“Unmanageable Threats?”

An examination of the Canadian Dangerous Offender designation as applied to Indigenous people

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Trigger Warning

This thesis contains discussions about sexual, physical, and psychological violence, suicide and self-harm, discrimination, and settler colonial practices of genocide, such as the residential school system, which may trigger the reader. Please consult the following resources, and any other resources available to you, should you experience any distress:

Canadian suicide hotline: 833-456-4566

Hope for Wellness Helpline (for Indigenous people in Canada): 1-855-242-3310

Indian Residential School Crisis Line: 1-866-925-4419

Support Services for Male Survivors of Sexual Abuse (Ontario): 1-866-887-0015

Assaulted Women's Helpline (Ontario): 1-866-863-0511

Trans Lifeline (Canada): 1-877-330-6366

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Abstract

In 2018-2019, 35.5% of people with a Dangerous Offender designation were Indigenous (Public Safety Canada, 2020, p. 117). While the disproportionate number of Indigenous people with the designation corresponds to the broader trend of overincarceration of Indigenous people in Canada, very little research has addressed the use of the designation on Indigenous people. This thesis provides a critical discourse analysis of 15 case law reports of Dangerous Offender designation hearings guided by settler colonial theory to examine why the designation disproportionately targets Indigenous people. I specifically examine the ways in which discourse enables the erasure of settler colonialism, and at time Indigeneity, in the decision-making process of Dangerous Offender designation hearings.

The analysis found that the juridical framework for the application of the Dangerous Offender designation does not allow the courts to consider the impacts of settler colonialism at the designation stage. As such, the social locations of the individuals that demonstrate how settler colonialism may have contributed to their offending are not discussed in the decision-making process thereby creating a form of erasure of settler colonialism in the designation process. Additionally, the juridical framework gives psych experts much authority in the decision-making process. Thus, risk discourse dominates much of the case law reports and the impacts of settler colonialism as thereby translated in individual risk factors. Many of the risk factors that justify the application of the designation are in fact symptoms of settler colonialism. In sum, I conclude that the juridical framework of the Dangerous Offender designation is designed in a way that contributes to disproportionately targeting Indigenous people because their unique experience of settler colonialism and the role in played in their offending is erased or translated in risk which makes them more of a target.

Keywords: Dangerous Offender designation; settler colonialism; erasure; risk; critical discourse analysis

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Chapter 1 - Introduction

There has been a recent push in Criminology and Feminist Studies, among many other fields, to center settler colonialism in research to better understand the current impacts of settler colonialism on Indigenous populations[1] (Aliverti et al., 2021, p.298; Arvin, Tuck, & Morrill, 2013, p.9). Several scholars have argued that the criminal justice system is a continuation of the settler colonial project to erase, segregate, assimilate, or marginalize Indigenous people (see Chartrand, 2019; Finnane & McGuire, 2001; Tauri & Porou, 2014). For instance, Chartrand (2019, p.76-77) argues that the Canadian penitentiary silently replaced overt forms of settler colonialism, such as the residential school system, at a time when freedom and progress were being promoted. Additionally, Chartrand (2014, p.13) points out that Indigenous people are disproportionality incarcerated, less likely to receive parole, more often confined in solitary, and are given higher risk classifications. Similarly with Dangerous Offender designations, in 2018-2019, 35.5% of Dangerous Offender designations in Canada were given to Indigenous people while they only constituted 4.9% of the Canadian population (Public Safety Canada, 2020, p. 117). The designation is the highest security classification in the Canadian correctional system and is meant to target a small group of individuals (*R v. Christensen*, 2020, p.5; *R v. Fontaine*, 2014, p.37-38) that have been described as "Canada's most violent criminals and sexual predators" (CBC News, 2010, para 1). The Dangerous Offender designation is also the only measure in Canada which allows for an indeterminate prison sentence.

Despite the disproportionate number of Indigenous people with the Dangerous Offender designation, the severity of the designation, and the push for more settler colonial analyses in

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[1] The term Indigenous is used in an all-encompassing manner to include First Nations (status and non-status), Métis, and Inuit people. When possible or appropriate, the person or group's specific Indigenous background is referred to.

Criminological studies, very little research has explored this phenomenon (see Milward, 2014; Nicholaichuk et al., 2013). To gain insight into why Dangerous Offender designations are more often applied to Indigenous people, this research is the first to analyze the application of the designation drawing from settler colonial analyses. To do so, and as further outlined below, I borrow from analyses that focus on the erasure of settler colonialism and Indigenous people via the criminal justice system, such as the works of Wolfe (2006), Tuck and Yang (2012), and Chartrand (2014; 2019). These theories of erasure provide a way of understanding how settler colonialism and Indigeneity are considered, if at all, and how ongoing colonialism is practiced in the Dangerous Offender designation process. Throughout this thesis, I examine case law reports of Dangerous Offender designation hearings to understand why Indigenous people are disproportionately targeted by the designation. More specifically, I seek to understand if and how settler colonialism and Indigeneity are considered in the designation process can provide a partial explanation to why Indigenous people are disproportionately given the Dangerous Offender designation. Though this research focuses solely on the Dangerous Offender designation, it contributes to the push to ground Criminological and Feminist research in settler colonial analyses that bring to light the ongoing effects of colonialism.

The second chapter of this thesis provides a review of the literature on the Dangerous Offender designation and on discourses of dangerousness pertaining to Indigeneity. The chapter begins with an overview of mainstream criminology works about the Dangerous Offender designation in Canada and similar designations in other Western countries, such as the United States, the United Kingdom, and Australia. After a review of the designation, I examine the discursive trajectory of the Dangerous Offender designation in Canada to better understand the origins of the designation, who it has targeted, and how it has developed into the version of the

designation that exists today. The works on the designation in Canada and abroad provide context that allows for a more complete understanding of the designation and how it changes over time and place. The literature not only shows the changing character of the designation but who is considered dangerous and why. Indeed, the Dangerous Offender designation has not always targeted Indigenous people which further substantiates the importance of asking why Indigenous people are targeted by contemporary applications of the designation. The last section of the literature review focuses on settler colonial studies pertaining to the criminal justice system and the different ways that Indigenous people have been constructed as dangerous. The combination of mainstream literature on the Dangerous Offender designation and settler colonial studies on the criminal justice system is used to form the foundation of this research project since there is little on the application of the designation on Indigenous populations in Canada. The literature indicates that the Dangerous Offender designation has a discursive and troubling past; it has been used to control varying populations over time and has been the focus of political and judicial scrutiny and debate (e.g. Brode, 2008; Chenier, 2003; 2008; Kinsman & Gentile, 2010; Pratt, 1996; Thompson, 2016). While there is little research on contemporary applications of the designation on Indigenous people (see Milward, 2014; Nicholaichuk et al., 2013), I observed that there may be a link between the shift from discourses of savagery to discourses of dangerousness and criminality (Anthony, 2018; Chartrand, 2014; Monaghan, 2013; Tedmanson, 2008; Tuck & Yang, 2012; Rifkin, 2009) and the disproportionate number of Indigenous people with the designation. Accordingly, the literature review indicates that there may be settler colonial logics and discourses embedded in the application of the Dangerous Offender designation that could contribute to understanding why Indigenous people are disproportionately targeted.

The third chapter provides an explanation of the theoretical framework applied in this research project. The theory with which I engage for analysis in this research is settler colonial theory with a focus on erasure (see Tuck & Yang, 2012; Wolfe, 2006). Grounding my research in settler colonial theory provides insight on whether there are ongoing colonial logics and practices embedded in courts with respect to the Dangerous Offender designation process that could help explain why Indigenous people are disproportionately targeted by the designation. A focus on erasure accounts for the cases in which settler colonialism and Indigeneity are not central in the case law reports or outright ignored. Theories of erasure offer an explanation of the significance and the impacts of settler colonialism and Indigeneity not being central in some of the case law reports. This theoretical framework draws on previous analyses which demonstrate that the criminal justice system is an inherently settler colonial institution which enables the erasure of colonialism via different discourses and practices (e.g. Chartrand, 2014; 2019; Finnane & McGuire, 2001; Morgensen, 2011). I draw from these works to conduct my own analysis of the case law reports to better understand the various forms of settler colonial erasure that operate in the courts for contemporary applications of the Dangerous Offender designation and how this could explain the disproportionate targeting of Indigenous people.

The fourth chapter consists of an overview of the methodology used to complete this research project. This chapter begins with a discussion of the data collection, followed by an elucidation of critical discourse analysis, the primary analysis method used in this thesis, and how it is applied in the analysis of my research data. The final part of this chapter pertains to issues of validity, the challenges faced while conducting the research, and the tactics used to overcome them, and ethics and power considerations.

The fifth chapter consists of an elaboration of the analytical findings of this research project. This chapter is divided into three sections, beginning with a discussion about the juridical framework used in Dangerous Offender designation hearings. Second is a review of the social locations, such as the education, employment, and gender of the individuals in the case law reports and how they are discursively constructed within the juridical framework of the Dangerous Offender designation. Last is a discussion of how psych experts[2] and risk discourse play a role in constructing Indigenous people as "unmanageable threats" to society thereby justifying the use of the Dangerous Offender designation and continued incarceration. The two predominant and interrelated types of discourses that were observed throughout the analysis were risk discourse and discourses of erasure. Risk discourse is perpetuated by the juridical framework and psych experts and contributes to constructing Indigenous struggles as risks of reoffending which contributes to justifying the application of the designation. Discourses of erasure occurred in cases where the impacts of settler colonialism on the patterns of offending were dismissed or marginalized in the Dangerous Offender designation process. The analysis traces how the individuals in the case law reports are discursively constructed in a way that justifies the application of the designation and could explain why Indigenous people are disproportionately targeted by it.

The concluding chapter of this thesis summarizes the findings of the research project to provide the answer to the research question: why are Indigenous people disproportionately targeted by the Dangerous Offender designation? The conclusion also provides recommendations for further research avenues and changes to the Dangerous Offender framework to combat the disproportionate use of the designation against Indigenous people.

[2] The term "psych experts" is used to refer mainly to psychiatrists and psychologists, but also other experts in related fields, to maintain brevity.

This thesis examines the application of the Dangerous Offender designation via 15 case law reports. While this was enough data to achieve saturation (Fusch & Ness, 2015; O'Reilly & Parker, 2013) and to gain important insight on my research question, there are many gaps that continue to exist in our understanding of the disproportionate number of Indigenous people with the designation including using regional and comparative data. These limitations, among others, are discussed throughout my research and indicate that there remain several angles from which contemporary applications of the designation on Indigenous people could be studied to obtain a more complete understanding of the phenomenon. Seeing as though this research is the first to examine the Dangerous Offender designation using settler colonial theory, a more expansive and fully funded research project will be needed to verify the findings in this research and advance the knowledge of this area of study.

Chapter 2 - Literature Review

This literature review begins with an outline of the Dangerous Offender Designation as it currently exists in Canada. The ensuing section is an overview of the scholarship relevant to Dangerous Offender designations in Canada and internationally. Shifting from its current conceptualizing, I then look at the literature that discusses the history of the designation from its inception in 1948 to the present. Within the historical review, the major sociopolitical influences and discursive shifts of the designation are also explored. I then highlight some of the relevant settler colonial scholarship that, although not specifically pertaining to the Dangerous Offender designation, can help understand the broader colonial context, thus providing a segue to my theoretical chapter on settler colonial theories of erasure. Outlining my literature review in this way provides for a better understanding of the Dangerous Offender designation and what it is meant to achieve. The review of the literature also emphasises the importance of the sociopolitical context, specifically the settler colonial context, in understanding the application of the designation. By exploring settler colonial scholarship alongside mainstream criminological works on the Dangerous Offender designation, I begin to see how settler colonial logics may contribute to Indigenous people being disproportionately targeted by the designation.

The Dangerous Offender Designation in Canada Today

In Canada, the legal definition of a Dangerous Offender is as follows:

> *(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing*
>
> *(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury*

> *to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,*
>
> *(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or*
>
> *(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or*
>
> *(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.* (Criminal Code, RSC 1985, c. C-46, s. 753(1))

A Dangerous Offender designation is for life and can result in one of three sentences. Once the designation is applied, in few cases, the individual will serve the regular sentence for the offence (Public Safety Canada, 2010, p. 9). In some cases, a long-term supervision order of up to ten years will be added to the regular sentence for the offence (Public Safety Canada, 2010, p. 9). In most cases, the designation results in the preventive detention in the form of an indeterminate sentence with no parole for up to seven years (Public Safety Canada, 2010, p. 8–9). Following the initial seven-year period, individuals with the Dangerous Offender designation are entitled to having their case reviewed by the Parole Board of Canada at least every two years (Criminal Code, RSC 1985, c. C-46, s. 761(1)). However, most individuals who receive an indeterminate sentence never leave prison (Milward, 2014, p. 657; *R v. Bird*, 2014, p.19). The Correctional Service of Canada (CSC) asserts that, in 2018-2019, only 4.7% of individuals with a Dangerous Offender designation and an indeterminate sentence were in the community under supervision (Public Safety Canada, 2020, p.65).

According to Nicholaichuk & Takahashi (2013, p.490-491), and as discussed in the historical overview below, there was a statistically significant increase in the number of Indigenous people designated as Dangerous Offenders between the 1977 to 1997 and the 1997 to 2008 periods studied. As of August 1997, individuals with a Dangerous Offender designation could no longer receive a determinate sentence and could only be given an indeterminate sentence because of an amendment to the legislation (Nicholaichuk et al., 2013, p.487). As discussed below, the legislation was amended again in 2008, which is why Nicholaichuk & Takahashi (2013) studied the differences between the periods of 1977 to 1997 and 1997 to 2008. Of the 194 individuals who obtained a Dangerous Offender designation between 1977 and 1997, 28 or 14.5% were Indigenous (Nicholaichuk et al., 2013, p.490). Between 1997 and 2008 there were 129 individuals designated as Dangerous Offenders and 31 or 24.0% were Indigenous (Nicholaichuk et al., 2013, p.490-491). As previously mentioned, today, Indigenous people continue to be disproportionately targeted by the designation. In addition, 27.1% of individuals serving a life or indeterminate sentence at the end of 2018-2019 were Indigenous (Public Safety, Canada, 2020, p.63). Seeing as though the Dangerous Offender designation is the only designation that can result in an indeterminate sentence, the above statistics also speak to the overrepresentation of Indigenous people with the Dangerous Offender designation.

Bonta et al. (1998, p.387) found that individuals with the Dangerous Offender designation in Canada had higher proportions of women and child victims than the control group of other individuals in prison. According to Petrunik (2003, p. 44), public opinion surveys revealed that those who target women and children are considered to be the most “vile and unredeemable”. Petrunik (2003, p.44) attributes society’s feelings towards people who victimize women and children to the fact that women and children are believed to be the most “pure, sacred, and

innocent" victims. Petrunik (2003, p.45) also draws a link between public perceptions of people who offend against children and the pervasiveness of anxieties surrounding threats to children. These public perceptions are exemplified by the fact individuals with sex offences are frequently placed in administrative segregation because they tend to be verbally and physically abused by individuals with whom they are incarcerated (Bonta et al., 1998, p. 382; Petrunik, 2003, p. 44). This scholarship indicates that the courts have targeted sex offences and offences against women and children via the application of the Dangerous Offender designation.

Another central criterion in Dangerous Offender designations is the concept of "risk". As stated in the definition of the Dangerous Offender designation in the Criminal Code, which is included above, the likelihood or risk that an individual will engage in criminal behaviour in the future is one of the criteria used to apply the designation. To determine the likelihood of reoffending, psych experts conduct risk assessments that are used by the courts to justify the application of the Dangerous Offender designation. Rasmussen (2011, p.38) speaks to the role psychiatry plays in managing socially acceptable behaviour by stating that psychiatry became a tool which aimed to protect society from the abnormal thereby creating a divide between what was considered "normal" and what was not (Rasmussen, 2011, p.38).

Research has increasingly challenged the use of risk assessment tools on Indigenous people, which is of interest because they contribute to legitimating the use of the Dangerous Offender designation. In Canada, the CSC has been asked to evaluate the reliability of the tools on Indigenous populations following the outcome of *Ewert v. Canada* (2018) which found that CSC violated the law by continuing to use tools for which the CSC had not yet established the reliability when used on Indigenous people. Thompson (2016, p. 69) stated that "Justice Phelan found that the use of risk assessment tools in the prediction of risk in Aboriginal offenders was inconsistent

with the principles found under ss. 4(g) and 24(1) of the Corrections and Conditional Release Act and violated s.7 of the Charter due to overbreadth and arbitrariness without s. 1 justification". The literature addressing the disproportionate representation of Indigenous people among Dangerous Offenders has stated that risk assessment tools contribute to unnecessarily labelling Indigenous people as dangerous (Milward, 2014, p. 621; Thompson, 2016, pp. 63–68). Risk assessment tools were not created or tested with Indigenous people in mind and cannot grasp the complexity of intergenerational trauma (Milward, 2014, p. 650). Experts have said that risk assessment tools are most effective when they are used on populations with similar characteristics as the individuals on which the tool was tested and this is not the case for Indigenous offenders (Harrison, 2010, p. 429). As such, risk assessment tools do not fully capture the experience of Indigenous people and disproportionately deem them as dangerous. The Canadian Human Rights Commission (2003) specifically stated that risk assessment tools discriminate against Indigenous women. The PCL-R, which is often used in the Dangerous Offender hearings discussed below, is ineffective for Indigenous offenders because there is a high risk of cross-cultural bias (Thompson, 2016, p. 69). These cases and scholarship raise important questions about the use of risk assessment tools to justify the application of the Dangerous Offender designation on Indigenous people. Because of the reliance on risk assessment tools for the application of the designation, the findings in the literature are important to consider to better understand why Indigenous people are disproportionately targeted by the Dangerous Offender designation.

Dangerous Offender Designations Internationally

Now that the Canadian definition of the Dangerous Offender designation has been discussed, this section will outline the criteria for similar designations in Australia, New Zealand, the United Kingdom, and the United States. The below literature provides additional context for

understanding the Dangerous Offender designation in Canada since the first version of the designation was modelled on a similar designation in the United States (Greenland, 1972, p.45) and there are many similarities between the different designations. Internationally, Dangerous Offender legislation typically targets sexual offences, with some variances. In Canada, the United States, the United Kingdom, and Australia, the stated goal of Dangerous Offender legislation and indeterminate sentencing is public safety (Bickle, 2008, p.610; Bonta et al., 1998, p.378; Clark, 2011, p.138; Petrunik, 2003, p.46). In Australia, Dangerous Offender designations are reserved for sex offenders (Gray, 2004, p. 245) who are then targeted for preventive confinement. Dangerous Offender legislations in the United-States and the United Kingdom both target violent and sexual offences (Bickle, 2008, p. 605; Clark, 2011, p. 142). Legislative definitions of dangerousness in all four countries, however, include sexual offences as part of the designation.

With respect to the application of the designation, for an offender to be deemed dangerous, all four countries require psychiatric assessments (Bickle, 2008, p. 604; Bonta et al., 1998, p. 378–379; Clark, 2011, p. 151; Gray, 2004, p. 245; Petrunik, 2003, p. 47). Bonta et al. (1998, p.395) assert that a psychiatric assessment affirming that the offender has a severe personality disorder, such as psychopathy, is often accepted as evidence that the offender cannot be treated and are therefore said to pose a significant risk to the community. Indeed, despite widespread criticisms regarding certain psychiatric diagnoses and risk assessment tools, both of which are discussed throughout the literature review, international legislation pertaining to the Dangerous Offender designation continue to rely heavily on both.

The third element that is present in official definitions of dangerousness in Canada, the United-States, the United Kingdom, and Australia is violence (Bickle, 2008, p. 605; Clark, 2011, p. 142; Gray, 2004, p. 245; Petrunik, 2003, p. 45). Dangerous Offender legislation targets repeat

violent offenders. The threshold that determines when violence becomes an "unacceptable risk" to society is highly subjective (Bonta et al., 1998, p.393-394). Petrunik (2003, p.45) summarizes the general legislative definition of a Dangerous Offender by stating that it is an individual who "has physically, psychologically, and morally harmed themselves or others and is likely to do so again". Bonta et al. (1998, p.379) identify brutality as central to determining whether violent behaviour warrants a Dangerous Offender designation. However, violence is contextual and also hard to define, as further outlined in the discursive trajectory of the designation. In sum, the Dangerous Offender legislation in all the countries discussed above, use the criteria of sex offending, societal risk, and repeated violence. As I trace below, however, the meaning of these criteria of the designation has shifted over time.

Discursive Trajectory of the Dangerous Offender Designation

In outlining the history of the Dangerous Offender designation, I draw from the literature that discusses the emergence of psychiatric expertise in the criminal justice system, the historical conflation of homosexuality and dangerousness, and the criminalization of Indigenous people from the 1970s to the early 2000s. This section elaborates on what historical conditions have allowed for the creation of the version of the Dangerous Offender designation as it exists today and the link with its growing application to Indigenous people. To do so, I discuss the socio-political context of the designation and its legal application. This trajectory of the Dangerous Offender designation highlights the subjective nature of what is considered dangerous within the courts and public perception. As such, the literature discussed below begins to shed light on how perceptions of dangerousness within the courts' application of the designation shifted to eventually begin targeting Indigenous people.

<u>1948: The Criminal Sexual Psychopath</u>

The first version of the Dangerous Offender designation was established in 1948 as the Criminal Sexual Psychopath provision. According to several authors, there are two main factors that contributed to the creation of this legal provision: anxieties concerning the threat that non-heteronormative individuals posed to the social order in a post-World War II era (Brode, 2008; Chenier, 2003; Pratt, 1996) and psychiatry's rise to prominence and emergence as an authority in the field of criminal justice (Chenier, 2003; Greenland, 1972; Marcus, 1965; Tappan, 1955).

Chenier (2003) and Brode (2008) provide an in-depth analysis of the sociopolitical conditions that triggered the creation of the Criminal Sexual Psychopath provision of 1948. According to Chenier (2003, p. 77), the post-World War II era was marked with concerns about masculinity due to men living with the traumas of war and being disconnected from the domestic sphere for extended periods of time. Brode (2008, p.110) asserts that there was a strong desire for a return to normalcy following the war, which included men and women returning to their heteronormative gender roles; men were to return to their former jobs thereby pushing women back into the domestic sphere. As such, any deviation or threat to this return to normalcy was met with intense scrutiny. Brode (2008, p.109) explains that hypermasculine or hyperfeminine men transgressed "sexual innocence, gender roles, and social order". While hypermasculine men were perceived as threatening, gay men, who were thought to be hyperfeminine, would be the subject of fear and discrimination for many decades to come.

Pratt (1996, p.24-25) further argues that same-sex relationships were understood as threatening the values, purity, and even the very existence of the traditional family unit. Pratt (1996, p.25-26) explains that there were concerns about population decline in the post-war era. As such, individuals were strongly encouraged to get married and have children to revive population

growth (Pratt, 1996, p.25). Gay sex stood against this objective and was projected as unnatural and contrary to the moral norms and values that Pratt (1996, p.25-26) discusses. Moreover, Brode (2008, p.109) and Pratt (1996, pp. 24–25) state that gay men were also believed to be a danger to the youth because they were thought to have a tendency to lure and seduce them. At the time, the terms homosexual, pedophile, and sexual psychopath were being used interchangeably both publicly and legally (Brode, 2008, p.111). Both Brode (2008, p.110) and Chenier (2003, p.77) also discuss emerging moral panics regarding sexual offences that threatened the purity of the family unit. Media headlines led to believe that there was a growing number of sexual psychopaths harming women and children, despite reported rates of crime going down during this time (Brode, 2008, p.112-113). In Canada, there was an emerging pressure on the government to address the issue of the sexual psychopath (Chenier, 2003, p.76).

The Emergence of Psychiatry

In the late 1940s and early 1950s, the Canadian state, as elsewhere, adhered to the belief that the best way to address the issue of sexual deviance was to rehabilitate individuals through treatments that would rid them of their incontrollable sexual impulses (Chenier, 2003, p.76). Chenier's (2003, p.77) work elaborates on the epistemological shift towards a positivist criminology that allowed for medicine and the law to merge. Individuals who engaged in criminal behaviour were increasingly understood as being mentally ill, which made space for psychiatrists to become subject matter experts in deviant behaviour (Chenier, 2003, p.76). Brode (2008, p. 116) describes the role that psychiatrists played during World War II to assert that the field was growing in importance in all aspects of life during this time.

Also at this time, the concept of the Criminal Sexual Psychopath in Canada was heavily criticized by psych experts in the United-States and Canada (Greenland, 1972, p. 45; Marcus, 1965,

p. 100; see Tappan, 1955). Tappan (1955, p. 10) and Chenier (2003, p. 90) argue that there was a lack of consensus among psychiatrists on the meaning or even the very existence of Sexual Psychopaths. Tappan (1955, p.10) states that psychiatrists interviewed for the purpose of his research asserted that the concept was too vague and misunderstood and should not be used as the basis of the legislation. Marcus (1965, p.100) questions how the diagnosis of Sexual Psychopath was applied to people who committed sex offences stating that psychiatric evaluations presented in court were not specifically designed to diagnose sexual psychopathy. Moreover, Chenier (2003, p.79-82) describes the emergence of social scientific studies of sexuality beginning in the 1930s, such as A. J. Kilgour, Senior Physician at the Toronto Psychiatric Hospital in 1933, who challenged the idea that there was any physical and/or psychological abnormalities that caused sexual deviance, particularly homosexuality (Chenier, 2003, p.81). Instead, Kilgour argued that society had imposed a very narrow standard for sex, when in fact there were multiple ways to engage in healthy sexual habits (Chenier, 2003, p.82). However, this type of research was still quite new and controversial and did not manage to outweigh the general perceptions about sexual deviance all together, but nonetheless shows the changing tides for the designations.

Reports of the lack of consensus among psychiatrists regarding the Sexual Psychopath label did not deter its use in legislation. Greenland (1972) and Brode (2008) find that the provision was more so created to appease the public than to bring about real change. Greenland (1972, p.46) argues that legal experts thought the phraseology of the law was too vague and ambiguous which made enforcement difficult, a similar concern to those of psychiatrists. Brode (2008, p. 120) explains that there were constitutional inconsistencies with the 1948 legislation. For example, the federal government was responsible for penitentiaries, but the provinces were responsible for medical treatment facilities (Brode, 2008, p. 120). As a result, there was no funding provided by

the federal government to build and staff the treatment facilities described in the legislation, nor were the provinces consulted on whether they could support the legislative changes (Brode, 2008, p.120). In sum, the creation of the Criminal Sexual Psychopath provision was created amidst a fear of sexual deviance, particularly aimed towards gay men, despite serious concerns and a lack of consensus among psychiatrists and legal experts regarding the definition and application of the label of sexual psychopath.

1954: The Royal Commission on the Criminal Law Relating to the Criminal Sexual Psychopath

Given the tensions with the use of the Sexual Psychopath designation, the 1954 *Royal Commission on the Criminal Law Relating to the Criminal Sexual Psychopath*, otherwise known as the McRuer report, was established. Kinsman & Gentile (2010), Chenier (2008) and Brode (2008) discuss how psych experts were continuing to emerge as figures of authority within a growing bureaucratic and legal ordering.

Around this time, psychiatric experts became particularly responsible for enforcing sexual and gender norms (Chenier, 2008, p.80). For example, Kinsman & Gentile (2010, p.69) explain how members of the Canadian Armed Forces were discharged from their responsibilities because they were labelled as homosexual through psychological testing (Kinsman & Gentile, 2010, p.69). The purge of homosexuality from the Canadian public service occurred from the 1950s well into the 1990s. Being gay was viewed as "unnatural, weak, unstable, and prone to conspiracy, decadence, and irrationality" (Kinsman & Gentile, 2010, p.66). In line with Cold War era thinking, people who did not conform to heteronormative gender norms were associated with communism and left-wing ideology which was used to justify surveillance and criminalization of homosexual individuals (Kinsman & Gentile, 2010, p.75). In sum, gay men, and the 2SLGBTQQIA+

community more broadly, represented the antithesis of the heteronormative qualities sought out by Canadian bureaucracy and so-called "natural" order.

Psych experts played a significant role in the Royal Commission's investigation, solidifying their authority over the policing of the designation. Medical and mental health professionals represented 44.5% of the witnesses consulted by the Royal Commission, which is the largest group of individuals involved in the process (McRuer, 1954, p.2)[3]. Chenier (2008, p.80) argues that "the commission effectively entrenched mental health professionals as authoritative interpreters and regulators of sexual and gender behaviour and norms". Therefore, the Royal Commission resulted in a shift of the regulation of sex in Canada by solidifying the authority of psychiatrists.

One of the main topics addressed by the Royal Commission was homosexuality. Chenier (2008, p.95-100) explains that many mental health experts argued for the decriminalization of homosexuality stating that these individuals needed treatment rather than incarceration. Chenier (2008, p.95) explains that homosexuality was linked to pedophilia in part because many gay individuals met in public spaces, such as parks, which were also spaces that symbolized youth and family, thus reinforcing the link between homosexuality and pedophilia. Indeed, Bell (1995, p.142) asserts that such "places become invested in sexual meanings". Such was the case for certain parks across Canada that were known for being popular meeting spots for gay men, such as Mont Royal in Montreal, High Park in Toronto, and Stanley Park in Vancouver (Chenier, 2008, p.96). This logic was adopted in the 1954 Royal Commission thereby conflating homosexuality with pedophilia and subsequent criminalization.

[3] Gustave Desrochers, Assistant Medical Superintendent at St-Michel Archange Hospital, was one of the three commissioners (McRuer, 1954).

The conflation of homosexuality with pedophilia was made more evident when the Commissioners concluded that incest, on the other hand, did not pose a risk to public safety because it was not done in public but was maintained within the family (Chenier, 2008, p.104). A similar example is the exclusion of sexual assault against women in the Royal Commission's discussion, which was also considered a private matter (Chenier, 2008, p.105). Male sexual attraction towards women was considered natural, therefore it was believed that there was nothing pathologically wrong with a man who failed to control his sexual impulses towards women (Chenier, 2008, p.105). Given the above trajectory, Petrunik (2003, p.44) has pointed out that the Dangerous Offender legislation has been used selectively, typically targeting offences against women and children committed outside of the domestic realm. As such, the Royal Commission reinforced what Chenier (2008, p.112) calls the "myth of stranger danger" which is the belief that most sexual assaults are perpetrated by strangers.

Setting the stage of the discourse surrounding dangerousness, one significant change that occurred as a result of the Royal Commission is that the Criminal Sexual Psychopath became the Dangerous Sexual Offender in 1961 (Chenier, 2008, p. 108; Greenland, 1972, p. 45), along with its definition. This change was a result of the ongoing widespread disagreement between psych experts over the concept of the sexual psychopath. Before these changes, a convicted person had to show a lack of power to control their impulses whereas, following the Royal Commission, the wording became a failure to control impulses (Chenier, 2008, p.108). This happened because mental health experts found that sexual offences were typically premeditated which meant that the perpetrators were able to control their impulses but chose not to (Chenier, 2008, p.84). The changes to the definition of the designation broadened the category of who fell into this new legislated conception of sexual dangerousness. Overall, psychiatry and sexual deviance continued to be

central the Dangerous Sexual Offender designation with an emphasis on protecting public safety from violent offences.

1977: The Dangerous Offender Designation

In 1977, the Dangerous Offender designation emerged to replace the Dangerous Sexual Offender designation and broadened the category of people targeted (Bonta, Harris, Zinger, & Carriere, 1996, p. 4; Nicholaichuk, et al., 2013, p. 487). Though published almost ten years prior, this shift was in line with recommendations made by the Ouimet Report (1969), along with other key events that are discussed below.

Regarding the Dangerous Sexual Offender designation, the Ouimet Committee was tasked to ensure that the designation protected public safety and did not target individuals who did not represent real threats (Ouimet, 1969, p.241-242). Similar to the McRuer Report, psychiatrists indicated that it was difficult to determine whether someone was a dangerous sexual offender based on one or two interviews (Ouimet, 1969, p.254). The judgement of the Supreme Court of Canada in *Klippert v. The Queen* set a precedent that the Dangerous Sexual Offender designation was indeed being applied to individuals who were not dangerous (*Klippert v. The Queen*, 1967; Ouimet, 1969, p.255).[4]

The committee also concluded that sexual offenders only represented one kind of Dangerous Offender (Ouimet, 1969, p.256). In addition to sexual offences, the committee recommended that offences such as manslaughter, attempted murder, robbery, arson, and kidnapping be included in the Dangerous Offender designation (Ouimet, 1969, p.260). These

[4] Klippert was convicted of gross indecency for having consensual same-sex relations on at least four occasions. Because he repeatedly engaged in gay sex, thus “failing” to control his impulses, Klippert received a Dangerous Sexual Offender designation (*Klippert v. The Queen*, 1967).

changes are also recommended at a time when the Habitual Offender designation and capital punishment were being increasingly scrutinized and eventually abolished. The Habitual Offender designation, which could also result in an indeterminate sentence, was abolished following the recommendation of the Ouimet report which found that it was targeting individuals whose behaviour was generally non-violent and represented more of a "social nuisance" than a threat to public safety[5]. Similarly, capital punishment was abolished in Canada because of its limited deterrent effect and because of domestic and local case law which found it to be "cruel and unusual" punishment (see Welling & Hipfner, 1976). Capital punishment was permitted in Canada for the offences of "treason, piracy involving either murder, attempted murder, or an act of endangering life, and capital murder" which was the most common occurrence and typically against police officers or prison guards (Welling & Hipfner, 1976, p.75). As such, the committee suggested that the Dangerous Offender designation replace the Dangerous Sexual Offender designation to remove the focus from sexual offences and broaden the scope to encompass offences that were targeted by the Habitual Offender designation and capital punishment. Nevertheless, offences that specifically targeted gay men, including buggery, indecent assault on a male, and gross indecency, remained on the list of suggested offences to include in the Dangerous Offender provision (Ouimet, 1969, p.259-260). Despite the committee's attempt to make recommendations that would remove the focus of the Dangerous Offender designation from sexual offenders, Bonta et al. (1996, p.4) argue that there was no significant change in the type of offences targeted by the designation following the changes in 1977. In 1992, 92.2% of Dangerous Offenders had a sexual offence as their index offence (Bonta et al., 1996, p. 14). The legislation also implemented the recommendations that that courts should be able to impose not only an indeterminate sentence, but

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[5] Similar critiques had also previously been made for the Habitual Offender legislation in the United Kingdom and the United States (Ouimet, 1969, p.244-246).

choose a long determinate sentence (Ouimet, 1969, p.261) and that individuals with indeterminate sentences be entitled to having their case reviewed by the Parole Board every three years (Ouimet, 1969, p.262-263).

A review of the current version of the Criminal Code indicates that sexual deviance is still targeted by the Dangerous Offender designation. There are 25 designated offences for the Dangerous Offender designation, nine of which are sexual in nature (36%) (Criminal Code, RSC 1985, c. C-46, s. 752). Most of the designated offences that are sexual in nature are offences against a child or a person with disability, such as sexual exploitation of person with disability, child pornography, and parent or guardian procuring sexual activity, to name a few (Criminal Code, RSC 1985, c. C-46, s. 752). Moreover, there are prostitution offences and sexual offences against a child from previous versions of the Criminal Code of Canada that are still applicable to the Dangerous Offender designation if the offence happened before the Criminal Code was changed (Criminal Code, RSC 1985, c. C-46, s. 752). As such, sexual offences, particularly against children, are still considered among the most threatening offences in Canada, the difference is that gay men are no longer considered the main threat[6]. Some of the other designated offences include assault, robbery, using a firearm, hostage taking, and abduction of a minor (Criminal Code, RSC 1985, c. C-46, s. 752).

In sum, the Ouimet report made recommendations that would expand the Dangerous Offender provision to target violent and repeat offenders that had previously been targeted by the Habitual Offender designation and capital punishment, rather than just sexual offenders. Most of

[6] Hooper (2019, p.264) asserts that if anything changed following 1969, there was an increased criminalization of homosexuality, although not receiving a Dangerous Offender designation. Gay sex in public places went against "community standards of tolerance" (Warner, 2002, p.115). Offences such as buggery, indecent assault on a male, and gross indecency were still classified as index offences for the Dangerous Offender designation (Ouimet, 1969, p.259-260).

the recommendations were reflected in the new Dangerous Offender designation. With a broadened categorizing of the designation of "dangerous", this research sets out to understand why there has been a shift in focus on Indigenous people with this designation. As I discuss below, several scholars have looked at how the criminal justice targets Indigenous people.

Indigenous Sovereignty, the State, and DO Designations

Palmer (2009, p.385) states that by 1970, 30% of individuals in Canadian jails, prisons and youth detention centres were Indigenous while the latter only formed about 3% of the Canadian population. Between the 1950s and 1970s, the number of Indigenous people incarcerated in federal penitentiaries increased five-fold (Palmer, 2009, p.385). According to Nicholaichuk et al. (2013, p.490-491), there was a statistically significant increase in the number of Indigenous people designated as Dangerous Offenders between the 1977 to 1997 and the 1997 to 2008 periods. Of the 194 individuals who obtained a Dangerous Offender designation between 1977 and 1997, 28 or 14.5% were Indigenous (Nicholaichuk et al., 2013, p.490). Between 1997 and 2008 there were 129 individuals designated as Dangerous Offenders and 31 or 24.0% were Indigenous (Nicholaichuk et al., 2013, p.490-491).

Palmer (2009) and Nicholaichuk et al. (2013) indicate that criminalization of Indigenous people began to increase significantly during the 1960s and 1970s while Chartrand (2019) also highlights that Indigenous people were not significantly incarcerated in the penitentiaries until the 1960s. Nicholaichuk et al. (2013) similarly indicate that Indigenous people are increasingly targeted by the Dangerous Offender designation in the 1970s, but do not indicate why. While much of the literature does not specifically explain why the designation was increasingly used on Indigenous people, it is clear that Indigenous people began to be targeted by the new designation. This also supports the need for this research to begin to offer better understanding of this issues,

by looking at the juridical reasoning behind Dangerous Offender designations for Indigenous people.

2008: Tackling Violent Crimes Act

The most recent amendments to the Dangerous Offender designation occurred in 2008 with Bill C-2 or the "Tackling Violent Crimes Act" (Tackling Violent Crime Act, SC 2008, c 6). While many of the articles reviewed for this section do not directly discuss the Dangerous Offender designation, they shed light on the context and the politics that surrounded the most recent changes to the designation and are thus important to understand the contemporary application of the Dangerous Offender designation.

A review of Bill C-2 (Tackling Violent Crime Act, SC 2008, c 6) saw changes to the Dangerous Offender designation that prohibit a judge from deeming someone a Long Term Offender when the Dangerous Offender criteria is met, at which point the judge is required to apply the Dangerous Offender designation (Tackling Violent Crime Act, SC 2008, c 6). The Tackling Violent Crimes Act now requires the Crown to consider applying for the Dangerous Offender designation if the individual is convicted of a designated offence and has been previously convicted of two other designated offences for which the individual received at least two years incarceration (Tackling Violent Crime Act, SC 2008, c 6). In requiring judges to apply the designation when certain criteria are met, these changes to the Dangerous Offender designation removed judicial discretion at the designation stage (Tackling Violent Crime Act, SC 2008, c 6; Thompson, 2016, p.49). Judicial discretion is instead allowed at the sentencing stage where the judge has more flexibility to decided whether to apply a determinate or indeterminate sentence (Tackling Violent Crime Act, SC 2008, c 6). An indeterminate sentence is accorded to the discretion of the judge, though Thompson (2016) argues that, in introducing a determinate

sentence, this change diminishes the burden of the Crown to prove that the offender fits the criteria for an indeterminate sentence (Thompson, 2016, p. 50-53). Thompson (2016, p.61) states that, as of 2013, of the 177 individuals who were given a Dangerous Offender designation since the "Tackling Violent Crimes Act", 82.5% received an indeterminate sentence. According to Public Safety Canada (2018, p.59), in 2017-2018, 95.5% of individuals who received an indeterminate sentence remained incarcerated. Overall, since 2008, there has been an increase in the number of individuals deemed Dangerous Offenders (Thompson, 2016, p.50). Since the introduction of the new Dangerous Offender legislation in 2008, there has been a significant increase in the designation of Indigenous people and overall. In 2006-2007, 23.0% of individuals with the Dangerous Offender designation were Indigenous (Public Safety Canada, 2007, p.103) and ten years later, in 2016-2017, 34.5% were Indigenous (Public Safety Canada, 2017, p.107). This is an increase of 11.5% while the overall Indigenous population in Canada only went from 3.8% in 2006 to 4.9% in 2016 (Statistics Canada, 2016, p.1) which is only a 1.1% increase. In 2006-2007 there were 370 active Dangerous Offender designation and 349 were incarcerated, representing 2.6% of people in Canadian prisons (Public Safety Canada, 2007, p.103). In 2016-2017, there were 727 active Dangerous Offender designations and 671 were incarcerated, representing, 4.7% of the population of Canadian prisons (Public Safety Canada, 2017, p.107). While there was a general increase in the number of individuals with the Dangerous Offender designation between 2007 and 2017, the proportion of individuals in prison with the designation only grew by 2.1% while the proportion of Indigenous people with the designation increased by 11.5%. These figures demonstrate that the changes to the Dangerous Offender designation have greatly impacted Indigenous people involved with the criminal justice system.

The changes to the Dangerous Offender designation occurred in a post 9/11 context marked by enhanced security, intelligence and surveillance (Prince, 2015, p. 56–57). For Canada, this meant that there was a shift towards penal populism and increasingly punitive criminal justice policies (Kelly & Puddister, 2017; Prince, 2015; Webster & Doob, 2015). Kelly & Puddister (2017, p.394) describe penal populism as a commonsensical and tough on crime approach to criminal justice policy that favours non-traditional actors and distances itself from evidence driven policy making. Penal populism is also characterized by the politicization of criminal justice policy which means that a tough on crime approach is used to distinguish a political party from its "soft on crime" opponents (Kelly & Puddister, 2017, p. 394). As shown by critical race scholars, a penal populism also shifted the focus onto foreign nationals, immigrants and refugees, people of colour and Indigenous people (see Bhandar, 2009; Razack, 2000; Saleh-Hanna, 2015; Singh & Sprott, 2017). Harper's tough on crime approach and the politicization of criminal justice policy is reflected in the names of the policies enacted during his time as prime minister. The following are only a few of said Acts: Increasing Offenders' Accountability for Victims Act (Bill C-37), Safe Streets and Communities Act (Bill C-10), Tougher Penalties for Child Predators Act, Limiting Pardons for Serious Crimes Act (C-23A), Protecting Canadians by ending Sentence Discounts for Multiple Murders Act (Bill C-48) (Webster & Doob, 2015, p.310-313). Kelly & Puddister (2017, p.395) assert that it is unusual for criminal justice policies to have such politically charged names as the ones listed above and that Harper did so in an effort to politicize criminal justice issues. The Conservative government believed that harsher sentences would deter people from committing crimes (Marshall, 2015, p.3; Webster & Doob, 2015, p.311). As such, the current version of the Dangerous Offender designation was implemented in an era characterized by the politicization of criminal justice policy and the ensuing tough on crime approach.

Marshall (2015, p.8) states that "racialized spaces often become associated with violence and disorder, and accordingly become heavily policed. In this way, policies that are tough on crime become inevitably tough on racialized spaces and the individuals found therein". Razack (2014; 2000) argues that spaces dedicated to Indigenous people, such as reserves, are associated with disorder and dysfunctionality while settler spaces are seen as civilized and rational. The author further argues that when Indigenous people are forced into settler spaces, such as to pursue employment or educational opportunities, they threaten the boundary between the two spaces, and are heavily targeted by the criminal justice system as a result (Razack, 2014; 2000).

Criminal Justice and Settler Colonial Studies

Although not many critical race and settler colonial scholars have explored Dangerous Offender designations specifically (see Milward, 2014), they nonetheless highlight the links between colonialism and the penal and carceral systems. As outlined below, the literature suggests that the criminal justice system is a colonial tool which serves to erase and dispossess Indigenous people form their lands and communities. Below, I outline some of the scholarship that discusses Canada's colonial past and present, with particular reference to the criminal justice system to provide context for the next chapter that outlines a settler colonial analysis of the Dangerous Offender designation.

According to Milward (2014, p.625), the social conditions of communities have had a strong negative impact on Indigenous people. As such, the poor social conditions that exist in many Indigenous communities because of ongoing colonialism and the effect of intergenerational trauma are important in understanding criminal trends and criminalization among Indigenous communities. Milward (2014, p.620-621) further asserts that colonial structures have continuously

deprived Indigenous communities of resources that are needed to have a liveable life. These conditions are the result of continuous dispossession.

Historical and ongoing colonial policies have led to intergenerational trauma and difficult conditions in Indigenous communities (Milward, 2014, p.620). Colonialism has continuously displaced Indigenous communities from their land and pushed them into remote areas where few economic opportunities exist and where they are disconnected from an essential component of their identity. It is estimated that approximately 150,000 Indigenous children were sent to residential schools where they were mentally, physically, and/or sexually abused (see Truth and Reconciliation Commission of Canada, 2015). The intergenerational trauma caused by the tearing apart of Indigenous communities is ongoing. For example, Indigenous children are still forced to leave their communities to pursue their education (see Lampron & Chartrand, 2020). There are still 58 long-term drinking water advisories in effect in Indigenous communities (Indigenous Services Canada, 2021). The Grand Chief and the Sioux Lookout Area Chiefs Committee on Health have declared a state of public health emergency over the number of Indigenous youths committing suicide (House of Commons Canada, 2016). While these social conditions created by colonization continue today, the response towards Indigenous people has been the use of repressive institutions, such as prisons and child removals as previously noted (Chartrand, 2014; Milward, 2014; Truth and Reconciliation Commission of Canada, 2015). As pointed out by Chartrand (2014, p.15)

> Aboriginal peoples die in custody at a disproportionately higher rates and at an earlier age than other prisoners, are subjected to sanctions at the deeper end of the penal system, are significantly over-represented in prisons and security classifications, and are often taken into custody and imprisoned for more minor offenses that could have been sanctioned by diversionary means.

The overrepresentation of Indigenous people with the Dangerous Offender designation supports Chartrand's (2014, p.15) findings that Indigenous people are overrepresented at all levels of the system.

Even in other settler countries, like Australia, Indigenous people are disproportionately charged for offences committed against non-Indigenous people while crimes committed by Indigenous people against other Indigenous people received less attention (Finnane & McGuire, 2001, p. 283). These observations demonstrate, and as I further discuss in the next chapter, that Indigeneity plays a role in the criminalization process, and not simply applications of the criminal law what constitutes dangerousness. In discussing the history of criminalization of Indigenous populations in Australia, Finnane & McGuire (2001, p. 282) also state that the public execution of Indigenous offenders showed settlers that the "Indigenous threat" was being dealt with by punishing them harshly for their offences against European society. While this research was conducted in the Australian context, it can help make sense of the situation in Canada as well. For example, the Broken Trust report (2018) which was the result of an investigation of the Thunder Bay Police Service following the suspicious deaths of Indigenous Youth in Thunder Bay, found that crimes against Indigenous people are not investigated with the same rigour as crimes against white people are. During the Gladue Supreme Court case, Justice Cory stated that because of discrimination, Indigenous people are more likely to feel the pains of imprisonment and less likely to be rehabilitated because incarceration is not culturally appropriate and Indigenous offenders continue to face discrimination inside the penitentiaries (Thompson, 2016, p. 74). Given the above history, Indigenous people continue to experience the ongoing impacts of colonization as targets of the criminal justice system, among others. And, as I further discuss below, are linked to discourses of dangerousness.

Discourses of Dangerousness

In the 15th century, settlers described Indigenous communities as savage and uncivilized because they were considered threats to the settler project (Monaghan, 2013, p.489; Rifkin, 2009, p. 101; Tedmanson, 2008, p. 145). These discourses persist today shifting to titles such as criminal or lazy (Tuck & Yang, 2012, p. 9) and still labelled as social threats (Anthony, 2018, p. 41; Monaghan, 2013, p. 495). The following paragraph summarizes the literature that further explains the shift in discourses used to construct Indigenous people today. This literature provides insight on how what types of contemporary discourses are used to construct Indigenous people as dangerous.

McIntosh (2006, p.53-54) explains that marginalized individuals are seen as dangerous because they fall outside the influence of socially accepted norms and morals and are unlikely to have any kind of allegiance to mainstream power structures. Similarly, Anthony's (2018) article discusses Bauman's work which states that discourses of disorder, deviance and abnormality are used by the state to justify violent and inhumane treatment of marginalized individuals. Anthony (2018, p.40) applies Bauman's analysis to the treatment of Indigenous youth incarcerated in the Northern Territory of Australia. Bauman, as cited in Anthony (2018, p.41-42), states that extreme harm inflicted on marginalized individuals in government-run institutions, such as prisons, are justified as normal and necessary in order to maintain social order. Resultingly, rather than portraying Indigenous people as a threat against the settler colonial project, settler colonial discourses create a sense that Indigenous people are a threat against public safety. All of the literature discussed above demonstrates how colonial structures have created the very conditions that have forced Indigenous people to live and behave in ways that settlers denounce as dangerous. Rasmussen (2011) also discusses some of the tactics used to construct Indigenous populations as

dangerous or risky, one of which is the conflation of race with lifestyle or culture. Rasmussen (2011, p.46) argues that contemporary forms of racism replace "race" with "culture" or "lifestyle" to avoid appearing explicitly racist. As such, the conceptualization of dangerousness in settler society is more concerned with marginalized individuals who fall outside the influence of social norms, morals, and mainstream forms of power and control (McIntosh, 2006, p.53-54), than with specific criminal acts. McIntosh (2006) and Anthony (2018) provide insight on the different ways that marginalized populations, including Indigenous people, are constructed as dangerous. This scholarship is relevant to see whether similar discourses are used to justify the application of the Dangerous Offender designation on Indigenous people.

Conclusion

The research discussed above outlined the criteria used to legitimate the application of the Dangerous Offender designation. Research on similar designations in Australia, the United State, and the United Kingdom as well as on the history of the Canadian Dangerous Offender designation provide additional context to understand how and why the current designation came about. While the literature confirms that there has been an increase in the proportion of Indigenous people with the Dangerous Offender designation, particularly since the 2008 legislative changes, the research does not provide an in-depth explanation of why this shift has occurred. This literature indicates that legislative definitions of the Dangerous Offender designation are evolving and dependent on the sociopolitical context. Considering different conceptualizations of dangerousness exist, I also reviewed settler colonial research on discourses of dangerousness to better understand how Indigenous people are constructed as dangerous in a settler colonial context. These works are useful to examine whether the discourses utilized by the courts to justify the application of the designation are rooted in settler colonial logics. Indeed, the following chapter provides a discussion

of settler colonial theory. The research in this chapter provides insight on the judicial process applied in Dangerous Offender hearings and discourses of dangerousness and are needed to further develop an understanding of why Indigenous people are disproportionately targeted by the designation.

Chapter 3 - Theoretical Framework

To uncover the settler colonial logics imbedded in the application of the Dangerous Offender designation, the theoretical framework for my research is inspired by the literature of settler colonial theorists, including but not limited to Wolfe (2006), Tuck and Yang (2012), Chartrand (2019), and Latty et al. (2016). I draw from Wolfe (2006) and Tuck and Yang (2012) to operationalize the idea of settler colonial erasure. I then include Chartrand (2019) and Latty et al. (2016) who provide examples of how erasure of Indigenous people and settler colonialism is enacted via the Canadian criminal justice system and spatial violence, respectively. Indeed, the lens of settler colonial theory has been applied to a vast array of research areas, but I will specifically draw on settler colonial analyses of the criminal justice system as they are most relevant to this research project. Settler colonial scholars argue that settler colonial logics of erasure and assimilation are embedded in the criminal justice system (Chartrand, 2019; Morgensen, 2011; Wolfe, 2006). As such, drawing from previous analyses of settler colonial erasure within the criminal justice system will provide insight on how settler colonial erasure operates within the criminal justice system and how to identify these processes of erasure in the application of the Dangerous Offender designation. By drawing from settler colonial theories of erasure, I seek to understand whether such settler colonial logics could partially explain the overrepresentation of Indigenous people with the Dangerous Offender designation.

Settler Colonial Theory

Generally speaking, settler colonial studies attempt to make sense of the practices that occurred when settler communities were formed on stolen land and how they persevere today (Veracini, 2010, p.9). In settler colonies, the colonizers stay (Morgensen, 2011, p.56; Wolfe, 2006, p.388). The goal of many settler colonial studies is to analyze the ongoing structures of colonialism as well as forms of resistance that exist in response (e.g. McGuire & Palys, 2020; Monture, 2006; Tuck & Yang, 2012). While I read and borrowed from some post-colonial theorists to gain a better understanding of different forms of colonialism, a post-colonial theory is not appropriate for this research because I am examining current settler colonial structures rather than the impacts of past or post forms of colonialism. Below, I provide an overview of settler colonial theory as it relates to this research project with a focus on colonial practices of erasure and land dispossession as outlined by Wolfe (2006) and Tuck and Yang (2012) respectively. The scholarship discussed below provides examples of different forms of settler colonial erasure, including genocide, assimilation, dispossession, incarceration, and risk discourses. This section concludes with a discussion of the critiques of settler colonial studies and how the challenges identified in the critiques are mitigated in my application of settler colonial theory.

Loomba (2015, p.7-8) defines colonialism generally as the “conquest and control of other people’s land and goods”. Colonialism thus produced “complex and traumatic” relationships in history between the colonized and colonizer. Loomba (2015, p.20-21) further explains that colonialism has existed in many different forms throughout human history such as the Roman Empire’s conquests stretching from Armenia to the Atlantic, the Mongols’ conquest of the Middle East and China, the conquest of various kingdoms in southern India by the Vijaynagar and the Ottoman Empires, and modern European colonialism in Asia, Africa, and the Americas. Settler

colonialism is a specific form of colonialism that Wolfe (2006, p.388) defines as a structure rather than a historical event. Understanding settler colonialism as a structure emphasizes the idea that settler colonialism still exists today in our everyday practices, rather than being an event of the past. Wolfe (2006, p. 388), Morgensen (2011, p.52-54), and Tuck and Yang (2012, p.5) explain that settler colonialism is unique because settlers come to stay by making stolen land their home. To achieve this goal of settlement, Wolfe (2006, p.388) and Tuck and Yang (2012, p.6) explain that settlers must attain complete sovereignty over the land and everything in it by destroying and disappearing Indigenous communities. In other words, to establish a new colony on stolen land, settler colonialism "requires a mode of total appropriation of Indigenous life and land" (Tuck & Yang, 2012, p.5). Wolfe (2006, p.387) refers to this process as settler colonialism's logic of elimination. In discussing the logic of elimination, Wolfe (2006, p.401-402) asserts that "assimilation can be a more effective mode of elimination than conventional forms of killing", though both have been used against Indigenous people.

Scholars who study settler colonialism, such as Wolfe (2006) and Morgensen (2011), often assert that Western law is founded on the logics of elimination of settler colonialism. Wolfe (2006, p.388), for example, explains that the perceived need to eliminate or contain Indigenous populations comes from settler society's need for land and resources. In order to invade a territory, settlers need access and dominance over the land which is where Indigenous people become a threat (Wolfe, 2006, p. 388). As such, Western law is founded on the need to contain, amalgamate and erase Indigenous people in order for settler society to replace them on the land (Morgensen, 2011, p. 59). In doing so, Western law provides a more discrete and legitimate manner of eliminating Indigenous people than conventional forms of killing that were historically used (Wolfe, 2006, p. 402). This phenomenon manifests itself in diverse ways throughout the various

levels of the criminal justice system and how the latter becomes involved in the lives of Indigenous people.

There are multiple examples of how logics of elimination have been enacted in the Canadian context. For instance, seven generations of Indigenous children were forced to attend residential schools with the primary purpose of "cultural indoctrination" (Truth and Reconciliation Commission, 2015, p.VII). In a statement in the Truth and Reconciliation Commission's (2015, p.VII) final report, Justice Murray Sinclair asserts that the residential school system was part of a widespread attempt from the Canadian government to assimilate Indigenous people through policies the Commission labels as cultural genocide. Many other policies within the Indian Act contributed to the government-sanctioned attempt at erasing Indigenous people, such as those that "encouraged voluntary and enforced enfranchisement" (Joseph, 2018, p.27-30), "renam[ing] individuals with European names" (Ibid. p.34-36), and "declar[ing] potlatch and other cultural ceremonies illegal" (Ibid. p.47-49). A more contemporary example of state-sanctioned Indigenous erasure through assimilation is the sixties scoop. McKenzie et al. (2016, p.2) explain that when residential schools began to be shut down, the state's apprehension of Indigenous children from their families continued through child welfare workers who subsequently placed the children with non-Indigenous families. McKenzie et al. (2016, p.1) also state that there are more Indigenous children currently in state care than there were Indigenous children in residential schools when enrollment peaked in the 1940s. Each of these examples demonstrate that the Canadian government has long been involved in the attempted and ongoing erasure of Indigenous people, particularly through assimilatory policies.

Criminal justice practices today also contribute to the disappearing of Indigenous people. Chartrand (2019, p.68) argues that "underlying structures and logics of colonialism continue to

pervade criminal justice practices, albeit within diversified and fragmented forms". Chartrand (2019) explains that, while the penitentiary was initially primarily used for white male settlers, the same logics and practices were applied by the Indian agents who were responsible for managing Indigenous people at the time. The examples in the article include forced labour, physical punishment, restricted movements, and isolation, all of which were present in both penitentiaries and residential schools as methods to reform, assimilate, and "civilize", "rehabilitate" or "normalize" certain groups of people (Chartrand, 2019, p.75). Then, during the post-war era and the age of human rights, the prison quietly became the new "expression of colonialism" as formal colonization practices were declining (Chartrand, 2019, p.77). The prison system became the "normal and necessary" response to the "Indian problem" which was reframed as legacies of colonialism resulting in Indigenous criminality (Chartrand, 2019, p.78). Accordingly, Chartrand (2019, p.78) asserts that the somewhat dated discourse of civility versus savagery has shifted towards discourses of criminality. This article further elucidates the structural nature of colonialism as Chartrand (2019, p.78) asserts that placing colonialism as an event of the past allows the penitentiary to enact the same fundamental colonial logics without being recognized as such. Indigenous incarceration, including Dangerous Offender designations are as much a part of the colonial processes of erasure rather than merely the result of it.

There are several indicators that the criminal justice system is a settler colonial institution that is involved in the containment of Indigenous people. For instance, according to the Office of the Correctional Investigator (2017), on average, Indigenous people are incarcerated for longer periods of time because they are disproportionately affected by high security classifications, segregation, use of force, maximum security, and forced interventions (see also Chartrand, 2019, p.69). As mentioned in the literature review, risk assessment tools, which are administered by

psych experts and heavily involved in the Dangerous Offender designation process, have also contributed to Indigenous people being unnecessarily considered high risks (Milward, 2014, p. 621; Thompson, 2016, pp. 63–68).

To summarize, Wolfe (2006, p.389) abridges the definition of settler colonialism by asserting that "settler colonialism is an inclusive, land-centered project that coordinates a comprehensive range of agencies, from the metropolitan centre to the frontier encampment, with a view to eliminating Indigenous societies". The above discussed literature and Wolfe's (2006) work on settler logics of elimination are relevant to this research which asks if and how settler colonial logics are tied to the disproportionate number of Indigenous people labeled with the Dangerous Offender designation. The research discussed thus far has demonstrated that the criminal justice system is embedded with settler colonial logics, particularly logics of elimination (Chartrand, 2014; 2019; Finnane & McGuire, 2001; Morgensen, 2011). As such, the concept of settler colonial erasure serves as a framework to analyze whether a similar pattern is occurring with the application of the Dangerous Offender designation. Moreover, attempts to erase Indigeneity demonstrate that, while the prison was not originally intended for Indigenous people, it has adopted that role because it is founded on the same colonial and carceral logics as other institutions, such as the residential school system.

Land Dispossession and Spatial Violence

The erasure of Indigenous people also occurs via land dispossession and spatial violence. Wolfe (2006, p.388) maintains that to invade a territory, settlers need access and dominance over the land, which is where Indigenous people become a threat. Tedmanson (2008, pp. 145–148) asserts that the very concept of *Terra Nulius* on which settler colonialism is founded categorises

Indigenous people as "quasi human" in order to establish a doctrine of discovery whereby no other people or forms of governance were acknowledged as existent. The doctrine of discovery legitimates a legal discourse of sovereignty. Tedmanson (2008, p.145) explains that the concept of *Terra Nulius* implies that Indigenous lives could be governed by settler society rather that recognized as legitimate and independent forms of inhabitancy. To believe otherwise would be to acknowledge that a group other than settlers had rights and ownership over the land. Rifkin (2009, p. 94) adds to this idea by stating that Indigenous forms of inhabitancy and land ownership were not recognised either. Tedmanson (2008, p.148) claims that Indigenous ways of life and land tenure were seen as illegitimate which reinforced the settlers' claim of *Terra Nulius* by positioning Indigenous people as non-people, equivalent to the land's flora and fauna. Indigenous people make claims to land and ways of life that challenge the idea of *Terra Nulius* (Tuck & Yang, 2012, p.9). As such, for the settler colonial project to be completed, and claim sovereignty over the lands, it needed to be established that the existing peoples were inconsequential and could be dispossessed.

Scholars such as McKittrick (2011) and Latty et al. (2016) discuss how contemporary forms of spatial violence are used to dispossess Black and Indigenous population from their land and how it renders their spaces and bodies as "neither viable nor desirable" (Latty et al., 2016, p.141). In discussing the black sense of place, McKittrick (2011, p.952-955) states that the prison industrial complex is an extension of the plantation and of practices of urbicide whereby urban spaces primarily inhabited by racialized bodies are destroyed via floods, fires, bombs, or crumbling infrastructure. McKittrick (2011, p.951) asserts that the destruction of Black geographies perpetuates capitalist practices and ideals that associate Blackness to social, environmental, and infrastructural decay, underdevelopment, and poverty. The spatial violence discussed in McKittrick (2011) perpetuates anti-Black discourses that label Black people and spaces as

dangerous and on the verge of death (p.954). As such, prisons are a continuation of this spatial violence in that it is the ultimate dispossession of the individuals who survived. Similarly, Latty et al. (2016) demonstrate how spatial violence and land dispossession are used to exclude Black and Indigenous populations from the category of human by discussing the death of Indigenous youth in Thunder Bay, Ontario and the deadly water crises in Flint, Michigan. Latty et al. (2016) demonstrate how spatial violence is enacted on Black and Indigenous populations through the removal of essential services, such as potable water, food, shelter, and education. This spatial violence culminates in the death of Black and Indigenous people, but the deaths are rendered invisible because the spaces and the bodies that inhabit them are considered as damaged and on the path to extinction and therefore unsalvageable (Latty et al., 2016, p. 137-138). The articles by McKittrick (2011) and Latty et al. (2016) argue that the settler colonial state creates conditions and discourses that depict Indigenous people and spaces as on the verge of extinction which contributes to justifying their dispossession. Similarly, Saleh-Hanna (2015, paras. 4-9) argues that settler society claims to punish people via the criminal justice system for what they did instead of who they are, thereby camouflaging the fact that colonial institutions target populations that have historically been labelled as biologically and morally inferior. Moreover, the articles demonstrate how the exclusion of Indigenous people from the category of human, which Tedmanson (2008, p.48) indicates began with the concepts of *Terra Nulius* and the doctrine of discovery, pervade today.

These conversations about land dispossession and spatial violence are relevant to this research project because of the link to the criminal justice system identified in both McKittrick (2011, p.955-960) and Latty et al. (2016, p.137). A similar analysis applied to contemporary applications of the Dangerous Offender designation draws attention to how discourses about

Indigenous people and the spaces they occupy contribute to justifying the application of the designation and explaining the disproportionate number of Indigenous people with the designation. Of relevance will be the application of this analysis in the cases where the individuals come from spaces or communities that are characterized by the type of spatial violence described above.

Operationalization of Erasure

As discussed above, the criminal justice system is a settler colonial institution that contributes to dispossessing and disappearing Indigenous people and the ongoing effects of colonialism. To further demonstrate whether settler colonial logics of elimination contribute to the high number of Indigenous people with the Dangerous Offender designation, I also borrow from Tuck & Yang's (2012) operationalization of erasure through "moves to settler innocence".

Tuck & Yang's (2012) article focuses on settler moves to innocence which consist of the multiple ways that settler society attempts to alleviate settler guilt without giving up power or privilege. One move to innocence discussed by Tuck & Yang (2012) that is relevant to this examination of the Dangerous Offender designation is referred to by the authors as "A(s)t(e)risk peoples" and defined as "the way in which Indigenous peoples are counted, codified, represented, and included/disincluded by educational researchers and other social science researchers". This settler move to innocence is twofold in that Indigenous people are made invisible by either being diminished to "at risk" people or being marginalized in important datasets (asterisk) (Tuck & Yang, 2012, p.22). Indigenous people are depicted as "at risk" through descriptions of a population "on the verge of extinction, culturally and economically bereft, engaged or soon-to-be engaged in self-destructive behaviours which can interrupt their school careers and seamless absorption into the economy" (Tuck & Yang, 2012, p.22). Indigenous people become an asterisk by being

marginalized in important datasets that inform policy that greatly impact their lives (Tuck & Yang, 2012, p.22). In the case of Dangerous Offender designations, this move to innocence legitimates the white settler expertise imposed on Indigenous people and ignores the context of white settler colonialism in their lives. It also denies their voices and experiences as part of any solution moving forward. As such, this move to innocence only serves to push Indigenous people further into the margins of public discourse thereby simultaneously obscuring who they are and erasing their presence from the conversation (Tuck & Yang, 2012, p.22). This method minimizes the existence and realities of Indigenous people to an asterisk or problematic population near extinction. The settler move to innocence that Tuck & Yang (2012, p.22) calls "A(s)t(e)risk peoples" is used in the following discussion of the Dangerous Offender designation to analyse the way in witch Indigeneity is discussed, or not, in the case studies. Whether the individual's Indigeneity is viewed as problematic (at risk) or barely considered at all (asterisk) in the decision of whether to deem them a Dangerous Offender will shed light on how the designation contributes to the erasure of Indigenous peoples.

Critiques of Settler Colonial Studies

In this section, I reflect on the critiques of settler colonial studies and how I can mitigate these issues in my own work. Critiques of settler colonial studies have pointed out that the institutionalization of this discipline of study has erased or obscured the essential contributions of Indigenous scholars (Carey & Silverstein, 2020; Kauanui, 2016; Snelgrove, Dhamoon & Corntassel, 2014). Settler colonial studies are often attributed to Wolfe (2006), Veracini (2010; 2016), and Cavanagh (2016), none of whom are Indigenous. Kauanui (2016, para 2) explains that while Wolfe often asserts that he did not create settler colonial studies, his work is the most frequently cited, as is the case in this research project which relies heavily on Wolfe's theorization.

The attribution of settler colonial studies to primarily non-Indigenous scholars obscures the contributions of Indigenous and Black activists, leaders, and scholars. Carey & Silverstein (2020, p.6) explain that academia is an institution that marginalizes certain forms of knowledge. Indeed, Indigenous works do not always fall into scholarly boundaries and are thus left out (Carey & Silverstein, 2020, p.6). These exact forms of erasures wherein Indigenous knowledge is ignored or discredited are also observed and critiqued in the below analysis of the Dangerous Offender designation. Women of colour and Indigenous activists and scholars have been discussing the effects of settler colonialism long before settler colonial studies came into prominence, even if some of them never used the term settler colonialism (Carey & Silverstein, 2020, p.6). As such, settler colonial studies' reliance on the works of non-Indigenous scholars creates an erasure of Indigenous activism and scholarship.

The erasure of Indigenous scholarship is epitomized in the institutionalization of settler colonial studies. Snelgrove, Dhamoon & Corntassel (2014, p.9) have stated that the field of Indigenous studies has difficulties receiving support and funding while settler colonial studies are being rapidly institutionalized and proliferated through "conferences, workshops, courses, […] blogs, websites, […] and teach-ins" (see also Kaunaui, 2016, para 4). In this sense, settler colonial studies, a field dominated by white scholars, have overshadowed Indigenous studies, a field dominated by Indigenous scholars. Kaunaui (2016, para 4) asserts that "settler colonial studies do not, should not, and cannot replace Indigenous studies". Parallel gaps in funding for programs that are based in Indigenous knowledge versus those that are not, is also a prominent theme in the analysis of the Dangerous Offender designation process. Carey & Silverstein (2020) and Snelgrove, Dhamoon & Corntassel (2014) further seem to suggest that the gap and relationship

between Indigenous studies and settler colonial studies must be mended, but what this might look like is not clearly discussed and, as a white scholar, I do not wish to impose this kind of reconciling.

This research project examines settler colonial attempts to erase Indigeneity, as outlined by wolf (2006) and further explored by other critical race scholars as I outline above. I would like to avoid the irony of critiquing the erasure of Indigeneity while perpetuating this exact phenomenon myself through my work. While I do rely heavily on non-Indigenous scholars to inform my research, such as Wolfe (2006), Chartrand (2014; 2019), and Tedmanson (2008), I also engage with the works of Indigenous scholars, such as Tuck & Yang (2012) and McIntosh (2006). The works of Indigenous scholars that are cited throughout this thesis, and those that indirectly informed it, have heavily influenced the ethos of my research project. Specifically, Tuck & Yang (2012) made me reflect about my own positionality at every stage of my research, a topic I discuss further in my methodology. Thoughtful consideration for my positionality as a white woman and the discomfort that sometimes occurs while conducting settler colonial research, shaped the lens through which I frame my research. Indigenous scholars informed my research and helped me create a project that is informative and respectful to the Indigenous people targeted by the Dangerous Offender designation. This is why it was particularly important for my research to be informed by the works of scholars with diverse backgrounds that go beyond the settler/Indigenous binary and to draw from multiple analyses. While my research falls under criminology rather than settler colonial studies, it certainly contributes to settler colonial studies due to my topic and theoretical framework. Thus, my research is contributing to the institutionalization of settler colonial studies. I do not wish to overshadow Indigenous studies and the work of Indigenous scholars; however, there is a place to highlight the problematic nature and character of colonial institutions such as the prison and Dangerous Offender designations.

In sum, settler colonial theory, with a focus on settler colonial logics of elimination and erasure, is used to frame this research project to better understand how the Dangerous Offender designation contributes to the varying ways erasure of Indigenous people occurs through the criminal justice system and, for this research, the Dangerous Offender designation. Specifically, previous settler colonial analyses of the criminal justice system, as outlined above, are also borrowed for my own analysis to demonstrate how the Dangerous Offender designation process is embedded within settler colonial logics which contributes to understanding why Indigenous people are disproportionately targeted.

Conclusion

The theoretical framework which informs my research and is discussed in this chapter is settler colonial theory. More specifically, I engage with settler colonial theories of erasure which establish that the criminal justice system is a part of the settler colonial apparatus that enables the elimination of Indigenous populations via different practices of erasure, such as assimilation, rehabilitation, or indefinite incarceration. Settler colonial theory also discusses how erasure is enacted through various means, particularly through spatial violence and constructions of Indigenous people as at risk, unsalvageable, and on the verge of extinction. My analysis is informed by the works of settler colonial theorists discussed in this chapter to see whether similar patterns or discourses are used in the Dangerous Offender designation process and how they may contribute to the disproportionate number of Indigenous people with the designation.

Chapter 4 - Methodologies Chapter

This chapter outlines the research methodology used to complete this thesis. I conducted a critical discourse analysis to gain a better understanding of why Indigenous people represent 35.5% of individuals with a Dangerous Offender designation (Public Safety Canada, 2020, p. 117). A critical discourse analysis of case law reports of Dangerous Offender designation hearings provides insight on what discourses are used to legitimate the application of the designation and how said discourses may perpetuate settler colonial logics thereby making Indigenous people more susceptible to receiving the designation. This chapter begins with an explanation of the data collection strategy followed by a discussion of the analysis procedure and techniques. The latter section also provides an overview of critical discourse analysis as a method of analysis and is particularly influenced by van Dijk's (1993; 2011) work because of its focus on how discourse can expose power imbalances, such as in relation to race. Additionally, van Dijk (2011) discusses several linguistic devices through which power is perpetuated and which relate directly to the types of settler colonial discourses of erasure identified in the theoretical framework. There is a particularly strong link between van Dijk's linguistic devices and Tuck and Yang's (2012) operationalization of erasure that will be discussed in this chapter. As such, van Dijk's method (1993; 2011) provides an important orientation to understanding how settler colonial discourses of erasure occur, a concept that is operationalized in Chapter 3. Works regarding juridical discourse analysis, primarily Gibbons (2004), but also Schiavi (2011) and McCaul (2016), are also discussed in the analytical strategy as they provide guidance pertaining specifically to the analysis of juridical documents, in this instance, case law reports. In this chapter, I also operationalize the main concepts and themes that guide my research. The final section of this chapter is dedicated to issues of academic rigour, ethics, and the overall challenges of conducting a critical discourse analysis with the selected data and in this area of study.

Data Collection

To begin to understand why Indigenous people are disproportionately targeted by the Dangerous Offender designation, I have chosen to analyse case law reports that are publicly available through the Canadian Legal Information Institution (CanLII[7]). Each case law report is written by the judge presiding over the Dangerous Offender hearing and provides an overview of the facts of the case, arguments made by the defense and prosecution, the verdict, and how it was decided.

Overall, case law reports provide information on why and how the Dangerous Offender designation is applied. While providing insight into the court's decision-making process, case law reports are free and publicly available which addresses time and resource constraints in research, particularly given the length of time to acquiring full transcripts, no doubt amplified by the Covid-19 global pandemic. An additional analysis of interviews with judges may also have provided additional insight, but given the need to limit the data collection, the global pandemic, and the fact that the research only requires an analysis of judicial reasoning of Dangerous Offender designations, this additional data was not necessary.

A total of 15 case law reports of Dangerous Offender designation hearings were analyzed for this thesis project. On average, each case law report was 54.5 pages in length for a total of 818 pages analysed, with the longest case having 114 pages and the shortest being 17 pages. After multiple coding processes, as further elaborated below, my initial assessment was confirmed whereby similar themes continued reappearing throughout the documents to make a quality assessment of the data and for future research to replicate the study (Fusch & Ness, 2015, p.1408;

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[7] https://www.canlii.org/en/

O'Reilly & Parker, 2013, p.194). Sandelowski (1995, p.179) asserts that ten cases studies can be considered adequate for research aimed at critical case studies given that the goal is to complete an in-depth analysis of specific cases. Because my research is aimed to test previously established theoretical processes discussed in Chapter 3, i.e. the settler colonial theory of erasure, 15 cases was sufficient for this purpose.

In choosing the cases for my research, I conducted a form of selective sampling to ensure that I could capture a range as well as overlapping criteria and demographics of Dangerous Offender designation cases. I chose ten cases where the judge decided to apply the Dangerous Offender designation and five cases where the designation was not applied. This particular sample selection provided a small control or negative comparator against positive cases where the designation was applied (Beck, 1993, p.265; Merrick, 1999, p.29). This approach increased the reliability of the analysis by controlling for any variances in the reasons for assigning or not assigning a Dangerous Offender designation.

Other considerations that determined the data selection process was first, the cases selected had to be ones where the individual being considered for a Dangerous Offender designation was identified in the case law report as Indigenous. Cases where the individual is non-Indigenous fell outside of the scope of this research project. As such, I searched CanLII using the search operators "Dangerous Offender AND Indigenous OR Aboriginal" which yielded 740 results. I then sorted through the cases by searching for the terms Indigenous, Aboriginal, First Nation, Metis, and Inuit to ensure that the use of the terms were to identify the individual being considered for the designation and not in reference to another case.

The second selection criterion was in relation to the date of the case. As discussed in my literature review, the most recent amendments to the Dangerous Offender designation occurred in 2008 (Criminal Code, RSC 1985, c. C-46, s. 752). To control for the variability in legislation on Dangerous Offender designations, the cases selected occurred between the years 2008 (post legislative change) and 2021. I also removed from these results cases that went to trial after 2008 but applied the previous version of the legislation because the events occurred prior to 2008 as well as appeals of Dangerous Offender designation hearings that occurred prior to 2008. This further narrowed the cases selected to yield 581 results. While a comparative analysis between recent and historical cases with a consideration for legislative differences would provide interesting insights on the evolution of the application of the Dangerous Offender designation, it is outside of the scope of this research.

The third criterion for the selection of the case law reports pertains to geographic location. The cases being analyzed were taken from the four provinces with the highest numbers of individuals with the Dangerous Offender designation (see Appendix A): four cases from Ontario, five from British Columbia, two from Quebec, and four from Saskatchewan (Public Safety, 2019, p.118). This approach offered a cross-sectional analysis to the data selection to provide some geographic continuity and control for the socio-political variability between provinces, while yielding the most results to draw from. Adding a filter in CanLII to limit the results to cases in the four selected provinces yielded 346 cases. According to the most recent census, Ontario, British Columbia, and Saskatchewan are also among the five provinces with the largest Indigenous populations (Statistics Canada, 2016). Quebec is the province with the sixth largest Indigenous population (Statistics Canada, 2016); Manitoba and Alberta have larger Indigenous populations, but do not apply the Dangerous Offender designation as frequently as Quebec (Public Safety, 2019,

p.118). While a much broader selection of cases would yield interesting comparative results across regions, this would require many more cases to garner such a broad analysis. The four regions nonetheless provide a broad enough cross-sectional range to account for some of the geopolitical differences by province, while offering a way to limit the mass of data available. In so doing, this also limits the analysis to a more select group of Indigenous nations. Nine of the individuals in the case law reports are from various First Nations communities, including but not limited to Cree and Dene nations, one is Métis, and one is Inuk. In the remaining three cases, the individuals are only described as Indigenous or Aboriginal in the case law reports with their specific background being omitted. These variances among nations were not, however, factored into the decisions making criteria of the judges which, as I note in my discussion, which highlights the colonial trend to treat Indigenous people as an aggregate.

Once all the case law reports that respected the selection criteria were identified, 89 cases remained, of which I narrowed to 15 cases using some additional useful criteria. First, I selected cases that were lengthier. This is to ensure that the case law reports would provide enough information for a more a comprehensive data analysis. Moreover, I selected cases where the designation was applied to self-identified men, one woman[8], and one where the individual identifies as non-binary. This selection process was approximately reflective of the distribution of gender of the remaining cases of Dangerous Offender designations and provided a relative sample of gender. Analysing cases where individuals of various genders are involved in Dangerous Offender designation hearings provides insight on how gender impacts the decision-making process. I also selected cases involving a variety of types of crimes, including assault, sexual

[8] In an additional case, *R v. Cragg* (2018), the individual identified as a man at the time of the Dangerous Offender hearing, but in a case law report from 2020 (*North v. British Columbia Attorney General*, 2020), the individual identifies as a transgender woman.

assault, robbery, and murder. This particular range of crimes provides insight into the emphasis placed on varying criteria in Dangerous Offender designation hearings for a range of criminalized activities. Given that this is a qualitative analysis with 15 case studies, it does not provide quantifiable insight into which specific crimes, if any, ore often result in a designation. As I note below, this would be most interesting and important for future research. The above data collection strategy led to the selection of 15 cases that would account for diverse factors employed for Indigenous people receiving the designation and the different criteria considered in the decision-making process.

Critical Discourse Analysis

The selected cases were analysed using a critical discourse analysis, as described in this section, to examine what discourses are used to legitimate the use of the designation on Indigenous people. Critical discourse analysis offers a methodological framework to understand how social structures and institutions that are taken for granted and assumed to be necessary are in fact shaped by "social, political, cultural, economic, ethnic, and gender factors" (Guba & Lincoln, 2011, p.110). Critical discourse analysis challenges the taken for granted notions around social and political structures and institutions with the goal to dismantle or alter them. A critical discourse analysis is a useful method for this research project because it reveals how the discourses used to legitimate the designation also (re)produces and shifts various forms of power and dominance (Blommaert & Bulcaen, 2000, p.448; Lazar, 2007, p.141; van Dijk, 2011, p.249). The use of the term (re)production signifies a dialectical, or two-way relationship, whereby discourse "is shaped by situations, institutions, and social structures, but it also shapes them" (Fairclough, 2013, p.232; van Dijk, 2011, p.357). The literature review demonstrated how discourses of dangerousness influence the Dangerous Offender designation, but the designation also influences our

understanding of who is dangerous. In this research project, power is operationalized in a Foucauldian (1982) way in that power does not operate from the top down, but rather operates in a diffuse or capillary manner (Bevir, 1999, p. 353), including through discourse. The focus of critical discourse analysis on power and inequalities is of relevance to this project because it seeks to critically understand how discourses within the criminal justice system construct Indigenous people as dangerous thereby justifying the use of the designation, rather than take such designations for granted by assuming they are natural, inevitable, or necessary. I elaborate below on the literature on critical discourse analysis that I used to guide my analysis and how I applied this method to my own research.

According to critical discourse analysts, elite groups and institutions in society have privileged access to use and mobilize discourse in a way that continues to promote the interests of elite groups, such as judges and criminal justice professionals. Through such discourses, this arrangement and access is often at the expense the "other" (Fairclough, 2013, p.232; van Dijk, 1993, p.225). van Dijk (2011, p.243; 1991, p.264) elaborates that "modern racist discourse tends to use either negative words to describe the properties or actions of immigrants or minorities (for instance "illegal") or else will adopt special code words such as 'welfare mothers' or 'inner city youths' in negative contexts". In the case law reports, this is enacted using terms such as brutal (*R c. Mequish*, 2016, p.3-4; *R v. Dunlop*, 2018, p.24; *R v. Kerr*, 2019, p.37), savage (*R v. Dunlop*, 2018, p.24), and "impulsive nomadic or parasitic lifestyles" (*R v. Toutsaint*, 2014, p.31), all of which have historically been used to create negative representations of Indigenous people and legitimate the Indigenous dispossession and land theft (Chartrand, 2019, p.78; Rifkin, 2009, p.101; Tuck & Yang, 2012, p.5). Speaking specifically about critical discourse analysis as applied to studies of racial inequality, van Dijk (2011, p.243) states that the researcher should pay particular

attention to the language used to name or refer to people, how they are described and qualified, what arguments are used to justify said characterization, and which perspectives are privileged when speaking about racialized groups. Critical discourse analysts also take notice of discourses about space because when negative values are attributed to spaces they are, by extension, attributed to the people who occupy said spaces (van Dijk, 2011, p.244; see also Razack, 2000). This speaks directly to settler colonial logics discussed in the theory chapter whereby the discourses used to discuss (or not) Indigeneity and the spaces Indigenous people inhabit contribute, as I conclude in my discussion in the next chapter, are used to justifying their erasure. As such, van Dijk's (2011) work on critical discourse analysis confirms the importance of these types of discourses and their role in perpetuating power structures, such as the settler colonial relations between figures of authority in the criminal justice system and Indigenous people. A critical discourse analysis that focuses on how the courts discuss the individuals being considered for the designation, their Indigeneity, and the spaces they occupy sheds light on the colonial logics and practices that contribute to the designation disproportionately targeting Indigenous people. A critical discourse analysis provides insight on how settler colonial discourses of dangerousness, risk, deviance, and helplessness, all of which are discussed in Chapter 3 and supported in my research findings, contribute to making Indigenous people more vulnerable to receiving the Dangerous Offender designation. The focus on the dialectical relationship between discourse and institutional practices and policies involved in the Dangerous Offender designation process, such as the application of the Gladue principles, the use of psychiatric testing, and risk assessment tools, will allow for an understanding of the knowledge, reasonings, and rationales that shape the decision-making behind the application of the Dangerous Offender designation pertaining to Indigenous people.

To unveil the relationship between discourse and power, critical discourse analysts observe what "structures, strategies, and other properties of text and talk are used to (re)produce power and dominance" (van Dijk, 1993, p.250). The strategies used to disseminate negative representations of the "other" that I particularly focus on in this research, and discuss below, are argumentation, rhetorical figures, lexical style, and quoting credible witnesses, sources, and experts (van Dijk, 1993, p.264). I use these discursive strategies to explore the discourses used to construct Indigenous people as dangerous in the case law reports thereby justifying the application of the designation. In court, argumentation is a process whereby perceived 'facts' are used to create negative representations of marginalized groups (van Dijk, 1993, p.264). In the case law reports, these "facts" construct the individuals as unquestionably dangerous to legitimate that use of the Dangerous Offender Designation. For instance, in *R v. Christensen* (2020, p.50) a psych expert describes Christensen's level of risk as "so high that it cannot go higher". The use of rhetorical figures is a strategy whereby the negative actions of the "other" and the positive actions of the dominant groups are emphasised while the negative actions of dominant groups are downplayed (van Dijk, 1993, p.264). For example, in examining the risk that individuals pose to society, the courts sometimes describe in much detail the poor institutional behaviour of individuals, particularly conflict with staff and other people in prison (see *R v. Dunlop*, 2018; *R v. Toutsaint*, 2014). However, the courts will not acknowledge that prison guards may exhibit abusive and racist behaviour that triggers the institutional behaviour that is considered problematic (see *R v. Dunlop*, 2018; *R v. Toutsaint*, 2014). Indeed, the Office of the Correctional Investigator (OCI) has published several reports providing evidence of various forms of abuse perpetrated by correctional staff in Canada (e.g. OCI, 2020; Sapers, 2008). For example, the OCI investigated the death of Ashley Smith which found that her death was preventable and was the culmination of individual

and system problems that are occur outside of the Ashley Smith case also, such as prolonged use of segregation, use of force and restraints, and withholding specialized treatment (Sapers, 2008). The 2019-2020 annual report published by the OCI highlighted the CSC's failure to detect, investigate, or prevent sexual violence and coercion in prison that is perpetrated by both people in prison and correctional staff (OCI, 2020). Lexical style refers to the use of words that impose a negative or positive representation of certain groups (van Dijk, 1993, p.264). This would be exemplified by using some of the derogatory language discussed throughout the literature review and theory that is commonly used to describe Indigenous people, such as brutal (*R c. Mequish*, 2016, p.3-4; *R v. Dunlop*, 2018, p.24; *R v. Kerr*, 2019, p.37), savage (*R v. Dunlop*, 2018, p.24), and "impulsive nomadic or parasitic lifestyles" (*R v. Toutsaint*, 2014, p.31), or any synonyms. Lastly, van Dijk (2011, p.249) uses John Steckley's work on representations of Indigenous people in Canadian textbooks to illustrate how another strategy in discourse is to bury, disqualify, or omit knowledge about marginalized groups altogether thereby creating another form of erasure. In the case studies, this is frequently exemplified by the disqualification or omission of Indigenous approaches to justice (*R v. Christensen*, 2020, p.27-28; *R v. Dunlop*, 2018, p.23; *R v. Toutsaint*, 2014, p.33). As it has been well documented, even where race is ostensibly ignored, race is an organizing feature of discourse (see Stoler, 1995; Foucault, 2007, inter alia). The discursive strategies discussed above were sought out in my analysis of the case studies and provide insight into how Indigenous people are understood and constructed in Dangerous Offender hearings which provides insight on why they are disproportionately targeted by the designation. Each of the above-mentioned linguistic devices used to (re)produce power and inequality was coded in the data set, as further elaborated below.

Juridical Discourse

Using juridical documents as the data set, I outline below why analysing legal discourse is important and what special considerations need to be made when working with this specific type of discourse. Schiavi (2011, p.194) explains that judges' decision-making processes are important because of the doctrine of precedent. One decision can set the tone for following cases with similar circumstances. As such, the case law reports are important not only because they shed light on how the court decides whether to apply the Dangerous Offender designation, but they could also potentially influence the outcome of similar future cases. Schiavi (2011, p.206) further argues that discourse analysis of court records sheds light on the extent to which a judge's understanding of the "real world" influences the decision-making process. Thus, analysis of the case law reports sheds light on dominant ways of thinking about dangerousness and Indigeneity vis a vis the courts today. A critical discourse analysis of legal documents also demonstrates how judicial decision making is moral and political rather than an objective account of facts. An analysis of the discourse and context in which these decisions are made is insightful to accessing the crucial factors influencing the application of the designation (Balkin, 1991, p.1842). Indeed, the literature review demonstrates that the designation has had a discursive trajectory and has been involved in enforcing moral and political beliefs of the time, such as the belief that gay men posed a danger to society, particularly to children, because of their sexuality. Accordingly, the literature review of the history of the Dangerous Offender designation provides a more comprehensive understanding of how and why the context and emergence of the Dangerous Offender designation influences its current application. This analysis seeks to understand current growing rates of Dangerous Offender designations for Indigenous people with reference to that trajectory. In sum, case law reports shed light on why the Dangerous Offender designation is applied, what factors influence the decision-

making process, and how the legal discourse is inextricably tied to broader modes of reasoning and logics over time.

Each genre of research material, such as the law, has special conventions and codes that are central to the functioning of the system, but also difficult to ascertain as an outsider. Gibbons' (2004) work on language and the law is a useful resource that outlines the various elements that form the legal genre and thereby aids to abate this challenge. The first characteristic is the presence of multiple discourses and competing interests, including those of the prosecution, defense, witnesses, police, and judges (Gibbons, 2004, p.287). Another characteristic is the importance of courtroom and police procedures with significant power dynamics that creates hierarchies and prioritize certain discourses (Gibbons, 2004, p.287). For example, in both a courtroom setting and in police interviews, witnesses are encouraged to speak only when called upon (Gibbons, 2004, p.289). An important part of the discourse analysis of the case law reports of Dangerous Offender hearings is noticing not which point of views or discourses are prioritized over others, but evidence and discourses are advanced and how this impacts the dynamics of the proceedings and the outcome of the trial. Another important aspect of the legal genre is that it is based on oral tradition (Gibbons, 2004, p.287-288). Consequently, legal texts are particularly lengthy and complex. The technicality of the legal genre also contributes to the complexity of written texts (Gibbons, 2004, p.288) as it not only poses difficulties for the reader, but also for the people involved in the legal proceedings. To overcome the challenges imposed by the complexity of the legal genre, during the first round of coding, I identified any jargon that impeded on my understanding of the summary and researched these terms to gain clarity. Legal discourse is also characterized by terms such as "accuracy, fact, truth, right, wrong, and fairness" (McCaul, 2016, p.14) which creates a polarizing discourse surrounding the criminal acts being investigated and that lacks nuance and much context.

Gibbons (2004, p.289) explains that the difficulty of legal language creates a hierarchy within court settings as it differentiates who can understand it and who cannot. Language also enhances power differences because lawyers frequently use language to get specific answers out of witnesses (Gibbons, 2004, p.290). Often, lawyers use language that results in some type of slandering of the witness (Gibbons, 2004, p.295). In sum, Gibbons' (2004) discussion of the legal genre demonstrates that the power dynamics embedded in the adversarial criminal justice system transpire in legal text through various means. To properly understand legal texts, I have developed a grasp of legal jargon and legal proceedings and the implications they have for legal texts.

Analytical Coding Strategy

The discourse analysis as described above, with consideration for the juridical genre of the case law reports, was applied using a coding strategy drawn from Hsieh and Shannon (2005) and Elo and Kyngäs (2008) who use a three-step process that combines inductive and deductive coding methods. Hsieh and Shannon (2005, p.1283) conducted a directed content analysis in which pre-existing concepts drawn from their theoretical framework guided their analysis. This method is consistent with van Dijk's (2011, p.358) assertion that critical discourse analysis is "informed through theory". Accordingly, the research conducted for this thesis, which was outlined in the literature review, theoretical framework, and the literature on critical discourse analysis, has guided my coding process by forming initial codes (further discussed below) sought out in the case law reports. However, Hsieh and Shannon's (2005, p.1282) method also allows for new codes to emerge from the data, which sometimes contradict the theoretical framework informing their project. Similarly, my research project considers the theoretical framework detailed in Chapter 3, while building new understandings and insights through an inductive coding process. Below is a discussion of the codes used from the theory emergent themes from the data, as well as the specific

steps undertaken to code the research material to increase the reliability and validity of the research.

The Preparation Phase

Before beginning the coding process, Elo and Kyngäs (2008, p.109) recommend engaging in a preparation phase (see Basit, 2003, p.144; Burnard, 1991, p. 462). The preparation involves picking the texts that are to be analysed and the guiding concepts that will be sought out in the chosen texts (Elo & Kyngäs, 2008, p.109). From the literature review, theoretical, and methodologies chapters I identified the concepts that would act as the preliminary codes (Basit, 2003, p.144-145). An excel spreadsheet was created to sort the codes into two broader categories with assigned colours to facilitate the coding process which was conducted manually.

The first category of codes account for concepts that are indications of "settler colonial logics" (see Table I below). These codes are primarily drawn from the theoretical chapter and include various indicators of settler colonialism as defined in the theories chapter, including and most notably indications of erasure of settler colonialism, dispossession from land and communities, and assimilation. The codes are drawn from the theoretical framework, and I used the coding strategy discussed in this chapter to see if and how they emerged in the case law reports. My use of the theoretical framework to construct my initial codes gave me a starting point to know what to look for to see whether settler colonial logics were at play in the case law reports. The codes for settler colonial logics are operationalized by asking the following questions: How is Indigeneity discussed in the case law reports, if at all? How are settler colonialism, the experiences of settler colonialism, and the impacts of settler colonialism discussed in the case law reports, if at all? Is risk discourse used to frame experiences of settler colonialism and how does this create a form of erasure? How is the overrepresentation of Indigenous people with the Dangerous Offender

designation, and the overrepresentation of Indigenous people in the carceral system more generally, discussed in the case law reports, if at all? Are the protections against the overrepresentation of Indigenous in the criminal justice system, such as Gladue and *Ewert v. Canada* (2018), applied? This operationalization of settler colonial logics is aligned with critical discourse analysis as it seeks to understand how concepts such as land dispossession, erasure, and assimilation are constructed via discourse. By seeking out the discursive nature of settler colonialism in the case law reports, I am shedding light on how discourse is used to perpetuate settler colonial logics in the application of the case law reports. A visualisation of the codes and examples of the questions asked to identify and analyse them is provided in Table I below. As my analysis shows, drawing attention to the ways in which the courts discuss Indigeneity and settler colonialism sheds light on the different forms of erasure that occur during the designation process thereby making Indigenous people more susceptible to receiving the Dangerous Offender designation.

Table I – Coding for Settler Colonial Logics

Codes tracked in the case law reports	Questions asked for coding and analysis	The broader thematic represented
Land Dispossession	- How is land dispossession discussed by the courts? - Is land dispossession legitimated through discourses used by the courts?	Indicators of Settler Colonial Logics
Erasure of settler colonialism	- How is settler colonialism erased via discourse and linguistic devices?	
Assimilation/Rehabilitation/Civilization	- How is assimilation/rehabilitation/civilization enacted and legitimated by court discourses?	
Indigeneity	- How is Indigeneity discussed by the courts, or not?	
Risk assessments	- Are Indigenous struggles translated into risk using risk assessment tools?	

Undervaluing/Discrediting Indigenous knowledge and ways of life	- What practices and discourses are used to undervalue and discredit Indigenous knowledge and ways of life?	

The second category is "social locations" (see Table II below). Also drawn from the theoretical framework, these codes attend to the ways that different social locations such as race, class, and gender are discussed, or not, in the case law reports. This set of codes provides an overview of the demographic characteristics identified in the case law reports of the individuals being considered by the Dangerous Offender designation as well as how social location is used in determinations of the designation. I operationalized social location by asking these specific questions during my analysis: Which social locations are emphasized by the courts and does this impact the application of the Dangerous Offender designation and how (see Bogosavljevic, 2018, p.73)? Which social locations tend to be characterized as risky or dangerous? A focus on the social locations of the individuals receiving the designation sheds light on which types of individuals are more likely to receive the designation and, using the instances where the designation was not applied, what type of individuals are not declared Dangerous Offenders. These codes also contribute to the critical discourse analysis since van Dijk (2011, p.243) asserts that researchers must pay attention to how racialized groups are discussed, the justification for the language used to describe them, and whose voices are prioritized in the discourse. Accounting for this concept contributes to answering the research question because, as per my findings, many of the social locations emphasized in the case law reports disproportionately affect Indigenous people.

Table II – Coding for Social Locations

Psychiatric and psychological makeup	**Social Locations**
Race	
Sexuality	

Lifestyle/Culture	
Gender	
Socioeconomic status	

The Coding Phase

Once the preparation is complete, as per Hsieh and Shannon (2005, p.1281), I used a three-step coding strategy to conduct the analysis of the case law reports (see Basit, 2003, p.143; Burnard, 1991). For the first step, I completed an initial reading of the research material and highlighted passages that, at first glance, seemed to correspond to the codes established during the preparation phase (Hsieh & Shannon, 2005, p.1281) and highlighted relevant information in the determination of the designation. During the second step, I read the research material again, but this time further breaking down the highlighted passages according to the codes identified above (Hsieh & Shannon, 2005, p.1281). For the last step, I created new codes for any highlighted information that did not correspond to the pre-existing categories established by the theoretical framework (Hsieh & Shannon, 2005, p.1281). During this last round of coding, I added an additional category of codes that emerged from the data itself: juridical processes (see Table IV below). In the final coding phase, I also checked for negative instances to the predetermined codes, as addressed in the discussion of the next chapter. The codes for juridical process accounted for passages in the case law reports that discussed the legislation surrounding the application of the Dangerous Offender designation. For instance, and as discussed in greater detail in my findings, in all 15 case law reports, the judges discuss their obligation to apply the Gladue principles, but in many of the cases this is followed by a discussion of public safety which overshadows the importance of Gladue (e.g. *R v. Shanoss*, 2013, p.67). The codes for juridical process also allowed me to apply a settler colonial analysis of the juridical framework that influences the application of the Dangerous Offender designation.

Table IV – Coding for Juridical Processes

Juridical Processes	Criteria need to apply the Dangerous Offender designation
	Sentencing Principles
	Gladue Principles
	Public Safety
	Doctrine of Precedent

Once the three-step coding process was completed for each case law report, I completed an axial coding process that allowed for the interrelationship between the codes to be identified (Blaikie, 2000, p.239; see Elo & Kyngäs, 2008, p.111). To complete the axial coding processes, I created metacodes by grouping case law reports together based on thematic resemblances (Pierce, 2008, p.254). This axial coding process led to a content analysis, in addition to the critical discourse analysis. The content analysis complimented the critical discourse analysis as it allows for a broader analysis of the "meanings, contexts, and intentions contained in messages (Prasad, 2008, p.1). Holsti (1968) further defines content analysis as the process of examining characteristics in documents or messages. As such, by broadening the critical discourse analysis through an axial coding process, complimented by a content analysis, I went beyond capturing the discourse used to justify the application of the designation and integrating an understanding of the broader context and themes at hand.

Additionally, the content analysis component of my research allowed me to consider the instances where certain themes were not discussed in the case law reports and to seek meaning in such an absence. For example, through the axial coding process, I determined that there are seven cases in which Indigenous knowledge or ways of life are discounted or discredited, three cases in which the topic is not discussed, and five cases in which Indigenous knowledge and ways of life are accorded importance, sometimes emphasised. However, it is worth noting that the primary

research method was a critical discourse analysis as it is more aligned with the critical framework and the primarily qualitative nature of my research, whereas a true content analysis is a quantitative method that strives for objectivity. As discussed in the epistemological and ontological considerations below, the quantitative nature of a true content analysis is not aligned with the framework for my research which is why it is secondary to the critical discourse analysis.

This step in the coding process not only drew attention to one of the ways that erasure of Indigeneity and settler colonialism occurs in the case law reports, but also identified five possibly negative instances that provide nuance to my analysis. Appendix B provides a visual of how the cases were sorted according to common themes to facilitate the content analysis component of the research project. The use of metacodes allowed me to rapidly identify which case law reports I could draw from for extracts and examples in my analysis chapter. The table also demonstrates data saturation by drawing attention to the overlap in themes between the different case law reports. During the coding phase, I also identified and highlighted instances of the linguistic devices discussed above, such as rhetorical figures and lexical style, among others. Identifying these linguistic devices allowed me to further substantiate my analysis of the other themes discussed in this chapter by focusing on discourse.

The coding process described above allowed me to conduct an in-depth critical discourse analysis of the case law reports to observe how the codes identified in the research were discussed in the case law reports and identify codes in the data that had not been accounted for in the theoretical framework. As discussed in the next chapter, the critical discourse analysis sheds light on how the various themes pertaining to settler colonialism, the social locations of the individuals in the case law reports, and juridical framework of the Dangerous Offender designation are

discursively constructed to justify the application of the Dangerous Offender designation and contribute to explaining why it is disproportionately applied to Indigenous people.

Ensuring Academic Rigour

The analysis strategy described above was designed to include multiple practices that methodological rigour of the research project. In other words, to verify that I am measuring or analysing what is intended to be analysed and to ensure the replicability of the study. To begin, the use of theory to guide the critical discourse analysis ensures that arbitrary ideas and inferences are grounded in an existing academic framework. Alvesson and Karreman (2011, p.61) argue that theorization allows for disciplined imagination by creating a balance between creativity and structure in the research process. Reliance on a theoretical framework ensures that the various aspects of the research project align thereby forming a coherent ensemble. However, an over-reliance on theory can lead to a theoretical imposition or to constraining the data (Hsieh & Shannon, 2005, p.1283). There is a risk of paying greater attention to evidence that is in accordance with the theoretical framework and research objectives rather than evidence that is non-supportive (Hsieh & Shannon, 2005, p.1283). This type of bias also creates a risk that the analysis will be overly theoretical and ignore what the research material is conveying (Tavory & Timmernmans, 2014, p.2). As noted above, while guiding the analysis with theory and previously established literature, I also explore the thematic elements that emerge from the data itself, apart from any theoretical underpinnings.

Furthermore, the three-step coding process is designed to ensure that the research is engaged in a rigorous analytical process in which the materials are reviewed multiple times and using the same method across the different cases analysed. The replicability of the study is ensured via the detailed explanation of the research methodology provided in this chapter (Ali & Yusof,

2011, p.34; Morgan & Drury, 2003, p.6). Indeed, Morgan and Drury (2003, p.6) and Ali and Yusof (2011, p.34) argue that qualitative researchers can ensure the reliability of their study by providing an explanation of the steps used to fulfill their research. The coding scheme described above ensures that validity is achieved because the materials will be thoroughly analysed allowing for repetitive codes and themes and patterns to be identified and cross referenced through axial coding and the finding of negative instances. However, Creswell and Miller (2009, p.127) warn that relying on negative evidence to demonstrate the validity of research project can be difficult because the researcher's positionality still influences the disproving themes they identify. Given that objectivity is not the goal, if that were even possible, but rather thematic patterning and data saturation, methodological rigour is still attained.

Nonetheless, a third effort to demonstrate academic rigour consists of disclosing the researcher's positionality and intentions throughout the research project. Creswell and Miller (2009, p.127) assert researcher reflexivity is a validity procedure in which the researcher discloses how their "personal beliefs, values, and biases may shape their inquiry". My beliefs and goals as a researcher are clearly outlined below and are reflected in every decision made throughout the research process. This practice is in line with the critical theory paradigm in which researcher "reflect on the social, cultural, and historical forces that shape their interpretation" (Creswell & Miller, 2009, p.127). In sum, various measures are ingrained in every stage of this research design to ensure the methodological rigour of the study.

Epistemological and Ontological Framework

I will now discuss the epistemological and ontological underpinnings of the critical theory paradigm, mentioned above, to provide insight on how these fit with the broader methodological and theoretical framework used for this research. Not only does critical discourse analysis aim to

study how discourse (re)produces power and dominance, but the goal is to contribute to social change by advancing new knowledge and insights which is in line with the critical theory paradigm (Cresswell & Miller, 2009, p.126; van Dijk, 1993, p.253). The changes sought out in this research project are outlined further in the conclusion in the form of recommendations and generally aim to reduce the number of Indigenous people with the Dangerous Offender designation, in light of this new research. Thus, the target audience of the work of critical discourse analysts are the people and institutions upholding power inequalities, in this case, the courts, psych experts, correctional employees, legislation and policy makers, among others (van Dijk, 1993, p.252). That said, critical discourse analysis is inherently political work (van Dijk, 1993, p.252).

Accordingly, the epistemological assumptions of critical discourse analysis and of this research project state that the positionality of the researcher will influence the research project (Guba & Lincoln, 2011, p.109-110). For instance, as a white woman who has never experience any form of incarceration, I cannot speak to the experiences and needs of Indigenous people which is why this research project focuses on the settler colonial structure of the criminal justice system rather than the experiences of those subjected to it. The focus of this thesis is also influenced by the five years of learning about the overrepresentation of Indigenous people in the criminal justice system in graduate and undergraduate courses. By writing this thesis, I hoped to gain a further understanding of this overrepresentation by studying Dangerous Offender designations as one of the mechanisms through which it occurs. Considerations for my positionality led me to study the designation from this angle because, while I cannot speak to the experiences of Indigenous people, I can speak to the inner workings of the criminal justice system and how it disadvantages and targets Indigenous people in various ways. Given these insights and according to my research whereby I conclude that ongoing colonial dispossession is built into the system, simply reforming

the institutions will not address the problem. As I elaborate in my conclusion, and in line with abolitionist arguments (e.g. Ambrose, 2019; Hackett & Turk, 2018; McLeod, 2015) decarceration efforts with an ongoing restructuring of the justice system would be a far more effective way to eliminate institutional racism.

The ontological assumptions of critical discourse analysis research state that taken for granted social structures and institutions are in fact shaped by various sociopolitical factors (Guba & Lincoln, 2011, p.110). Critical discourse analysis questions the taken for granted notions around social and political structures and institutions with the goal to dismantle or alter them. In this research project, by employing CDA, I consider taken for granted knowledge about the criminal justice system through a colonial analysis and provide a different context and lens for understanding judicial decision making around Dangerous Offender designations. As mentioned, the goal is to reduce the number of Indigenous people with the designation which contributes to the overincarceration of Indigenous people.

Additionally, the ontological and epistemological assumptions of the critical theory paradigm which frame this research project support the idea that objective knowledge does not exist (Nielsen, 2019, p.9). Rather, knowledge is socially produced, and it is thus important to acknowledge the social conditions which influence the research project at hand (Nielsen, 2019, p.9). This research project is being submitted as a master's thesis for a Criminology department which is primarily critical in nature. Additionally, the thesis was in production at a time when settler colonialism in Canada is increasingly being brought to light, such as through the identification of thousands of bodies of Indigenous children in unmarked graves who never made it home from residential schools across Canada (Austen, 2021), Indigenous-led pipeline blockades and protests (BBC News, 2020), and resistance to policing and violence enacted against

Indigenous fishing activities (Montgomery, 2021). Within this context, this research project also specifically aims to bring to light to the ongoing expressions of settler colonialism in the criminal justice system. Accordingly, this research project does not take the criminal justice institution for granted and how it addresses Indigeneity while acknowledging that my positionality influences the analysis and interpretation of the texts being considered. As discussed above, multiple practices were employed to ensure that my intentions, goals, and values do not dominate the research project so as to maintain the integrity of the research being produced.

Limitations of the Research Design

Now that the research design has been established, including the data collection and analysis strategies and the epistemological and ontological framework, this section provides a discussion of the limitations of the research, in particular using a critical discourse analysis and applying it to case law reports. The primary limitation of this research project is the use of case law reports as the source of data. As previously mentioned, the case law reports published on CanLII are written by different judges. While every case law report follows a similar structure with sections dedicated to summarizing the Crown's position, the Defense's position, the statutory framework, the personal circumstances of the individual, the circumstances of the offence, and the reasons for judgement at both the designation and sentencing stages, the level of detail varies. As such, while some judges may include certain details and themes others do not which inevitable influences the content of my analysis. However, as demonstrated and discussed in my analysis strategy, I identified many themes and topics that were discussed across most of the 15 cases I analyzed which demonstrates a certain level of uniformity across the case law reports in terms of what the judges included. Although there are some elements that may have been potentially missed as result of this omission in the case reports, I nonetheless captured the significant and common

elements in the decision-making criteria. Additionally, I acknowledge that this thesis provides a partial understanding of the Dangerous Offender designation process rather than a complete understanding in part because of this limitation in terms of the information available through the data I have chosen. Lastly, this limitation offers potential avenues for future research which may include full transcripts of the hearings or interviews with lawyers and judges as research data to obtain a more holistic understanding of the Dangerous Offender designation process.

The case law reports were analysed using a critical discourse analysis which also poses some challenges. Blommaert and Bulcaen (2000, p.455) cite Widdowson (1995, 1996, 1998) as one of the biggest critics of critical discourse analysis. Widdowson (1998, p.146) argues that practicians of critical discourse analysis complete "careful selection and partial interpretation of whatever linguistic features suit their own ideological position and disregard the rest". Widdowson (1998) argues that critical discourse analysis does not shed light on power and oppression, rather he argues that it reflects one way of interpreting a set of texts (see also Blommaert & Bulcaen, 2000, p,455). Blommaert and Bulcaen (2000, p.455) also state that Widdowson criticizes critical discourse analysts for not taking into consideration the contexts in which the texts are produced or consumed. Albeit, while we cannot attend to all limitations in research, these critiques may be more reflective of the moniker "the pot calling the kettle black" and a consequence of where all research is a partial framework of some phenomenon. Such critiques are also indicative of the power relations van Dijk (2011; 1993) explains in who gets to define whose research as legitimate.

Ethics and Power Considerations

The last methodological consideration discussed is that of ethics and power. Because this research project does not involve live human or animal subjects, it is exempt from having to undergo an ethics application. However, there are still two other important ethical issues that need

to be addressed. First, while the case law reports are public information, they draw attention to the very personal and painful experiences of people (see Biber & Luker, 2014), and particularly Indigenous people who have already been subject to many colonial violences and are over-researched. It is important to note that this research project is not about Indigenous people themselves or their experience. Rather, this research is on the system that targets Indigenous people for Dangerous Offender designations. Therefore, in an effort to be respectful of the individuals whose cases are analysed; I refrain from using full names, using only the last name of the individual being considered for the Dangerous Offender designation, and most often referring to the case itself. Additionally, the names of other individuals mentioned in the case law reports, such as family members, friends, experts, and correctional and police officers are not mentioned. Although identity is not concealed in this way given, again, that the case law reports are public documents, it avoids directly identifying and personalizing the research or objectifying people. Similarly, graphic or "voyeuristic" (Hartman, 1997) details of the offenses are not provided so as to not contribute to the "damage discourses" or voyeur imagery such details create (Tuck, 2009). Neither one of these elements, names or graphic details, are fundamental or germane to the analysis. This decision is also for the reader, who may be triggered by the content of some of the cases discussed.

The second ethical issue with this particular research approach is regarding the experiences of the victims impacted by the crimes committed by the individuals with Dangerous Offender designations. It is important to acknowledge that, while this research project takes issue with the Dangerous Offender designation, this research does not want to detract from any kinds of harms or hardships of the victims, families, and communities involved. This project does not seek to diminish the experiences of those who suffered because of the acts that were committed or the fear and danger caused by the existence of offenses that are typically targeted by the Dangerous

Offender designation, such as rape and murder. These are real harms that need to be addressed. To address this ethical consideration, a statement and a trigger warning are included at the Introduction of the thesis project to state the content of the project from the onset and to warn readers who may have personal experiences with the materials being discussed.

Conclusion

This chapter has outlined the data collection and analysis strategy used to uncover what discourses are used in the case law reports to justify the application of the Dangerous Offender designation and how they may explain the disproportionate number of Indigenous people with the designation. The critical discourse analysis conducted for this research aimed to uncover whether major topics discussed in the literature review and the theoretical framework appeared in the case law reports. I focused my analysis on the two broader codes of social locations and settler colonial logics and observed what discourse was used to discuss these topics. The three-step coding process discussed above also led to the identification of codes accounting for the juridical processes involved in the Dangerous Offender designation hearings. I complete the critical discourse analysis with a content analysis that allowed me to understand the broader context and meaning of the discourses identified in the case law reports. The following chapter discusses the findings resulting from the critical discourse analysis described above to provide some insight into why Indigenous people are disproportionately targeted by the designation.

Chapter 5 - Analysis and Discussion

Below is a discussion of the findings obtained following the analysis of 15 case law reports of Dangerous Offender hearings, beginning with a review of the institutional framework that dictates the Dangerous Offender designation process. This first section is of particular importance because it influences if and how the initial codes of settler colonialism and social locations impact the decision to apply the designation or not. Indeed, the institutional framework states what the judges must consider at each stage of the decision process and does not leave much leeway for discussions about the impacts of settler colonialism on patterns of offending.

Following this is a discussion of the findings on the social locations of the individuals being considered for the designation, how they are discursively constructed by the courts, and how they influence the application of the Dangerous Offender designation. In this section, I find that the social locations of the individuals are constructed via discourses of erasure or risk discourse. The social locations of the individuals and the impacts of settler colonialism on their lives are often erased via discourses and linguistic devices that dismiss or minimize the impacts of settler colonialism and the uniqueness of the Indigenous experience. In turn, the struggles that the individuals in the case studies faced, many of which are tied to settler colonialism, are translated into risk discourse that justifies the application of the designation.

The last section of this chapter addresses how risk discourse is operationalized and used to justify the application of the designation using psych experts, risk assessments, and programming. This section provides insight on how psych experts and risk assessments contribute to constructing the individuals in the case law reports as dangerous. The discussion about programming, or the lack thereof, examines how the individuals in the case law reports are kept in a perpetual state of riskiness when they do not have access to adequate programming that is tailored to the specific

needs of Indigenous people suffering the impacts of colonialism. In turn, high risk levels are used to legitimate the application of the Dangerous Offender designation.

Each of these findings elaborated upon below demonstrate the different ways that settler colonialism is erased in the Dangerous Offender designation process and how, as a result, Indigenous struggles are pathologized. This process contributes to constructing Indigenous people as dangerous and is used to legitimate the application of the designation. As such, these findings shed light on why the Dangerous Offender designation disproportionately targets Indigenous people by drawing attention to the ways that settler colonialism is erased throughout the decision-making process.

Juridical Processes

The findings discussed here pertain to how the juridical framework for the application of the Dangerous Offender designation does not make space for the impacts of settler colonialism to be considered in the decision-making process. As discussed in the literature review, the 2008 changes to the Dangerous Offender designation removed judicial discretion at the designation stage meaning that, if certain criteria are met, the judge has no choice but to apply the designation (Tackling Violent Crime Act, SC 2008, c 6). Judicial discretion is instead allowed at the sentencing stage where the judge has more flexibility to decided whether to apply a determinate or indeterminate sentence (Tackling Violent Crime Act, SC 2008, c 6). The first criterion to be met at the designation stage is proof that the individual has been convicted of a serious personal injury offence (Criminal Code, RSC 1985, c. C-46, s. 753(1)). Since the Dangerous Offender designation hearing occurs after the individual has already been charged with the designated offence, there is typically not much discussion needed to conclude that this first criterion is met. For instance, every case law report begins with a statement summarizing the conviction for the designated offence(s)

that is similar to the following: "On December 8, 2017, I convicted Mr. Kerr on two counts of counselling murder and one count of obstruction of justice. […] In that connection, the Crown brought an application pursuant to s. 754 of the *Criminal Code* […] for an order finding Mr. Kerr to be a dangerous offender" (*R v. Kerr*, 2019, p.1). This statement demonstrates that the individual, Mr. Kerr, has already been charged with the offences that triggered the Crown to apply for the Dangerous Offender designation. Subsequently, in the designation stage, the judge must demonstrate that the individual was charged with one or more serious personal injury offence as per the definition provided in the *Criminal Code* (*R v. Kerr*, 2019, p.26). To do so, the judge in *R v. Kerr* (2019, p.26) explains that "[t]he counselling of murder offences involved the 'use or attempted use of violence against another person' and 'conduct endangering or likely to endanger the life or safety of another person' as described in paragraph (a) of the definition of 'serious personal injury offence". The judge in every case law report makes a similar statement because the Crown would not apply for a Dangerous Offender designation if the individual had not already been convicted of a serious personal injury offence. As such, no further discussion allowing for an analysis of the application of the designation to Indigenous people occurs at this stage of the decision-making process.

The second criterion is proof that the individual showed a pattern of aggressive behaviour that is likely to eventually cause death, injury, or severe psychological damage (Criminal Code, RSC 1985, c. C-46, s. 753(1)). The third criterion is proof that the pattern of behaviour is "of such brutal nature" that future behaviour is unlikely to be controlled by "normal standards of behavioural restraints" (Criminal Code, RSC 1985, c. C-46, s. 753(1)). The last two criteria that need to be met to apply the Dangerous Offender designation are primarily measured through a risk analysis from the judge and which relies on psych experts and risk assessment tools. As it has been

discussed in the literature review and will be further discussed below, the concept of risk and the use of risk assessment tools has been challenged by the courts (*Ewert v. Canada*, 2018) and scholars (Dolan & Doyle, 2000; Gray, 2004; Hannah-Moffat, 2004). More relevant to this research, some critical race and settler colonial scholars have argued that risk assessment tools cannot account for the impacts of settler colonialism on the lives of Indigenous people (Milward, 2014; Neve & Pate, 2005; Thompson, 2016). Despite this research, in all the case law reports, the designation stage consists overwhelmingly of the review of the list of offences perpetrated by the individuals, the risk assessments carried out by the psych professionals, and the outcome of the programming completed by the individual while incarcerated. Thus, the criteria needed to apply the Dangerous Offender designation do not allow the courts much leeway to consider the background of the individual and how settler colonialism may have impacted the individual's life in a way that reconsiders or diminishes the culpability of the individual. These findings support the conclusions in Thompson (2016, p.50) which state that the 2008 changes to the Dangerous Offender designation resulted in more people receiving the designation, to which this research adds that Indigenous people were disproportionately affected. The second criterion for the application of the designation relies on risk assessment tools that are not as accurate in predicting risk when used on Indigenous people (Milward, 2014; Neve & Pate, 2005; Thompson, 2016). Additionally, the 2008 changes that removed judicial discretion at the designation stage makes it difficult for judges to mitigate the issues pertaining to the risk assessment tools by considering the Indigenous background of the individuals and the experiences of settler colonialism that created unique challenges. Together, these two aspects of the judicial process in applying the designation make Indigenous people more susceptible to being labelled as risky thus legitimating the use of the designation. The below findings pertaining to the social locations of the individuals in the case

law reports will further demonstrate how the judicial framework restricts what is considered in the decision-making process and how Indigenous struggles are translated into risk.

Public Safety vs. Gladue Principles

The juridical framework for the Dangerous Offender designation indicates that the objective of the designation is to ensure public safety, or protection of the public, which is emphasized in all 15 case studies. The literature cited throughout this paper demonstrates that, while public safety is articulated as an effort towards more deterrence and crime control, it is in fact heavily tied to sociopolitical context, norms, and settler colonialism. Historically the Dangerous Offender designation targeted gay men in the name of public safety (see Chenier, 2003; Brode, 2008) which is tied to social norms rather than an actual threat to public safety. Similarly, settler colonial scholars have stated that Western law is founded on the need to amalgamate or erase Indigenous people to protect settler colonial interests (Morgensen, 2011, p.59). In contemporary applications of the law, Indigenous people are depicted as a threat to public safety instead of as a threat to settler colonialism, but the end result of containment and erasure remains the same. Indeed, Chartrand (2019, p.78) and Dobchuk-Land (2017, p.3) articulate that the criminal justice system has evolved to become the normal and necessary response to the "Indian problem" or for the "damaged" Indigenous communities. Dobchuk-Land (2017, p.2) further demonstrates this point by citing Carmichael and Kent (2015) who found that "visible minority" is an important predictor for the size of police forces in large Canadian cities. All of this literature indicates that public safety in Canada aims at protecting the settler colonial projects and those that abide by it. As such, public safety excludes the safety of Indigenous people as they are the perceived threat which then serves to justify their incarceration.

This idea of public safety, the version that claims to deter crime, is prominent in all of the case law reports. For example, *R v. Kerr* (2019, p.21) indicates that the "emphasis is on the degree and nature of the risk the individual poses to the public, the necessity to protect the public from that risk and the availability of means to mitigate that risk". *R v. Christensen* (2020, p. 12) indicates that "public protection is the primary objective of the Dangerous Offender scheme". Consequently, the below findings demonstrate how the idea of public safety overshadows measures that were designed to decrease the number of Indigenous people in the prison system, such as the Gladue principles. The rulings in *R v. Gladue* (1999) and *R v. Ipeelee* (2012) reinforced s. 718.2(e) of the Criminal Code which states that judges are required to consider the unique circumstances of Indigenous people in their analysis and to consider alternative forms of sentencing other than incarceration to combat the overincarceration of Indigenous people in Canada. It is important to note that the Gladue principles only impact the sentencing decision (i.e. whether the individual receives an indeterminate or determinate sentence, and in the case of a determinate sentence, how long). As such, despite the Dangerous Offender designation being a sentencing principle, as it is stated in *R v. Shanoss* (2013, p.56), the Gladue factors do not influence the judge's decision as to whether the Dangerous Offender designation is applied or not. This is another way that the juridical framework prevents the Gladue principles from influencing the designation stage of Dangerous Offender designation hearings thereby erasing the impact of settler colonialism in the decision-making process. While the Gladue principles do not influence the application of the Dangerous Offender designation, the below findings remain important because they speak to how settler colonialism is discussed in the case law reports. The following discussion demonstrate how public safety consistently overshadows considerations for the impacts of settler colonialism in the Dangerous Offender designation process.

The analysis of the application of the Gladue principles found that there are only three cases in which it was evident that Gladue resulted in a lesser prison sentence (*R c. Mequish*, 2016; *R v. Kritik*, 2020; *R v. Toutsaint*, 2014). In two of the case law reports, there is a detailed discussion of how the Gladue principles were relevant to the individual, but no indication that they impacted the sentencing decision. In the remaining ten cases, Gladue is mentioned or acknowledged, but there is no in-depth analysis of how it applied to the situation pertaining to the individual in question or influenced the sentencing decision. For instance, in *R v. Jennings* (2014), there is only one mention of *R v. Gladue* (1999) and *R v. Ipeelee* (2012) on page 40 of 41. The following extract shows how Gladue is dismissed in this case law report, which resulted in the application of the Dangerous Offender designation with an indeterminate sentence:

> "I am familiar with the Supreme Court of Canada decisions in R. v. Gladue, [1999] 1 SCR 688 and R. v. Ipeelee, [2012] SCR 433 which set out sentencing considerations specific to aboriginal offenders. I am aware of the overrepresentation of aboriginal offenders in Canadian prisons. I am also aware of the systemic and background factors that contribute to the socio-economic gaps that exist between aboriginal and non-aboriginal Canadians and how these gaps translate into higher levels of incarceration for aboriginal people. I accept that these systemic and background factors likely contributed to dysfunction within Mr. Jennings' family and, to some degree, to Mr. Jennings' offending. I am familiar with and support the use of restorative justice principles when sentencing aboriginal offenders - in appropriate cases. I have reached the conclusion, however, that protection of the public is the paramount consideration in Mr. Jennings' case and that his case is not amenable to the application of restorative justice principles" (*R v. Jennings*, 2014, p.40).

The above extract is an example of apparent empathy, a linguistic device whereby the judge made a list of acknowledgements of the circumstances surrounding Indigenous people but without further analysis, only to swiftly dismiss Gladue to prioritize public safety (van Dijk, 2011, p.244). The following excerpt from *R v. Kerr* (2019, p. 21) is a similar example of how public safety eclipses discussions of settler colonialism:

> "The addition of aboriginal circumstances to this complex mix of unfortunate circumstances provides additional context to be sure but does not fundamentally alter the nature of the picture. The degree of blameworthiness of the individual is a factor in a Dangerous Offender application, but the greater emphasis is on the degree and nature of the risk the individual poses to the public, the necessity to protect the public from that risk and the availability of means to mitigate that risk."

This quote from *R v. Kerr* (2019, p.21) is an example of the use of apparent concession, a linguistic device whereby the judge seems to accept that the impacts of settler colonialism on Kerr's life played a role in his offending, but then states that it actually does not change the nature of the events and that public safety is to be emphasised. The discussion of the Gladue principles in *R v. Kerr* (2019) concludes with the judge stating that there is no evidence that public safety can be ensured while also taking the Gladue principles into consideration (p.22). Indeed, in most of the case law reports, even some which contain an in-depth analysis of the Gladue principles, Gladue is set aside because it does not override the stated objective of the designation to ensure public safety. *R v. Shanoss* (2013) has a substantial discussion pertaining to *R v. Gladue* (1999); however, the judge states that "despite the influence of Gladue factors in this case, the need to protect the public has to be paramount" (*R v. Shanoss*, 2013, p.67). Public safety was also emphasized in the cases where the Gladue principles did result in a lesser prison sentence. For example, the judge in *R c. Kritik* (2020, p.14) stated that "on account of the necessity to protect society from [the] accused if he has not been treated, which is the fundamental purpose of sentencing, on account of the seriousness of the offence, a sentence of imprisonment has to be imposed and less weight must be given to the principle of restorative justice". The judge in *R v. Toutsaint* (2014, p.56) takes a different approach to the Gladue principles, stating that the principles are equally as important in cases of serious and violent offences as they are in other cases, which represents a negative instance compared to the other cases. However, the threat to public safety remains a question in the application of the Gladue principles when the judge states that Toutsaint does not represent a threat

to the general public since most of his offences were committed while in custody or on probation (*R v. Toutsaint*, 2014, p.59). *R v. Toutsaint* (2014) begins to indicate that the Gladue principles may be prioritized over other sentencing principles, such as public safety, only in cases where there is less of a perceived public threat. In *R v. Toutsaint* (2014) it appeared to be easier than in other cases to justify putting the Gladue principles at the forefront because most of Toutsaint's offences occurred while incarcerated. While it is difficult to make this argument with only one case as an example, this may offer the opportunity for further research on how the Gladue principles are applied in Dangerous Offender designation hearings. Overall, the case summaries demonstrate how consideration for the impacts of settler colonialism is eclipsed by the idea of public safety except, perhaps, when there is less of a perceived public threat. The findings speak to how the juridical framework of the Dangerous Offender designation may contribute to Indigenous people being disproportionately targeted by the designation by not allowing judges to take into consideration the impacts of settler colonialism in the decision-making process thereby creating a form of erasure of settler colonialism in the case law reports.

While I had not originally anticipated to code the case law reports for the impacts of the juridical framework on the erasure of settler colonialism, the above findings demonstrate how the framework impedes on the courts' ability to consider the impacts of colonialism in the decision-making process. Consequently, the extenuating circumstances that contributed to brining the individuals before the courts for the Dangerous Offender designation, which are acknowledged in the cases often through Gladue reports, are overshadowed by considerations for public safety over other concerns, such as the unique experiences and needs of Indigenous people and the impacts of settler colonialism. While public safety is important to maintain, the framework does not allow the courts alternative means to address the root causes of crime and the unique needs of Indigenous

people. These findings support Anthony's (2018, p.41-42) assertion that the incarceration of marginalized individuals, such as Indigenous people, is justified as normal and necessary to maintain social order, in this case, public safety. The juridical framework discussed here greatly influences the way the other concepts coded for in the data are discussed in the case law report. Indeed, the below findings will indicate that many of the social locations of the individuals that demonstrate the impact of colonialism on their lives are not taken into consideration at the designation stage because of the strict juridical framework.

Social Locations

Below are the findings pertaining to how the social locations of the Indigenous people in the case law reports are discussed and how social location impacts the application of the designation. These findings support the theoretical framework and provide further insight to why Indigenous people are disproportionately targeted by the Dangerous Offender designation by demonstrating that, even despite Gladue, the impacts of the settler colonialism do not influence the decision-making process. In the following sections, I discuss how Indigeneity, geography, family relations, education, employment, and gender are considered in the case law reports with a focus on the discourse used to construct each of these social locations. I find that discourses of erasure and risk discourse work together to erase the impacts of settler colonialism on the trajectories that brought the Indigenous people in the case law reports to the point of receiving a Dangerous Offender designation. Additionally, the findings further demonstrate how the juridical framework discussed above prevents the courts from applying an analysis of settler colonialism to better understand the circumstances that contributed to bringing the individuals in the Dangerous Offender designation process.

Defining Indigeneity

An analysis of the ways in which the Indigeneity of the individuals is discussed in the case law reports provides insight on how Indigeneity is constructed in Dangerous Offender designation hearings. One of the ways that Indigeneity is discussed in the cases is through pan-Indigenization which occurs when the diversity of Indigenous populations in Canada is ignored in favour of a more generic version of Indigeneity which accommodates settler colonial institutions and perpetuates stereotypes (McGuire & Palys, 2020, p.64; Monture, 2006, p.27). There are three case law reports in which the specific Indigenous backgrounds of the individuals are not mentioned (*R v. Bird*, 2014; *R v. Dunlop*, 2018; *R v. Kerr*, 2019). In *R v. Bird* (2014, p.20), Bird's Indigeneity is left out of the discussion of the designation process and is only mentioned in the discussion pertaining to sentencing. In the reasons for sentencing, the judge writes a paragraph pertaining to Bird's personal circumstances to identify the Gladue factors that must be taken into consideration (*R v. Bird*, 2014, p.20). In doing so, the judge states that "Mr. Bird is aboriginal" (*R v. Bird*, 2014, p.20) and provides no additional details on his Indigenous background. In *R v. Dunlop* (2018, p.3), the judge acknowledges early in the case law report that Dunlop is "of aboriginal descent on his mother's side" but offers no information as to his specific Indigenous background. Lastly, in *R v. Kerr* (2019, p.19) the judge writes that "[t]he evidence regarding Mr. Kerr's aboriginal background is somewhat unclear". Indeed, in both *R v. Kerr* (2019) and *R v. Dunlop* (2018) their Indigeneity is called into question, a matter I discuss further below. The three cases discussed here engage in a form of erasure in which the specific Indigenous backgrounds and the unique experiences of settler colonialism are not taken into consideration in the decision-making process. There are some negative instances in which settler colonialism is discussed in the case law reports. These negative instances provide examples of the impact that consideration for settler colonialism can have on the

outcome of Dangerous Offender designation hearings. For instance, in *R c. Mequish* (2016, p.10) the judge asserts that:

> "the possibility should be assessed of imposing a sanction that may be appropriate for such an offender because of the offender's Aboriginal heritage or connection. These judgements recall that it [TRANSLATION] is now recognized that *it is necessary to abandon the presumption that all offenders and all communities share the same values* and that, given these different world views, a different or alternative sanction may also more effectively achieve the objectives of sentencing in a particular community. For this reason, the Court requested that a report specific to the Aboriginal reality of Mequish be prepared and filed at the sentencing hearing" (emphasis added).

Accordingly, the discussion of Gladue in *R c. Mequish* (2016, p.10-11), provides an analysis of the impacts of settler colonialism and the residential school system on the Atikamekw First Nation of Opitciwan, the community to which Mequish belongs. While Mequish was still given the Dangerous Offender designation, the judge gave her a determinate sentence of 48 months largely because of the findings of the Gladue report (*R c. Mequish*, 2016, p.15-16). This type discussion of settler colonialism provides a better contextualization of the life circumstances that may have contributed to bringing Mequish before the court for a Dangerous Offender hearing. As such, omitting consideration for the specificities of the communities to which the individuals belong is a form of erasure of the unique settler colonial context which may have contributed to bringing the individuals into the Dangerous Offender designation process and is supposed to be taken into account in the sentencing process via the Gladue principles. *R c. Mequish* (2016) is an example of a negative instance which demonstrates how taking into consideration the specific Indigenous background of the individual can change the sentencing outcome of Dangerous Offender cases.

Additionally, and as previously mentioned, there are four cases in which the Indigeneity of the individuals is questioned by the court or by psychiatric experts. In *R v. States* (2017, p.40), a

psychiatric expert questioned Mr. States' Indigenous heritage, primarily because he did not read the Gladue submission. The judge asserted that Mr. States is indeed of Mi'kmaq descent and expressed discontent towards the expert that had not read all the documents available (*R v. States*, 2017, p.40). A psychiatric expert in *R v. Tom* (2017, p.53) seemed to question the importance Tom attributed to his Indigenous heritage because he had not expressed "enough" interest according to the expert. In *R v. Dunlop* (2018, p.53), the case law report indicates that Dunlop "became noticeably agitated and offered a menacing glare in Crown counsel's direction when his indigenous background's veracity was questioned". Lastly, in *R v. Kerr* (2019, p.19-20) it is explained that Aboriginal Legal Services (ALS) was asked to provide a report detailing their efforts to prove Kerr's Indigenous background because the evidence in that regard was unclear. ALS was unable to demonstrate Kerr's Indigenous background because his deceased mother was adopted by a non-Indigenous family (*R v. Kerr*, 2019, p.19). Kerr asserts that he has known that his maternal grandparents were Indigenous since he was a child, but this assertion is questioned by the judge because there is no evidence that Kerr discussed his Indigenous background with any psychiatric expert or other figure of authority throughout his involvement with the criminal justice system (*R v. Kerr*, 2019, p.19). Kerr explains that he did not know about the Gladue principles until soon before the Dangerous Offender hearing (*R v. Kerr*, 2019, p.20). In the end, the judge accepts that Kerr is Indigenous (*R v. Kerr*, 2019, p.20). The way that Kerr's Indigeneity is addressed in this case law report demonstrates that self-identifying is not enough to be considered as Indigenous and that the courts take it upon themselves to determine whether claims to Indigeneity are legitimate. The other three examples discussed also demonstrate how judges, lawyers, and psychiatric experts will question an individual's background and the worth the individual attributes to it. The way that Indigeneity is discussed in the case law reports, whether it be by ignoring

Indigeneity altogether, questioning one's Indigeneity, or grouping all Indigenous people into one category, is reflective of the process of pan-Indigenization discussed above. Each of these tactics contribute to erasing the diversity of Indigenous experience and impose one definition of Indigeneity based on expert claims from the courts and psych experts. The type of white authority over claims to Indigeneity occurs because of power imbalances in the courtroom whereby lawyers, judges, and psych experts have control over whose discourse emerges during the hearing (Gibbons, 2004, p.287-288), including Indigenous status. The authority attributed to the various experts involved in Dangerous Offender designation hearings contributes to the marginalization of Indigenous voices because it allows experts to question or minimize the importance of their Indigenous heritage, a form of erasure discussed in Tuck and Yang (2012, p.22). The examples described above represent a discourse of erasure that is familiar in settler colonial institutions. Similar to the *Indian Act* (RSC 1985, c I-5), which continues to give the state power over legitimate claims to Indigeneity through "Indian Status", experts in Dangerous Offender designation hearings have authority over who has legitimate claims to Indigeneity. This is also an example of the discursive strategy whereby the courts rely on experts to the extent that the voices of Indigenous people are marginalized in the process (van Dijk, 1993, p.264). Consequently, the various authorities in the Dangerous Offender designation process also have the authority to decide who is entitled to the measures meant to combat Indigenous overrepresentation in the criminal justice system, such as the Gladue principles, as only individuals confirmed to be Indigenous might be afforded these safeguards.

Geographies

Another form of erasure of the impacts of settler colonialism on the lives of the individuals in the case law reports appears in the discourse surrounding the geographic locations inhabited by

the individuals. The findings discussed below indicate that the Dangerous Offender designation targets individuals who live more nomadic lifestyles. The discourses identified in the case law reports construct Indigenous spaces, such as reserves and remote communities, as dysfunctional. However, the individuals who leave these spaces are frequently constructed as unable to adapt to settler colonial spaces (i.e., the city). Indeed, almost all the individuals in the case law reports have experienced living in both rural or remote communities and urban centers. The exceptions are *R v. Dunlop* (2018) for which there is little to no details regarding his life trajectory; *R c. Kritik* (2020) and *R v. Keenatch* (2019) who remained in their respective communities while not incarcerated. Of interest is also the fact that *R c. Kritik* (2020) and *R v. Keenatch* (2019) are both among the five of these cases for which the Dangerous Offender designation was not applied. This further demonstrates that the designation seems to primarily target the individuals who live a nomadic lifestyle by moving between Indigenous and settler spaces, rather than individuals who remain in Indigenous spaces.

Most of the other individuals in the cases were forced to leave their communities to pursue educational or employment opportunities that are not available in remote Indigenous communities. In six of the cases, the individuals also had to leave because their communities were seen as negative influences and as risk factors that played a role in the individual's offending due to widespread community difficulties, such as substance abuse (see *R v. Fontaine*, 2014, p.6; *R v. Shanoss*, 2013, p.22; *R v. Tom*, 2017, p.21). This supports Razack's (2014; 2000) findings that reserves are characterized as disordered and dysfunctional and Latty et al.'s (2012, p.141) assertion that racialized spaces are often seen as "neither viable nor desirable". For example, in *R v. Shanoss* (2013, p.29), one of the psych experts recommends that Shanoss not return to his home community, even where his children reside, because it is a "dysfunctional family and community environment

where sexual boundaries have not been generally respected". Similarly, one of Fontaine's probation officers asserted that "Mr. Fontaine's decision to leave LaLoche and live in Prince Albert was a good one. In addition to being able to access more resourced in Prince Albert, he would be separated from the negative peers he associated with in LaLoche" (*R v. Fontaine*, 2014, p.16). One of the psych experts in *R v. Toutsaint* (2014, p.27) attributed Toutsaint's criminal behaviour to "being raised in northern Saskatchewan, being under-socialised, and then thrust into the drug and gang life in Prince Albert with no positive authority figures in his life". This is also an example of the discursive strategy called lexical style whereby words with negative connotations, such as "under-socialized" and "dysfunctional", are used to paint a negative picture of marginalized groups (van Dijk, 1993, p.264), despite little knowledge of the community itself.

The familiar settler colonial discourse that Indigenous communities are "uncivilized" (Monaghan, 2013, p.489; Rifkin, 2009, p. 101; Tedmanson, 2008, p. 145) is particularly evident in *R v. Shanoss* (2013, p.29) and *R v. Toutsaint* (2014, p.27) where the experts specifically mention how their respective home communities do not offer adequate socialization or respect social boundaries. In chapter 3, it is noted that Chartrand (2019, p.78) states that discourses of civility versus savagery have shifted towards discourses of criminality. Here, we see these two types of discourses merging. The excerpts from the case law reports discussed here also demonstrate how the various experts involved in Dangerous Offender designation hearings characterize Indigenous spaces and the people within them as unfavourable for rehabilitation and recommend that Indigenous people leave their communities for them to become better socialized. This is reflective of assimilation tropes and how the courts enable the erasure of settler colonialism by reducing Indigenous spaces and the people within them to being problematic and unsalvageable (Tuck & Yang, 2012, p.22) or underdeveloped and poor (McKittrick, 2011, p.951-954). The way that

Indigenous spaces are constructed in the case law reports justifies the removal of Indigenous people from their lands by either not allowing them to return or attributing a higher risk classification that justifies the application of the Dangerous Offender designation with an often lengthy, potentially indeterminate, prison sentence.

According to the case law reports, once individuals from rural or remote communities moved into urban centers, they continued to face difficulties. In seven of the case law reports, the individuals are said to have experienced homelessness or issues finding stable and adequate housing. Tom moved to Vancouver from Lillooet to improve his life circumstances and get away from the Indian Posse, a gang which he was a part of (*R v. Tom*, 2017, p.26). However, once Tom left the Indian Posse, and by extension of his involvement in the drug trade, he had no source of income and no legitimate work experience and thus ended up homeless (*R v. Tom*, 2017, p. 32). The case law report indicates that "Mr. Tom's counsel advised the court that Mr. Tom's difficulties stemmed from his challenge in adjusting to the pace of urban life after spending his entire life in Lillooet" (*R v. Tom*, 2017, p. 31). The judge decided to give Tom a Dangerous Offender designation with an indeterminate sentence for various reasons, one of which is that, considering the difficulties he faced adjusting to urban life, his level of risk cannot be address in the community (*R v. Tom*, 2017, p.65-66). As such, when tracing the life trajectories of the individuals in the case law reports, the various experts involved in the hearings focus on the individuals' "inability" to adjust to life in the city, a predominantly settler space, which contributes to constructing them as high risks to society.

R v. Tom (2017) and many of the other cases illustrate the self-fulfilling prophecy described by Wolfe (2006, p.396) whereby the individuals who move between rural and urban spaces are punished via settler colonial institutions when, in fact, they were forced to live that lifestyle

because of the impacts of settler colonialism. This also speaks to Razack's (2014; 2000) insights that Indigenous people who are pushed into settler spaces threaten the boundary between dysfunctional Indigenous spaces and civilized settler spaces and are therefore more heavily policed, such as through the application of the Dangerous Offender designation. The trajectory of many of the individuals in the case law reports also parallels those of the seven youth in Thunder Bay discussed in Lampron and Chartrand (2020). In their article, Lampron and Chartrand (2020) found that conditions of settler colonialism pushed Indigenous youth out of their communities and into marginal urban spaces to seek educational or employment opportunities or escape poverty. However, the Indigenous youth ended up in containment zones of violence and poverty (Lampron & Chartrand, 2020). In the case law reports, the consequence of the individuals being pushed into the margins of society, between settler and Indigenous spaces, was the continuous involvement in the criminal justice system that contributed to justifying the application of the Dangerous Offender hearings. Indeed, the individuals are at risk if they return to their communities that are labelled as dysfunctional and they are at risk when they are in urban centers because of the "inability" to adapt. This is another example of the form of erasure discussed in Tuck and Yang (2012, p.22) whereby Indigenous people are reduced to problematic and "at risk" communities because their complex realities are ignored are they are constructed as unable to adapt to "modern" civilization (p.5). As such, the application of the Dangerous Offender designation is justified through these discourses because prison becomes are space the individuals can be re-socialized and where the threat they pose to public safety can be contained.

Family Relations

The communities to which the individuals belong, and the people within those communities (i.e., family and friends), are similarly constructed as dysfunctional. The findings in this section

focus on the discourses pertaining to the family relations of the individuals in the case law reports. The family histories and relationships described in each of the case law reports demonstrate that all 15 of the individuals come from difficult family dynamics. There are indicators in the case law reports that the family dynamics are symptoms of settler colonialism. The below findings indicate how the family relations are either discussed as part of a tragic background that is described and then barely considered in the decision-making process (i.e., a form of erasure), or considered as an additional risk that justifies the application of the designation because the individuals are considered to have no positive role models or support to help them reduce their risk of reoffending.

In four of the cases there is mention of a family history of attending residential schools. Here, the focus is on how the family history of attending residential schools impacted the upbringing of the individuals being considered for the designation. In *R v. Shanoss* (2013, p.2-3) and *R v. Tom* (2017, p.2) both parents were residential school survivors and both Shanoss and Tom were raised in households where substance abuse was rampant. Shanoss' father was physically abusive (*R v. Shanoss*, 2013, p.3), and physical violence was commonly used as a form of discipline by Tom's entire family (*R v. Tom*, 2017, p.13). Tom's mother, in her testimony, expressed regret for the way Tom was raised and explained that her parenting reflected the abuse that she suffered in residential school stating that "she knew nothing else" (*R v. Tom*, 2017, p.13). There is also a family history of attending residential schools in *R v. Cragg* (2018, p.47). North's grandmother indicated that her parents went to residential school which resulted in her being raised in an environment characterized by substance abuse, and physical and sexual violence (*R v. Cragg*, 2018, p.47). North's grandmother also states that the "cycle is unbroken, as she observes her children and grandchildren struggle with the same intergenerational trauma" (*R v. Cragg*, 2018,

p.47). In *R v. R.R.* (2020, p.18), R.R.'s mother and sister attended residential school and his mother struggled with substance abuse.

The discourse pertaining to the family histories of attending residential school in *R v. Tom* (2017), *R v. Cragg* (2018), and *R v. R.R.* (2020) is a discourse of erasure. In *R v. Tom* (2017), his parents' experience with residential schools is mentioned in the section of the case law report pertaining to his personal background. The judge states that "[h]is parents were both victims of the residential school system. As a result, Mr. Tom suffered what can, I think, fairly be described as a chaotic, abusive, and troubled upbringing, setting the unfortunate stage for his repeated violent offenders" (*R v. Tom*, 2017, p.2). Afterwards, his family history of attending residential schools is briefly mentioned in the summary of reasons for judgement for past offences, is entirely left out of the psych assessments and the judge's analysis as the designation stage (*R v. Tom*, 2017). At the sentencing stage the judge makes the following statement:

> I am mindful that Mr. Tom's tragic and terrible antecedents and experience as an aboriginal person have set the stage for and contributed to where he now finds himself. Nevertheless, Mr. Tom is now in this place, not only as a result of his background, but because he has repeatedly declined to engage in treatment and programs offered in any meaningful way (*R v. Tom*, 2017, p.66).

As such, Tom's family history of attending residential school is described as part of the tragic circumstances of his life but is almost entirely left out of the decision to give him the Dangerous Offender designation and an indeterminate sentence (*R v. Tom*, 2017, p.67). The above excerpt is also an example of apparent empathy, a discursive strategy whereby the judge appears to concede that Tom faced significant struggles that led to his pattern of offending, but then disrupts this statement to turn it into an individualistic discourse that places the blame on the individual (van Dijk, 2011, p.244). Similarly, in *R v. Cragg* (2018), the family's history of attending residential

school is not discussed in the section of the case law report pertaining to the personal background and is not discussed until page 47 in the discussion of the Gladue report. Residential schools are also not mentioned in the sections of the case law report pertaining to the psych assessment; there is even one expert that did not read the Gladue report (*R v. Cragg*, 2018, p.49). Lastly, the family history of attending residential schools is not mentioned in neither the designation nor the sentencing stages in *R v. Cragg* (2018). While North was not given the Dangerous Offender designation (*R v. Cragg*, 2018, p.96), the decision-making process focused primarily on the extensive number of programs that were attended rather than the impacts of settler colonialism on the individual's family, community, and life. These cases provide additional examples of how erasure occurs in the case law reports by reducing Indigenous people and their families to problematic and "at risk" individuals (Tuck and Yang, 2012, p.22). This occurs by describing the backgrounds of the families as tragic and then not considering them when building an understanding of the patterns of offending. Additionally, the discourses used by the courts in certain case law reports, such as *R v. Tom* (2017), shift the blame for offending mainly on the individual and disappearing the links between trauma caused by the residential school system and offending in Indigenous communities.

In *R. v. R.R* (2020), erasure of the family history of attending residential schools happens differently than in *R v. Tom* (2017) and *R v. Cragg* (2018). The judge in *R v. R.R* (2020) considers the impacts of settler colonialism, and specifically mentions the residential school system, in the explanation of why he did not give R.R. the Dangerous Offender designation. Indeed, the judge uses the Gladue report to demonstrate that R.R.'s level of risk is not intractable because the report asserts that R.R. acknowledges that the trauma he experienced due to settler colonialism and the legacies of the residential schools system played a role in his offending and he is interested in

pursuing treatment to address said trauma (*R v. R.R.*, 2020, p.51). This is an example of how the Gladue report could be used to influence the designation process even though it is not typically used this way in the case law reports. The example of *R v. R.R.* (2020) also demonstrates how risk discourse and considerations for public safety overshadow the safeguards against overincarceration of Indigenous people because the discussion of Gladue is framed via risk discourse. The argument that R.R.'s level of risk is not intractable is also conditional on treatment and programming, rather than only on based on the findings from the Gladue report. The Gladue report and the impacts of settler colonialism and the residential school system on R.R. were taken into consideration via a risk framework that could use the report to show that R.R.'s level of risk to public safety could be improved. However, similar to the two other cases, the psych experts made no mention of the family histories of attending residential school. In fact, one of the psych experts in *R v. R.R.* (2020, p.29) stated that "Mr. R.R.'s Indigenous ancestry did not affect his opinion using the risk assessment tests, but it would impact the treatment Mr. R. can receive because it would allow for culturally specific treatments that might be more effective". *R v. R.R.* went to court after *Ewert v. Canada* (2018) which raised concerns regarding the reliability of risk assessment tools being used on Indigenous populations.

As such, all three cases discussed above demonstrate how family histories of attending residential schools were erased in different ways throughout the case law reports. *R v. Tom* (2017) and *R v. Cragg* (2018) demonstrate how the erasure occurred by considering residential schools as a tragic aspect of the individual's upbringing but omitting a settler colonial understanding of the impacts of residential schools in the decision-making process. This is likely to be caused by the strict juridical framework discussed above which does not enable much discussion about the impacts of settler colonialism on the individuals' offending in the Dangerous Offender designation

process. *R v. Cragg* (2018) and *R v. R.R.* (2020) demonstrate how psych experts largely contribute to the erasure of settler colonialism by not taking it into account in their assessments which heavily impact designation decisions.

As for *R v. Shanoss* (2013), the family history of attending residential school is primarily shaped by risk discourse. While Shanoss' family history of attending residential school is not mentioned in the designation stage, it is discussed in the sections of the case law report pertaining to the personal background, the programming completed, and in the sentencing stage (*R v. Shanoss*, 2013). In the sentencing stage, the judge states that

> While the accused has family members residing in the Kispiox area who appear to be willing to provide him with support and supervision, many of these people have their own problems that make them inappropriate monitors and others have unsuccessfully tried to supervise him in the past (*R v. Shanoss*, 2013, p. 64).

As such, similar to how the communities of some of the individuals are considered as additional risk factors because of dysfunction, Shanoss' family is also considered a risk because of their own problems that are related to the impacts of the residential school system which were previously discussed. *R v. Shanoss* (2013) and the other three case law reports discussed above continue to demonstrate how discourses of erasure and risk continue to shape how the impacts of settler colonialism are addressed in the cases. Indeed, the case law reports enact the form of erasure described in Tuck and Yang (2012, p.22) where Indigenous communities are reduced to being "at risk" and problematic rather than suffering from the impacts of intergenerational trauma and settler colonialism. The cases also provide additional examples of how settler colonialism is not discussed at the designation stage, likely because of the juridical framework.

Another finding pertaining to the family relations of the individuals in the case law reports indicates that most of the individuals have lived significant family dislocation. Eight of the 15 individuals were not raised by their biological parents; four grew up in the child welfare system and the other four were raised by extended family, such as grand-parents or aunts and uncles. Additionally, 11 of the 15 individuals were raised in households with absent fathers which is the most common family dynamic observed in the case law reports. While the context behind the fathers' absence is often omitted from the case law reports, *R v. Toutsaint* (2014, p.58) indicates that he grew up without his father who was incarcerated. The four cases in which the fathers were present, describe family dynamics riddled with physical violence, neglect, and substance abuse (see *R v. Cragg*, 2018; *R c. Kritik*, 2020; *R v. Shanoss*, 2013; *R v. Tom*, 2017). Family dislocation is addressed in the same way as the impacts of residential schools, that is, the family relations are described as part of the background of the individuals but does not influence the decision-making process of the outcome of the case. In one case law report (*R v. Shanoss*, 2013), it is explicitly demonstrated how family dislocation can be made worse because of the designation. In *R v. Shanoss* (2013, p.12), it is mentioned that Shanoss does his best to provide for his children when he is not incarcerated. Shanoss was given the designation and an indeterminate sentence thereby adding a long-term barrier to his ability to support his family (*R v. Shanoss*, 2013). In five of the cases, it is stated that the individual has no connection with their children and in the other nine cases it is unclear whether the individuals have children. In *R v. Christensen* (2020, p.22) and *R v. R.R.* (2020, p.20), the men are unsure of how many children they biologically fathered. As such, this summary of the family relations of the individuals in the case law reports demonstrates that, although occurring in different ways, family dislocation is present in all 15 case law reports.

Examples of discourses of risk or erasure have already been provided for many of the cases mentioned here, but *R v. Toutsaint* (2014) provides an additional example of how family relations are constructed as an additional risk that contributes to justifying the application of the designation. One of Toutsaint's parole officers expressed concern about his lack of family involvement (*R v. Toutsaint,* 2014, p.27) while one of the psych experts asserted that he is "concerned about Toutsaint's decision to have nothing to do with his family upon release as this suggests he has no community support whatsoever" (p.32). Toutsaint's family relations are not discussed at the designation stage, and, while the Gladue principles play a significant role in the sentencing stage, the judge reiterates that Toutsaint's lack of family involvement suggests that he has no support system which could "help stabilize his transition back into society" (*R v. Toutsaint*, 2014, p.58). It is worth noting that part of the reason Toutsaint has no contact with his family is because his father is incarceration and his mother and grandfather are both deceased (*R v. Toutsaint*, 2014, p.27). Settler colonial policies and practices has notoriously contributed to dislocating Indigenous families. For example, *The Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015, p.68-69) asserts that the child welfare system gradually replaced the residential school system by describing a "transferring of children from one form of institution, the residential school, to another, the child-welfare agency" (p.68). *R v. Toutsaint* (2014) exemplifies how, despite family dislocation being tied to settler colonialism, Indigenous people are penalized in Dangerous Offender designation hearings for not having sufficient family support. However, without the courts considering the impacts of settler colonialism, a such understanding of the experiences of Indigenous people is not achieved. It is also coming to light that risk discourse is also a form of erasure in that, by constructing the families and communities as additional risk

factors that justify the application of the designation or the sentencing decisions, the impacts of colonialism on the families are not being discussed.

Education

Another common thread among the social locations of the individuals discussed in the case law reports is their level of education. It was pointed out that none of the 15 individuals had more than a high school degree, though a few completed additional courses while incarcerated (see *R v. States*, 2017, p.6). Of the 15 individuals, four had their high school diploma or had completed the General Educational Development (GED) test, three partially completed high school, two pursued no education after elementary school, and in six of the cases the exact educational achievement level is unknown. Many of the individuals experienced significant difficulties and traumatic experiences while attending school, causing them to drop out while others experienced incarceration and homelessness that disrupted their educational careers. The below findings suggest that educational achievements are considered a mitigating factor which places the individuals in the case law reports, and Indigenous people more generally, at a disadvantage because of issues regarding access to education (see Lampron & Chartrand, 2020, p.236-237). This creates a form of erasure because the unique challenges Indigenous people face to obtain an education are not considered.

As previously mentioned, there are three individuals who are residential school survivors. Similar to my findings for the other social locations discussed above, the impacts of the residential school system are not considered at the designation stage because of the rigid legal framework. However, discourse pertaining to the impacts of the residential school system of the individuals in the case law reports vary. *R c. Mequish* (2016, p.5) explains that Mequish attended residential

school between the ages of 11 and 15 at which point she left and returned home to help her grandmother with household chores (*R c. Mequish*, 2016, p.5). Mequish was sexually assaulted by one of the nuns at the residential school (*R c. Mequish*, 2016, p.5). Mequish also experienced the foster care system at the age of nine when she was sent to live with an Atikamekw family who lived off the reserve to attended school (*R c. Mequish*, 2016, p.5). During this time, Mequish was sexually assaulted by her foster mother's son (*R c. Mequish*, 2016, p.5). Mequish testified that "her offending behaviour was the result of post-traumatic shock suffered following many physical and sexual assaults" (*R c. Mequish*, 2016, p.12). While not discussed in the designation stage, *R c. Mequish* (2016, p.16) is the only case that makes a direct link between the abuse she suffered in residential school and the subsequent difficulties she faced throughout her life at the sentencing stage. When explaining the sentencing decision, the judge in *R c. Mequish* (2016, p.15-16) writes that

> [r]eports of the Royal Commission on Aboriginal People and the most recent report of the Truth and Reconciliation Commission expose the intergenerational effects of the Indian residential schools and the result of several decades of physical, emotional, sexual, and spiritual abuse. […] There is an explicit causal relationship between the accused's Aboriginal status and the major problems she subsequently developed. Imposing a sentence of detention in a penitentiary for an indeterminate period fails to comply with this specific sentencing principle (section 178.2(e) of the *Criminal Code*).

As such, *R c. Mequish* (2016) demonstrates that, while erasure of the impacts of settler colonialism continues to occur at the designation stage, the Gladue principles at the sentencing stage offer the opportunity for a more in-depth settler colonial understanding which can influence the judge's decision-making process.

Despite the Gladue principles offering a framework for taking the impacts of settler colonialism into consideration at the sentencing stage, *R v. Fontaine* (2014) and *R v. Bird* (2014)

are examples of how erasure of settler colonialism continues to occur in sentencing. Fontaine also experienced the abusive nature of residential schools when he was forced to attend for four years starting at the age of nine (*R v. Fontaine*, 2014, p.5). The case law report explains that Fontaine suffered extensive physical abuse because he was not allowed to speak Dene and was unable to speak English (*R v. Fontaine*, 2014, p.5). Fontaine never returned to school after he left residential school (*R v. Fontaine*, 2014, p.6). The case law report for *R v. Fontaine* (2014, p.32-33) acknowledges the judge's obligation to consider the Gladue principles but offers no insight on whether the impacts of settler colonialism on Fontaine's life were taken into consideration or how they impacted the sentencing decision. Immediately after acknowledging the Gladue principles, the judge states

> [h]aving regard to the above-mentioned factors, the next step to consider is whether Mr. Fontaine is treatable at all, or treatable to such an extent as to make it feasibly to release him into the community without endangering the public. Obviously, if the evidence was such that Mr. Fontaine was not treatable, them he would be subject to an indeterminate sentence (*R v. Fontaine*, 2014, p.34).

What follows is a summary of the psych assessments which found that Fontaine's level of risk could be reduced to an acceptable level for him to eventually be released into the community (*R v. Fontaine*, 2014, p.34-39). As such, in *R v. Fontaine* (2014), erasure of the impacts of settler colonialism occurs at the sentencing stage because discourses of risk and public safety overshadow the Gladue factors that the judge must consider. Bird also possibly attended residential school; it is unclear because the school is also referred to as student residence (*R v. Bird*, 2014, p.20). Bird was from Montreal Lake and sent to what is believed to be a residential school in Prince Albert on two occasions (*R v. Bird*, 2014, p.20). Bird was also sexually assaulted while attending the school in Prince Albert (*R v. Bird*, 2014, p.20). The fact that it is unclear whether the school was a residential school or not underplays the severity of the residential school system. Additionally,

while the judge considers the Gladue factors and mentions Bird's experience in residential school (*R v. Bird*, 2014, p.20-21), the judge focuses primarily on the psych assessments and makes the following statement:

> All six of my Dangerous Offender applications have involved aboriginal offenders. This is the first case where the danger posed in the future by the offender is of less serious nature. *R v. Gladue* stands for the proposition that society must take some responsibility for the disproportionate number of aboriginal people in the prison system. With responsibility comes obligations. I believe the obligation on the justice system to fashion a sentence recognizing the disadvantage aboriginals have suffered in society is met by the sentence I have determines (p.25).

What transpires from this quote is that the judge was able to abide by the Gladue principle and apply a determinate sentence because the risk is less serious. As such, similar to *R v. Fontaine* (2014), risk discourse took precedence over the Gladue principles. While *R v. Fontaine* (2014) and *R v. Bird* (2014) both resulted in a determinate sentence like *R c. Mequish* (2016), the analysis was focused more on risk than on the impacts of settler colonialism. In sum, what the three cases discussed above have in common is that the individuals all attended residential school and the trauma from this experience was not considered in the designation stage of the case law reports. Where they vary is that, while *R c. Mequish* (2016) engages in a discussion of settler colonialism to understand the impacts of the residential school system at the sentencing stage that played a direct role on the judge's sentencing decision, the sentencing decision in *R v. Fontaine* (2014) and *R v. Bird* (2014) focuses on the level of risk.

While most of the individuals in the case law reports did not attend residential school, my findings indicate that many of them faced different types of barriers preventing them from pursuing an education. For instance, five of the case law reports describe the individual as continuing their schooling while incarcerated and two experienced homeless in their youth. In the case of *R v. Tom*

(2017, p.14), both early involvement with the police and homelessness contributed to him not being able to pursue an education. The police began to be involved in Tom's life when he was only ten years of age because he started running away from home where he experienced extensive physical abuse and engaging in fighting and bullying (*R v. Tom*, 2017, p.14). At the age of 14, Tom's mother told him he was unwelcomed in their home at which point he became homeless (*R v. Tom*, 2017, p.14). The case law report states that "[i]n any event, the evidence is clear that Mr. Tom stopped attending school and essentially lived on the streets, near the riverbank, or temporarily in the homes of family or friends" (*R v. Tom*, 2017, p.14). On pages 33 and 36 of *R v. Tom* (2017) it is noted that Tom was working towards obtaining his Grade 12 education and on page 43 it is noted that he completed his High School education and both statements were made as mitigating factors in his previous trials. However, the barriers that Tom faced to complete his High School education and their link to settler colonialism are not discussed beyond the summary of his personal background. As such, Tom's educational achievements are framed with a risk discourse that does not take into account the barriers to education that Indigenous people face due to settler colonialism which creates a form of erasure.

Similarly, North also became homeless at the age of 14 when she left home to escape the abuse she was suffering (*R v. Cragg*, 2018, p.15). The case law report indicates that Cragg lived in a youth shelter and began to have substance abuse issues when she left home (*R v. Cragg,* 2018, p.15). While North's exact education level is unknown, the case law report describes a psychiatric report written while North was in a youth detention facility which indicates that "[she] had the intellectual potential to do well at school […] but [she] lacked motivation to apply [herself] when [she] was not in custody". As such, the case law report indicates that both youth homelessness and incarceration played a role in disrupting North's education. North's education is only mentioned

again in the designation stage where the judge summarizes the mitigating circumstances found by one of the psych experts which states that North is interested in pursuing a culinary arts program (*R v. Cragg*, 2018, p.87). *R v. Tom* (2017) and *R v. Cragg* (2018) provide examples of how educational achievements or goals are considered as factors that diminish an individual's level of risk, but that the unique barriers to obtaining an education that the individuals in the case law reports face and their link to experiences of settler colonialism are not taken into consideration. There are at least five cases in which the individuals had to pursue their education while incarcerated due to various barriers that are described in the case law reports but are not placed within the broader settler colonial context.

Employment

Low educational achievement and frequent incarceration has also made it difficult for the individuals to gain employment experience. There are only four case law reports in which there is evidence that the individuals have extensive work experience, while there are six cases in which the individuals have little to no work experience, and five cases where there is no information about their employment history. However, in many of the cases, the individuals had employment goals, such as States who expressed a desire to work in the construction and renovation business (*R v. States*, 2017, p.6), and North who is interested in the culinary arts (*R v. Cragg*, 2018, p.86). The findings discussed below indicate that the barriers to employment the individuals are used against them either by blaming the individual or by treating the lack of experience as an additional risk factor. The way that employment experience is constructed in the case law reports is similar to the findings pertaining to education. The findings also demonstrate that whether the individuals have employment experience or opportunities is not one of the most important factors at the designation stage, in part because of the rigid juridical framework. As previously mentioned, the

judicial framework limits the courts' ability to consider factors like access to employment or education in the decision-making process.

As previously mentioned, none of the case law reports indicate that the individuals have more than a high school education or GED certificate. As such, there is a link between low educational achievements and lack of employment opportunities. For example, one of the pre-sentencing reports cited in *R v. Toutsaint* (2014, p.20) states that "At age 17, Joey has a grade five level which indicates under achievement and it would be difficult for him to attain employment due to the language barrier as well as lack of education". Indeed, the case law report describes Toutsaint as having no employment experience at the time of the hearing, at which point he was 34 years old (*R v. Toutsaint*, 2014, p.23). Toutsaint's lack of employment experience is not mentioned at the designation stage which focuses on his pattern of offending (*R v. Toutsaint*, 2014, p.38-43). This is another indication that the rigid juridical framework for applying the Dangerous Offender designation makes it difficult for judges to take into account the impacts of settler colonialism on the circumstances of the individuals in the case law reports. However, at the sentencing stage, the judge notes that one of the psych experts listed "lack of education and lack of employable skills" as a risk factor that increases Toutsaint's likelihood of reoffending (*R v. Toutsaint*, 2014, p.48). *R v. Toutsaint* (2014) demonstrates how lack of employment experience is framed using risk discourse, but does not play a significant role in neither the designation nor the sentencing stages.

Moreover, in some of the cases, such as *R v. Tom* (2017) and *R v. Shanoss* (2013), access to employment in remote communities was also a barrier. *R v. Shanoss* (2013, p.22) indicates that "due to high unemployment in Kispiox, the accused may have difficulty finding employment and staying sober". Despite this statement, Shanoss does have some legitimate work experience in the

logging industry, helping his father with a firewood business, and doing odd jobs for the band council (*R v. Shanoss*, 2013, p.12). Shanoss' work experience is not mentioned in neither the designation nor the sentencing stages of the case law report. Rather, one of the mitigating factors at the designation stage is the fact that Shanoss accepted that he could not go back to his community because of the prevalence of poverty and unemployment (*R v. Shanoss*, 2013, p.49). The sentencing stage also focuses on the additional risk factors posed by Shanoss' community which played a significant role in Shanoss receiving an indeterminate sentence (*R v. Shanoss*, 2013, p.67-68). The judge in *R v. Shanoss* (2014) did not acknowledge that, despite there being little employment opportunity in his community, Shanoss was able to gain legitimate work experience. Instead, the focus is on Shanoss accepting to leave his community which places the focus on justifying dispossession. Similar to *R v. Toutsaint* (2014), *R v. Shanoss* (2013) demonstrates how risk discourse is used to frame discussions about employment. These findings are similar to the ones above whereby Indigenous spaces are characterized as "neither viable nor desirable" (Latty et al., 2012, p.141; see also McKittrick, 2011) which is a discourse that appears throughout the case law reports to justify the containment of Indigenous people via the Dangerous Offender designation.

Lastly, some of the individuals experienced employment difficulties due to their release conditions. Such was the case for Christensen because he was a long-haul truck driver; however, on multiple occasions, his release conditions required him to remain in British Columbia unless permission was granted (*R v. Christensen*, 2020, p.18-19). In 2013 and 2015 Christensen was accused of "breaching his recognizance" because he had left the province and failed to attend meetings with his probation officers (*R v. Christensen*, 2020, p.19). On both occasions, Christensen stated that he believed he could leave the province for employment and on one occasion he became

frustrated and accused his probation officer of "sabotaging his employment and stormed out of the meeting" (*R v. Christensen*, 2020, p.19). Christensen's employment experiences and the difficulties he faced because of his conditions are not mentioned in neither the designation nor the sentencing stages of the case law reports. Jennings also had difficulties finding employment because public notifications were made in both Edmonton (*R v. Jennings*, 2014, p.8) and in the Kamloops (p.14) that Jennings was an untreated sex offender. In fact, the first notification that was made in Edmonton brought Jennings so much negative attention that it forced him to move to British Columbia (*R v. Jennings*, 2014, p.8). Consequently, the case law report states that the notoriety brought upon Jennings by the notifications caused difficulties finding housing and employment (*R v. Jennings*, 2014, p.35). The case law report also indicates that "Mr. Jennings also asks that [the judge] take into account how difficult it is for him to engage in pro-social activities without interacting with children" (*R v. Jennings*, 2014, p.35). Jennings employment and housing problems are listed as risk factors increasing the likelihood of reoffending at the designation stage, but the designation stage makes no mention about how notoriety played a role in enhancing these difficulties (*R v. Jennings*, 2014, p.28). At the sentencing stage, the judge acknowledges that notoriety made it difficult for Jennings to find employment and housing and expresses empathy for Jennings, but then goes on to state that "[w]hile these factors may reduce Mr. Jennings' moral blameworthiness, I must consider whether there is evidence to satisfy me that a sentence other than an indeterminate sentence will adequately protect the public" (*R v. Jennings*, 2014, p.35). In the end, the judge gave Jennings an indeterminate sentence. Similar to *R v. Shanoss* (2014), *R v. Christensen* (2020) and *R v. Jennings* (2014) demonstrate that risk discourse dominates the conversation about employment in the case law reports in a way that focuses only on whether or

not the individual has work experience and erases the institutional barriers that contributed to the individuals' lack of legitimate employment experience.

The case law reports also demonstrate a link between absence of employment experience and precarious housing situations. Four of the six individuals who have little to no employment experience have also had trouble with housing or experienced homelessness. Consequently, a few of the individuals engaged in illegitimate work, such as participating in the drug trade and becoming affiliated with gangs to make a living. As previously mentioned, Tom was part of a gang called the Indian Posse (*R v. Tom*, 2017, p.17). The case law report states that "[f]ollowing his departure from the Indian Posse, Mr. Tom began to lead a less affluent lifestyle. The drug trade had been fairly lucrative for him" (*R v. Tom*, 2017, p. 32). Following his exit from the gang, Tom became homeless (*R v. Tom*, 2017, p.32). Tom's experience with homelessness following his exit from the gang is not discussed at neither the designation nor the sentencing stages, even though leaving a gang would be considered a significant move away from "risk". Toutsaint is another individual who has no work experience, was involved with a gang and drugs, and is said to have difficulty living independently because of his lack of education and work experience (*R v. Toutsaint*, 2014, p.23). In the case law report it is explained that the gang "is the only family he has" and the "only associates he knows" which makes it difficult for him to leave (*R v. Toutsaint*, 2014, p.23). Toutsaint's case demonstrates that gang involvement is not only caused by lack of legitimate work opportunities, but also a lack of belonging because of social and family dislocation. This is also demonstrated in *R v. Keenatch* (2019, p.20), where Keenatch is said to have begun associating with gangs at the age of nine. The case law report indicates that gang activity would assist him with financial difficulties and gave him a sense of belonging (*R v. Keenatch*, 2019, p.20). While it is unknown whether Keenatch experienced precarious housing

situations, the case law report makes a direct link between gang activity and income. At the designation stage, the judge indicates that Keenatch cutting ties with the gang is a mitigating factor that reduces his risk of reoffending (*R v. Keenatch*, 2019, p.20). The case law reports demonstrate that a lack of legitimate work opportunities has contributed to brining the individuals into the criminal justice system by propelling them into situations where involvement in criminal activity is more likely, including poverty, homelessness, and gang affiliations. However, there is very little discussion of these factors at neither the designation nor the sentencing stage which creates another form of erasure of the conditions that contribute to the offending described in the case law reports.

In sum, the case law reports discussed above provide two major findings pertaining to the discourse surrounding employment in Dangerous Offender designation hearings. First, the cases demonstrate that employment experience, or a lack thereof, is framed within a risk discourse that provides no further acknowledgement or analysis of the institutional barriers at work for both the designation and the sentencing stages. Therefore, employment does not seem to be a defining criterion in the decision-making process for the Dangerous Offender designation hearings analysed, which is further confirmed by the fact that five of the cases analysed do not discuss employment at all. Second, the link between illegitimate work, such as gang involvement, precarious housing, and lack of employment opportunities is largely ignored in the case summaries. Indeed, the individuals' involvement in gang activity as a source of income is discussed as a risk factor and in discussions of past offences, but there is a lack of consideration of gang involvement and the criminality that ensues as a result of institutional barriers to legitimate work.

Gender

Another social location that was coded for in my analysis was gender. All but one of the individuals in the 15 cases analysed are identified as men. The only case law report pertaining to a woman is *R c. Mequish* (2016). However, the case law report for *R v. Bird* (2014) was also coded for findings pertaining to gender because Bird is said to have a "gender disorder" by the courts. The below findings pertaining to gender in *R c. Mequish* (2016) and *R v. Bird* (2014) provide insight on how the intersection of gender and race may contribute to making Indigenous people who defy gender norms, or Indigenous women, more likely to receive the Dangerous Offender designation.

Mequish is one of ten women in Canada to have received the Dangerous Offender designation (Public Safety Canada, 2019, p.117). The language used in *R c. Mequish* (2016) is reminiscent of patriarchal gender roles and norms. For example, when discussing Mequish's childhood, the court indicates that she was an "orderly little girl, clean, and resourceful" (*R c. Mequish*, 2016, p.5). In contrast, States was also considered to exhibit normal behaviour as a child and the court said of him that he "was not hyperactive nor did he exhibit any inattention" (*R v. States*, 2017, p. 4). The standards for normal behaviour for young boys and girls are apparently quite different according to these statements.

Furthermore, Mequish's case is an example of how Indigenous women in the criminal justice system have different experiences because of the intersectionality of various social locations, particularly race and gender (see Hill Collins & Bilge, 2016). For example, on several occasions, Mequish's behaviour at the time of the predicate offence is characterized as excessively "brutal" (*R c. Mequish*, 2016, p.3-4). For example, the court describes Mequish as "so brutal that

it is impossible not to conclude that future behaviour is unlikely to be inhibited by normal standards of behavioural restraint" (*R c. Mequish*, 2016, p.3). Mequish's predicate offence was a robbery during which herself and two others stole two cases of beer from a convenience store (*R c. Mequish*, 2016, p.2). When the clerk was able to catch up to Mequish to try to take back the beer, Mequish hit her on the shoulder and on the head (*R c. Mequish*, 2016, p.2). While Mequish's actions undoubtedly caused harm, the statement that they were so "brutal" that Mequish would not respond to normal "behavioural restraints" (*R c. Mequish*, 2016, p.3) does not appear proportionate to the offence. While it is difficult to assess based on one case, the way that Mequish's actions were constructed during the Dangerous Offender designation hearing may speak to Chesney-Lind and Eliason's (2006, p.30-31) argument that racialized women in the criminal justice system are criminalized more harshly because they are transgressing both the law and gender norms. An intersectional lens further supports the above argument by emphasising that Mequish's race, gender, and other social locations work together to shape her experiences in interactions and institutions (Hill Collins & Bilge, 2016, p.13-15). In the criminal justice system, Indigenous women, such as Mequish, are disadvantaged (see Wesley, 2012). In fact, Indigenous women are the fastest growing population in Canadian prisons (Wesley, 2012, p.1). More specific to this project, while filtering through the Dangerous Offender cases in CanLII to identify cases of individuals with various gender identities, I identified four Indigenous women with the Dangerous Offender designation[9], one of which is a trans women (*R c. Mequish*, 2016; *R v. Acoby*, 2011; *R v. Blackplume*, 2019; *R v. Neve*, 1994). As such, of the ten women with the Dangerous Offender

[9] *R v. Neve* (1994) and *R v. Acoby* (2011) were excluded from this research because the offences occurred prior to the 2008 changes to the Dangerous Offender designation legislation and *R v. Blackplume* (2019) because the trial occurred in Alberta which was not one of the geographic locations selected for this research. Additional research on the application of the Dangerous Offender designation to Indigenous women would provide additional insight on how the intersection of race and gender impacts the application of the designation.

designation in Canada, potentially[10] almost half are Indigenous. In sum, while women are less likely to be considered dangerous, hence the small number of women in Canada to have been designated as Dangerous Offenders, Indigenous women are more likely to receive the designation in part because of the intersection between their race and gender.

A similar analysis of the intersection of race and gender was found in *R v. Bird* (2014) in which Bird was declared a Dangerous Offender and originally given a determinate sentence which was replaced by an indeterminate sentence following an appeal in 2015 (*R v. Bird*, 2015). The court summarizes a psychological report which describes Bird as "effeminate in his actions and voice and had at times dressed as a woman and wore makeup. He admitted to cross-dressing in private and experiencing sexual fantasies where he played the role of a woman" (*R v. Bird*, 2014, p.6). This speaks to the discursive trajectory of the designation being involved in reinforcing gender and sexual norms, particularly by relying on pscyh experts (see Rasmussen, 2011, p.38). The same report states that Bird likely has a "gender identity disorder" and requires counselling that is only available in urban areas (*R v. Bird*, 2014, p.6). Access to programming for individuals who exhibit "sexual deviance" has been problematic since the inception of the Dangerous Offender designation. Psychiatric and legal experts expressed concerns about the lack of facilities in 1948 when the Criminal Sexual Psychopath provision was created (Brode, 2008, p.120) and this issue was entirely disregarded in the 1954 McRuer (1954) report. The 1969 Ouimet report highlighted the importance of access to custodial and treatment facilities specifically for individuals who were "sexually deviant" (p.262), but Chenier (2008, p.114) indicates that such facilities were not commonplace until the 1990s. Not only is the discourse surrounding Bird's sexual orientation and

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[10] I use the word potentially here because it is unclear whether Public Safety Canada includes trans women in the statistics regarding women with the Dangerous Offender designation and two of the Indigenous women with the Dangerous Offender designation that I identified are transgender.

gender identity one of risk, but it is also heavily medicalized and pathologized in a way that is reminiscent of the origins of the Dangerous Offender designation. Indeed, the literature review which traced the discursive history of the designation indicates that psych experts have long been involved in regulating sexual and gender norms (Chenier, 2008, p.80).

Additionally, the discourse about Bird's gender identity overshadows any consideration for Indigeneity and the impacts of settler colonialism, which are afforded only one paragraph in the case law report (*R v. Bird*, 2014, p.20). Gender becomes the focus of the case law report rather than the impacts of colonialism, how they may have contributed to bringing Bird into the Dangerous Offender designation process in the first place, and how alternatives to incarceration would better address these impacts. As such, the intersection of Bird's gender identity, which was pathologized and emphasized in the case law report, and Indigeneity, which inevitably shaped much of Bird's life and was largely secondary in the case law report, speak to how race and gender are discussed in Dangerous Offender hearings.

In sum, the *R c. Mequish* (2016) and *R v. Bird* (2014) cases demonstrate how discourses pertaining to race and gender intersect in the case law reports. The analysis of these case law reports, the research pertaining to the history of the designation targeting sexual deviance, and the number of Indigenous people, specifically Indigenous women, with the Dangerous Offender designation, suggest that Indigenous people who defy gender norms and Indigenous women vulnerable to the application of the designation.

<u>Conclusion</u>

The findings pertaining to how the Indigeneity, geographies, family relations, education, employment, and gender of the individuals in the case law reports impacted the Dangerous Offender designation process indicate that erasure and risk discourses shaped the discussions of

the designation. Erasure occurred in cases where the social locations of the individuals are discussed in the summary of their personal background but are not included in the decision-making process. The description of the personal backgrounds of the individuals in the case law reports painted a tragic picture of their lives. Instead of prioritizing an analysis of the impacts of settler colonialism to understand the experiences of the individuals in the case law reports, the courts prioritized a risk discourse through a focus on risk assessments and programming. As mentioned throughout this section, this corresponds to the type of erasure discussed in Tuck and Yang (2012, p.22) whereby Indigenous communities are reduced to being "at risk" and problematic without real consideration for their complex needs and realities. Accordingly, if the social locations were considered in the decision-making process, they were framed with a risk discourse that ignored the broader settler colonial context that impacted the livelihood of the individuals in the case law reports. This ignores the fact that, as indicated in the literature review, the social conditions in Indigenous communities are important to understand patterns of crime (Milward, 2014, p.620-621).

The findings discussed above further indicate that the juridical framework of the Dangerous Offenders designation process is one of the reasons that the courts do not consider the settler colonial context to understand how the life circumstances of the individuals contributed to bringing them into the Dangerous Offender designation process. As such, an overview of the social locations of the individuals in the case law reports indicate that many of them have experienced the adverse effects of colonialism, including family and community dislocation, abuse, difficulty accessing education, employment, and stable housing, but that the Dangerous Offender designation process is designed in a way that does not allow for an analysis of these factors in the designation process. This corresponds to the literature which indicates that harsh punitive tactics

are used because of the state's unwillingness to address or even consider the effects of colonialism (Chartrand, 2014, p. 4; Finnane & McGuire, 2001, p. 293).

Psych Experts and Risk Discourse

The findings in this section further elaborate on how the social locations discussed above, and other struggles experienced by the individuals in the case law reports, are translated into risk factors that legitimate the application of the designation. The history of the Dangerous Offender designation demonstrates the central role that psych experts have played since the inception of the designation. The literature which informs my thesis also indicates that the risk assessments conducted by the psych experts have been criticized by both the courts and academia for their effectiveness when used on Indigenous people (Dolan & Doyle, 2000; *Ewert v. Canada*, 2018; Gray, 2004; Hannah-Moffat, 2004). The juridical framework discussed above demonstrates the importance placed on risk in the current application of the Dangerous Offender designation. The important role psych experts play in legitimating the application of the Dangerous Offender designation process was also apparent in the case law reports due to the number of psychiatric diagnoses imposed on the individuals. In all the case law reports, a psychiatric diagnosis was given, and 14 individuals have two or more psychiatric diagnoses with the remaining individual having only one. The below findings demonstrate how the designation process depends heavily on expert opinions which is one of the discursive strategies noted in the methodology chapter (van Dijk, 1993, p.264). The findings in this section also show how the prevalence of psychiatric diagnoses contributes to pathologizing the struggles that the Indigenous people in the case law reports experience because of colonialism. Indeed, the below findings demonstrate how psych experts and risk assessments contribute to depicting the Indigenous people in the case law reports as "at risk". The findings here combined with the above findings on social locations perpetuate the image of

Indigenous people "on the verge of extinction, culturally and economically bereft, engaged or soon-to-be engaged in self-destructive behaviours which can interrupt their school careers and seamless absorption into the economy" (Tuck & Yang, 2012, p.22). The risk discourses identified in this section and throughout the chapter contribute to justifying the application of the Dangerous Offender designation.

Most Common Psychiatric Diagnoses

There are important patterns that emerged in the type of diagnoses that the individuals in the case law reports received. Of the 15 individuals, nine were diagnosed with polysubstance abuse while all 15 were cited as having dealt with addiction throughout their lifetime. All the case law reports also indicate that substance abuse played a significant role in the individuals' offending. The link between residential schools or child removals and chronic substance abuse in many Indigenous communities is well documented (see Ross et al., 2015; TRC, 2015; Wilk, Maltby & Cooke, 2017). The analysis of the family relations of the individuals in the case law reports further indicates that substance abuse is linked to intergenerational trauma. As I outlined below, while the judges may sometimes identify the link between substance abuse and the life trajectories of the individuals and, in even fewer occasions, the link to settler colonialism, this type of analysis is almost always missing in the psychological and psychiatric evaluations. As such, the psych experts identify substance abuse as a personal shortcoming that contributes significantly to criminal behaviour thereby justifying continued incarceration of individuals with addiction. The fact that the individuals in the case law reports are described as unable to overcome their addiction corresponds to the settler colonial logics whereby Indigenous people are described as at risk (Tuck & Yang, 2012, p.22) and unsalvageable (McKittrick, 2011, p.954). For example, at the designation stage in *R v. Tom* (2017, p.61) one of the elements the judge cites to prove that Tom is a threat to

the public is the fact that "Mr. Tom has recognized many times in the past that his substance misuse contributes to his offending and he has refused to do anything to address it". Moreover, one of the elements that is used to justify the use of an indeterminate sentence is that Tom has "a longstanding and severe addiction to drugs and alcohol. […] His motivation to change is highly questionable and his capacity to do so even less" (*R v. Tom*, 2017, p. 66-67). Similarly, in discussing Dunlop's history of addiction at the designation phase, the judge in *R v. Dunlop* (2018, p. 54) asserts that "there is no evidence that his problems are amenable to treatment". *R v. Tom* (2017) and *R v. Dunlop* (2018) demonstrate how the individuals are constructed as lacking motivation or unable to overcome addiction which contributes to legitimating the use of the designation. Substance abuse is constructed as a personal shortcoming and the ways in which experiences of colonialism might play a role in the individuals' addiction is not considered.

Even in the cases where substance abuse is also described as a broader issue in the community to which the individual belongs, risk discourse is used to construct the social problem as creating an additional risk that the individual is going to reoffend. For instance, according to the case law report, Fontaine stated that "there's nothing there to do in my home town, so everyone drank" (*R v. Fontaine*, 2014, p.25). One of the psych experts went on to say that Fontaine is at a higher risk of offending when in an environment where he is exposed to negative peers and alcohol which implies that his hometown is an additional risk factor (*R v. Fontaine*, 2014, p.22). The judge later concludes that, considering the risk factors identified by the experts, "it is unrealistic to expect that Mr. Fontaine's risk is controllable if released into the community in the near future" (*R v. Fontaine*, 2014, p.30). Similarly, in *R v. Shanoss* (2013, p.36) it is stated that alcoholism is one of Shanoss' most important risk factors and that "a return to Kispiox after he has completed any sentence imposed would set him up for relapse and failure". Shanoss' home community is further

described as having “rampant drug and alcohol abuse; there are blurred sexual boundaries and stress of family, unemployment and poverty” (*R v. Shanoss*, 2013, p. 49). In the sentencing stage, the judge finds that the negative factors outweigh the positive and therefore justify the application of an indeterminate sentence (*R v. Shanoss*, 2013, p.67-68). Pages 63 to 65 of *R v. Shanoss* (2013) are dedicated to listing the reasons why Shanoss’ desire to return to his community, including to see his children, are important aggravating factors at the sentencing stage. Therefore, in the cases where substance abuse is identified as a social problem, it is used as a risk factor that justifies the application of the designation and sentencing decisions. Similar to the previously discussed findings pertaining to the geographies and family relations of the individuals in the case law report, these findings also correspond to the literature on how spatial violence permits a construction of Indigenous people as undesirable, damaged, or dysfunctional and justifies their incarceration (Latty et al. 2016; McKittrick, 2011; Tuck & Yang, 2012). As such, here we see the discourses about Indigenous communities that are discussed throughout this chapter being enacted in the designation process via “risk” which is how discourses of dysfunction come to legitimate the use of the designation.

Additionally, eight of the 15 individuals were diagnosed with antisocial personality disorder. These findings coincide with those of Beaudette and Stewart (2016, p.627) who found that Indigenous people in prisons have significantly higher rates of personality and substance abuse disorders. The prevalence of the diagnosis of antisocial personality disorder is important given the definition of the disorder. One of the central components of antisocial personality disorder stated in the DSM-5 is “failure to conform to lawful or culturally normative ethical behaviour” (American Psychiatric Association, 2013). The definition of antisocial personality disorder contains a link to the role psychiatry plays in determining what is normal and what is not (Rasmussen, 2011, p.38).

The definition also creates a circular argument: the individuals have an antisocial personality disorder because they are prone to unlawful behaviour, and they are prone to unlawful behaviour because they have a personality disorder. This makes it difficult to challenge any diagnosis, and is completely devoid of any context, colonial or otherwise. Issues with the antisocial personality disorder diagnosis were identified in the case law reports. One of the psych experts in *R v. States* (2017, p.42) indicates that

> "individuals who come into conflict with the law are wrongly labeled as suffering from an [anti-social personality disorder]. On the surface one sees features of selfishness and narcissism, but in Mr. States' case […] he considers these traits are likely driven by low self-esteem, identity problems and low self-confidence, rather than by a true personality disorder".

Additionally, the psych expert asserts that States' anti-social behaviours are "secondary to his lifestyle of drug abuse". These statements are important because all the individuals in the case law reports struggled with substance abuse and many are said to have issues with self confidence (see *R v. Cragg*, 2018, p.43; *R v. Jennings*, 2014, p.6; *R v. Toutsaint*, 2014, p.27). As such, in each case there is a possibility that the antisocial personality traits identified and diagnosed by the psych experts are secondary to substance abuse, low self-esteem, and extensive social stressors. However, the lack of examination of the settler colonial context by the psych experts disappears the social context and pathologizes Indigenous struggles.

While the individuals in the case law reports did cause harm, the findings in this chapter demonstrate that the root causes of their crimes may lie in various experiences, such as substance abuse and family trauma, many of which were tied to settler colonialism in the discussion on social locations. The above findings indicate that struggles from these experiences are pathologized through diagnoses that justify the application of the designation. The diagnoses discussed here are

the most common among the case law reports analysed; however, as previously mentioned, all 15 individuals in the case law reports had psychiatric or psychological diagnoses and 14 of the individuals had two or more. This further demonstrates that the individuals in the case law reports were heavily pathologized.

Risk Assessment Tools

Risk discourse is operationalized in the form of risk assessment tools which are used in every Dangerous Offender case. The below findings support the literature reviewed for this thesis which indicates that risk assessment tools contribute to unnecessarily labelling Indigenous people as dangerous (Harrison, 2010, p.429; Milward, 2014, p.621; Neve & Pate, 2005, p.33; Thompson, 2016, p.63-68) because they demonstrate how risk assessments supersede and erase the impacts of colonialism in the decision-making process. The case law reports demonstrate that risk assessment tools are still heavily relied on in Dangerous Offender hearings to determine whether the individual is at risk of "causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour" (Criminal Code, RSC 1985, c. C-46, s. 753(1)). According to the definition of the Dangerous Offender designation in the Criminal Code, determining the likelihood that an individual will cause future harm is one of the criteria that needs to be proven to justify the application of the designation. In most cases, there is no discussion of the impacts of subjecting Indigenous people to risk assessment tools that were not designed for them.

However, the case law reports for *R v. States* (2017) and *R v. Kerr* (2019) do raise questions about how risk assessment tools are used and whether they are effective, somewhat consisting of a negative instance. In *R v. Kerr* (2019, p.27), the judge cautions against "the seduction of

deceptively-certain actuarial figures that are often used to translate as abstract a concept as risk into concrete numbers". The judge further states that the numbers needed to reach the threshold that justified the application of the Dangerous Offender hearing is subjective and ill-defined (*R v. Kerr*, 2019, p.27). Additionally, the judge in *R v. Kerr* (2019, p. 21) states that "even without focusing on issues of aboriginal heritage in particular, almost every psychiatrist and psychologist […] has remarked upon the deeply-rooted psychological issues contributing to his offending". The judge then goes on to say that "The addition of aboriginal circumstances to this complex mix of unfortunate circumstances provides additional context but does not fundamentally alter the nature of the picture" (*R v. Kerr*, 2019, p.21). As such, although calling into question the use of risk assessment tools generally, the judge explicitly states that the psych assessments were entirely devoid of considerations of settler colonialism and erased the fact that Kerr's mental wellness is intrinsically linked to "aboriginal circumstances" (*R v. Kerr*, 2019, p.21) by stating the latter add context but do not change the assessment. This reflects how the majority of the cases understand the psychological makeup of the individuals; their life circumstances are described to add context but are not taken into consideration in the psych assessments that focus almost exclusively on individual characteristics via the use of risk assessment tools. These findings also correspond to the previous discussion about how the idea of public safety eclipses considerations for settler colonialism through the application of the Gladue principles. Risk assessments consist of another tool that overshadows and erases settler colonialism and heavily contributes to the decision-making process in Dangerous Offender designation hearings.

The case of *R v. States* (2017, p.41) is another interesting deviation from my analysis of the other case law reports because three psych experts were involved in the assessment and one of them diagnosed States with an antisocial personality disorder whereas the two others asserted that

he did not meet the criteria for such a diagnosis. One of the experts who disagreed with the diagnosis of antisocial personality disorder indicates that the actuarial risk assessment tools used to make that assessment "are only moderately predictive of risk and they fail to predict when a violent offense is going to occur" (*R v. States*, 2017, p. 42). The judge in this case provides a lengthy critical analysis of the expert testimonies, including cautioning the fact that individuals with severe substance abuse problems can be misdiagnosed as having antisocial personality disorder which may contribute to disproportionately designating people who suffer from addiction as dangerous (*R v. States*, 2017, p.70). The judge also finds that one of the psych experts' assessments was less reliable because he did not consult all the documents that were made available to him while the other two experts did and his assessment is the one that was different (*R v. States*, 2017, p.17). States was not found to be a Dangerous Offender and the judge's analysis on the expert assessments played an important role in the decision. Thus, the case of *R v. States* (2017) provides further evidence of how expert assessments and the tools they use can influence the outcome of a decision Dangerous Offender designation decision. It is noteworthy that many of the case law reports only had one psych expert which meant that a critical analysis such as the one in *R v. States* (2017) is more difficult to achieve. The fact that there were multiple psych experts in *R v. States* (2017) and that they provided conflicting assessments brought concerns about risk assessments to the forefront which likely made it more difficult for risk to trump in this case, as it did in many of the other case law reports. *R v. States* (2017) and *R v. Kerr* (2019) reinforce the doubts pertaining to the use of risk assessment tools expressed in the literature and emphasise the importance of critically thinking about risk assessment tools.

Additionally, there are only three case law reports in which the use of risk assessment tools on individuals with different cultural backgrounds is discussed. In *R v. Shanoss* (2013, p.38) there

is one specific risk assessment tool, the Rorschach Ink Blot test, that is called into question due to its limitations when used on Indigenous people. Otherwise, none of the other, more mainstream, risk assessment tools are critiqued in this case law report even though their effectiveness has been called into question (*Ewert v. Canada*, 2018; Harrison, 2010, p.429; Milward, 2014, p.621; Neve & Pate, 2005, p.33; Thompson, 2016, p.63-68). The case law report for *R c. Kritik* (2020, p.6) provides a more general critique of risk assessment tools by acknowledging that none of the tools that were used to evaluate Kritik had been validated on the Inuit. The summary also refers to an article which "concludes that the validity of the tools used to assess their [Indigenous people] risk of reoffending is lower than the validity of the same tools when assessing the risk of non-Indigenous offenders". Nonetheless, the psych expert "concluded that the cultural aspect that had to be taken into account only played a minor role" (*R c. Kritik*, 2020, p.7). This is similar to a statement made in *R v. R.R.* (2020, p.29) in which the psych expert was of the opinion that Indigenous ancestry did not impact the risk assessment. This demonstrates that despite the amount of research that proves that risk assessment tools are not effective when used on Indigenous people (Harrison, 2010, p.429; Milward, 2014, p.621; Neve & Pate, 2005, p.33; Thompson, 2016, p.63-68), psych experts still fail to acknowledge these limitations when using the tools. Additionally, these passages in the case law report represent the discursive strategy discussed in van Dijk (2011, p.49) where knowledge about issues with the effectiveness of risk assessment tools when used on Indigenous people is discredited or omitted by psych experts which is also a form of erasure discussed in Tuck and Yang (2012, p.22). Of interest is the fact that *R c. Kritik* (2020) is the second Dangerous Offender hearing for Kritik who was able to successfully appeal the designation and indeterminate sentence in 2019 (*Kritik c. R,* 2019). The summary of the appeal was reviewed for additional context. The outcome of the appeal was influenced by the fact that the initial Dangerous

Offender designation decision was "partially based on risk assessment tools that had not been validated specifically for Inuit offenders" (*Kritik c. R*, 2019, p.8). Finally, the judge concluded that "perhaps the psychologist was aware of the limitations of such tools and used her expertise to overcome them. However, the fact remains that the resulting sentence, as a whole, strikes one as insensitive to the specific reality of the Inuit people, who appear to be quite distinct" (*Kritik c. R,* 2019, p.8). Following the second Dangerous Offender hearing, the designation was not applied (*R c. Kritik*, 2020). *R c. Kritik* (2020) is thus another negative instance where the use of risk assessment tools on Indigenous people is called into question. As such, like *R v. States* (2017), *R c. Kritik* (2020) demonstrates how critical thinking about the use of risk assessment tools on Indigenous people can significantly impact the outcome of Dangerous Offender hearings.

The two negative instances *R v. States* (2017) and *R c. Kritik* (2020) demonstrate that when a settler colonialism framework is used to critically think about risk assessment tools, the outcome of Dangerous Offender designation hearings can change. The cases that call into question the effectiveness of risk assessment tools support the literature that states that the tools contribute to unnecessarily labelling Indigenous people as dangerous. Thus, considering the important reliance on risk assessment tools in Dangerous Offender designation hearings, based on these case law reports, the use of the tools is one of the factors contributing to Indigenous people disproportionately being targeted by the designation. This is especially true when an analysis and consideration of settler colonialism is not used alongside the use of risk assessment tools to consider the impacts on Indigenous people.

Programming

The findings pertaining to FASD, cognitive difficulties, and gender identity all shed light on various barriers to access to programming. Access to programming is an important way that individuals can lower their perceived level of risk. Without access to programming, the individuals risk levels remain high which, as previously discussed, is a defining criterion in the application of the Dangerous Offender designation. In addition to insufficient access to programing tailored to the needs of individuals that seem to be targeted by the designation, there exist several issues pertaining to the programs that are meant to be Indigenous-focused. Specifically, Indigenous programs are often undervalued or entirely dismissed in Dangerous Offender designations. However, three (*R c. Kritik*, 2020; *R v. Keenatch*, 2019; *R v. R.R.*, 2020) of the five cases where the designation is not applied are cases where Indigenous programming is emphasized, sometimes even more than core CSC programming[11]. These findings suggest that emphasis on Indigenous programming may be a way of diminishing the number of Dangerous Offender designations applied to Indigenous people.

There are several cases in which the importance of culturally appropriate programming is under-valued or entirely discredited. For example, in *R v. Christensen* (2020, p.27-28) there is a list of over 20 programs that were completed or partially completed, none of which are Indigenous-focused. Additionally, the psych experts in *R v. Christensen* (2020, p.36) asserted that Christensen needs constant supervision, psychological therapy, and medical intervention[12] to manage his risk.

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[11] It is worth noting that many Incarcerated Indigenous people discuss how Indigenous programming is appropriated by the Criminal Justice System and not reflective of true Indigenous thinking and healing (Hachey, forthcoming; Jamieson, forthcoming). However, delving into the appropriateness of the Indigenous programming offered by CSC is outside of the scope of this research.

[12] The medical intervention that is suggested in *R v. Christensen* (2020) is the use of anti-androgen medication, though the psych experts note that the medication has not been approved by Health Canada for treatment of sex offenders (p.37).

None of the recommendations by the experts or the court include culturally appropriate healing methods. Similarly, in *R v. Toutsaint* (2014, p.33) the experts recommended "high intensity Anger Management and Violent Prevention Programming, continued access to anti-depressants […], trauma therapy, drug therapy […] and substance abuse treatment". None of the recommendations by the psych experts included Indigenous-specific programming and one of the witnesses explained that core CSC programming needs to be completed before individuals can access specialized programming, such as Indigenous-focused programs (*R v. Toutsaint*, 2014, p.29). The latter assertion shows a preference for core CSC programs over those that are meant to be Indigenous-focused. These findings continue to demonstrate how the experts in Dangerous Offender designation hearings place the focus on traditional correction tools, such as risk assessments and programming, that do not consider the specific needs and circumstances of Indigenous people. The lack of consideration for Indigenous programming is another aspect of the Dangerous Offender designation process that erases the impacts of settler colonialism and the importance of Indigenous experiences in the lives of the individuals in the case law reports.

Some cases discredit the value of Indigenous programs. This approach is particularly evident in *R v. Dunlop* (2018) where it is frequently repeated that there is no "data which would suggest that aboriginal programming, treatment and therapy have led to any success in reducing the violent reoffending risk of individuals" (p.23). The judge accepted this opinion even though the writer of the Gladue report stated that "the programs that appear most effective for Mr. Dunlop are programs that employ aboriginal culture and spiritual teachings" (*R v. Dunlop*, 2018, p.35) and made several recommendations of programs available in the community. The Gladue report writer and two other witnesses specialized in different types of Indigenous-focused programs provided the judge with options for Dunlop. The judge discredited all their testimonies in favour of

individuals who were either psych experts or employed by CSC because there was no statistical data indicating that the Indigenous programs were effective for violent offenders (*R v. Dunlop*, 2018, p.34-40). For example, regarding the author of the Gladue report, the judge stated that they were "unwilling to place any weight on her suggestions or recommendations" because there was no verifiable evidence or data that the methods suggested were effective (*R v. Dunlop*, 2018, p.36-37). Similarly, the judge rejected the suggestions of an individual Dunlop had previously worked with stating that "the court was offered no statistical data on the success rate of aboriginal programming or treatment on violent repeat offenders" (*R v. Dunlop*, 2018, p.37). As such, the judge applied a positivistic discourse and way of thinking despite being presented with several other options. Additionally, this is an example of the discursive strategy where the knowledge of marginalized groups is discredited or omitted thereby creating a form of erasure of the voices of Indigenous people (Tuck & Yang, 2012, p.22; van Dijk, 2011, p.249). Again, this further marginalizes Indigenous knowledge and culture in the designation process and the expertise and experience of Indigenous people in the criminal justice system by dismissing programs that are meant to address these unique experiences.

Whether Indigenous programs are simply absent from the case law reports or discredited, when core CSC programming or Indigenous focused programs were found to be ineffective in reaching the needs of the individual, the individual is labelled as treatment-resistant or untreated. For example, Toutsaint opted to spend more time in segregation because that is where he felt safer but in doing so, he did not have access to programming (*R v. Toutsaint*, 2014, p.27). As such, Toutsaint is described as "essentially unmotivated, spends most of his time sleeping or watching tv in his cell" (*R v. Toutsaint*, 2014, p.29). Despite Kerr having spent time in several psychiatric facilities, mental health programs, and core CSC programming, one of the experts in the case law

report indicates that Kerr has an "almost entirely untreated personality disorder […] He has shown little insight into his problems. He has deflected responsibility […]" (*R v. Kerr*, 2019, p.39). In *R v. Cragg* (2018, p.83) one of the psych experts states that "many factors contribute to treatability, but perhaps the most important factor is motivation". However, in most cases, the individual's motivation is only commended when it is pertaining to core CSC programming or psychological and psychiatric treatment, not when it is for Indigenous centered healing methods (see *R v. Bird*, 2014, p.9; *R v. Cragg*, 2018, p.93; *R v. Toutsaint*, 2014, p.32). Again, the discourse surrounding CSC programming construct the inefficacies of the programs as solely individual shortcomings and erases institutional problems which contributes to using the designation as a public safety measure. This corresponds to the discursive strategy van Dijk (1993, p.263) calls rhetorical figure. The language used in the examples provided above is also an example of argumentation, a discursive tool where perceived "facts" are used to create negative representations of an individual or group (van Dijk, 1993, p.264). These discourses also ignore findings that Indigenous people feel the pains of imprisonment more than others and are less likely to be rehabilitated through incarceration because of it, and because it employs culturally inappropriate methods of rehabilitation (Thompson, 2016, p. 74; *R v. Gladue*, 1999). This impacts the application of the designation because, without programming that can adequately address the risk of the individual, the judge is likely to determine that the individual will continue to be a threat to public safety thereby justifying the application of the designation.

Conclusion

In sum, the findings pertaining to the types of psychiatric diagnoses imposed on the individuals in the case law reports demonstrates that the Dangerous Offender designation targets individuals whose struggles are pathologized. Indeed, the findings showed that substance abuse

and antisocial personality disorder are the two most common diagnoses applied in the case law reports analysed. Both substance abuse and antisocial personality disorder were found to have ties to broader issues that the individuals in the case law reports faced in relation to settler colonialism. In addition to providing diagnoses, psych experts use risk assessment tools to evaluate the likelihood of reoffending. The above findings support the literature stating that risk assessment tools contribute to disproportionately labelling Indigenous people as dangerous (Harrison, 2010, p.429; Milward, 2014, p.621; Neve & Pate, 2005, p.33; Thompson, 2016, p.63-68). Most of the case law reports did not consider the impacts of using risk assessment tools on Indigenous people and those that did, often rejected the idea that the tools were less accurate when used on Indigenous people. In contrast, the negative instances where the courts did consider the impacts of settler colonialism to evaluate the use of risk assessment tools on Indigenous people provide examples of how such an analysis can change the outcome of Dangerous Offender designation hearings. Psychiatric diagnoses and risk assessment tools individualize Indigenous struggles and translate them into risk factors that justify the application of the designation. Additionally, the lack of consideration for programming or other ways forward that are designed to address the specific needs of Indigenous people contributes to keep the individuals in the case law reports in a perpetual state of "riskiness" which legitimates the use of the designation. Indeed, when mainstream CSC programming is not effective for Indigenous people, they are labelled as "unmanageable" and "untreatable". As such, these findings demonstrate that, while discussions of settler colonialism are often present in the case law reports, these considerations are often dismissed as irrelevant or subsumed under something more important, such as the concept of risk.

Chapter 6 – Conclusion

This thesis applied a critical discourse analysis guided by settler colonial theory to 15 case law reports pertaining to Dangerous Offender designation hearings. This research also traced the history of the Dangerous Offender designation to highlight its discursive character and better situate the version of the designation that exists today. More specifically, the goal of this project was to gain an understanding of why Indigenous people are disproportionately targeted by the designation. The analysis found that Indigenous people are targeted by the Dangerous Offender designation primarily because the impacts of settler colonialism are erased throughout the case law reports. The erasure of settler colonialism does not always mean that colonialism was not considered at all by the courts. In many cases, settler colonialism is discussed, but it is subsumed by other considerations, primarily risk and public safety. The emphasis on risk in the case law reports pathologizes and individualizes Indigenous struggles in a way that justifies the use of the designation.

The research findings indicate that the 2008 changes to the designation which removed judicial discretion at the designation stage (Tackling Violent Crime Act, SC 2008, c 6) made it difficult for the courts to consider the impacts of settler colonialism when making their decision. Indeed, the findings also demonstrated that the idea of public safety overshadowed the Gladue principles which were mainly taken into consideration at the sentencing stage. As such, while ensuring public safety is important, the juridical framework prevented the courts from considering alternatives to incarceration that may protect public safety while recognizing the unique circumstances of the Indigenous people in the case law reports. It is noteworthy that detaining Indigenous individuals as Dangerous Offenders is more costly long-term than it would be to invest in adequate social and health services (Milward, 2014, p. 634).

The juridical framework's emphasis on risk permeated throughout the case law reports and framed how the social locations of the individuals were understood. In the section discussing the social locations of the individuals in the case law reports (i.e., Indigeneity, geographies, family relations, education, employment, and gender) many aspects of the lives of the individuals were constructed as risk factors. For example, family dislocation was a prevalent theme in every case law report analysed. The absence of strong family bonds was considered as a risk factor that justified the application of the designation because the individuals were thought to have no positive role models or support to help them reduce their risk of reoffending. The focus on risk overshadows how settler colonialism is responsible for family dislocation of Indigenous communities (Truth & Reconciliation Commission of Canada, 2015). Indeed, many of the case law reports make links to settler colonialism when discussing the personal backgrounds of the individuals. However, in the decision-making process, the links to settler colonialism are either not included in the analysis or they are shaped by a risk discourse that justifies the application of the designation. This is significant because settler colonialism is everywhere and nowhere in the case law reports which comes back to the idea that settler colonialism is constantly overshadowed by considerations for public safety and risk.

The risk of the individuals is measured by psych experts through risk assessment tools. Academic literature and a few of the case law reports indicate that risk assessment tools are less effective on Indigenous people and contribute to disproportionately labelling them as a dangerous (Harrison, 2010, p.429; Milward, 2014, p.621; Neve & Pate, 2005, p.33; Thompson, 2016, p.63-68). Despite the concerns raised about risk assessment tools, they are still widely used to justify the application of the designation. Additionally, in several of the case law reports analysed, the experts dismissed questions about the effectiveness of risk assessment tools stating that Indigeneity

and settler colonialism did not fundamentally alter the assessment. These findings are significant because of how heavily the courts rely on these experts to make judicial decisions. The findings in the final section of this chapter also indicate that the most common diagnoses in the case law reports, polysubstance abuse and antisocial personality disorder, can often be linked or secondary to broader social stressors such as settler colonialism. However, the psych experts do not have an awareness of settler colonialism that would bring to light such links in their assessments. The impact of settler colonialism on the Indigenous people in the case law reports is also ignored in the type of programming that is recommended. In many cases, the psych experts and the courts favored mainstream CSC programming over Indigenous focused programming. When the programs were not seen as successful in reducing the level of risk of the individuals, they were constructed as unmanageable, untreatable, unmotivated, or unsalvageable risks to society which justified the use of the Dangerous Offender designation.

The five cases in which the designation was not applied provide additional proof that a decision-making process that considers the impacts of settler colonialism could change the outcome of the hearings, so long as it remains framed with a risk discourse that emphasises public safety. Indeed, *R c. Kritik* (2020), *R v. R.R.* (2020), *R v. Keenatch* (2019), *R v. States* (2017), and *R v. Cragg* (2018) placed more focus on how Indigenous programming could reduce risk and the importance of adequate psych and risk assessments that take into consideration the unique circumstances of Indigenous people caused by settler colonialism. It is worth noting that the five cases in which the designation was not applied occurred within the last four years which may indicate that a shift is occurring and that courts are applying an analysis of the impacts of settler colonialism in their decisions.

In sum, these findings demonstrate how the Dangerous Offender designation is designed in a way that overshadows settler colonialism with discourses of risk and public safety. As a result, the courts are not offered alternatives to the Dangerous Offender designation that would address the unique needs of Indigenous people. Because their needs are not being met, they are perpetually labelled as risky, untreated, unmanageable threats to public safety which in turn justifies the application of the designation. The findings in this research project indicate that many Indigenous people who received the Dangerous Offender designation are not, in fact, unredeemable. Instead, their unique circumstances, needs, and versions of justice are not being considered which means they are not always being given a fair chance to be better.

Implications of the research findings

Given the problematic nature of the Dangerous Offender designation in Canada to target specific populations over the course of many years, this research project suggests that the designation should be eliminated. The literature review for this research indicates that the designation has been criticized and questioned for various reasons throughout its history. For instance, previous versions of the designation have been criticized for targeting gay men because of narrow social standards (Chenier, 2003, p.79-82), having constitutional inconsistencies (Brode, 2008, p. 120), targeting individuals that are not dangerous (Ouimet, 1969, p.241-242). To these critiques, my research shows how contemporary applications of the Dangerous Offender designation are tied to settler colonial logics and claim to ensure an ideal of public safety that disadvantages Indigenous people. The research findings summarized in this final chapter demonstrate the various ways the designation labels Indigenous people as dangerous and then incarcerating them for an indeterminate amount of time.

Eliminating the Dangerous Offender designation also means eliminating indeterminate detention in Canada. Doing so may also help reduce the overrepresentation of Indigenous people in Canadian prisons as individuals are more likely to get out and stay out of prison. As previously mentioned, indeterminate detention is extremely costly and the funding saved by eliminating the designation could be redirected towards prioritizing community-based solutions that could help Indigenous people stay out of the criminal justice system. Lastly and perhaps most importantly, eliminating the Dangerous Offender designation removes one way that Indigenous people are dispossessed from their lands, families, and communities through incarceration. As such, not only does this theory broaden the application of settler colonial theory, it also sheds light on one of the ways that Indigenous people are overrepresented in the Canadian criminal justice system and provides support and evidence for removing the Dangerous Offender designation to partially address the high rates of Indigenous incarceration for decades in Canada.

Future Research

As mentioned early in the thesis, there is scarce research on the application of the Dangerous Offender designation on Indigenous people. This is the first research to integrate a settler colonial analysis of the topic. As such, there are several avenues for future research to be conducted, some of which have already been identified throughout my research. For instance, one of the shortcomings of the research is that is does not provide a comparative analysis between the application of the designation on Indigenous people and on non-Indigenous people. A research project that focuses on a said comparison could provide further information on the ways the Dangerous Offender designation targets Indigenous people through settler colonial discourse and practices. As previously mentioned, a spatial analysis of the application of the designation throughout Canada may indicate how the courts in different geographic locations apply the

designation and how the different applications influence whether Indigenous people are disproportionately targeted or not. Additionally, a temporal analysis may identify whether recent scrutiny facing ongoing colonialism in Canada has had an impact on the number of Indigenous people receiving the designation. Additional research should also look into the use of indeterminate sentencing in Canada, a practice that has been described as draconian (*R v. States*, 2017, p.67) and equated to throwing people away like garbage (*R v. Shanoss*, 2013, p.50).

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Appendix A – Dangerous Offender Designation Statistics

Table E3: The number of dangerous offender designations

Province/Territory of Designation	All Designations (Designated Since 1978)	Active Dangerous Offenders		
		# of Indeterminate Offenders	# of Determinate Offenders	Total
Newfoundland & Labrador	14	8	1	9
Nova Scotia	25	16	2	18
Prince Edward Island	0	0	0	0
New Brunswick	8	4	0	4
Quebec	126	92	22	114
Ontario	411	271	81	352
Manitoba	29	25	2	27
Saskatchewan	104	58	36	94
Alberta	65	52	3	55
British Columbia	165	116	18	134
Yukon Territories	6	1	4	5
Northwest Territories	11	11	0	11
Nunavut	3	1	2	3
Total	**967**	**655**	**171**	**826**

Source: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2019/index-en.aspx#e3

Appendix B – Data Selection

Case Title	Year of Decision	DO Applied	Setence	Designated Offence	Indigenous Identity	Location	Gender Identity	Length of Case Law Report
R v. Dunlop	2018	YES	Indeterminate	entering a dwelling house with intent to commit an indictable offence robbery aggravated assault	Indigenous (unspecified)	ON	Man	65
R v. Toutsaint	2014	YES	Determinate	Robbery assault of a peace officer Uttering threats	Dene, Black Lake First Nation	SK	Man	60
R v. Kerr	2019	YES	Indeterminate	2 counts of counselling murder one count of obstruction of justice	Indigenous (unspecified)	ON	Man	40
R v. Kritik	2020	NO	Determinate	Sexual assault	Inuk	QC	Man	17
R c. Mequish	2016	YES	Determinate	Robbery	Atikamekw, Opitciwan	QC	Woman	18
R v. Christensen	2020	YES	Indeterminate	sexual assaults uttering threats to cause death or bodily harm	Metis	BC	Man	63
R v. Bird	2014	YES	Determinate	Sexual assault breach of conditions	Indigenous (unspecified)	SK	Man (Non-binary)	26
R v. Keenatch	2019	NO	Determinate	Assault causing bodily harm	Cree, Big River First Nation	SK	Man	43
R v. Cragg (Naveah North)	2018	NO	Determinate	Arson attempted murder Assault	Carrier First Nation	BC	Trans Woman	114
R v. Jennings	2014	YES	Indeterminate	Sexually assaulting sexually touching a minor	Cree	BC	Man	40
R v. Shanoss	2013	YES	Indeterminate	Sexual assault	Frog Clan, Gitxsan Nation	BC	Man	68
R v. States	2017	NO	Determinate	aggravated assault assault with a weapon possession of a weapon for a purpose dangerous to the public peace failure to comply with the terms of probation	Mi'kmaq	ON	Man	94
R v. Tom	2017	YES	Indeterminate	unlawful confinement assault with a weapon assault causing bodily harm possession of a weapon for purpose dangerous to the public uttering threats to cause death or bodily harm	st'at'imc First Nation	BC	Man	70
R v. R.R	2020	NO	Determinate	Two counts of sexual assault touching for a sexual purpose	Anishinawbe	ON	Man	60
R v. Fontaine	2014	YES	Determinate	Sexual assault	Clearwater River Dene Nation	SK	Man	40
							Total page count:	**818**
							Average page count:	**54.53**

Appendix C – Metacoding Table[13]

Case Law Reports	Gladue Principles	Indigenous Knowledge/ Justice	Access to Rehabilitative Programming	Questioning Indigeneity	Lifelong Institutionalization	Problematization of Risk Assessment Tools	Psychiatric and psychological assessments	Land and Community Dispossession
R v. Kerr	X	X		X	X	X	X	
R v. States	X	X		X	X	X	X	
R v. Keenatch	X	X	X		X		X	
R v. Christensen	X	X			X		X	
R v. Jennings	X				X		X	
R v. Bird	X	X	X		X		X	
R v. Dunlop	X	X		X	X	X	X	
R v. Tom	X	X		X	X		X	X
R v. Cragg	X	X	X		X		X	
R v. Fontaine	X		X		X		X	X
R v. Mequish	X				X		X	X
R v. Shanoss	X	X	X		X	X	X	X
R v. Kritik	X	X	X			X	X	
R v. Toutsaint	X	X	X				X	X
R v. R.R.	X	X	X		X	X	X	X

[13] The red Xs in the columns for "Gladue Principles" and "Indigenous Programming" indicate the case law reports in which these factors were undervalued or discredited, whereas the green Xs indicate that case law reports in which they were attributed significant importance.