

# Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties

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S A R A H R U N Y O N \*

**A**n offender, who we will refer to as N.J., stood in front of the court plagued by all of those features set out in the landmark ruling of *R v Ipeelee*. His Indigenous community was one marked by fragmentation and re-location. As a child in foster care, he suffered physical and sexual abuse, prompting a life on the street. His daily struggle as a homeless teenager prevented him from completing high school. To cope with the anxiety of a street-entrenched lifestyle, he turned to illicit substances and soon found himself in the active throes of a heroin addiction. He started to steal in order to feed that addiction. His sentences resulted in robust probation orders. As an offender diagnosed with fetal alcohol spectrum disorder and a range of neurocognitive ailments, the conditions of his order required the following: that he report to an assigned probation officer at a specific time each week; stop using the opioids he was addicted to; remain inside a residence he didn't have between 10:00 p.m. and 6:00 a.m.; and not attend in the downtown core of his community. Within one week's time, N.J. missed his probation appointment. With no access to resources that would allow him to safely withdraw from his addiction, he continued to use. He was back before the court – this time inside the prisoner's box. The sentence for breaching his conditions of probation was a short period of custody, followed by the imposition of yet another probation order – now of a longer duration. Fast forward three years later and N.J. has amassed a criminal record consisting of three substantive offences of theft and 26 breaches of administrative court orders. Each breach resulted in a longer period of incarceration. N.J. is the epitome of the revolving door of despair created by the irresponsible and unthinking imposition of administrative court orders. N.J.'s case is far from unique.

In 2015, the Canadian Department of Justice (the Department) recognized that offences against the administration of justice are “a substantial and growing proportion of the caseloads of police, prosecution, youth courts, and custodial facilities.”<sup>1</sup> The Department also acknowledged that “there is almost no published Canadian research on the processes generating these remarkable numbers” nor is there any research identifying the prevailing causes of the disproportionately high number of Indigenous peoples incurring these offences.<sup>2</sup> In a recent report authored by the Canadian Civil Liberties Association (the “CCLA Report”), breaches of court orders overwhelmingly account for police reported crime.<sup>3</sup> Despite the ubiquitous nature of these offences, they have long been regarded as a correctional afterthought.

The Department defines offences against the administration of justice, colloquially referred to as breach offences, as rarely involving harm to a victim, not involving “behaviour that is popularly considered “criminal”[,],... and committed only after another offence has already been committed, or alleged.”<sup>4</sup> The Department recognizes that these offences are “particularly at risk of contributing to the ‘revolving door’ syndrome.”<sup>5</sup> The lack of attention given to the study of administrative offences is at odds with the Canadian government’s efforts over the past two decades to reduce the rates of traditional incarceration in the Indigenous population. Counter-intuitively, while the crisis of Indigenous over-incarceration in Canada is a well-documented feature of its criminal justice system, the ways in which

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<sup>1</sup> Canada, Department of Justice, *Police Discretion with Young Offenders* (Ottawa: DOJ, 2015), online <[www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/descript/discretion.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/descript/discretion.html)> [perma.cc/D878-QpKK] [DOJ, *Police Discretion*] [footnotes omitted].

<sup>2</sup> *Ibid.*

<sup>3</sup> Abby Deshman & Nicole Myers, “Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention” (2014) at 1, 7, 65, 83, online (pdf): *Canadian Civil Liberties Association and Education Trust* <[ccla.org/cclanewsitewp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf](http://ccla.org/cclanewsitewp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf)> [perma.cc/6RUS-5E3J].

<sup>4</sup> DOJ, *Police Discretion*, *supra* note 1.

<sup>5</sup> *Ibid.*

administrative offences reflect and perpetuate the criminalization of these marginalized populations remain largely unexplored.

I aim to address this scholarly gap by responding directly to the Department's request for reflection about the prevailing causes of breach-related crime among the Indigenous populations. Experiential evidence suggests that those offenders living in poverty – usually homeless or transient, addicted, and suffering from cognitive impairment – are the same offenders subject to court ordered curfew conditions, drug and alcohol abstention clauses, geographic restrictions, and demanding reporting requirements. Statistical evidence confirms the aforementioned traits are endemic to Indigenous offenders in Canada.<sup>6</sup> The goal of reducing Indigenous over-incarceration by employing non-custodial measures is thwarted as these segments of the population become further marginalized, both socially and economically, through the criminal prosecution of their administrative offences. I argue that efforts to reduce over-incarceration will fall short if the justice system and its participants continue to ignore the devastating impact that administrative court orders have on the accused.

As a caveat, I do not aim to provide the answer to over-incarceration in Canada, but I hope to encourage focused attention on the correlation between the imposition of an administrative court order and Indigenous recidivism. My objective is to encourage dialogue about how community-based dispositions can be better deployed, by whom, and for what purpose, in the hopes of moving us one step closer to fulfilling promise espoused in the landmark cases of *R v Gladue*<sup>7</sup> and *R v Ipeelee*.<sup>8</sup>

This paper is organized into three parts. In Part I of this article, I review the statistics that document (i) the proliferation of breach-related offences in Canada and (ii) rates of Indigenous recidivism. While focused attention exists on each of these problems in isolation, the published empirical research that specifically explores the correlation between breach-related offences and Indigenous over-incarceration is thin. In Part II, I situate these

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<sup>6</sup> See e.g. Darcie Bennett & DJ Larkin, "Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia" (2019), online (pdf): *Pivot Legal Society* <d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/3297/attachments/original/1/project-inclusion-digital.pdf> [perma.cc/LDA9-KU78]. See also Canada, Department of Justice, *Administration of Justice Offences Among Aboriginal People: Court Officials' Perspective*, by Mylène Magrinelli Orsi & Sébastien April (Ottawa, DOJ: 2013) [Orsi & April, *Courts Officials' Perspective*]; Deshman & Myers, *supra* note 3.

<sup>7</sup> [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

<sup>8</sup> 2012 SCC 13 [*Ipeelee*].

statistics (and lack thereof) in the context of critical race theory in order to demonstrate the ways in which administrative court orders can serve to create and perpetuate a form of social hierarchy that justifies continued discrimination and oppression. I argue that the social ordering effect of the administrative court order on the Indigenous accused is reminiscent of the colonial policies that perpetuated racism by condemning an entire class as immoral, inferior, and not deserving of society's tolerance and protection. The second half of this section transitions its focus to revisit the foundational cases of *Gladue* and *Ipeelee*. These decisions are often celebrated for their acknowledgment that “overincarceration and systemic discrimination requires not only innovative uses of community sanctions, but a recognition that the traditional purposes of sentencing frequently do not work and can aggravate disadvantages suffered by... [Indigenous] offenders.”<sup>9</sup>

Part III of this article addresses sentencing judges' responses to *Gladue*'s direction, which often manifests in the form of a community-based disposition administered through a court order. I argue that rather than ameliorating the crisis of over-incarceration, the imposition of a community-based disposition, which relies on an administrative court order as its enforcement mechanism, serves to exacerbate the problem. Using practical examples of commonly imposed conditions, I demonstrate that despite the Supreme Court's dogged efforts toward a restorative justice approach, the criminal justice system's treatment of Indigenous offenders has arrived where it began.

## I. THE PROLIFERATION OF BREACH OFFENCES AND RATES OF RECIDIVISM FOR INDIGENOUS PEOPLES

### A. A Note on Terminology

Before going further, it is important to have a general understanding of what is meant by “administrative court order” or “breach offence”, as well as the legal principles that animate their application. This article focuses on three of the most common administrative court orders: probation orders,

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<sup>9</sup> Kent Roach and Jonathan Rudin “*Gladue*: The Judicial and Political Reception of a Promising Decision” (2000) 42:3 Can J Crim 355 at 359; *R v Itturiliq*, 2018 NUCJ 3177 at paras 17-18; Benjamin Berger, “Sentencing and the Salience of Pain and Hope” (2015) 70 SCLR (2d) 337.

conditional sentence orders, and bail orders.<sup>10</sup> While each order differs in its legislative framework, all rely on preventive discourses to establish their validity.

### 1. Probation Orders

Probation orders are a form of sentence that can be imposed only in circumstances described in section 731 of the *Criminal Code*:

731 (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

(a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or

(b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

(2) A court may also make a probation order where it discharges an accused under subsection 730(1).<sup>11</sup>

Traditionally, probation has “been viewed as a rehabilitative sentencing tool.”<sup>12</sup> As explained by the Court in *R v Shoker*:

The probationer remains free to live in the community but certain restraints on his freedom are imposed for the purpose of facilitating his rehabilitation and protecting society. An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an offence under s. 733.1 punishable by up to two years' imprisonment.<sup>13</sup>

All probation orders must contain at a minimum three conditions as prescribed under s. 732.1(2): (a) keep the peace and be of good behaviour; (b) appear before the court when required to do so by the court; and (c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.<sup>14</sup>

<sup>10</sup> See generally Statistics Canada, *Trends in Offences Against the Administration of Justice*, by Marta Burczycka & Christopher Munch, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015), online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/1433-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/1433-eng.htm)> [perma.cc/26WD-F95U] [Burczycka & Munch, *Administration of Justice*]; Dushman & Myers, *supra* note 3; Bennett & Larkin, *supra* note 6.

<sup>11</sup> *Criminal Code*, RSC 1985, c C-46, s 731(1)-(2) [*Criminal Code*].

<sup>12</sup> *R v Proulx*, 2000 SCC 5 at paras 32 [Proulx].

<sup>13</sup> 2006 SCC 44 at para 10 [Shoker].

<sup>14</sup> *Ibid* at para 11.

Pursuant to subsection 732.1(3) of the *Criminal Code*, additional optional conditions may be imposed.<sup>15</sup> In *Shoker*,<sup>16</sup> the Supreme Court also discussed this power to impose optional conditions:

The residual power under s. 732.1(3)(h) speaks of "other reasonable conditions" imposed "for protecting society and for facilitating the offender's successful reintegration into the community". Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community.<sup>17</sup>

The "residual power to craft individualized conditions" is characterized by the Court as "very broad."<sup>18</sup> It is common for bail and probation orders to contain abstention clauses, curfew conditions, reporting requirements, residency constraints, geographical restraints, and various no-contact orders which tend to apply to a complainant, victim, witness, or co-accused.<sup>19</sup>

## 2. *Conditional Sentence Orders*

With the advent of section 742.1, Parliament has mandated that certain offenders, who would otherwise complete a custodial term, will serve their sentences in the community.<sup>20</sup> As explained by the Court in *Proulx*, "[s]ection 742.1 makes a conditional sentence available to a subclass of non-dangerous offenders who, prior to the introduction of this new regime, would have been sentenced to a term of incarceration of less than two years for offences with no minimum term of imprisonment."<sup>21</sup>

As described by the Supreme Court in *Proulx* "offenders who meet the criteria of s. 742.1 will serve a sentence under strict surveillance in the community instead of going to prison. These offenders' liberty will be constrained by conditions to be attached to the sentence, as set out in s.

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<sup>15</sup> *Ibid* at para 12; *Criminal Code*, *supra* note 11, s 732.1(3).

<sup>16</sup> *Shoker*, *supra* note 13.

<sup>17</sup> *Ibid* at para 13 [footnotes omitted].

<sup>18</sup> *Ibid* at para 14.

<sup>19</sup> See generally Bennett & Larkin, *supra* note 6.

<sup>20</sup> *Proulx*, *supra* note 12 at para 12.

<sup>21</sup> *Ibid* [emphasis added].

742.3 of the [*Criminal Code*].”<sup>22</sup> If an offender breaches a condition, they are brought back before a judge, pursuant to section 742.6:<sup>23</sup>

If an offender cannot provide a reasonable excuse for breaching the conditions of his or her sentence, the judge may order him or her to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence.<sup>24</sup>

Indeed, if an offender, without a reasonable excuse, breaches a condition set by the judge, there is a presumption that the offender should serve the remainder of their sentence in jail.<sup>25</sup> This constant threat of incarceration “help[s] to ensure that the offender complies with the conditions imposed.”<sup>26</sup>

Conditional sentence orders have been construed as more punitive than a probation order, notwithstanding the similarities between the two sanctions in respect of their rehabilitative purposes.<sup>27</sup> Conditions such as house arrest or strict curfews are intended to be the norm, rather than the exception.<sup>28</sup>

The conditional sentence order was envisioned as being more effective than incarceration at achieving the restorative objectives of rehabilitation, “reparations to the victim and community, and the promotion of a sense of responsibility in the offender.”<sup>29</sup>

### 3. *Bail Orders*

With few exceptions, the *Criminal Code* requires that the accused be released from detention before trial on bail.<sup>30</sup> Although release is generally the default position, the court may deny the release of an accused or impose conditions on the accused when they are released, if the prosecution justifies the detention or the conditions.<sup>31</sup>

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<sup>22</sup> *Ibid* at para 21.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at para 39.

<sup>26</sup> *Ibid* [footnotes omitted].

<sup>27</sup> *Ibid* at paras 28–29.

<sup>28</sup> *Ibid* at para 36.

<sup>29</sup> *Ibid* at para 18.

<sup>30</sup> *R v Antic*, 2017 SCC 27 at para 21.

<sup>31</sup> *Ibid*.

The CCLA report<sup>32</sup> reveals that if an accused is released on bail, restrictive conditions are often imposed. Common conditions include curfews; reporting to police or bail supervision workers; movement restrictions and geographical boundaries; no-contact orders; drug or alcohol abstinence orders; medical or addictions treatment orders; bans on cell phones, computers or internet use; and house arrest.<sup>33</sup> Violating any condition of a bail order is a criminal offence.

All of these orders have two things in common. First, they ostensibly aim to prevent crime. By confining people to certain areas, certain residences, certain behavior, criminals (alleged or proven) are thought to be prevented from misbehaving. Second, the imposition of these behavioral conditions fails to acknowledge the realities and complexities of the lives of people experiencing poverty, addiction, mental illness, and lack of education and community support.

Studies,<sup>34</sup> private and public research reports<sup>35</sup>, scholarly works<sup>36</sup>, and jurisprudence<sup>37</sup> have concluded that these are precisely the factors faced by

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<sup>32</sup> Dushman & Myers, *supra* note 3.

<sup>33</sup> *Ibid* at 8.

<sup>34</sup> For the most recent example, see Canada, Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: Research and Statistics Division, 2017), online: <[www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf](http://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf)> [perma.cc/V8C2-P4AQ].

<sup>35</sup> See e.g. Canada, Department of Justice, *Representation of Aboriginal People in the Canadian Criminal Justice System*, by Karen Beattie, Valerie Boudreau & Meneka Raguparan (Ottawa: Research and Statistics Division, 2014), online: <[publications.gc.ca/collection/s/collection\\_2018/jus/-eng.pdf](http://publications.gc.ca/collection/s/collection_2018/jus/-eng.pdf)> [perma.cc/HL5V-EEF8] [Beattie, Boudreau & Raguparan, *Representation of Aboriginal People*]; Canada, Aboriginal Justice Implementation Commission, *Final Report* (Winnipeg, MB: AJIC, 29 June 2001) (Paul L. A. H. Chartrand & Wendy Whitecloud), online: <[www.ajic.mb.ca/reports/final\\_toc.html](http://www.ajic.mb.ca/reports/final_toc.html)> [perma.cc/WD9H-R55Z]; Statistics Canada, *The Incarceration of Aboriginal People in Adult Correctional Services*, by Samuel Perreault, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2009), online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2009003/article/10903-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2009003/article/10903-eng.htm)> [perma.cc/RRQ5-GBR3].

<sup>36</sup> See e.g. David Milward, "Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons" (2014) 51:3 *Alta L Rev* 619 at 658; David Milward & Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 *Man LJ* 84 at 110; David Milward, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47:3 *UBC L Rev* 1057 at 1083; Jane B Sprott & Nicole M Myers, "Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 *Can J Corr* 404.

<sup>37</sup> See e.g. *Gladue*, *supra* note 7; *Ipeelee*, *supra* note 8.

the majority of Indigenous offenders.<sup>38</sup> The ethical imperative of finding better ways to administer the laws relating to bail, probation, and conditional sentence orders in an effort to reduce Indigenous over-incarceration attains strong footing when one looks to the proliferation of administrative offending.

## B. Proliferation of Administrative Offending

Only a few civil rights groups and legal scholars have started to document the rise of charge and conviction rates for breaching administrative court orders.<sup>39</sup> The CCLA report persuasively demonstrates that saddling those released on bail with unrealistic conditions increases the chance of breach, re-arrest, and pre-trial detention, especially considering that alleged breaches are themselves reverse onus offences.<sup>40</sup> The statistics relating to the proliferation of breaches offences are staggering.<sup>41</sup>

The number of charges of failing to comply with a bail order increased by 27% between 2006 and 2012.<sup>42</sup> All of Canada's provinces and territories revealed an overall increase in the rate of charges for this offence, ranging from 169 charges per 100,000 residents in British Columbia to 1099 charges per 100,000 in the Yukon.<sup>43</sup> The report also shows that in 2012, property offences and other non-violent *Criminal Code* offences, including administrative offences, accounted for 79% of police-reported crime.<sup>44</sup> Across Canada, "an administration of justice charge was the most serious

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<sup>38</sup> See also Suzanne Bouclin, "Identifying Pathways to and Experiences of Street Involvement Through Case Law" (2015) 38:2 Dal LJ 345 which explores longitudinal research indicating that Indigenous peoples constitute between 20% and 50% of the urban street-involved population; over half of Indigenous peoples on reserve live in sub-standard housing; Indigenous peoples are at greater risk of socio-economic marginalization and housing inadequacies off-reserve; Indigenous peoples have lower levels of formal, accredited education, higher unemployment rates, and lower individual and family incomes.

<sup>39</sup> See generally Deshman & Myers, *supra* note 3; Bennett & Larkin, *supra* note 6; Sprott & Myers, *supra* note 36.

<sup>40</sup> See generally Deshman & Myers, *supra* note 3.

<sup>41</sup> *Ibid.*

<sup>42</sup> Legal Aid Ontario, *A Legal Aid Strategy for Bail* (Report) (Toronto, ON: Legal Aid Ontario, last visited 2 July 2020), online: <[www.legalaid.on.ca/more/corporate/reports/a-legal-aid-strategy-for-bail/#section1](http://www.legalaid.on.ca/more/corporate/reports/a-legal-aid-strategy-for-bail/#section1)> [perma.cc/FZJ7-XHA4].

<sup>43</sup> Deshman & Myers, *supra* note 3 at 64.

<sup>44</sup> *Ibid* at 1.

charge in over 20% of the criminal and federal cases completed; about half of these cases stemmed from violations of bail conditions.”<sup>45</sup>

In 2019, British Columbia’s Pivot Legal Society published “Project Inclusion,” aimed at confronting Anti-Homeless and Anti-User Stigma in British Columbia.<sup>46</sup> The Report also documents the remarkable rise of administrative offending. Pivot’s numbers reveal that between 2001–2012, “charges for failure to comply with a court order (often breaching a bail condition) increased by” roughly 58%.<sup>47</sup> In British Columbia, charges for breach of probation conditions now represent over 40% of all criminal cases.<sup>48</sup> In provinces such as Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario, and Saskatchewan more than 25% of remand cases were attributable to an administration of justice offence.<sup>49</sup>

A 2014 report published by the Canadian Department of Justice, found that “police reported 171,897 incidents of offences against the administration of justice, a rate of 484 incidents per 100,000 population, or about one-tenth of all *Criminal Code* violations (excluding traffic) reported by police.”<sup>50</sup> The same report also noted that “charges were laid against 91% of all persons accused of offences against the administration of justice, compared to 49% of those accused of *Criminal Code* incidents that did not include administration of justice offences (or offences reported by police under the *Youth Criminal Justice Act*).”<sup>51</sup>

While this type of offence accounts for one out of ten criminal incidents that are reported by the police, “administration of justice charges are involved in over one-third of completed adult criminal court cases.”<sup>52</sup> In Canada, in 2013/2014, 39% of adult criminal court cases included at least one administrative offence.<sup>53</sup>

Breaching court orders appears to be linked with a probability of reoffending. A study conducted in Saskatchewan revealed that 50% of offenders found guilty of breaching a court order returned to correctional

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<sup>45</sup> *Ibid* at 2 [footnotes omitted].

<sup>46</sup> Bennett & Larkin, *supra* note 6.

<sup>47</sup> *Ibid* at 75 [footnotes omitted].

<sup>48</sup> *Ibid*.

<sup>49</sup> Orsi & April, *Court Officials’ Perspective*, *supra* note 6 at 2.

<sup>50</sup> Burczykca & Munch, *Administration of Justice*, *supra* note 10 at 6.

<sup>51</sup> *Ibid* at 10.

<sup>52</sup> *Ibid* at 12.

<sup>53</sup> *Ibid*.

services in the four years following their release.<sup>54</sup> The provincial breakdown of breach related recidivism is important. The highest provincial rates of administrative offending were reported in Saskatchewan and Manitoba.<sup>55</sup> Some of the lowest rates are reported in Prince Edward Island.<sup>56</sup> Prince Edward Island has the smallest Indigenous population while Saskatchewan and Manitoba have the country's highest.<sup>57</sup>

The 2014 report published by the Canadian Department of Justice also found that:

In 2014, rates of administration of justice offences recorded in the territories were higher than those reported by the provinces. Rates ranged from 2,448 incidents per 100,000 reported by police in the Northwest Territories, to a rate of 1,706 in Nunavut. Since 2004, the Yukon has reported a 73% increase in the rate of this type of crime, while the rate in the Northwest Territories increased by 11%.<sup>58</sup>

In the Yukon, as of 2016, 23.3% of people identified as "Aboriginal."<sup>59</sup> In the Northwest Territories, that number rises to 50.7%.<sup>60</sup> In Nunavut, that number soars to 85.7%.<sup>61</sup> In Manitoba, Yukon, and Saskatchewan, completed adult criminal court cases involving at least one administration of justice charge represented about half of the cases in those provinces in 2013/14.<sup>62</sup> "Conversely, adult criminal courts in Quebec and Prince

<sup>54</sup> Orsi & April, *Court Officials' Perspective*, *supra* note 6 at 2.

<sup>55</sup> Burczycka & Munch, *Administration of Justice*, *supra* note 10 at 9.

<sup>56</sup> *Ibid.*

<sup>57</sup> Statistics Canada, *Table Two: Number and Distribution of the Population Reporting an Aboriginal Identity and Percentage of Aboriginal People in the Population, Canada, Provinces and Territories, 2011* in *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit*, Catalogue No 99-011-X (Ottawa: Statistics Canada, last modified 23 December 2015), online: <[www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm](http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm)> [perma.cc/M2AN-ZWF6] [Statistics Canada, *Distribution of the Population*].

<sup>58</sup> Burczycka & Munch, *Administration of Justice*, *supra* note 10 at 10.

<sup>59</sup> Statistics Canada, *Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Yukon, 2016 Census in Focus on Geography Series, 2016 Census*, Catalogue No 98-404-X2016001 (Ottawa: Statistics Canada, 2017), online: <[www.statcan.gc.ca/eng/star](http://www.statcan.gc.ca/eng/star)> [perma.cc/V7Vp-2X5W].

<sup>60</sup> Statistics Canada, *Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Northwest Territories, 2016 Census in Focus on Geography Series, 2016 Census*, Catalogue No 98-404-X2016001 (Ottawa: Statistics Canada, 2017), online: <[www.statcan.gc.ca/eng/start](http://www.statcan.gc.ca/eng/start)> [perma.cc/E682-TJEP].

<sup>61</sup> Statistics Canada, *Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Nunavut, 2016 Census in Focus on Geography Series, 2016 Census*, Catalogue No 98-404-X2016001 (Ottawa: Statistics Canada, 2017), online: <[www.statcan.gc.ca/eng/star](http://www.statcan.gc.ca/eng/star)> [perma.cc/92LM-X72A].

<sup>62</sup> Burczycka & Munch, *supra* note 10 at 13.

Edward Island reported smaller proportions of cases involving this type of offence” (roughly 30 per cent).<sup>63</sup> Again, Quebec and Prince Edward Island have the lowest number of Indigenous peoples, while Manitoba, Yukon, and Saskatchewan, have some of the country’s highest.<sup>64</sup>

Turning to more micro-level studies, in 2017 researchers from the University of Ottawa, Simon Fraser University and the University of Montreal, found that administrative court orders are widely used against drug users, sex workers and the homeless in the Downtown Eastside of Vancouver, impacting access to vital resources including food, shelter and harm-reduction services.<sup>65</sup> Repeating findings from the City’s 2017 count, the 2018 City of Vancouver’s homelessness services report found that 40% of Vancouver’s homeless population identifies as Indigenous. That compares to just 2.2% of the general population.<sup>66</sup>

The documented rise of administrative offending is no different under the *Youth Criminal Justice Act*. For example, Nicole Myers and Sunny Dhillon found that 12.2% of all youths (Indigenous and non-Indigenous) charged with an offence in 2009 were charged with failing to comply with an administrative court order.<sup>67</sup> Between 2008 and 2009, “24% of all youth admissions to pre-sentence custody across Canada involved an administrative [offence]... as the most significant charge.”<sup>68</sup>

In the last decade, the attention of the public and those agencies involved in the criminal justice system have not focused on the normative implications of these offences, but on the resources and related costs of prosecuting these and other offences.<sup>69</sup> In 2009, the Department of Justice Canada estimated the total annual system costs of these violations to be

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<sup>63</sup> *Ibid.*

<sup>64</sup> Statistics Canada, *Distribution of the Population*, *supra* note 57.

<sup>65</sup> Marie-Eve Sylvestre et al, “Red Zones and Other Spatial Conditions of Release Imposed on Marginalized People in Vancouver” (2017), online (pdf): *Research Gate* <[www.researchgate.net](http://www.researchgate.net)> [perma.cc/AGU2-6Z9X].

<sup>66</sup> “Response to Homelessness” (1 May 2018) at 17, online (pdf): *City of Vancouver Homelessness Services* <[council.vancouver.ca/20180501/documents/rr1presentation.pdf](http://council.vancouver.ca/20180501/documents/rr1presentation.pdf)> [perma.cc/BRF7-BQG6]. See also Marie-Eve Sylvestre et al, *supra* note 65 at 44, which finds that while Indigenous peoples make up one third (34%) of the homeless population in Metro Vancouver, they represent only 2.5% of the population.

<sup>67</sup> Nicole M Myers and Sunny Dhillon, “The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions” (2013) 55:2 *Can J Corr* 187 at 191.

<sup>68</sup> *Ibid* at 192 [footnotes omitted].

<sup>69</sup> Burczykca & Munch, *Administration of Justice*, *supra* note 10 at 2.

roughly \$730 million (this estimate includes the costs of policing, prosecution, legal aid, courts, and corrections).<sup>70</sup> The annual expenditure has likely increased given the documented increase of these types of offences.<sup>71</sup>

The potential impact of these statistics on the continued over-incarceration of Indigenous accused should be obvious when one considers custody was the most common sentence handed down.<sup>72</sup> However, to date, there is little in the way of published empirical research demonstrating what, if any, correlation exists between the rise of administrative offending and the continued crisis of Indigenous over-incarceration. The scant research that does exist is explored below. However, these studies tend to make only passing reference to breach-related recidivism as part of a larger Indigenous recidivism investigation.

### C. The Continued Problem of Indigenous Recidivism

In 2014, the Department published a “fact sheet” entitled “Representation of Aboriginal People in the Canadian Criminal Justice System.”<sup>73</sup> Statistics cited by the Department reveal that Indigenous peoples are more likely to return “to correctional supervision in the two-year period following release... compared to non-Aboriginal people (45% versus 29%).”<sup>74</sup> Re-involvement rates for Indigenous peoples are “highest in Nova Scotia (47%), closely followed by Saskatchewan (45%), and New Brunswick (40%).”<sup>75</sup>

The Department also found that the rate/number of breaches of community supervision orders, such as the failure to complete a conditional sentence or period of probation, was higher among Indigenous offenders relative to non-Indigenous offenders.<sup>76</sup> The Department relies on the following statistics:

In Saskatchewan, Aboriginal men had a breach rate almost double that of non-Aboriginal men (32% versus 17%), while Aboriginal women had a breach rate

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<sup>70</sup> Canada, Department of Justice, *The Justice System Costs of Administration of Justice Offences in Canada, 2009*, by D Wade & T Zhang (Ottawa: Research and Statistics Division, 2013).

<sup>71</sup> See generally Burczycka & Munch, *Administration of Justice*, *supra* note 10.

<sup>72</sup> *Ibid* at 14.

<sup>73</sup> Beattie, Boudreau & Raguparan, *Representation of Aboriginal People*, *supra* note 35.

<sup>74</sup> *Ibid* at 14.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*.

almost triple that of their non-Aboriginal counterparts (30% versus 12%). In Alberta, breach rates of Aboriginal adults were higher than that of their non-Aboriginal counterparts both for men (53% versus 34%) and women (48% versus 32%), and across all age groups.<sup>77</sup>

In the spring of 2019, Correctional Service Canada published *A Comprehensive Study of Recidivism Rates among Canadian Federal Offenders*.<sup>78</sup> The stated objective was to provide a “measure of reoffending that would include both returns to federal custody for an offence as well as reoffending that results in provincial or territorial sanctions.”<sup>79</sup> Rates of recidivism for Indigenous offenders continued to be higher relative to the general population: “37.7% for Indigenous men and 19.7% for Indigenous women” compared to 24.2% for non-Indigenous men and 12% for non-Indigenous women.<sup>80</sup>

The rates of recidivism for Indigenous offenders were also recently captured in Celeste McKay and David Milward’s article entitled “Onashowewin and the Promise of Aboriginal Diversionary Programs.”<sup>81</sup> In 2016 Indigenous persons represented “26% of admissions to provincial and territorial jails, and 28% of admissions to federal penitentiaries, despite being only 3% of the Canadian population.”<sup>82</sup> The rates of recidivism for Indigenous offenders are characterized as “higher than for non-Indigenous persons, although studies vary on the degree of difference.”<sup>83</sup> Milward cites the following historical statistics:

[A] 1986 study... found that Indigenous parolees were almost twice as likely (51% to 28%) to have parole revoked in comparison to non-Indigenous parolees. Indigenous prisoners released from federal penitentiary were 12% to 19% more likely to commit an indictable offence following release.... An analysis of 1993 data for offenders released from federal penitentiaries that included 243 Indigenous offenders and 271 non-Indigenous offenders found that Indigenous offenders had a higher recidivism rate (66%) compared to non-Indigenous offenders (47%).... A more recent study was based on all offenders in Ontario who were either released after serving at least one month in provincial jail, were given a conditional sentence, or had begun a term of probation, in the

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<sup>77</sup> *Ibid.*

<sup>78</sup> Correctional Service of Canada, *A Comprehensive Study of Recidivism Rates Among Canadian Federal Offenders*, by Lynn Stewart & Geoff Wilton (Ottawa: CSC, 2019), online: <[www.csc-scc.gc.ca/005/008/092/err-19-02-en.pdf](http://www.csc-scc.gc.ca/005/008/092/err-19-02-en.pdf)> [perma.cc/L9PH-VYRY].

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> (2018) 41:3 Man LJ 127 at 161.

<sup>82</sup> *Ibid* at 132 [footnotes omitted].

<sup>83</sup> *Ibid.*

2004 calendar year. The sample included 1,274 male Indigenous offenders and 418 female Indigenous offenders. The recidivism rate was 57% for Indigenous offenders, and 33% for non-Indigenous offenders. The rates amongst Indigenous offenders by gender were 60.7% for male offenders and 45.9% for female offenders.<sup>84</sup>

Milward also references a more recent study based on offenders in Ontario who were either released after serving at least one month in provincial jail, were given a conditional sentence, or had begun a term of probation. It was found that “[t]he recidivism rate was 57% for Indigenous offenders, and 33% for non-Indigenous offenders.”<sup>85</sup>

Academic studies aside, the potential correlation between administrative offending and Indigenous incarceration was briefly picked up on by mainstream media. In 2016, *Maclean’s Magazine* published an article entitled “Canada’s Prisons are the New Residential Schools” which acknowledged that charges for violating criminal court orders are “soaring.”<sup>86</sup> *Maclean’s* reported that in British Columbia, “40 per cent of criminal court matters are... ‘administration of justice offences’”.<sup>87</sup> In the province of Alberta, it was reported “that 52 per cent of Indigenous prisoners had been incarcerated for a breach, almost twice the rate for non-Indigenous prisoners.”<sup>88</sup> These startling statistics prompted one former inmate to opine: “[o]nce you are in the system, you never get out.”<sup>89</sup>

In summary, the data released by the Department of Justice and public interest groups reveal that the provincial jurisdictions experiencing the largest volume of administrative offending are jurisdictions that statistically house the majority of Indigenous offenders in Canada. The data further underscores that those marginalized populations, who are statistically more likely to be caught in a cycle of breach, contain a large majority of Indigenous peoples.

In a country obsessed with studying, re-studying, and over studying the cause and effects of Indigenous incarceration, it is noteworthy that the issue of administrative offending among the Indigenous population remains a

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<sup>84</sup> *Ibid* at 132–33 [footnotes omitted].

<sup>85</sup> *Ibid* at 133 [footnotes omitted].

<sup>86</sup> Nancy MacDonald, “Canada’s Prisons are the ‘New Residential Schools’”, *Maclean’s* (18 February 2016), online: <[www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/](http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/)> [perma.cc/FJE4-3MWN].

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*.

form of *avant garde* concern. By employing a critical race paradigm, we can begin to understand the contours of this intellectual deficit, the obfuscation of the structural forms of prejudice faced by the Indigenous accused within the administrative regime, and the role these factors play in the continued marginalization of Canada's Indigenous population.

## II. CRITICAL RACE THEORY, THE SAVAGE INDIAN TROPE, AND *GLADUE'S* BROKEN PROMISE

Formulating a comprehensive definition of Critical Race Theory (CRT) is a difficult task. Kimberlé Crenshaw, both a founder and leader of the critical race movement, defines contemporary critical race theory as “a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era.”<sup>90</sup> CRT began as a movement of legal scholars and practitioners who interrogated the role that law plays in creating and perpetuating racial oppression. Scholars in this field hold as a starting point that racialization, racism, and white privilege are constitutive elements of the legal system.<sup>91</sup> CRT employs an approach that inquires how law oppresses, dehumanizes, creates, and maintains hierarchy, systems, customs, and other social institutions.<sup>92</sup> CRT's foundational text offers the following broad precis:

The critical race theory (CRT) movement is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up but places them in a broader perspective that includes economics, history, setting, group and self-interest, and emotions and the self-conscious... critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.<sup>93</sup>

The animating principles or basic tenets of CRT are that first, “racism

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<sup>90</sup> Kimberlé Williams Crenshaw, “Twenty Years of Critical Race Theory: Looking Back to Move Forward” (2011) 43:5 Conn L Rev 1253 at 1261.

<sup>91</sup> Kimberlé Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995); Mari J Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993) at 3–6.

<sup>92</sup> See generally Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001).

<sup>93</sup> *Ibid* at 3.

is ordinary.”<sup>94</sup> We operate in a society that is colour coded, not colour blind and, therefore, our laws must be as well. Second, “racism advances the interests of both elite (materially) and working-class whites (physically), large segments of the population have little incentive to eradicate it.”<sup>95</sup> Third, the concept of “race” and “racism” are social constructs as opposed to biological realities.<sup>96</sup> Finally, CRT theorists advance a notion of “a unique voice of color.”<sup>97</sup> Those who have faced oppression offer a form of exclusive narrative. As certain constructed identities are marginalized, the identities that are the normative reference points are accorded privileged societal status.<sup>98</sup>

As stated by Derrick Bell, one of the theory’s pioneers, “most critical race theorists are committed to a program of scholarly resistance... [in order to] lay the groundwork for wide-scale resistance.”<sup>99</sup> This line of scholarship has developed “an orientation around race that seeks to attack a legal system which disempowers people of color.”<sup>100</sup> Laws, according to these theorists, are not created from a neutral perspective because a “neutral” perspective simply does not exist; not all “perspectives are equally valued, equally heard, or equally included.”<sup>101</sup> There is a collective recognition that many perspectives “have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized-and all of this, not accidentally.”<sup>102</sup> In emphasizing the marginality of certain perspectives, these theorists engage in a form “of outreach to those similarly situated but who are so caught up in the property perspectives of whiteness that they cannot recognize their subordination.”<sup>103</sup>

By illuminating the ways in which societal valuations and distributions are manipulated according race, critical race scholarship has historically provided the language and framework necessary to analyze Indigenous identity. In his influential text, *Savage Anxieties the Invention of Western*

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<sup>94</sup> *Ibid* at 8.

<sup>95</sup> *Ibid* at 9.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid* at 11.

<sup>98</sup> *Ibid* at 12.

<sup>99</sup> Derrick A Bell, “Who’s Afraid of Critical Race Theory?” (1995) U Ill L Rev 1995:4 893 at 900.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid* at 901.

<sup>102</sup> *Ibid*.

<sup>103</sup> *Ibid* at 902.

*Civilization (Savage Anxieties)*, Robert A. Williams employs CRT to analyze the trope of the Indian savage as a form of normative instrument used to justify colonial power.<sup>104</sup> Much can be gleaned from Williams' historical account of the savage: one could argue that the notion of the savage continues to inform the criminal justice's response to Indigenous offenders and explains why the issue of over-incarceration remains unabated.

In what follows, I argue that the West's 'savage anxiety' persists and manifests in the form of constant state surveillance of the Indian other. I rely on critical race scholarship as a theoretical framework to explain how the imposition of administrative court orders on the Indigenous accused draw battle lines where contemporary colonialism is simultaneously asserted and resisted.<sup>105</sup> Through the imposition of administrative court orders, we control which subjects not only enter the system, but whether they will stay in the system, and ultimately how they will interact with an incredibly powerful arm of the state. These orders are a form of "power over." They engage features of the historical apparatus that has, for centuries, served to marginalize and control "the savage Indian." They serve to create social order, impose the stigma of criminality, and ultimately perpetuate the prejudice and racism launched against the Indigenous peoples since Greek antiquity.

### A. Savage Anxieties and the Use of the Savage Indian Trope

*Savage Anxieties* holds as its premise that Western civilization has, since Greek antiquity, used negative cultural imagery to construct the other as savage.<sup>106</sup> In the context of colonialism, the savage trope has been created to strip Indigenous communities of their rights, status and ultimately their land through the Doctrine of Discovery.<sup>107</sup> By creating the illusion of the

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<sup>104</sup> Robert A Williams, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012).

<sup>105</sup> A phrase first offered by Nate Jackson in his article "Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence" (2015) 52:4 *Alta L Rev* 927 at 930.

<sup>106</sup> Williams, *supra* note 104.

<sup>107</sup> Black's Law Dictionary defines 'Discovery' as "the foundation for a claim of national ownership or sovereignty, discovery is the finding of a country, continent, or island previously unknown, or previously known only to its uncivilized inhabitants". See Bryan A. Garner, ed, *Black's Law Dictionary* (St. Paul, MN: Thomson Reuters, 2014) sub verbo "discovery". See also Rebecca Tsosie, "Indigenous Identity, Cultural Harm, and the Politics of Cultural Production: A Commentary on Riley and Carpenter's 'Owning

savage infidel, colonizers could justify the colonized as unworthy and incapable of land ownership and, by extension, undeserving of cultural autonomy and self-determination. As Williams explains, it is this image of the savage that justified the forcible expropriation of tribal lands and facilitated “the ultimate extinguishment of Indian tribalism as a way of life on the North American continent.”<sup>108</sup>

This historical stereotype continues to play a pivotal role “in rationalizing individual prejudice and bias in attitudes and behaviors toward... racial groups in our society.”<sup>109</sup> Williams references the Western world’s most advanced countries, and emphasizes that even today we “continue to perpetuate the stereotypes and clichéd images of human savagery that were first invented by the ancient Greeks to justify their ongoing violations of the most basic human rights of cultural survival.”<sup>110</sup> *Savage Anxieties* references compelling examples of the ways in which modern day politicians, military generals, and mainstream media “draw on a language of savagery to describe the West’s violent, dangerously opposed enemies in the ‘primitive’ mountain ranges and ‘tribally controlled’ territories of Afghanistan and Pakistan.”<sup>111</sup> How the West had, at one point, in its head the image of “Osama Bin Laden hiding in a cave in some mountainous, lawless, and inaccessible ‘tribal’ region that marks off that alien and distant part of the world.”<sup>112</sup> Williams also prompts his readers to think of the common images and stereotypes associated with American Indians in the Western world today: “they really do not have ‘red skins,’ few if any live in teepees, they tend to leave their bows and arrows at home when they go to the supermarket, and when they speak their native tongue, they never use the words ‘ugh’ and ‘how’.”<sup>113</sup>

The vocabulary, visual representations, and arguments that surround the image of the savage Indian continue to infiltrate discursive power. Building on Williams’ central thesis that dominant social discourse has both presently and historically employed savage imagery to shape the status of the Indigenous community, I argue that this status is physically signaled by

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Red”, (2016) 94 Tex L Rev 250, which offers a similar explanation of the West’s treatment of the Indigenous other.

<sup>108</sup> Williams, *supra* note 104 at 8.

<sup>109</sup> *Ibid* at 2.

<sup>110</sup> *Ibid* at 8-9.

<sup>111</sup> *Ibid* at 220.

<sup>112</sup> *Ibid*.

<sup>113</sup> *Ibid* at 3.

geographic restrictions, no-contact and abstention clauses, and residency and curfew conditions. The Indigenous occupation of a lower social stratum is reinforced by the constant state surveillance resulting from reporting and residency requirements, geographic restrictions, and drug and alcohol abstention clauses. These conditions, a routine component of administrative court orders, produce and perpetuate social distinction. They are the medium through which discriminatory animus continues to infiltrate our criminal justice system. This was not the intended effect of *Gladue* and its progeny.

### **B. *Gladue* and *Ipeelee*: The Purported Response to the Crisis of Indigenous Over-Incarceration**

In 1996, an amendment to paragraph 718.2(e) of the *Criminal Code* of Canada held the promise of keeping Indigenous offenders outside of prison, whenever possible, by directing sentencing judges to consider the unique and systemic background factors of Indigenous offenders in the search for an appropriate non-custodial sentence.<sup>114</sup> This provision was intended to signal a “paradigm change in the framework for sentencing Indigenous offenders.”<sup>115</sup>

The now prominent decision in *Gladue* provides an examination of the purpose behind paragraph 718.2(e).<sup>116</sup> A unanimous court, famously termed the problem of Indigenous overincarceration “a crisis in the Canadian criminal justice system.”<sup>117</sup> The significant overrepresentation of Indigenous peoples within the Canadian criminal justice system and the prison population was characterized as “a sad and pressing social problem.”<sup>118</sup> Section 718.2 was interpreted as “Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavor to remedy it, to the extent that a remedy would be possible through the sentencing process.”<sup>119</sup>

The unbalanced ratio of imprisonment was attributed to features of substance abuse, lack of education, poverty, and the lack of employment

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<sup>114</sup> *Ipeelee*, *supra* note 8 at paras 58–59; *Criminal Code*, *supra* note 11, s 718.2(e).

<sup>115</sup> Alexandra Hebert, “Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice” (2017) 43:1 *Queen’s LJ* 149 at 151.

<sup>116</sup> *Supra* note 7.

<sup>117</sup> *Ibid* at para 64.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

opportunities for Indigenous peoples.<sup>120</sup> Sentencing judges were given the power to influence the treatment of Indigenous offenders in the justice system and control the problem of overincarceration.<sup>121</sup>

Section 718.2, as interpreted in *Gladue*, reinforced the obligation of the sentencing court to understand the needs, experiences, and perspectives of Indigenous peoples or Indigenous communities. The frank and unequivocal language employed by the Court in *Gladue* made national headlines.<sup>122</sup> Segments of the judgment are worthy of repetition:

Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system”.<sup>123</sup>

The response was a new, ostensibly forward-thinking and culturally sensitive sentencing practice that would keep Indigenous offenders in their respective communities:

[T]he point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.<sup>124</sup>

The decision and its stark pronouncements are cited in virtually all major sentencing cases dealing with an Indigenous accused. The case was celebrated for its revolutionary strategy to decolonize the relationship between the Indigenous people and the Crown and thus inspired high

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<sup>120</sup> *Ibid* at paras 50, 65, 93.

<sup>121</sup> *Ibid*.

<sup>122</sup> See e.g., the following headline Kirk Makin, “Top court appalled as Natives fill Canada’s jails”, *The Globe and Mail* (24 April 1999), online: <fact.on.ca/newspaper/gm990424.htm> [perma.cc/Y7FA-63E2] as noted in Jonathan Rudin “Aboriginal Overrepresentation and *R. v. Gladue*: Where we Were, Where we Are and Where we Might be Going” (2008), 40 *SCLR* (2d) 687 at 694, n 39.

<sup>123</sup> *Gladue*, *supra* note 7 at para 61.

<sup>124</sup> *Ibid* at para 74.

hopes.<sup>125</sup> With the advent of the Court's judgment, provinces across the country experienced the formation of dedicated *Gladue* courts.<sup>126</sup> These specialized courts are described as standard "criminal courts that apply Canadian law in cases involving Aboriginal offenders, but they are distinctive in their approach to sentencing."<sup>127</sup> These courts seek to embrace and apply specialized Indigenous knowledge to produce alternative understandings of an accused to ensure that bail orders and sentences conform to *Gladue's* intent.<sup>128</sup> They aim to situate a defendant's behaviour within collective histories and experiences of colonialism. "[A]lternatives to custody and information about the factors that perpetuate patterns of over-incarceration are also brought before the court."<sup>129</sup>

Canadian courts do not require the specialized *Gladue* architecture to situate the offender's action within a legacy of colonialism. Jurisdictions across the country have access (albeit limited) to *Gladue* writers whose stated goal is to systemically implement *Gladue* principles in the criminal justice system.<sup>130</sup> These highly-skilled writers work with the Indigenous accused, their family, and their community to understand and articulate the ways in which the unique and systemic background factors discussed in *Gladue* have brought the offender before the court. The information is contained in a report prepared for the presiding judge, prosecutor, and defence counsel. Often, a primary goal of the report is to recommend sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of their particular Indigenous heritage or connection.

As a criminal defence lawyer for the Indigenous accused, there is no question that these reports become essential to the judge's understanding of the accused and how their conduct is situated within histories of racial and systemic discrimination and exploitation. However, there is currently no mechanism available in the *Criminal Code* to implement a community-

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<sup>125</sup> Ryan Newell, "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration" (2013) 51:1 Osgoode Hall LJ 199 at 211.

<sup>126</sup> Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451.

<sup>127</sup> *Ibid* at 452.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid* at 452.

<sup>130</sup> "Towards Fair Treatment of Indigenous People in the Criminal Justice System" (last visited 30 June 2020), online: Gladue Writer's Society of British Columbia <[www.gladuesociety.com/about-the-society-1](http://www.gladuesociety.com/about-the-society-1)> [perma.cc/22QCC-49BA].

based sentence without an administrative court order of some kind. Consequently, well-meaning judges, alive to the jurisprudence in *Gladue* and its progeny, as well as the criminogenic factors outlined in the various *Gladue* reports, often prefer to craft onerous conditions of release than order the accused's detention.

Professor Roach and Jonathan Rudin foreshadowed the consequences of *Gladue's* emphasis on a community-based approach:

If trial judges, inspired by *Gladue*, impose punitive and unrealistic "healing" conditions as part of conditional sentences, aboriginal offenders may well find themselves disproportionately breached and imprisoned, perhaps for a longer period than if they had been sent directly to jail. This, combined with the youth of aboriginal populations in Canada, a shortage of community programmes to provide alternatives to imprisonment, and a reluctance to depart from imprisonment in serious cases makes it unlikely that *Gladue*-inspired sentencing innovations will significantly reduce aboriginal overrepresentation in prison in the near future.<sup>131</sup>

Professor Roach and Jonathan Rudin's projections have proven accurate. When *Gladue* was released, the Indigenous accused accounted for 12% of all federal inmates and 19% of all sentenced inmates.<sup>132</sup> By 2004/2005, that number rose to "17 per cent of admissions to federal custody and 22 per cent of admissions to all provincial correctional facilities."<sup>133</sup> This steady upward trend is also observable in young offenders. These numbers have prompted notable jurists to opine "[i]f this is progress, it is progress of the worst kind."<sup>134</sup>

The continued rise in the over-representation of the Indigenous in the justice system has been characterized by some as "mystifying."<sup>135</sup> Others have laid blame on the lack of *Gladue*-specific information the sentencing judge receives about the offender,<sup>136</sup> certain legislative interventions,<sup>137</sup> or a lack of funding for meaningful *Gladue* reports.<sup>138</sup> At the time of writing, the potential correlation between the proliferation of administrative offences

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<sup>131</sup> Roach & Rudin, *supra* note 9 at 357.

<sup>132</sup> Rudin, *supra* note 122 at 701.

<sup>133</sup> *Ibid* [footnotes omitted].

<sup>134</sup> *Ibid* at 701.

<sup>135</sup> See e.g. Julian Roberts & Ronald Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) 45:2 Can J Corr 211 at 226.

<sup>136</sup> Roach & Rudin, *supra* note 9 at 375, 378.

<sup>137</sup> See e.g. Rudin, *supra* note 122.

<sup>138</sup> Dushman & Myers, *supra* note 3.

and Indigenous over-incarceration, initially anticipated by Professor Roach and Jonathan Rudin, has not been fully explored.

Yet, we know that while the imposition of administrative court orders is on the rise, offences for breaching those court orders are also on the rise. They are increasing in jurisdictions with a high percentage of Indigenous offenders. First, if we stop and think about the characteristics associated with the Indigenous accused and, second, acknowledge that these orders fail to understand the intersection of intergenerational trauma and criminality and the related effects of poverty, addiction, and mental disorder, we begin to see how these orders perpetuate the recidivism that they are designed to prevent.

By employing a critical race paradigm, we can start to understand why it does not seem to matter how much information we receive about the colonial legacy, intergenerational trauma, and the resulting socio-economic issues that plague our Indigenous communities. The hold and control that these orders place on the Indigenous accused is a contemporary form of colonial encounter: these orders, implemented by the colonial government, communicate hegemonic normativity and maintain control over the savage other through constant surveillance justified by the administrative court order. In Part III of this article, I aim to demonstrate the practical ways in which administrative court orders render the Indigenous offender a form of the colonial subject who is once again pitted against the Crown.

### **III. ADMINISTRATIVE COURT ORDERS TO CONTROL THE SAVAGE OTHER**

In the current legal landscape, it is all too easy to create the conditions ripe for breach. The homeless cannot abide by a curfew or residency requirement. Those living on remote reserves and in poverty often do not have a vehicle or telephone, rendering it impossible to report to their bail or probation officer. Geographical restrictions often prevent the accused from accessing resources such as food banks, soup kitchens, and shelters, breeding the same cycle of marginalization which motivated the initial offending. These problems are compounded when dealing with the fetal alcohol spectrum disorder (FASD) offender: alcohol-related neurodevelopmental disorders often render it difficult, if not impossible, for offenders to practice the flawless time management skills that these administrative orders require.

The inevitable breach leads to a badge of criminality and facilitates discrimination because the law, vis-à-vis the administrative court order, permits differential treatment. It becomes easy, if not axiomatic, to punish and discriminate. The net effect is the creation, or perhaps maintenance, of a social hierarchy that encourages constant state surveillance of the Indigenous community, suppresses autonomous community development, justifies employment discrimination and a lack of educational opportunities, separates Indigenous children from their criminal families, and ultimately impairs liberty and autonomy in the prodigious and unforgivable way colonial powers and policies always have. One could argue that Indigenous rights groups have become casualties of their own reforms: state control of the 'savage other' is as much the real goal as it ever was.

By insisting on alternatives to incarceration, the justice system is forced to rely on administrative court orders managed by provincial probation services. The judiciary and justice system participants possess a misplaced faith in the probationary regime which functions as another repressive system of control that necessarily views the Indigenous accused as a risk that must be managed. In what follows, I will demonstrate how the most common probation conditions, far from fostering reintegration, serve to erode individual autonomy and engender mistrust, alienation, resentment, and resistance, creating disunity and discord.

### **A. The Trouble with Canada's Probation System and the Orders it Administers**

The assignment of an offender's probation officer represents an extraordinary transfer of power from sentencing judges to a non-judicial actor. The following judicial pronouncements pulled from a random sample of judgments from across the country demonstrate the level of control the probation officer has over the life of the accused:

I designate that you will be under the supervision of a probation officer. You must report to the probation officer in person today and after that as directed by the probation officer... You will live at a place approved by the probation officer... You will stay in the province of Alberta unless your probation officer gives you permission in writing to go outside the province... You will, in the sole discretion of your probation officer, follow such curfew as may be designated by your probation officer... You must be enrolled in and attend school but I leave it in the discretion of the probation office as to whether you complete such schooling in person or by correspondence. Your probation officer will be entitled to obtain a record of performance... You will be assessed and will take any counselling or treatment directed by your probation officer for alcohol or substance abuse, anger

management and psychological or psychiatric issues and will provide your probation officer with proof of attendance and completion of any counselling or treatment so directed... You will not be in contact, in any way, with L.F. or any other person named in writing from time to time by your probation officer.<sup>139</sup>

The probation officer possesses the unfettered discretion to dictate the frequency of the offender's reporting, where he lived, whether he could travel, when he needed to be home, how he would receive his education, who he could associate with, and force him to engage in the intimate experience of therapy. The form and content of these conditions create space for prejudice and bias to dictate outcomes and shape the lives of many offenders, particularly when we consider that the average length of community supervision is 356 days.<sup>140</sup>

## B. Counselling Conditions

Counselling conditions are commonplace<sup>141</sup> and in many jurisdictions, they appear as a standardized term on the judiciary's bail and sentencing picklist.<sup>142</sup> Prosecutors are quick to seek the therapeutic conditions under the guise that it will "help them stop drinking," "get a handle on their addiction," or "let them sort out anger issues." These standard counselling conditions become particularly problematic for several reasons.

First, the professed therapeutic relationship often becomes a coercive and intrusive experience that manifests as a tool of social control administered by the power of the state. Consider the following example from a sentencing court in Ontario:

When I put such other issues, and that includes such things like grief counselling, which might be appropriate and that is thing that is identified by I believe one of the priests, Reverend Salvadore and I am going to leave that to the discretion of the probation office. You are to sign any release forms required to allow your probation officer to confirm your attendance in counselling and treatment and not discontinue any counselling and treatment recommended by the probation

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<sup>139</sup> *R v LMF*, 2003 ABPC 174 at para 37.

<sup>140</sup> British Columbia, Ministry of Public Safety and Solicitor General, *A Profile of BC Corrections: Reduce Reoffending, Protect Communities 2017* (Vancouver, BC: Ministry of Public Safety and Solicitor General, 2017) at 10 [BC, *A Profile of BC Corrections*].

<sup>141</sup> Dushman & Myers, *supra* note 3 at 49.

<sup>142</sup> See "Court Issues Standardized Terms for Criminal Court Orders: Its Latest Initiative to Produce Orders More Quickly, Accurately and Consistently" (27 June 2017), online: *Provincial Court of British Columbia* <[www.provincialcourt.bc.ca/enews/enews-27-06-2017](http://www.provincialcourt.bc.ca/enews/enews-27-06-2017)> [perma.cc/54JV-WSH8].

officer without the consent of your probation officer.<sup>143</sup>

The vast majority of Indigenous offenders come into contact with the justice system as a result of experiencing intergenerational trauma associated, either directly or indirectly, with the legacy of colonialism. The judiciary has long accepted that those criminogenic factors are the result of state action. The irony in coercing the offender to revisit and cope with that trauma in the way the state deems acceptable is palpable. If an offender refuses to attend or participate in programming, it can result in a breach of the court order, leading to a subsequent criminal charge.<sup>144</sup> The imposition of this type of condition, more than any other, reflects a complete lack of understanding of the colonial context, and intergenerational trauma and its contribution to socio-economic problems plaguing Indigenous communities.

Second, a more practical concern: the only no-cost counselling sessions available to the offender are delivered by the provincial probation system. In British Columbia, the programs typically consist of a Substance Abuse Management Program or a Living without Violence course.<sup>145</sup> In the confines of these programs, the offender does not have the ability to select a therapist or clinician of their choosing (indeed, it is frequently the assigned probation officer who serves as the program's facilitator).<sup>146</sup> The sessions are scheduled on a specific day, at a specific time, for a series of weeks. If the offender arrives intoxicated or fails to attend, they are often expelled, and a breach charge is forwarded to the prosecution.

We return to the circumstances of N.J., mentioned at the beginning of this article. His main priorities are how he will find shelter that evening, where he can find a meal, and where he can find heroin before he becomes dangerously sick from withdrawal. He does not own a watch or a cell phone. Having no steady routine or orientation, N.J. loses track of the days and week. He does not have a friend or family member to predictably remind him of the time of his counselling session. The factors that prompt him to miss a counselling session are the same factors he has little to no control

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<sup>143</sup> *R v Eckert*, 2001 OJ No 5060 at para 17.

<sup>144</sup> In British Columbia, counselling available through community corrections consists of the Living Without Violence Program, Substance Abuse Management Program, Sex Offender Treatment and Maintenance Program, and Thinking Leads 2 Change. See BC, *A Profile of BC Corrections*, *supra* note 140 at 13.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid* at 12.

over, which have contributed to his cycle of offending: he did not ask to be plagued by the effects of fetal alcohol spectrum disorder, and very few, if any, offenders choose to be hungry, addicted, and alone on the street. The imposition of an administrative court order telling him to be at the local probation office on Tuesday at 4:00 p.m. for a counselling session lasting sixty minutes does little, if anything, to address his rehabilitation and even less to satisfy the ostensible objective of public safety.

### C. Reporting Requirements

The erosion of autonomy under the probationary regime is patent when dealing with mandatory reporting requirements:

The conditions of Mr. LeBlanc's probation included that he report to and be under the supervision of a probation officer. Mr. LeBlanc complains that he has been required to report in person to the probation office in Burton, some distance from his home.

The probation officer has the discretion to consider Mr. LeBlanc's concerns and to reduce the number of his personal attendances or to let him report by telephone. Mr. LeBlanc can discuss those concerns with his probation officer or his probation officer's supervisors.<sup>147</sup>

All too frequently, offenders residing on remote reserves are compelled to attend in person to a local community corrections office. Reporting by telephone or some other medium is often left to the discretion of the probation officer. Similarly, if offenders are employed in remote, camp-like settings, or in the commercial fishing industry (as so many members of Canada's west coast reserves are), the form of reporting is at the sole discretion of the probation officer:

After your first reporting your regular reporting may include reporting by telephone in the discretion of your probation officer. That is to allow you, if you are in camp, to be able to report. If they allow it. They have to give you permission.<sup>148</sup>

It is not at all uncommon to hear offenders complain to a Provincial Court judge that their bail supervisor or probation officer refuses to grant permission to attend work. The explanations for refusal often consist of the

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<sup>147</sup> *R v Leblanc*, [1998] NBJ No 159 at paras 8–9, 1998 CarswellNB 158.

<sup>148</sup> *R v Berry*, 2007 BCPC 506 at para 15.

inability of an offender to provide a predictable work schedule.<sup>149</sup> In order to highlight the collateral damage of a term that, at first blush, appears to be of no consequence, consider the following example.

H.S. was charged with sexual assault and released on bail. His bail order was robust. He lived on a remote reserve with no cellular reception, some two hours away from the nearest bail office. His band had previously paid for him to receive the training he needed to be employed in the wildfire fighting industry. He was the sole breadwinner: he supported his wife and seven children by fighting wildfires. Throughout the course of his life, he worked to overcome the effects of residential school. He had no formal education and was limited in terms of his career opportunities. I asked him what he did at these weekly report meetings. The response: *I just sign my name on a piece of paper and leave.*

The weekly reporting requirement meant that H.S. could not accept shifts of employment. H.S. brought this to the attention of his bail supervisor. Permission to pursue his (only) line of employment would be granted if he could produce a predictable work schedule. That was impossible for H.S. to do. The nature of his work was on-call and fluctuated with the patterns of the environment. Without employment, he could no longer afford a vehicle. Without a vehicle, he could not return to his reserve and continue to satisfy the in-person reporting requirement. H.S. was forced to live in a city shelter, away from his family and community. He soon returned to consuming alcohol and predictably, a breach of several conditions on his bail order followed. These consequences are the result of an order intended to “protect the public.”

#### D. Spatial Restrictions

Prohibiting an accused or offender from accessing certain public spaces is a common feature of bail and probation orders. One study revealed that geographic restrictions account for nearly 20% of all conditions imposed through criminal proceedings.<sup>150</sup>

Experiential evidence suggests that those offenders with a history of committing petty crime, most often to feed to their addiction or themselves, become a nuisance for local businesses. Not only do these petty acts of theft

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<sup>149</sup> Which is often the case with employees of the commercial fishing industry whose length of voyage depends on the fluctuating fish stocks, or those employed to combat wildfire who must leave on very short notice.

<sup>150</sup> Sylvestre et al, *supra* note 65 at 4.

disrupt the bottom-line, observable effects of addiction are unpleasant to customers. Voices from local commerce are often heard loudly at city hall. Those voices carry over to the local prosecution office, often manifesting in the form of a so-called “red-zone.” The accused is ousted from public space and often from those areas that house the local soup kitchen, food bank, shelter, sobering centers, social assistance offices, and other valuable resources. Rather than addressing the root cause of this petty offending, supervision and control of offenders that are subject to red zone conditions becomes a primary and expensive mandate of local law enforcement street crime units. “Such state control over Indigenous people’s movements is part of a long history of colonial efforts to displace and contain Indigenous people in order to facilitate settlement.”<sup>151</sup>

For example, an accused named G.S. was released on bail after allegedly committing a series of minor offences in the downtown core of her community. The prosecution sought and received a red-zone condition restricting her from attending within a certain radius of the downtown core. G.S. was from a reserve in Canada’s far north. The only set of contacts she had in her new community resided within the red-zone. She was collecting social assistance and she had to enter the red-zone to collect her cheque. She was addicted to a series of illicit substances and the city’s only drug outreach and sobering center was in the red-zone. Often homeless or transient, one of the only two shelters in the city was located in the red zone. G.S. had stronger temptations to offend now than she ever did before.

### E. Abstention Clauses

Release orders frequently require individuals to abstain from consuming drugs, alcohol, or both: “[a]cross all courts, a quarter of releases required the accused to not purchase, possess or consume any non-medically

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<sup>151</sup> Gabe Boothroyd, “Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice” (2019) 56:3 Alta L Rev 903 at 932 [footnotes omitted]. For a more general discussion of the ways in which spatial restrictions impact marginalized segments of society see Sylvestre et al, *supra* note 65, which offers a strong case for arguing that the criminal justice system (i.e., prosecutors and judges) are responsible for keeping certain offenders under constant judicial surveillance, thus creating the conditions for the perpetration of crime. Sylvestre and colleagues further argue that problematic situations or conflicts that the state chooses to criminalize are not merely the result of actions undertaken by individuals who have immediate personal interests, but instead, they are the result of relationships and interactions embedded in social and economic systems, dynamics of power, and political and cultural resistance.

prescribed drugs, and 27.3% of releases required accused to abstain absolutely from the purchase, possession or consumption of alcohol.”<sup>152</sup> The CCLA report found that most accused who reported ongoing problems with alcohol were released on a condition that they not consume alcohol. Similarly, the majority “of accused who reported drug use problems were specifically required to abstain from consuming drugs while on bail.”<sup>153</sup> The utility of this condition, and others like it, received scrutiny in a compelling lower court judgment out of Alberta.

*Omeasoo*<sup>154</sup> concerned the sentencing of two Indigenous offenders, each an alcoholic, who were charged with minor offences and released from police custody on the condition that they abstain from consuming alcohol. Justice Rosborough framed the issues as follows: (1) “[u]nder what circumstances should alcoholics be prohibited from consuming alcohol as a condition of their release from custody? [(2)] What is a fit sentence for those alcoholics who breach that condition?”<sup>155</sup>

Justice Rosborough imposed nominal sentences on each offender and moved to address the generalized imposition of unreasonable conditions leading to repeated breaches of conditions:

There are circumstances where individuals can be expected to comply with bail conditions merely because they are pronounced by a person in authority and will result in penal sanctions if breached. This is seldom the case with alcoholics subjected to abstention clauses, however. Ordering an alcoholic not to drink is tantamount to ordering the clinically depressed to “just cheer up”. This type of condition has been characterized by some courts (at least in the context of a probation order) as “not entirely realistic”.... It has been found to have set the accused up for failure.<sup>156</sup>

The absence of an abstention clause from an order for judicial interim release does not place the community in any greater danger than release of an offender on an undertaking with an abstention clause that (s)he will not comply with.<sup>157</sup>

There is nothing rehabilitative or restorative about placing an alcoholic or drug addict on an abstention clause. Indigenous communities in Canada

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<sup>152</sup> Dushman & Myers, *supra* note 3 at 56.

<sup>153</sup> Experiential evidence suggests that the same is true of the offenders placed on probation.

<sup>154</sup> 2013 ABPC 328 [*Omeasoo*].

<sup>155</sup> *Ibid* at para 1.

<sup>156</sup> *Ibid* at para 37 [footnotes omitted].

<sup>157</sup> *Ibid* at para 39. Despite the volume of administrative offences, the reasoning in *Omeasoo* has been cited on few occasions.

appear to be particularly vulnerable to the effects of fetal alcohol spectrum disorder.<sup>158</sup> Schwartz and colleagues explained:

It is estimated that the prevalence of FAS/FAE in high-risk populations, including First Nations and Inuit communities may be as high as 1 in 5. The rates of FAS/FAE in some First Nations and Inuit communities are much higher than the national average which is estimated to be somewhere between 123-740 FAS and 1000 FAE babies born each year. FAS/FAE has been termed a "northern epidemic" and \$1.7 million in funding is reported to be made available every year to support a new initiative addressing FAS/FAE impact on First Nations and Inuit reserve communities.<sup>159</sup>

Research also indicates that many Indigenous youth involved in the justice system suffer from some form of Fetal Alcohol Spectrum Disorder. In *R v FD*, a case that dealt with the sentencing of an Indigenous youth with FASD, the court noted that out of the total reported youth cases, "89% of aboriginal young persons were suffering from FASD."<sup>160</sup> The disorder has emerged as a significant risk factor to youth offending, as young people suffering from FASD are "likely to have diminished capacity to foresee consequences, make reasoned choices or to learn from their mistakes."<sup>161</sup>

Returning to the pronouncements in *Omeasoo*:

Even without this evidentiary expedient, however, the high incidence of substance abuse amongst Alberta [A]boriginals and even amongst the [A]boriginal population in Hobbema have been the subject-matter of authoritative (if somewhat dated) comment. In the *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, March 1991*, (the 'Cawsey Report'), the Task Force made the following remarks (at pp. 8-5 to 8-7):

A high percentage of Aboriginals who come into contact with the justice system abuse alcohol, drugs or other substances.

The Brief from the Poundmaker's Lodge offered the following observations: "Hobbema, one of the wealthiest Reserves in Alberta where poverty and poor housing are not the major problems facing the community, alcohol and teenage suicides are the primary issues facing the reserve. Eighty percent of the community is having problems with alcohol and drugs."

The cycle of social and economic problems that lead first to alcoholism, then to involvement with the criminal justice system, then to subsequent release to

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<sup>158</sup> Bryan P. Schwartz, Terrence Laukkanen & Justine Smith, "A Prevention Strategy: Eliminating FASD in Indigenous Communities" (2017) 40:2 Man LJ 123 at 123.

<sup>159</sup> *Ibid* at 144 [footnotes omitted].

<sup>160</sup> 2016 ABPC 40 at para 7.

<sup>161</sup> *Ibid*.

the community only to engage in the same activities is often repeated. If left untreated, the disease of alcoholism is fatal.

Alcoholism must be treated as a disease and not as a crime. The criminal justice system has proven conclusively that incarceration, fines and community service do not cure the disease....<sup>162</sup>

The warped logic of continuing to impose abstinence-based conditions, as statistics reveal the courts so often do, is an extension of a key feature of colonialism: deploying strategies of social oppression that serve to further marginalize and control. I do not mean to suggest that every sentencing judge presiding over an Indigenous offender is necessarily racist, consciously inflicting the law's violence. But I do argue that the imposition of these conditions often reflects, at the very least, the ways in which the legacy of colonialism has permeated the criminal justice system and the unconscious and subtle ways systemic racism infects our justice system.

## F. Curfew Conditions and Residency Clauses

In *R v J (TJ)*, a young Indigenous accused stood in front of the Court charged with crimes of violence.<sup>163</sup> The prosecution's case against the accused was admittedly weak.<sup>164</sup> The bail court judge was informed that the accused was addicted to alcohol, diagnosed with fetal-alcohol spectrum disorder, and suffered from depression.<sup>165</sup> The accused was released on onerous terms. Within one month he was back before the court and was released on similar terms. He was released again, breached within another month, and was then in custody for months before applying for bail a third time.<sup>166</sup> None of the alleged breaches involved substantive offending or behavior that could be construed as violent. Instead, this young accused, struggling with severe cognitive deficits, breached his curfew and could not stop consuming the alcohol he was addicted to.

The bail judge was sensitive to symptoms of fetal alcohol spectrum disorder and held that courts had the responsibility to accommodate this disability: "[t]he justice system should not be used as a substitute for social

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<sup>162</sup> *Supra* note 154 at para 23; Alberta, *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton, AB: Justice and Solicitor General, 1991) at 8-5 to 8-7.

<sup>163</sup> 2011 BCPC 155.

<sup>164</sup> *Ibid* at para 55.

<sup>165</sup> *Ibid* at para 36.

<sup>166</sup> *Ibid* at paras 3-4.

services and supports for these most vulnerable citizens.”<sup>167</sup> However, the accused was ultimately released on the same set of strict bail conditions. It is as if the sentencing judge experienced a gravitational pull to “do something” to promote the illusory promise of rehabilitation and restorative justice, even if the result generated more harm than good.

These conditions, and the paternalistic framework they operate in, are not eradicating crime, but classifying and regulating the Indigenous offender in ways that replicate colonial practices and foster a relationship of domination and subordination that continues to discursively infuse the contours of our criminal justice system. “They” are the social problem, the threat to public order and the probationary regime is here to “fix” them. By continuing to impose these orders we simply pay lip-service to demands for reform by citing the rhetoric and semantics so often seen in *Gladue* and its progeny. The colonial gaze of the court is left to revel in its purported benevolence while reproducing the injustices it ostensibly wants to prevent. But lurking behind the scenes are those persistent anxieties Williams dissects. Colonialism has not just lead to factors that produce crime, contemporary forms of colonialism are producing crime.

It is no surprise that advocacy groups, such British Columbia’s Pivot Legal Society paint a bleak landscape of administrative offending.<sup>168</sup> These administrative court orders are setting some people up to fail, leading them into a cycle of criminalization and incarceration because these conditions fail to reflect the ways in which “intersections of poverty, substance use, mental health, disability, and racism shape people’s lives and daily activities.”<sup>169</sup> The result is that Indigenous peoples:

[A]re treated by the criminal justice system as prolific offenders. Their records expand year over year, breach after breach—often starting with things like petty theft for stealing food when they were hungry, or using drugs to dull the pain of homelessness, injury, or illness. These are the so-called “criminals” who now crowd our prisons.<sup>170</sup>

The net effect of these orders leads to over-policing and over-surveillance of the Indigenous population which serves to deepen social disorganization and marginalization.

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<sup>167</sup> *Ibid* at para 3.

<sup>168</sup> Bennett & Larkin, *supra* note 6.

<sup>169</sup> *Ibid* at 74.

<sup>170</sup> *Ibid* at 75.

Donna Coker, a noted American scholar, writes about the ways in which drug enforcement concentrated in poor inner-city areas in the United States, occupied by people of colour deepens social disorganization in already troubled neighborhoods.<sup>171</sup> The removal of individuals in large numbers from their communities is said to contribute to “higher levels of joblessness, low economic status, and family disruption.”<sup>172</sup> These factors disrupt the “social structural and cultural determinants of community-based control.”<sup>173</sup> Over-surveillance was also acknowledged as an invitation for “other agents of state control, notably child protection services.”<sup>174</sup> Coker’s analysis extends by analogy to Canada’s urban Indigenous population.

Experiential evidence suggests that the prevalence of administrative court orders also contributes to racial profiling. As can be gleaned from countless reports to Crown counsel, local enforcement often develops an expectation that the Indigenous members of the community are subject to some form of court order and are immediately branded as suspect. The Ontario Human Rights Commission in its report, “Paying the Price: The Human Cost of Racial Profiling” highlights research that found “the psychological effects of racial profiling... include post-traumatic stress disorder and other forms of stress-related disorders, perceptions of race-related threats and failure to use available community resources.”<sup>175</sup>

One consistent, collective effect that emerged from the Commission’s inquiry was the disempowering impact of profiling. Victims of profiling “used the words ‘impotent’, ‘powerless’, ‘helpless’ and ‘emasculated’ to describe how they felt as a result of” racialized policing.<sup>176</sup> This sense of powerlessness is often experienced by entire communities, not simply individual victims of the practice. Collateral effects include a reluctance to seek out and gain positions of power or authority in societal institutions. As a consequence, “these communities are not well represented in key societal institutions, including the ones that have some control over the issue of

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<sup>171</sup> Donna Coker, “Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System” (2003) 93:4 J Crim & Criminology 827 at 843.

<sup>172</sup> *Ibid* at 840.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid* at 842-43 [footnotes omitted].

<sup>175</sup> Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Queen’s Printer for Ontario, 2003) at 17, online: <[www3.ohrc.on.ca/sites/default/files/attachments/Paying\\_the\\_price%3A\\_The\\_human\\_cost\\_of\\_racial\\_profiling.pdf](http://www3.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf)> [perma.cc/9YMV-H4YX] [footnotes omitted].

<sup>176</sup> *Ibid* at 35.

racial profiling itself.”<sup>177</sup> The administrative court order insidiously operates to perpetuate racial subordination and can be considered the latest social mechanism used to exclude the Savage Other.

#### IV. CONCLUSION

My aim has been to demonstrate that the required and optional conditions of these administrative court orders act as a form of tripwire, rendering the offender vulnerable to sanction. These community-based dispositions should no longer be viewed as a progressive alternative to incarceration. In Part I of this article, I explored the staggering proliferation of administrative offending and the unabating rise of Indigenous recidivism. The objective was to showcase how the likely correlation between these two issues suffers from a massive intellectual deficit: these issues are undertheorized and under-researched by the scholarly community and justice system participants alike. As a consequence, we are suffering from a dearth of policy solutions that could provide better outcomes in the immediate future.

In Part II and III, I explored, in broad strokes, critical race scholarship as a pragmatic means to critique Canada’s criminal justice system and the way in which racism is institutionalized in and by law. We then narrowed the focus to administrative court orders as the medium through which exploitation and domination of the Indigenous accused are rendered morally permissible and defensible. Viewing these orders and their intended target from a critical race perspective exposes how these orders have evolved to insidiously perpetuate, rather than curtail, Indigenous marginalization and criminalization. The collateral consequences function to confine the Indigenous accused to the primitive end of the civilization spectrum. The antiquated idea of the Savage Indian is still tethered to the criminal justice system’s modern perception of the Indigenous offender.

Until we devise a better policy alternative to administer community-based sanctions, which will likely involve amendments to Canada’s *Criminal Code*,<sup>178</sup> the responsibility lies with defence counsel to advocate against the imposition of these conditions just as fiercely as custodial terms; to educate

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<sup>177</sup> *Ibid.*

<sup>178</sup> In a forthcoming publication, I argue that Canada’s *Criminal Code* must be amended to include provisions that allow for community-based sanctions administered by Indigenous communities themselves.

the court and the prosecution about the circumstances that surround the Indigenous offender to demonstrate the unique ways in which their clients become entrenched in the criminal justice system as a result of these orders.

Prosecutors have a responsibility to ensure that the conditions they seek to impose are “reasonable” pursuant to section 732 of the *Criminal Code*, as opposed to unjustifiable state intrusions. Common sense dictates that only those conditions that are fair and attainable will motivate and support offenders in reintegrating into society. When the inevitable breach occurs, sentencing judges must refrain from viewing the contravention as an oppositional move intended to demonstrate a blatant disrespect for court orders. The time has also come for a moment of judicial activism. That criminal sentencing courts continue to endorse the utility of these court orders, demanding that the accused undertake to follow the order, thus feeding (or at least maintaining) the crisis of Indigenous over-incarceration, is unjustifiable.

My hope is that this paper inspires empirical research on the correlation between over-incarceration and administrative offences. The spirit of *Gladue* is entirely compromised if we simply acknowledge “the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples”<sup>179</sup> but continue to deploy a different version of the same oppressive tactics. Thus far, this is exactly what the criminal justice system has done but we, as a justice system, refuse to acknowledge that. Our current efforts at “restoring” and “rebuilding” are misguided, and the effect was not what *Gladue* intended.

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<sup>179</sup> *Ipeelee*, *supra* note 8 at para 60.

