

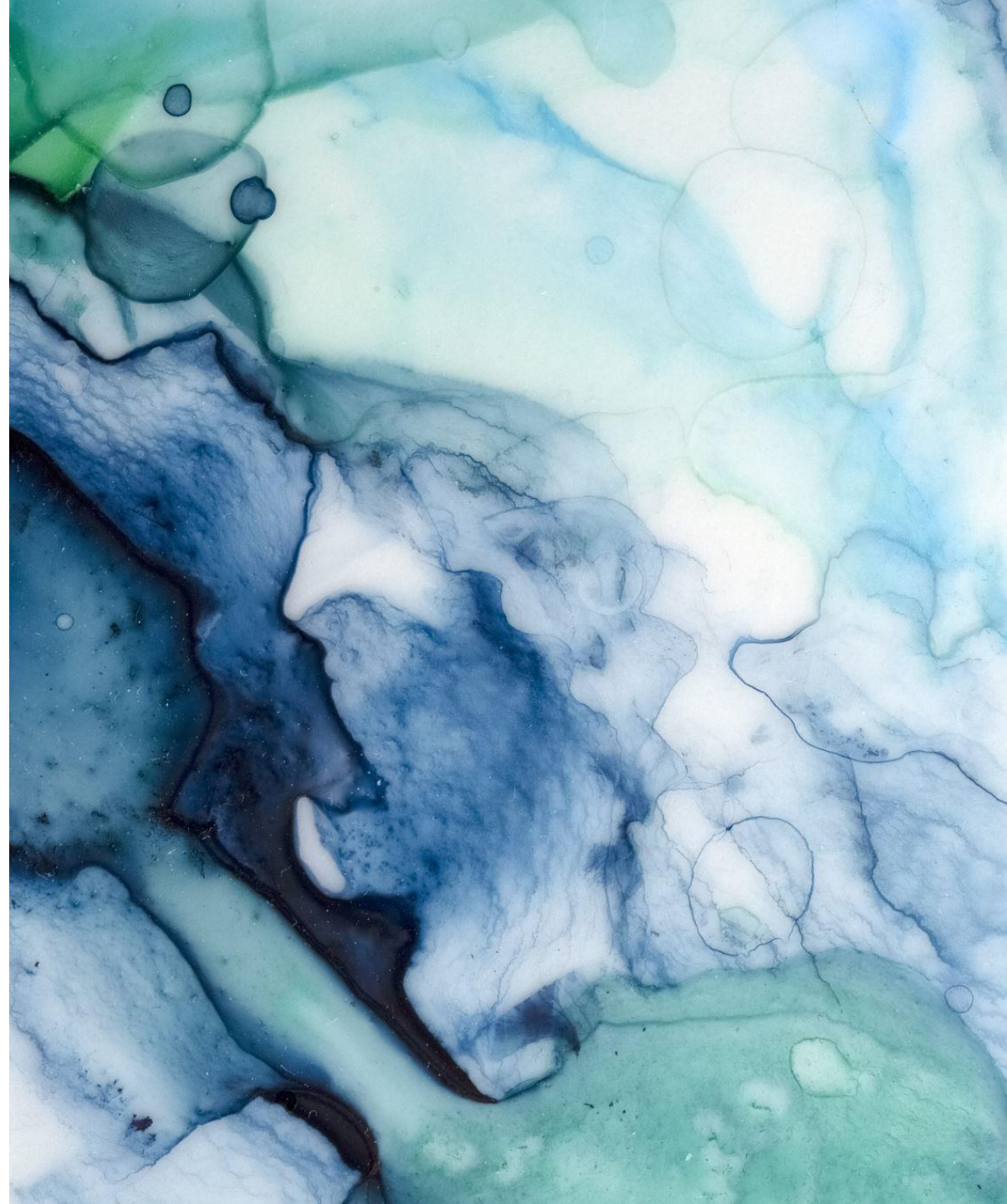
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# RACE, RISK, AND BAIL.

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# ANTI- BLACKNESS

- Anti-Black systemic racism embedded within the Canadian criminal justice system. Notably, this fact was recognized in several cases, including as far back as 1993 in *R v Parks* (1993 CanLII 3383 (ONCA)). The existence of anti-black racism in Canadian criminal law was affirmed in several later cases, including *R v Le*, 2019 SCC 34, *R v Theriault*, 2021 ONCA 517, and *R v Morris*, 2021 ONCA 680.



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# LEGISLATIVE HISTORY

- Bill C-75 (2019) was enacted and brought into force. Subsections 493.2(a) and (b) were added to the CC, requiring that decision-makers in the bail context must give particular attention to the circumstances of Indigenous and other accused individuals belonging to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release.
  - What is the purpose of Bill C-75 and s. 493.2?
  - Hansard – 300 (May 24, 2018)
  - Codified the principle of restraint, consistent with the SCC’s decision in Antic, especially with respect to the massive remand population.
  - Address the disproportionately impacted groups affected by breach charges, namely Indigenous and marginalized Canadians.
  - “Bill C-75 is about addressing systemic barriers for marginalized people, for vulnerable people, and for victims.”
  - Specifically calls for improving outcomes for marginalized and vulnerable individuals.
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# LEGISLATIVE HISTORY

- Bill C-48 (2024) added section 515(13.1) to the CC, requiring decision-makers to include in the record of proceedings how section 493.2 was considered in making their decision.

# QUESTION

- How has race, particularly blackness, been considered in the context of bail since the addition of 493.2 into the *Criminal Code*?

# RISK AND RACE

- Trotter: *The Law of Bail in Canada*, 3<sup>rd</sup> ed. (Toronto: Carswell, 2020) at 1.4(e) “It is very difficult to predict the future dangerousness accurately and the problem of prediction ought to be a troubling concern in the area of bail.”
- Predictive analysis and concerns about the risk of reoffending dominate the question of bail.
- If s. 493.2 is not meant to capture some semblance of blameworthiness or address the fact that certain racialized bodies are considered “riskier”; then it becomes a footnote in substantially addressing systemic inequality and unequal treatment in the bail context. It is reduced to a procedural checkmark that bail decision-makers must include in their reasons for judgment, rather than a serious contemplation of the systemic issues and whether denying bail to yet another racialized accused continues to perpetuate systemic inequality.

# JURISPRUDENCE

- *A.A.* notes that “The most obvious means [of ameliorating the pre-trial overincarceration of the overrepresented] is to release more accused described in 493.2.
- *R v E.B.* 2020 ONSC 4383 held that “[i]f there is a substantial likelihood that the accused will commit further offences if released, and thereby compromise public safety, the fact that systemic or background factors contributed to that substantial likelihood does not change the result. It [s. 493.2] does not supersede 515(10).
- Citing *R. v Sims* (2005), 78 O.R. (3<sup>rd</sup>) 183 (ONCA), the court in *E.B.* said “A dangerous person is no less dangerous because he/she is a member of a vulnerable group”. This arguably is a continuation of stereotypes of black accused being “dangerous”, and race/risk interplay.
- *R v E.B.* at para 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 whether detention is necessary. For the secondary ground, 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 relevant systemic factors.”
- *R v Ismail*, 2020 ONSC 5519, 166 WCB (2d) 300: Harris J states that section 493.2(b) bares some resemblance to section 718.2(e) of the Criminal Code. Both provisions, in their respective contexts, require consideration of socioeconomic and systemic factors. This is what the Supreme Court said with respect to Section 718.2(e) and it is pertinent and applies to Section 493.2(b) as well: Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment.
- *R v Raheem-Cummings*, 2020 SKQB 342: Mitchell J notes that the plain objective sought to be achieved by section 493.2 is to address two systemic problems with our current system of bail. First, there is an apparent over-use of pre-trial custody and second, there is the well-documented and unfortunate reality that some historically disadvantaged groups are over-represented in the criminal justice system generally, and the remand population particularly. Mitchell J notes the Indigenous population and the African-Canadian community in particular.

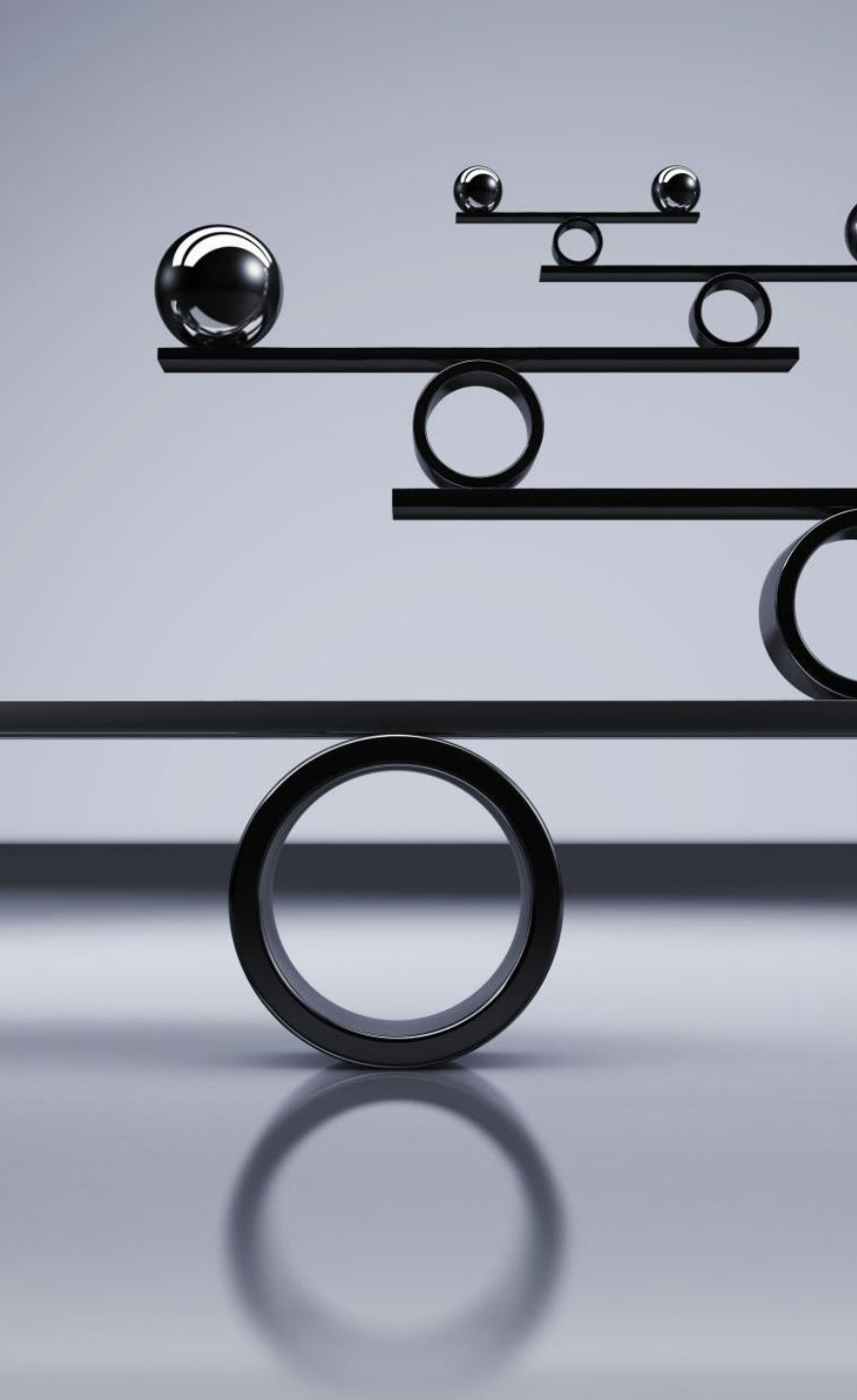
# CONSIDERING RACE

How has blackness been considered in the context of bail?

- Some cases describe social factors that can lead to a pattern of criminal behaviour, largely stemming from lack of alternative choices (see *R v Khandai*, 2020 ONSC 3580). However, this detailed accounting of the experience of blackness remains rare in the bail context, and is usually reserved for the sentencing phase, where moral blameworthiness becomes a consideration.

Courts have still yet to adequately take into consideration the downstream effects of Anti-Black racism in the bail context.

The JP deciding this case cited Mr. Baugh's limited work history as evidence regarding his stability and suggesting that he may be more prone to returning to criminal activities (para 51). While this reasoning might be logically coherent, it nevertheless perpetuates the overrepresentation of Black Canadians in the criminal justice system by failing to recognize that systemic racism is largely to blame for some of these risk factors. *R v Baugh*, 2024 ONCJ 637:



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# ERROR OF LAW

- It is an error of law to fail to consider 493.2: *R v Raheem-Cummings*, 2020 SKQB 342; *R v LWB*, 2021 ONSC 6152.
  - If not an error of law, then bail review cases order release in part due to 493.2 considerations, when initially denied release. See, among others;
    - *R v H.B.* 2022 ONSC 4858,
    - *R v A. A.*, 2022 ONSC 4310,
    - *R v A.M.*, 2024 ONSC 4805.
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# KEY TAKEAWAYS

- Courts remain hesitant to fully embrace ss. 493.2, insofar as it relates to releasing racialized offenders.
- While there are notable exceptions (*R. v A.A.*, 2020 ONSC 4310), courts continue to find that black accused are owed particular consideration. However, they are generally detained on secondary and/or tertiary grounds.

