RAISING ANTI-BLACK RACISM AT BAIL

PRACTICAL GUIDE

LEGAL AID ONTARIO
AIDE JURIDIQUE ONTARIO

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INTRODUCTION

The following is a practical guide for lawyers assisting Black clients at the bail stage.

In this document, you will find sample questions for a client interview that you can use to get information about your client's experiences with systemic anti-Black racism.

You will also find tips on how to invoke s. 493.2 of the *Criminal Code*, as well as sample submissions.

CLIENT INTERVIEW

This section provides sample questions for an initial client interview. The questions are designed with a focus on racialized individuals, particularly Black people. Use these questions to get information about your client's experiences with systemic racism and the effects of those experiences, and to make Morris and Section 493.2 submissions at the bail hearing.

The applicability of the questions will depend on your client's individual circumstance. You are encouraged to supplement the sample questions with your own questions to obtain any other information relevant to your client's matter.

Prior to conducting the initial interview, you may want to explain to the client the purpose of these questions, particularly in the context of s. 493.2.

PERSONAL INFORMATION

In what country were you born? _____

(If not born in Canada) What is your immigration status? _____

(If not born in Canada) If you identify as a refugee, have you been granted Convention Refugee status by the Canadian government?

- ○ Yes
- ○ No

RACE[1]

How would you best describe your race?

- ○ Black
- ○ Multiracial – Black
  - ☐ Black/white
  - ☐ Black/Indigenous
  - ☐ Black/Asian
  - ☐ Other

[1] "Race" refers to a person's genetic makeup and biological features. It can be skin colour, skin tone, eyes, eye colour, hair colour, etc. It is something that a person is born with.

PERSONAL EXPERIENCES WITH POLICE

Please note that, while you are encouraged to ask the questions in order to obtain information from the client, whether or not it is beneficial for the client to raise these at the bail hearing (in evidence or in submissions) will depend on the circumstances.

Have you had prior interactions with the police where no charges had been laid?
- ○ Yes
- ○ No

Have you ever felt unfairly targeted by the police because of your race (e.g. stopped/questioned/searched for no reason)?
- ○ Yes
- ○ No

If yes, what experiences have you had with the police that made you feel targeted because of your race?
_____

Do you feel that your arrest on the current charges was motivated by racial discrimination?
- ○ Yes
- ○ No

If yes, please provide details.
_____

Do you / have you lived in a neighbourhood that has been targeted by the police (e.g. being watched by police, stopped by police, “carding,” etc.)?
- ○ Yes
- ○ No

What neighbourhood(s)?
_____

Have you experienced racial discrimination from police because of a neighbourhood that you have lived in?
- ○ Yes
- ○ No

If yes, please provide details.
_____

IMPACTS OF PERSONAL EXPERIENCES WITH POLICE

Have you ever felt fear when interacting with the police?
- ○ Yes
- ○ No

If yes, please provide details.
_____

Have you ever felt humiliated by your experiences with the police?
- ○ Yes
- ○ No

If yes, please provide details.
_____

Have you lost trust in the police because of your experience?

- ○ Yes
- ○ No

Have your experiences with the police led to any of the following symptoms:

- ○ flashbacks
- ○ nightmares
- ○ anxiety
- ○ feeling on edge
- ○ jumpiness
- ○ difficulty sleeping
- ○ panic attacks
- ○ other:_____

Have you ever been physically injured as a result of your interactions with the police?

- ○ Yes
- ○ No

if yes, please provide details of the injuries and any lasting effects. _____

Were you injured as a result of your interaction with police on the present charges?

- ○ Yes
- ○ No

If yes, please provide details. _____

Do you have any ongoing challenges as a result of your interactions with police (e.g. employment, school, ability to function day to day, relationships with other people)?

- ○ Yes
- ○ No

If yes, please provide details. _____

FAMILY HISTORY

Where were your parents born? _____

How would you best describe your parents' race? _____

How would you best describe your parents' ethnicity? _____

What is the status of your parents' relationship? _____

What is your mother's occupation? _____

What is your father's occupation? _____

How many siblings and/or step-siblings do you have? _____

Have you ever seen your parent or guardian experience any racial discrimination?

- ○ Yes
- ○ No

If yes, please describe the racial discrimination that you have seen your parent or guardian experience. _____

Have you ever seen your siblings or close relatives experience any racial discrimination?

- ○ Yes
- ○ No

If yes, please describe the racial discrimination that you have seen your siblings or close relatives experience. _____

EARLY CHILDHOOD

Where did you live in your childhood? _____

Who did you live with in your childhood? _____

Was a child welfare agency involved in your early childhood?

- ○ Yes
- ○ No

If yes, how old were you? _____

Please provide details. _____

Did you live in any group homes/foster homes?

- ○ Yes
- ○ No

If yes, please provide details. _____

At what age did you live in group homes/foster homes? _____

Did you experience any racial discrimination when in the care of a child welfare agency?

- ○ Yes
- ○ No

If yes, please provide details. _____

How would you describe your relationship with your parents in your childhood? _____

SOCIO-ECONOMIC STATUS

How would you best describe your family income in your childhood?

- ○ Low income – my family consistently struggled to cover basic costs of living (e.g. housing, food, transportation, etc.)
- ○ Average income – my family rarely struggled to cover basic costs of living
- ○ High income – my family never struggled to cover basic costs of living
- ○ other:_____

How would you best describe your neighbourhood in your childhood?

- ○ Low income neighbourhood
- ○ Middle income neighbourhood
- ○ High income neighbourhood

Did your family experience any financial stressors/hardships in your childhood?

- ○ Yes
- ○ No

If yes, how did financial stressors/hardships affect your childhood? _____

Did the financial stressors/hardships ever change? Things get better? Or worse? _____

EDUCATION SYSTEM EXPERIENCES

What elementary/middle school/high school/college/university/other types of career college or a trade program have you attended? _____

If you did not complete high school, what were the reasons/barriers? _____

Were you interested in further education that you did not pursue? If so, what were the barriers? _____

Have you experienced any racial discrimination from teachers/staff/fellow students?

- ○ Yes
- ○ No

If yes, please provide details.

_____

EMPLOYMENT EXPERIENCES

Work history _____

Have you experienced racial discrimination in any of your places of employment?

- ○ Yes
- ○ No

If yes, please provide details. _____

Have you experienced racial discrimination when applying for jobs?

- ○ Yes
- ○ No

If yes, please provide details. _____

THE BAIL HEARING

In this section, you will find tips for making submissions at a bail hearing in the context of Section 493.2 of the *Criminal Code*, and comments on some of the potential impacts of those submissions for a bail review application.

SECTION 493.2 OF THE *CRIMINAL CODE*

Section 493.2 of the *Criminal Code* provides:

> 493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
>
> a) Aboriginal accused; and
>
> b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

Parliament placed this section at the beginning of the bail release sections in Part XVI of the *Criminal Code*. The section must be given effect (see "shall" in s. 493.2) whenever an accused who is a member of a vulnerable population overrepresented in the criminal justice system is before a bail court. It is an error in law not to do so, where it could potentially make a difference to the decision.[2]

Parliament enacted s. 493.2 to "tackle the stubborn and unacceptable problem of overrepresentation".[3]

The objective of Section 493.2 was discussed in *R. v. A.A.* as follows:

> [45]… Section 493.2 does not explicitly state the final objective of the provision. However, put in the most general terms, it is clearly to ameliorate the pre-trial over incarceration of the overrepresented, vulnerable groups referred to, in this case Black accused. The most obvious means is to release more of the accused described in the provision. That is its ultimate and highest purpose.[4]

The objective of Section 493.2 was also discussed in *R. v. E.B.*[5] as follows:

> [22] Their clear purpose is to remedy the problem of overuse of pre-trial custody as well as the overrepresentation of certain populations in the criminal justice system in general and the remand population in particular.

[2] *R. v. A.A.*, 2022 ONSC 4310 at para 50.
[3] *Ibid* at para 48.
[4] *Ibid* at para 45.
[5] *R. v. E.B.*, 2020 ONSC 4383.

> [27] The reasons why certain populations are overrepresented in the criminal justice system are complex. However, in my view it is beyond dispute that systemic racism in the justice system is part of the cause. Where overrepresentation relates not to those who have been convicted of crimes, but those who are presumed innocent, the problem is all the more dire. This is a problem that must be remedied. Section 493.2 is clearly intended to be part of the remedy.

Section 493.2 is broadly inclusive. The following are examples of accused who have been found to belong to "vulnerable, overrepresented populations historically disadvantaged in obtaining bail":

- racialized individuals, particularly Black individuals[6]
- individuals who suffer from mental illness[7]
- individuals living in poverty and with addictions[8]
- low-income people with no fixed address, no cell phone, and few if any supports in the
- community[9]

A critical approach to overrepresentation is necessary. In *A.A.,* the court indicated the following:

> [49] … A critical approach to overrepresentation can directly affect the evaluation of the three grounds of bail and guide the process of crafting conditions to meet head on the risks of bail release. The methods to affect the change required … are left to the ingenuity and discretion of the judiciary.[10]

Note that, as a result of Bill C-48: An Act to amend the *Criminal Code* (bail reform), which came into effect on January 4, 2024, a justice or judge conducting a bail hearing is required to indicate whether section 493.2 applies to the accused, and, if so, how the circumstances of the accused were considered in making a decision on bail. The new section 515(13.1) states:

> **515(13.1)** A justice who makes an order under this section shall include in the record of proceedings a statement that sets out both how they determined whether the accused is an accused referred to in section 493.2 and their determination. If the justice determines that the accused is an accused referred to in section 493.2, they shall also include a statement indicating how they considered their particular circumstances, as required under that section.

[6] *Ibid* at para 26.
[7] *Ibid* at para 26.
[8] *R. v. Ismail,* 2020 ONSC 5519 at para 23.
[9] *R. v. E.V.,* 2021 ONSC 6501 at para 45.
[10] *A.A.* at para 49.

INVOKING SECTION 493.2

If your client identifies as a racialized person, particularly a Black person, it is essential for you to advise the court of this fact.

You will not need to provide extensive information about the client's life or the disadvantages that the client personally suffered for s. 493.2 to be considered. Identifying as a person who belongs to a vulnerable, overrepresented population is sufficient to invoke the section.

For example, in *R. v. L.W.B.*,[11] the detaining Justice of the Peace acknowledged that the Applicant was a member of the Black community but concluded that "nothing in [L.W.B.'s] personal background has been presented in this hearing to show he has personally suffered that disadvantage." The reviewing court responded:

> [44] … LWB is a Black man. He is a 23-year-old young Black man. He has had an earlier interaction with the criminal justice system as a youth which resulted in two convictions. He has no adult convictions. There are no violations of court orders. The courts are beginning to address the issue of racial profiling and the experience of racial groups such as Indigenous and Black peoples in Canada's criminal justice system. Judicial notice has been taken of that reality…
>
> …
>
> [48] I do not have extensive information about LWB's life. But I believe this is not necessary for me to observe that he is visibly a member of a population that is being adversely affected by over-policing and discriminatory biases and practices within the system.[12]

SAMPLE SUBMISSIONS

My client is a [Black/racialized person].

The overrepresentation of Black individuals in the criminal justice system is a serious systemic problem. [13]

The overrepresentation of Black individuals in pre-trial detention is a serious systemic problem.[14]

Section 493.2 must be given effect, and to do otherwise would constitute an error of law in circumstances where it could potentially make a difference to the decision.[15]

[11] *R. v. L.W.B.,* 2021 ONSC 6152.
[12] *Ibid* at paras. 44-48.
[13] *R. v. Morris*, 2021 ONCA 680; *R. v. Le*, 2019 SCC 34.
[14] *A.A.* at para 46.
[15] *Ibid* at para 50.

CLIENT' S PERSONAL EXPERIENCE

Where applicable, it is important to make submissions about any experiences that a defendant has had with over-policing and/or systemic racism.

These submissions must be based on evidence called at the bail hearing. Often, the only opportunity to present this evidence at the bail hearing stage will be through a proposed surety.

See *L.W.B.* regarding the relaxed nature of the adherence to the rules of evidence at a bail hearing:

> [47] A bail hearing occupies a different place in the system from sentencing. Bail is at the beginning and sentencing is at the end. Bail hearings occur at the earliest stage of the criminal justice process when evidence is most Often at a premium. And bail hearings are more informal proceedings where dependence on the rules of evidence and witnesses is relaxed.[16]

At a bail hearing, evidence about a defendant's particular experiences with systemic racism can form the basis on which to make submissions under both secondary and tertiary grounds. If the defendant's detention is ordered, the evidence elicited at the bail hearing can be supplemented with an affidavit provided by the defendant at the bail review.

See comments of the courts in the following bail review decisions regarding the impact of the failure to present evidence about the defendant's experiences with systemic racism:

R. V. GRANT[17]

> [129] … s. 493.2 is a relevant factor for consideration. The difficulty is that it cannot be given fuller, more specific consideration without fuller more specific evidence from Grant nor, as Morris notes at paras. 4 and 5, can the impact of systemic racism on Grant be assessed in an evidentiary vacuum …
>
> [130] Since Grant has not provided any evidence that relates to his particular circumstances as a member of a racially disadvantaged group, then I am regrettably left simply with the generalities as they have been described in other cases. I must, and have still considered the mater and those generic circumstances. However, without evidence from Grant about particulars, about how he has personally been impacted by systemic racism, then any conclusions drawn beyond the generic would be pure speculation in light of the fact that there are no specifics before me. I have no evidence about any particular racially motivated conduct towards him, beyond defence counsel's speculative suggestions, and so there is nothing to either explain or excuse Grant's numerous misconducts, some of which are obviously much more serious than others.

[16] *L.W.B.* at para 47.
[17] *R. v. Grant*, 2023 ONSC 132.

R. V. L.C.[18]

[50] It remains to consider whether the fact that LC self-identifies as Indigenous, and is a Black woman, tips the balance in favour of her release, in accordance with s. 493.2 of the *Criminal Code*.

[51] The Crown provided a June 2019 letter from Aboriginal Legal Services (ALS), responding to a request to prepare a Gladue report in relation to LC. The ALS letter outlined the reasons why the clinic was not able to provide a Gladue Report for LC. I therefore have no basis for assessing how being an Indigenous person might have affected LC's life circumstances.

[52] Similarly, LC did not provide any evidence indicating how the fact that she is a racialized Black woman might have affected any of the maters relevant to this bail review.

[53] As such, I am unable to find that either of these factors is sufficient to tip the balance in favour of release in this case.

R. V. YOUNG [19]

[10] Mr. Young argues that he is an indigenous person and the Justice of the Peace erred in law in failing to consider the Gladue principles. In support of his position, he filed an unsworn affidavit. In the affidavit he states that he was told by his father that he is indigenous and believes he is Mohawk from Six Nations. He also sets out his personal background including that he was placed in CAS at age 8 and remained in the system until he turned 21. He states that he has accessed resources at Toronto Council Fire and attended diversion through Aboriginal Legal Services.

[16] …Although I admit the unsworn affidavit, I am of the view that the new evidence has little or no bearing on the issues to be determined on this Application. The new evidence does not show a material and relevant change in the circumstances of the case that would justify a review of the Justice of Peace's decision.

[33] Mr. Young's affidavit does not set out in any detail how his indigenous heritage affected his life or how it may have been a factor in being before the court. I acknowledge that as an indigenous person, Mr. Young has access to indigenous community organizations. I note that Mr. Young states that he has had the support of Aboriginal Legal Services since 2015.

[18] *R. v. L.C.*, 2020 ONSC 5608.
[19] *R. v. L.C.*, 2020 ONSC 5608.

SECONDARY GROUNDS

The ultimate question under the secondary grounds is: Can the threat to the public be reduced to an acceptable level using bail conditions?[20]

In *E.B.,* the court indicated the following:

> [43] Where s. 493.2 comes into play, in my view, is in the court's examination of the type of factors that are relied upon to make the determination of whether detention is necessary. For the secondary grounds, which is at issue in this case, this usually consists of the accused's criminal antecedents as well as the nature of the allegations. Making an accurate determination of whether those factors lead to the conclusion that detention is necessary requires that they be considered having regard to the unique circumstances of the accused, including any systemic factors.[21] [Emphasis added]

For Black accused persons, any assessment of risk to the protection and safety of the public under the secondary grounds ought to be made in the context of Section 493.2. Specifically, evidence of the accused's identity as a Black person and experiences of anti-Black racism is relevant to assessing the weight given to an accused's criminal record, including for failing to comply with court orders. It is, therefore, necessary to consider the accused's criminal record and background in light of Section 493.2.

CRIMINAL RECORD – GENERAL

In the bail context, evidence about an accused's background and circumstances is relevant to assessing both the weight to be given to an accused's criminal record and the accused's likelihood of committing a criminal offence if released. It is further relevant to the determination of the appropriate bail conditions.

In *A.A.*, for example, the court held:

> In this case, in my view, there are two aspects of Section 493.2 that tend to militate against the case for the Applicant's detention on the secondary ground: First, the Applicant's history as part of an overrepresented and vulnerable population opens up a more realistic perspective on the Applicant's many fail to comply with recognizance and disposition convictions. It has the direct effect of reducing the tendency of these convictions to cast doubt on the Applicant's trustworthiness on bail. Second, the focus demanded by the new provision supports the efficacy of the bail conditions proposed by the Applicant and demonstrates this bail plan's ability to reduce the risk of re-offence.[22]

[20] *A.A.* at para 76.
[21] *E.B.* at para. 43.
[22] *A.A.* at para 51.

Similarly, in *R. v. E.B.*, the court commented on the Applicant's criminal record in the following way:

> [59] The foregoing discussion should not be taken to mean that the applicant's antecedents are not a cause of significant concern. They clearly are, even when subjected to the type of contextual examination I believe s. 493.2 requires. There is no question that the applicant has a long history of failing to abide by court orders and that he had repeatedly engaged in criminal conduct, including serious crimes of violence. However, giving particular attention to the applicant's circumstances as an Indigenous accused and one who belongs to a vulnerable and overrepresented population means that I should not simply write him off as "just a recidivist", as he was referred to by one of the judges who sentenced him in a decision provided to me by counsel.[23]

CRIMINAL RECORD – CONVICTIONS FOR FAIL TO COMPLY

Section 493.2 requires the court to consider the accused's membership in a vulnerable and overrepresented population when determining what weight to assign to a criminal record for failing to abide by court orders.[24]

When assessing the weight to assign to a criminal record for fail to comply with orders, the court can take judicial notice of the following two factors:

> First, there are widespread problems with the imposition of bail conditions that set a defendant up to fail.[25] The court in *E.B.,* indicated that:
>
> > [48] In my view, s. 493.2 requires me to consider the applicant's membership in vulnerable and overrepresented populations when determining what weight to assign to his criminal record for failing to abide by court orders. In doing so, there are certain facts about which I take judicial notice. The first is that as was recently recognized in *R.v. Zora*, 2020 SCC 14, at para. 26, there are "widespread problems ... with the ongoing imposition of bail conditions which are unnecessary, unreasonable, unduly restrictive, too numerous, or which effectively set up the accused to fail." The effect of imposing such conditions was described in Zora at para. 57:
> >
> > > ... [B]reach charges often accumulate quickly People with addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits. Convictions for failure to comply offences can therefore lead to a vicious cycle where increasingly numerous and onerous conditions of bail are imposed upon conviction, which will be harder to comply with, leading to the accused accumulating more breach charges, and ever more restrictive conditions of bail or, eventually, pretrial detention …

[23] *E.B.* at para. 59.

[24] *Ibid* at para 48.

[25] See *R* v. *Zora*, 2020 SCC 14.

Second, the accumulation of fail to comply charges has the effect of leading to detention before trial which, in turn, leads to an incentive to plead guilty, regardless of actual guilt. The court in *E.B., supra,* commented that:

> [49]…This is especially true with respect to more minor offences that result in sentences of imprisonment for a few months, for it is those where the accused risks spending more time in pre-trial custody than he would otherwise serve unless he pleads guilty …

Pursuant to s. 493.2, a proper contextual consideration of an accused's criminal record means that the court should exercise caution before relying on numerous breach convictions to conclude that an accused is incapable of abiding by bail conditions.[26]

CRIMINAL RECORD – OVER-POLICING

The Supreme Court of Canada has recognized that there is "disproportionate policing of racialized and low-income communities".[27]

> [90] Members of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada … racial minorities are both treated differently by the police and that such differential treatment does not go unnoticed by them.
>
> …
>
> [93] [The Ontario Human Rights Commission (OHRC) Report] revealed that "Black people are much more likely to have force used against them by the TPS that results in serious injury or death" and between 2013 and 2017, a Black person in Toronto was nearly 20 times more likely than a White person to be involved in a police shooting that resulted in civilian death (p. 19). The OHRC report reveals recurring themes: a lack of legal basis for police stopping, questioning or detaining Black people in the first place; inappropriate or unjustified searches during encounters; and unnecessary charges or arrests (pp. 21, 26 and 37). The report reveals that many had experiences that have "contributed to feelings of fear/trauma, humiliation, lack of trust and expectations of negative police treatment" (p. 25).
> …
>
> [97] We do not hesitate to find that … we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities …[28]

Over-policing of racialized communities must be taken into account when assessing the weight to be given to a criminal record.[29]

[26] *E.B.* at para 50. See also *R. v. King*, 2022 ONCA 665 at paras. 187-190.
[27] *R. v. Le*, at para 97.
[28] *Le* at paras. 90-97.
[29] *E.B.* at paras 52-53.

In a case involving an Indigenous defendant, the court in *R. v. King* addressed over-policing in the following passage:

> [46] I take judicial notice of the fact that Indigenous persons are often subject to over-policing, over-charging, and racial profiling; I also recognize that discriminatory attitudes against Indigenous accused also persist. In this way, an Indigenous accused's prior criminal record evidence can be of less probative value and, simultaneously, of greater prejudicial effect." [Emphasis added] [30]

SAMPLE SUBMISSIONS

If the defendant has a CRIMINAL RECORD:

My client has experienced [over-policing, racial profiling, harassment, etc.].

The Supreme Court of Canada has recognized that there is disproportionate policing of racialized and low- income communities.[31]

Over-policing of racialized communities must be taken into account when assessing the weight to be given a criminal record.[32]

My client's criminal record should have less probative value given the systemic problems of overrepresentation, over-policing, racial profiling, etc.[33]

Section 493.2 reduces the tendency of criminal convictions to cast doubt on my client's trustworthiness on bail.[34]

[30] *R. v. King*, 2019 ONSC 6851 at paras. 35-46. See also *R. v. King*, 2022 ONCA 665 at para. 179, where the Ontario Court of Appeal discusses weighing probative value against prejudicial effect in the context of an Indigenous person's criminal record at a *Corbett* application.
[31] *Le* at paras. 89-97.
[32] *E.B.* at paras. 52-53.
[33] *King* at para. 46. See also *E.B.* at para. 59.
[34] *A.A.* at para. 51.

If the defendant has convictions for FAIL TO COMPLY:

My client has experienced [over-policing, racial profiling, etc.].

The Supreme Court of Canada has recognized that there are widespread problems with the imposition of bail conditions that set a defendant up to fail.[35]

The accumulation of fail to comply charges leads to the incentive to plead guilty, regardless of actual guilt. [36]

My client's experiences must be a factor when considering how much weight to assign to the criminal record for failing to comply with court orders. [37]

In the context of s. 493.2, caution should be exercised before concluding that my client is not capable of abiding by bail conditions. [38]

My client's fail to comply convictions may raise some concern about governability on bail BUT those convictions should be attributed lower weight in the context of s. 493.2. [39]

TERTIARY GROUNDS

The essence of tertiary grounds is the necessity of ordering detention to "maintain confidence in the administration of justice, having regard to all the circumstances." The statutory factors that form part of the assessment under the tertiary grounds are:

I. the apparent strength of Crown's case;

II. the gravity of the offence;

III. the circumstances surrounding the commission of the offence, including whether a firearm was used; and

IV. the potential for a lengthy term of imprisonment.

CIRCUMSTANCES SURROUNDING THE COMMISSION OF THE OFFENCE

The personal circumstances of the accused may be considered under this statutory factor of the tertiary grounds. See *R. v. L.W.B.*,[40] where the court referred to the decision in *R. v. St. Cloud*, 2015 SCC 27:

> [39] … Section 515(10)(c)(iii) refers to the "circumstances surrounding the commission of the offence". I would add that the personal circumstances of the accused (age, criminal record, physical or mental condition, membership in a criminal organization, etc.) may also be relevant. [R. v. St-Cloud, at para. 71]

[35] *Zora* at para. 26. See also *E.B* at para. 48.
[36] E.B. at para. 49.
[37] *E.B.* at para. 48.
[38] *E.B.* at para. 50 and *A.A.* at paras. 65-73.
[39] *R. v. L.W.B.*, 2021 ONSC 6152.
[40] *R. v. L.W.B.*, 2021 ONSC 6152.

…

> [41] *R. v. St-Cloud* directs that the personal circumstances of the accused, their age, criminal record, physical or mental condition, membership in a criminal organization, etc. may also be relevant. I add to that list whether the accused is a member of a racial group that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release.

The court in *L.W.B.* found that membership in a population that is disadvantaged in obtaining release is a personal circumstance surrounding the commission of the crime that must be considered in determining whether an accused's continued detention is warranted.[41]

It is an error for a justice to not consider the impact on members of vulnerable populations in obtaining release as a circumstance surrounding the commission of the offence and arrest under the tertiary grounds:

> Section 493.2 specifically calls for consideration of the impact on members of vulnerable populations in obtaining release. I find the justice of the peace erred in not giving consideration to this as a circumstance surrounding the commission of the offence and the arrest of LWB.[42]

In *L.W.B.,* the detaining Justice of the Peace acknowledged that the Applicant was a member of the Black community but indicated that "nothing in [L.W.B.'s] personal background has been presented in this hearing to show he has personally suffered that disadvantage." The reviewing court responded in the following way:

> [44] LWB is a Black man. He is a 23-year-old young Black man. He has had an earlier interaction with the criminal justice system as a youth which resulted in two convictions. He has no adult convictions. There are no violations of court orders. The courts are beginning to address the issue of racial profiling and the experience of racial groups such as Indigenous and Black peoples in Canada's criminal justice system. Judicial notice has been taken of that reality. The Supreme Court of Canada in *R. v. Le* took notice of the particular experiences of young Black men.
>
> …
>
> [48] I do not have extensive information about LWB's life. But I believe this is not necessary for me to observe that he is visibly a member of a population that is being adversely affected by over-policing and discriminatory biases and practices within the system.
>
> [49] Accused persons before bail courts are innocent until proved guilty. The purpose of the bail system is to consider the prospect of release for remand accused as soon as possible with the evidence available at that stage. Black accused persons should not be deprived of the court's attention to the systemic factors that might have brought them before the court because they have exercised their right to have their pre-trial custody reviewed at an early stage.[43]

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[41] *L.W.B.* at para 59.

[42] *L.W.B*. at para 54.

[43] *L.W.B.* at paras 44-49.

NON-STATUTORY FACTORS

The court in *R. v. A.A.*[44] noted:

> While the statutory factors are the primary focus of the tertiary ground, the non-statutory factors must also be taken into account: *St. Cloud*, at paras. 66-71. Justice Doherty wrote in *R v Jaser*, [2020] O.J. No. 4423, 2020 ONCA 606 (Ont. C.A.),
>
> > 91. Not only is it clear the relevant factors extend beyond those enumerated in s. 515(10)(c), the balancing of the relevant circumstances envisioned by the provision is not value neutral. Instead, that balancing must reflect the law's commitment to the fundamental principles of the presumption of innocence and the entitlement to reasonable bail: *R*. v. *St-Cloud*, at paras. 56, 70.[45]

By enacting Section 493.2, Parliament has now made the values embodied in that section another element in maintaining confidence in the administration of justice. This element and these values have to be balanced against the statutory factors under the tertiary grounds.[46]

REASONABLE COMMUNITY PERCEPTION

In considering whether detention is necessary to maintain confidence in the administration of justice pursuant to the tertiary grounds, the inquiry must focus on the reasonable community perception of the necessity of denying bail to maintain confidence in the administration of justice.

The court must adopt the perspective of the "public," that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.[47]

The court in *R. v. E.B.*,[48] indicated the following:

> [67] The tertiary ground requires the court to consider the perception of reasonable members of the community who are informed about the philosophy behind the bail provisions in the Code, Charter values and the actual circumstances of the case … This would include the type of circumstances referred to in s. 493.2 of the Code.[49]

The values embodied in Section 493.2 can act as a powerful counterweight to the statutory factors in Section 515(10)(c). That is, if there is a record of an accused's experiences with anti-Black racism, an argument can be made that ordering detention would both be contrary to Section 493.2 and undermine confidence in the administration of justice. To order detention in those circumstances would "'foster complicity in anti-Black racism' to quote *Morris* and fail to distance the court from it".[50]

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[44] *L.W.B.* at paras 44-49.
[45] *R. v. A.A.*, 2022 ONSC 4310.
[46] *A.A.* at para. 95.
[47] *R. v. St-Cloud*, 2015 SCC 27 at paras. 79-84, 87.
[48] *R. v. E.B.*, 2020 ONSC 4383.
[49] *E.B.* at para. 67.
[50] *A.A.* at para 101.

A reasonably informed member of the public, apprised of Parliament's intent in Section 493.2 to reduce the overrepresentation of Black individuals in pretrial detention, would believe that society's participation in the maltreatment of an accused is of sufficient magnitude to impact the tertiary ground.[51]

In *A.A., supra,* the court held as follows:

> [102] If the allegations were of the very highest seriousness or if they were heinous, the weight of Section 493.2 could potentially be overborne by the statutory factors. But the allegations in this case are not of that order. They are very serious, no mistake should be made of that, but they do not rise to this level. I conclude that Section 493.2 constitutes a substantial weight against detention on the tertiary ground.[52]

See also *R. v. D.J.*,[53] where Justice Schreck held:

> … D.J. is a young Black man. There can be no doubt that he is part of a vulnerable group that is overrepresented and disadvantaged in the criminal justice system: *R. v. Morris,* 2021 ONCA 680, 159 O.R. (3d) 641, at paras. 40-42; 75-79; 90; 123.
>
> Section 515(10)(*c*) refers to confidence in the administration of justice "having regard to all the circumstances". In my view, "all of the circumstances" clearly includes the "circumstances" expressly mentioned in s. 493.2, which a court considering bail is statutorily required to consider. This is clearly part of the "circumstances of a case" that a reasonable member of the public would consider: *St-Cloud,* at para. 80; 97-101; *R. v. A.A.,* 2022 ONSC 4310 at paras. 96-101; *R. v. H.B.,* 2022 ONSC 4858, at paras. 25-26; *R. v. E.B.,* 2020 ONSC 4383, at para. 67; *N.Y.,* at paras. 41-44.
>
> The reasonable members of the community whose confidence s. 515(10)(*c*) is intended to maintain would be aware of and concerned by the overrepresentation of Black people in Canadian custodial institutions. They would expect the court to take steps to remedy the problem when they are able to do so. In the sentencing context, courts can do so by giving effect to the principle of restraint: *Morris,* at para. 123. Restraint is an important principle in the bail context as well, and has now been codified in s. 493.2 of the *Criminal Code*: *R. v. Zora,* 2020 SCC 14, at para. 83; *R. v. Antic,* 2017 SCC 27, [2017] 1 S.C.R. 509, at para. 29; *Myers,* at para. 25.
>
> Ensuring that s. 493.2 of the *Code* is properly applied and appropriately balanced with the circumstances enumerated in s. 515(10)(*c*) and any other relevant circumstances gives effect to that principle. I agree with my colleague, Harris J., in *A.A.,* at para. 101, that in some cases, "the values embodied in s. 493.2 ... act as a powerful counterweight to the statutory factors in s. 515(10)(*c*).[54]

[51] A.A. at para 100.
[52] A.A. at para 102.
[53] *R. v. D.J.*, 2023 ONSC 1530.
[54] *D.J.* at paras 38-40.

For an example of a competing view on these issues see the bail decision of Justice D. Galiatsatos of the Court of Quebec in *R*. v. *Kadjulik.*[55]

> [142] First, the expression "systemic racism" is both politically charged and highly subjective, with its meaning varying significantly per the eyes of the beholder. More importantly, the expression is not useful and it does not advance the analysis of s. 515 in any principled way. Section 515 seeks to protect the community from danger.
>
> [143] Moreover, words have meaning. To be abundantly clear in the case at bar, based on the evidence before me and the procedural history of the petitioner's multiple files, there isn't an iota of evidence suggesting that there was any racism in how Ms. Kadjulik was investigated, apprehended by the police, processed during her booking or dealt with during her court appearances.
>
> [144] Adding an all-encompassing suffix of "systemic", "unconscious", "implicit" or "latent" does not change this reality, nor does it warrant changing the fundamental structure of the Code's bail provisions.
>
> …
>
> [146] In *R. v. E.B.*, the Court also draws upon concepts of over-zealous policing of aboriginal people and colonialism at the bail stage.
>
> [147] With great respect, while these notions have their place in the public discourse (and potentially in matters of sentencing), they are wholly irrelevant to safety concerns under s. 515(10)(b) of the *Criminal Code*. In particular, when looking at the circumstances of the alleged index offences to assess the danger presented by the accused, contrary to E.B., I fail to see how systemic and background factors (such as the intergenerational impact of colonialism) has any bearing on the accused's dangerousness. There is simply no logical link between the two.
>
> [148] As such, importing arguments of policy or ideology when assessing one's dangerousness carries a risk that we distort our entire bail process. In turn, this does a great disservice to the community that the criminal law seeks to protect.
>
> [149] Ultimately, the Court must assess the following question: is the detention necessary for the protection or safety of the public? Stated otherwise, if released, is there a substantial likelihood that Ms. Kadjulik will break into another innocent citizen's home in the middle of the night, effectively terrorize them and steal their property? If the answer to that question is "yes" and said risk cannot be sufficiently mitigated by a plan of release, then it is incumbent on the Court to order her detention. Parliament provides for this at s. 515(10) C.C. and bail justices are duty- bound to ensure the public safety. The citizens of Park-Extension and St-Michel are entitled to the full protection of the law.
>
> [150] That duty is not displaced by any will to combat the effects of colonialism. Placing the public at significant risk is not an acceptable means of promoting some form of reconciliation, tolerance or social justice. In fact, such an approach may lead to the very opposite result.

[55] *R*. v. *Kadjulik*, 2021 QCCQ 4344.

> [151] As for fears regarding generalized over-policing of aboriginal individuals, this is another area where I decline to follow the reasoning espoused in R. v. E.B.

An appropriate response to the reasoning espoused in Kadjulik can be found in R. v. Grant,[56] where the court indicated the following:

> [124] As in *Morris*, we can, and must all acknowledge and understand that there plainly is systemic racism in Canada, in Toronto, in the criminal justice system, including within pre-trial detention and other correctional facilities. Anybody who does not accept this reality must either be suspect themselves, or has lived in a cave with no exposure to the news of Canada and the rest of the world, or has paid no attention to the interaction of minority communities, particularly the Black community, with white society in Canada, or with its interaction with police and other regulatory authorities. [57]

SAMPLE SUBMISSIONS

At a bail hearing, evidence about a defendant's particular experiences with systemic racism will form the basis on which to make submissions under the tertiary grounds. The submissions will include addressing the statutory factors and the "reasonable community perception" as they relate to the tertiary grounds.

Circumstances surrounding the COMMISSION OF THE OFFENCE

My client has experienced [over-policing, racial profiling…].
The personal circumstances of an accused may be considered under this statutory factor.[58]

My client's experiences as member of a disadvantaged population is a personal circumstance under this factor that must be considered when determining whether detention is necessary.[59]

Non-statutory factors must also be taken into account on the tertiary grounds – the values embodied in s. 493.2 are a non-statutory factor.[60]

My client's experiences must be taken into account and balanced against the statutory factors when considering whether detention is necessary.

[56] *R. v. Grant*, 2023 ONSC 132.
[57] *Grant* at para. 124.
[58] *L.W.B.* at para 39-41.
[59] *L.W.B.* at para 59.
[60] *A.A.* at paras 95-96.

Reasonable COMMUNITY PERCEPTION

The tertiary ground requires the court to consider the perception of reasonable members of the community who are informed about the philosophy behind bail provisions, Charter values and the actual circumstances of the case.

Information about the philosophy behind bail provisions includes the type of circumstances referred to in s. 493.2. [61]

A reasonably informed member of the public, informed on the values in s. 493.2, would believe that society's participation in the maltreatment of an accused is of sufficient magnitude to impact the tertiary grounds assessment. [62]

My client has experienced [over-policing, racial profiling…].

In the context of s. 493.2, my client's experiences should constitute a substantial weight against detention under the tertiary grounds. [63]

COMMUNITY SUPPORTS

At the bail hearing stage, there may be community members who support a defendant in the context of s. 493.2 but are not available to act as sureties. That is, there may be persons who are aware of the defendant's experiences as a member of a disadvantaged group, and who are available to provide support for the defendant while on bail. These support persons may not be available to attend at a bail hearing, in which case their availability can be elicited through the evidence of a surety who testifies at the bail hearing.

If secondary ground concerns can be effectively addressed with a strong plan that includes the support of community members, then s. 493.2 is another factor in favour of release, given the section's focus on stopping overrepresentation in jails.

See the comments of the court in *A.A.*, regarding the benefits of guidance and mentorship in the context of s. 493.2:

> 82 …To have a mentor guiding the Applicant and providing him with wise counsel stands as a major comfort to the public and as a guard against re-offending on this bail release. The direction in Section 493.2 suggests that with a person historically disadvantaged in being released on bail, guidance and mentorship may have a particular ability to address secondary grounds concerns.[64]

At the bail stage, it is important to make submissions, where applicable, about the existence of support persons for the defendant in the context of Section 493.2. If detention is ordered, these submissions will provide an opportunity upon which to build a more robust plan at a bail review.

[61] *E.B.* at para 67.
[62] *A.A.* para 100.
[63] *A.A.* at para 102.
[64] *A.A.* at para. 82.

CIRCUMSTANCES OF ARREST

Where the circumstances of a defendant's arrest appear to be motivated by racial bias, submissions may be made regarding these circumstances. The circumstances of the arrest can be used as evidence of the defendant's experience with systemic racism.

As most arguments asserting a racially biased arrest can only be developed upon review of disclosure, however, **such submissions ought to be approached with utmost caution**.

For example, see the evidence advanced by the defence in *R. v. L.W.B*:

> [50] The defence presented evidence they contend demonstrates that the police targeted LWB. Counsel played brief video recordings that, due to disclosure delays, I assume were not available for the bail hearing. The recordings capture LWB at the mall walking into a gas station and exiting. He has the Tommy Hilfiger satchel over his shoulder. He reaches his hand into the front pocket of his pants to retrieve money to pay for an item. The Synopsis prepared by the police summarizes as follows the basis of their suspicions that LWB was carrying a firearm: The accused was wearing a black "Tommy Hilfiger" satchel which [sic] with the strap over his shoulder and the pouch on his side. The satchel appeared to be full and heavily weighted. As the accused walked from retail stores, he was observed removing his wallet and other items from his side pant pockets not utilizing the satchel. The accused was seen continuously touching/tapping his satchel as if to check that its contents are still secure.
>
> [51] It was those observations that prompted the police to pursue LWB, detain him, conduct a search, and ultimately arrest him. The defence asserts racial stereotyping and racial bias against a young Black man prompted the police to find LWB's conduct indicative of possession of a firearm.
>
> [52] The defence points out that just because the satchel seemed heavy does not lead to the natural conclusion that it contained a firearm. It could contain any weighty thing. The defence points out that because LWB reached into his pocket for money rather than into the satchel does not mean he was trying to avoid exposing the contents of the satchel. Many men keep their money in their pockets. In the defence's estimation, one would not logically conclude the satchel contained a firearm unless LWB were viewed through the lens of racial bias. The actions highlighted by the police permit innocent explanations. The defence made the further point, which I observed, that LWB did not in fact touch or tap his satchel at all in the recordings.
>
> [53] There appears to be some cogency to the defence's position. But it will ultimately be for the trial judge to consider the defence's position on the totality of the record before the court at trial.[65]

[65] *L.W.B.* at paras. 50-52.

If s. 493.2 was not raised at a bail hearing, evidence that s. 493.2 applies could arguably constitute a material and relevant change in the circumstances of the case that would justify a bail review.

In *R. v. Monckton*,[66] for example, the Appellant led no evidence before the sentencing judge regarding his ancestry. On appeal, he made no formal application to admit fresh evidence, but instead included an affidavit from his father in his appeal book asserting Indigenous identity and that the Appellant was pursuing a status card under the *Indian Act*. While noting that the Appellant's failure to raise his Indigenous heritage at trial "remains a mystery", the Court of Appeal for Ontario held that "… given the importance of the values embodied in s.718.2(e) of the *Criminal Code* … this is an appropriate case to admit the fresh evidence and to consider it in reviewing the fitness of the sentence imposed."[67]

Similarly, in *R. v. Young*,[68] the Applicant at a bail review argued that he was Indigenous and that the Justice of the Peace erred in law in failing to consider the *Gladue* principles. In support of his position, he filed an unsworn affidavit. In the affidavit he stated that he was told by his father that he was Indigenous and believed he was Mohawk from Six Nations. He also set out his personal background including that he was placed in the care of a child welfare agency at age 8 and remained in the system until he turned 21. The Crown argued that the affidavit was inadmissible. Citing *Monckton*, the court held as follows:

> [16] I have concerns with respect to the trustworthiness of the affidavit. However, in light of the importance of taking into account the Gladue principles in a bail hearing, I admit the fresh evidence.[69]

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