Troubling the Path to Decolonization: Indian Residential School Case Law, Genocide, and Settler Illegitimacy[1]

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Abstract

In this paper, I argue that Indian Residential School (IRS) litigation, and the emphasis on "cultural loss" or genocide, threatened to expose the illegitimacy of Canada's claim to sovereignty and the settler collective's occupancy of Indigenous lands today. When settler illegitimacy is brought into view, settler collectives typically respond with violence. In IRS case law, this violence consists of the dehumanization of the Indigenous collective as property. I trace this violence on the part of Canada (government and law) in *Blackwater v Plint* (1996–2005). I suggest that Canada's "disturbing defence strategy" in *Blackwater* likely contributed to Canada's signing of the 2006–2007 IRS settlement agreement that brought *Baxter v Canada* to a close. I conclude that settler illegitimacy, genocide, and law's racialized violence in the present ought to trouble the settler collective's vision of both decolonization and the role of settler law in decolonization.

Keywords: Indian residential school case law, settler colonialism, sovereignty, Canada, possessive individualism, decolonization

Résumé

Dans cet article, je soutiens que le litige lié aux pensionnats indiens et l'accent qui est mis sur la « perte de la culture » ou le génocide ont menacé de rendre publique le caractère illégitime de la revendication du Canada à la souveraineté et de l'occupation des terres autochtones par la collectivité des colons. Lorsque l'illégitimité des colons est remise en perspective, les collectivités coloniales réagissent typiquement par la violence. Dans la jurisprudence liée aux pensionnats indiens, cette violence se manifeste par une déshumanisation de la collectivité autochtone, celle-ci étant considérée comme propriété. Pour ce qui est du Canada (le gouvernement ainsi que la réglementation), cette violence remonte à *Blackwater v Plint* (1996–2005). À mon avis, « l'inquiétante stratégie de défense » du Canada dans l'affaire *Blackwater* a probablement contribué à la signature de la Convention de règlement relative aux pensionnats indiens (2006–2007), menant ainsi à terme l'affaire *Baxter v Canada*. Je conclus que l'illégitimité des colons, le génocide et la violence raciale jurisprudentielle actuelle devraient remettre en cause la perspective de la collectivité des colons en ce qui a trait à la décolonisation et le rôle du droit de peuplement dans la décolonisation.

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Mots clés : Jurisprudence liée aux pensionnats indiens, colonialisme de peuplement, souveraineté, Canada, individualisme possessif, décolonisation

Introduction

> "Residential schools" is a terrible euphemism. This term obscures and cleanses the truth about these terrible places and the shocking program of political and cultural destruction of which they were a central pillar. The places to which we were taken were places of involuntary childhood internal exile and, frequently, systematic maltreatment. Their larger purpose was not to house or educate us, but rather to separate whole generations of indigenous children from their parents and communities and traditional lands and resources. The chilling overall policy idea was to ultimately eliminate our peoples by assimilating the indigenous children while allowing time for parents, grandparents and nations to die off alone in their traditional lands, thus clearing the country for settlement, agriculture and resource extraction by the Crown.
>
> –Grand Chief Matthew Coon Come[2]

Indigenous survivors of Canada's Indian Residential School (IRS) system have long argued that its violence must be understood as a form of genocide (whether cultural annihilation, ethnic cleansing, or forced assimilation).[3] This attempt at genocide—the targeting of 150,000 Indigenous children, their families, communities, and nations—was legally and systematically sustained by Canada and generations of its citizens for well over one hundred years. As such, this violence was instrumental to Canada's colonial nation-building project and to Canada's claim to sovereignty, dominance, and control over Indigenous people and their land.

IRS litigation[4] is primarily a story about the effort of IRS survivors to have Canada and its justice system acknowledge that cultural genocide (connected to land) was a goal and partial outcome of the IRS system. Thus, IRS claimants sought to name "loss of culture" as an actionable tort. IRS litigation is also a story about the Government of Canada's effort to deny legal recognition of loss of culture. Citing statutes of limitations, the Canadian government and its law allowed only "historical sexual assault," negligence, and breach of fiduciary duty as legally recognized harms. Historic sexual assault does not mean sexual assault within the context of colonialism. Rather, it means abuse perpetrated by individuals so long

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2 Matthew Coon Come, "Canada: They Tried to Destroy Us," *Ottawa Citizen*, June 30, 2010, accessed August 1, 2013, http://globaltj.wordpress.com/2010/06/30/canada-they-tried-to-destroy-us/.

3 See Roland Chrisjohn, T. Wasacase, L. Nussey, A. Smith, M. Legault, P. Loiselle, and M. Bourgeois, "Genocide and Indian Residential Schooling: The Past is Present," in *Canada and International Humanitarian Law: Peacekeeping and War Crimes in the Modern Era*, eds. R. D. Wiggers and A. L. Griffith (Halifax: Dalhousie University Press, 2002); Roland Chrisjohn and Sherri Young, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton, BC: Theytus Books, 1997/2006).

4 See the Official Court Website of the Indian Residential School Settlement Agreement of 2006/2007 (IRSSA), accessed June 20, 2013, http://www.residentialschoolsettlement.ca/English.html.

ago that memories fade, evidence disappears, witnesses are few, and "many of the perpetrators are dead."[5] Declaring the connection between historic sexual abuse and cultural loss as "strained at best,"[6] courts sever sexual abuse from collective crimes such as genocide, and sever both sexual abuse and genocide from issues of land. In IRS class actions, most notably *Cloud v Canada*, this legal framing proved useful to Canada and its law in denying a common cause and a common class.[7] *Cloud* claimants eventually omitted reference to sexual abuse altogether, in order to emphasize "systemic negligence," resulting in loss of culture and language, as the wrongdoing.[8] Although *Cloud* was certified in 2004, Goudge J cautioned that the "new tort" would likely fail. Importantly, *Cloud*'s certification rendered the certification of *Baxter v Canada* probable. Representing more than 80,000 IRS survivors, the *Baxter* claim explicitly cited the United Nations' convention against genocide.[9] Cultural loss as an actionable tort was never tested, as the five–billion–dollar Indian Residential Schools Settlement Agreement (IRSSA) of 2006–2007 brought both *Baxter* and *Cloud* to a close.

Many legal scholars critique Canadian IRS case law and the exclusion of loss of culture as an actionable tort.[10] Some argue that although Canadian law is inadequate for defining and addressing the injustices of the IRS system, existing torts could be tailored to approximate the harm of loss of culture. Zoe Oxaal creatively suggests that mental torture and unjust incarceration could serve this purpose. Bruce Feldthusen argues that with the necessary political will, Canada could easily amend law to include loss of culture as an actionable tort. Kathleen Mahoney suggests that Canada's law is not the appropriate instrument to address the "mass violation of human rights." The chief negotiator for the Assembly of First Nations regarding the IRSSA, Mahoney claims that, unlike Canadian civil and criminal law, the IRSSA successfully reflects Indigenous values and principles of restorative justice that are "victim centered, inclusive, generous, holistic and culturally sensitive."[11] Whether Canadian law is, or might be rendered, an appropriate mechanism for addressing past colonial injustices—the very injustices it legally authorized[12]—is not the direct focus of my paper. Rather, I examine IRS case law for evidence of

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5 *Blackwater v Plint* 2001 BCSC 997 SCBC para 4.

6 Justice Esson's words, *WRB v Plint* [2003] BCJ No 2783, BCCA 2003 Dec 10 BCJR 60045.

7 *Cloud v Canada*, Court of Appeal for Ontario, [2004] 1203, Docket: C40771 (*Cloud*). Filed in 1998, *Cloud* represented 1,400 survivors from the Mohawk IRS in Brantford, Ontario.

8 *Cloud* 2004, at para 1. See Margaret I. Hall, "Institutional Tort Feasors: Systemic Negligence and the Class Action," *Tort Law Journal* 2 (2006): 1–43.

9 *Baxter v Canada*, affidavit, *Charles Baxter Sr and Elijah Baxter et al v Attorney General of Canada*, Joint Factum of the Plaintiffs, Ontario Superior Court of Justice, court file no 00-CV-192059CP, July 25, 2003 (*Baxter*); *Baxter v Canada*, *Charles Baxter Sr and Elijah Baxter et al v Attorney General of Canada et al*, Ontario Superior Court of Justice, court file no 00-CV-192059CV, December 15, 2006 (*Baxter* 2006).

10 See Bruce Feldthusen, "Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It," *Canadian Journal of Law and Society* 22, no.1 (2007): 61–91; Zoe Oxaal, "'Removing That Which was Indian From the Plaintiff': Tort Recovery for Loss of Culture and Language in Residential School Litigation," *Saskatchewan Law Review* 68 (2005): 367–404.

11 Kathleen Mahoney, "Indian Residential School Settlement Agreement: Is Reconciliation Possible?," ABlawg.ca (July 26, 2013): 3, 5, accessed August 1, 2013, http://ablawg.ca.

12 Patricia Monture-Angus, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender," in *Locating Law: Race/class/gender connections*, eds. E. Comack et al. (Halifax: Fernwood Publishing, 1999), 93.

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how colonial power continues to operate through law in the present. Informed by anti-colonial analyses of the connection between Canadian law, sovereignty, and settler violence, I show how Canada's defence strategy and the judicial reasoning in IRS case law may be related to Canada's ongoing claim to sovereignty, dominance, and control over Indigenous peoples' lands and resources. In Part I of this paper, I suggest that IRS litigation, and the emphasis on cultural loss or genocide, threatened to expose the illegitimacy of settler sovereignty and the settler collective's occupancy of Indigenous lands today. In Part II, I trace Canada's response to this threat in *Blackwater v Plint*. I contend that the law's emphasis on "historic sexual abuse" as the only actionable tort—at a time when there was no possibility of cultural loss becoming a legally recognized harm—allowed Canada to simultaneously acknowledge the fact of colonization and genocide, evade responsibility for both colonization and genocide, and reassert settler sovereignty through the dehumanization of the Indigenous survivors and their communities. I suggest that Canada's "disturbing defence strategy" in *Blackwater* had implications for *Baxter* and may partially explain why Canada agreed to the 2006–2007 IRSSA. If this is the case, then Mahoney's claim that the IRSSA, "[b]y comparison with other countries and what they have awarded for similar abuses, [. . .] is on the higher end of generous and that [this] *is something we can be proud of,*"[13] warrants scrutiny. I conclude the paper with the suggestion that settler illegitimacy, genocide, and law's racialized violence of the present, ought to trouble the settler collective's vision of both decolonization and the role of settler law in decolonization.

PART I: The Violence of Settler Illegitimacy

Even if Canada had not attempted genocide against Indigenous people through mechanisms such as the IRS system, Canada's claim to sovereignty over Indigenous lands and nations would still be illegitimate, because it rests on many other forms of violence. One such form of violence is that of the *mere assertion* of dominance over the many Indigenous nations that have occupied land since before European arrival/invasion. Canadian courts acknowledge this ethically fragile foundation of Canadian sovereignty. For example, in *Haida Nation* v *Canada*,[14] a 2004 Supreme Court of Canada decision aimed at producing a "general framework" regarding Canada's duty to consult and accommodate Indigenous nations before rights claims are heard regarding land and resources,[15] SCC Chief Justice Beverley McLachlin relies on the concept of the "honour of the Crown" and states,

> In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[16]

[13] Ibid., 2. My italics.
[14] *Haida Nation v British Columbia* (Minister of Forests), [2004] 3 SCR 511, 2004 SCC73, (*Haida*).
[15] *Haida* at para 11.
[16] *Haida* at para 17.

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And later: "Canada's Aboriginal peoples were here when Europeans came, and were never conquered."[17] As John Borrows and others argue,[18] the violence of the assertion of sovereignty is intimately tied to the violence of an expanding settler occupation, the mere fact of which tarnishes (renders coercive) the context in which treaties were and are made. In judicial reasons directly related to land, law operates as steward of settler sovereignty, insofar as it obscures the unjust origin and conditions of settler sovereignty. Settler illegitimacy is more difficult to conceal when tethered to the unquestionably dishonourable behaviour of attempted genocide. Relatedly, the dishonourable behaviour of the IRS system may directly impact current litigation regarding land and resources. Canadian law often requires Indigenous collectives to establish their pre-contact and ongoing association with land and their culturally distinct use of resources.[19] Is this a just requirement, given that Canada (government backed by law) sought to obliterate both through the IRS system? The emphasis on cultural loss in IRS litigation thereby threatens to reveal not only past human rights violations, but the ongoing illegitimacy of settler sovereignty and occupation. In settler colonial contexts, the settler collective typically responds with violence when its illegitimacy is rendered visible.[20] I argue that, in IRS case law, this violence consists of the relentless dehumanization of the Indigenous collective *as property*. I contend that the settler collective *reasserts* sovereignty *through* this dehumanization of the Indigenous collective, and that law operates as steward of settler sovereignty even in IRS litigation.

Asserting Sovereignty through Processes of Dehumanization

Frantz Fanon argues that settler colonialism is a race identity project that "parcels out the world" and "begin[s] with the fact of belonging or not belonging to [not only a given space, but] a given race, a given species."[21] European colonizers justified the mere assertion of sovereignty over Indigenous people on the grounds that the latter did not relate to land as private property. The European concept of property, rooted in the influential ideology of possessive individualism, generated an entire racial ontology. As C. B. Macpherson argues, relating to land as private property was said to be evidence of the individual's ability to use the rational mind to

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17 Ibid. at para 25.

18 John Borrows, *Crown and Aboriginal Occupations of Land: A History & Comparison*, Report for the Ipperwash Inquiry (October, 15 2005), accessed July 10, 2013, http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/History_of_Occupations_Borrows.pdf. See also: Lorenzo Veracini, "Settler Collective, Founding Violence and Disavowal: The Settler Colonial Situation," *Journal of Intercultural Studies* 29, no. 4 (November 2008): 363–79.

19 This important insight is considered by Ronald Niezen, 2003 Ronald Niezen,"Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada," *Canadian Journal of Law and Society* 18, no. 2 (2003): 1–26; and Celeste Hutchinson, "Reparations for Historical Injustice: Can Cultural Appropriation as a Result of Indian Residential Schools Provide Justification for Aboriginal Cultural Rights?," *Saskatchewan Law Review* 70 (2007): 425.

20 Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963) (*Wretched*); Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967) (*Black Skin*); Sherene H. Razack, introduction to *Race, Space and the Law: Unmapping a White Settler Society*, ed. S. Razack (Toronto: Between the Lines Press, 2002).

21 Fanon, *Wretched*, 40.

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control the body (and its animal desires).[22] This internal relationship, wherein the rational mind controls the body, was conceptualized as ownership and possession of the body. Those individuals—entire collectives of individuals—thought to lack this capacity for self-possession, were deemed less than fully human and in need of a rational mind (or minds) to control, possess, and improve their bodies for them. Those incapable of controlling body (and thereby land) as property were excluded from full legal and political personhood and its rights and responsibilities. If, as Macpherson argues, the origin and justification of modern law was to protect the private property of individuals rational enough to accumulate wealth within full market capitalism, then European law is deeply implicated in the eviction of many from full humanity. Fanon argues that, within settler colonialism, belonging to a given space, race, or species is asserted (or denied) through the settler's marking of the Black or native body as less than human, as object, as property.[23] Since property is both an internal and an external relationship, the violent processes of eviction and of dehumanization are integral to the construction of settler identity and subjectivity, at the level of the collective psyche or consciousness, at the level of the body, and at the level of the wider "spatial and temporal world."[24]

The settler's dehumanization of the Indigenous collective as property—as incapable of rational control of body and land—surfaces blatantly throughout IRS case law. Indigenous survivors (of attempted genocide) are portrayed as perpetual children or as angry, vengeful, and irrational adults. They are portrayed as incapable of controlling their addictions and sexual urges and as inclined toward sexual violence. They are said to inherit low intelligence and to be biologically and culturally damaged collectives, both prior to and after their IRS experience. What does this violence of dehumanization *do* in IRS case law? Portrayed as incapable of sovereignty, self-determination, and economic self-sufficiency, this dehumanization is likely experienced by Indigenous survivors as a familiar, yet new, assault on their individual and collective being. In turn, it likely enables settlers to experience themselves as rational and in control, and thereby as racially superior and morally entitled to *stay*. As Mark Rifkin states, law is central to how ". . . settler states' regulate not only proper kinds of embodiment . . . but also legitimate modes of collectivity and occupancy."[25] I now trace the racial ontology of property and its violence in *Blackwater v Plint*.[26]

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22 C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (London: Oxford University Press, 1962). Macpherson claims that Locke's version of possessive individualism influenced colonization and remains influential in today's full market capitalism. See also: Radhika Mohanram, *Black Body: Women, Colonialism, and Space* (Minneapolis: University of Minnesota Press, 1999); K. Anderson, *Race and the Crisis of Humanism* (New York: Routledge, 2007).

23 Emphasizing the unstable colonial mentality of the colonizer, Fanon states that "it is the settler who brings both the native and the settler into existence" (*Wretched*, 36).

24 Udo Krautwurst, "What is Settler Colonialism? An Anthropological Meditation on Frantz Fanon's 'Concerning Violence,'" *History and Anthropology* 14, no. 1 (2003): 55–72.

25 Mark Rifkin, "Indigenizing Agamben: Rethinking Sovereignty in Light of the 'Peculiar' Status of Native Peoples," *Cultural Critique* 73 (Fall 2009): 90.

26 For an insightful analysis of how Aboriginality as injured undermines the loss of culture claim in *Blackwater v Plint*, see Carole Blackburn, "Culture Loss and Crumbling Skulls: The Problematic of Injury in Residential School Litigation," *PoLAR: Political and Legal Anthropology Review* 35, no. 2 (2012): 289–307.

PART II: *Blackwater v Plint* and the "Cost of Doing Business"

The civil case *Blackwater* v *Plint* (1996–2005) concerns Alberni Indian Residential School (AIRS) in Port Alberni, British Columbia. This civil case was preceded by the criminal sentencing of Arthur Henry Plint, a dormitory supervisor at AIRS during the 1950s and 1960s.[27] Plint confessed to sixteen counts of indecent assault against male Indigenous children. In his decision, Hogarth J states that he fully believes the Indigenous survivors who testified that they experienced violence at the hands of many AIRS employees, not only Plint. He states, ". . . [T]here was a lot of violence used in the school, and whether it was done by the accused or anybody else is a good question . . ."[28] Hogarth J also acknowledges that AIRS was backed by Canadian legislation (the *Indian Act*), and that ". . . the Indian Residential School System was nothing but a form of institutionalized pedophilia . . .".[29] His decision contrasts sharply with the judicial reasoning in *Blackwater*. In 1996, following the criminal case and the sentencing of Plint to twelve years in prison, twenty-seven plaintiffs pursued a civil case against Canada and the United Church as well as other employees of AIRS, who the plaintiffs alleged committed sexual and physical abuse against them. The civil case had three phases and was heard by BCC Justice Donald Brenner.

Phase One: The Settler Collective as Vicariously Responsible

Justice Brenner's 1998 phase-one decision is considered a landmark decision in that it holds both Canada and the United Church vicariously responsible for the sexual assaults committed by Plint.[30] I consider Brenner J's phase-one decision important because it brings the racial ontology of property into view. The very notion of "vicarious responsibility" as "no fault" responsibility is historically rooted in the racialized, economic, master/slave relation, whereby a master was held economically responsible for any damage that a runaway slave caused to another master's property.[31] This law was later extended to the economic relation between employer and employee. Brenner J explicitly states that Canada and the Church were in a business relationship: they were partners in the "great enterprise of the schools" and had a "partnership in nation-building."[32] The Church's business was that of schooling children in religion. Canada's business was that of fulfilling its statutory obligations under the *Indian Act*.[33] Moreover, Canada was the senior business partner, for the *Indian Act* legislation gave Canada "control over virtually every aspect of the lives of Indians."[34] Brenner J frequently reminds the Court that

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27 *R v Plint* [1995] BCJ No 3060, March 21, 1995.
28 Ibid. at para 69.
29 Ibid. at para 14.
30 Brenner's 2001 decision apportions seventy-five percent vicarious responsibility to Canada and twenty-five percent to the Church (*Blackwater* 2001 at para 326). Despite appeals and reversals, this apportionment is upheld in *Barney v Canada* (*Blackwater v Plint*), 2005 SCC 58, [2005] SCJ No 59 Docket 30176, October 21 (*Barney*).
31 A. Watson, "Thinking Property at Rome," in *Slavery & the Law,* ed. P. Finkelman (England: Rowman & Littlefield Publishers, 2002): 419–36.
32 *Blackwater,* June1998 at paras 98, 99.
33 Ibid. at para 143.
34 *Blackwater* 2001 at para 254.

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vicarious responsibility involves no dishonourable behaviour on the part of Canada (only its employees).[35] Rather, "the fact that wrongful acts may occur is a cost of business."[36] Thus, Brenner J's reasons indirectly acknowledge the link between sexual abuse (wrongful acts) and nation building (Canada's business), and they erect a racializing economic framework for IRS case law (as all tort law) to which relations of property (and land) are integral. This framing allows for both the acknowledgement of the IRS system as a colonizing mechanism and the denial of responsibility for the dishonourable behaviour associated with it.

Phase Two: Racializing the Indigenous Collective as Property/Object

With Brenner's encouragement, all but seven of the twenty-seven plaintiffs settle out of court between the first and second phases of *Blackwater*.[37] In phase two, Brenner J must decide the issue of direct liability on the part of Canada and/or the Church: Did they know, or ought they to have known, about the sexual abuse committed by Plint? Were they negligent in failing to prevent or investigate abuse? Was Canada's duty non-delegable to the Church? Did Canada breach a fiduciary duty? Brenner J finds that Canada is directly liable in one sense: by virtue of being the "senior business partner" and bound by the *Indian Act*, Canada had a non-delegable statutory duty to ensure the safety and welfare of the students at the school. This finding of direct liability is overturned in 2005 by SCC CJ McLachlin.[38] Thus, by the end of *Blackwater* in 2005, Canada and the Church remain only vicariously "no fault" responsible for the violence committed by Plint.

Brenner must also decide whether it is probable that AIRS employees other than Plint committed sexual and physical abuse against the plaintiffs. MJ, the only female among the remaining seven plaintiffs, alleges that she was repeatedly raped by Principal Caldwell and assaulted by a dormitory supervisor, Mr. Peake.[39] She also claims to have suffered a broken nose from being pushed down a stairway and to have been slapped and locked in a dark room by a matron.[40] Although MJ does not make any allegation against Plint, the violence she experienced occurred during the time that Plint was employed at AIRS. Other plaintiffs claim that Principal Andrews physically abused them, that they were beaten by Mr. Humchitt, or that Mr. Hindmarsh (a temporary dormitory supervisor) fondled them.[41] All the plaintiffs tell of being subjected to "the gauntlet," a method of punishing "troublemakers" that was organized by teachers or principals. Indigenous children were forced to form two lines. The child to be punished was forced to run between these lines, sometimes naked. The children in the lines, and often the teachers

35 *Blackwater* June 1998 at para 109; *Blackwater* 2001 at paras 419–20.
36 McLachlin CJ, *Barney* at para 20, *supra* note 30.
37 *WRB v Plint* [2003] BCJ No 2783, BCCA 2003 Dec 10 BCJR 60045 at para 28.
38 *Barney* at para 50. Relying on the slippery wording of (the defendant Canada's) *Indian Act*, McLachlin CJ notes that the *Indian Act* uses the word "may" as in, "The Minister may provide for . . ." and thus, "The *Indian Act* falls far short of creating a mandatory duty to ensure the health and safety of children in residential schools."
39 *Blackwater* 2001 at paras 38–56.
40 Ibid. at paras 666, 699, 700.
41 Ibid. at paras 20, 24, 450.

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themselves, were required to verbally ridicule as well as physically assault the child as he or she ran through the lines.

Although a civil case requires Brenner to weigh the evidence with merely the "balance of probabilities" in mind, Brenner is compelled to avoid tarnishing the reputation of those wrongfully accused of sexual and physical assault. As none of the accused admits guilt, and as some are no longer alive to answer to the serious allegations against them, Brenner subjects these allegations to great scrutiny.[42] Moreover, while Canada and the Church do not challenge any of the claims related to Plint (because Plint confessed to so many other similar crimes), they do challenge the claims of direct liability: negligence, breach of non-delegable duty of care, and breach of fiduciary duty. Ultimately, Brenner decides that none of the other alleged perpetrators likely violated the Indigenous plaintiffs. With the exception of Canada's non-delegable duty, Brenner concludes that Canada and the United Church could not reasonably have known about the abuse of children at AIRS.

Given that the Court is dealing with historical sexual abuse and all the problems inherent in proving it, Brenner J's decision rests entirely on his assessment of the credibility of the plaintiffs' and the Crown's witnesses. Remnants of possessive individualism are traceable in his reasoning. He decides that although the plaintiffs' memories are credible with regard to the violence they experienced at the hands of Plint (after all, these memories are confirmed by Plint's confession in the criminal trial), the plaintiffs' memories are not credible with regard to the violence they allege to have experienced at the hands of other employees of AIRS and of the Port Alberni community. Brenner declares that the plaintiffs are simply mistaken that they told teachers, nurses, and RCMP officers about the abuse. The adult Indigenous plaintiffs are constructed as perpetual children whose memories are flawed and subject to "recall bias." The consignment of Indigenous adults to the category of child, with presumed underdeveloped intellect and lack of bodily control, is a common settler discursive strategy used to justify the domestication of Indigenous nations.[43]

Relatedly, if the plaintiffs have substance abuse issues, behaviour or anger problems, or complain of being in pain—that is, if they have diminished control over their bodies in these ways—they are deemed thoroughly lacking in credibility. As Brenner J harshly states with regard to the testimony of MJ:

> Perhaps the clearest example of Ms. MJ's lack of credibility and her dogged determination to associate every negative event in her life with her experiences at AIRS is Ms. MJ's insistence that [only her experience at AIRS affected her ability to earn an income later in life].[44]

Brenner J is so irritated by MJ's tendency to explain her inconsistencies in memory or her life choices by claiming that she "was in pain" that he mocks her on two occasions.[45] Clearly, the trauma and pain in survivors' lives can be acknowledged

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42 *Blackwater* 2001 at paras 15–17.

43 K. Schaffer and S. Smith, *Human Rights and Narrated Lives: The Ethics of Recognition* (New York: Palgrave Macmillan, 2004); Rifkin, "Indigenizing Agamben," *supra* note 25.

44 *Blackwater* 2001 at para 690.

45 Ibid. at paras 663, 669.

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only if it undermines their position.[46] Brenner ultimately dismisses MJ's claim in its entirety.[47] The plaintiffs as a collective are thereby excluded from the category of fully rational humans and are deemed incapable of asserting that their bodily integrity was unjustly violated. In contrast, the teachers, nurses, and police who testify against the plaintiffs—and even those who are long dead but presumably were respectable by virtue of their employment as teachers, nurses, or police—are constructed as rational adults and caring pseudo-parents. Brenner simply declares that they would have done something about the abuse had they known about it. As they did nothing about the abuse, it follows that they did not know about it. Consequently, Brenner does not find it reasonable to believe that a child-like Indigenous collective has reliable memories of sexual violation.

Historic sexual assault claims are claims that individuals know what happened to them, and more specifically, what happened to their bodies, in the past. Insofar as adult Indigenous survivors are denied the experiential knowledge they claim for their own bodies, they are excluded from the category of rational individuals who own their own body as property. They are dehumanized in this process. IRS historic sexual assault claims are also, clearly, collective claims: an Indigenous collective claims to know that a settler collective violated Indigenous bodies sexually (among other ways) as part of a wider strategy of genocide and the usurpation of land (the latter explicitly acknowledged by the Court in phase one). The Court responds to this collective claim by reducing the Indigenous collective to a "mass of neediness" in need of improvement.[48] The Court emphasizes the aftermath of attempted genocide without ever assigning responsibility for the destruction to the collective perpetrator that carried it out. The subject position of possessive individuals, those who are rationally in control of their own bodies, is denied to Indigenous survivors *collectively* through law. This eviction occurs through the very reasoning of Justice Brenner and mirrors the historical and contemporary exclusion of Indigenous people from owning private property in land under the *Indian Act*. The two evictions—symbolic and material—fit hand in glove. The settler "establishes" that the collective memory of Indigenous people is not credible with regard to what was done to their own individual bodies. The settler presumes that the collective memory of Indigenous people is even less reliable with regard to experiences (such as the signing of treaties or land and resource agreements) passed down to them through generations. This is one way in which colonial power—a reassertion of sovereignty and dominance in relation to Indigenous people and land—operates in the judicial reasoning here. Acknowledgement of the colonial context of the IRS system, made possible by the legal framing of this system as an "economic enterprise" and the law's emphasis on "historic sexual abuse" as the only actionable tort, allows the defendant Canada to simultaneously acknowledge the fact of colonization and genocide, evade responsibility for both colonization and genocide, and reassert settler sovereignty through the dehumanization of the Indigenous survivors and their

[46] See Blackburn, "Culture Loss and Crumbling Skulls," *supra* note 26.

[47] Esson J allows MJ's appeal and orders a new trial on the grounds that Brenner may have overlooked evidence and interpreted evidence in an unreasonably unfavorable way. *WRB v Plint* [2003] BCJ No 2783, BCCA 2003 Dec 10 BCJR 60045 at paras 91–99.

[48] Rifkin, "Indigenizing Agamben," *supra* note 25.

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communities. An even more explicit dehumanization of the Indigenous collective occurs in the third phase, which assesses "damages to property or person."

Phase Three: Canada's "Disturbing" Defence Strategy

In the third phase of *Blackwater,* counsel for the plaintiffs seek to have loss of culture count as an aggravating condition to the sexual assault that was committed against Indigenous survivors of AIRS. Justice Brenner allows this. The defendant Canada does not object to loss of culture as an aggravating condition. Perhaps over-confident that loss of culture was not itself an actionable tort and never would be, Canada then engages in a defence strategy that Chief Robert Joseph, the executive director of the Provincial Residential School Project, referred to as "disturbing."[49] Although Brenner J acknowledges that Canada's strategy may appear "distasteful," he states that "it is nonetheless the inevitable result" of statutes of limitations on everything but sexual assault.[50] The strategy is as follows: In order to reduce the compensation for the impact of the sexual abuse for which Canada was seventy-five percent vicariously responsible, Canada uses the words of the plaintiffs to argue that the mere fact of being at AIRS, and all the other violence survivors experienced while there, had more of an impact on survivors' lives and communities than did the sexual abuse they experienced at the hands of the individual perpetrator Plint. Reiterating Canada's argument, Brenner J states:

> Leaving aside the sexual assault, the plaintiffs would still have been at AIRS and they would a) have been living away from their families, communities and culture; b) have been forced to speak English instead of their own native languages; c) have had to eat food that was vastly different from what they were used to; d) have been subjected to the physical pain and the fear associated with the violence among the children; e) have endured the terror of the gauntlet; f) have been victims of excessive corporal punishment from supervisors and other adults at AIRS; and g) have been subject to racist discrimination when bussed to public schools.[51]

In determining the award of damages to the plaintiffs, Brenner considers two factors that may have had a psychological impact on the IRS survivors. First, the sexual assault committed by Plint, and second, "the simple fact of attending IRS" and all the harms to which attendance gave rise. While the defence strategy on the part of Canada and the Church is indeed disturbing, it is made more so by Canada's and Brenner's emphasis on a third possible causal factor: the prior home lives of the plaintiffs and their lives after leaving AIRS. Brenner explains:

> . . . [W]ith their family backgrounds, home lives prior to AIRS, the institutionalization at AIRS, and all of the non-sexual traumas which they have suffered to date, the plaintiffs had measurable risks and shortcomings which were inherent to their position regardless of the sexual assaults.[52]

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[49] P. Barnsley, "Alberni Indian Residential School Trial Decision 'Shocks,'" *Windspeaker News,* July 10, 2001, accessed August 1, 2013, http://www.ammsa.com/publications/windspeaker/alberni-indian-residential-school-trial-decision-shocks.

[50] *Blackwater* 2001 at para 458.

[51] *Blackwater* 2001 at para 334.

[52] *Blackwater* 2001 at para 388.

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Where more than one wrongdoing or set of causal conditions occurred, as revealed in the above passage, it becomes a challenge for Brenner J to siphon off the consequences of one harm from another, especially when the effects of the tort are psychological (that is, "not objective"). If a clear line of causation cannot be drawn between the wrongdoing and its damage, then the amount of compensation for the tort may be decreased. Given all the non-sexual violence related to AIRS, Brenner J finds it difficult to pinpoint the aspect of the physical and sexual assault committed by Plint that gave rise to trauma in the lives of the plaintiffs.[53] Here, the non-sexual violence associated with forced assimilation and genocide is explicitly acknowledged (by both Canada and the Court) as having devastating effects on the plaintiffs. As the non-sexual violence is not a legally recognized harm, Canada's acknowledgement of it is protected by law. In this context, such an acknowledgement must have felt like yet another form of violence to the plaintiffs. How much more so, when Canada and Brenner J twist the plaintiffs' own words in order to undermine the survivors' claim?

For example, many survivors testified to the daily terror of the gauntlet. MW1 testified that he was forced to run the gauntlet several times a week, and that it terrified him so much, he would pass out.[54] After FLB's first experience of the gauntlet, he ". . . tried to kill himself by jumping head first off the exterior stairs of AIRS."[55] Emphasizing that the plaintiffs responded to the terror of the gauntlet with attempts at suicide and/or violence against others,[56] Canada and the Court turn the fact of cultural genocide against the victim of genocide:

> It is questionable as to whether Mr. [FL]B's lifetime pattern of violence is directly connected to his experiences of being sexually assaulted. It appears that he developed a pattern of resorting to violence as a result of being so violently treated himself at AIRS for reasons he could never understand.[57]
>
> While Plint sexually brutalized Mr. [FL]B. while he attended AIRS, I conclude that the non-sexual brutalization he suffered also had a significant impact.[58]
>
> At AIRS, Mr. [FL]B describes the "enormity" of the loss of his culture and connection with his family as being "overwhelming" and the effects "irreversible." Being sent to AIRS, he says, cost him his identity and self-esteem. Mr. [FL]B says that it is obvious that the loss of his culture had a "tremendous" effect on him as a person, leaving him "angry as hell."[59]
>
> . . . The fact that Mr. [FL]B attempted to commit suicide after his first exposure to the gauntlet suggests the extent of his psychological difficulties well before the sexual assaults by Plint were ever committed.[60]

[53] Ibid. at paras 445, 446, 449.
[54] Ibid. at paras 835, 847.
[55] *Blackwater* 2001 at paras 440–41.
[56] Ibid. at paras 436, 437.
[57] Ibid. at para 454.
[58] Ibid. at para 457.
[59] Ibid. at para 519.
[60] Ibid. at para 522.

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The violence of genocide is emphasized in order that the perpetrator of genocide (Canada and the Church) may save some money. The violence is acknowledged as clearly rooted in the IRS system operated by Canada and backed by the *Indian Act*. It is also indirectly acknowledged that the violence in survivors' lives was carried out by a collective (teachers, police, nurses, townspeople, and members of businesses, church, and government), specifically for the purpose of nation building, rather than by the individual perpetrator for whom Canada is vicariously responsible. Canada argues (and Brenner concurs) that the survivors' psychological difficulties also resulted from life prior to AIRS. Children came from generations of damaged peoples and cultures. Here, colonization is not acknowledged as the source of any such intergenerational damage to Indigenous cultures. Generation after generation of Indigenous people are characterized as being of low intelligence, thereby explaining their lack of education and fruitful employment. That many of the plaintiffs' families have problems with addiction and substance abuse, as well as with high rates of interpersonal violence, is interpreted by Brenner as evidence of biological, racial inferiority. In the end, the damaged lives, bodies, and cultures that preceded the removal of children to AIRS mitigates any damage caused by attempted genocide, which in turn mitigates any damage caused by the sexual assault. Canada and the Church will be required to pay very little in compensation.[61]

Brenner's judgement leaves us with an account of Indigenous survivors as perpetually childlike, as culturally and personally dysfunctional, and as damaged property in need of transformation and improvement (by the settler). Importantly, dysfunctional people cannot be awarded stewardship of land. Brenner's judgement also leaves us with an account of the settler collective as capable of genocide but as only vicariously responsible for the crimes of individuals. I suggest that reducing Indigenous survivors to property becomes even more pronounced in this phase precisely because law enabled the settler to freely boast about the violence of the IRS system as a colonizing mechanism. The settler's racial fantasy of rightful ownership of land is bolstered, despite the ever-growing recognition of its illegitimacy.

What "Lurks beneath the Surface" of *Blackwater*?

All parties to the litigation appeal Brenner J's 2001 decision, and it eventually reaches the Supreme Court of Canada under the case title *Barney v Canada*. In the 2005 decision, SCC CJ McLachlin upholds most of Brenner's original decision. As previously mentioned, she overturns Brenner's ruling that Canada had "a non-delegable statutory duty to ensure the safety and welfare of the students at the school," the only thread of direct liability on the part of Canada. Lawyers for FLB (and LEAF as intervener) argue that Brenner ought to have regarded the "original position as pre-IRS internment."[62] With AIRS as the original position, Brenner

[61] Brenner awarded damages in the range of $10,000–$20,000 for three of the plaintiffs and $85,000–$145,000 for the other three plaintiffs.

[62] Factum of the Interveners *Barney v Canada* (Women's Legal Education and Action Fund (LEAF), The Native Women's Association of Canada, and Disabled Women's Network of Canada), April 23, 2005 at para 3.

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could not trace a direct causal connection between sexual abuse alone and psychological impact. With pre-internment as the original position, FLB could claim that Canada breached its fiduciary duty ". . . of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests" in subjecting children to all the "non-sexual brutality" of the schools.[63] In this decision, McLachlin notes that another issue "lurks beneath the surface," namely,

> . . . the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples.[64]

McLachlin dismisses this claim, finding that neither Canada nor the Church were "dishonest or intentionally disloyal."[65] Breach of this second basis of fiduciary duty (a duty rooted in treaties between nations) remains untouchable through law. This 2005 decision followed within a year of McLachlin's 2004 *Haida* decision and the 2004 certification of *Cloud*. If these are considered in tandem, law once again appears to function as steward of settler legitimacy. To sever the sexual assaults committed within the IRS system from the cultural violence (across generations) committed through the IRS system, is to obscure the connection between IRS genocide and land—land seized and occupied through dishonourable means. McLachlin clears the way for the Crown—whose sovereignty hangs on a mere assertion—to "consult and accommodate" regarding land and resources with the appearance of honour. McLachlin's ruling on fiduciary duty may also protect Canada against the loss of culture claims in the looming *Cloud* and *Baxter* class actions.

Implications for *Baxter v Canada*

Canada's disturbing defence strategy in *Blackwater* occurred when courts would not consider loss of culture as an actionable tort. With the 2004 certification of *Cloud*, *Baxter v Canada* would also likely be certified. Initiated in 2000, by 2006, *Baxter* merged all IRS class and individual actions against the Government of Canada that were in the courts at the time and represented more than 80,000 Indigenous claimants from across the land. While it began as a twelve-billion-dollar suit, its amended 2006 claim sought one hundred billion in damages against Canada (and another one hundred billion against the Churches). When the government's appeal of both *Cloud* and *Baxter* failed in May of 2005, the government hired retired SCJ Iacobucci to negotiate a settlement agreement. Up until this time, every Canadian government (Liberal and Conservative) challenged every IRS litigation claim and resisted negotiating global reparations for survivors of the IRS system. Is there something about *Baxter* that may have changed Canada's response?

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63 *Barney* at para 57.
64 *Barney* at para 61.
65 Ibid. at para 60.

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The *Baxter* 2003 application for certification claims that the Crown breached Aboriginal treaty rights and human rights to enjoy, practice, and transmit Aboriginal languages, and that the Crown breached its fiduciary duty with respect to its conduct regarding the purpose, operation, management, and supervision of IRS. *Baxter* claims that the Crown was systemically negligent and in breach of its non-delegable fiduciary duty to protect the health, safety, well-being, language, culture, customs, traditions, and education of survivors, and that it unlawfully apprehended and confined children and separated them from family and community. Moreover, *Baxter* cites United Nations' conventions regarding genocide, war crimes, crimes against humanity, and the rights of children.

The plaintiffs in *Baxter* emphasize the intergenerational impact of attending IRS. I contend that *Baxter* frames survivors' experiences as evidence of ongoing genocide rather than as evidence of biological, racial, and cultural inferiority, as interpreted in *Blackwater*. As with the testimony in other civil suits such as *Blackwater,* the plaintiffs' affidavits reveal a web of violence committed by a settler collective (state agents and citizens including teachers, nurses, police, clergy, and government officials) well into the present. Truant officers abducted children and loaded them in trucks. Trucks driven by Canadian citizens delivered the children to airplanes. Airplanes piloted by Canadian citizens delivered children to remote institutions, and these institutions were operated by yet more Canadian citizens. A great number of Canadians were necessary to carry out the organized violence of the IRS system. *Baxter* places genocide explicitly on the table and implicates a settler collective in this violence through time.

I suggest that revealing this dishonourable behaviour in a court of law (even if the Indigenous claimants were to lose) threatened to reveal the illegitimacy of both Canada's claim to sovereignty and the sense of rightful belonging on the part of the settler collective. Further, Canada's disturbing defence strategy in *Blackwater*—i.e., its argument that loss of culture was more to blame for the psychological impact of IRS than was the historic sexual abuse—could have backfired on Canada if *Baxter* were to proceed to court and with the argument that Canada knowingly engaged in practices tantamount to genocide. For, given Brenner's 2001 decision, there is now at least one judicial decision documenting Canada's argument that cultural loss (and every violence other than the sexual abuse) had a greater impact on Indigenous survivors' lives than did sexual abuse alone. In 2006–2007, nine justices simultaneously certify *Baxter* and bring *Baxter* (and *Cloud*) to a close by authorizing the IRSSA. In their decisions, they once again mark the Indigenous survivors as a damaged collective. With the dishonourable behaviour of genocide and settler illegitimacy hidden from view, and the potential damage of Canada's defence strategy in *Blackwater* under control, Canada is free to move forward with business as usual. Business regarding land claims and delimiting forms of Indigenous sovereignty and self-determination. The *Baxter* settlement allows the settler collective (and its law) to *stay*.[66]

[66] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (December 2006): 387–409.

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Conclusion: Troubling the Path to Decolonization

The racial ontology of property and the violence of dehumanization continue to operate within Canadian law, reproducing ideas of those who belong and those who do not belong to a given race and place. The violence of the mere assertion of sovereignty, which, in Fanon's words, "parcels out the world;" the violence of the settler collective's occupation of Indigenous lands; and the violence of attempted genocide, are interrelated, past into present. These interrelated forms of violence, as revealed in IRS case law, should trouble the settler collective's vision of decolonization and the role that Canadian law may play in decolonizing processes. What, if not attempted genocide, will Canadian law ever count as dishonourable behaviour on the part of the Crown? Should a law that authorized past colonial violence, and that readily unleashes the violence of dehumanization today, be preserved (rather than abandoned and replaced altogether)? As Taiaiake Alfred argues, justice requires the dismantling of settler colonial institutions, a redistribution of power, and a return of land and resources.[67] Canadian law operates contrary to these goals.

Relatedly, what, if not attempted genocide, will shake the settler collective's sense of rightful belonging and the right to stay on Indigenous land? Recognition of the IRS system as genocide is now—after the settlement of *Baxter*—surfacing in mainstream Canadian social and political discourse. More settlers embrace the idea that "we are all treaty peoples," and yet we, the settlers, continue to draw a line, parceling out the world, beyond which (we assert) we will not move. This line is that of refusing to even imagine the return of land to Indigenous people and, more importantly, to acknowledge and live by the Indigenous laws of that land. This line is that of refusing to even imagine that if justice requires an end to settler occupation of Indigenous land, then the settler collective is morally required to move. Rather, the settler collective presumes that it is enough to tweak aspects of government-to-government relations in order to extend economic prosperity to Indigenous peoples whose lands (we assert) we will continue to "share" because Indigenous people do not want us to leave anyway. The settler promises to enhance the Indigenous collective's ability to (barely) survive: to create opportunities for the Indigenous collective to become better educated and to become labourers in the settler's profitable economy—one of the goals of the IRS system. All such strategies leave the settler feeling good about "improving" the Indigenous collective, while leaving settler sovereignty and settler occupation unchanged.[68]

Genuine decolonization requires more from settlers. It requires that settlers address the violence not only of genocide, but also of Canada's mere assertion of sovereignty over Indigenous nations and the ongoing violence of settlers' own

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[67] Taiaiake Alfred, "Restitution is the Real Pathway to Justice for Indigenous Peoples," in *Response, Responsibility and Renewal: Canada's Truth and Reconciliation Journey*, ed. G. Younging, J. Dewar, and M. De Gagne (Ottawa, ON: Aboriginal Healing Foundation, 2009), accessed July 10, 2013 http://www.ahf.ca/.

[68] Jeff Corntassel, "Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-determination," *Decolonization: Indigeneity, Education & Society* 1 (2012): 86–101.

(uninvited and unauthorized) physical occupation of Indigenous lands. As Tuck and Yang argue, the injustice of settler occupation changes the terms on which decolonization should be negotiated.[69] Indigenous nations should decide whether the settler collective has a future on Indigenous territory. Thus there are different paths for the settler collective and Indigenous collectives in moving towards decolonization. Just as Glen Coulthard recommends that Indigenous people cultivate "anti-colonial agency" by disengaging from "the colonial project" and refusing to look to the settler for recognition of either humanity or sovereignty,[70] I recommend that we, the settlers, challenge the arrogant assumption (and law) that we legitimately belong on Indigenous land, and that we rightfully have the power to grant humanity or sovereignty to anyone.

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[69] Eve Tuck and K. Wayne Yang, "Decolonization is Not a Metaphor," *Decolonization: Indigeneity, Education & Society* 1, no.1 (2012): 1–40.

[70] Glen S. Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada," *Contemporary Political Theory* 6 (2007): 453, 454.

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