coded as: 0 = No Sentence, 1 = Sentence(s); where Gladue Bail Status is coded: 0 = Non-Gladue, 1 = Gladue; where Number of Charges is continuous; where Presence of Charges against the Person is coded: 0 = No Charges against the Person, 1 = Charge(s) against the Person; where Presence of Charges against Property is coded: 0 = No Property Charges, 1 = Property Charge(s); where Presence of Administration of Justice Charges is coded: 0 = No Administration of Justice Charges, 1 = Administration of Justice Charge(s); where Outcome of (First) Bail (Formal Determinations of Bail Only) is coded: 0 = Bail Granted, 1 = Bail Formally Denied.

Appendix S – Longitudinal Trends in the Number of Charges in a Case

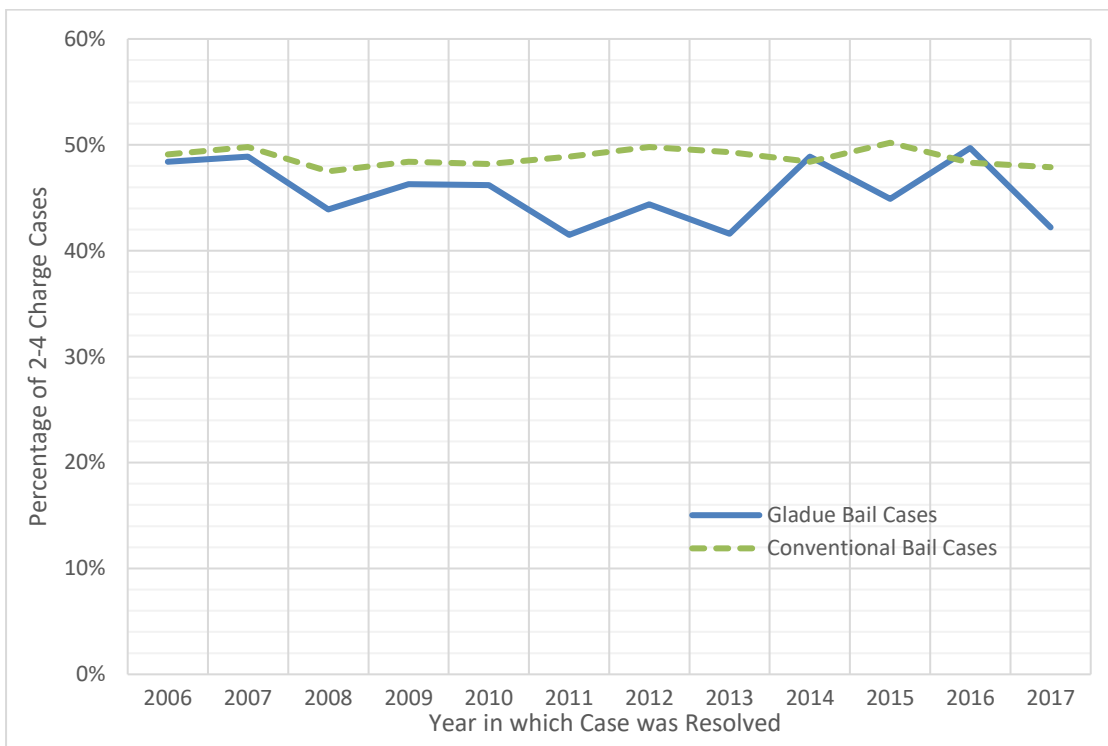
Table S.1: Crosstabulation of Gladue Bail Status by Number of Charges in a Case over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Year				Number of Charges in a Case			Total
				1	2-4	5+	
2006	Gladue Bail Status	No	Count	4376	6439	2307	13122
			% within Gladue Bail Status	33.3%	49.1%	17.6%	100.0%
	Yes	Count	150	234	99	483	
			% within Gladue Bail Status	31.1%	48.4%	20.5%	100.0%
	Total	Count	4526	6673	2406	13605	
			% within Gladue Bail Status	33.3%	49.0%	17.7%	100.0%
2007***	Gladue Bail Status	No	Count	4724	6772	2116	13612
			% within Gladue Bail Status	34.7%	49.8%	15.5%	100.0%
	Yes	Count	157	257	112	526	
			% within Gladue Bail Status	29.8%	48.9%	21.3%	100.0%
	Total	Count	4881	7029	2228	14138	
			% within Gladue Bail Status	34.5%	49.7%	15.8%	100.0%
2008	Gladue Bail Status	No	Count	4881	6411	2211	13503
			% within Gladue Bail Status	36.1%	47.5%	16.4%	100.0%
	Yes	Count	197	240	110	547	
			% within Gladue Bail Status	36.0%	43.9%	20.1%	100.0%
	Total	Count	5078	6651	2321	14050	
			% within Gladue Bail Status	36.1%	47.3%	16.5%	100.0%
2009***	Gladue Bail Status	No	Count	4472	6242	2194	12908
			% within Gladue Bail Status	34.6%	48.4%	17.0%	100.0%
	Yes	Count	163	252	129	544	
			% within Gladue Bail Status	30.0%	46.3%	23.7%	100.0%
	Total	Count	4635	6494	2323	13452	
			% within Gladue Bail Status	34.5%	48.3%	17.3%	100.0%
2010*	Gladue Bail Status	No	Count	4153	5845	2138	12136
			% within Gladue Bail Status	34.2%	48.2%	17.6%	100.0%
	Yes	Count	105	156	77	338	
			% within Gladue Bail Status	31.1%	46.2%	22.8%	100.0%
	Total	Count	4258	6001	2215	12474	
			% within Gladue Bail Status	34.1%	48.1%	17.8%	100.0%
2011***	Gladue Bail Status	No	Count	3958	6079	2384	12421
			% within Gladue Bail Status	31.9%	48.9%	19.2%	100.0%
	Yes	Count	25	44	37	106	
			% within Gladue Bail Status	23.6%	41.5%	34.9%	100.0%
	Total	Count	3983	6123	2421	12527	
			% within Gladue Bail Status	31.8%	48.9%	19.3%	100.0%
2012	Gladue Bail Status	No	Count	3735	6052	2357	12144
			% within Gladue Bail Status	30.8%	49.8%	19.4%	100.0%
	Yes	Count	107	148	78	333	
			% within Gladue Bail Status	32.1%	44.4%	23.4%	100.0%
	Total	Count	3842	6200	2435	12477	
			% within Gladue Bail Status	30.8%	49.7%	19.5%	100.0%
2013***	Gladue Bail Status	No	Count	3274	5193	2056	10523
			% within Gladue Bail Status	31.1%	49.3%	19.5%	100.0%
	Yes	Count	143	194	129	466	
			% within Gladue Bail Status	30.7%	41.6%	27.7%	100.0%
	Total	Count	3417	5387	2185	10989	
			% within Gladue Bail Status	31.1%	49.0%	19.9%	100.0%
2014	Gladue Bail Status	No	Count	2822	4389	1849	9060
			% within Gladue Bail Status	31.1%	48.4%	20.4%	100.0%
	Yes	Count	177	314	151	642	
			% within Gladue Bail Status	27.6%	48.9%	23.5%	100.0%
	Total	Count	2999	4703	2000	9702	
			% within Gladue Bail Status	30.9%	48.5%	20.6%	100.0%
2015***	Gladue Bail Status	No	Count	2628	4290	1634	8552
			% within Gladue Bail Status	30.7%	50.2%	19.1%	100.0%
	Yes	Count	152	301	218	671	
			% within Gladue Bail Status	22.7%	44.9%	32.5%	100.0%
	Total	Count	2780	4591	1852	9223	
			% within Gladue Bail Status	30.1%	49.8%	20.1%	100.0%

2016***	Gladue Bail Status	No	Count	2490	4188	1990	8668
			% within Gladue Bail Status	28.7%	48.3%	23.0%	100.0%
		Yes	Count	123	308	189	620
			% within Gladue Bail Status	19.8%	49.7%	30.5%	100.0%
	Total	Count	2613	4496	2179	9288	
		% within Gladue Bail Status	28.1%	48.4%	23.5%	100.0%	
2017***	Gladue Bail Status	No	Count	2563	4383	2200	9146
			% within Gladue Bail Status	28.0%	47.9%	24.1%	100.0%
		Yes	Count	126	269	243	638
			% within Gladue Bail Status	19.7%	42.2%	38.1%	100.0%
	Total	Count	2689	4652	2443	9784	
		% within Gladue Bail Status	27.5%	47.5%	25.0%	100.0%	

* $p < .05$ ** $p < .01$ *** $p < .001$

Figure S.1: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 2-4 Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Appendix T – Longitudinal Trends in the Presence of Charges against the Person

Table T.1: Crosstabulation of Gladue Bail Status by Presence of Charges against the Person over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of Charges against the Person		
Year			No Charges against the Person	Charge(s) against the Person	Total
2006	Gladue Bail Status	No	Count	9182	3940
			% within Gladue Bail Status	70.0%	30.0%
		Yes	Count	334	149
			% within Gladue Bail Status	69.2%	30.8%
	Total		Count	9516	4089
			% within Gladue Bail Status	69.9%	30.1%
2007	Gladue Bail Status	No	Count	9304	4308
			% within Gladue Bail Status	68.4%	31.6%
		Yes	Count	349	177
			% within Gladue Bail Status	66.3%	33.7%
	Total		Count	9653	4485
			% within Gladue Bail Status	68.3%	31.7%
2008	Gladue Bail Status	No	Count	9389	4114
			% within Gladue Bail Status	69.5%	30.5%
		Yes	Count	380	167
			% within Gladue Bail Status	69.5%	30.5%
	Total		Count	9769	4281
			% within Gladue Bail Status	69.5%	30.5%
2009	Gladue Bail Status	No	Count	8738	4170
			% within Gladue Bail Status	67.7%	32.3%
		Yes	Count	357	187
			% within Gladue Bail Status	65.6%	34.4%
	Total		Count	9095	4357
			% within Gladue Bail Status	67.6%	32.4%
2010	Gladue Bail Status	No	Count	7905	4231
			% within Gladue Bail Status	65.1%	34.9%
		Yes	Count	222	116
			% within Gladue Bail Status	65.7%	34.3%
	Total		Count	8127	4347
			% within Gladue Bail Status	65.2%	34.8%
2011	Gladue Bail Status	No	Count	8224	4197
			% within Gladue Bail Status	66.2%	33.8%
		Yes	Count	70	36
			% within Gladue Bail Status	66.0%	34.0%
	Total		Count	8294	4233
			% within Gladue Bail Status	66.2%	33.8%
2012**	Gladue Bail Status	No	Count	7909	4235
			% within Gladue Bail Status	65.1%	34.9%
		Yes	Count	191	142
			% within Gladue Bail Status	57.4%	42.6%
	Total		Count	8100	4377
			% within Gladue Bail Status	64.9%	35.1%
2013	Gladue Bail Status	No	Count	6897	3626
			% within Gladue Bail Status	65.5%	34.5%
		Yes	Count	294	172
			% within Gladue Bail Status	63.1%	36.9%
	Total		Count	8100	4377
			% within Gladue Bail Status	64.9%	35.1%
2014	Gladue Bail Status	No	Count	5933	3127
			% within Gladue Bail Status	65.5%	34.5%
		Yes	Count	433	209
			% within Gladue Bail Status	67.4%	32.6%
	Total		Count	6366	3336
			% within Gladue Bail Status	65.6%	34.4%
2015	Gladue Bail Status	No	Count	5471	3081
			% within Gladue Bail Status	64.0%	36.0%
		Yes	Count	406	265
			% within Gladue Bail Status	60.5%	39.5%

2016	Total		Count	5877	3346	9223
			% within Gladue Bail Status	63.7%	36.3%	100.0%
	Gladue Bail Status	No	Count	5486	3182	8668
			% within Gladue Bail Status	63.3%	36.7%	100.0%
		Yes	Count	386	234	620
			% within Gladue Bail Status	62.3%	37.7%	100.0%
Total		Count	5872	3416	9288	
		% within Gladue Bail Status	63.2%	36.8%	100.0%	
2017	Gladue Bail Status	No	Count	5737	3409	9146
			% within Gladue Bail Status	62.7%	37.3%	100.0%
		Yes	Count	393	245	638
			% within Gladue Bail Status	61.6%	38.4%	100.0%
	Total		Count	6130	3654	9784
			% within Gladue Bail Status	62.7%	37.3%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix U – Longitudinal Trends in the Presence of Charges against Property

Figure U.1: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 1+ Charges against Property, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

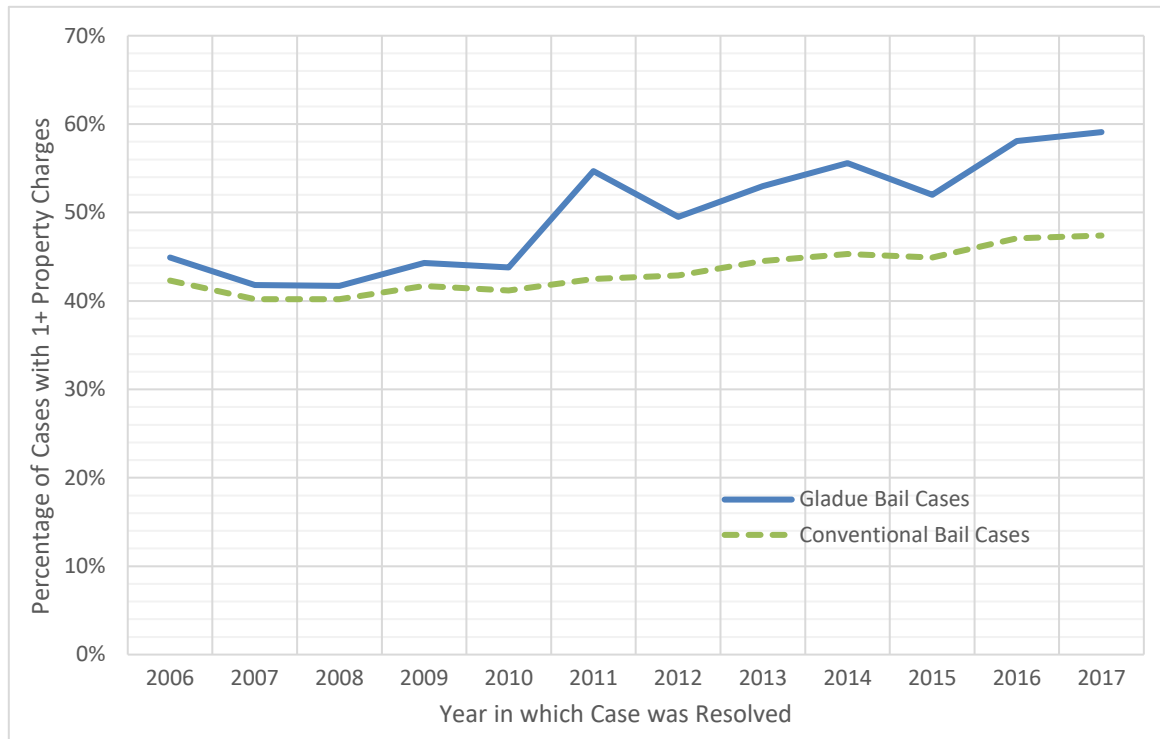


Table U.1: Crosstabulation of Gladue Bail Status by Presence of Charges against Property over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Presence of Charges against Property						
Year			No Property Charges	Property Charge(s)	Total	
2006	Gladue Bail Status	No	Count	7569	5553	13122
			% within Gladue Bail Status	57.7%	42.3%	100.0%
		Yes	Count	266	217	483
	% within Gladue Bail Status		55.1%	44.9%	100.0%	
	Total		Count	7835	5770	13605
		% within Gladue Bail Status	57.6%	42.4%	100.0%	
2007	Gladue Bail Status	No	Count	8137	5475	13612
			% within Gladue Bail Status	59.8%	40.2%	100.0%
		Yes	Count	306	220	526
	% within Gladue Bail Status		58.2%	41.8%	100.0%	
	Total		Count	8443	5695	14138
		% within Gladue Bail Status	59.7%	40.3%	100.0%	
2008	Gladue Bail Status	No	Count	8076	5427	13503
			% within Gladue Bail Status	59.8%	40.2%	100.0%
		Yes	Count	319	228	547
	% within Gladue Bail Status		58.3%	41.7%	100.0%	
	Total		Count	8395	5655	14050
		% within Gladue Bail Status	59.8%	40.2%	100.0%	
2009	Gladue Bail Status	No	Count	7521	5387	12908
			% within Gladue Bail Status	58.3%	41.7%	100.0%
		Yes	Count	303	241	544
	% within Gladue Bail Status		55.7%	44.3%	100.0%	
	Total		Count	7824	5628	13452
		% within Gladue Bail Status	58.2%	41.8%	100.0%	
			Count	7134	5002	12136

2010	Gladue Bail Status	No	% within Gladue Bail Status	58.8%	41.2%	100.0%
		Yes	Count	190	148	338
	Total		% within Gladue Bail Status	56.2%	43.8%	100.0%
			Count	7324	5150	12474
2011*	Gladue Bail Status	No	% within Gladue Bail Status	58.7%	41.3%	100.0%
		Yes	Count	7137	5284	12421
	Total		% within Gladue Bail Status	57.5%	42.5%	100.0%
			Count	48	58	106
2012*	Gladue Bail Status	No	% within Gladue Bail Status	45.3%	54.7%	100.0%
		Yes	Count	7185	5342	12527
	Total		% within Gladue Bail Status	57.4%	42.6%	100.0%
			Count	6938	5206	12144
2013***	Gladue Bail Status	No	% within Gladue Bail Status	57.1%	42.9%	100.0%
		Yes	Count	168	165	333
	Total		% within Gladue Bail Status	50.5%	49.5%	100.0%
			Count	7106	5371	12477
2014***	Gladue Bail Status	No	% within Gladue Bail Status	57.0%	43.0%	100.0%
		Yes	Count	5836	4687	10523
	Total		% within Gladue Bail Status	55.5%	44.5%	100.0%
			Count	219	247	466
2015***	Gladue Bail Status	No	% within Gladue Bail Status	47.0%	53.0%	100.0%
		Yes	Count	6055	4934	10989
	Total		% within Gladue Bail Status	55.1%	44.9%	100.0%
			Count	4960	4100	9060
2016***	Gladue Bail Status	No	% within Gladue Bail Status	54.7%	45.3%	100.0%
		Yes	Count	285	357	642
	Total		% within Gladue Bail Status	44.4%	55.6%	100.0%
			Count	5245	4457	9702
2017***	Gladue Bail Status	No	% within Gladue Bail Status	54.1%	45.9%	100.0%
		Yes	Count	4708	3844	8552
	Total		% within Gladue Bail Status	55.1%	44.9%	100.0%
			Count	322	349	671
2018***	Gladue Bail Status	No	% within Gladue Bail Status	48.0%	52.0%	100.0%
		Yes	Count	5030	4193	9223
	Total		% within Gladue Bail Status	54.5%	45.5%	100.0%
			Count	4582	4086	8668
2019***	Gladue Bail Status	No	% within Gladue Bail Status	52.9%	47.1%	100.0%
		Yes	Count	260	360	620
	Total		% within Gladue Bail Status	41.9%	58.1%	100.0%
			Count	4842	4446	9288
2020***	Gladue Bail Status	No	% within Gladue Bail Status	52.1%	47.9%	100.0%
		Yes	Count	4815	4331	9146
	Total		% within Gladue Bail Status	52.6%	47.4%	100.0%
			Count	261	377	638
2021***	Gladue Bail Status	No	% within Gladue Bail Status	40.9%	59.1%	100.0%
		Yes	Count	5076	4708	9784
	Total		% within Gladue Bail Status	51.9%	48.1%	100.0%
			Count			

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix V – Longitudinal Trends in the Presence of Charges against the Administration of Justice

Table V.1: Crosstabulation of Gladue Bail Status by Presence of One or More Charges against the Administration of Justice over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Year				Presence of Charges against the Administration of Justice		Total
				No Administration of Justice Charges	Administration of Justice Charge(s)	
2006***	Gladue Bail Status	No	Count	7220	5902	13122
			% within Gladue Bail Status	55.0%	45.0%	100.0%
	Yes	Count	203	280	483	
			% within Gladue Bail Status	42.0%	58.0%	100.0%
	Total	Count	7423	6182	13605	
			% within Gladue Bail Status	54.6%	45.4%	100.0%
2007***	Gladue Bail Status	No	Count	7710	5902	13612
			% within Gladue Bail Status	56.6%	43.4%	100.0%
	Yes	Count	245	281	526	
			% within Gladue Bail Status	46.6%	53.4%	100.0%
	Total	Count	7955	6183	14138	
			% within Gladue Bail Status	56.3%	43.7%	100.0%
2008***	Gladue Bail Status	No	Count	7505	5998	13503
			% within Gladue Bail Status	55.6%	44.4%	100.0%
	Yes	Count	257	290	547	
			% within Gladue Bail Status	47.0%	53.0%	100.0%
	Total	Count	7762	6288	14050	
			% within Gladue Bail Status	55.2%	44.8%	100.0%
2009***	Gladue Bail Status	No	Count	7282	5626	12908
			% within Gladue Bail Status	56.4%	43.6%	100.0%
	Yes	Count	208	336	544	
			% within Gladue Bail Status	38.2%	61.8%	100.0%
	Total	Count	7490	5962	13452	
			% within Gladue Bail Status	55.7%	44.3%	100.0%
2010***	Gladue Bail Status	No	Count	6899	5237	12136
			% within Gladue Bail Status	56.8%	43.2%	100.0%
	Yes	Count	147	191	338	
			% within Gladue Bail Status	43.5%	56.5%	100.0%
	Total	Count	7046	5428	12474	
			% within Gladue Bail Status	56.5%	43.5%	100.0%
2011***	Gladue Bail Status	No	Count	6974	5447	12421
			% within Gladue Bail Status	56.1%	43.9%	100.0%
	Yes	Count	40	66	106	
			% within Gladue Bail Status	37.7%	62.3%	100.0%
	Total	Count	7014	5513	12527	
			% within Gladue Bail Status	56.0%	44.0%	100.0%
2012***	Gladue Bail Status	No	Count	6678	5466	12144
			% within Gladue Bail Status	55.0%	45.0%	100.0%
	Yes	Count	134	199	333	
			% within Gladue Bail Status	40.2%	59.8%	100.0%
	Total	Count	6812	5665	12477	
			% within Gladue Bail Status	54.6%	45.4%	100.0%
2013***	Gladue Bail Status	No	Count	5835	4688	10523
			% within Gladue Bail Status	55.4%	44.6%	100.0%
	Yes	Count	165	301	466	
			% within Gladue Bail Status	35.4%	64.6%	100.0%
	Total	Count	6000	4989	10989	
			% within Gladue Bail Status	54.6%	45.4%	100.0%
2014***	Gladue Bail Status	No	Count	5130	3930	9060
			% within Gladue Bail Status	56.6%	43.4%	100.0%
	Yes	Count	260	382	642	
			% within Gladue Bail Status	40.5%	59.5%	100.0%
	Total	Count	5390	4312	9702	
			% within Gladue Bail Status	55.6%	44.4%	100.0%
2015***	No	Count	4826	3726	8552	
			% within Gladue Bail Status	56.4%	43.6%	100.0%

	Gladue Bail	Yes	Count	224	447	671
			% within Gladue Bail Status	33.4%	66.6%	100.0%
	Total		Count	5050	4173	9223
			% within Gladue Bail Status	54.8%	45.2%	100.0%
2016***	Gladue Bail Status	No	Count	4755	3913	8668
			% within Gladue Bail Status	54.9%	45.1%	100.0%
		Yes	Count	223	397	620
			% within Gladue Bail Status	36.0%	64.0%	100.0%
	Total		Count	4978	4310	9288
			% within Gladue Bail Status	53.6%	46.4%	100.0%
2017***	Gladue Bail Status	No	Count	4980	4166	9146
			% within Gladue Bail Status	54.5%	45.5%	100.0%
		Yes	Count	227	411	638
			% within Gladue Bail Status	35.6%	64.4%	100.0%
	Total		Count	5207	4577	9784
			% within Gladue Bail Status	53.2%	46.8%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix W – Longitudinal Trends in Presence of any s.145 Charges

Table W.1: Crosstabulation of Gladue Bail Status by Presence of One or More s.145 Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Year			Presence of Any s.145 Charge		Total
			No s.145 Charges	s.145 Charge(s)	
2006***	Gladue Bail Status	No	Count	9495	3627
			% within Gladue Bail Status	72.4%	27.6%
	Yes	Count	289	194	483
			% within Gladue Bail Status	59.8%	40.2%
	Total	Count	9784	3821	13605
			% within Gladue Bail Status	71.9%	28.1%
2007***	Gladue Bail Status	No	Count	9830	3782
			% within Gladue Bail Status	72.2%	27.8%
	Yes	Count	338	188	526
			% within Gladue Bail Status	64.3%	35.7%
	Total	Count	10168	3970	14138
			% within Gladue Bail Status	71.9%	28.1%
2008***	Gladue Bail Status	No	Count	9633	3870
			% within Gladue Bail Status	71.3%	28.7%
	Yes	Count	341	206	547
			% within Gladue Bail Status	62.3%	37.7%
	Total	Count	9974	4076	14050
			% within Gladue Bail Status	71.0%	29.0%
2009***	Gladue Bail Status	No	Count	9479	3429
			% within Gladue Bail Status	73.4%	26.6%
	Yes	Count	315	229	544
			% within Gladue Bail Status	57.9%	42.1%
	Total	Count	9974	4076	14050
			% within Gladue Bail Status	71.0%	29.0%
2010***	Gladue Bail Status	No	Count	9004	3132
			% within Gladue Bail Status	74.2%	25.8%
	Yes	Count	196	142	338
			% within Gladue Bail Status	58.0%	42.0%
	Total	Count	9200	3274	12474
			% within Gladue Bail Status	73.8%	26.2%
2011***	Gladue Bail Status	No	Count	9210	3211
			% within Gladue Bail Status	74.1%	25.9%
	Yes	Count	62	44	106
			% within Gladue Bail Status	58.5%	41.5%
	Total	Count	9272	3255	12527
			% within Gladue Bail Status	74.0%	26.0%
2012*	Gladue Bail Status	No	Count	9064	3080
			% within Gladue Bail Status	74.6%	25.4%
	Yes	Count	230	103	333
			% within Gladue Bail Status	69.1%	30.9%
	Total	Count	9294	3183	12477
			% within Gladue Bail Status	74.5%	25.5%
2013***	Gladue Bail Status	No	Count	7987	2536
			% within Gladue Bail Status	75.9%	24.1%
	Yes	Count	313	153	466
			% within Gladue Bail Status	67.2%	32.8%
	Total	Count	8300	2689	10989
			% within Gladue Bail Status	75.5%	24.5%
2014***	Gladue Bail Status	No	Count	6919	2141
			% within Gladue Bail Status	76.4%	23.6%
	Yes	Count	449	193	642
			% within Gladue Bail Status	69.9%	30.1%
	Total	Count	7368	2334	9702
			% within Gladue Bail Status	75.9%	24.1%
2015***	Gladue Bail Status	No	Count	6573	1979
			% within Gladue Bail Status	76.9%	23.1%
	Yes	Count	452	219	671
			% within Gladue Bail Status	67.4%	32.6%
	Total	Count	7025	2198	9223
			% within Gladue Bail Status	76.2%	23.8%

2016***	Gladue Bail Status	No	Count	6643	2025	8668
			% within Gladue Bail Status	76.6%	23.4%	100.0%
	Yes	Count	435	185	620	
			% within Gladue Bail Status	70.2%	29.8%	100.0%
	Total	Count	7078	2210	9288	
			% within Gladue Bail Status	76.2%	23.8%	100.0%
2017***	Gladue Bail Status	No	Count	6967	2179	9146
			% within Gladue Bail Status	76.2%	23.8%	100.0%
	Yes	Count	429	209	638	
			% within Gladue Bail Status	67.2%	32.8%	100.0%
	Total	Count	7396	2388	9784	
			% within Gladue Bail Status	75.6%	24.4%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix X – Longitudinal Trends in the Presence of s.145(2) Charges

Table X.1: Crosstabulation of Gladue Bail Status by Presence of s.145(2) Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Year				Presence of s.145.2 Charges		Total
				No s.145(2) Charges	s.145(2) Charge(s)	
2006***	Gladue Bail Status	No	Count	11790	1332	13122
			% within Gladue Bail Status	89.8%	10.2%	100.0%
	Yes	Count	377	106	483	
			% within Gladue Bail Status	78.1%	21.9%	100.0%
	Total	Count	12167	1438	13605	
			% within Gladue Bail Status	89.4%	10.6%	100.0%
2007***	Gladue Bail Status	No	Count	12396	1216	13612
			% within Gladue Bail Status	91.1%	8.9%	100.0%
	Yes	Count	445	81	526	
			% within Gladue Bail Status	84.6%	15.4%	100.0%
	Total	Count	12841	1297	14138	
			% within Gladue Bail Status	90.8%	9.2%	100.0%
2008***	Gladue Bail Status	No	Count	12332	1171	13503
			% within Gladue Bail Status	91.3%	8.7%	100.0%
	Yes	Count	462	85	547	
			% within Gladue Bail Status	84.5%	15.5%	100.0%
	Total	Count	12794	1256	14050	
			% within Gladue Bail Status	91.1%	8.9%	100.0%
2009***	Gladue Bail Status	No	Count	11958	950	12908
			% within Gladue Bail Status	92.6%	7.4%	100.0%
	Yes	Count	469	75	544	
			% within Gladue Bail Status	86.2%	13.8%	100.0%
	Total	Count	12427	1025	13452	
			% within Gladue Bail Status	92.4%	7.6%	100.0%
2010***	Gladue Bail Status	No	Count	11350	786	12136
			% within Gladue Bail Status	93.5%	6.5%	100.0%
	Yes	Count	285	53	338	
			% within Gladue Bail Status	84.3%	15.7%	100.0%
	Total	Count	11635	839	12474	
			% within Gladue Bail Status	93.3%	6.7%	100.0%
2011***	Gladue Bail Status	No	Count	11613	808	12421
			% within Gladue Bail Status	93.5%	6.5%	100.0%
	Yes	Count	89	17	106	
			% within Gladue Bail Status	84.0%	16.0%	100.0%
	Total	Count	11702	825	12527	
			% within Gladue Bail Status	93.4%	6.6%	100.0%
2012***	Gladue Bail Status	No	Count	11462	682	12144
			% within Gladue Bail Status	94.4%	5.6%	100.0%
	Yes	Count	299	34	333	
			% within Gladue Bail Status	89.8%	10.2%	100.0%
	Total	Count	11761	716	12477	
			% within Gladue Bail Status	94.3%	5.7%	100.0%
2013***	Gladue Bail Status	No	Count	9895	628	10523
			% within Gladue Bail Status	94.0%	6.0%	100.0%
	Yes	Count	420	46	466	
			% within Gladue Bail Status	90.1%	9.9%	100.0%
	Total	Count	10315	674	10989	
			% within Gladue Bail Status	93.9%	6.1%	100.0%
2014***	Gladue Bail Status	No	Count	8579	481	9060
			% within Gladue Bail Status	94.7%	5.3%	100.0%
	Yes	Count	585	57	642	
			% within Gladue Bail Status	91.1%	8.9%	100.0%
	Total	Count	9164	538	9702	
			% within Gladue Bail Status	94.5%	5.5%	100.0%
2015***	Gladue Bail Status	No	Count	8060	492	8552
			% within Gladue Bail Status	94.2%	5.8%	100.0%
	Yes	Count	603	68	671	
			% within Gladue Bail Status	89.9%	10.1%	100.0%
	Total	Count	8663	560	9223	

	Total		% within Gladue Bail Status	93.9%	6.1%	100.0%
2016**	Gladue Bail Status	No	Count	8182	486	8668
			% within Gladue Bail Status	94.4%	5.6%	100.0%
	Yes	Count	568	52	620	
			% within Gladue Bail Status	91.6%	8.4%	100.0%
	Total		Count	8750	538	9288
			% within Gladue Bail Status	94.2%	5.8%	100.0%
2017***	Gladue Bail Status	No	Count	8635	511	9146
			% within Gladue Bail Status	94.4%	5.6%	100.0%
	Yes	Count	560	78	638	
			% within Gladue Bail Status	87.8%	12.2%	100.0%
	Total		Count	9195	589	9784
			% within Gladue Bail Status	94.0%	6.0%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix Y – Longitudinal Trends in the Presence of s.145(3) Charges over Time

Table Y.1: Crosstabulation of Gladue Bail Status by Presence of s.145(3) Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Year				Presence of s.145(3) Charges		Total
				No s.145(3) Charges	s.145(3) Charge(s)	
2006*	Gladue Bail Status	No	Count	11474	1648	13122
			% within Gladue Bail Status	87.4%	12.6%	100.0%
		Yes	Count	404	79	483
			% within Gladue Bail Status	83.6%	16.4%	100.0%
	Total		Count	11878	1727	13605
			% within Gladue Bail Status	87.3%	12.7%	100.0%
2007**	Gladue Bail Status	No	Count	11656	1956	13612
			% within Gladue Bail Status	85.6%	14.4%	100.0%
		Yes	Count	426	100	526
			% within Gladue Bail Status	81.0%	19.0%	100.0%
	Total		Count	12082	2056	14138
			% within Gladue Bail Status	85.5%	14.5%	100.0%
2008***	Gladue Bail Status	No	Count	11307	2196	13503
			% within Gladue Bail Status	83.7%	16.3%	100.0%
		Yes	Count	422	125	547
			% within Gladue Bail Status	77.1%	22.9%	100.0%
	Total		Count	11729	2321	14050
			% within Gladue Bail Status	83.5%	16.5%	100.0%
2009***	Gladue Bail Status	No	Count	10838	2070	12908
			% within Gladue Bail Status	84.0%	16.0%	100.0%
		Yes	Count	380	164	544
			% within Gladue Bail Status	69.9%	30.1%	100.0%
	Total		Count	11218	2234	13452
			% within Gladue Bail Status	83.4%	16.6%	100.0%
2010***	Gladue Bail Status	No	Count	10162	1974	12136
			% within Gladue Bail Status	83.7%	16.3%	100.0%
		Yes	Count	242	96	338
			% within Gladue Bail Status	71.6%	28.4%	100.0%
	Total		Count	10404	2070	12474
			% within Gladue Bail Status	83.4%	16.6%	100.0%
2011***	Gladue Bail Status	No	Count	10378	2043	12421
			% within Gladue Bail Status	83.6%	16.4%	100.0%
		Yes	Count	74	32	106
			% within Gladue Bail Status	69.8%	30.2%	100.0%
	Total		Count	10452	2075	12527
			% within Gladue Bail Status	83.4%	16.6%	100.0%
2012*	Gladue Bail Status	No	Count	10104	2040	12144
			% within Gladue Bail Status	83.2%	16.8%	100.0%
		Yes	Count	259	74	333
			% within Gladue Bail Status	77.8%	22.2%	100.0%
	Total		Count	10363	2114	12477
			% within Gladue Bail Status	83.1%	16.9%	100.0%
2013***	Gladue Bail Status	No	Count	8870	1653	10523
			% within Gladue Bail Status	84.3%	15.7%	100.0%
		Yes	Count	355	111	466
			% within Gladue Bail Status	76.2%	23.8%	100.0%
	Total		Count	9225	1764	10989
			% within Gladue Bail Status	83.9%	16.1%	100.0%
2014***	Gladue Bail Status	No	Count	7635	1425	9060
			% within Gladue Bail Status	84.3%	15.7%	100.0%
		Yes	Count	501	141	642
			% within Gladue Bail Status	78.0%	22.0%	100.0%
	Total		Count	8136	1566	9702
			% within Gladue Bail Status	83.9%	16.1%	100.0%
2015***	Gladue Bail Status	No	Count	7215	1337	8552
			% within Gladue Bail Status	84.4%	15.6%	100.0%
		Yes	Count	513	158	671
			% within Gladue Bail Status	76.5%	23.5%	100.0%
	Total		Count	7728	1495	9223

	Total		% within Gladue Bail Status	83.8%	16.2%	100.0%
2016***	Gladue Bail Status	No	Count	7298	1370	8668
			% within Gladue Bail Status	84.2%	15.8%	100.0%
	Yes	Count	485	135	620	
			% within Gladue Bail Status	78.2%	21.8%	100.0%
	Total		Count	7783	1505	9288
			% within Gladue Bail Status	83.8%	16.2%	100.0%
2017***	Gladue Bail Status	No	Count	7679	1467	9146
			% within Gladue Bail Status	84.0%	16.0%	100.0%
	Yes	Count	475	163	638	
			% within Gladue Bail Status	74.5%	25.5%	100.0%
	Total		Count	8154	1630	9784
			% within Gladue Bail Status	83.3%	16.7%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix Z – Longitudinal Trends in the presence of s.733.1(1) Charges

Table Z.1: Crosstabulation of Gladue Bail Status by Presence of s.733.1(1) Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

Year			Presence of s.733.1(1) Charges		Total
			No s.733.1(1) Charges	s.733.1(1) Charge(s)	
2006**	Gladue Bail Status	No	Count	10849	13122
			% within Gladue Bail Status	82.7%	100.0%
	Yes	Count	376	107	483
			% within Gladue Bail Status	77.8%	100.0%
	Total	Count	11225	2380	13605
			% within Gladue Bail Status	82.5%	100.0%
2007***	Gladue Bail Status	No	Count	11567	13612
			% within Gladue Bail Status	85.0%	100.0%
	Yes	Count	405	121	526
			% within Gladue Bail Status	77.0%	100.0%
	Total	Count	11972	2166	14138
			% within Gladue Bail Status	84.7%	100.0%
2008***	Gladue Bail Status	No	Count	11472	13503
			% within Gladue Bail Status	85.0%	100.0%
	Yes	Count	433	114	547
			% within Gladue Bail Status	79.2%	100.0%
	Total	Count	11905	2145	14050
			% within Gladue Bail Status	84.7%	100.0%
2009***	Gladue Bail Status	No	Count	10823	12908
			% within Gladue Bail Status	83.8%	100.0%
	Yes	Count	403	141	544
			% within Gladue Bail Status	74.1%	100.0%
	Total	Count	11226	2226	13452
			% within Gladue Bail Status	83.5%	100.0%
2010	Gladue Bail Status	No	Count	10180	12136
			% within Gladue Bail Status	83.9%	100.0%
	Yes	Count	279	59	338
			% within Gladue Bail Status	82.5%	100.0%
	Total	Count	10459	2015	12474
			% within Gladue Bail Status	83.8%	100.0%
2011***	Gladue Bail Status	No	Count	10292	12421
			% within Gladue Bail Status	82.9%	100.0%
	Yes	Count	73	33	106
			% within Gladue Bail Status	68.9%	100.0%
	Total	Count	10365	2162	12527
			% within Gladue Bail Status	82.7%	100.0%
2012***	Gladue Bail Status	No	Count	9874	12144
			% within Gladue Bail Status	81.3%	100.0%
	Yes	Count	214	119	333
			% within Gladue Bail Status	64.3%	100.0%
	Total	Count	10088	2389	12477
			% within Gladue Bail Status	80.9%	100.0%
2013***	Gladue Bail Status	No	Count	8466	10523
			% within Gladue Bail Status	80.5%	100.0%
	Yes	Count	289	177	466
			% within Gladue Bail Status	62.0%	100.0%
	Total	Count	8755	2234	10989
			% within Gladue Bail Status	79.7%	100.0%
2014***	Gladue Bail Status	No	Count	7353	9060
			% within Gladue Bail Status	81.2%	100.0%
	Yes	Count	401	241	642
			% within Gladue Bail Status	62.5%	100.0%
	Total	Count	7754	1948	9702
			% within Gladue Bail Status	79.9%	100.0%
2015***	Gladue Bail Status	No	Count	6819	8552
			% within Gladue Bail Status	79.7%	100.0%
	Yes	Count	369	302	671
			% within Gladue Bail Status	55.0%	100.0%
	Total	Count	7188	2035	9223
			% within Gladue Bail Status	77.9%	100.0%

2016***	Gladue Bail Status	No	Count	6687	1981	8668
			% within Gladue Bail Status	77.1%	22.9%	100.0%
	Yes		Count	348	272	620
			% within Gladue Bail Status	56.1%	43.9%	100.0%
	Total		Count	7035	2253	9288
			% within Gladue Bail Status	75.7%	24.3%	100.0%
2017***	Gladue Bail Status	No	Count	7055	2091	9146
			% within Gladue Bail Status	77.1%	22.9%	100.0%
	Yes		Count	370	268	638
			% within Gladue Bail Status	58.0%	42.0%	100.0%
	Total		Count	7425	2359	9784
			% within Gladue Bail Status	75.9%	24.1%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AA – Longitudinal Trends in the Number of (First) Bail Appearances

Figure AA.1: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 2 Bail Appearances, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Bail Appearances; 2006-2017)⁵³⁹

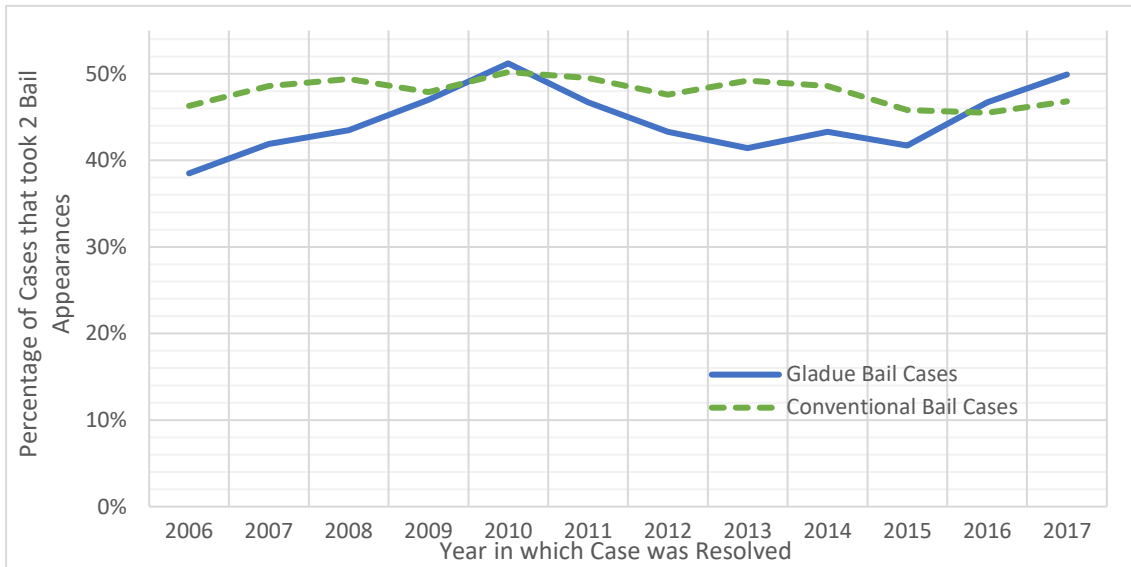
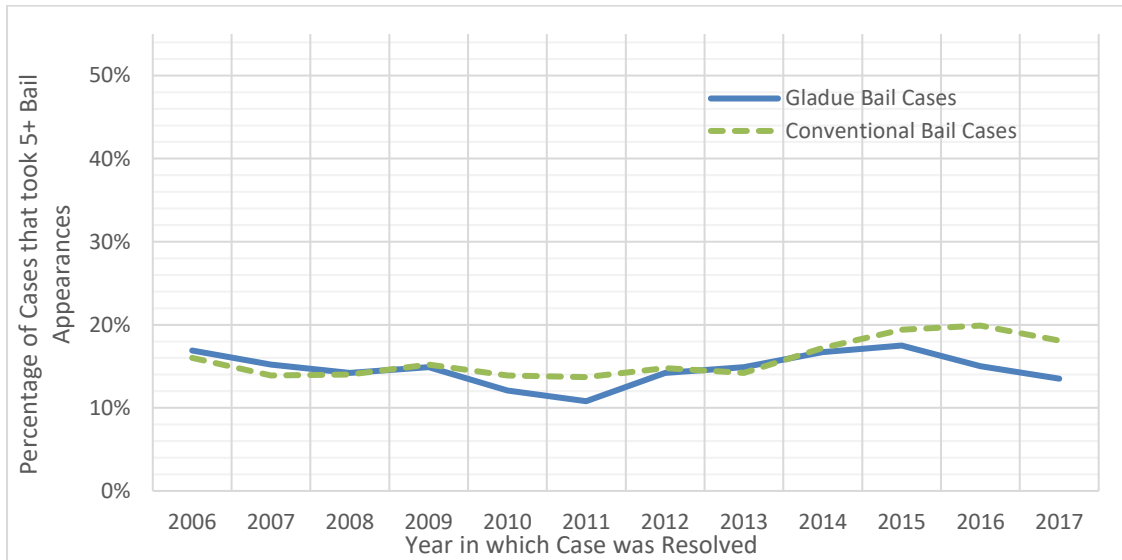


Figure AA.2: Line Chart of Gladue Bail Cases and Conventional Bail Cases with 5+ Bail Appearances, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Bail Appearances; 2006-2017)



⁵³⁹ In the regression model, while the interaction term between Year and Gladue Bail Status was statistically significant ($p < .01$) when predicting both cases with 2 bail appearances and cases with 5+ bail appearances, any consistent differences between Gladue bail and conventional bail cases were not immediately apparent in the line charts and thus these differential changes over time do not appear to be particularly meaningful. Furthermore, the interaction term between Year and Gladue bail status when predicting cases with 3-4 bail appearances was not statistically significant ($p = .449$).

Table AA.1: Crosstabulation of Gladue Bail Status by Number of (First) Bail Appearances over Time, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Bail Appearances⁵⁴⁰; 2006-2017)

Year				Number of (First) Bail Appearances			
				2	3-4	5+	Total
2006***	Gladue Bail Status	No	Count	4789	3898	1658	10345
			% within Gladue Bail Status	46.3%	37.7%	16.0%	100.0%
		Yes	Count	200	232	88	520
			% within Gladue Bail Status	38.5%	44.6%	16.9%	100.0%
	Total		Count	4989	4130	1746	10865
			% within Gladue Bail Status	45.9%	38.0%	16.1%	100.0%
2007**	Gladue Bail Status	No	Count	4793	3696	1368	9857
			% within Gladue Bail Status	48.6%	37.5%	13.9%	100.0%
		Yes	Count	234	239	85	558
			% within Gladue Bail Status	41.9%	42.8%	15.2%	100.0%
	Total		Count	5027	3935	1453	10415
			% within Gladue Bail Status	48.3%	37.8%	14.0%	100.0%
2008*	Gladue Bail Status	No	Count	4830	3579	1374	9783
			% within Gladue Bail Status	49.4%	36.6%	14.0%	100.0%
		Yes	Count	263	256	86	605
			% within Gladue Bail Status	43.5%	42.3%	14.2%	100.0%
	Total		Count	5093	3835	1460	10388
			% within Gladue Bail Status	49.0%	36.9%	14.1%	100.0%
2009	Gladue Bail Status	No	Count	4448	3418	1414	9280
			% within Gladue Bail Status	47.9%	36.8%	15.2%	100.0%
		Yes	Count	303	246	96	645
			% within Gladue Bail Status	47.0%	38.1%	14.9%	100.0%
	Total		Count	4751	3664	1510	9925
			% within Gladue Bail Status	47.9%	36.9%	15.2%	100.0%
2010	Gladue Bail Status	No	Count	4262	3041	1183	8486
			% within Gladue Bail Status	50.2%	35.8%	13.9%	100.0%
		Yes	Count	186	133	44	363
			% within Gladue Bail Status	51.2%	36.6%	12.1%	100.0%
	Total		Count	4448	3174	1227	8849
			% within Gladue Bail Status	50.3%	35.9%	13.9%	100.0%
2011	Gladue Bail Status	No	Count	4454	3308	1237	8999
			% within Gladue Bail Status	49.5%	36.8%	13.7%	100.0%
		Yes	Count	56	51	13	120
			% within Gladue Bail Status	46.7%	42.5%	10.8%	100.0%
	Total		Count	4510	3359	1250	9119
			% within Gladue Bail Status	49.5%	36.8%	13.7%	100.0%
2012	Gladue Bail Status	No	Count	4211	3333	1307	8851
			% within Gladue Bail Status	47.6%	37.7%	14.8%	100.0%
		Yes	Count	156	153	51	360
			% within Gladue Bail Status	43.3%	42.5%	14.2%	100.0%
	Total		Count	4367	3486	1358	9211
			% within Gladue Bail Status	47.4%	37.8%	14.7%	100.0%
2013**	Gladue Bail Status	No	Count	3752	2784	1083	7619
			% within Gladue Bail Status	49.2%	36.5%	14.2%	100.0%
		Yes	Count	208	219	75	502
			% within Gladue Bail Status	41.4%	43.6%	14.9%	100.0%
	Total		Count	3960	3003	1158	8121
			% within Gladue Bail Status	48.8%	37.0%	14.3%	100.0%
2014**		No	Count	3267	2294	1158	6719
			% within Gladue Bail Status	48.6%	34.1%	17.2%	100.0%

⁵⁴⁰ Recall that analyzing the number of bail appearances for only those cases with two or more bail appearances allows for an examination of more comparable groups (in that those less serious cases deemed suitable for same day release, potentially before the opportunity or need to appear in Gladue Court are removed). However, these longitudinal analyses were also performed for all bail cases (that is, including single bail appearance cases) with similar results. While there appeared to be, again, no consistent or meaningful trends over time (i.e., the number of required bail appearances was reasonably stable over time), these Gladue bail cases were consistently slightly more likely than conventional bail cases to have 5+ bail appearances, somewhat less likely to have 3-4 bail appearances, and considerably less likely than their counterparts to have only 1-2 bail appearances (with differences $p < .001$ for all years). Yet recall that some of these differences are likely to be a reflection of Gladue Court scheduling and referral processes.

2015**	Gladue Bail	Yes	Count	317	293	122	732
			% within Gladue Bail Status	43.3%	40.0%	16.7%	100.0%
	Total		Count	3584	2587	1280	7451
			% within Gladue Bail Status	48.1%	34.7%	17.2%	100.0%
	Gladue Bail Status	No	Count	2879	2188	1216	6283
			% within Gladue Bail Status	45.8%	34.8%	19.4%	100.0%
		Yes	Count	328	321	138	787
			% within Gladue Bail Status	41.7%	40.8%	17.5%	100.0%
	Total		Count	3207	2509	1354	7070
			% within Gladue Bail Status	45.4%	35.5%	19.2%	100.0%
2016**	Gladue Bail Status	No	Count	2898	2203	1269	6370
			% within Gladue Bail Status	45.5%	34.6%	19.9%	100.0%
		Yes	Count	314	257	101	672
			% within Gladue Bail Status	46.7%	38.2%	15.0%	100.0%
	Total		Count	3212	2460	1370	7042
			% within Gladue Bail Status	45.6%	34.9%	19.5%	100.0%
2017**	Gladue Bail Status	No	Count	3090	2309	1197	6596
			% within Gladue Bail Status	46.8%	35.0%	18.1%	100.0%
		Yes	Count	411	302	111	824
			% within Gladue Bail Status	49.9%	36.7%	13.5%	100.0%
	Total		Count	3501	2611	1308	7420
			% within Gladue Bail Status	47.2%	35.2%	17.6%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AB – Longitudinal Trends in the Time Spent in (First) Bail

Figure AB.1: Line Chart of Gladue Bail Cases and Conventional Bail Cases that took 2-8 Days in Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Days in Bail; 2006-2017)⁵⁴¹

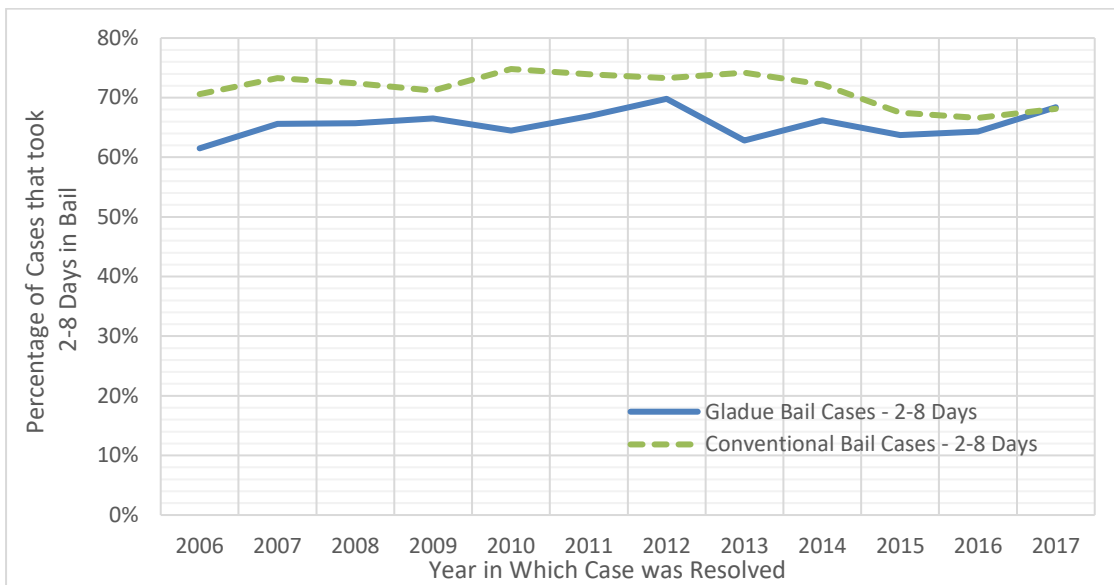
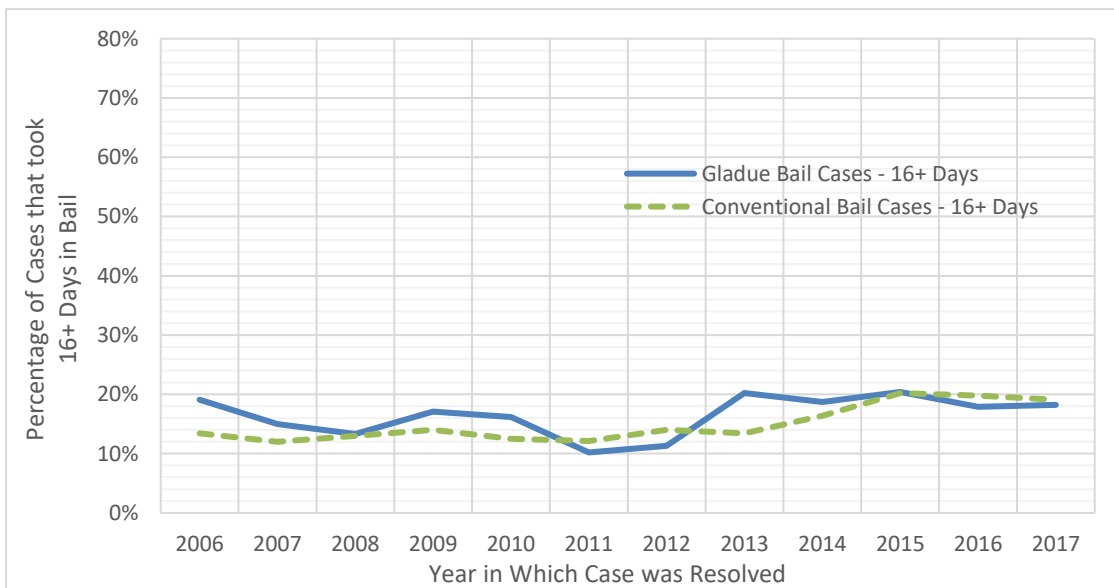


Figure AB.2: Line Chart of Gladue Bail Cases and Conventional Bail Cases that took 16+ Days in Bail, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Days in Bail; 2006-2017)



⁵⁴¹ In the regression model, while the interaction term between Year and Gladue Bail Status was statistically significant ($p < .001$) when predicting cases which required two to eight days to complete bail, this same interaction effect was not statistically significant ($p = .573$) when predicting cases which required 16 or more days to complete bail (and similarly not statistically significant when predicting cases with nine to 15 days in bail; $p = .446$).

Table AB.1: Crosstabulation of Gladue Bail Status by Time Spent in (First) Bail over Time, Old City Hall and College Park Bail Cases (Event Dataset; 2+ Days in Bail⁵⁴²; 2006-2017)

Year			Time in (First) Bail				
			2-8 Days	9-15 Days	16+ Days	Total	
2006***	Gladue Bail Status	No	Count	7197	1630	1370	10197
			% within Gladue Bail Status	70.6%	16.0%	13.4%	100.0%
		Yes	Count	316	100	98	514
			% within Gladue Bail Status	61.5%	19.5%	19.1%	100.0%
	Total		Count	7513	1730	1468	10711
			% within Gladue Bail Status	70.1%	16.2%	13.7%	100.0%
2007***	Gladue Bail Status	No	Count	7115	1431	1167	9713
			% within Gladue Bail Status	73.3%	14.7%	12.0%	100.0%
		Yes	Count	362	107	83	552
			% within Gladue Bail Status	65.6%	19.4%	15.0%	100.0%
	Total		Count	7477	1538	1250	10265
			% within Gladue Bail Status	72.8%	15.0%	12.2%	100.0%
2008***	Gladue Bail Status	No	Count	6925	1390	1244	9559
			% within Gladue Bail Status	72.4%	14.5%	13.0%	100.0%
		Yes	Count	389	124	79	592
			% within Gladue Bail Status	65.7%	20.9%	13.3%	100.0%
	Total		Count	7314	1514	1323	10151
			% within Gladue Bail Status	72.1%	14.9%	13.0%	100.0%
2009*	Gladue Bail Status	No	Count	6501	1357	1275	9133
			% within Gladue Bail Status	71.2%	14.9%	14.0%	100.0%
		Yes	Count	415	102	107	624
			% within Gladue Bail Status	66.5%	16.3%	17.1%	100.0%
	Total		Count	6916	1459	1382	9757
			% within Gladue Bail Status	70.9%	15.0%	14.2%	100.0%
2010***	Gladue Bail Status	No	Count	6244	1059	1048	8351
			% within Gladue Bail Status	74.8%	12.7%	12.5%	100.0%
		Yes	Count	227	68	57	352
			% within Gladue Bail Status	64.5%	19.3%	16.2%	100.0%
	Total		Count	6471	1127	1105	8703
			% within Gladue Bail Status	74.4%	12.9%	12.7%	100.0%
2011*	Gladue Bail Status	No	Count	6558	1247	1073	8878
			% within Gladue Bail Status	73.9%	14.0%	12.1%	100.0%
		Yes	Count	79	27	12	118
			% within Gladue Bail Status	66.9%	22.9%	10.2%	100.0%
	Total		Count	6637	1274	1085	8996
			% within Gladue Bail Status	73.8%	14.2%	12.1%	100.0%
2012**	Gladue Bail Status	No	Count	6397	1107	1223	8727
			% within Gladue Bail Status	73.3%	12.7%	14.0%	100.0%
		Yes	Count	247	67	40	354
			% within Gladue Bail Status	69.8%	18.9%	11.3%	100.0%
	Total		Count	6644	1174	1263	9081
			% within Gladue Bail Status	73.2%	12.9%	13.9%	100.0%
2013***	Gladue Bail Status	No	Count	5565	924	1007	7496
			% within Gladue Bail Status	74.2%	12.3%	13.4%	100.0%
		Yes	Count	314	85	101	500
			% within Gladue Bail Status	62.8%	17.0%	20.2%	100.0%
	Total		Count	5879	1009	1108	7996
			% within Gladue Bail Status	73.5%	12.6%	13.9%	100.0%
2014**	Gladue Bail Status	No	Count	4765	752	1079	6596
			% within Gladue Bail Status	72.2%	11.4%	16.4%	100.0%
		Yes	Count	482	110	136	728
			% within Gladue Bail Status	66.2%	15.1%	18.7%	100.0%
	Total		Count	5247	862	1215	7324

⁵⁴² Similar to Appendix AA above, data are presented here for only those bail cases that spent two or more days in the bail process. These same analyses were also performed for all bail cases (that is, including cases which spent only a single day in bail court). Similar to the data presented here, trends for all bail cases were reasonably stable over time, although Gladue bail cases were consistently and considerably less likely than conventional bail cases to complete the bail process in only one to eight days and were somewhat more likely than their conventional bail counterparts to require nine to 15 days or 16 or more days to complete the bail process (with differences $p < .001$ for all years). However, recall that some of these differences in bail processing times are likely attributable to Gladue bail scheduling.

	Total		% within Gladue Bail Status	71.6%	11.8%	16.6%	100.0%
2015*	Gladue Bail Status	No	Count	4181	765	1252	6198
			% within Gladue Bail Status	67.5%	12.3%	20.2%	100.0%
	Yes	Count	499	124	160	783	
			% within Gladue Bail Status	63.7%	15.8%	20.4%	100.0%
	Total		Count	4680	889	1412	6981
			% within Gladue Bail Status	67.0%	12.7%	20.2%	100.0%
2016**	Gladue Bail Status	No	Count	4211	862	1251	6324
			% within Gladue Bail Status	66.6%	13.6%	19.8%	100.0%
	Yes	Count	432	120	120	672	
			% within Gladue Bail Status	64.3%	17.9%	17.9%	100.0%
	Total		Count	4643	982	1371	6996
			% within Gladue Bail Status	66.4%	14.0%	19.6%	100.0%
2017	Gladue Bail Status	No	Count	4428	833	1242	6503
			% within Gladue Bail Status	68.1%	12.8%	19.1%	100.0%
	Yes	Count	561	110	149	820	
			% within Gladue Bail Status	68.4%	13.4%	18.2%	100.0%
	Total		Count	4989	943	1391	7323
			% within Gladue Bail Status	68.1%	12.9%	19.0%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AC – Longitudinal Trends in Bail Outcomes (All Outcomes)

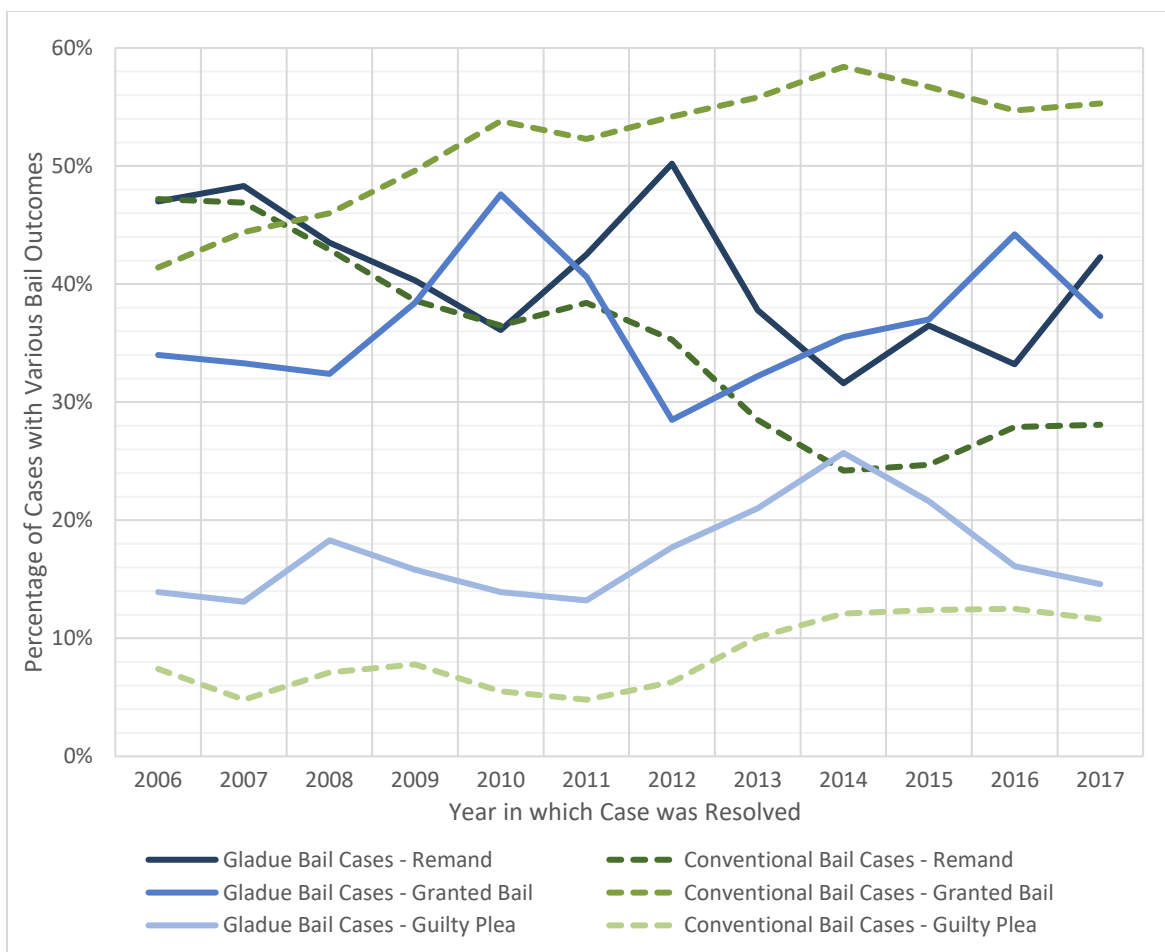
Table AC.1: Crosstabulation of Gladue Bail Status by Outcome of (First) Bail over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

				Outcome of (First) Bail				
Year				Remand	Granted	Guilty Plea	Other	Total
2006***	Gladue Bail Status	No	Count	6192	5436	969	523	13120
			% within Gladue Bail Status	47.2%	41.4%	7.4%	4.0%	100.0%
		Yes	Count	227	164	67	25	483
			% within Gladue Bail Status	47.0%	34.0%	13.9%	5.2%	100.0%
	Total		Count	6419	5600	1036	548	13603
			% within Gladue Bail Status	47.2%	41.2%	7.6%	4.0%	100.0%
2007***	Gladue Bail Status	No	Count	6382	6046	652	531	13611
			% within Gladue Bail Status	46.9%	44.4%	4.8%	3.9%	100.0%
		Yes	Count	254	175	69	28	526
			% within Gladue Bail Status	48.3%	33.3%	13.1%	5.3%	100.0%
	Total		Count	6636	6221	721	559	14137
			% within Gladue Bail Status	46.9%	44.0%	5.1%	4.0%	100.0%
2008***	Gladue Bail Status	No	Count	5793	6214	952	544	13503
			% within Gladue Bail Status	42.9%	46.0%	7.1%	4.0%	100.0%
		Yes	Count	238	177	100	32	547
			% within Gladue Bail Status	43.5%	32.4%	18.3%	5.9%	100.0%
	Total		Count	6031	6391	1052	576	14050
			% within Gladue Bail Status	42.9%	45.5%	7.5%	4.1%	100.0%
2009***	Gladue Bail Status	No	Count	4988	6402	1007	511	12908
			% within Gladue Bail Status	38.6%	49.6%	7.8%	4.0%	100.0%
		Yes	Count	219	209	86	30	544
			% within Gladue Bail Status	40.3%	38.4%	15.8%	5.5%	100.0%
	Total		Count	5207	6611	1093	541	13452
			% within Gladue Bail Status	38.7%	49.1%	8.1%	4.0%	100.0%
2010***	Gladue Bail Status	No	Count	4430	6525	663	518	12136
			% within Gladue Bail Status	36.5%	53.8%	5.5%	4.3%	100.0%
		Yes	Count	122	161	47	8	338
			% within Gladue Bail Status	36.1%	47.6%	13.9%	2.4%	100.0%
	Total		Count	4552	6686	710	526	12474
			% within Gladue Bail Status	36.5%	53.6%	5.7%	4.2%	100.0%
2011† ***	Gladue Bail Status	No	Count	4774	6495	602	549	12420
			% within Gladue Bail Status	38.4%	52.3%	4.8%	4.4%	100.0%
		Yes	Count	45	43	14	4	106
			% within Gladue Bail Status	42.5%	40.6%	13.2%	3.8%	100.0%
	Total		Count	4819	6538	616	553	12526
			% within Gladue Bail Status	38.5%	52.2%	4.9%	4.4%	100.0%
2012***	Gladue Bail Status	No	Count	4285	6582	765	511	12143
			% within Gladue Bail Status	35.3%	54.2%	6.3%	4.2%	100.0%
		Yes	Count	167	95	59	12	333
			% within Gladue Bail Status	50.2%	28.5%	17.7%	3.6%	100.0%
	Total		Count	4452	6677	824	523	12476
			% within Gladue Bail Status	35.7%	53.5%	6.6%	4.2%	100.0%
2013***	Gladue Bail Status	No	Count	3002	5876	1066	578	10522
			% within Gladue Bail Status	28.5%	55.8%	10.1%	5.5%	100.0%
		Yes	Count	176	150	98	42	466
			% within Gladue Bail Status	37.8%	32.2%	21.0%	9.0%	100.0%
	Total		Count	3178	6026	1164	620	10988
			% within Gladue Bail Status	28.9%	54.8%	10.6%	5.6%	100.0%
2014***	Gladue Bail Status	No	Count	2194	5294	1100	472	9060
			% within Gladue Bail Status	24.2%	58.4%	12.1%	5.2%	100.0%
		Yes	Count	203	228	165	46	642
			% within Gladue Bail Status	31.6%	35.5%	25.7%	7.2%	100.0%
	Total		Count	2397	5522	1265	518	9702
			% within Gladue Bail Status	24.7%	56.9%	13.0%	5.3%	100.0%
2015***	Gladue Bail Status	No	Count	2115	4848	1058	531	8552
			% within Gladue Bail Status	24.7%	56.7%	12.4%	6.2%	100.0%
		Yes	Count	245	248	145	33	671
			% within Gladue Bail Status	36.5%	37.0%	21.6%	4.9%	100.0%
	Total		Count	2360	5096	1203	564	9223

	Total		% within Gladue Bail Status	25.6%	55.3%	13.0%	6.1%	100.0%
2016***	Gladue Bail Status	No	Count	2422	4741	1081	424	8668
			% within Gladue Bail Status	27.9%	54.7%	12.5%	4.9%	100.0%
		Yes	Count	206	274	100	40	620
	Total		% within Gladue Bail Status	33.2%	44.2%	16.1%	6.5%	100.0%
		Count		2628	5015	1181	464	9288
			% within Gladue Bail Status	28.3%	54.0%	12.7%	5.0%	100.0%
2017***	Gladue Bail Status	No	Count	2571	5057	1059	459	9146
			% within Gladue Bail Status	28.1%	55.3%	11.6%	5.0%	100.0%
		Yes	Count	270	238	93	37	638
	Total		% within Gladue Bail Status	42.3%	37.3%	14.6%	5.8%	100.0%
		Count		2841	5295	1152	496	9784
			% within Gladue Bail Status	29.0%	54.1%	11.8%	5.1%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$ † low expected frequency (one cell = 4.68)

Figure AC.1: Line Chart of Gladue Bail Cases and Conventional Bail Cases with Various bail Outcomes, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)



Appendix AD – Longitudinal Trends in Formal Determinations of Bail

Table AD.1: Crosstabulation of Gladue Bail Status by Outcome of (First) Bail over Time, Old City Hall and College Park Bail Cases (Person Dataset; Cases with a Formal Determination of Bail Only; 2006-2017)

Year				Formal Determination of Bail		Total
				Bail Denied	Bail Granted	
2006	Gladue Bail Status	No	Count	2627	5436	8063
			% within Gladue Bail Status	32.6%	67.4%	100.0%
		Yes	Count	80	164	244
			% within Gladue Bail Status	32.8%	67.2%	100.0%
	Total	Count	2707	5600	8307	
		% within Gladue Bail Status	32.6%	67.4%	100.0%	
2007*	Gladue Bail Status	No	Count	2292	6046	8338
			% within Gladue Bail Status	27.5%	72.5%	100.0%
		Yes	Count	90	175	265
			% within Gladue Bail Status	34.0%	66.0%	100.0%
	Total	Count	2382	6221	8603	
		% within Gladue Bail Status	27.7%	72.3%	100.0%	
2008	Gladue Bail Status	No	Count	1950	6214	8164
			% within Gladue Bail Status	23.9%	76.1%	100.0%
		Yes	Count	66	177	243
			% within Gladue Bail Status	27.2%	72.8%	100.0%
	Total	Count	2016	6391	8407	
		% within Gladue Bail Status	24.0%	76.0%	100.0%	
2009	Gladue Bail Status	No	Count	1968	6402	8370
			% within Gladue Bail Status	23.5%	76.5%	100.0%
		Yes	Count	65	209	274
			% within Gladue Bail Status	23.7%	76.3%	100.0%
	Total	Count	2033	6611	8644	
		% within Gladue Bail Status	23.5%	76.5%	100.0%	
2010	Gladue Bail Status	No	Count	1578	6525	8103
			% within Gladue Bail Status	19.5%	80.5%	100.0%
		Yes	Count	33	161	194
			% within Gladue Bail Status	17.0%	83.0%	100.0%
	Total	Count	1611	6686	8297	
		% within Gladue Bail Status	19.4%	80.6%	100.0%	
2011	Gladue Bail Status	No	Count	1595	6495	8090
			% within Gladue Bail Status	19.7%	80.3%	100.0%
		Yes	Count	9	43	52
			% within Gladue Bail Status	17.3%	82.7%	100.0%
	Total	Count	1604	6538	8142	
		% within Gladue Bail Status	19.7%	80.3%	100.0%	
2012***	Gladue Bail Status	No	Count	1092	6582	7674
			% within Gladue Bail Status	14.2%	85.8%	100.0%
		Yes	Count	40	95	135
			% within Gladue Bail Status	29.6%	70.4%	100.0%
	Total	Count	1132	6677	7809	
		% within Gladue Bail Status	14.5%	85.5%	100.0%	
2013**	Gladue Bail Status	No	Count	676	5876	6552
			% within Gladue Bail Status	10.3%	89.7%	100.0%
		Yes	Count	33	150	183
			% within Gladue Bail Status	18.0%	82.0%	100.0%
	Total	Count	709	6026	6735	
		% within Gladue Bail Status	10.5%	89.5%	100.0%	
2014***	Gladue Bail Status	No	Count	553	5294	5847
			% within Gladue Bail Status	9.5%	90.5%	100.0%
		Yes	Count	50	228	278
			% within Gladue Bail Status	18.0%	82.0%	100.0%
	Total	Count	603	5522	6125	
		% within Gladue Bail Status	9.8%	90.2%	100.0%	
2015***	Gladue Bail Status	No	Count	492	4848	5340
			% within Gladue Bail Status	9.2%	90.8%	100.0%
		Yes	Count	46	248	294
			% within Gladue Bail Status	15.6%	84.4%	100.0%
		Count	538	5096	5634	

	Total		% within Gladue Bail Status	9.5%	90.5%	100.0%
2016***	Gladue Bail Status	No	Count	427	4741	5168
			% within Gladue Bail Status	8.3%	91.7%	100.0%
	Yes	Count	44	274	318	
			% within Gladue Bail Status	13.8%	86.2%	100.0%
	Total	Count	471	5015	5486	
			% within Gladue Bail Status	8.6%	91.4%	100.0%
2017***	Gladue Bail Status	No	Count	358	5057	5415
			% within Gladue Bail Status	6.6%	93.4%	100.0%
	Yes	Count	42	238	280	
			% within Gladue Bail Status	15.0%	85.0%	100.0%
	Total	Count	400	5295	5695	
			% within Gladue Bail Status	7.0%	93.0%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AE – Longitudinal Trends in the Presence of a Finding of Guilt and Associated Sentence

Table AE.1: Crosstabulation of Gladue Bail Status by Presence of a Sentence for One or More Charges over Time, Old City Hall and College Park Bail Cases (Person Dataset; 2006-2017)

			Presence of a Sentence for at least One Charge		
Year			No Sentence	Sentence	Total
2006	Gladue Bail Status	No	Count	4690	8432
			% within Gladue Bail Status	35.7%	64.3%
		Yes	Count	153	330
			% within Gladue Bail Status	31.7%	68.3%
	Total		Count	4843	8762
		% within Gladue Bail Status	35.6%	64.4%	
2007***	Gladue Bail Status	No	Count	5408	8204
			% within Gladue Bail Status	39.7%	60.3%
		Yes	Count	162	364
			% within Gladue Bail Status	30.8%	69.2%
	Total		Count	5570	8568
		% within Gladue Bail Status	39.4%	60.6%	
2008***	Gladue Bail Status	No	Count	5550	7953
			% within Gladue Bail Status	41.1%	58.9%
		Yes	Count	177	370
			% within Gladue Bail Status	32.4%	67.6%
	Total		Count	5727	8323
		% within Gladue Bail Status	40.8%	59.2%	
2009***	Gladue Bail Status	No	Count	5513	7395
			% within Gladue Bail Status	42.7%	57.3%
		Yes	Count	176	368
			% within Gladue Bail Status	32.4%	67.6%
	Total		Count	5689	7763
		% within Gladue Bail Status	42.3%	57.7%	
2010***	Gladue Bail Status	No	Count	5768	6368
			% within Gladue Bail Status	47.5%	52.5%
		Yes	Count	130	208
			% within Gladue Bail Status	38.5%	61.5%
	Total		Count	5898	6576
		% within Gladue Bail Status	47.3%	52.7%	
2011**	Gladue Bail Status	No	Count	5885	6536
			% within Gladue Bail Status	47.4%	52.6%
		Yes	Count	36	70
			% within Gladue Bail Status	34.0%	66.0%
	Total		Count	5921	6606
		% within Gladue Bail Status	47.3%	52.7%	
2012***	Gladue Bail Status	No	Count	5986	6158
			% within Gladue Bail Status	49.3%	50.7%
		Yes	Count	87	246
			% within Gladue Bail Status	26.1%	73.9%
	Total		Count	6073	6404
		% within Gladue Bail Status	48.7%	51.3%	
2013***	Gladue Bail Status	No	Count	5361	5162
			% within Gladue Bail Status	50.9%	49.1%
		Yes	Count	168	298
			% within Gladue Bail Status	36.1%	63.9%
	Total		Count	5529	5460
		% within Gladue Bail Status	50.3%	49.7%	
2014***	Gladue Bail Status	No	Count	4907	4153
			% within Gladue Bail Status	54.2%	45.8%
		Yes	Count	235	407
			% within Gladue Bail Status	36.6%	63.4%
	Total		Count	5142	4560
		% within Gladue Bail Status	53.0%	47.0%	
2015***	Gladue Bail Status	No	Count	4450	4102
			% within Gladue Bail Status	52.0%	48.0%
		Yes	Count	204	467
			% within Gladue Bail Status	30.4%	69.6%
			Count	4654	4569

	Total		% within Gladue Bail Status	50.5%	49.5%	100.0%
2016***	Gladue Bail Status	No	Count	4326	4342	8668
			% within Gladue Bail Status	49.9%	50.1%	100.0%
	Yes	Count	225	395	620	
			% within Gladue Bail Status	36.3%	63.7%	100.0%
	Total		Count	4551	4737	9288
			% within Gladue Bail Status	49.0%	51.0%	100.0%
2017***	Gladue Bail Status	No	Count	4726	4420	9146
			% within Gladue Bail Status	51.7%	48.3%	100.0%
	Yes	Count	227	411	638	
			% within Gladue Bail Status	35.6%	64.4%	100.0%
	Total		Count	4953	4831	9784
			% within Gladue Bail Status	50.6%	49.4%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AF – Longitudinal Trends for the Presence of a Custodial Sentence among Sentenced Cases

Table AF.1: Crosstabulation of Gladue Bail Status by Presence of One or More Custodial Sentences over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)

				Presence of a Custodial Sentence for at least One Charge		
Year				No Custodial Sentence	Custodial Sentence(s)	Total
2006	Gladue Bail Status	No	Count	2012	6420	8432
			% within Gladue Bail Status	23.9%	76.1%	100.0%
		Yes	Count	76	254	330
			% within Gladue Bail Status	23.0%	77.0%	100.0%
	Total		Count	2088	6674	8762
		% within Gladue Bail Status	23.8%	76.2%	100.0%	
2007***	Gladue Bail Status	No	Count	1999	6205	8204
			% within Gladue Bail Status	24.4%	75.6%	100.0%
		Yes	Count	54	310	364
			% within Gladue Bail Status	14.8%	85.2%	100.0%
	Total		Count	2053	6515	8568
		% within Gladue Bail Status	24.0%	76.0%	100.0%	
2008	Gladue Bail Status	No	Count	1848	6105	7953
			% within Gladue Bail Status	23.2%	76.8%	100.0%
		Yes	Count	75	295	370
			% within Gladue Bail Status	20.3%	79.7%	100.0%
	Total		Count	1923	6400	8323
		% within Gladue Bail Status	23.1%	76.9%	100.0%	
2009**	Gladue Bail Status	No	Count	1935	5460	7395
			% within Gladue Bail Status	26.2%	73.8%	100.0%
		Yes	Count	74	294	368
			% within Gladue Bail Status	20.1%	79.9%	100.0%
	Total		Count	2009	5754	7763
		% within Gladue Bail Status	25.9%	74.1%	100.0%	
2010	Gladue Bail Status	No	Count	1790	4578	6368
			% within Gladue Bail Status	28.1%	71.9%	100.0%
		Yes	Count	51	157	208
			% within Gladue Bail Status	24.5%	75.5%	100.0%
	Total		Count	1841	4735	6576
		% within Gladue Bail Status	28.0%	72.0%	100.0%	
2011	Gladue Bail Status	No	Count	1719	4817	6536
			% within Gladue Bail Status	26.3%	73.7%	100.0%
		Yes	Count	13	57	70
			% within Gladue Bail Status	18.6%	81.4%	100.0%
	Total		Count	1732	4874	6606
		% within Gladue Bail Status	26.2%	73.8%	100.0%	
2012***	Gladue Bail Status	No	Count	1662	4496	6158
			% within Gladue Bail Status	27.0%	73.0%	100.0%
		Yes	Count	25	221	246
			% within Gladue Bail Status	10.2%	89.8%	100.0%
	Total		Count	1687	4717	6404
		% within Gladue Bail Status	26.3%	73.7%	100.0%	
2013***	Gladue Bail Status	No	Count	1472	3690	5162
			% within Gladue Bail Status	28.5%	71.5%	100.0%
		Yes	Count	26	272	298
			% within Gladue Bail Status	8.7%	91.3%	100.0%
	Total		Count	1498	3962	5460
		% within Gladue Bail Status	27.4%	72.6%	100.0%	
2014***	Gladue Bail Status	No	Count	1158	2995	4153
			% within Gladue Bail Status	27.9%	72.1%	100.0%
		Yes	Count	63	344	407
			% within Gladue Bail Status	15.5%	84.5%	100.0%
	Total		Count	1221	3339	4560
		% within Gladue Bail Status	26.8%	73.2%	100.0%	
2015***		No	Count	1174	2928	4102
			% within Gladue Bail Status	28.6%	71.4%	100.0%
			Count	68	399	467

2016**	Gladue	Yes	% within Gladue Bail Status	14.6%	85.4%	100.0%
	Total		Count	1242	3327	4569
			% within Gladue Bail Status	27.2%	72.8%	100.0%
	Gladue Bail Status	No	Count	1162	3180	4342
			% within Gladue Bail Status	26.8%	73.2%	100.0%
		Yes	Count	78	317	395
			% within Gladue Bail Status	19.7%	80.3%	100.0%
	Total		Count	1240	3497	4737
			% within Gladue Bail Status	26.2%	73.8%	100.0%
2017**	Gladue Bail Status	No	Count	1246	3174	4420
			% within Gladue Bail Status	28.2%	71.8%	100.0%
		Yes	Count	89	322	411
			% within Gladue Bail Status	21.7%	78.3%	100.0%
	Total		Count	1335	3496	4831
			% within Gladue Bail Status	27.6%	72.4%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AG – Longitudinal Trends for the Presence of a Conditional Sentence among Sentenced Cases

Table AG.1: Crosstabulation of Gladue Bail Status by Presence of One or More Conditional Sentences over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)

				Presence of a Conditional Sentence for at least One Charge		
Year				No Conditional Sentence	Conditional Sentence(s)	Total
2006***	Gladue Bail Status	No	Count	7916	516	8432
			% within Gladue Bail Status	93.9%	6.1%	100.0%
	Yes	Count	268	62	330	
		% within Gladue Bail Status	81.2%	18.8%	100.0%	
	Total	Count	8184	578	8762	
		% within Gladue Bail Status	93.4%	6.6%	100.0%	
2007	Gladue Bail Status	No	Count	7779	425	8204
			% within Gladue Bail Status	94.8%	5.2%	100.0%
	Yes	Count	337	27	364	
		% within Gladue Bail Status	92.6%	7.4%	100.0%	
	Total	Count	8116	452	8568	
		% within Gladue Bail Status	94.7%	5.3%	100.0%	
2008***	Gladue Bail Status	No	Count	7521	432	7953
			% within Gladue Bail Status	94.6%	5.4%	100.0%
	Yes	Count	321	49	370	
		% within Gladue Bail Status	86.8%	13.2%	100.0%	
	Total	Count	7842	481	8323	
		% within Gladue Bail Status	94.2%	5.8%	100.0%	
2009***	Gladue Bail Status	No	Count	6933	462	7395
			% within Gladue Bail Status	93.8%	6.2%	100.0%
	Yes	Count	318	50	368	
		% within Gladue Bail Status	86.4%	13.6%	100.0%	
	Total	Count	7251	512	7763	
		% within Gladue Bail Status	93.4%	6.6%	100.0%	
2010**	Gladue Bail Status	No	Count	5926	442	6368
			% within Gladue Bail Status	93.1%	6.9%	100.0%
	Yes	Count	183	25	208	
		% within Gladue Bail Status	88.0%	12.0%	100.0%	
	Total	Count	6109	467	6576	
		% within Gladue Bail Status	92.9%	7.1%	100.0%	
2011***	Gladue Bail Status	No	Count	6033	503	6536
			% within Gladue Bail Status	92.3%	7.7%	100.0%
	Yes	Count	55	15	70	
		% within Gladue Bail Status	78.6%	21.4%	100.0%	
	Total	Count	6088	518	6606	
		% within Gladue Bail Status	92.2%	7.8%	100.0%	
2012	Gladue Bail Status	No	Count	5696	462	6158
			% within Gladue Bail Status	92.5%	7.5%	100.0%
	Yes	Count	228	18	246	
		% within Gladue Bail Status	92.7%	7.3%	100.0%	
	Total	Count	5924	480	6404	
		% within Gladue Bail Status	92.5%	7.5%	100.0%	
2013*	Gladue Bail Status	No	Count	4805	357	5162
			% within Gladue Bail Status	93.1%	6.9%	100.0%
	Yes	Count	287	11	298	
		% within Gladue Bail Status	96.3%	3.7%	100.0%	
	Total	Count	5092	368	5460	
		% within Gladue Bail Status	93.3%	6.7%	100.0%	
2014	Gladue Bail Status	No	Count	3937	216	4153
			% within Gladue Bail Status	94.8%	5.2%	100.0%
	Yes	Count	391	16	407	
		% within Gladue Bail Status	96.1%	3.9%	100.0%	
	Total	Count	4328	232	4560	
		% within Gladue Bail Status	94.9%	5.1%	100.0%	
2015		No	Count	3942	160	4102
			% within Gladue Bail Status	96.1%	3.9%	100.0%
			Count	441	26	467

2016	Gladue	Yes	% within Gladue Bail Status	94.4%	5.6%	100.0%
	Total		Count	4383	186	4569
			% within Gladue Bail Status	95.9%	4.1%	100.0%
	Gladue Bail Status	No	Count	4181	161	4342
			% within Gladue Bail Status	96.3%	3.7%	100.0%
		Yes	Count	378	17	395
			% within Gladue Bail Status	95.7%	4.3%	100.0%
	Total		Count	4559	178	4737
			% within Gladue Bail Status	96.2%	3.8%	100.0%
2017	Gladue Bail Status	No	Count	4237	183	4420
			% within Gladue Bail Status	95.9%	4.1%	100.0%
		Yes	Count	388	23	411
			% within Gladue Bail Status	94.4%	5.6%	100.0%
	Total		Count	4625	206	4831
			% within Gladue Bail Status	95.7%	4.3%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AH – Longitudinal Trends for the Presence of a Probation Order among Sentenced Cases

Table AH.1: Crosstabulation of Gladue Bail Status by Presence of One or More Probation Orders over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)

			Presence of a Probation Order for at least One Charge			
Year			No Probation	Probation	Total	
2006	Gladue Bail Status	No	Count	4475	3957	8432
			% within Gladue Bail Status	53.1%	46.9%	100.0%
		Yes	Count	190	140	330
			% within Gladue Bail Status	57.6%	42.4%	100.0%
	Total		Count	4665	4097	8762
		% within Gladue Bail Status	53.2%	46.8%	100.0%	
2007	Gladue Bail Status	No	Count	4470	3734	8204
			% within Gladue Bail Status	54.5%	45.5%	100.0%
		Yes	Count	188	176	364
			% within Gladue Bail Status	51.6%	48.4%	100.0%
	Total		Count	4658	3910	8568
		% within Gladue Bail Status	54.4%	45.6%	100.0%	
2008	Gladue Bail Status	No	Count	4440	3513	7953
			% within Gladue Bail Status	55.8%	44.2%	100.0%
		Yes	Count	194	176	370
			% within Gladue Bail Status	52.4%	47.6%	100.0%
	Total		Count	4634	3689	8323
		% within Gladue Bail Status	55.7%	44.3%	100.0%	
2009	Gladue Bail Status	No	Count	3571	3824	7395
			% within Gladue Bail Status	48.3%	51.7%	100.0%
		Yes	Count	181	187	368
			% within Gladue Bail Status	49.2%	50.8%	100.0%
	Total		Count	3752	4011	7763
		% within Gladue Bail Status	48.3%	51.7%	100.0%	
2010	Gladue Bail Status	No	Count	2901	3467	6368
			% within Gladue Bail Status	45.6%	54.4%	100.0%
		Yes	Count	85	123	208
			% within Gladue Bail Status	40.9%	59.1%	100.0%
	Total		Count	2986	3590	6576
		% within Gladue Bail Status	45.4%	54.6%	100.0%	
2011	Gladue Bail Status	No	Count	3082	3454	6536
			% within Gladue Bail Status	47.2%	52.8%	100.0%
		Yes	Count	32	38	70
			% within Gladue Bail Status	45.7%	54.3%	100.0%
	Total		Count	3114	3492	6606
		% within Gladue Bail Status	47.1%	52.9%	100.0%	
2012	Gladue Bail Status	No	Count	2768	3390	6158
			% within Gladue Bail Status	44.9%	55.1%	100.0%
		Yes	Count	98	148	246
			% within Gladue Bail Status	39.8%	60.2%	100.0%
	Total		Count	2866	3538	6404
		% within Gladue Bail Status	44.8%	55.2%	100.0%	
2013	Gladue Bail Status	No	Count	2251	2911	5162
			% within Gladue Bail Status	43.6%	56.4%	100.0%
		Yes	Count	130	168	298
			% within Gladue Bail Status	43.6%	56.4%	100.0%
	Total		Count	2381	3079	5460
		% within Gladue Bail Status	43.6%	56.4%	100.0%	
2014	Gladue Bail Status	No	Count	1828	2325	4153
			% within Gladue Bail Status	44.0%	56.0%	100.0%
		Yes	Count	170	237	407
			% within Gladue Bail Status	41.8%	58.2%	100.0%
	Total		Count	1998	2562	4560
		% within Gladue Bail Status	43.8%	56.2%	100.0%	
2015	No		Count	1771	2331	4102
			% within Gladue Bail Status	43.2%	56.8%	100.0%
			Count	197	270	467

2016	Gladue	Yes	% within Gladue Bail Status	42.2%	57.8%	100.0%
	Total		Count	1968	2601	4569
			% within Gladue Bail Status	43.1%	56.9%	100.0%
	Gladue Bail Status	No	Count	1837	2505	4342
			% within Gladue Bail Status	42.3%	57.7%	100.0%
		Yes	Count	166	229	395
			% within Gladue Bail Status	42.0%	58.0%	100.0%
	Total		Count	2003	2734	4737
			% within Gladue Bail Status	42.3%	57.7%	100.0%
2017***	Gladue Bail Status	No	Count	1911	2509	4420
			% within Gladue Bail Status	43.2%	56.8%	100.0%
		Yes	Count	142	269	411
			% within Gladue Bail Status	34.5%	65.5%	100.0%
	Total		Count	2053	2778	4831
			% within Gladue Bail Status	42.5%	57.5%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AI – Longitudinal Trends in the Presence of a Fine among Sentenced Cases

Table AI.1: Crosstabulation of Gladue Bail Status by Presence of One or More Fines over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)

			Presence of a Fine for at least One Charge			
Year			No Fine	Fine(s)	Total	
2006	Gladue Bail Status	No	Count	7927	505	8432
			% within Gladue Bail Status	94.0%	6.0%	100.0%
		Yes	Count	318	12	330
			% within Gladue Bail Status	96.4%	3.6%	100.0%
	Total		Count	8245	517	8762
		% within Gladue Bail Status	94.1%	5.9%	100.0%	
2007*	Gladue Bail Status	No	Count	7658	546	8204
			% within Gladue Bail Status	93.3%	6.7%	100.0%
		Yes	Count	350	14	364
			% within Gladue Bail Status	96.2%	3.8%	100.0%
	Total		Count	8008	560	8568
		% within Gladue Bail Status	93.5%	6.5%	100.0%	
2008*	Gladue Bail Status	No	Count	7345	608	7953
			% within Gladue Bail Status	92.4%	7.6%	100.0%
		Yes	Count	354	16	370
			% within Gladue Bail Status	95.7%	4.3%	100.0%
	Total		Count	7699	624	8323
		% within Gladue Bail Status	92.5%	7.5%	100.0%	
2009***	Gladue Bail Status	No	Count	6814	581	7395
			% within Gladue Bail Status	92.1%	7.9%	100.0%
		Yes	Count	360	8	368
			% within Gladue Bail Status	97.8%	2.2%	100.0%
	Total		Count	7174	589	7763
		% within Gladue Bail Status	92.4%	7.6%	100.0%	
2010	Gladue Bail Status	No	Count	5864	504	6368
			% within Gladue Bail Status	92.1%	7.9%	100.0%
		Yes	Count	198	10	208
			% within Gladue Bail Status	95.2%	4.8%	100.0%
	Total		Count	6062	514	6576
		% within Gladue Bail Status	92.2%	7.8%	100.0%	
2011	Gladue Bail Status	No	Count	6068	468	6536
			% within Gladue Bail Status	92.8%	7.2%	100.0%
		Yes	Count	69	1	70
			% within Gladue Bail Status	98.6%	1.4%	100.0%
	Total		Count	6137	469	6606
		% within Gladue Bail Status	92.9%	7.1%	100.0%	
2012	Gladue Bail Status	No	Count	5739	419	6158
			% within Gladue Bail Status	93.2%	6.8%	100.0%
		Yes	Count	237	9	246
			% within Gladue Bail Status	96.3%	3.7%	100.0%
	Total		Count	5976	428	6404
		% within Gladue Bail Status	93.3%	6.7%	100.0%	
2013	Gladue Bail Status	No	Count	4695	467	5162
			% within Gladue Bail Status	91.0%	9.0%	100.0%
		Yes	Count	279	19	298
			% within Gladue Bail Status	93.6%	6.4%	100.0%
	Total		Count	4974	486	5460
		% within Gladue Bail Status	91.1%	8.9%	100.0%	
2014***	Gladue Bail Status	No	Count	2730	1423	4153
			% within Gladue Bail Status	65.7%	34.3%	100.0%
		Yes	Count	206	201	407
			% within Gladue Bail Status	50.6%	49.4%	100.0%
	Total		Count	2936	1624	4560
		% within Gladue Bail Status	64.4%	35.6%	100.0%	
2015***	Gladue Bail Status	No	Count	2080	2022	4102
			% within Gladue Bail Status	50.7%	49.3%	100.0%
		Yes	Count	183	284	467
			% within Gladue Bail Status	39.2%	60.8%	100.0%
			Count	2263	2306	4569

	Total		% within Gladue Bail Status	49.5%	50.5%	100.0%
2016***	Gladue Bail Status	No	Count	2120	2222	4342
			% within Gladue Bail Status	48.8%	51.2%	100.0%
	Yes	Count	113	282	395	
			% within Gladue Bail Status	28.6%	71.4%	100.0%
	Total		Count	2233	2504	4737
			% within Gladue Bail Status	47.1%	52.9%	100.0%
2017***	Gladue Bail Status	No	Count	2758	1662	4420
			% within Gladue Bail Status	62.4%	37.6%	100.0%
	Yes	Count	216	195	411	
			% within Gladue Bail Status	52.6%	47.4%	100.0%
	Total		Count	2974	1857	4831
			% within Gladue Bail Status	61.6%	38.4%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$

Appendix AJ – Longitudinal Trends in the Presence of a Victim Fine Surcharge among Sentenced Cases

Table AJ.1: Crosstabulation of Gladue Bail Status by Presence of One or More Victim Fine Surcharges over Time, Old City Hall and College Park Bail Cases (Person Dataset; Sentenced Cases Only; 2006-2017)

Year			Presence of a Victim Fine Surcharge for at least One Charge		Total
			No Victim Fine Surcharge	Victim Fine Surcharge(s)	
2006	Gladue Bail Status	No	Count	7302	8432
			% within Gladue Bail Status	86.6%	100.0%
	Yes	Count	293	37	330
			% within Gladue Bail Status	88.8%	100.0%
	Total	Count	7595	1167	8762
			% within Gladue Bail Status	86.7%	100.0%
2007	Gladue Bail Status	No	Count	7318	8204
			% within Gladue Bail Status	89.2%	100.0%
	Yes	Count	331	33	364
			% within Gladue Bail Status	90.9%	100.0%
	Total	Count	7649	919	8568
			% within Gladue Bail Status	89.3%	100.0%
2008**	Gladue Bail Status	No	Count	7243	7953
			% within Gladue Bail Status	91.1%	100.0%
	Yes	Count	353	17	370
			% within Gladue Bail Status	95.4%	100.0%
	Total	Count	7596	727	8323
			% within Gladue Bail Status	91.3%	100.0%
2009	Gladue Bail Status	No	Count	6877	7395
			% within Gladue Bail Status	93.0%	100.0%
	Yes	Count	348	20	368
			% within Gladue Bail Status	94.6%	100.0%
	Total	Count	7225	538	7763
			% within Gladue Bail Status	93.1%	100.0%
2010	Gladue Bail Status	No	Count	5933	6368
			% within Gladue Bail Status	93.2%	100.0%
	Yes	Count	199	9	208
			% within Gladue Bail Status	95.7%	100.0%
	Total	Count	6132	444	6576
			% within Gladue Bail Status	93.2%	100.0%
2011	Gladue Bail Status	No	Count	6161	6536
			% within Gladue Bail Status	94.3%	100.0%
	Yes	Count	69	1	70
			% within Gladue Bail Status	98.6%	100.0%
	Total	Count	6230	376	6606
			% within Gladue Bail Status	94.3%	100.0%
2012***	Gladue Bail Status	No	Count	5806	6158
			% within Gladue Bail Status	94.3%	100.0%
	Yes	Count	244	2	246
			% within Gladue Bail Status	99.2%	100.0%
	Total	Count	6050	354	6404
			% within Gladue Bail Status	94.5%	100.0%
2013	Gladue Bail Status	No	Count	4673	5162
			% within Gladue Bail Status	90.5%	100.0%
	Yes	Count	271	27	298
			% within Gladue Bail Status	90.9%	100.0%
	Total	Count	4944	516	5460
			% within Gladue Bail Status	90.5%	100.0%
2014***	Gladue Bail Status	No	Count	1581	4153
			% within Gladue Bail Status	38.1%	100.0%
	Yes	Count	114	293	407
			% within Gladue Bail Status	28.0%	100.0%
	Total	Count	1695	2865	4560
			% within Gladue Bail Status	37.2%	100.0%
2015	No	Count	246	3856	4102
			% within Gladue Bail Status	6.0%	100.0%
		Count	18	449	467

2016	Gladue	Yes	% within Gladue Bail Status	3.9%	96.1%	100.0%
	Total		Count	264	4305	4569
			% within Gladue Bail Status	5.8%	94.2%	100.0%
	Gladue	No	Count	94	4248	4342
	Bail		% within Gladue Bail Status	2.2%	97.8%	100.0%
	Status	Yes	Count	11	384	395
			% within Gladue Bail Status	2.8%	97.2%	100.0%
	Total		Count	105	4632	4737
			% within Gladue Bail Status	2.2%	97.8%	100.0%
2017	Gladue	No	Count	47	4373	4420
	Bail		% within Gladue Bail Status	1.1%	98.9%	100.0%
	Status	Yes	Count	2	409	411
			% within Gladue Bail Status	0.5%	99.5%	100.0%
	Total		Count	49	4782	4831
			% within Gladue Bail Status	1.0%	99.0%	100.0%

* $p < .05$ ** $p < .01$ *** $p < .001$