WHITE TERROR, CANADA’S INDIAN RESIDENTIAL SCHOOLS 
AND THE COLONIAL PRESENT: 
FROM LAW TOWARDS A PEDAGOGY OF RECOGNITION

by

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A thesis submitted in conformity with the requirements 
For the degree of Doctor of Philosophy 
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Ontario Institute for Studies in Education 
University of Toronto

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ABSTRACT

What does it mean to say that settler states have a colonial present? In this thesis, I first draw upon the anti-colonial theory of Frantz Fanon (1963, 1967) and contemporary anti-colonial theorists, to understand the nature of colonial power and settler occupation. I develop the theoretical framework of “white terror as colonial force field” structured by the triadic relation of land—terror—white identity, and emphasize that any given site within a colonial force field must be understood as systematically interrelated with other sites, maintained by a settler collectivity. The old European political rationality of “possessive individualism,” the historical rationale for not only capitalist accumulation but modern liberal law, government, and sovereignty, is especially useful for tracing interconnections (symbolic and material) among sites within a colonial force field. This ideology functions, in Fanon’s words, to “bring settler and native into being” through processes which dehumanize the latter as property. Marking the Indigenous collective as inherently damaged, reconstitutes the settler collective as legitimate occupiers of land. Next, I provide an illustration of this theoretical framework. I argue that the Canadian government and law’s response to Indigenous peoples’ demand for justice regarding the genocidal violence of Canada’s Indian Residential Schools (IRS) must be read within the
context of a contemporary colonial force field. I trace possessive individualism and the ontological force of property in IRS case law, specifically, *R v. Plint, Blackwater v. Plint, Cloud v. Canada* and *Baxter v. Canada*. I also examine the 2006 IRS Settlement Agreement and Canada’s 2008 Apology to “former students” of IRS. I show how discursive strategies on the part of Canada, recuperate and perpetuate anew the familiar relation of colonized and colonizer. Canada’s response is thereby intimately tied to issues of land, white identity and sovereignty today. Finally, I lay the groundwork for an anti-colonial pedagogy of recognition which requires settler occupiers to recognize the re-colonizing moves which reconstitute settlers as racially dominant in relation to Indigenous nations and their lands. This pedagogy has relevance for the Government’s (now unfolding) IRS Truth and Reconciliation Commission, and other anti-colonial social change and education initiatives.
Acknowledgements

I owe my deepest gratitude to my supervisor Dr. Sherene Razack. A brilliant scholar and dedicated teacher, Sherene’s analysis of the violence of settler colonialism and her insistence that all non-Indigenous Canadians think about our relation to “the land beneath our feet,” both initiated and shaped my own understanding and examination of the colonial present. I thank her for her inspirational commitment to the work of anti-colonial critique and social change, and for her belief in my ability to contribute to this important work through this thesis. It was an honour to write this thesis under her supervision.

I am also grateful to my thesis committee for their rigorous and enthusiastic engagement with this thesis. Dr. Kari Dehli and Dr. Tanya Titchkosky provided critically insightful suggestions for improving my theoretical framework and data analysis. I have learned so much from each of them in this process. My external examiner, Dr. Verna St. Denis, offered invaluable critical feed-back with great encouragement and generosity of spirit. Her expertise in pedagogy has inspired me to think more carefully about how to teach about the violence of colonialism. Internal-external examiner Dr. Martin Cannon, has compelled me to think about some surprisingly complex dimensions to settler identity. Thank you all.

My friends, who are my family, among them especially Martha Ayim, Maryann Ayim, and Mavis Jones, have been a source of unconditional love and support, joy and inspiration over the past few decades of my life. With respect to this thesis, their daily encouragement and patience, during what at times seemed an endless writing process, gave me the determination to persevere. A special thank you to Mavis in this regard, for her tireless moral and practical support, and for her discerning feed-back on every chapter at every stage of writing. Thank you to Christine Giese for many sparkling conversations regarding social justice pedagogy, to Gloria Alvernaz Mulcahy for sharing her wisdom about settler colonialism with me, to Sandy Morton, Janine Burigana, Jacquie McGann, Anna Ziolecki, and Carmela Murdocca for encouragement.

Thank you also to Shaista Patel, Carol-Lynne D’Arcangelis, Laura Kruk, Nashwa Salem, Zahra Rasul and Tammy George for their invaluable critique of my thesis.

Gifts of time, energy, and computer expertise made the completion of this thesis possible. Thank you to Lynn Caldwell, Larry Brookwell, Ilya Brookwell, Rob Nuttall, and Michael Doering.

Finally, thank you to Martha Ayim, Maryann Ayim, and my late friend Joan Mason-Grant, for financing my return to university. Their amazing generosity, together with the research employment opportunities made possible by Dr. Razack, enabled me to complete this degree. I also thank the Social Sciences and Humanities Research Council for a one year doctoral fellowship.
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Chapter 1: Introduction

1.1 Nature of the Project and Situating the Study

The Historical Present: a “New Relationship” or Colonialism On-Going\(^1\)?

I stand before you today to offer an apology to former students of Indian residential schools. The treatment of children in these schools is a sad chapter in our history. ...There is no place in Canada for the attitudes that inspired the Indian residential schools system to ever again prevail. ...[the] settlement agreement... gives us a new beginning and an opportunity to move forward ... forging a new relationship based on knowledge of our shared history, a respect for each other and ... a renewed understanding that strong families, strong communities, and vibrant cultures and traditions will contribute to a stronger Canada for all of us. God bless all of you. God bless our land.

Prime Minister Stephen Harper, June 11, 2008.\(^2\)

…the significance of this day is not just about what has been but, equally important, what is to come. Never again will this House consider us the Indian problem just for being who we are. ... Brave survivors, through the telling of their painful stories, have stripped white supremacy of its authority and legitimacy. The irresistibility of speaking truth to power is real. ... Emboldened by this spectacle of history, it is possible to end our racial nightmare together. ...This day...signifies...a respectful, and therefore, liberating relationship between us and the rest of Canada.

Assembly of First Nations Grand Chief Phil Fontaine, June 11, 2008.\(^3\)

On June 11\(^{th}\), 2008 the Prime Minister of Canada stood in the House of Commons and delivered an apology to “former students” of Canada’s Indian Residential School system (IRS). The 2008 Apology followed upon nearly two decades of political struggle on the part of Indigenous people calling for such an apology.\(^4\) It also followed upon the 2006 IRS Settlement Agreement (IRSSA) to the largest class action in Canada’s legal history: the Baxter National Class action which represented more than 80,000 Indigenous
survivors of Canada’s IRS—itself a culmination of nearly two decades of battle within Canada’s legal system. Although not ultimately legally mandated by the settlement, the Prime Minister’s apology was seen by many Indigenous peoples as a prerequisite for moving forward with reconciliation between Indigenous and settler Canadians, reconciliation with respect not only to IRS, but with respect to broader economic and political issues regarding Indigenous sovereignty, land and resources (AFN 2004). For many, as for Harper and Fontaine above, the IRSSA and the Apology may symbolically bring to a close the “legacy” of Canada’s IRS and may constitute the long awaited first step towards reconciliation and the creation of “a new relationship” between Canada and Indigenous nations as called for by the 1996 Royal Commission on Aboriginal Peoples (Canada 1996, hereafter, RCAP). Others, including me, may be less optimistic if by “new relationship” we mean an anti-colonial or non-colonial relationship. Colonial relations involve struggle over land, but also, as Patricia Monture-Angus claims: “colonial relations have as a central characteristic the belief that one has legitimate power over the other group—justified by a number of myths about that group’s inferiority” (2002, 158). In this thesis I show how Canada’s response regarding IRS violence, reproduces colonial relations in the present.

1.1.1 “Speaking Truth to Power”: Naming the violence of Indian Residential Schools

Indigenous leaders, scholars, and activists argue that Canada’s Indian residential school system, which operated for well over 100 years (1879–1996), was instrumental to Canada’s colonial project of building a white settler nation on Indigenous land (Chrisjohn et al.1997/2006, Churchill 1997, 2003, 2004). Many Indigenous people identify the
“racial nightmare” of IRS specifically in terms of genocide (Chrisjohn et al., 1997, 2001, 2002, 2008). I concur with this analysis. The 100 year project can be understood as a settler identity project which sought to sever Indigenous children from their families and cultures, and attempted to disrupt the inter-generational transference of knowledge of the land. Thus, the violence of IRS—whether child abduction, sexual abuse, physical abuse, medical experimentation, exposure to disease, death, the extermination of languages, the destruction of families, the elimination of cultures (Kelm 1998)—can be fully understood only within this context of the colonial quest to control land and resources in the interests of a dominant white collective (settler occupiers). This colonial context changes the nature, scope and meaning of the violence associated with IRS, and renders it a category of violence different from the sexual and physical abuse of children within institutions for orphans, people with disabilities, etc. From the time in the late 1980s when the sexual abuse of Indigenous children within Canada’s IRS began to surface in mainstream consciousness (e.g., covered by mainstream news), Indigenous people emphasized that the focus on sexual abuse alone was too narrow, and that sexual violation needed to be seen as interconnected with the violence of colonization more broadly (Chrisjohn 1997). Although Indigenous people have persisted for decades in “speaking truth to power,” it appears that power is not yet willing to also speak this truth as it glances at its past nation building practices. For despite immunity from future litigation concerning IRS, Harper’s carefully worded apology never mentions colonization and mentions land but once: in the final four words which affirm the land as belonging to Canada, blessed by the colonizer’s god. Similarly, colonization and land were curiously absent from the CBC News-world
national coverage of the Apology (CBC News-world 2008). Historian James Miller provided a brief historical account of IRS and the abuses to which Indigenous children were subjected. He explained the three components to “The [5 Billion dollar legal] Settlement” to be funded by Canada: the Common Experience Payment (CEP) made to each Individual IRS survivor as compensation for (often forced) attendance at the institutions, the Independent Assessment Process (IAP) which will provide further redress to individual survivors who experienced “serious” sexual or physical abuse, and the “cornerstone of the settlement”: the Truth and Reconciliation Commission (TRC) which will unfold over five years with the mandate of creating an accurate historical record of Canada’s IRS as told from the perspective of survivors, for the purpose of healing amongst Indigenous communities, educating the general Canadian public, and promoting reconciliation between Indigenous peoples and non-Indigenous Canadians.  

Nothing was stated in Harper’s apology or the news coverage, about the specific content and significance of the Baxter national class action claim. Yet Baxter was prepared to argue that Canada’s involvement in creating, maintaining and monitoring the IRS system, itself constituted a grave violation of human rights, a violation equivalent to genocide (Baxter v. Canada, Affidavit 2003; Amended Claim 2006). As such, Baxter seemed to work from the premise that IRS violence was part of a larger colonial project, that is, intimately connected to land.

Indigenous scholars such as Roland Chrisjohn (2006, 2008, 2009), Taiaiake Alfred (2009), and Waziyatawin (2009) argue that Canada’s Apology means very little if the colonial and genocidal nature of the past injustice of IRS is not accurately named. Ward
Churchill (1997) suggests that genocide is integral to colonization, that all colonial states are genocidal. Both terms “colonization” and “genocide” were absent from the Apology. Why is Canada reluctant to name the violence of IRS in these terms, especially if—as dominant narratives emphasize—this is a violence of the past? What is at stake for Canada in naming the injustice of IRS accurately? Some argue that, to formally acknowledge that Canada’s IRS system was a past mechanism of genocide for the purpose of nation building would not only call into question Canada’s self-identity as a peace loving nation, it would call into question the legality of Canada’s past acquisition of Indigenous lands (Slattery 2006, Churchill 2003). Although a significant consequence, is this the only consequence for Canada?

Dominant discourse with respect to IRS, fixates either on the past or the future. Little is said about the present. The poverty and “fourth world” living conditions of many Indigenous nations, is often said to be the “legacy” of IRS, past colonial policies and practices. The present is portrayed as, at worst, a space marked by such remnants of an unjust colonial past. The present is portrayed as a space of promise and opportunity to right these wrongs through apology and “economic partnership,” to paraphrase P.M. Paul Martin’s (Lib.) statement regarding the Kelowna Accord (Canada 2005a). As above, Prime Minister Harper’s 2008 apology emphasizes the ability to “move forward” and “create a stronger Canada for all of us” (Canada 2008). Relatedly, in 2009, Governor General Michaele Jean, serving as honorary witness to the re-launch of the Truth and Reconciliation Commission, states “...if the present does not recognize the wrongs of the past, the future takes it’s revenge.” The present is never portrayed in dominant discourse
as a space which is unjust because colonial relations both persist and are created anew. In this thesis, I contend that what is at stake is the power to name present reality as colonial and violent. This risks bringing into view a white collective as an on-going occupier of Indigenous lands. If the colonial relationship remains intact today in even new formation, it would call into question the moral, political and legal legitimacy not merely of what Canada inherits from the past, but of Canada’s present day on-going effort to control Indigenous lands and resources (Churchill 2003). It would call into question Canada’s very existence as a sovereign nation (Monture-Angus 1999). To expose a wider unjust colonial relationship—the wider racial nightmare—which continues to operate today, not merely as a “remnant of the past” (Lipsitz 1998), but through institutions (political, legal, economic) and ways of life currently upheld and practiced by settler Canadians in the present, threatens to reveal colonizers as alive and well today. This would reconfigure issues of responsibility and justice, not just regarding the past, but with reference to the present. I contend that Canada’s inaccurate naming of the past violence of IRS serves to mask (and protect) present day colonial relations, relations between Indigenous people and settlers, structured by the triadic relation of land—terror—white collective identity. More specifically, I contend that Canada’s response to Indigenous people’s demand for justice regarding IRS, is a response which protects Canada’s on-going assertions of sovereignty in relation to Indigenous nations.

1.1.2 “Just for being who we are”: Land and White settler identity

In addition to the claim that the Prime Minister’s Apology means very little, some Indigenous leaders, such as First Nations’ Summit of BC Grand Chief Edward John, claim
that there is a *contradiction* in Canada’s gesture towards reconciliation with respect to IRS and Canada’s decades long resistance to the formulation of the United Nations’ Declaration of the Rights of Indigenous Peoples (hereafter UNDRIP). The United Nations passed UNDRIP in 2007, yet Canada and three other white settler nations refused to sign.¹² According to Grand Chief Edward John, UNDRIP would give Indigenous peoples:

> ...legal recognition and protection to [their] lands, territories and resources ...with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. ...Canada’s policy of denying Aboriginal title and rights is premised on the very same attitudes that Prime Minister Harper referred to in his residential school apology. (John 2009, 2–3)

It is clear to Indigenous people that Canada’s effort to control Indigenous lands and resources has never ceased; that is to say, it is an on-going project, not a merely historical one. There are numerous examples of Canada’s present day interest and effort in acquiring and / or maintaining control of Indigenous land and resources. Consider the B.C. “Modern Treaties” where Indigenous people lose over 90% of their traditional territories (Morse 2008a, Woolford 2004, 2005, Alfred 2001), the Alberta tar sands (Thomas-Muller 2008), and the boreal forests of Grassy Narrows Ontario (Willow 2009). Yet, there would be a contradiction between Canada’s gesture of reconciliation regarding IRS and its refusal to sign UNDRIP only if Canada’s apology regarding IRS was *not also* about settler control of land. I suggest that just as the violence of IRS can be fully understood only when analyzed as part of a larger past colonial project of land theft and nation building, so too, Canada’s *response* of the past two decades to the violence of IRS, must be analyzed within the context of present day colonial strategies for securing Canada’s control of
(Indigenous) land and resources. I propose to show that Canada’s contemporary response (in both law and government discourse) to IRS is ultimately about land today. But this is not a merely economic claim. As post-colonial theorists argue, although the acquisition or control of land and resources is central to colonization, colonialism is not merely about acquisition or accumulation, it is not merely an economic relation (Fanon 1963, 1967; Memmi 1965, Said 1993a, Taussig 2004a). Rather, colonialism’s quest for land is also a quest for “identity,” specifically racial superiority. I argue that white racial identity and hegemony are constructed and solidified through relations of accumulation (Fanon 1963, Farley 2005, Hill Collins 2009). The European ideology of “possessive individualism” (Macpherson 1962) and the ontological force of property (Bryan 2000) is integral to white settler identity. I show that, just as settler control of land is always about white identity, so too, white identity is always about land, even when land is not explicitly visible or tangible. I contend that a close examination of Canada’s response to the violence of IRS—Canada’s effort to control the meaning of history regarding IRS—will reveal the inner workings of modern-colonial power: we will glimpse how closely white settler identity remains tethered to land today.

1.1.3 Towards a Critical Pedagogy of Recognition

In his reflection upon what reconciliation between Indigenous and non-Indigenous Canada would entail, Taiaiake Alfred (2009) states that:

> Without a substantial change in the circumstances of colonization, there is no basis for considering the historical injustice [of IRS]. The crime of colonialism is present today, as are its perpetrators, and there is yet no moral or logical basis for Indigenous peoples to seek reconciliation with Canada. …Real change will happen only when settlers are forced into a
reckoning of who they are, what they have done, and what they have inherited; then they will be unable to function as colonials and begin instead to engage other peoples as respectful human beings.

Alfred concludes that “restitution is a precondition for reconciliation.” Restitution involves giving back the land, dismantling colonial institutions, and restoring nation to nation relationships. True reconciliation requires giving back the land, but it also requires that Canadians address their identity issues which are at the heart of Indigenous and settler relations. I am a Canadian of European descent, a Euro-Canadian, a white settler, white. I agree with Alfred that settlers must be forced into a reckoning of who (and perhaps what) we are, before we can be held accountable for colonial violence (past and present) and before we can attempt to embark upon anti- or non-colonial relationships with Indigenous peoples in the present. I suggest that this reckoning of which Alfred writes—which involves both a recognition and a sense of responsibility for who we are now as Euro-Canadians—requires that Euro-Canadians understand that we are part of a white collective body (Cortlett 2001), and that this collective body continues to engage in practices (often violent, always vile) which secure its occupation of Indigenous lands. In short, we need to understand how modern-colonial power operates within white settler states such as Canada, how colonial relations and colonial subject positions—especially, white colonial collective subject positions (settler occupiers)—are (re)produced in the present. And we need to illuminate the violence inherent to these relations and processes of collective subject formation. This theoretical groundwork is necessary for a pedagogy of recognition, where recognition means “the knowledge or feeling that someone or something present has been encountered before” and which is in turn the first step
towards anti-colonial reconciliation between Indigenous and settler Canadians. Recognition in this sense not only differs from, but counters, the problematic legal and political gestures of recognition by liberal modern states in regard to Indigenous nation status, title to land, and human rights. As I explain, liberal forms of recognition are mere strategies on the part of Canada for re-colonization (Samson 1999, Povinelli 2002, Short 2005, Coulthard 2007, Rifkin 2009). To date, such gestures simply re-assert Canadian sovereignty over Indigenous nations and their lands.

In this thesis I have two goals. The first goal—to which I devote nearly half the length of the thesis—is to articulate a theoretical framework for understanding how power operates within the modern-colonial present. To this end, I develop the notion of “white terror as colonial force field” structured by the triadic relation of land—terror—white identity, which brings into view the discursive production of the white collective subject and its interrelatedness with land and the violence of occupation. I explain how the European ideology of possessive individualism (Macpherson 1962), and the ontological force of property (Bryan 2000) to which it gives rise, is one important element to this racial power network and its productive force. This portion of the thesis does not address the issue of IRS specifically, but rather seeks to theorize the context in which IRS, as well as any other issue regarding settler – indigenous relations, must be analyzed. The second goal is to illustrate white terror as colonial force-field and to trace the operation of the ontological force of property in one specific area: the Canadian government and law’s response to Indigenous peoples’ demand for justice regarding the violence of Canada’s Indian residential school system [IRS]. My analysis of the legal and political events of R v. Plint...
Blackwater v. Plint (1995–2005), Cloud v. Canada (1998–2004), Baxter v. Canada (2000-2006), and the Prime Minister’s 2008 apology to “former students” of Canada’s IRS, will expose discursive moves on the part of Canada which not only obscure Canada’s past colonial (land related) objectives but which recuperate and perpetuate anew the familiar relation of colonized and colonizer within the present. The subject positions rendered possible through the Canadian Government and law’s response to the violence of IRS, will be seen to undermine the possibility of anti-colonial relations between Indigenous people and Canadian settlers. I contend that understanding how to recognize (theorize) this settler collective (the white collective body) and its re-colonizing moves will have implications for critical anti-colonial and anti-racism pedagogy which seeks to change present colonial relations, whether through the Government’s (now unfolding) Truth and Reconciliation Commission regarding IRS specifically, or other anti-colonial social change and education initiatives regarding relations between Canada and Indigenous nations.

1.2 Theoretical Framework

What does it mean to say that the present is colonial in white settler states such as Canada? I draw upon the anti-colonial theory of Frantz Fanon (1963, 1967), as well as many contemporary anti-colonial theorists, in order to develop a theoretical framework for understanding how power operates within the modern colonial present. The following concepts are key elements to this theoretical framework.
1.2.1 White Terror as Colonial Force-field

Since the influential work of Michel Foucault (1997, 1983), it is common to conceptualize modern power as multi-relational (rather than merely top down), as a “field or network of force relations” sustained and reproduced through various discursive struggles and material practices. Discourse is central to the operation of modern power and the construction of modern subjects/subjectivity. Foucault encourages us to ask “what subject positions are possible within certain discourses” and why (Hook 2001, 527). I borrow this notion of power as a network of force-relations, but in order to tailor it to specifically settler colonial contexts, I merge the notion of power as force-field with Frantz Fanon’s account of settler colonialism as one of terror, always connected to land, and always about settler identity (Fanon 1967, 88). The emergent framework of “white terror as colonial force field” emphasizes the terror of not only explicit fist to face encounters between settlers and indigenous, but the violence of white value schemes, social institutions, and the everyday structural components to a colonial life world. White terror as colonial force-field enables us to trace the connections between these various aspects to a settler colonial context and to analyze the conditions of subject formation. In particular, I fore-front Fanon’s insight that settler identity is discursively produced through the settler’s dehumanization of “the native,” and that racial hegemony is accomplished through relations of accumulation and property.
1.2.2 Possessive Individualism and the Ontological Force of Property

To clarify how white terror as colonial force-field discursively produces modern colonial subjects of the sort analyzed by Fanon, it is useful to understand the historical roots of white identity. White identity is rooted in the old European ideology of possessive individualism and the European concept of private property. The ideology of possessive individualism is found in the theory of Western philosophers and politicians from Hobbes to Locke and Hegel (Macpherson 1962, Mohanram 1999, Lowe 2006, Adams 2007, Anderson 2007). Historically, this ideology justified the accumulation of wealth of individuals and sovereign nations, and the domination of non-European societies by European societies. Some scholars, such as C.B. Macpherson (1962), argue that possessive individualism remains central to contemporary liberal states and full market capitalism. This ideology holds that private property is both an internal relation between an Individual’s rational mind and body, and an external relation between a rational human being and objects. As I explain in detail in Chapter 2, on this ideology, property is central to what it means to be most human and most free. Possessive individualism has an ontological force: it schematizes and categorizes humans into kinds of beings, those who are fully human, are beings of worth and political status, versus those who are not fully human, who are of lesser worth and political status. This ideology also establishes the historical connection between white identity and property, for those who were thought capable of owning property were designated by the socio-political term “white” (Fanon 1963, 1967; Harris 1993, Ignatiev 1995, Kinchloe 1998, Lipsitz 1998, Mohanram 1999, Roediger 1999, Anderson 2007, Gomez 2007). Thus, we see how racial difference (as
inferiority / superiority) is produced through relations of accumulation. With the help of Radhika Mohanram (1999) I explain how the centrality of property to white identity also solidifies the centrality of land to white settler identity, at the same time that it generates anxiety and the conditions for settler violence.

1.2.3 The Productive Function of Law: The Violence of Assertion, Eviction, Recognition, and Re-colonization

The justification for the existence of modern law is not only as protector of sovereignty, but the private property of a collective of individuals (Macpherson 1962). David Goldberg claims that the modern racial state “speaks through the law” (2002, 85). Law also has a cultural force, it constitutes social relations and through political rationalities, delimits what can be “thought” or known. As Goldberg claims, “law also calls subjectivities into being. This is law’s constitutive role in daily life” (2002, 146). While law is not the only important institution or element within a colonial force-field, its intimate ties to private property and colonial projects renders it an especially promising site for tracing the discursive formation of colonial subjects and colonial power relations into the present. The institution of modern law and “the rule of law” was a key mechanism in the past European colonization of non-European peoples (Monture-Angus 1999, Fitzpatrick 2001, Merry 2004, 2008). Far from being impartial and universal, modern law upheld European interests and was used to justify and enforce the colonial violence of the economic and race project of land usurpation (usurpation which in the Canadian context rests on a mere assertion of British / Canadian sovereignty over Indigenous lands), settler occupation, policies of forced assimilation and genocide of non-European peoples. According to
Fitzpatrick (2001) modern law itself, came into being through ontological distinctions regarding race and cannot be thought outside of these distinctions. This violence of “eviction” (also at the heart of possessive individualism) is inherent to the very idea of modern law (Fitzpatrick 2001, Farley 2005). Of interest to me, is the role of law in protecting the colonial violence of assertion and eviction today. Relatedly, its role in this regard renders suspicious its role in legal and political processes of recognition. In Canada to date, legal recognition of Indigenous nations as pre-existing Canadian sovereignty, has been conveyed in a way which does not challenge Canada’s underlying unjustifiable claim to sovereignty and dominance (Samson 1999, Slattery 2006, Coulthard 2007). As such, law acts as “steward of whiteness” and facilitates and monitors processes of re-colonization.

1.3 Method of Analysis of Legal and Government Discourse re: IRS

As stated, Indigenous people consider the violence of IRS as violence committed as part of a colonial project of land theft. Many Indigenous people name this violence explicitly as genocide. My approach to interpreting the Canadian government and legal system’s response of the last two decades to this Indigenous account, is to situate the response within a wider colonial force-field. I analyze judicial reasons in IRS case law: R v. Plint (1995), Blackwater v. Plint (1996–2005), the class actions Cloud v. Canada (1998–2006) and Baxter v. Canada (2000–2006), as well as the 2006 IRS Settlement Agreement (IRSSA) and the political event of the “Apology to former students” of IRS, delivered by the P.M. of Canada in the House of Commons on 11 June 2008. My methodology is informed by Fanon’s account of settler colonialism, as well as by the methodology of
scholars Derek Hook (2001, 2003, 2005b) and Radhika Mohanram (1999). Each author offers methodological tools to access important aspects of the modern-colonial force field. Fanon’s analysis of the embedded nature of colonial identity / psychopathology and the structures of colonialism, his analysis of how settler subjectivity is constituted through the dehumanization of “the native,” and his insight regarding the “stages” of settler colonialism,15 enable the mapping of the settlers’ strategies of assertion, eviction, recognition, and re-colonization. Hook’s “sound discursive analytic” emphasizes Foucault’s idea of power as a network of interrelated forces, and recommends approaching discourse as an active element in this network. To make visible the processes through which certain subject positions are made possible (and others excluded) within power contexts, discourse analysis must map the “lateral linkages” between various discursive and extra- or non-discursive aspects to this power domain. Mohanram’s Fanon-inspired account of “mapping rhetorical strategies of displacement” posits that tracing how dominant white subjects construct the body of the “Other” as racially inferior because closer to land or nature, brings the “lost white body” of possessive individualism into view. Importantly, Mohanram’s approach posits that the white subject’s construction of the other serves not only to construct the white subject as superior, but simultaneously to anchor white identity physically and spatially to land. Both Hook and Mohanram emphasize the role that oppositional discourses and forms of subjugated knowledge play in resisting dominant power relations and “truth effects.” I look for moments in the discursive struggle over naming the violence of IRS, where the white collective body (the settler collective), its violence and its connection to land, surfaces in the testimonies or
narratives of Indigenous peoples, in the judicial reasoning regarding IRS case law, and in Government narrative regarding IRS. My methodology allows me to trace the production of white terror as colonial force field and the white collective (settler) subject within the Canadian government and law’s response to the violence of IRS. I show how tracing the ontological force of property is one way to trace white subject formation both within IRS case law and between IRS case law and other sites within the contemporary colonial force-field of the Canadian context.

1.4 Contribution of the Study

body and its violence into view and which sheds light on the role that possessive
individualism and the concept of private property play in the discursive production of the
settler collective. I also contribute site specific analysis in my focus on the dominant
government and legal discourses regarding IRS, as discourses which recuperate and
perpetuate colonial relations between settler and Indigenous people.

My thesis also contributes to critical legal studies and post-colonial studies which
focus specifically on Canada’s Indian residential school system. Legal scholars focus on
the inadequacies of Canada’s civil law and explore how Canadian law should or could
handle the sexual and physical abuse of Indigenous children and the “loss of culture” as
what counts as apology, reconciliation, and effective mechanisms for truth and
reconciliation processes (Giokas 2000, Llewellyn 2008 and many others). Post-colonial
scholarship informed by Foucault’s account of modern power, governmentality, and
carcerality, critiques Canada’s IRS as “totalizing institutions,” state mechanisms for
assimilation and population control (Scott 1995, Smith 2001, Million 2000). There is
interesting scholarship which interviews Canadians who taught in IRS (Chambers 2003)
and which examines the racial geography of IRS distribution (de Leeuw 2007). Canadian
scholarship argues that the IRS ADR process is a re-colonizing move (Rice and Snyder
2008) and that the 2008 Apology masks and enables on-going colonial relations and
collective political interests in land (Dorrell 2009, Henderson and Wakeham 2009,
McCready 2009). While the arguments of these latter scholars are very similar to the
argument I offer in this thesis, I believe that my Fanon-inspired tracking of possessive individualism and the ontological force of property across two legal events and one political event makes a unique and valuable contribution to our understanding of how Canadian law and government discourses re: IRS discursively reproduce (while they simultaneously obfuscate) the collective white settler body, its occupation of land, and its violence in the present.

Finally, while my thesis does not provide an actual critical anti-colonial pedagogy, I believe I provide important theoretical starting points for such a pedagogy, specifically, a pedagogy for recognizing the present as colonial and for recognizing how settlers illegitimately occupy land. This is what I mean by a “pedagogy of recognition.” As a settler, I write for an audience of settlers. A pedagogy of recognition which targets settlers must be a pedagogy which does not simply inform settler Canadians about the fact of past colonial violence or the inappropriate attitudes of long dead white people. Rather, it must be a pedagogy which brings into view the connection of each (individual) settler subject to the violence of colonialism of the present. It must be a pedagogy which examines the mechanisms through which the occupation of Indigenous land by a white collective body is maintained and obscured today. It must be a pedagogy which enables the settler to see her body as occupying Indigenous space, enabled by her nation’s illegitimate claim to sovereignty, and which urges and enables the settler as occupier to at least imagine leaving. Such a pedagogy, for which I lay the groundwork, should inform the portion of Canada’s Truth and Reconciliation Commission concerned with educating Canadians about IRS, if it is to function as a “pivotal mechanism” of social change. However,
neither my thesis nor proposed pedagogy concerns IRS alone, but rather, the wider colonial force-field from which it cannot be separated. A critical pedagogy of recognition casts its light more widely upon the force field of the colonial present and the role of contemporary Canadians (through government and law) in the perpetuation of colonial relations today.

1.5 Chapter Summaries

Chapter 1: Introduction

Chapter 2: Theorizing the Colonial Present: White Terror as Colonial Force Field

Chapter 2 is intentionally not about Canada’s Indian Residential Schools. I draw upon the anti-colonial theory of Frantz Fanon (1963, 1967) and contemporary anti-colonial theorists, to understand the nature of colonial power and settler occupation in the present. I develop the theoretical framework of “white terror as colonial force field” structured by the triadic relation of land—terror—white collective identity. I emphasize that any given site within a colonial force-field must be understood as systematically interrelated with other sites, maintained by a settler collective. The old European political rationality of “possessive individualism” and private property, the historical rationale for not only capitalist accumulation but modern liberal law, government, and sovereignty (Macpherson 1962), is especially useful for tracing interconnections (symbolic and material) among sites within a colonial force-field. This ideology functions, in Fanon’s words, to “bring settler and native into being” through processes which dehumanize the latter. Marking the Indigenous body as inherently damaged, reconstitutes the settler collective as legitimate occupiers of land (Mohanram 1999). Finally, I explain how law functions as “steward of
white identity” and is implicated in the violence of colonial assertion, eviction, recognition and re-colonization. In later chapters, I bring this theoretical framework to bear on my analysis of Canada’s response to the violence of Canada’s “Indian Residential School” system.

Chapter 3: Methodology: Tracking the White Collective Body and the Colonial Present in Government and Legal Discourse regarding “Indian Residential Schools”

I first provide a brief overview of the nature of the violence specific to Canada’s IRS, followed by an overview of the Canadian government and legal system’s response of the last two decades to Indigenous efforts to name this violence as genocide and as part of a colonial project of land theft. I then discuss the research methodology which informs my research design and reading of the Canadian government and legal system’s response to the past violence of IRS. I describe my data sources and provide a rationale for both my methodology and data selection. My methodology is informed by my theoretical framework of “white terror as colonial force field.” I draw upon Fanon’s account of settler colonialism, as well as the methodology of scholars Derek Hook (2001, 2003, 2005b) and Radhika Mohanram (1999). Each author offers methodological tools to access important dimensions to the colonial present: Fanon’s analysis of how settler subjectivity is constituted through the dehumanization of “the native,” and his insight regarding the “stages” of settler colonialism, enable the mapping of the settler strategies of assertion, eviction, recognition, and re-colonization. Hook’s “sound discursive analytic” emphasizes Foucault’s idea of power as a network of interrelated forces, and advocates that discourse analysis must map the “lateral linkages” between various discursive and non-discursive
aspects to this power domain. Mohanram’s Fanon-inspired account of “mapping rhetorical strategies of displacement” posits that tracing how dominant white subjects construct the body of the “Other” as racially inferior because closer to land or nature, brings the “lost white body” of possessive individualism into view. I show how tracing the ontological force of property is one way to trace white settler subject formation both within IRS case law and between IRS case law and other sites within Canada’s colonial present.

**Chapter 4: Recognizing Terror: The White Collective and Judicial Reasoning in *R v. Plint***

This chapter analyzes *R v. Plint* (1995), the judicial reasons in the criminal sentencing of Arthur Henry Plint, a dormitory supervisor at Alberni Indian Residential School (AIRS) in Port Alberni British Columbia, during the 1950s and 1960s. He plead guilty to charges of indecent assault against 27 male Indigenous claimants when they were children residing at AIRS. In this judicial decision, Canada’s colonial policy which gave rise to IRS, and the white settler collective who operated AIRS, are revealed (through Indigenous testimony) as implicated in IRS violence. This generates anxiety on the part of the Judge, who then wields the ontology of possessive individualism (“the rational individual”) to evict both Plint and the Indigenous plaintiffs from membership in the white settler collective (of property owners). The judicial reasons ultimately reinforce the settler fantasy that Canada’s IRS system was a flawed education system which tragically attracted only pathological *individual* perpetrators, individuals whose violence produced thoroughly dysfunctional Indigenous *collectives*. Finally, I situate possessive individualism’s regime of truth in *R v. Plint* within a wider colonial force-field, tracing linkages to three other
sites of struggle between settler and Indigenous: the 1995 Gustafsen Lake stand-off, the 1997 Delgamuukw decision, and the 1998 Nisga’a treaty negotiation. This brings into view Canada’s colonial present as structured by the triadic relation of land—terror—white collective identity.

Chapter 5: Re-asserting Sovereignty: Colonial Power and Judicial Reasoning in

Blackwater v. Plint.

In 1996 (through 2005) the 27 male claimants, joined by 2 female claimants, went on to file a civil suit against Plint and other staff members of AIRS, as well as the Government of Canada and the United Church: Blackwater v. Plint. I trace the operation of possessive individualism in the judicial decisions related to this case, and I show how racial superiority is (to paraphrase Frantz Fanon) rationally organized through relations of accumulation. When the legitimacy of Canada’s sovereignty is threatened (as it was by events which happened in the interim between the end of R v. Plint and the beginning of this case) the settler responds with a pronounced dehumanization of the Indigenous plaintiffs. Each of the three phases of this trial, may be read as an effort on the part of Canada to reassert sovereignty and protect the settler’s interests. And yet the settler’s violent strategy has the potential to backfire. Law as steward of white identity (and settler sovereignty) steps in to control the damage in the 2005 SCC Blackwater v. Plint (aka. Barney v. Canada) decision. I end by tracing linkages within law, between this decision and other decisions, more directly linked to the settler’s control of land (e.g., SCC Haida 2004).
Chapter 6: Re-Colonizing Concessions: The 2006 Indian Residential School Settlement Agreement (IRSSA)

In this chapter I continue to pursue how the colonial force field and colonial subject positions are protected and reproduced in the present, through the Government and law’s response to the Cloud class action of 1998 through 2004, and the Baxter National Class Action of 2000 through 2006. The Baxter National Class Action threatened to expose Canada as a Nation built on “forced assimilation” and “loss of culture” (which much of the world recognizes as genocide), thereby threatening the legitimacy of Canada’s past assertion of sovereignty. I argue that the Baxter national class action called into question not only the legitimacy of Canada’s past assertion of sovereignty, but Canada’s “honour” in on-going negotiations regarding land. Baxter threatened to expose the colonial force field and the white settler collective as alive and well in the present, engaging in continued practices aimed at the “elimination of the native.” When read in the context of a colonial force-field, for example, alongside the Kelowna Accord, we see the colonial discursive strategies which effectively contain these threats and which enable Canadian government and law to recuperate and reinstall white dominance within a contemporary colonial order.

Chapter 7: Reconciliation: Restoring Settler Legitimacy through Canada’s Apology to “Former Students of Indian Residential Schools”

I argue that Canada’s 2008 Apology delivered by P.M. Harper in the House of Commons, is an apology born of fear on the part of the settler, fear of a terrifying future where settler sovereignty is dismantled, fear generated by the Baxter class action. In the previous chapters I showed how the settler collective may respond to challenges to its
sovereignty with a more violent dehumanization of the native. In this chapter, I emphasize Fanon’s claim that the violence of indifference or paternalism towards the native may also be a response. In the conclusion to this chapter, I place the apology alongside other settler strategies of recognizing the native—specifically, the 2008 extension of Canada’s human rights legislation to Indigenous people who remain subject to the Indian Act, Canada’s 2010 signing of the United Nations Declaration of the Rights of Indigenous peoples, and Canada’s commitment to economic development programs (including programs which appear to allow Indigenous nations to own private property after all). I show how the apology and these other invitations to equality and humanity, together reinstall the settler occupier as the rightful owners of the land.

Chapter 8: Towards a Critical Pedagogy of Recognition

In this brief chapter, I suggest that a precondition for genuine decolonization and a future where Indigenous nations and settler nation(s) may peacefully coexist, is that the settler collective must recognize or confront the fact that we do not rightfully belong on this land. I advocate a Fanon inspired pedagogy of recognition targeted to the settler, and framed by three questions informed by my account of white terror as colonial force field: How did we get here? What violence allows us to stay? When will we be leaving? The third question is especially important as the inability of the settler/occupier to even imagine the need to leave, reveals the inability to truly recognize and understand one’s body as occupier, and as part of an unjust occupation of Indigenous land.
Chapter 2: Theorizing the Colonial Present: White Terror as Colonial Force Field

This chapter is intentionally not about Canada’s Indian Residential Schools, at least not directly. Rather, I develop a theoretical framework for recognizing that white settler states such as Canada are presently colonial. In later chapters, I bring this theoretical framework to bear on my analysis of Canada’s response to the violence of Canada’s Indian Residential School system. In this chapter I first provide a descriptive account of “the historical constant of terror at home”—the practices to which Indigenous people point when they claim that Canada remains a racist colonial context. Second, in order to clarify how colonial relations and colonial subject positions are reproduced in the present, I develop the notion of “white terror as colonial force field.” I draw upon anti-colonial and critical race theory, in particular that of Frantz Fanon (1963, 1967), to illuminate the discursive production of the white collective body and its interrelatedness with land and the violence of settler occupation. I argue that although settler colonialism (and its violence) is undeniably an economic project, it is not merely this. Rather, it is an identity project wherein racial hierarchy is produced through relations of accumulation. Third, in support of this argument, I explain how the old European ideology of “possessive individualism” (Macpherson 1962, Mohanram 1999) and the “ontological force of property” (Bryan 2000) are central to settler colonialism’s identity project, and are useful for tracing the interrelatedness amongst seemingly disparate sites (including law) within the colonial present. Finally, I explain modern law’s role in the production and protection of settler identity, a role which renders suspect the settler state’s motives in its gestures of legal, political, and ethical “recognition” of Indigenous nation status and aboriginal title.
and rights. I suggest that such recognition is a recuperative strategy, one amongst many strategies of re-colonization. Contrary to this, a Fanon-inspired practice of recognition requires that white settler subjects recognize ourselves as integral to white terror of the present. Such recognition is a necessary step towards taking responsibility not only for past colonial injustices, but most importantly, for dismantling the colonial present.

2.1 “The historical constant of terror at home”

...the Government of Canada played a prominent role in eliminating the apartheid regime [of South Africa]. However, at home in Canada, the oppression, marginalization and dispossession of Indigenous peoples continue. ...the social and other conditions I have seen in Mexico, Thailand and Brazil ...are familiar to me as a Canadian Indigenous person. The lesson for me is that colonial and discriminatory policies and practices are not restricted to less-developed parts of the world. They are also to be found in Australia, Canada, New Zealand, the United States and Scandinavia. …Indigenous people everywhere are being ‘pushed to the edge of extinction’—even in Canada, where plentiful land, resources, and capacity exist to correct these ongoing injustices.

AFN Chief Matthew Coon Come, Speech to World Anti-Racism Conference, Durban South Africa (30 August 2001a)

People like myself are not just annoyed, we’re just beside ourselves. …There’s no proof of this in modern times—that the Canadian government and the general population are racist towards Aboriginal people. ...Quite frankly, I think Matthew Coon Come owes us an apology. He will make it very difficult for people to do business with him if he’s going to make those kinds of serious accusations...

Robert Nault, (Lib.) Minister of Indian & Northern Affairs 1999–2003 (Toronto Star 31 August 2001)

The above response by then Minister of Indian and Northern Affairs (MINA) Robert Nault (Liberal) to then Assembly of First Nations (AFN) National Chief Matthew Coon Come, captures one moment in time within the unfolding wider contemporary colonial
context this chapter aims to theorize. It is but one of many sites of discursive and material struggle between Indigenous and Settlers,\textsuperscript{18} this one over the naming of Canada. In his speech to the 2001 \textit{World Anti-Racism Conference}, National Chief Coon Come referred to Canada as a (still) colonial state and provided numerous examples of racism and discrimination against Indigenous persons on the part of Canadians and the Canadian government. He made this statement as part of his argument against a clause proposed by the United Nations working group on the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). The clause would effectively deny extending universal human rights to Indigenous peoples by making such rights contingent upon what could be negotiated with the dominant colonial state. Coon Come argued that colonial interests could, and do, unjustly delimit and undermine Indigenous rights, which should be recognized as inherent. Coon Come linked the diminishment of human rights directly to the diminishing Indigenous land base. Both Robert Nault and then Prime Minister Jean Chretien (Liberal) publicly reprimanded Coon Come for his speech (Lawton 2001, McCarthy 2001).\textsuperscript{19} Nault seemed especially outraged as the above quote indicates. Ironically, as pointed out by Coon Come in his response to Nault, evidence of this contemporary racism was documented by the Canadian Government’s own five year \textit{Royal Commission on Aboriginal Peoples} (Canada 1996; Coon Come 2001b). The racism continues to be documented today by Indigenous leaders and Indigenous and non-Indigenous scholars and activists. Even if by “modern times” we mean merely the last few decades in the Canadian context, rather than the last few centuries since modernity’s birth, the racism for which there is no evidence includes the very \textit{Indian Act} legislation which
defines the MINA portfolio and which remains “a cradle-to-grave set of rules, regulations and directives” imposed on the lives of Indigenous peoples without their consent (Mercredi and Turpel, 1994 82–83). The racism for which there is no evidence includes a range of practices from everyday racism documented by researchers who study communities where both Indigenous and non-Indigenous peoples coexist (Furniss 1999),

to the fist-to face violence committed by individual Canadian citizens against Indigenous peoples, to the state violence committed by agents of the state (such as police and military) and the racism of Canadian legal, political, economic, and social policies, all of which challenge the sovereignty and undermine the self-determination of Indigenous nations. Consider the following examples (occurring before, during and after Nault’s time as MINA).

Violence committed by individual Canadians includes whites hurling rocks at Indigenous elders during the “Oka crisis” 1990; whites shooting at Indigenous fisher boats during the “Burnt Church crisis” 2000; whites gathering a menacing crowd in Caledonia / Six Nations in 2006; the on-going abduction and murder of now more than 580 Indigenous women across Canada (Culhane 2003, Amnesty International Report 2004); the sexual abuse of Indigenous girls by whites such as B.C. Judge Ramsay who was charged in 2005 for his sexual violation of Indigenous girls in the child welfare system (Vancouver Province 2008), or the three white Saskatchewan men who in 2001 abducted, plied with beer and then raped a 12 year old Cree girl (CBC News 2003).

Violence committed by state agents includes the RCMP “starlight tours,” a practice of abandoning intoxicated Indigenous men on the outskirts of town during winter

The violence of legal, political, economic and social policies includes the aforementioned Indian Act which delimits governance, property rights, and citizenship status (Cannon 2011, Mercredi and Turpel 1994) and allows the child welfare protection act to remove Indigenous children from Indigenous homes and place them in white foster care (Blackstock 2007); the Federal Government’s use of the Indian Act to impose the Band Council system on Nations governed by Hereditary / Traditional governments, most recently attempted by MINA Chuck Strahl (Conservative) at Barrier Lake in 2010. The violence includes the Federal government’s failure to provide water treatment equipment to remove toxins from the water on reserves in 2006 (Murdocca 2010); the failure of the Ontario government to supply native communities with the H1N1 vaccine in 2009. The violence includes the environmental racism of numerous contractual agreements between Municipal governments, corporations and sometimes Indigenous nations, which allows
cities to dump their garbage on the margins of Indigenous reserves creating serious health threats to Indigenous populations (e.g., Toronto’s garbage will be dumped near Oneida on the Thames Reserve, beginning in 2011).

Writing within the settler state context of the USA, Jeanette Haynes Writer (2002) refers to a similar array of on-going (past into present) state and everyday violence against Indigenous peoples (including the USA intensification of border control post-9/11) as “the historical constant of terror at home.” She conceptualizes this array of racist violence as specifically colonial terror. What does it mean to say that the above examples of individual and state violence against Indigenous peoples within the Canadian context, constitute colonial terror? Is it simply that many of these are examples of brute force committed by whites against Indigenous persons? Is it that there are so many instances of brute force, and therefore more than a few white people committing the violence? In what way could the past massacre of many, such as the genocide of the Beothuk and the attempted genocide of the Wendat / Huron (Lawrence 2002), the past violation of Indigenous children in Indian residential institutions, and the present murder of one (and one more, time and again) be interrelated? How is the violence of murder connected to the violence of segregation, beating, expulsion, rock throwing and racist name calling? Why call the above violence “colonial terror” rather than simply an array of isolated unfortunate events committed by individual whites who don’t know each other and (some may argue) who don’t know any better? According to Haynes Writer and other Indigenous scholars, it is colonial terror because it functions to maintain white control of Indigenous lands and people today (Writer 2002, A. Smith 2005, Lawrence as interviewed by
That is, land is a significant part of what renders all of the above instances of daily violence interrelated.

Indeed, all of the above forms of racism unfold within a context of the Canadian Federal and Provincial Government’s continued (illegal) practice of selling Indigenous land to private corporations without adequate consultation with Indigenous stakeholders (Grant 2010, Lovelace 2010). Major resource extraction continues apace—e.g., the Alberta Tarsands (Thomas-Muller 2008, Amnesty International 2010), Grassy Narrows Boreal forests (Willows 2009), Shabot Lake uranium mining (Lovelace 2010), Takla Lake Northern B.C. mining (Harvard Law School, 2010)—enabled by “modern treaties” or political agreements regarding major land claims, particularly in British Columbia. While these modern treaties may be a sign of the “new (respectful) partnership” between Canadians and Indigenous peoples as called for by many Indigenous nations and the 1996 RCAP Report, others point out that the treaties continue to benefit dominant economic interests by securing the Crown’s profit from the resources extracted from the land (Woolford 2005, 2004; Alfred 2001). Moreover, as Bradford Morse claims, the Indigenous peoples involved in these modern treaties have “generally surrendered over 80–90 percent of [their] original land-base in order to achieve an agreement” (Morse 2008a, 287). These land negotiations were among the reasons the Canadian Government of the past two decades refused (until November 2010) to sign the UNDRIP, stating that the UNDRIP would undermine Section 35 of the Canadian Constitution and the treaties Canada has with Indigenous nations (Joffe 2010, Canada 2010). The Canadian Government held this position despite the unanimous demand by Indigenous leaders and
organizations such as the AFN, that Canada sign the UNDRIP. According to Indigenous leaders, as of May 2011, Canada has yet to abide by UNDRIP (see Chapter 7).

Relatedly, even at the time of the exchange between Coon Come and Nault, the latter (then simultaneously Minister of Northern Economic Development) was in the midst of creating the First Nations Governance Act (FNGA). This act was later deemed by Coon Come “the most colonial legislation since the Indian Act itself.”

According to the testimony of Indigenous witnesses before the Aboriginal Affairs, Northern Development and Natural Resources Committee (AAND February 2003), FNGA would eliminate reserves altogether, undermine the power which treaty nations have over land, and treat treaty nations identically to non-treaty nations. This governance plan would assimilate Indigenous peoples by requiring Indigenous nations to adhere to a form of self-governance subsumed within the system of Canadian governance. This would render Indigenous nations at best “domestic nations” within the sovereign nation Canada (Rifkin 2009). It would allow Indigenous nations powers akin to municipal, provincial, or territorial governments only. While some Indigenous nations have agreed to this form of government, many others have critiqued it. Coon Come argued that Indigenous nations want more power over their lives than to “decide whether dogs should be walked on leashes within city limits” (2001b). The FNGA, and presumption that Canada can delimit another nation’s government, denies the sovereignty of Indigenous nations and their inherent right to self-determination and self-government (vs. mere self-administration). It would break International law which holds that Canada (as well as other colonial states) should honor the treaties between nations: here the nation of Britain/Canada and various
Indigenous nations, i.e., “First Nations” (AAND February 2003, 1650), treaties which “recognize” pre-colonization Aboriginal title and Indigenous nations as nations. Inherent rights cannot be conferred by one nation (Canada) upon another. According to Gordon Lee of Ermineskin First Nation, Nault’s proposed legislation was part of a long line of strategies carried out by the Government of Canada, of the recent and distant past, to undermine the reserve system and hereditary / traditional government systems in order to take away what is left of their land for good. Lee referred to elders who have warned that “the government will never stop” in its efforts to do this. He and others who testified claimed that Nault’s proposed legislation must be seen as connected to ongoing attempts at assimilation and cultural genocide. Lee then read aloud the United Nations definition of cultural genocide, which the AAND Chair (Mr. Raymond Bonin, Nickle Belt, Liberal) dismissed as irrelevant. Lee retorted:

I disagree with you. I say it’s relevant. …you cannot look at this [FNGA] in isolation… You have to look at the whole picture to really understand. But I’ll keep quiet, sir. Thank you (AAND 2003, 1625).

The need to look at “the whole picture” in order to understand what is happening, as part of systematic cultural annihilation, as part of struggle for sovereignty and land, is a claim Indigenous people frequently make in various seemingly disconnected contexts. Taken together, the above examples of individual practices and state policies provide a glimpse of the whole picture: a specifically colonial reality in contemporary Canada. One can understand why Indigenous peoples may feel under siege. In the next section of this chapter, I suggest we conceptualize this whole picture as a colonial force-field, within which settler violence related to land is central. Land will be shown to be central to a
colonial force-field in two interrelated senses: land as property to be owned or usurped, but more interestingly, land as integral to white settler identity. That colonial relations are also about white settler identity is implied by Nault’s public reprimand of a prominent Indigenous leader. Nault’s reaction suggests that there is clearly something very serious at stake when Indigenous people dare to identify Canada as a colonial state or to suggest that present day racism has anything to do with Canadians in general, or land in particular. Nault demands that the Indigenous leader apologize to him and Canadians in general, for this “serious accusation.” The ease with which Nault makes his public threat to make business negotiations difficult—presumably political and economic negotiations regarding tribal sovereignty and self-governance, legal claims and treaty negotiations regarding land and resources, as well as (at the time) a resolution and apology regarding Indian Residential Schools—implies that Nault is confident that he is backed by a collective of people who share his identity, values and, outrage. While Nault protests his innocence and the innocence of people like him, and while he distances himself from racists who could exist only in an earlier pre-modern time, the tangible menace of his own words clearly reveals the nature of his power and his awareness that it is his to wield. The colonial relation remains firmly entrenched. In the remainder of this chapter, I develop a framework which enables us to theorize contemporary Canada as presently colonial, a framework which brings into view for non-Indigenous people, what Indigenous people see clearly: the connection between all white Canadians—not just Nault, but people like him—their/our occupation of land, and the violence required to maintain the occupation.
2.2 Theorizing the Present as Colonial

White settler states by definition have colonial origins or colonial pasts. What might it mean to say that the present is colonial, within a settler context? I draw upon scholarship and examples regarding historically diverse European colonial contexts and I emphasize what is common to these contexts, including the Canadian context outlined in the previous section (Said 1997). Many anti-colonial theorists begin with what is most visible within a colonial context: the violence. Although he makes no reference to contemporary settler states, George Steinmetz (2008) claims that “all forms of colonialism involve a cultural, political, and psychological assault on the colonized” (2008, 589), and as Haynes Writer and other Indigenous scholars emphasize, the violence of colonialism is always related to land. Derek Gregory (2004), from whom I borrow the phrase “the colonial present,” states that while it is important not to “reduce everything to the marionette movements of a monolithic colonialism” (2004, 7), the term the “colonial present” retains “the active sense of the verb ‘to colonize’” and brings into view “the constellations of power, knowledge, and geography that …continue to colonize lives all over the world” (2004, xv). In order to theorize the violence of contemporary settler states as colonial, and as connected to land, Gregory challenges us “to rethink the lazy separations between past, present, and future” and to see that “the capacities that inhere within the colonial past are routinely reaffirmed and reactivated in the colonial present” (2004, 7). The contemporary settler context, to borrow Patricia Hill Collins’ words, “reflects a situation of [both] permanence and change,” wherein old racial formations persist, but which are now somewhat differently organized, expressed, and accomplished through new processes and mechanisms (such as
technology and media in Hill Collins’ study 2009, 379). The idea that the colonial past is both reactivated in the present and created anew, is also articulated by Patrick Wolfe (2006). Wolfe compellingly argues that because settler colonialism is “irreducibly” about access to land, it is both inherently violent and on-going. The violence is on-going because “settler colonizers come to stay” (388):

…invasion is a structure not an event. ...elimination is an organizing principle of settler society rather than a one-off (and superseded) occurrence. ... (388) ...it is both as complex social formation and as continuity through time that I term settler colonization a structure rather than an event. (390)

Settler colonialism is an on-going project, not a singular event occurring and contained within the past. To assume that settler colonialism and its violence was a “one-off” event in the past, is to assume that settler sovereignty is uncontested and that Indigenous people no longer resist colonization. Rather, as Wolfe so insightfully argues, settler colonialism requires the continuous physical and symbolic removal of Indigenous peoples from the land in order for settlers to continue to occupy, i.e., “erect a settler society upon,” that land. Wolfe claims that the on-going invasion—the historical constant of terror at home—involves a multitude of processes of removal and displacement: genocide, apartheid, miscegenation, assimilation. All are processes structured by a “logic of elimination” (388). To conceptualize the structure of settler colonialism in terms of an organizing principle such as the logic of elimination as does Wolfe, means that there is continuity to settler contexts over time, despite change. Thus, to theorize what is common to different contexts of settler colonialism is not an ahistorical approach, but rather, forefronts the significance of historical forces in the creation of the present (as well as in
the violence of the present). It also allows for the possibility that new forms and expressions of specifically settler colonial relations emerge in contemporary times. As Michel Foucault notes with respect to the context of liberal states (many of which have colonial origins), even within times of apparent peace, “…we are always writing the history of the same war” (1997, 16). Colonial struggle is on-going.

2.2.1 Colonial Terror as Force-Field

Many anti-colonial scholars find Michel Foucault’s notion of modern power as a “field or network of force relations” (Foucault 1997, 24, 29) especially useful for theorizing colonial power and its violence (Hook 2005b, Riggs and Augoustinos 2005, Steinmetz 2008, Gregory 2004). Discourse as “both the instrument and effect of power” is integral to this network of power relations:

...in any society, multiple relations of power traverse, characterize, and constitute the social body; they are in-dissociable from a discourse of truth ...they can neither be established nor function unless a true discourse is produced ... (Foucault 1983, 24).

The contestation over what counts as truth, what will be remembered about a colonial encounter (past or present), is usually violent (Alonso 1988), as we saw with Nault’s menacing response to Coon Come’s naming of Canada as a racist state. Viewing the settler context in terms of a force-field enables us to envision various seemingly disconnected sites (and numerous individuals) within a settler context as interrelated. This brings a geography or spatialization to the colonial present into view (Gregory 2004, 4). If one were to view a force field from a bird’s eye view (or perhaps from a war room), one would see multiple sites of discursive and material struggles unfolding simultaneously.
The multiple instances of present day violence against Indigenous people within the Canadian context, as identified in the previous section, may or may not be directly connected, through the logic of elimination perhaps or, in Ann Stoler’s words, through processes wherein “older racial discourses…are reshaped into new ones, understood as a layering of sedimented hierarchical forms” (Stoler 2002, 149). Whether directly connected or not, the force of the simultaneity of the unfolding of multiple sites of struggle is significant in itself and produces what Indigenous people experience as a state of terror. Dynamics within each site of struggle, as well as between sites, create the conditions of possibility for the discursive formation of subject positions (embodied ways of being in the world) both dominant and subordinate. While these are collective subject positions, the collective nature is obscured through the emphasis on “the Individual.”

Modern power operates through “manufacturing the Individual” (Foucault 1983, 94) (a multitude of individuals) and in turn, the seemingly isolated self-directed actions of individuals perpetuate or sustain this network of power relations. As Foucault states:

…one of the first effects of power is that it allows bodies, gestures, discourses and desires to be identified and constituted as something individual. The individual is not, in other words, power’s opposite number; the individual is one of power’s first effects. The individual is in fact a power-effect, and at the same time, and to the extent that he is a power-effect, the individual is a relay; power passes through the individuals it has constituted. (1997, 29-30)

I will say more about this “individual” later in this chapter. Conceptualized as a force-field, a settler colonial context is one which must be actively maintained via multiple practices on a daily basis, engaged in by numerous individuals, whose interconnection is
thereby established, as their collective actions—their shared meanings and practices—together uphold the wider context.

The notion of terror as colonial force-field, is an important step towards understanding the “whole picture” of colonialism on-going, but more is needed. In his account of settler colonialism, Patrick Wolfe rightly forefronts the connection between settlers as occupiers, the land they/we occupy, and the violence necessary to maintain the occupation. That is, his account enables us to recognize that numerous bodies of settlers are imbricated in the battle. However, in his effort to have us see the important and often obscured, connection between settlers, land and violence, Wolfe states:

   Whatever settlers have to say ...the primary motive for elimination is not race...but access to territory. Territoriality is settler colonialism’s specific, irreducible element (2006, 388).

Although the on-going violence within a white settler state is indeed irreducibly about control of territory, I suggest that without understanding how the primary motive for elimination is simultaneously about race, we cannot truly understand the on-going nature of settler colonialism. Conceivably, and chillingly, a settler state could be achieved once and for all through genocide, through the total elimination of Indigenous peoples and the complete usurpation of land and resources which are finite. Since it has not, it is plausible that there is something more going on here. As Sherene Razack (2000, 2011) argues, violence committed by white Canadians against Indigenous women and men, violence undeniably related to land, is a violence which whites engage in, in order to know themselves as racially superior to other humans. It is violence which reproduces (symbolically and materially) both the individual white colonial subject and the white
colonial nation as racially dominant, as “the rightful owners of the land” (Razack 2011). That is, settler violence is a practice driven by the collective white settler psyche’s need to assert and reassure itself of racial superiority (Razack 2000, 2004, 2011; Derek Hook 2005a, 2008, Riggs and Augoustinos 2005). Damian Riggs and Martha Augoustinos, drawing upon the work of Derek Hook, call this the “psychic life of colonial power” which they equate with “…a network of racialized practices that are performed by recognized colonizing subjects who hold an investment in this power” (2005, 468).

If the violence of settler colonialism is an identity making practice—if identity is at the heart of the settler logic of elimination—then this explains why colonialism is on-going. Colonialism is on-going precisely because this white collective psychic desire is never stabilized, satisfied or sufficiently reassured. Thus, there is an even more chilling implication: colonialism within settler states will remain on-going until white identity and identity making practices are disrupted and eradicated. Patrick Wolfe’s claim that “the primary motivation of elimination is access to territory” needs tweaking. I suggest that we view the desire for territory as an inherently racialized and racializing desire. That is, within settler contexts, a racial identity claim is embedded in the “economic” desire for control of territory, land, and resources. 29 In order to theorize settler colonialism as a race identity project in this way, many scholars turn to the anti-colonial theory of Frantz Fanon. 30 As critical psychologist Derek Hook so eloquently states, Fanon teaches us that:

...the violence of the colonial encounter is absolutely unprecedented, that the colonial moment of epistemic, cultural, psychical and physical violence makes for a unique kind of historical trauma. [Colonialism is] ...a means not only of appropriating land and territory, but of appropriating culture and history themselves...a way of appropriating the means and resources of identity. (Hook 2005a, 479)
In the next section I draw upon Frantz Fanon’s *Black Skin / White Masks* (1967), hereafter BSWM) and *The Wretched of the Earth* (1963, hereafter WE), as well as contemporary anti-colonial theory, in order to illuminate the structural and psychic dimensions to settler colonialism as force-field and to clarify how racial superiority is enacted through economic relations of accumulation.

### 2.3 Recognizing Settler Colonialism: Land, Terror and White Identity

The settler and the native are old acquaintances. In fact, the settler is right when he speaks of knowing “them” well. For it is the settler who has brought the native into existence and who perpetuates his existence. The settler owes the fact of his very existence, that is to say, his property, to the colonial system. (Fanon WE, 36)

Frantz Fanon’s work has been central to our understanding of colonization as an economic project which is an inherently racial project, a race identity project which “parcels out the world” and “begin[s] with the fact of belonging or not belonging to a given race, a given species” (WE 40). Fanon’s account of the violence of settler contexts is informed by his own experience as a colonized Black man living within a colonial context as well as his medical practice as a psychiatrist with the colonized. Fanon was born in the French colony of Martinique in 1925. He later studied medicine and psychiatry at the Sorbonne in France. Dominant discourse within psychiatry, science, and medicine of Fanon’s day, focused on the violence of the colonized in order to pathologize the colonized. Fanon also analyzes the violence committed by the colonized (in contexts both of colonization and de-colonization) and speaks of the necessity, inevitability, and even “therapeutic value” of this violence (WE 85–95). But Fanon argues that the violence
engaged in by the colonized must be understood as a response to the violence of the colonizer (WE 89). It is the colonizer’s psychopathology and everyday violence which precedes and necessitates violence in response from the colonized. Both psyches (what others of his day term mental disorders) are a product of “colonial war” (WE 249). Thus, (as similarly noted by Riggs and Augoustinos 2005, 473), Fanon offers critical tools for recognizing the colonizer, for de-cloaking and interrogating white settler identity and the conditions of its possibility.

On Fanon’s account of settler colonialism, the colonizers’ desire to experience or know himself as racially superior can be achieved only in part through physical violence. It also requires putting in place a certain “structural presence” (Krautwurst 2003, 58). As stated above, although settler contexts differ from each other, and may change over time, Fanon suggests that there is a structure common to various colonial contexts, one which categorizes humans into degrees of humanness, and which facilitates or informs the construction of minds and bodies which fit these categories (BSWM 213). As the above quote states, it is the settler who brings both the native and the settler into existence. The colonizer’s desire to know himself as racially superior, is structured by a system of logic and values, a system of meaning which enables the colonizer to fantasize and reify himself as superior through his construction of the colonized as inferior (WE 89). Much of this is accomplished through the racial marking of bodies. The settler “dehumanizes the native [by] turning him into an animal” (42). In “the colonial vocabulary” and “in the mind of the settler” (WE 42), the native is the “anti-thesis” to settler values (WE 41). Natives are viewed as mere:
...hordes of vital statistics...hysterical masses, those faces bereft of all humanity, those distended bodies which are like nothing on earth, that mob without beginning or end, those children who seem to belong to nobody, that laziness stretched out in the sun, that vegetative rhythm of life... (WE 42–43).

“The white man organizes dehumanization rationally” (BSWM 231). Yet the settler’s logic is circular: it marks certain bodies as less human than others, and then uses the marked body as proof of its inferiority, which is further used to justify the settler’s physical violence of dispossession.

Other post- and anti-colonial theorists similarly emphasize the violence of the collective psychological desire or pathology of the colonizer. Edward Said (1993a) argues that the practices of colonial acquisition and accumulation are supported by racist “cultural formations.” The key racist cultural formation is the idea that “certain territories and peoples invite domination” and violence. The “savage body” cries out for civilizing. The savage body fails to use the land properly, and so the land must be taken and made valuable. Said claims that in the imperialist / colonialist mind, it becomes a moral obligation to dominate certain people and to take their land: in Said’s words, “…you’re not just robbing them, you’re improving them in some way…” (Said 1993b). The violence is transformed into a moral duty of the colonizer and evidence of his moral superiority. The colonizer is transformed into a saviour, never a perpetrator. The violence of dispossession, relocation, assimilation, disappearance cannot be seen as unjust violence and therefore in a sense, cannot be seen as violence at all.

There are many disturbing examples of the pathology of the white colonial psyche which render plausible the claim that the colonizers’ violence is as much about racial
identity as it is about economic dominance and profit. Two such examples are as follows. Michael Taussig (2004a) describes the “culture of terror” created by British colonials as they enslaved the Indigenous South American Putumayo people at the turn of the 19th Century. The British forced the Putumayo to harvest rubber from trees. The colonizers brutally tortured and murdered the Indigenous peoples in the most horrendous ways imaginable on a daily basis. As this excessive violence not only risked producing organized resistance, but risked producing a shortage of labourers (and thereby a shortage of profit), Taussig argues that the rationale for the excess of violence could not be the profit motive alone. Rather, Taussig documents that whites took great pleasure in collectively committing this violence, which he suggests was fulfillment of a collective desire. Importantly, the violence was fuelled by the fantasy narratives of colonialists wherein the Indigenous peoples were portrayed as violent savages and as inherently evil. The more violent the colonial portrayals of the Putamayo, the more violent the colonizers behaved toward them. These narratives fuelled white desire to prove itself as opposite to the savage other, and set the terms for how this distancing would be achieved. There is no more logical way to prove oneself as opposite to something, than to demonstrate your ability to annihilate it, yet the settler cannot entirely eliminate the native, as doing so would undermine his own existence. Thus, Taussig emphasizes the Fanonian insight that, embedded in the stories of Putamayo as told by whites, are the stories whites tell of themselves and the centrality of these stories to colonial subject formation, stories which both reflect and fuel colonial desire.
A second example heralds from the settler colonial context of the United States, where an increase in the lynching of Black people by white people occurred after the abolition of slavery (Messerschmidt 1998). The spectacle of lynching reveals how white solidarity and pleasure is fuelled through white collective violence. I quote at length from David Roediger who, relying upon the 1985 statistical research of Black American Ida B. Wells-Barnett, remarks:

We should consider that more than 3000 lynchings of African Americans between 1890 and the Great Depression included many instances in which thousands and even upwards of 10,000 whites witnessed the horror. So planned as spectacles were some lynchings that excursion trains brought the huge crowds. Remains of the victims at times remained for days on public display. Crowds watched brawls over “souvenir” body parts. Folk songs memorialized the brutality. The sites of mob actions remained etched for decades in local memory, white as well as Black. It would seem beyond question that several million early twentieth century whites witnessed a lynching or touched its relics, and that tens of millions more were initiated into whiteness partly by hearing stories of racist terror from those closest to them. It is within the African-American tradition that the greatest awareness of such terror as a constituent part of white identity has been present (Roediger 1998, 15–16).

White terror and white identity are intimately connected. The settler’s marking of the native’s body is inherently violent, whether expressed through extreme violence (as in the above examples) or through everyday encounters where no physical violence is visible. Fanon’s account of settler colonialism brings into view the everydayness or banality of the settler’s violent system. Critical race scholar, Anthony Farley (2005), speaking not merely of past violence such as lynching but of present everyday racism, eloquently conveys Fanon’s point that racial subjects are constructed through relations of property:

The mark is a wound. Those who would own must gather together as one in order to mark the others for dispossession. The mark of dispossession
must be written on the body because that is where the dispossessed are to be penned. [...] The mark changes the skin and that within into a thing, a possession, a commodity. (2005, 68)

Fanon experienced the settler’s marking first hand in several contexts. The French (colonizer’s) value system was imposed on Martinique (where Fanon was born and raised), a value system which divided the world into white/good and Black/evil. As the population of Martinique was predominately dark skinned, Fanon among them, Blacks never assigned the colonial dichotomy between white/good and Black/evil to skin / bodies, they never biologized or naturalized these categories. Rather they assumed the dichotomy marked a difference in ethical behaviour. Blacks who lived morally upstanding lives, understood themselves to be white, as did Fanon (Sullivan 2004, 11). Only when he moved to France, was he forced to view his body as the colonizer had intended, i.e., as Black/evil (BSWM 149, 191). The ontological force of the colonizer’s value system is conveyed in Fanon’s detailed account of his brief encounter with a little white French girl on the train who says to her mother while pointing to him, “Mama see the Negro! I’m frightened!” (BSWM 111–114). Fanon details the shift in his perception of his own skin and sense of identity upon hearing these words in that moment. Even a white child shares a white collective knowledge that allows her to know herself as superior to an adult Black male. Astoundingly, even a small white child can accomplish his objectification. The abrupt shift in his consciousness regarding the assigned meaning to his body / skin and the shift in his ontological status from human to subordinate or even, non-being (BSWM 8), was experienced by Fanon as a violent assault, like “knife blades opening within him” (BSWM 109–118).
Shannon Sullivan (2004) argues that it was this experience of growing up “white” with Black skin and the ensuing racist trauma (forced shift in consciousness) done to him through the marking of his body, which gave rise to Fanon’s theory of “embodied consciousness” and “sociogeny”: the idea that the individual body and psyche are produced within and in response to a wider socio-cultural context. The wider social system, in a sense, has a psyche (collective consciousness) which may be “disordered” (i.e., “racist”) and which, according to Sullivan “…shapes the Black world’s collective conscious into a body of values that reflects the white world’s racist commitments, which then in turn infuses individual people’s unconscious with those same values” (Sullivan 2004, 17). Fanon’s personal experience of believing himself to be white although Black skinned, is the source of his critique of biological essentialism and his understanding that racial inferiority and superiority are social constructs with bodily dimensions and manifestations. In Fanon’s words:

Below the corporeal schema I had sketched a historico-racial schema, the elements that I used had been provided for me … by the …white man, who had woven me out of a thousand details, anecdotes, stories. (BSWM 111)

Thus, when Fanon writes of “the colonizer” or “the colonizer’s psyche,” and illuminates the connection to bodies (dominant and subordinate), he does not use these terms in biologically essentialist ways. Rather, settlers too “… represent a historically constructed and conditioned principle, not a category with inherent and essential characteristics” (Krautwurst 2003, 58). Fanon’s account of the encounter with the white girl (and his experience with “hundreds” of other white people) exposes the violence of
Dehumanization even if no physical violence ensues. Dehumanization can be attempted or accomplished through myriad means in a settler context: through physical violence, a “glance that shrivels” (WE 45), a smile, words, institutions such as law, all infused with the settler’s logic. Even in periods of supposed de-colonization where explicit force may recede and the colonials make concessions to the colonized, inviting them to participate as consumers in the colony-as-market (WE 65), i.e., to adopt and live within the settler’s value and economic system which remains dominant, Fanon declares:

...when the native hears a speech about Western culture, he pulls out his knife—or at least he makes sure it is within reach. The violence with which the supremacy of white values is affirmed and the aggressiveness which has permeated the victory of these values over the ways of life and of the thought of the native mean that, in revenge, the native laughs in mockery when Western values are mentioned in front of him. (WE 43)

The colonial system of meaning is violent not merely because it is forcefully imposed, but violent by virtue of its ontological force: it categorizes and discursively constructs humans into kinds of being, superior/dominant and inferior/subordinate. The settler’s logic and structure accomplish the eviction of some humans from the category of “fully human.” The settler’s logic inculcates in both the native and the settler, a corresponding “structure of feeling” at the level of the psyche: internalized inferiority for Blacks, internalized superiority and its pleasure for whites. Fanon’s own account renders visible the everydayness (and banality) of “that violence which is just under the skin” of both settler and native within settler contexts (WE 71).

Thus, on Fanon’s account, settler colonialism is not simply an identity project, but an identity project accomplished through a peculiar strategy: the white embodied subject reassures itself of its superiority through its construction of the Black body as inferior.
The white body constructs its self / identity through marking the Black body as less than human, as object, as property. The violence of dehumanization is thereby core to the construction of settler identity and subjectivity, at the level of the psyche (what Fanon calls the collective unconscious), the level of the body, and the wider “spatial and temporal world” (BSWM 111). Thus, racial identity is always a collective claim and is collectively embodied. Fanon claims that the more colonizers that are “implanted,” the more heightened is the “reign of terror” (Fanon WE, 88). Yet this is not only because settler bodies often displace (and dispossess) native bodies, but because the bodies of both settler and native bear the settler’s colonial meaning. The more settler bodies, the more explicit the force of the assigned meanings to bodies (BSWM 149, 191).

Relatedly, the structural presence of settler colonialism gives rise to a colonial geography or spatialization. A contemporary example of the everyday geography of colonial terror is provided by bell hooks (1992) in her Fanon-inspired essay “The Representation of Whiteness in the Black Imagination.” hooks recounts an experience from her childhood:

It was a movement away from the segregated blackness of our community into a poor white neighbourhood. I remember the fear, being scared to walk to Baba’s, our grandmother’s house, because we would have to pass that terrifying whiteness—those white faces on the porches staring down with hate. Even when empty or vacant those porches seemed to say danger, you do not belong here, you are not safe. …Even though it was a long time ago that I made this journey, associations of whiteness with terror and the terrorizing remain… All black people in the United States, irrespective of their class status or politics, live with the possibility that they will be terrorized by whiteness. (hooks 1992, 175)
Black collective memory of past white terror (slavery and lynching in particular), inductive knowledge passed down through generations of Black community, enables even a small Black child to weigh the probabilities, to predict or expect, violent behaviour in the present and to infer that any given white person is capable of such violence. In hooks’ experience, each and every white body she encounters is at least initially read as a body capable of committing violence against her. Thus whiteness as terror is a representation embodied by each individual white, whether or not they themselves engage in fist-to-face violence. Moreover, even when no white body or physical violence is visible, the menace of whiteness remains through the geography of whiteness: the racialized boundaries which divide up the town. This white geography informs hooks’ everyday reality, her daily bodily movements through certain parts of town or territory, her sense of freedom or lack thereof. Her own body and thoughts both as child and adult, on a daily basis, must monitor and negotiate the meaning of the white body (and its space) as a body prone to an array of habits of domination, and importantly, as a body which threatens to summon a wider violent collective. Thus, Black Americans’ collective memory-knowledge exposes whiteness as terror as belonging to a collective white body *active* and living in the present everyday world, not merely a colonial past.

Echoing Derek Gregory’s claim that “the constellation of power, knowledge and geography” characterizes the colonial present, I suggest that the structural presence which emerges from Fanon’s account of settler colonialism as an identity project, is the dynamic triadic relation between land, terror and white collective identity. Each element in this triadic relation entails the presence of (imbrication with) the other two. There are material
and symbolic dimensions to each element. For example, land may be understood literally in terms of land and resources, but also as a colonial geography or spatialization. Terror refers to literal fist to face violence, but also the myriad processes and practices of dehumanization. White identity refers to the material body of individuals (as individuals and as members of a white collective), as well as a collective consciousness or psychic desire, and a shared knowledge and value system. The experiences of Fanon and hooks provide a view of the colonial force-field from the ground, from within any given singular location. In tandem with the birds-eye view of a colonial force-field suggested earlier, the various instances and forms of physical, psychological, epistemic, and cultural violence, whether carried out by individuals, the state, or a settler logic, is revealed as a collective phenomenon. The violence not only materially benefits the dominant white collective, but reproduces their collective identity as dominant/superior. Moreover, violence must be done to ensure not only that the white collective body has some place to occupy, rule and be served (as Patrick Wolfe 2006 argues) but some place to be pleased and feel superior.

On Fanon’s view, we see the violence of the colonizer’s system of meaning and the discursive construction of racialised bodies, the violence between bodies (physical, psychological, cultural) to which this gives rise, and the sense of self/identities formed within this network of power relations. As Damian Riggs and Martha Augoustinos (2005) state:

… in the context of a nation built upon colonising desires (such as Australia), bodies come to matter precisely as markers of race that are used to shore up the colonising project. Bodies must thus be invested with race as a prerequisite for intelligibility within a nation that is founded upon racial difference as its source of legitimation. …White bodies are spoken into being specifically as colonial bodies…(473).
In a settler context where the violence of occupation must be “forgotten” (Lowe 2006), that is, where the contemporary violent occupier must remain hidden, the notion of white terror as colonial force-field, structured by land—terror—white identity, is a useful analytical tool for bringing the collective white body and the colonial force field into view. In the next section we will see how the triadic relation of land—terror—white identity is also internal to the very idea of the modern individual through whom, in Foucault’s words, “power passes.”

2.4 Possessive Individualism: Land as Internal to White Identity

On Fanon’s account of settler colonialism, the psychic desire for racial superiority is expressed through the marking of bodies, a collective phenomenon enabled by an entire colonial system. European colonialism and capitalism go hand in glove, “the settler owes...his very existence, that is to say, his property, to the colonial system” (Fanon WE 36). In this section I take a closer look at the ontological force of property (Bradley 2000) and how bodies are racially marked through relations of property (Farley 2005). This involves understanding property as inherently raced and as a racializing mechanism. The European concept of property infuses all aspects of modern (liberal) settler society. It is as such, one important element to trace within a white settler colonial force-field. Property shapes institutions (law, government, economy) and determines the rights and freedoms of individuals (Mohanram 1999, 36). Property also functions as norm to shape individual identity, collective identity, and infuse colonial desire: “the individual is a power-effect” (Foucault 1997, 29-30). In order to clarify how white racial identity and hegemony are constructed and solidified through relations of acquisition and accumulation, and more
specifically, the sense in which white identity is *always* about land, it is important to examine the European political theory of “possessive individualism,” the historical root of white identity. As Aileen Moreton-Robinson states:

> White possession …is the foundation of property; it requires physical occupation and the will and desire to possess. Possession of lands is imagined to be held by the King and in modernity it is the nation-state (the Crown) that holds exclusively possession on behalf of its subjects. Therefore possession is tied to right and power. (Moreton-Robinson 2006, 389)

Possessive individualism was propounded in the theory of European philosophers and politicians from the 17th Century through to the 19th Century. Various (naturalist and historicist) versions of it can be found in the theory of Hobbes, Locke and Hegel among others (Macpherson 1962, Mohanram 1999, Goldberg 2002, Lowe 2006, Adams 2007, Anderson 2007). What follows is a generalized account, but one which emphasizes components to John Locke’s theory as, according to C.B. Macpherson, it is Locke’s version of possessive individualism which influenced British colonial political, economic, legal institutions and values the most. More importantly (for our analysis of the colonial present), Macpherson claims that possessive individualism remains central to the contemporary liberal democratic state and any full market society wherein labour is a commodity (1962, 48). Historically, the political theory of possessive individualism functioned as both explanation and justification of the economic and political inequality between classes of human beings. Political rights and freedoms were tied to rationality, and specifically, rationality as expressed through the individual desire for the accumulation of property and wealth (Macpherson 1962, 231–232). This economic and
political inequality was also racialized: the desire for private property determined membership in the political category of European and later, “white” (Farley 2005, Mohanram 1999, Bell 1998, Kinchloe 1998, Harris 1993).

Possessive individualism presumes and perpetuates a set of nested or inter-embedded hierarchical dichotomies: human vs. animal, mind vs. body, reason vs. emotion/instinct, culture vs. nature, autonomy vs. dependence, law vs. chaos, civility vs. savagery, male vs. female, white vs. Black etc. (Anderson 2007, Mohanram 1999). Property (vs. non-propertied) becomes a key uniting element to all of these dichotomies.

Possessive individualism holds that the essence of humanness is rationality and the ability to use one’s rationality to transcend (and improve upon) nature (Anderson 2007; 7, 70). According to Macpherson, possessive individualism holds that the individual is most free and thereby most human, when he is “independent of the will of other humans” (Macpherson 1962; 3, 263–269). The individual is autonomous when he uses his rational mind to control his own body and bodily desires, all within him which is “closer to nature / animal” (Anderson 2007, 14). When the individual uses his mind to control his body, this relation is conceptualized as one of ownership. (Thus freedom and property are analytically linked within Western thought.) The individual (mind) owns its own body as property and thereby has an exclusive right to this body. Thus, property is first an internal relation between mind and body of a given rational individual.

Property is also an external relation between rational individuals and things. Humans who use their rational mind to control their body, i.e., who own their own body as property, are thereby capable of owning external objects as property. In order to own
something, e.g., land, one need only mix one’s own labour with it. For example, by ploughing the soil a man uses his will/reason to control his body (physical labour) to transform nature (the soil) into an object which now serves his interests. In this process he appropriates the soil as his own. As Anderson argues, this process of appropriation, of transforming nature whether internal to the individual or external, is conceptualized as self-improvement and improving upon nature respectively. During the Enlightenment, the desire to improve nature through appropriation, was believed to be the key characteristic which distinguished humans from non-human animals (Anderson 2007, 89 ff.). As we saw with Said (1993b), this notion of improvement, so core to colonial desire, obscures the violence of colonial practices.

On Macpherson’s (1962) interpretation of Locke, within the state of nature, it is rational for humans to desire to fulfill their needs (this is in keeping with the law of nature which is reason). Within the state of nature, an individual may appropriate as much land etc. as he can use without waste. This ensures that other individuals will have enough land or goods to also meet their needs (this is in keeping with God’s will). In Locke’s state of nature, European men are equal in terms of capacity for rationality. However, given the undeniable economic inequality amongst European men, Locke sought to not only explain but justify, this inequality. Locke engages in some “magical thinking” in order to do so (Samson 1999). According to Macpherson, Locke simply asserted that economic inequality occurred within the state of nature (i.e., prior to social contract regarding a sovereign). Locke conceptualized the state of nature as simply Locke’s own society (a full market society), but imagined without a sovereign (law or government) in place. Locke
held that an individual’s participation in a market society, and more specifically his use of money in relations of exchange, constitutes tacit consent to the economic inequality which results from some accumulating more than others in the market (Macpherson 1962; 203, 209). Moreover, the inequality of wealth is not immoral because money does not rot, it can be stockpiled without waste. Thus, on Locke’s view, there is no natural or moral limitation to how much money one may accumulate (199, 220–221). Further, it is rational to desire to accumulate as much wealth as possible as this increases your independence from others (which increases your freedom and makes you more fully human).

Macpherson reveals how, on Locke’s view, “fully rational behaviour [is thereby assumed] to be accumulative behaviour” (236) and that “full rationality [and therefore full humanity] is possible only for those who can so accumulate” (233).

Macpherson explains Locke’s justification of class divisions between European men, further. European men who (due to laziness or moral failure) do not use their rationality to accumulate wealth, will have property only in their body. They may alienate their labour for a wage, transferring ownership of the product they produce to the capitalist. The working poor live a stressful existence, they spend their lives working for others and do not have the time to develop their rationality or the means to acquire property. The reasoning is circular: they are poor because they have not developed their capacity for rational decision making. We know they have not developed their capacity for rationality, because they are poor (Macpherson 232). European men who are poor and who do not work are lazy and morally corrupt, they are to blame for their situation, as they
have not used their rationality to better their life position. Thus, Macpherson insightfully argues:

Once the land is all taken up, the fundamental right not to be subject to the jurisdiction of another is so unequal between owners and non-owners that it is different in kind, not in degree: those without property are...dependent for their very livelihood on those with property, and are unable to alter their own circumstances....the man without property in things loses that full proprietorship of his own person which was the basis of his equal natural rights. ...Civil society is established to protect unequal possessions, which have already in the state of nature given rise to unequal rights (231–232).

To reiterate, on Locke’s magical thinking, the equal capacity for rational thought coexists with the unequal actualization of rational thought which explains and justifies the unequal distribution of wealth. In turn, accumulation is evidence that one has acted rationally on one’s rational desire for property. To deter the poor or property-less from stealing property from the wealthy, a sovereign is needed (Macpherson, 237). Law and government come into existence in order to protect the proper functioning of the market society, that is, the collective right of individuals to accumulate as much private property as they can. Relatedly, Locke argued that those who own external property prove their rationality and are justifiably given more political rights than others, for example, the right to create laws by which one is bound, the right to vote for representatives who will protect property interests (91). As neither the working class nor the poor own property (beyond their own body), neither has interests in (and thus cannot be trusted in) protecting private property. Both are therefore justifiably excluded from participation in government and law—-institutions created for the protection of the market and private property (247, 249). Thus, although all European male human beings are naturally equal in the sense of starting
off life with the possibility of using their rationality in the way meant for humans (to control their body and acquire external property to meet their needs), they are and will remain substantively (materially, economically, politically) unequal. Macpherson argues that the formal equality / substantive inequality rift—which is justified by Locke’s notion of possessive individualism—is a necessary feature of all modern capitalist states (269). One needs exploitable labour to make a profit after all. Interestingly then, even some European men are not fully human on Locke’s view. Later in European thought, most notably with John Stuart Mill, colonization of Indigenous lands in America, will be seen as one way to improve the diminished life opportunities of property-less working class European men (Bell 2010). Thus as Macpherson argues, a division of human kinds occurs within the category of European men.

A further division of human kind amongst Europeans is created along gender lines. Locke held that, unlike working class European men, European women are not born with the capacity for rational thought (Macpherson, 224). European women cannot control their own body and are therefore incapable of owning their own body as property. They are closer to non-human animals and more like objects of property (as are children). They need a rational mind to control or own their body for them, and a law to prevent them from dreaming otherwise. Membership in the category of full human or personhood, is thus a politically determined, rather than strictly biologically determined, category. As Fanon states, the “white man organizes dehumanization rationally,” and as we have seen, through rationality. Thus, the eviction of some (many) from full humanity and full political rights is an issue of identity, established and expressed through relations of
property and the marking of bodies. This is also a racializing process. Anthony Farley warns that “property rights are the means of protecting the master class until everything and everyone comes to be owned” (2005, 50). He contends that:

…For some to own, others must first be owned. … Property requires slavery. Ownership of things is first of all ownership of people. The institution of property requires the institution of property relations.

…Class formation is racial formation and racial formation is class formation…the mark must be made on the flesh because before the property relation there is only skin …Hierarchy must be written on the body before it is reified or sublimated as property.

…Property relations are relations between people that are looked upon as if they were relations between people and things.” (2005; 51, 65, 69)

Thus, Possessive Individualism also informed the strategies colonialists used with regard to non-Europeans. Colonization and the usurpation of land was said to be justified only if imposed upon non-equals. (I will say more about this in the next section on law.) Evidence of inferiority was typically determined by whether non-Europeans related to land as private property (rather than communal property). A lack of desire for private property was evidence of an inferior culture (Henderson 2000a). This is because the desire to transform nature through rational activity (especially accumulation) was evidence not only of self-improvement, but evidence of a progressive culture, a peoples’ ability to transcend and improve upon nature. Cultures without a property relation similar to that of Europeans, were viewed as “closer to nature” in the sense of being in the early stages of human development. Thus, as Kay Anderson (2007) argues, it was the way of life, and not skin color per se, which Europeans read as a sign of inferiority when they deemed Black Africans suitable to enslavement, and Indigenous people (at various stages of
colonization) as potentially capable of emerging out of “savagery” (Anderson 2007, 58). Colin Samson clarifies that Locke held that “Indians lived a wretched existence—worse than a day labourer in England” (1999, 16), but that “‘civilization’ would teach natives the virtues of labour and private property” (15). Anderson (2007) argues that the desire to transcend nature, and the perception of the varying abilities of humans to accomplish this, is at the heart of a crisis in humanism (the anxiety that Europeans may not be as different from non-human animals as they think) and eventually gave rise to more explicitly biological accounts of racial difference as inferiority / superiority. Similarly, as legal scholar Cheryl Harris (1993) documents in the case of the Euro-American enslavement of Black Africans, whites defined (in law) their liberty through ownership of property at the same time they defined racialized others as property to be owned by whites. Given the connection between whiteness, property and legal rights, there is a sense in which whiteness itself becomes property, something which (certain) individuals own and to which they have a right of exclusion:

...the racial line between white and Black was extremely critical; it became a line of protection and demarcation from the potential threat of commodification, ... White identity and whiteness were sources of privilege and protection; their absence meant being the object of property. (Harris 1993, 1720–1721)

This reflects Locke’s account of property as an internal relation of mind over body, i.e., property as internal to white identity. Interestingly, if the desire for property (rather than actual ownership) is a marker of racial superiority or membership in the category “fully human,” then as Derek Bell (1998) notes:

...even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered more willing to accept their
lesser share, by an unspoken but no less certain property right in their “whiteness.” (139)

The individual and collective desire for self-improvement, achieved through transcending nature by accomplishing what mere animals cannot: the improvement of nature, the transformation of nature to meet our interests, is intimately tied to processes of accumulation and appropriation. Such improvement is never accomplished once and for all, and as such may generate anxiety, self-doubt, and even self-hatred which may in turn give rise to violence. White identity requires continual reassurance of superiority.

2.4.1 A Closer Look at the Existential premise to Property

The preceding clarifies the ontological force of property in terms of how property delimits human kinds to which differential legal, political, and economic rights apply. In order to understand the sense in which the settler’s very existence is tied not only to property but to land specifically—that is, the sense in which white identity is and will always be about land—I turn to Radhika Mohanram’s (1999) insightful Fanon-inspired interpretation of Locke. Her argument clarifies how the settler’s marking of the native’s body not only re-assures the settler of his racial superiority, but reassures him of his very existence by re-inscribing the settler as occupier of land. Mohanram (like Macpherson) claims that consciousness and rationality are the essence of humanness on Locke’s view. Consciousness (rationality / whiteness) has the ability to move over time, to change, to develop, to progress and to transcend materiality and nature (50–51). On the other hand, body is static, materially located and anchored to land / space, wherein no movement or development over time is possible (52–53). This division corresponds to the Modern / pre-
Modern divide. Locke had a problem, as he believed that the (devalued) body—because located in space—played a necessary role in establishing continuity of identity for consciousness. As Mohanram states “The body has no identity on its own except insofar as it is property, functioning as object to provide subject status to the individual” (Mohanram 1999, 36). Mohanram suggests that the task for white consciousness is to forget, dissociate itself from, or “lose” its devalued body (devalued because aligned with nature) and to deny as much as possible, the body’s significance for human (white) identity and freedom, while simultaneously finding some way to spatially secure identity through time. A task fraught with anxiety. White consciousness accomplishes this through “rhetorical strategies of displacement” (52), discursive moves which detract attention from the white body’s materiality by focusing attention on the materiality of all that is opposite to whiteness, especially the body of the Other. That is, the disembodied white mind anchors its own identity (continuity through time) through its marking of the Other as body (as property). The marked /devalued Black body serves a dual purpose: it reassures whites of superiority and does the dirty work of anchoring white identity. The white mind’s marking of the Black body is thereby evidence of the white body’s spatial location. White narratives about the Black body as static and pre-modern (like land and nature), function as a radar or compass for the white mind to monitor the location of its own body. We have already seen these rhetorical strategies as examined in the work of Fanon: strategies fuelled by the settler’s logic, the colonial imagination, the colonial vocabulary which effect the objectification or dehumanization of the Black body. All such marking renders the Black body visible as property. The visibility marks the Black body as a target
for violence, violence for which it is in turn blamed. The white marking of the Black body specifically as body, as located in space, as rooted on land is not simply to reassure whites that they are superior, but is a way for whites to reassure themselves that they too are spatially located, that is, that they exist. Mohanram’s account may seem overly abstract, and yet, as we will see in the section on law, her account illuminates how this existential component to identity is intimately tied to something very concrete: the settler’s claim to sovereignty over Indigenous lands and people.

2.4.2 Contemporary Examples of Possessive Individualism and Property Relations

Before turning to the role of law in the production of white terror as colonial force-field, I provide two examples of how the old property relation and its ontological force, may be reactivated and relived in the colonial present. The desire to own property can be announced or communicated (to others) and experienced through the practice of controlling another human, which both presupposes and constructs them as less human in the process. The desire for control of property/body, translates easily into the desire to control another human body through marking, possessing, occupying, or violating the body sexually (Dworkin 1987, Mohanram 1999). Sexual violence was historically organized by European patriarchal institutions such as law, the economy, and the nuclear family. Sexual terror on the part of European men against European women and children is integral to European culture and (remains) rampant in everyday life (Hammer 2005, 223, 226, 238). Thus, European colonizers had readily available to them, sophisticated technologies of sexual control which could be deployed against Indigenous people and other non-Europeans in their Imperial projects (Stevenson 1999, Smith 2005, Carter
1997). The desire for property (individually and collectively) required, justified, and naturalized the violence of dispossession, including dispossession accomplished through sexual violation of bodily integrity (Dworkin 1987, Smith 2005). In order to clarify how the ontological force of property may operate through sexual violence in the modern colonial present, I draw examples from the anti-colonial feminist theory of Patricia Hill Collins (2009) and Sherene Razack (2000).

Patricia Hill Collins (2009) argues that capitalism and technology enable the wide dissemination of old ideologies and symbols of racial superiority which are reproduced and are used to justify contemporary racism (380). In particular “past racial formations” and representations of the Black body (female and male) as sexualized object / property for white desire and consumption are given new life through contemporary sites of “sexual spectacle” (i.e., sites where power relations of dominance and subordination are symbolically crystallized and materially enacted). One such site is that of the music video where Black women’s bodies are represented (often by the women themselves) as sexual object/property for consumption and domination. Collins presents a compelling case that these spectacles are on a continuum (in theme) with colonial sexual spectacles, whether the slave block, touring captive Black women’s bodies for white viewing, or the collective sexual desire experienced by whites during lynching of Blacks. She argues that the contemporary sexual spectacle thus may create the conditions for the possibility of colonial subject formation: a sense of racial superiority to be experienced amongst whites who view and take pleasure in the sexual dehumanization of Black bodies. But now, Whites no longer have to travel to a physical site (e.g., the location of a lynching) to share
in this white collective identity, they need simply purchase and consume these representations as individuals in the privacy of their own homes. Monetary rewards (for the more famous Black women singers and Black male rappers) and narratives of how empowerment is achieved through the objectification and selling of one’s own body for profit, complicates the racial and gender hierarchy in this dynamic.

Relatedly, in the Canadian context today, there are approximately 580 missing or murdered Indigenous women across Canada (Amnesty International 2004). The violence against Indigenous women must be understood as part and parcel of this colonial context past into present (Culhane 2003). Sherene Razack’s (2000) analysis of the 1996 murder of Pamela George, an Indigenous mother and sex trade worker in Saskatchewan, and the trial of the young white men who murdered her, brings this colonial context into view. According to Razack, George was picked up at night by the men, they drove her out to the country, had sex with her and then physically beat her until she was unconscious. They left her face down in a puddle and she drowned. The men, who were young athletes, were supported by the white town when they went to trial. Razack argues that this sexualized racialized violence against the body of an Indigenous woman has the markings of an explicitly colonial encounter; that the “relationship between identity and space” was enacted through this white violence (2000, 96). Razack states:

…the subject who must cross the line between respectability and degeneracy and significantly, return unscathed is first and foremost a colonial subject seeking to establish that he is indeed in control and lives in a world where a solid line marks the boundary between who he is and who he is not. It is the surest indicator that he is a subject in control. [the violence enables the] …white middle class male to gain mastery and self-possession. (2000, 107)
Moreover, Razack argues that the spatialization of this identity practice, serves to naturalize the violence. This is another way in which the violation of an Indigenous person’s body is not seen as unusual or unjust. As we saw with Fanon, Said and Taussig, whites have historically represented the Indigenous body as uncivilized and degenerate. In the white imagination, white violence against such a body is not only justified but further confirms the degeneracy of the Indigenous body. Razack emphasizes that the violence itself is a pronounced marking of the body as racially inferior (and by implication, the white body as racially superior). The identity of the men as racially superior was accomplished through their physical and sexual violation of George’s Indigenous body. Razack’s emphasis on the spatiality/geography to this violence, reminds us that colonial identity is always intermeshed with land. Land surfaces literally and metaphorically; materially and symbolically in several ways in this murder. There is the geography of the town (which Razack details) connected to a historical dispossession of Indigenous by whites, which accounts for why so many Indigenous are impoverished, why Indigenous women may sometimes resort to the sex trade for survival, and why whites are in a position to purchase Indigenous bodies for sexual service. There is the geography of the land fantasized as a frontier in the white psyche and reified as a crime scene (out in the country) where George was murdered and abandoned and from which the white men returned safely. Indeed, George’s body may itself represent land or nature. Returning safely from the encounter is what serves as proof of their superiority, and allows them to experience it at the level of the body in their sense of mastery of self-possession. Here we have one example of how the ideology of possessive individualism and its ontological
force operates in the contemporary Canadian context. Possessive Individualism harnesses the identity of the individual to the white collective and its nation through sexual terror against Indigenous bodies: land—terror—white identity. In the next section I examine the role of law within this colonial force field.

2.5 Law and White Terror: Eviction, Assertion, Recognition, Re-colonization

Think about everything that First Nations people have survived in this country: the taking of our land, the taking of our children, residential schools, the current criminal justice system, the outlawing of potlatches, Sundances, and other ceremonies, and the stripping of Indian women (and other Indian people) of their status. Everything we survived as individuals or as Indian peoples. How was all of this delivered? The answer is simple: through law.

Patricia Monture-Angus (1999, 93)

It is my humble hope that I may leave you with at least one small idea which may prove of interest. It is this. A nation's law is the sum of its history; and a nation's judges give voice to the values that are the sum of that history.

Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada (McLachlin 2004)^35

As Monture-Angus reminds us, Canadian law was (and remains) a key instrument in the violence of dispossession and attempted cultural annihilation (genocide) of Indigenous peoples. As the McLachlin quote suggests, law is more than an instrument of colonial power, law is also a constitutive force in the creation and maintenance of collective and national identities across time (past into present). McLachlin’s words tacitly acknowledge that law is neither impartial nor universal, but culture specific. Law, more specifically, modern (European, Western, liberal, white) law, is deeply implicated in the identity project of colonialism. The historical reason for law’s very existence, the very origin of
sovereignty, is the protection of the market (i.e., the colonizer’s property and value system) and the collective of individuals who, through accumulation, demonstrate membership in the category of “most human” (Macpherson 1962, 84). Law is, in effect, a steward of white identity and possessive individualism. As steward of white identity, modern / liberal law can never be the impartial arbiter of justice between Indigenous and Settler nations. McLachlin’s “small idea” would have, in Fanon’s words, the native reaching for his knife. This section outlines some of the interrelated forms of colonial violence touched upon in the previous sections to this chapter, but now as accomplished through law: the eviction of some from the category of fully human, the assertion of sovereignty on the grounds of such eviction, the obfuscation of the barbarity and insanity of the colonizer and the colonial system, and colonial (liberal) gestures of recognition and invitations to “full humanity” as strategies of re-colonization. Law remains integral to the maintenance of a colonial force-field today, on all three interrelated fronts: land, terror, and white identity.

2.5.1 Law and the Violence of Eviction and Assertion

As the above quote from Monture-Angus reminds us, Canadian law was instrumental in the dispossession of Indigenous peoples. In White Man’s Law, Sidney L. Harring claims that although all colonial powers use the “rule of law” as a weapon of legitimization and enforcement, Canadians are proud of the fact that the colonization of Indigenous nations was effected through the rule of law. Canadians embrace this as a nation-defining virtue and as evidence of their/our gentle, non-violent character (“civility”), character that supposedly distinguishes Canadians from their U.S.
counterparts and the more muscular strategies of colonization employed by the latter (1998, 17). Canadian national mythology romanticizes a “pre-colonial” era of fur trade and exploration where European and Indigenous relations are portrayed as mutually dependant and congenial.\(^3^6\) This, claims Bonita Lawrence (2002), likely obscures the evidence of the violence of contact and occupation even in times prior to explicit colonial policy, for example, the genocide of the Beothuk and the near extinction of the Wendat (Huron). Canadians may assume that any such violence resulted from the (now extinct) colonial mindset, and not the law itself, so that any out-dated barbaric aspects of colonial law have been displaced with something more in keeping with the neutral universal humanism said to be essential to liberalism and modern law today. In other words, the use of modern law for unjust purposes in the past is a merely contingent fact, and it is now possible to use the same law to advance more ethical ends today.\(^3^7\) This of course, requires a wilful ignorance of the fact that colonial law, most notably the *Indian Act*, and the colonial relations it structures are still in operation today. It also requires ignorance of the fact that modern liberal law and colonialism / imperialism go hand in glove. This so-called universal, impartial, rational law is ultimately grounded in both the presumption of white superiority and the protection of colonial interests. As Anthony Farley reminds us, “the rule of law is nothing other than the endless unfolding of the primal scene of accumulation” (2005, 63). Law is a crucial mechanism for, again in Fanon’s words, “organizing dehumanization rationally” (BSWM 231). The colonial mind-set is internal to white law. The colonial psyche needs a structural presence.
Critical legal scholars argue that modern law is inherently violent, as an “exclusionary premise” is embedded in the very analytical structure of modern law (hereafter “law”). Law both produces and enforces the violence of eviction. Nicholas Blomley (2002) and Stephen Pritchard (2000) claim that the European conceptualization of law defines law as a neutral mechanism external to violence which controls, regulates, and eradicates violence. Law and violence form a dichotomy; neither can conceptually exist without the other. Law makes sense only in opposition to its negation which is disorder, chaos, violence. Pritchard argues that the dichotomy between order and disorder/chaos is also coextensive with the dichotomy of “civility” and “barbarity.” One (law or civility) is present when, and to the extent that, the other (violence or barbarity) is absent. This conceptualization creates two corresponding material domains: that of order and disorder. Separate domains provide the conditions for the production of different kinds of beings to occupy each domain (and vice versa), the settler and the native as we saw with Fanon’s analysis, are “called into being” (Goldberg 2002). The domain of order must be continually guarded and the disorderly must be continually excluded. Thus, both symbolically and materially, law requires violence in order to remain itself a demarcation of civility and of white collective identity. As Mark Rifkin notes, law is central to “settler states regulat[ion of] not only proper kinds of embodiment…but also legitimate modes of collectivity and occupancy” (Rifkin 2009, 90).

Thus a racial hierarchy, the eviction of some from full humanity, is deeply embedded in modern law. As Peter Fitzpatrick (2001) explains, international law of the 16th Century—law which bound European imperial/colonial sovereign nations as they set
about to claim distant territories—and its development over the next two centuries, is grounded in natural law doctrine. While such doctrine claimed a basic universality amongst humans (recall Locke’s account of the original natural equality amongst humans in terms of potential for rational thought), it also required that some humans be regarded as less human than others, a “defective kind of human” (2001, 11). According to this logic, colonization (and the usurpation of territory) could be justified only if imposed upon non-equals, i.e., uncivilized humans. Fitzpatrick claims (and as we saw in the previous section) that evidence of this defect in non-Europeans, was said to reside in the manner in which they related to land. Uncivilized cultures lacked relations of private property. Rather than individual ownership of land, uncivilized humans collectively merely lived upon land (just as non-human animals do). They did not improve the land (through their labour and for purposes of accumulation). As James Henderson notes, the European (and specifically Lockean) assumption that an absence of private property, and more specifically, the lack of a desire for property acquisition and accumulation, was evidence of a lack of civility, allowed colonizers to (for the most part) dismiss “the customary system of government and law that maintained order in Indigenous nations” (2000a, 25). In this way, Indigenous people are relegated to the realm of disorder. Interestingly, Fitzpatrick notes that if relating to land as property qualified cultures for membership in the category of civilized, then this implied that if only non-civilized people were to adopt European ways of relating to the land, then they would no longer be legally excluded from full humanity (or the accumulation and power that goes with this). This possibility threatened the very identity of the colonist as civilized superior human. It also
threatened the legitimacy of colonial sovereignty and settler occupation. The possibility that Indigenous people might relate to land as property, likely generated great anxiety for the colonizer (Anderson 2007). Fitzpatrick claims that it is for this reason that Europeans ultimately defined Indigenous people as inherently inferior to Europeans. In Fitzpatrick’s words:

Clear criteria of adequate occupation would mean that savages could attain adequacy and may even have done so already. And what would be equally disruptive of the whole imperial scheme, many scant colonial occupations would fail to meet substantial criteria. The unavoidable consequence was that colonists could not erect general and clear criteria to justify occupation and found territoriality. …Sovereignty and proprietary title became existent and adequate only in their negative relation to the intrinsically inadequate other. (Fitzpatrick 2001, 15)

The justification for the colonizer’s assertion of sovereignty over Indigenous people and land—where assertion literally means the simple declaration that the (British) Crown now owns land because the Crown desires to own land—rests ultimately upon colonial ideas (fantasies) of racial inferiority and superiority (Monture-Angus 2002, 158). In Colin Samson’s words, “Canadian sovereignty should be treated as a magical contrivance” (1999, 23). Rational as they are, colonizers have long recognized the dubious legitimacy of such “might makes right” assertion.40 This remains a source of anxiety and instability for settler states today, a point to which I return in the next section on recognition and re-colonization.

Eviction continues to operate in law within contemporary white settler contexts, rendering the violence of law and white collective identity invisible. Stephen Pritchard (2000) demonstrates how the distinctions between civilized vs. barbaric and law/order vs.
violence, organize the New Zealand court today. When the Maori use the white justice system to challenge white injustice against them, the threat to colonial law is that its own procedures and processes will be revealed as a social construct, specific to a particular culture, and thereby an instrument for (unfairly and unjustly) serving the interests of white identity. The law must always counter for this effect (in order to maintain the appearance of being just), and yet cannot risk being too obvious in its effort to do so. Pritchard claims:

For the law loses legitimacy if it is seen to be exercised or applied excessively or unfairly. By saying what the law requires to be forgotten, radicalism makes it possible that the law may be made to appear unjust, illegitimate and unfair. It is in this way that the figure of the past returns to haunt the law, returning not as the savage, but as the innocent, the oppressed and the persecuted. The law, in order to be law, must always conceal this figure by repressing it as the body of the criminal, as violence or the antithesis of order. And yet, in its efforts to do so, especially when confronted or challenged, it must be careful not to respond excessively or violently. (284)

Judges must maintain the appearance of reasonableness, rationality, and even disinterestedness, while nevertheless ensuring that white law and the white collective not be seen as criminal or violent (2000, 277). The bodies we are allowed to see as criminal will be only those of the Indigenous other. White bodies as criminal, disappear altogether. Pritchard provides an example of this in the “Haka Party Case” (271). During a 1979 post-graduation party, engineering students at Auckland University, performed—as had the previous 20 years of graduating engineering students—a sacred Maori dance called “the haka.” The students called it a “war dance” and performed it in a mocking manner; the students were drunk, wore grass skirts, and replaced the words of the haka with racist slurs and obscenities. Maori had complained about this practice for many years. Finally, on this
day, a group of Maori confronted the engineering students and a fight between the two sides ensued. There were many Maori arrests. According to Pritchard, the fight was portrayed in the media as a “violent attack” on “innocent students” by the Maori. The portrayal of the Maori as violent, barbaric, and disorderly was also the predominant discourse during the trial. Pritchard emphasizes that the depth of the violence (and the colonial context) of the white students’ mock dance was never allowed to be visible. In an interesting move, the Maori chose to defend themselves by appealing to Maori law, and argued that the engineering students had defiled Maori law. Acknowledging a law (sovereignty) outside of white law (sovereignty) was inconceivable to the white courts. The Judge in the case portrayed the Maori law as illegitimate and disorderly, and chastised the Maori for “taking law into their own hands.” They and their culture were re-inscribed as inherently violent, savage, and “without law” (Pritchard 273–274). The colonizer’s legal system will not recognize the violence of colonial law and settlers. An interesting example from the Canadian legal context is provided by Carmela Murdocca (2009). Murdocca analyzes the 1999 Supreme Court of Canada Gladue decision which, in a seemingly progressive move, allowed criminal sentencing of Indigenous persons to take account of the colonial impact on Indigenous lives. Yet this was done in such a way as to obscure Canada’s wrong-doing as part of this historical colonial context. Rather, cultural difference, and the inability of Indigenous people to move beyond the colonial past, is blamed. Murdocca argues that cultural difference operates as legal eviction, in the criminal sentencing of Indigenous persons.
The assumptions of possessive individualism which justify the eviction of some humans from the fully human are internal to, and operate through, both law in general and specific laws such as property law. Nicholas Blomley (2002), with emphasis on property law, argues that individualism and private property remain the two principal mechanisms through which law exercises colonial violence in the present while simultaneously rendering this violence invisible.\textsuperscript{41} The political status of persons is still assigned largely on the basis of one’s relation to private property (Blomley 2002, 122). For example, in Canada, homeless people were (until very recently) excluded from basic political rights, such as voting, because they could not claim a fixed address and are property-less.

Blomley claims that the aggression against homeless people when they are expunged from public sidewalks and buildings in the name of protecting property rights (or to echo Said, improving the landscape) is seen as legitimate and thus not violence at all. Consider the common practice of clearing a city core of homeless people in preparation for the Olympic games. Thus, Liberalism’s legal concept of private property as “a bundle of rights to exclude others, to use and to transform” (121) naturalizes and normalizes the violence of these exclusionary practices. Property law sets bodies up in relation to each other, creates the conditions for violence and legitimizes the violence which results. The original and on-going colonial violence necessary to the process of surveying and partitioning usurped land, is also “…‘forgotten’ through a shift in emphasis and attention from processes of dispossession to possession…” (128). Blomley claims that the violence between law and the property-deprived; or between property owner and the property-deprived, remains invisible because the violence is seen as a function of property, not law.
Law defines the important relation as that “between owner and space [nothing], rather than owner and others” (131–132). This echoes the previously quoted insight by Farley (2005) that property is portrayed as a relation between people and things, rather than a relation between people. In a sense, property law functions as a rhetorical strategy of displacement. It enables the body which commits the violence (through relations of property) to remain invisible and innocent, while re-inscribing its occupancy of land.

2.5.2 Law and the Violence of Recognition and Re-colonization

While European colonial powers commonly defined Indigenous people as racially inferior in order to justify colonial declarations of sovereignty, assertion of sovereignty over Indigenous lands and peoples was historically, and remains today, fraught with anxiety for the colonizer (Rifkin 2009, 91). Indigenous people have always asserted nation status in their relations with European nations. Patricia Monture-Angus reminds us that “… it was never the intent of First Nations to enter into colonial relationships with the [British / Canadian] Crown” (2002, 158). Further, it is indisputable that Indigenous nations have a historical connection to the land which precedes European contact. The status of Indigenous nations as nations is acknowledged in key historical colonial legislation and contemporary legal decisions. Many interpret the British Crown’s Proclamation of 1763 as evidence that colonial powers recognized Indigenous nationhood early on. Recognition means acknowledgement of pre-existing nation status, not conferral of such status. Monture-Angus (2002) claims that the Proclamation articulates a fiduciary relationship between equal nations (each nation bound by its own law and government). The proclamation is the British (now Canadian) Crown’s promise to abide
by the agreements made with Indigenous nations, and to ensure that the Crown’s citizens honour agreements (treaties) regarding the sharing of land and resources. More specifically, it was an effort on the part of the distant British Crown to control and limit white settlers increasing encroachment of Indigenous nations’ reserved lands (Harring 1998). In order to prevent “exploitative bargains” (Monture-Angus 2002, 159; Slattery 2006, 261), i.e., of settlers swindling Indigenous people out of land, the Crown sought to oversee all land transactions, stipulating that Indigenous nations could transfer land only to the Crown (Slattery 2006, 279). (This law continues to operate today. Indigenous nations are allowed to sell their land only to Canada. Similarly, when courts refer to “the Honour of the Crown” they mean that Canada must abide by this promise to negotiate honestly nation to nation.) Keeping its own settler citizens under control would hopefully quell Indigenous unrest (Samson 1999, 16). However, white settlers resisted the Crown’s “prerogative treaties” (Henderson 2000a, 27). The number of white settlers increased and settlers became more and more violent in their occupation of Indigenous nations’ lands (Harring 1998). The reserves of land became smaller and more remote. Eventually, the British Crown simply sided with the settlers who more closely represented its interests, and embarked upon a period of more blatantly violent colonialism in law as well as on the ground (Harring 1998). During this time, the fiduciary relationship which was originally articulated as a relationship between equal nations, shifted (for the Crown) towards a relationship between non-equals, and was commonly characterized as a parent-child relationship where Indigenous people were legally construed as “wards of the state.” As Mark Rifkin (2009) argues (regarding the USA settler context), this “infantilizes”
Indigenous people as children in need of “safeguarding” and consequently, when “Native polities’ call for the acknowledgement of their boundaries and autonomy” their demand is “transfigured instead as a mass of “wants”—a term suggestive of persistent bodily need” (Rifkin 2009, 99). This configuration of Indigenous collectives not as nations but as a mass of needy dependents, facilitated the colonial fantasy (and legal reification) of them as “domestics” and generated their “peculiar” status as (at best) “domestic nations” within and bound by the overarching sovereign settler nation (Rifkin, Ibid., Samson 1999, 16). In calling attention to this self-serving colonial logic, Rifkin rhetorically asks:

If native peoples are the subjects of treaties, how are they not foreign? Why can the United States pass laws applicable to people on native lands? On what basis can the federal government claim the right to regulate the political entities that predate the existence of the United States? The official answer … is that native populations and lands are within the domain over which the United States is sovereign.” (Rifkin 106).

Here then we see how eviction is accomplished through gestures of “inclusion,” within the dominant colonial state, as well as exclusion from “the normal functioning of law” (Rifkin 2009, 98), the latter in the sense identified by Blomley and Pritchard. Rifkin claims that Indigenous difference functions as “the marker of an enforced structural relation” (Rifkin 2009, 112). The mere assertion of settler state sovereignty overrides and delimits the “nationhood” of Indigenous collectives. Elizabeth Povinelli (2002) writing in the settler context of Australia, terms this the “cunning of recognition.” Settler states (past and present) secure domination over Indigenous lands and peoples through myriad means, including invitations to equality through gestures of recognition of cultural difference. Povinelli critiques specifically liberal policies of multiculturalism, as strategies which
ultimately reinstall Indigenous cultural difference as inequality because always subsumed under /within settler sovereignty.

Assertion of sovereignty is not merely a one-time practice of the Crown of the distant past. Rather, re-assertion of sovereignty occurs regularly in the present. Colin Samson (1999, 2003) tracks this “magical process” in relation to Canada’s contemporary comprehensive land claims policy. He documents how the Innu of the Labrador-Quebec peninsula have had their territory invaded and usurped, most recently from the 1970s through to the late 1990s. The government of Canada forced a sedentary life upon the Innu, and leased their traditional lands to NATO for aerial military exercises (which had a negative impact on the health of the Innu and disturbed animal habitats), and sold their land to mining companies. Samson asks:

What makes these incursions possible? How is it that the Innu, who were not militarily conquered or the subject of treaties and in no way consented to the relinquishment of their land, can be dispossessed with such impunity at the hands of a supposedly conscientious liberal democracy? … no matter what the Innu say or do, the texts, laws and policies of Canada are invested with a power to dispossess. (1999, 10)

Even with recent court decisions such as the 1997 Delgamuukw decision which extends some Indigenous rights, “aboriginal title” remains “subordinate to Canadian sovereignty” (Samson 1999, 19; Slattery 2006). That is, what never changes is that settler sovereignty (resting precariously upon mere assertion) prevails (Samson 1999, 12; 20–21). This is referred to as “colonial overrule” or “legal re-colonization” (Dudas 2004). Colonial over-rule is an old practice, a strategy on the part of colonizers to re-establish colonial order
and dominance through concessions to those targeted for colonization. Peter Fitzpatrick explains:

Conceding some title to the savages was not a response to their being more or less adequately attached to the land but, rather, a response to varying exigencies of colonial occupation. When people impertinently resisted conquest or where colonial occupation was tenuous, the savages were often found to have proprietary rights after all, *rights which could then be transferred to settlers*. Yet imperial right was still founded on the negating of these same people, with the result that their “rights” were thoroughly subordinate and could never amount to or reflect that “holding...the land” which grounds the occidental “right of sovereignty.” (2001, 17)

In Canada, land struggles between Indigenous peoples and the Crown (Government of Canada and/or Province) have been on-going, spanning decades if not centuries. On any given day there are a multitude of land claims winding their way through the courts, and numerous reclamations of land or protests to halt the illegitimate use of Indigenous land by Canadian or Provincial Governments and the corporations they have contracted to extract resources. Various court decisions between 1970 and 2008 recognize that “Aboriginal title” precedes colonial contact and recommend that colonial governments (Canada or Province) consult with Indigenous nations before making decisions regarding the use of traditional Indigenous lands (Harvard Law 2010). Justice McLachlin, in the SCC 2004 Haida decision, clarifies that this duty to consult is rooted in the assertion of sovereignty:

The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, ...The duty ...is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. (SCC 2004 Haida, para 3)
Law keeps watch and gives warning to the settler state when the insanity and illegitimacy of the colonial regime slips into view. Law will do what it can to recuperate colonial dominance, but anxiously cautions the settler state to “negotiate” with the Indigenous to prevent mayhem. This is then mistaken as a gesture of recognition on the part of law that the Indigenous is human after all. Despite law’s admonishment to consult and accommodate, this is rarely done (Lovelace 2010, Grant 2010, Harvard Law 2010, Morse 2008a, Slattery 2006, Woolford 2005, 2004, Blackburn 2005, Alfred 2001). Canada and provincial governments remain bent on securing profit from resource rich land. Moreover, according to Woolford, Canada and provincial governments will not “negotiate with First Nations who launch land claims lawsuits or engage in claims-related road blockade activities” (2004, 114 ftnt 11).

Land struggles are especially prevalent in British Columbia where, unlike the rest of Canada, the majority of (resource rich) land remains unceded. (There are only two historical treaties in B.C.) As Andrew Woolford explains, due to “the lack of historical treaty settlements… the spectre of Aboriginal title has haunted the provincial government’s claim to jurisdiction over B.C.’s land and resources” (Woolford 2004, 111–113). It has created a legal and economic situation of “uncertainty,” whereby Canada and the B.C. government cannot with confidence enter into economic agreements with corporations without first knowing who owns the land (Blackburn 2005, Woolford 2005, Slattery 2006). As Carole Blackburn (2005) argues, this sense of uncertainty permeates beyond government, into the everyday between Indigenous and non-Indigenous in B.C.
Anxiety and tensions run high, giving rise in 2002 to a provincial referendum on Indigenous land claims (Rossiter and Wood 2005).

In 1991 the B.C. Treaty Process was initiated to address land negotiations between Indigenous Nations, BC Provincial Government, and the Federal Government and to establish certainty (for Canada) with respect to the content of Aboriginal title. The process has been flawed from the start and remains so today as a result of unilateral decision-making and less than honorable practices by the Crown. Bradford Morse (2008b) notes that Indigenous nations lose more than 80% of their traditional territories in B.C. “modern treaties” (Morse 2008b). Colin Samson (2003) shows that this is explained in part by the fact that these new treaties (like the old ones) are deceptive, and are framed by European liberal values of property which reestablish Canadian Sovereignty, into which Indigenous nations are (as previously discussed) “invited” to subsume their nationhood status.

Monture-Angus reminds us that:

The reason Canadian law does not fully work for resolving Aboriginal claims is simple. Canadian courts owe their origin to British notions of when a nation is sovereign. It is from Canadian sovereignty that Canadian courts owe their existence. Courts, therefore, cannot question the very source of their own existence without fully jeopardizing their own being.” (Monture-Angus, 1999, 93)

Canada as a nation owes its existence to the force of colonial law which brought it into existence (and vice versa). Colonial / modern law and white collective identity are inter-embedded. To challenge the legal system is to risk challenging the nation, and the very “imperial ontological scheme” to which it gives rise (Fitzpatrick 2002, 2001). Dismantling one requires dismantling the other. In her reflections on whether the fiduciary relationship between Indigenous Nations and the British / Canadian Crown as captured in the 1763
Proclamation might serve as a basis for future non-colonial relations, Patricia Monture-Angus claims that it would first need to:

…eradicate all traces of the preoccupation—overt and embedded— that the Crown and the people represented by the Crown have had with superiority. If this is not possible, then the full legal potential of the fiduciary relationship will not be realized. (Monture-Angus 2002, 158–159)

However, if a Fanonian analysis is correct, and settler identity / nation is constructed only through the dehumanization of the (Indigenous) Other, then invitations to equality with the settler, need to be met with scepticism. As Anthony Farley (2004) and others argue, inequality is inherent to colonial law, and the very ideal of equality, by definition (of settler logic) presupposes inequality. Real equality would require the demise of settler identity and its structural presence. Otherwise, recognition within such contexts is not genuine, but merely recuperates the settler – native relation. As Fanon indicates, in that case:

The negro is a slave who has been allowed to assume the attitude of the master. The white man is a master who has allowed his slaves to eat at his table. … The master laughs at the consciousness of the slave…what he wants from the slave is not recognition, but work. (BSWM 219; 220 fnm. 8)

Law remains a steward of white identity and settler sovereignty. Its origin is in the protection of private property and the collective of individuals who are rational enough to accumulate. Law remains integral to the maintenance of a colonial force-field today, on all three interrelated fronts: land, terror, and white identity.
Conclusion: “The Whole Picture”: Land—Terror—White Collective Identity

White terror as colonial force-field, is a network of power relations which include the seemingly fleeting moments such as Nault’s anger and his summoning of a white collective of “people like him” in response to being called a citizen of a white settler currently racist nation, his effort (in a long line of similar efforts) to domesticate Indigenous nations through his proposed FNGA, his punishment (by withdrawing funds for economic projects) of Indigenous nations that refused to support his FNGA. These and numerous other practices of state and individual violence committed daily against Indigenous peoples—including the sexual violence against and murder of Indigenous women, the on-going re-assertion of sovereignty and effort to control Indigenous lands and resources whether in Canadian courts or across Government tables—must be understood as systematically interrelated, as part of the whole picture of on-going cultural annihilation. “Settler occupiers come to stay” (Wolfe 2006). Components to this network of force relations are connected via their cumulative impact: a state of war experienced by Indigenous people. This geographical field of practices is linked through colonial magic, settler logic, white rationality and value systems, colonial mentalities, and the colonial desire for improving self and nature through accumulation. This specifically colonial force-field produces the racialized bodies and relations of “settler and native” as well as the psychic anxiety on the part of settlers that the illegitimacy of settler dominance and superiority will be revealed. To prevent this, the settler makes self-proclaimed generous gifts (of Indigenous land and resources) to Indigenous people. The settler invites the native to “share in our economic prosperity” or to participate in decision making regarding
their own lives and nations. In a settler context where the violence of occupation must be “forgotten” (Lowe 2006), that is, where the contemporary violent occupier must remain hidden, the notion of white terror as colonial force-field, structured by land—terror—white identity, is a useful analytical tool for bringing the collective white body as occupier within a thoroughly colonial present, into view.
Chapter 3 Methodology: Tracking the White Collective Body and the Colonial Present in Government and Legal Discourse regarding “Indian Residential Schools”

Chapter 2 developed a framework for theorizing the contemporary white settler state as presently colonial, as a context wherein white colonial subject positions and colonial relations are both obfuscated and created anew. In the remainder of this thesis, I use this theoretical framework to illustrate how colonial subject positions and power relations are reproduced within one specific site within the white settler context of Canada: that of Canada’s response (of the past two decades) to Indigenous peoples demands for justice regarding the violence of Indian Residential Schools (IRS). Just as the violence of IRS was instrumental to Canada’s colonial project and was therefore a violence connected to land and white identity, I show how Canada’s response is also a violence connected to land and white identity today. I analyze judicial reasoning in IRS case law, specifically *R v. Plint* (1995) in Chapter 4 and *Blackwater v. Plint* (1996–2005) in Chapter 5. In Chapter 6, I analyze the IRS class actions *Cloud v. Canada* (1998, 2004) and *Baxter v. Canada* (2000/3–2006) which gave rise to the 2006 IRS Settlement Agreement (IRSSA). In Chapter 7, I analyze the Prime Minister’s 2008 Apology to “former students” of Canada’s IRS. In all four chapters, I examine what Canadian law and government discourse allows us to see or know about the past colonial violence of IRS, as a way of mapping what it prevents us from seeing or knowing about present colonial violence, perpetrators, and occupiers of Indigenous peoples’ land. In particular, I show how possessive individualism and the ontological force of property continue to operate as a regime of truth through these responses, within a colonial force-field, shoring up the
triadic relation of land—terror—white identity. This focus situates my study within a growing subfield of anti-colonial studies and as part of a “new research agenda” which, in Aileen Moreton-Robinson’s words, asks:

How does white possession circulate as a regime of truth that simultaneously constitutes White subjectivity and circumscribes the political possibilities of Indigenous sovereignty? …How does it manifest as part of common-sense knowledge, decision-making and socially produced conventions and signs? (389) …how does it manifest in regulatory mechanisms including legal decisions, government policy and legislation? (Moreton-Robinson 2006, 391)

In this chapter, I first provide a brief account of the nature of the violence of IRS as conceptualized and experienced by Indigenous people, and as supported by Indigenous and non-Indigenous scholarship. IRS violence is presented as part of “the whole picture” of settler colonialism, more specifically, as attempted genocide intimately tied to land and white identity. I adopt this analysis and it informs my research design and interpretation of the data, specifically my analysis of what is curiously missing from the government and law’s account of IRS violence. Second, I provide an overview of the Canadian government and legal system’s response of the last two decades to Indigenous efforts to name the violence of IRS in terms of genocide and usurpation of land. This will provide the reader with context for the specific legal and political events I analyze in later chapters. Finally, I use the theoretical framework of white terror as colonial force field to inform my research questions and design, data selection and approach to interpretation of the data. In tracing the ontological force of property in Canada’s recent response regarding IRS, I show how this response is about land and white identity today.
### 3.1 Naming the Violence of Canada’s “Indian Residential Schools”

“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.

…Some in Canada feel that what has been under way is a definite social policy of “ethnic cleansing” of the national Canadian landscape. They argue, what else are you doing when, …you work for decades to destroy — through oppressive laws and policies, residential schools, and even withholding of essential services such as health care, housing, clean water and education — whole indigenous orders of government in this country and their communities and dispossess them of their traditional land and resources and their languages and their religions and their laws and their social cohesion?

Grand Chief Matthew Coon Come (June 30, 2010.)

Canada is a white settler state, with explicit colonial origins. Colonization and the creation of a settler state is an inherently violent process (Fanon 1963, 1967, Memmi 1965, Churchill 1997, Lawrence 2002, Wolfe 2006) involving strategies of displacement of the colonized by the colonizer, dispossession of land and resources, and disappearance of the colonized—the subordination and annihilation of the colonized and their cultures. In the making of Canada, the residential school system, the reserve system, and legislation such as the 1869 Indian Act were among the key mechanisms for the colonial project. It is now commonly acknowledged (by scholars, activists and increasingly, even some
politicians) that IRS was a central mechanism in Canada’s past colonization of Indigenous peoples for the purpose of nation building. As John S. Milloy (1999) argues in *A National Crime*—perhaps the most comprehensive critique of Canadian government documents regarding IRS—the rationale for IRS and the “civilizing mission” was fundamentally and openly political.\(^{44}\) Government officials viewed the IRS system as a means of undermining *adult* Indigenous resistance to colonization. Government officials hoped, especially shortly after the 1885 Louis Riel led Métis resistance, that Indigenous communities would be less likely to resist if their “children were held hostage” by the Government (Milloy, 31–32). Thus, IRS must be understood as but one key political strategy among many such strategies of colonization and land usurpation (Chrisjohn 2008, Coon Come 2010). The injustices of land-theft and IRS policy cannot be disentangled, either in the past, or in the present. For example, Indigenous nations in British Columbia, often request an apology for IRS from the federal or provincial governments, before proceeding with negotiations regarding land (Woolford 2004, 131).

Moreover, the past violence of IRS is conceptualized as the crime of genocide (Chrisjohn et al. 2008). Indigenous scholars, such as Roland Chrisjohn and Sherri Young (1997), contend that the purpose of the more than 138 Indian residential schools\(^{45}\) which the Government of Canada operated with the help of various Christian Churches between 1870 and 1986,\(^{46}\) was not the “benign assimilation” of Indigenous people into European settler society, but rather cultural annihilation and genocide in the effort to usurp land known to Indigenous nations since “time immemorial.”\(^{47}\) Milloy (1999) documents how Canada’s nation building project was rooted in the European view of “the citizen” and
fear of the inherent savagery and evil of the non-European “Other.” “Killing the Indian” was a prerequisite for establishing a colonial (civilized) nation (Milloy, 42) and as Chapter 2 theorized, for reassuring and producing white settler identity. The IRS system was seen as a mechanism for this “ontological revolution” (Milloy, 42). Indeed, Milloy argues that the “…essentially violent nature of the residential school system” was not only a logical outcome of these values and goals, but was foreseen and openly embraced by the Canadian Government. In the often quoted words of 1920–1932 Minister of Indian Affairs Duncan Campbell Scott (speaking to a Parliamentary committee):

I want to get rid of the Indian problem. …Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department. (As quoted in Milloy 1999, 46)

The violence specific to IRS, and the impact of this violence on Indigenous communities, has been well documented through research as well as in IRS survivor testimonials which began to surface (or rather, to be heard) in Canada in the 1980s. During the public consultations in the early 1990s for The Royal Commission on Aboriginal Peoples, commission members were so inundated with testimonials regarding residential schools that their 1996 report recommendations fore-fronted the need for the Government to address the concerns of the survivors of these institutions. From all of these sources we know that the violence of IRS was extensive and included the following. Indigenous children were forcefully removed from their birth communities and loved ones. Forceful removal was legally backed by the Indian Act from 1920 to 1951. In addition to the violence of taking children away from their birth communities, generations of children were prohibited from speaking their native languages and practicing their spirituality. The
United Nations 1948 Convention against Genocide, terms this “cultural annihilation” or “cultural genocide” (Chrisjohn and Young 1997, Chrisjohn 2006, Churchill 1997, 2004; Vrdoljak 2008). Indigenous children were emotionally and psychologically tormented, humiliated, beaten, sexually abused, raped, subjected to medical and dental experimentation, knowingly exposed to tuberculosis and influenza (Kelm,1998), overworked and underfed, all (allegedly) in the name of “civilizing” them. Some children were murdered or died from poor nutrition and lack of medical care. Indeed, according to Kelm (1998) as many as 50,000 children may have died while in or shortly after leaving IRS. Most were exploited as a cheap labor source. The “education” they received aimed to integrate them into white society not as “equals,” but as laborers at the lowest level of the service sector: male children were trained in agriculture and the trades, female children were trained as domestic servants (Milloy 1999, 31–33). According to James Miller (2006), Indigenous children spent half the day in the classroom and half the day labouring. As Dian Million (2000) argues, IRS were totalizing institutions, literal carceral spaces which both structurally and in terms of process, sought to regulate the time and space of every movement of the bodies and minds targeted. If successful, assimilation would ensure the smooth functioning of colonial power.

The more than one hundred years of daily terror to which Indigenous children were subjected—the everyday assaults against their bodily, psychological, and spiritual integrity—served the interests of settler government and society in many ways. The violence not only violated and traumatized individuals, but undermined the collective
identity and cohesion of Indigenous peoples. As Rhonda Claes and Deborah Clifton document:

Residential schooling was an aspect of colonization that had a particularly destructive effect on First Nations, Metis and Inuit communities, families and individuals. ...Knowledge of the genocidal intent of the colonisers is well entrenched in aboriginal consciousness... (1998, 1, 16)

The genocidal violence disrupted (or attempted to disrupt) the trans-generational transmission of Indigenous knowledge. Knowledge specifically, of a lengthy association with the land prior to European invasion. Land is central to many Indigenous peoples’ identity and culture (as it is to white identity and culture, as we saw in Chapter 2). When Indigenous survivors of IRS speak of their experience of IRS “abuse,” they often emphasize that this violence and the resulting trauma must be placed alongside the trauma of “loss of culture,” loss of language, and separation from family. For many Indigenous peoples, individual, cultural and spiritual identity is so intimately tied to land, that loss of land constitutes a disruption to identity (“loss of culture”). Disrupting Indigenous identity (causing “loss of culture”) is one colonial strategy for dispossessing Indigenous peoples of land. As Ana Vrdoljak explains, citing the work of various international bodies:

...indigenous peoples cultural heritage is intrinsically connected to their traditional lands and waters ...relations to land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. (Vrdoljak 2008, 201)

While Indigenous identity and land are intimately interconnected, this does not mean Indigenous identity and relations to land do not change over time. As Ann Willows (2009) reminds us, failure to acknowledge this risks essentializing and quarantining Indigenous
people in the pre-modern, and (on a Lockean view, as explained in Chapter 2) as thereby not fully human.

While the methods for accomplishing the disruption between Indigenous identity and land through Canada’s IRS system, may have changed over the years—the emphasis of the schools shifted from assimilation in the 1840s through 1910, to segregation from 1911–1951, and to integration from 1951–1970 (Llewellyn 2002)—the goal of an ontological revolution producing self-regulating liberal individual citizens (though not equal citizens) remains in all of these phases. Indeed, according to Chrisjohn (2006, 2008), given the goal of “killing the Indian” through assimilation, IRS would have been genocidal, even if the children were not abused, even if they were well fed and well treated. Here we see clearly how an economic project (of securing wealth from land and resources) is accomplished through racial domination and vice versa. Given what we know about possessive individualism’s centrality to white identity and settler systems, land is not merely a matter of “possession and production, but also a matter of material, spiritual and cultural legacy” for settlers as well, contrary to what Vrdoljak’s words above imply.

While Indigenous survivors, scholars, and leaders emphasize placing IRS in the context of “the whole picture” of colonization, dominant narratives and accounts of IRS violence narrowly focus upon the sexual abuse and physical abuse committed against Indigenous children. Given the colonial purpose of the IRS system, and given that colonial projects are often carried out through sexual violence (Razack 2000, Stoler 2002, Smith 2005, Hill Collins 2009), it is not surprising that sexual violence was common in IRS. I
consider the sexual violence committed by Euro-Canadians against the bodies of Indigenous children, as violence through which possessive individualism and the ontological force of property operate to establish racial superiority of the settler and the settler’s occupation of land. The settler’s logic and motivation of “improving the native” (where the Indigenous body is equated with land by the settler)—so explicitly stated in IRS policy—may be attempted through mixing the settler’s body with the body of the Indigenous person. In that encounter (of assimilation, consumption) the child is appropriated as property, becoming a “ward of the state.” The Indigenous child’s reduction to property, the Indigenous child’s eviction from humanity, announces the settler (both as individual and member of a white collective) as racially superior. In this way, the settler’s crime of the sexual violation of Indigenous children, was simultaneously a crime against Indigenous adults, a measure to deter political resistance, to eliminate entire ways of being. I suggest that it should be understood as equivalent to “rape as a crime of war.”

While it is not surprising that sexual violence was common in IRS, it is curious that, despite the array of violence committed against Indigenous children through the IRS system, dominant narratives emphasize primarily the sexual violence and physical abuse. In “Telling Secrets: Sex, Power and Narratives in Indian Residential School Histories,” Dian Million (2000) uses the Foucaultian point that dominant and subaltern discourses and narratives arise in relation to each other and need to be read off of each other in order to show how the socio-cultural conditions in Canada in the 1980s gave rise to the pouring out of Indigenous testimonials and narratives regarding sexual abuse within IRS. That is,
that the testimonials on the part of IRS survivors of sexual abuse emerged in the 1980s—after one hundred years of supposed silence—reveals much about the dominant white culture and what it was willing to hear. As such, the public testimonials of IRS sexual abuse often risk appropriation by settler subjects as a site of “spectacle,” a site of power wherein, to use Patricia Hill Collins’ analysis (2009), old colonial relations between property owners and humans as property to be owned, are revived and re-enacted. Of course, Canada does not hold to the analysis of sexual violence as a political weapon of war, as terror, or collective domination, but rather as a form of violence which is an expression of individual biological and psychological pathology. That is, on Canada’s account, sexual violence is construed (and purposively emphasized) as an individual crime unrelated to the collective practice of nation building and land theft. Moreover, as Mark Rifkin (2009) argues, narratives which mark the Indigenous body as child (and in perpetual need) are consistent with the colonial state’s view of Indigenous people as wards of the state, and marks them as merely “domestic nations,” subject to Canadian sovereignty. As my analysis of IRS case law shows, dominant accounts of IRS emphasize sexual abuse precisely in order that the connection to land and a violent white collective may be forgotten. And yet, as I show, even this emphasis on sexual violence committed by individuals, in time, threatens to reveal the connection between land, terror and white collective identity.

3.2 Canada’s Response: The Political and Legal Re-framing of IRS Violence

Is there no goddamn end to these people? First we get used and abused by white professionals—a perverted clergy. Then we have to spend years in therapy with other white professionals—high priced shrinks and
therapists. Then we have to have our lives and pain validated by yet more white professionals—old ex-judges hired to determine if we are lying or not. Then we have to leave ourselves in the hands of white lawyers who can only work with legal precedents that have been set by white judges already. Wake up and smell the coffee. Our very lives since residential school have been a precedent in themselves!

Gilbert Oskaboose, Ojibway journalist and survivor of Garnier Residential School.  

The Canadian Government was very slow to officially respond to the deluge of stories exposing the violence and impact of IRS, and the growing request on the part of Indigenous leaders that Canada address the legacy of IRS and restore justice for survivors and their families. This left Indigenous survivors with few options but to pursue justice through Canada’s legal system. Legal suits against the various Churches which operated the IRS system, and the Government of Canada, began to form in the late 1980s and early 1990s. However, seeking justice within Canadian law meant that Canada’s law determined what could be recognized as a criminal offense, or an actionable tort in civil cases. The statement by Oskaboose above, was written in response to the government and law’s refusal to recognize “loss of culture” in the Garnier Residential School claim in which he was a claimant. The story of IRS litigation is primarily a story about the concerted effort on the part of Indigenous claimants and their lawyers to get Canada’s government and law to legally recognize that IRS (including the sexual abuse perpetrated by individuals) were part of a wider colonial project involving land theft and the elimination of a people / way of life in the name of nation-building. It is also the story of Canada’s effort to deny that legal recognition. Thus, from the beginning of IRS litigation, claimants pushed for “loss of culture” as an actionable tort. However, Canadian
government and law, citing statute of limitations, allow only “historical sexual assault,”
negligence, and breach of fiduciary duty, as legally recognized harms.\textsuperscript{54} “Historic sexual
assault” does not mean with attention to the context of colonialism, but merely, abuse
which happened so long ago that memories fade, evidence disappears, and “many of the
perpetrators are dead” (see Chapter 5). Sexual abuse of children becomes the dominant
framework for analysis of the harm of IRS. Rather than seeing the sexual abuse as a
means of appropriation and assimilation (or “colonization from within”\textsuperscript{55}) sexual abuse is
portrayed as an unfamiliar, uncommon, and taboo violence committed by pathological
individuals, either pedophiles who bear no resemblance to everyday white folk, or clergy
whose sexual desires have run amuck, in some cases because the Church doesn’t allow
them to marry adult women. On the contrary, as Chrisjohn and Young compellingly
argue:

\begin{quote}
The abuses mentioned were by and large, criminal actions…carried out
by school or governmental personnel, or criminal omissions of action…
on the part of those in authority. In a “just” society the transgressions
would have been dealt with at the time of their commission; instead they
were compounded, by hatching cover-ups, …and impugning the victims.
A single victim of Indian Residential School abuse thus gives rise to a
host of perpetrators, only some of whom were involved in the original
criminal act. The factors impelling “keeping the lid” on the revelations
from Residential Schools derive not merely from an in-group desire to
protect its own, but also from a desire to avoid articulation of all the
“links” of the chain of those responsible for compounding the original
crime. (1997, 55; Authors’ bold.)
\end{quote}

As we will see in Chapter 5, the government becomes merely implicated (vicariously
responsible) for the crimes of individuals (rather than the crime of genocide), on the
grounds that it employed the wrong people and failed to investigate claims of neglect. The
courts will ultimately rule, that Canada did not fail its fiduciary duty to Indigenous nations or to the children in its care. In the individual court cases (a multitude of which unfold simultaneously between 1988 and 2006), the historical context of colonialism, and the triadic relation of land—terror—white collective identity is obfuscated and / or protected through this legal framing. Many scholars and legal practitioners critique Canadian IRS case law and the exclusion of “loss of culture” as an actionable tort-feasor (Blackburn 2010, McIntyre 2009, Feldthusen 2007, Hall 2006, 2000, Oxaal 2005, AFN Report 2005; Ogilvie 2004, Cunneen and Grix 2003, Cassidy 2002, Llewellyn 2002, Rowe 2001). Some argue that although Canadian law is inadequate for defining and addressing the harms and injustices of the Indian Residential School system perhaps existing torts could be tailored to approximate the harm of “loss of culture.” Zoe Oxaal (2005) creatively suggests that mental torture and unjust incarceration could serve this purpose. Bruce Feldthusen (2007) provides an insightful critique of a Saskatchewan IRS case, where the baker who committed the violence against Indigenous children was defined as not essential to the daily operation of the institution, and therefore not an employee for whom Canada is responsible. Feldthusen argues that with the political will, the government could easily amend law to include “loss of culture” as an actionable tort. But it never did. I suggest that if we assume that the Government’s response is really about white collective identity and land today—or more specifically, sovereignty—this refusal makes sense (as I explain in Chapter 5). The legal framing in IRS case law, makes it difficult to legally recognize a wider social context as responsible for the wrong-doing of IRS, let alone a wider colonial social context, engaged in on-going land theft. Nothing in these individual court cases
ever captures a perpetrator who is normal, white, collective and breathing—i.e., the settler occupier—the very people to which “there is no goddamn end.”

The political response of the Government of Canada unfolded alongside the ever increasing number of IRS court cases. In 1998, in response to the 1996 RCAP report, growing disapproval from Indigenous peoples, and growing litigation, then Minister of Indian and Northern Affairs Jane Stewart (Liberal) offered a “Statement of Reconciliation” and announced the “Gathering Strength” initiative to address the legacy of IRS, primarily through a $350 million Aboriginal Healing Fund. However, many Indigenous people did not accept this statement of reconciliation as an apology, because it was not offered in the House of Commons by then P.M. Jean Chretien (in fact Chretien refused to be present at the ceremony). Further, the statement of reconciliation was carefully worded so as to avoid further litigation, which undermined its perceived sincerity (Giokos 2000). (The statement was indeed later used in the Baxter class action as evidence of the Government’s knowledge of wrong-doing.) Some Indigenous peoples critiqued the healing fund’s implication that it is Indigenous peoples, rather than white people, who are psychologically damaged (echoing Chrisjohn and Young 1997).

Interestingly, Roland Chrisjohn (2008, 2002) documents how, throughout the 1990s, the government made a concerted effort in the international realm to have the clauses relating to cultural genocide and removal of children, removed from the United Nations convention against genocide. It also removed genocide from Canada’s criminal law. This speaks to the government’s knowledge of the implication of IRS genocide for present day entitlement to land. IRS civil suits continued to be filed despite the legal statute of
limitations described above. Most court cases continued to focus on sexual abuse and required that survivors prove that they were assaulted. This required that Indigenous survivors speak about the abuse (in great detail) in front of the court. This was experienced by many as re-traumatizing and humiliating (AFN 2004). To avoid this, many Indigenous claimants either dropped out of the litigation process or settled out of court, although many more Indigenous people continued to file claims. In 2003, Canada in consultation with the AFN, launched an Alternative Dispute Resolution process (ADR) ostensibly for the purpose of lessening this traumatic effect on survivors and on speeding the litigation process given the growing number of claims. The ADR would soon be criticized by the lawyers of Indigenous survivors, survivors themselves and Indigenous leaders, including the AFN, because the process remained constrained by the same legal adversarial procedural rules and simply moved the interrogation of witnesses behind closed doors (AFN 2004). The ADR process was, as Funk-Unrau and Snyder (2007) compellingly argue, simply a recolonizing move. Indigenous people continued to make claims through Canada’s legal system over the next decade and a half. By 2006 there were 13,050 claimants in litigation, most would continue to press for legal recognition for “loss of culture.”

In 2004 the class action Cloud v. Canada, originally filed in 1998, became the first IRS class action to be certified by the courts. It initially emphasized sexual and physical abuse, “loss of culture” as well as loss of language, but later dropped the sexual abuse claim, since (as explained in Chapter 6) when conjoined with sexual abuse, the court fronted sexual assault as the only actionable tort, reinforced the legal pronouncement that
the connection between sexual abuse and “loss of culture” was “strained at best,” and refused to see any commonality across the abuse experienced by individual children, all now adult survivors of the same institution. While it took six years for the claimants to be legally recognized as a class, Cloud’s certification virtually guaranteed that the largest class action in Canada’s history: the Baxter national class action which represented initially 90,000 (and ultimately over 80,000) survivors and which was filed in 2000, would also be certified. Baxter connected sexual and physical abuse to “loss of culture” and appealed to International law regarding the rights of the child and International conventions regarding genocide. As previously stated, given that Indigenous identity is intimately interrelated with land, then the meaning of “loss of culture” (the “intergenerational impact” of IRS) could now be explicitly linked to processes of genocide and land theft. If Cloud and Baxter were allowed to proceed, it would be the first time Canadian courts would hear claims regarding the “new tort.” In this sense, the Cloud and Baxter class actions had the potential to expose the colonial triadic relation of land—terror—white identity, the white collective body, at the heart of Canadian society, up until then effectively suppressed and rendered “untouchable” in the individual court cases. The Cloud and Baxter class actions threatened to reveal this triadic relation not only at the heart of Canadian society of the past, but as I show (in Chapter 6), of the present. As law is a central mechanism in every colonial context, and as its historical origin is in the protection of property (white identity) and settler sovereignty, it should not be surprising to find that law engages in containment strategies which protect current colonial interests in Canada. I suggest that, as steward of settler identity and sovereignty, the key task for
law is touncouple IRS fromCanada’scolonial project of the present. It tries to accomplish this through various strategies which attempt to uncouple IRS from even the colonial project of the past. Such strategies include individualizing and isolating IRS cases, defining “cultural loss” as a non-actionable tort, defining historic sexual assault against children as a rare and pathological crime, and individualizing and pathologizing perpetrators. It further casts Indigenous peoples as inherently culturally damaged collectives (Razack 2011, Rifkin 2009, Rowe 2001, Pritchard 2000a). Relatedly, as liberal modern law claims to be impartial and universal, it is entangled in a contradictory and perilousendeavourregarding IRS: it must address the harm of an explicitly colonial institution, without revealing its own role in this past mechanism of colonization. Moreover, it must not reveal its current role in maintaining colonial relations in the present. Contrary to this, in tracing white possession as a regime of truth, I show how the responses of Canada’s government and law are strategies that recuperate the familiar relation of colonizer and colonized within a colonial force field today.

3.3 Theoretical Framework and Method of Analysis

The theoretical framework of “white terror as colonial force field” as presented in Chapter 2, requires an approach to discourse analysis which allows me to trace both the renewing colonial force field and white collective subject formation in my analysis of the Canadian government discourse regarding the violence of IRS. I draw upon the methodologies of Derek Hook (2001, 2005b) and Radhika Mohanram (1999) which are perfectly suited to these interrelated tasks. Further, Frantz Fanon’s (1963, 1967) insights regarding the repertoire of settler strategies (and their violence) which bring “settler and
native into being,” and his insights regarding the “stages” of settler colonialism, centrally inform my interpretation of the data. Indeed, it is Fanon’s analysis (one that began as an analysis of French colonialism in Africa and the Caribbean) that will be shown to be almost uncannily applicable to the case of Canadian settler colonialism.

3.3.1 Tracing Contours of the Colonial Force Field: Hook’s Lateral Linkages

Derek Hook (2001, 2005b) articulates a Foucault-inspired “sound discursive analytic” tailored specifically to the role that discourse plays within modern networks of power. Discourse is intimately interrelated with power relations. Historical, social and, political realities set the conditions for the production of knowledge and truth. Conversely, power relations are enacted, produced and sustained through discourse. “The subject” (the individual, a multitude of individuals) also plays a crucial role in sustaining power networks (which in turn “manufacture” individuals). Hook argues that it is important to render visible the processes through which certain subject positions are made possible (and others excluded) through discourse. Analysis of discourse is simultaneously analysis of (because one element to) this complex field of material power relations wherein subjects are brought into being. According to Hook, a sound discursive analytic involves tracing how texts are “linked to a greater strategic offensive” (2005b, 6) and “concretely [tied] …to physical and material arrangements of force” (2001, 527). This is to “restore materiality and power to the linguistic notion of discourse” (2001, 522). In order to accomplish this, discourse analysis must do more than merely situate events within social contexts, it must map the “lateral linkages” between various discursive and extra-/non-discursive aspects to this power domain (2001, 526). This requires that we:
Drive the analysis of the discursive through the extra-discursive: corroborate the findings of textual analyses with reference to certain extra-textual factors (history, materiality, conditions of possibility). (2001, 543)

Hook’s directive influences both my selection of texts for analysis and my interpretation of settler discourse. In keeping with Hook, I distinguish between focal and lateral texts. While the focal texts are the IRS case law, the lateral texts are government and legal discourse regarding events related to other sites within a colonial force field, and thus which either unfold co-temporally with IRS case law or are geographically contiguous with IRS. For example, I pair my focal texts *R v. Plint* and *Blackwater v. Plint* which take place in the British Columbia Court system (BCC) and Supreme Court of Canada (SCC) from 1995 through 2005, with lateral texts concerning events related to land. With *R v. Plint*, I pair the 1995 Gustafsen Lake stand-off, the 1997 *Delgamuukw* decision, and the 1998 Nisga’a negotiations. With *Blackwater v. Plint*, I pair the 2005 SCC *Barney v. Canada* and the 2004 SCC *Haida* decision. I pair the focal texts of *Cloud v. Canada* (1998, 2004), *Baxter v. Canada* (2000–2006), and the IRS Settlement Agreement (2006) with lateral texts concerning the economic negotiation regarding the Kelowna Accord (2005) and government speeches reporting on the economic benefits of the IRSSA. I pair the focal text of the Prime Minister’s Apology (2008) with lateral texts regarding the 2008 extension of Canada Human Rights Legislation to Indigenous people subject to the *Indian Act*, Canada’s 2010 signing of the United Nations Declaration of Indigenous Peoples, and the Government’s most recent “Post-Apology” report of progress on improving the lives of Indigenous peoples, primarily through economic development (AAND Progress Report
These pairings between IRS cases and issues more explicitly related to land, allow me to show how possessive individualism operates not only at the specific site of IRS, but between otherwise seemingly disconnected sites. Mapping these interrelations brings the colonial force field into view and informs my interpretation of what subject positions are made possible through the dominant IRS discourse.

### 3.3.2 Tracking the White Collective Body: Mohanram’s Fanonian Method

As argued in Chapter 2, the ideology of possessive individualism and the ontological force of property were historically, and remain today, central to the modern white settler state and its sovereignty. Both are integral to the liberal state’s legal, economic, political, and social institutions and values. Through the ideology of possessive individualism, control of land remains tethered to white identity (which is always collectively embodied) and settler sovereignty. Possessive individualism is thereby central to power relations between settler and Indigenous. Thus, tracing the operation of this ideology in Canada’s discourse regarding IRS, illuminates processes of subject formation as well as the interconnections or resonances between various sites of power struggle within a modern colonial force field.

In order to capture this element to the modern colonial present and to operationalize the ontological force of property in the data I analyze, I draw upon the methodology of Radhika Mohanram (1999) and her approach to discourse analysis which involves mapping “rhetorical strategies of displacement.” This contrapuntal methodology, informed by the theory of Frantz Fanon (1963) and Edward Said (1993a), has two key assumptions. First is the idea that dominant discourses (or the narratives which dominant
subjects create) about “Others” (those whom dominant subjects perceive and define as “subordinate”) reveals far more about the dominant subject—his or her culture, identity, psychopathology, desires, hopes, fears—than it does about the Other. Thus, these discourses serve a function for the researcher, telling us about the subjects who generated them (as well as the function they serve for the generators).

A second key assumption to this methodology is that binary oppositional discourses are the primary means through which dominant subjects come to reify themselves and know themselves, as dominant. As previously argued, dominant and subordinate subjects—settler and native—are discursively constructed in relation to each other. More specifically, Europeans construct the Indigenous/Black body (Other) as at one with land, which Europeans conceptualize as static, unchanging, and permanently visible. Europeans thereby construct the Other as permanently reducible to the body: pre-modern, primitive, static. The dominant white subject, defined in opposition to the Indigenous/Black other, as disembodied mind/reason, transcendent of nature, is thereby constructed as modern, civilized, progressive through time. Yet (as we saw in Chapter 2) because spatiality is necessary to secure identity through time, the disembodied mind anchors its identity (continuity through time) through its marking of the body of the Other. That is, the Indigenous/Black body becomes the anchor to—and thereby evidence of—the white body’s identity and spatial existence. Thus, stories about the Indigenous / Black body as static and pre-modern, function as rhetorical strategies of displacement, a radar or compass of sorts for the white mind to monitor the location of its own body. This implies that the white body’s spatial location becomes visible (to the researcher) through
examination of how the white mind/body marks the body of the Other. Therefore, through mapping the construction of the Indigenous / Black body in dominant discourse, we simultaneously map what Mohanram calls “the lost white body” and the land beneath its feet. The settler occupier (and the land it occupies) is rendered visible.

Mohanram’s approach to reading data by looking for rhetorical strategies of displacement gives me a way to trace the dominant white collective body through its marking of the Indigenous body (and the body of the perpetrator of IRS violence). This is to say that processes of marking the body of the other are understood as processes through which white subjects constitute themselves. Using Mohanram’s approach, and with the understanding that possessive individualism rests upon the eviction of some humans from legal personhood, I examine discourse for moments where the marking of Indigenous bodies makes the colonial framing and the violence of genocide disappear. How does the marking of Indigenous bodies as property, as damaged, primitive, children, in perpetual need of improvement, or somehow less fully human reproduce the white settler as racially superior? I also examine the data for moments when the eviction of Indigenous people from full humanity, is revealed as unjustified or irrational to dominant subjects. What happens when dominant subjects recognize the humanity of Indigenous peoples, and / or recognize themselves as colonizers? What happens when the unjust occupation and the illegitimate sovereignty of the settler slips into view? How does the settler constrain his/her anxiety in these situations? Fanon’s analysis of the strategies employed by the settler in different stages of colonialism, inform my reading of the data. I look for processes of eviction, but also of recognition or invitations to equality, and ask how these
re-inscribe the structure of colonialism. Fanon, Mohanram and Hook, enable me to trace the various threads and forms of violence (subtle and explicit) in the settler’s responses. That is, the settler’s violence is brought into view.

Relatedly, both Hook and Mohanram emphasize the role that oppositional discourse and subjugated knowledge play in resisting dominant power relations and “power’s truth effects.” Although law (and government) constrains what can be known, I look for moments in the discursive struggle over naming the violence of IRS, where the white collective body, its violence and its connection to land, begin to materialize in the testimonies or narratives of Indigenous peoples. How do dominant subjects respond when they/we are revealed in this way by Indigenous peoples (do they refuse to give it uptake, redirect, express anger, etc.)? What does this response reveal about white identity and how modern-colonial power operates in the present? Mohanram’s approach invites us to use these moments as evidence of the presence of a white collective body actively securing its occupation of land.

3.4 Research Questions

Two general questions drive my research. How do government and legal discourse regarding IRS operate to sustain a wider colonial force field and the relation of land—terror—white identity? How does possessive individualism operate in discourse regarding IRS to reconstitute the white settler subject as rightful owners of land (and simultaneously in Moreton-Robinson’s words, to circumscribe Indigenous sovereignty)? In order to capture the productive function of discursive practices, I approach analysis of the data with the following specific questions in mind:
1) What do Government and legal discourses allow us to know about the violence of IRS, its victims, and its perpetrators (political rationalities)? (Alternatively, what are its silences?)

2) How does the above naming or conceptualization of the violence of IRS organize white bodies in relation to this violence, land / property, and the “past” (e.g., are settler Canadians allowed to conceptualize ourselves as innocent, as rescuers, as morally superior to (more civil than) our ancestors in relation to the past colonial violence, as now justifiably present on the land)?

3) How does the ontological force of property (the division between kinds of humans) circulate within government and legal discourse concerning IRS violence?

4) How does the ontological force of property reproduce a collective white colonial subject in the present?

5) When and how do moments of recognition (legal, political, ethical, Fanonian) arise in the data? How do dominant subjects respond to these moments? What form does anxiety take?

6) What are the lateral linkages between the political rationalities and rhetorical strategies of displacement identified in legal discourse regarding IRS and other political and economic events and discourse on the part of Government? (That is, how do Government discourses regarding IRS violence, uphold a wider colonial force field?)
3.5 Focal Texts: Data Selection and Rationale

As previously stated, I have chosen to analyze three interrelated events regarding IRS: two legal and one political to trace the processes which produce colonial subject positions within a colonial force field, as my focal texts. The two legal events are: first, the criminal sentencing decision in *R v. Plint* (1995) and the civil case *Blackwater v. Plint* (1996–2001, 2005). Second the class actions *Cloud v. Canada* (1998, 2004) and *Baxter v. Canada* (2000–2006), and the 2006 “IRS Settlement Agreement” which brought the class actions to a close. Third, the political event of the June 11th, 2008 Apology delivered by Canada’s Prime Minister in the House of Commons.\(^5\)

3.5.1 Focal Text Rationale


In 1996 the 28 male claimants, joined by 2 female claimants, went on to file a civil case *Blackwater v. Plint*, against Plint, other staff members of AIRS, as well as the Government of Canada and the United Church. The civil suit had three phases ending in 2001. The decision was appealed in 2003 and the Supreme Court of Canada ruled on it in 2005.
The case against Plint was one of the earliest (third) IRS cases in British Columbia and all of Canada to be filed by a group of Indigenous claimants (in four actions).\(^{58}\) It was one of the longest, with over 100 days of hearings over a three year period. It was covered in the popular press and by Indigenous press. Most importantly, it is considered in law as a “land-mark” case for the 1998 phase one decision regarding “vicarious liability” which apportions responsibility for compensation between the Government of Canada and the United Church (75% and 25% respectively). It is thought that this ruling added to the pressure on the government a decade later, to agree to the Settlement conditions for the Baxter National Class Action. I argue that it was actually Canada’s strategy of defence in *Blackwater v. Plint* which rendered Canada vulnerable to the Baxter class action and which compelled Canada to agree to the IRSSA. Reasons for the selection of this legal case relate to the goal of my thesis which is to map the discursive processes which produce the white colonial subject and which obscure the triadic relation of land—terror—white identity within a colonial force field. It is important to me that settler Canadians learn to “recognize” ourselves in the nation-building events which I analyze. While it is undeniable that Christianity conducted much of the colonizing work on behalf of Canada, and while the Churches are also named in this litigation, my focus is on the ways in which the Nation Canada secures its on-going occupation of Indigenous lands today (by means other than religion). Euro-Canadians (especially non-religious ones) may see themselves as quite different from clergy who commit sexual abuse. This move is not possible in the case of Plint, for Plint was not a member of the clergy. Further, Plint died only in 2006. Thus he was alive at the time of the hearings. This constitutes an important
challenge to the belief that perpetrators of the violence of IRS have long been dead and have little to do with Canadians alive in the present. Most importantly, because Plint pleaded guilty to the crime of “indecent assault” against (sexual violation of) more than 27 Indigenous children, there would be no legal strategies harnessed to protect the presumption of innocence on the part of the accused. Thus, any obfuscation of the collective white body cannot be linked to requirements of due process.

3.5.2 Focal Text Rationale: Cloud v. Canada, Baxter v. Canada, IRSSA

Cloud v. Canada represents a long battle on the part of survivors of the Mohawk IRS in Brantford Ontario. Initially launched in 1998, it came up against legal definitions regarding a “common class” and actionable tort. It initially claimed damages on the basis of sexual abuse and “loss of culture” but eventually dropped the former. It was certified in 2004, and thereby opened the door for the Baxter class action (representing between 80,000 and 90,000 IRS survivors) to be certified. Like the Cloud class action, Baxter would proceed to name “loss of culture” and “intergenerational trauma” as actionable tort, using United Nations conventions and international law as justification for doing so. More specifically it would appeal to the UN convention against genocide and international law concerning the rights of children. It sought damages in the amount of 200 billion—100 billion against Canada and 100 billion against the Churches, about 95 billion more than the IRSSA required of Canada. Analyzing the Baxter application for certification gives me access to legally constrained Indigenous accounts of the violence of IRS. I also examine the Standing Committee on Aboriginal Affairs and Northern Development hearings of February 2005 regarding the failure of the Government’s ADR process, as this
was a critical point in Baxter’s gaining momentum (AAND 2005). Lastly, I examine the judicial decisions of nine provincial Supreme Court Justices across Canada who were required to authorize The IRSSA as part of the simultaneous certification of Baxter. Emphasis is upon the decisions of lead Justice Winkler (Ontario) because the remaining eight judgments vary little from the lead decision (as is standard practice). I also analyze Justice Brenner’s decision as he was the judge in Blackwater v. Plint. I select this case for its settlement implies that the legacy of IRS (the so called sad chapter in Canadian history) has been brought to a just close.

3.5.3 Focal Text Rationale: Canada’s June 11, 2008 “Apology to Former Students of Indian Residential Schools”

I examine the June 11, 2008 Apology to “former students of Indian residential schools” as delivered by Prime Minister Harper (PC). This apology was ultimately not legally mandated by the IRSSA, and thus I refer to it as a political event. The Apology is chosen because it is acknowledged by most as a “historical event” with great promise of reconciling relations between Indigenous people and settlers. Broadcast across Canada, it provided the opportunity for Canadians to collectively learn about our colonial past and symbolically brings closure to the IRS “legacy.”

3.6 Lateral Site Data Selection and Rationale

For R v. Plint (1995) I chose the lateral sites of the 1995 Gustafsen lake stand-off; the 1997 J. Lamer Delgamuukw decision, and; the 1998 Minutes from the B.C. Legislature discussing the Nisga’a Land agreement. For Blackwater v. Plint I point to other legal
decisions regarding IRS, but also the 2004 SCC Haida decision regarding the Crown’s duty to achieve consent from Indigenous nations in land negotiations. I chose the 2005 Kelowna Accord and the 2007 Senate proposal to uphold it, as the lateral site for *Baxter v. Canada*. As the lateral sites for the Apology, I chose the 2011 Canadian Human Rights tribunal decision regarding Indigenous individual rights to develop property on reserve; Canada’s 2010 signing of UNDRIP, and the Government’s post-apology economic development initiatives in partnership with Indigenous people.

### 3.6.1 Lateral Site Rationale

Selecting extra-discursive sites or objects outside the specific discourse and issue analyzed was somewhat tricky. The goal is to not merely provide a social context in which the focal sites unfold, but to trace linkages (as opposed to causality) between discourse regarding the specific issue of IRS, and other texts, power struggles, or material forces within the colonial force field. Given the historical constant of terror at home, there are always a plethora of options (material and symbolic sites) from amongst which to choose. As causal or direct linkages are not necessarily sought, there is an apparent arbitrariness to the choice of sites. Given that my analysis sees the colonial force field as structured by the triadic relation of land—terror—white identity, and emphasizes the force of the simultaneity of events, I chose lateral sites which literally involve land and economic relations and which are co-temporal with each of the IRS focal sites I examine. I selected events which received national coverage in order to assume a reasonable degree of common knowledge of such events, amongst settlers. The lateral sites are themselves, also interrelated. Presented in each chapter under the heading “The Colonial Present…”, one
may read across the lateral sites from each chapter to attain a “bird’s eye view” of the simultaneity of the multitude of sites unfolding within Canada’s colonial force-field. In conclusion, the methodology I have chosen enables me to illustrate how Canada’s response to the demand for justice regarding IRS, is a response intimately connected to the settler collective’s interests in securing occupancy of land today.
Chapter 4: Recognizing Terror: The White Collective and Judicial Reasoning in *R v. Plint*

Indigenous people connect the 100 years of racial terror—attempted genocide—of Canada’s Indian residential school system (IRS) explicitly to Canada’s nation-building (struggle for sovereignty and land). What kind of a people attempts nation-building—gaining and maintaining control of land and territory—through genocide (or its equivalent: cultural annihilation, cultural loss, assimilation)? Typically, a collective fuelled by fantasies of racial superiority, and in a white settler state, armed with myriad weapons including the rule of law. The fact that IRS was official policy and practice for more than 100 years, renders explicit the fact that generations of Canadians—well into the present—participated in this attempted genocide. Further, Indigenous people emphasize that IRS was just one strategy amongst many in Canada’s colonial identity project and that the struggle for land and sovereignty is not merely a struggle of the past, but also of the present. The settler occupier—the white collective—comes to stay, and continues (even after the system of IRS is dismantled) to engage in a multitude of daily practices to secure the occupation of land, identity-making practices which if not technically genocide, are nevertheless motivated by a “logic of elimination” (Wolfe 2006). The terror continues. Canada’s response to Indigenous demands for justice regarding IRS is one such identity-making practice of the present. Thus, IRS is not merely an issue of the past.

The IRS issue is perhaps unique in its potential to reveal the continuity (past into present) of a white settler collective and its practices. What happens to this white collective and its violence when it becomes recognizable in Indian residential school case
law? In this chapter I analyze the judicial reasoning in the 1994–1995 criminal case *R v. Plint* regarding the violence committed against Indigenous children within the Alberni Indian Residential School (AIRS) in Port Alberni, British Columbia. I suggest that when the white collective (of the past into present) surfaces in the details of Indigenous testimony in this case, white settler identity is destabilized, threatened, and shaken. The judge, in what seems an effort at damage control, wields the values and ontology of possessive individualism to reassert the law he embodies, as a site of rationality and order, a site external to colonial violence. This discursive strategy protects the white collective of the present, and reinforces the common settler story of IRS as a flawed system which tragically attracted pathological *individual* perpetrators, individuals whose violence produced thoroughly dysfunctional Indigenous collectives. Moreover, in tracing the operation of possessive individualism in this judicial decision, we see how racial superiority is (to paraphrase Frantz Fanon) rationally organized through relations of accumulation. That is, we see how settler identity is constituted through the dehumanization of the native *as* property. This process of dehumanization is itself a form of settler and legal violence, yet another practice geared towards the “elimination of the native” (Wolfe 2006). While these processes of dehumanization are part of the structure of settler colonialism (Fanon WE), in order to situate possessive individualism’s regime of truth in *R v. Plint* within a “wider strategic offensive” (Hook 2005), I conclude this chapter with a brief description of the contours of the colonial force field, a context marked by the literal struggle between settler and Indigenous nations for land. Through this and the next chapter, I hope to render plausible my claim that Canadian law and
government’s response to the past colonial violence of IRS, is about land and white identity today, a response which reproduces the relation of “settler and native” anew. Land and white identity are always just beneath the surface in IRS case law, always integral to the “psychic life of colonial power” (Riggs and Agoustinos 2005) and its terror.

4.1 The Colonial Context in Plain View

The white man organizes dehumanization rationally.
(Fanon, BSWM 231)

The Alberni Indian Residential School (AIRS) was operated by Canada and the United Church (and its predecessors) in Port Alberni British Columbia from the late 1800s until 1973. AIRS was just one of 18 such institutions in British Columbia, and just one of over 130 such institutions across Canada. Arthur Henry Plint was a dormitory supervisor from 1948–1953 and 1963–1968 at AIRS. In 1994, 27 Indigenous men (in four separate actions), all survivors of AIRS, pressed criminal charges against Plint. They alleged that when they were children between the ages of 5 and 19 years of age residing at AIRS, Plint sexually and physically assaulted them. Plint—seventy seven years of age at the time of the trial—did not contest the charges. He plead guilty to 16 counts of “indecent assault,” which included multiple instances of anal rape, forced oral sex, masturbation, fondling, and physical beatings in the course of these sexual violations of Indigenous children. In March 1995, after reading extensive victim impact statements from the plaintiffs, listening to representative testimony from one Indigenous survivor, and hearing testimony from experts in psychology, Justice Douglas Hogarth sentenced Plint to 11 years in prison. In 1997, after a separate hearing for one student, Plint’s sentence was increased to 12 years.
Plint lived out most of his sentence in prison, but was paroled for health reasons in 2006 and died in that same year.63

The fact that the IRS system was central to Canada’s colonial project, is often simultaneously in plain view and obfuscated in IRS case law. The colonial context which gave rise to the Indian residential school system is explicitly acknowledged early on in Justice Hogarth’s reasons for judgement concerning the sentencing of Plint. Hogarth describes the “type” of institution of concern in this case by quoting Judge Cunliffe Barnett from another British Columbia IRS case, whose “sentiments” Hogarth “adopts completely”:

[Para 11] … “It must be remembered that the schools were established to further Canadian government policy. That policy was intended to destroy the Indian social fabric so that the Indian people might be ‘absorbed into the body politic’ thus eliminating the ‘Indian question.’ […] Many persons think that the Indian residential schools accomplished their purpose with devastating effectiveness. Generations of children were wrenched from their families and communities. They were taught to be ashamed of being Indian. They were made to do a lot of work and given a little schooling. When they left the schools, they were not accepted into white society and were strangers at home. Some were institutionalized…”

Stated plainly at the outset of Hogarth’s decision, this recognition of the historical context of IRS as backed by colonial policy, a policy intended to eliminate Indigenous cultures, frames Hogarth’s reasoning. Implicit in the above passage is the fact that the purpose of eliminating the “Indian question”—i.e., the purpose of attempted genocide—was to enable the Crown to control territory and establish sovereignty. Land and nation-building are absent referents whenever the Indian Act and “colonial policy” are mentioned.64 Also implicit is the fact that such “Nation-building” is a collective endeavour as it was carried
out over “generations.” Further, given that the survivors are alive and breathing (as is the perpetrator Plint), the settler collective is also likely alive and well. Past bleeds into present, the settler collective of the present begins to materialize. When this occurs, it is perhaps more difficult for dominant subjects to conceptualize IRS (colonial policy, the violence of genocide and its perpetrators) as quarantined in the distant past. Possessive individualism as a regime of truth, enables Hogarth to manage this acknowledgement of colonial policy, with its implications for the present. With the victim impact statements fresh in his mind, Hogarth asserts:

[para 14] ...I do not hesitate to say ... that so far as the victims of the accused in this matter are concerned, the Indian Residential School System was nothing but a form of institutionalized pedophilia, and the accused, so far as they are concerned, being children at the time, was a sexual terrorist.

In this passage, the colonial purpose of IRS institutions is de-emphasized. Rather, it is the design and remote location of the institutions which explains why so much violence happened within them. Echoing a common view of the time, that “the pedophiles in our midst” seek out isolated brick buildings full of vulnerable children (a fact he seems to find disturbing in itself), to enact their immoral desires in secrecy, safe from the public eye, Hogarth leaves us with the understanding that although IRS policy may have created pools of vulnerable children, it was the individual pedophiles who caused the violence. In this move, colonial policy and sexual violence against Indigenous children are merely contingently connected. Moreover, the violence within the institutions (specifically, the sexual terrorism of individual pedophiles) masks the violence of the system (specifically the white terror of the colonial policy of assimilation) which was created and upheld by
successive governments (and citizens) of Canada and its legal system for over 100 years. While the historical colonial context begins to fade from view, almost as soon as it is mentioned, threads of the old ideology of possessive individualism resurface, ensuring that the past and the present remain intimately intertwined and that the colonial relation of “settler and native” is revived in this legal moment.

4.2 Anxious Recognition: “There was a lot of violence used in the school”

The collective aspect of the colonial project, the fact that it required many participants engaging in terror against Indigenous bodies, surfaces throughout the Plint decision. Justice Hogarth listens to and reads the victim impact statements which detail horrendous violence against children. These statements (as we will learn in the civil case) also contain allegations that people other than Plint committed sexual offences, physical violence, and neglected to help the children. Hogarth expresses great emotion after hearing the victim impact statements. He struggles to mentally discipline his emotions, and in particular, his anger. Possessive individualism’s ontology of rational mind in control of body/property is called upon to help him do this. After providing details of this violence, Hogarth states:

[para 36] I must be very careful, but one cannot turn a blind eye, or a deaf ear, to what was said to me by these victim impact statements, and particularly by the eloquent testimony I heard this morning.

I suggest that in addition to the egregious acts of sexual violence committed by Plint, both the reality that many others were complicit in the violence at AIRS and the fact that this was enabled by government policy, generates not just anger, but anxiety, on the part of Hogarth (anxiety of the sort historically generated by unstable settler identity). Before
supporting this claim, I will quote at length from Hogarth’s decision, offering only short points of clarification in between.

While Plint confessed to his crimes, Hogarth must be careful not to name or judge those who are indirectly exposed in the witness impact statements. Hogarth cautions himself:

[para 14] …I do not think that words can possibly project my concern with respect to what has been said. I would go much further if I could, but I must discipline myself to the effect that many persons who are affected by what I might say are not here to make their observations and I might well be compounding tragedy upon tragedy if I were to make such remarks…. 

With regard to the idea that the IRS system was institutionalized pedophilia and Plint a sexual terrorist, Hogarth continues:

[para 15] …It is difficult not to agree and, of course, I must discipline myself that I am not here to agree, but it is difficult not to agree, and I am guiding myself by biblical reference which says that “the anger of men does not achieve the righteousness of God” and similarly the anger of a judge does not achieve the ends of justice if I permit myself to embark on the concerns that I have just expressed.

[para 16] Thusly the matter must be dealt with within the terms of the principles of general sentencing of this court that have been established over many years and are of concern when matters of this kind are drawn to the court’s attention. I start with the single proposition that a judge is endowed with a very serious and solemn trust. He must reflect the values and views of the community in which the matters have taken place. He must filter out the quite human and appropriate emotional response, or the desire for revenge and hatred that the victims have and that has been imposed by such conduct, as has been expressed here and he must do his best to impose a sentence upon the accused that all right-thinking members of the community would say is fair and just.

[para 17] The community in this regard in this case is twofold. There is the Native Indian Community, which is the extended family of the Native people throughout this Province, and the community in which these
offences were committed. That is to say the actual geographic Community of this city.

Hogarth is obliged first of all to acknowledge the nature of the violence that is revealed. Although Plint could not remember all details about all occasions of his violence, he did not contest any allegation. As Plint confessed, Hogarth has no reason to doubt the truth of the impact statements, clarifying later [para 60] that “there can be no doubt” that Plint’s “memory is not as vivid as those of his victims.” As such, details of other violence are taken as fact:

[para 33] [the assaults] ...did not occur just once or twice with one particular boy or another…they were repetitively occurring from time-to-time and throughout almost all the stays of these children in the residential school.

[para 34] In almost all cases there was the threat of violence, or the actual use of violence, if anybody had the courage to decide to complain.

[para 35] Throughout the whole narrative there are strong overtones of racial deprivation and cultural ruination to an intolerable degree, and these were used for the purposes of the sexual gratification of the accused.

[para 41] In every instance in which these offences occur the accused was in a position of supervision over these children. They were not only children in a school situation, they were prisoners in the residential school and he knew it, and he knew further that any complaint could be easily dealt with by saying that the child was just acting up or otherwise was talking nonsense, and thereupon take it out on him should the occasion arise when such a complaint was drawn to his attention.

[para 42] Complaints were feebly made because they were not going to be responded to, no matter who they were made to because nobody would believe them. And it was tragic, tragic in the extreme, that nothing was done. I am not blaming anybody, but nothing was done and those who tried to complain were not listened to.
[para 43] The breach of trust in this case, in considering the situation in which those victims were placed in that residential school, was one that was abhorrent in the extreme. … I have never seen such a terrible situation.

And later in the decision:

[para 69] [Plint] apparently, through his counsel, suggests that he did not systematically use violence in this school as some people have suggested. I do not think any of the persons really suggested that he was the prime instigator of systematic violence, but the one thing abundantly clear is there was a lot of violence used in the school, and whether it was done by the accused or anybody else is a good question…

We see in the above passages (14–17, 33–43, 69) how Canada’s colonial policy and the violence of others is a recurring subtext in Hogarth’s sentencing of Plint. Hogarth’s use of the phrases “racial deprivation” and “cultural ruination” clearly suggest the policy of assimilation, something no individual perpetrator can accomplish alone. Reference to the prison like quality of IRS acknowledges a system of violence beyond the specific violence committed by Plint, and counters the common claim that IRS offered “education.” In this way, Hogarth indirectly connects larger systemic forces (including racism and cultural deprivation) to Plint’s sexual crimes (para 35), (a connection which the Government and law consistently and vehemently try to sever). Other violence which Hogarth will likely have learned about (but which we will read about in the civil case decision), such as the disciplinary practice of “the gauntlet,” may also be on his mind. The gauntlet consisted of two lines of children facing each other. Children who had misbehaved were forced by the adults to run (often naked) between the lines. Children in the lines were forced to punch and ridicule those who ran through the gauntlet. The teachers also joined in. The complicity of other employees of AIRS, who were physically violent and who enabled
Plint to carry on with his pleasures, seems to bother Hogarth deeply. When Hogarth notes that other adults were told about Plint’s violence and did nothing, he intimates that they either didn’t care or that they didn’t believe the children. That they “were not going to respond” and that “nobody would believe” the children, indicates he believes there was a wilful ignorance on the part of employees at AIRS. (Or perhaps, there was so much violence at AIRS, that Plint’s violence did not stand out.) The suggestion that this type of punishment was a common standard of the day, expressed here by Plint (and also by others in the civil case) is challenged by Hogarth:

[para 71-72] …He [Plint] says that there were different values then. He says that corporeal punishment was a more acceptable way to deal with children. …I have some reservation about that. I am not far from the age of the accused, and I do not think it can be said that in our childhood corporeal punishment, as demonstrated in this case, was an acceptable norm in this community or any other community. It is admitted that some people advocated it more than others, more than it is done now.

Hogarth clearly sees the violence committed by Plint as interrelated with the violence of others, and as made possible by the IRS system and colonial policy (para 69). Thus, in paragraph 43, it is ambiguous as to whether “breach of trust” refers to either or both, the breach of trust on the part of Canada in fulfilling treaty obligations to educate Indigenous children who lived on reserves, or on the part of Plint, in fulfilling the “parental” obligations conferred upon him by Church and Canada. Although Hogarth has “never seen such a terrible situation,” (para 43) he does not blame anybody (para 42). Law requires him to focus only on the criminal offences of Plint.

Hogarth’s anger in the face of the evidence of pervasive violence against children is understandable, as are his emotions. Justices throughout the civil proceedings to come,
will also refer to the importance of keeping their emotions under control when hearing of
violence committed against children. (Settler occupiers are not without compassion for
those whom they dispossess.) In this sense Hogarth’s moral outrage is similar to Romeo
D’allaire’s response to witnessing genocide in Rwanda as analyzed by Sherene Razack
(2004, 18–27). Razack argues that D’allaire represents the rational Western individual
who “sees” the moral depravity of the genocide, a rational man who can nevertheless feel
empathy for the other. His empathy and his account of the genocide marks the racialized
others as “sick bodies.” His ability to feel moral outrage marks him as modern and more
civilized in relation to those who committed the genocide (in the case of Rwanda, also
people of color). In this liberal expression of empathy, D’allaire re-inscribes the color line
central to the modernity/pre-modernity divide. Razack argues that Western narratives
which emphasize the trauma of outsiders witnessing genocide, mask the complicity of the
West in bringing about the genocide. Although traces of “trauma” are clearly present in
Hogarth’s decision, unlike the D’allaire example, Hogarth’s words reveal a rational mind
unwilling to give over to the emotions elicited by witnessing evil. Hogarth does not
willingly court insanity brought on by heightened moral perception. I suggest that
elements to his decision can be understood only as an expression of anxiety connected to a
destabilized settler identity, and as an effort to control this anxiety. In particular, anxiety
regarding the close connection between Plint’s violence, the violence of others at AIRS,
and the colonial (land related) policy of assimilation (genocide), as exposed in the
Indigenous testimonials. Anxiety is induced in the settler when the settler glimpses the
humanity of those defined by settler logic as less than human. This glimpse in turn,
requires the settler to question the settler’s presumption of superiority (Anderson 2007, Fitzpatrick 2001, Fanon 1967). Perhaps Hogarth recognizes the Indigenous adults before him as human and worthy of compassion. Hogarth recognizes something familiar, about the violence (colonial barbarity) of which he has just heard. Both recognitions destabilize the entire “imperial ontological scheme” (Fitzpatrick 2001) so integral to his community and its law. Hogarth sees that those who were supposed to be civilized, behaved with brutality against undeniably innocent children. What kind of a people attempts genocide for the purpose of nation-building? What kind of a people targets children? What kind of a law enables both? Unlike the D’allaire example, the attempted genocide through IRS was not only committed by colonizers long dead, but by (many) people who, like Hogarth (para 72), are alive today, some sitting in his court. Bodies of the past inch closer to those of the present. Clearly shaken, Hogarth looks to law (and god) to help recuperate his objectivity and balance, in order to serve the interests of the wider community of “right-thinking” people. His rationality will be necessary for the task at hand: to sentence Plint, but also, I suggest, to make sense of (and respond to) the above exposed connections.

While Hogarth is undoubtedly angry presumably on behalf of innocent child victims; his anger alone cannot explain the distancing moves—the strategies of displacement—which follow.

In passages (36, 14–17), Hogarth reassures himself and the court that he will keep his emotions in check and deliver an objective judgment. At the outset, he alludes to disability (impaired bodies) in a pejorative manner. He implies that “blindness” and “deafness” compromise the capacity for rational judgement (objectivity, truth, justice). He on the
other hand, will not allow himself to be impaired in this way. The rational individual of possessive individualism surfaces, and reassures himself that he is in control of his own body which is (as Hogarth implies) representative of the court and right thinking members of the community. Unlike (his perception of) people with disabilities, his control of his body will enhance his ability to make a rational decision based on all the evidence, difficult as it was to hear. His community and its law, can trust that his reasoning will be fair and just. In this move, persons with disabilities—anyone with an impaired body—are excluded or evicted from membership in the right-thinking community and through this eviction, Hogarth’s body is reinstalled as placeholder of the rational individual.

Next, the Indigenous survivors are also excluded from those who can know truth and justice. Despite his attribution of eloquence and the “quite human response” on the part of IRS survivors, they are ultimately motivated by base emotions such as hatred and revenge. These emotions prevent Indigenous survivors from objective rational reasoning. Indigenous bodies are thereby impaired bodies (disabled). Hogarth begins to differentiate himself from them. Unlike them, he is rational, he will keep his anger under control. They can entrust him with this responsibility. In this internal struggle, Hogarth maintains his membership in the category of rational property owner: the type of individual / being who uses their own mind to control and regulate their own body and its emotions. The law requires this of him. Though Hogarth acknowledges their humanness, Indigenous bodies (mentally impaired by anger and desire for revenge) are bodies out of control, not fully rational. They are thus more akin to property, than to owners of property. In this subtle move, they too are evicted from the subject position of full personhood (a category from
which they have been historically excluded). Hogarth’s struggle is on the one hand, a process internal to him, yet on the other hand, even he understands his position as judge to be one representative of members of a particular community with which he associates a specific geography / landscape: the entire province of British Columbia. As Mark Rifkin (2009) argues, the dynamics of biopolitics and geopolitics are intertwined. While the community he represents is two-fold—the Native Indian Community and the community in which the latter matters have taken place—the values he claims to represent are the values of the latter community. In the face of accounts of terror committed by people like him, Hogarth connects his struggle to maintain an objective rational standpoint to land. He represents the collective of rational individuals (property owners or would be property owners) who occupy this vast location. In Hogarth’s reasoning, law as an instrument of justice is portrayed as external to the violence of IRS / genocide, yet law also represents the very community which has been exposed as violent (towards innocent children), and which used law to enable it to do so. This contradiction calls into question the legitimacy of the settler community’s presence. An occupation achieved through unjust means is itself unjust. This contradiction (plausibly) induces anxiety in those whose identity is intimately tied to (constituted by) law. As steward of white identity, how will law ensure that this violent contradiction and its implications are obscured? Settlers have a repertoire of rhetorical strategies of displacement from which to draw. As Stephen Pritchard (2000) states, when:

the figure of the past returns to haunt the law, returning not as the savage, but as the innocent, the oppressed and the persecuted. …The law, in order to be law, must always conceal this figure by repressing it as the body of the criminal, as violence or the antithesis of order.
Can law (and possessive individualism as a regime of truth) plausibly construct Indigenous survivors of child abuse and attempted genocide as criminals? Surprisingly yes.

4.3 Multiple Evictions: Marking the Indigenous Body

If only anger on behalf of child victims of injustice motivated Hogarth’s reasoning, there would be no need to further mark the bodies of Indigenous survivors as thoroughly as he does. Anxiety rooted in destabilized racial identity (individual and / or collective) can explain it. Upon hearing victim impact statements and psychiatric reports, Hogarth states:

[37] The statements and evidence that were given are not wild vengeful exaggerations that repeat again and again the same problem with the same paradigm. They indicate paradigms of personality dysfunction that this kind of offence causes children, no matter when it occurred or where it occurs. Psychologists and those who are specialists in the field, have reflected exactly what these witnesses have been complaining about, a lack of personal self-esteem, a hostility and aggressiveness towards all persons in authority. There is alcoholism, there is drug addiction, and what is really worse is that there is a tendency of such persons who have been inflicted with this kind of conduct to take out on other persons exactly what has been administered to them.

[para 38] There is nothing new in what I heard, but I have never heard it expressed with such eloquence. The effect of the imposition of aggressive sexual misconduct on children by an adult during the course of the child’s early sexual development is devastating and destroys many of the fundamental traits of human existence. They are deprived of the right to an adequate and appropriate sexual response during one’s lifetime. This message has been put before the courts in endless psychiatric reports.

[para 40] The victims here, all male, range from the ages of six to thirteen. Their sexual development had yet to be fulfilled. Some of them will be permanently scarred. Some of them will be permanently affected. All of them will have difficulties, I have no doubt whatsoever, of one kind or another.
While Hogarth states the above with empathy, his narrative restricts the possibilities of subject formation open to the adult survivors within the court room. His narrative produces survivors—now adult Indigenous persons—as not quite fully human (again in the sense of fully rational minds in control of their bodies). Rather, they are either reduced to perpetual children—infantilized and appropriately considered wards of the state (all part and parcel of a common move to domesticate their nations, as Rifkin (2009) might suggest)—or as adults now lacking the “fundamental traits of human existence.”

Moreover, if not actual criminals, the Indigenous adults are construed as having a propensity for criminality: they are hostile, revengeful, aggressive, likely to be unruly towards authority, and thus likely to commit violent acts themselves. Amongst those violent acts, sexual violations of the very nature committed against them by Plint (para 37). Indigenous survivors are thereby likened to Plint: sexually violent and morally depraved. Further, they are prone to alcohol and drug addiction. All of these subject positions are incompatible with the rational control of body necessary to the fully human individual (collective) of possessive individualism. The Indigenous body is thereby evicted from the category of fully human, property owner, and reduced symbolically to that which is more like property / land, in need of control and improvement by an outside force. I do not mean to suggest that the violence of IRS has not been devastating in just the ways mentioned above. Rather, as Fanon would caution, our attention is diverted from the violence done to the native (by the settler and his system), to the native’s damaged psyche and the native’s potential or actual violence in response to the colonizer.
Chrisjohn and Young (1997) similarly argue that to pathologize the Indigenous survivor of IRS (by attributing for example, the psychological disorder of “Indian Residential School Syndrome”) diverts attention from the white psycho-pathology which created IRS as an instrument of genocide (Ibid.). Acknowledging the extent of the damage of the violence done to Indigenous people, without accurately naming the source and purpose of the violence, without acknowledging that Indigenous people have survived the attack and without asking how representations of Indigenous bodies as perpetual children and/or inherently or permanently damaged (or criminal) adults, informs the subject position of non-Indigenous people, is part of what enables law to continue to constitute the settler as racially superior. Hogarth does not generate these descriptors of Indigenous survivors on his own. As an “Individual” his body is part of a wider collective body which shares a culture, a settler’s value scheme. Law organizes what can be seen and heard in the courtroom (Pritchard 2000), lawyers build their case following the rules of what counts as a crime, evidence of harm, the types of expert testimony allowed and so forth. Survivors are likely coached to emphasize certain aspects of their violation in order to make their case more compelling to the court. Thus Hogarth’s words are representative of the legal norms and rules which frame this process, and not merely his individual beliefs. Without bringing the violence of the colonizer and colonial law into view in a manner which identifies it as the source of the problem, the Indigenous survivors of IRS are collectively permanently relegated to the realm of less than fully human, more akin to property than property owners, and racially inferior. They are external to both law and modernity (Razack 2008). Their eviction solidifies the settler’s position as within and of law and
upholds the settler as the “rightful owners of the land” (Razack 2011). As Fanon would say, the settler brings the native into being; the settler owes his very existence to this property (Fanon WE 36). The original marking of Indigenous children’s bodies as property was attempted through the assimilationist policy and violent practices of IRS, said to be justified and motivated by “civilizing” and “improving” Indigenous bodies, where improvement means transforming the Indigenous body from its natural (savage) state to something recognizable by the colonizer as useful to the latter’s interests. All of the violence committed by individuals (exploitation, psychological, physical and sexual abuse) was, from the perspective of the settler, necessary or permissible on the grounds that these children were settler property, “wards of the state.” Yet it is important to note that adult Indigenous survivors are marked as property again in the present. As adults they are either permanently infantilized or deemed psychologically pathological (as criminals or sexual aggressors). In the colonial imagination, only the helpless children (who no longer exist as children) are worthy of compassion. Indigenous people are evicted numerous times (continuously) from fully human status. The marking is relentless because the marking is necessary to settler identity and nation-building (Razack 2011, Wolfe 2006). “For some to own, others must be owned; the mark is the wound” (Farley 2005). Settler identity is always a work in progress, never completed, always unstable. The collective nature of this practice must remain invisible. Possessive Individualism as a regime of truth informs law’s strategies of concealment, which includes reducing the collective violence of IRS to the violence committed by “individuals.” In order to ensure that the perpetrator is not mistaken for the common individual (a member of the white
collective), the perpetrator must also be evicted from the category of “fully rational, fully human.”

4.4 The Violence of One: Arthur Henry Plint

A potential anxiety producing problem for Hogarth and the court is that, but for his criminal acts, Arthur Henry Plint seems an ordinary Euro-Canadian man for men of his era (estimated date of birth: 1918). From video footage of him at the trial,\textsuperscript{67} he is (or appears to be) white. Hogarth J., describes Plint as follows:

[para 65] …he was one of four children, his mother died in 1939 and his father passed away in 1964. He had an older brother and two older sisters. His brother Leonard died and his sister’s whereabouts are unknown. He has lost touch since 1964. He is Canadian born from Winnipeg. The family moved to Calgary where the accused started school. He went to Vancouver shortly thereafter. He entered Grade 3 in Vancouver and remained in school up to the 10\textsuperscript{th} grade, then he had to go to work because of the depression.

[para 66] He served honourably with the Armed Forces. He was with the Navy and present at D-Day and also present on the earlier occasion when the Invasion of Italy took place from North Africa. He was employed on the coast as a stoker, he was employed as a store keeper, and he was on the Princess Mary on the Gulf Island run for a number of years. He left the Canadian Pacific Railway in 1948, and that is when he became employed as a supervisor at the Indian Residential School.

[para 68] He remained there, as I earlier suggested until 1953 and then became a postman and went into the postal service, quit the postal service as I earlier suggested, then went back to the residential school. He left the residential school after five years and went to work in the Chinese Hospital, which closed in 1978, and thereafter he worked in an old age home and that took place until his retirement.

[para 70] He says that he has been living in Victoria on Old Age Pension modestly, and has but one friend, Mr. Jon Boyd, and they have a mutual-assistance lifestyle in that city.
[para 73] It is pointed out, and I think much to the credit of the accused, that no other criminal conduct has been shown to exist. He has no other criminal record.

That Plint seems an ordinary fellow may account for the fact that he was hired twice at the same institution, a fact that the trial judge (Justice Brenner) in the civil case will note with puzzlement. From the above, we know that, despite his crimes, Plint is a man who honourably defended the nation, and who has been otherwise law abiding. However, Plint is different from other Canadians in one important way: he confessed to committing egregious crimes against Indigenous children. Law needs to sever this individual and his criminal activity from the violence of IRS policy and the collective crime—carried out over generations—of attempted genocide in the name of nation-building. This is accomplished in part, by consigning Plint to the realm of property (rather than property owner). This is accomplished through two interrelated rhetorical strategies of displacement, both captured simultaneously in the phrase “sexual terrorist,” the label Hogarth uses for Plint at the outset of his decision and the label which follows Plint’s name in the mainstream news for years thereafter (Stonebanks 1998). Both rhetorical strategies biologically essentialize Plint’s body, first as sexually pathological and second as the racialized other.

4.4.1 Pathologizing the Perpetrator

As we saw, Plint is represented as a particular kind of criminal: he is a sexual terrorist. What work does criminalizing Plint as a sexual terrorist do here? Justice Hogarth shows much emotion when he mentions the type of sexual violence Plint committed
against Indigenous boys. The forced sodomy / rape counts are of a different “genre of offence” than the other sexual offences and are of “grave concern” to him (para 32, 50).

Despite conflicting and “insufficient evidence,” Hogarth implies that Plint may be a pedophile:

[para 77] …[this] indicates to me that the accused has had a pedophilic tendency for many years.

[para 78] …I am not suggesting for one moment there is evidence before me upon which I could find that the accused was a pedophile.

Further, not only is Plint likely a pedophile, but Hogarth implies he is likely a homosexual pedophile. In addition to previous references to “mutual assistance lifestyle” and the fact that Plint targeted boys, the phrase “sexual propensity” in the following passage is ambiguous:

[para 53] …but certainly the separation of ten years when the accused had ample opportunity to stay away from that school and not go back, and I am satisfied that he went back with a reckless disregard as to what his sexual propensity were going to be with respect to the boys in that school, and there is no doubt in my mind about that, he went back any way and committed a whole series of new offences, three of which were the rapes that I earlier spoke of, to my mind, that is most reprehensible and it attracts consecutive sentencing between the groups.

It is difficult to tell if it is the sexual propensity of pedophilia or the sexual propensity of homosexuality which is of grave moral concern to Hogarth. In any case, the above passage reminds the court that Plint is rational enough to form criminal intent to satisfy his bodily needs (sexual desire). However, Plint’s rationality is compromised, he is not intelligent enough to understand the moral depravity of his actions:
On Hogarth’s view, Plint’s moral depravity and mental inability are rooted in his body and its abnormal sexual desire. Plint’s violence is conveyed as biologically caused, the product of a biological malfunction, an impaired body. In Western medical and popular discourse, a pedophile is a person who due to biological forces cannot control their sexual desire for children. (Historically, in Western thought, the same has been feared of homosexuals.) The assumption that a pedophile is unable to control his own body with the force of his rationality / mind, implies (on the Lockean view of property) that he is unable to own his own body as property. Plint is, due to biological limitations on his rationality, thereby more akin to property and less than fully human.

From Hogarth’s reasoning we begin to grasp that the kind of person who harms children is one who is criminally inclined, sexually and morally depraved, possibly a homosexual pedophile, always one who is biologically unrelated to the children he violates. Fathers who rape their children are rarely called pedophiles, or terrorists. Calling Plint a sexual terrorist camouflages the fact that sexual violence against children by their fathers, and sexual violence against women by their husbands, was and is a common heterosexual practice within European patriarchal societies. Historically, this practice was made possible through various European institutions which defined women and children as the property of heterosexual men and which denied full legal personhood (and rights) to women and children (as well as criminals and the insane) (Mossman 1998). Importantly, for our purposes, sexual violence as a means of enforcing property relations, was a skill
transferable to the context of European colonization of Indigenous people (Hammer 2005, Dworkin 1987, Smith 2005, Stevenson 1999). Using sexual violence against Indigenous bodies is one thing Plint has in common with generations of settler colonizers. In sexually pathologizing Plint, the colonial system which created the conditions for Plint’s expression of sexual violence fades from view. Plint’s sexual moral depravity becomes the cause of (sexually) damaged Indigenous adults and the main source of their dehumanization. Calling Plint a pedophile, likely homosexual, sexual terrorist evicts Plint from the white collective and the law which represents it. He is of the realm of disorder. In a very short time, this otherwise ordinary man will be perceived as only:

...one especially vicious sexual predator... J. Miller (2001, para 5)

...[among the] monsters at Alberni... (AIRS staff member interviewed by N. Chambers 2003).

...a sadistic dormitory supervisor... (TIME Magazine, “Canada’s Schools of Shame,” July 2003)

That is, law constructs Plint as exceptional, as only a sadistic and especially vicious monster and not both especially vicious and very much like other Canadians. The white collective is cleansed.

4.4.2 Racializing the Perpetrator

The process of evicting Plint from the white collective is not yet complete however. Again, Plint is represented as a particular kind of criminal: he is a sexual terrorist. I suggest that labelling Plint a sexual terrorist, racializes the body of Plint. In the white imagination, the term “terrorist” commonly represents the racialized “Other” and is often
associated with a “land war” from a land far away (or as we will see, from a land reclamation site). Terrorists are commonly portrayed as insane and irrational in their misguided efforts to usurp territory through criminal activity and violence (Said 1998). Relatedly, terrorists are said to be both opposed to and jealous of Western freedom and democracy (to which capitalism is integral). Whether as pedophile or terrorist, to the extent that he is lacking in the capacity for rationality and the ability to control his bodily desires, Plint is reduced to the body (nature, land, property). Plint is thereby placed within a historically racialized category—a body that is more appropriately the object of ownership—alongside the bodies of people of color who have been defined by Westerners as property. Here are traces of the biological racism which is core to possessive individualism and which emerges in virulent form in response to the colonizer’s anxiety regarding settler identity (Anderson 2007). Thus, Plint is twice reduced to property, both as pedophile and as racialized other. While labelling Plint a (homosexual) pedophile may sever Plint’s white body from how a wider white collective imagines itself, the racialization of his body cements the separation. Disturbingly, Plint and the Indigenous people he (and the IRS system) violated, are ultimately constituted as more alike than different, both consigned to the realm of property (less than fully human). Plint is evicted from the white property-owning collective. Indigenous survivors are denied inclusion in the category of property-owner. Through Hogarth’s reasoning, the perpetrator’s body (body of color) is seen as the origin of disorder, chaos, and violence. (The Indigenous survivor’s body is seen as the origin of future disorder, chaos, and violence.) Both are external to law. Both thereby have only illegitimate ties to land. This marking functions as
a rhetorical strategy of displacement, the marking reassures whites (individuals such as Hogarth, and whites collectively) that whites are the opposite: ordered, non-violent, innocent, and justifiably on the land (so justifiably that we rarely give any thought to our position on land at all). Whites are constituted as racially / morally superior to those bodies marked as property and out of order. This is a very old story, alive in the present.

What purpose might it serve? The fact that the ordinary white person can distance himself/herself from any terrorist, including Plint, likely renders it more difficult for Euro-Canadians to perceive ourselves as engaged (either in the past or in the present) in terrorist tactics of our own, related to the (rational economic) desire to control land. This will be useful for settlers engaged in contemporary land struggles. Perhaps calling Plint a terrorist also functions as a reminder to Indigenous people of what they know intimately from their experience of white terror on a daily basis for over a century, viz., that each and every white body is capable of violence against them (echoing bell hooks (1992). The word “terrorist” may thereby serve to keep both whites and Indigenous symbolically in their place as dominant and subordinate respectively. At the same time, the Canadian Government and its legal system, or individual judges such as Hogarth, come across as "saving" Indigenous children (who no longer exist anyway, as they are now adults) from the sexual escapades of this isolated madman terrorist through these various rhetorical strategies of displacement. The frame of genocide—a collective crime—fades from view, as does the connection between land, terror, and white identity in the present. In R v. Plint we see how possessive individualism operates as a regime of truth in the present to curtail what can be known about the past, viz., the systemic and collective nature of the violence
of IRS, and the role of this collective violence in the making of Canada as a Sovereign nation. Moreover, Canadian law is also revealed as implicated in the collective crime of genocide. The nature of this past violence, if fully grasped as one that unfolds over generations not just of Indigenous people, but generations of Canadians, threatens to reveal the illegitimacy and injustice of both the past assertion of Canadian Sovereignty and contemporary (re-)assertions of Sovereignty. Possessive Individualism operates in *R v. Plint*, to revive and reproduce anew the colonial relation and subject positions of “settler and native.” To be represented as a “rational individual” consigns one to membership in a collective legitimately tied to land and law, a collective of ontologically superior beings capable of controlling (transforming and improving upon) their own body and other objects as property (Anderson 2007). Law is a primary mechanism of the “improvement.” To be represented as a perpetual child or an emotional and damaged adult, consigns one to a collective not capable of control of body as property, a collective incapable of private property ownership. A collective with at best, tenuous ties to land and law. Possessive Individualism is the ink with which the racial hierarchy between settler and native collectives, is etched. However, this is not accomplished once and for all at the singular site of this legal event. Rather, the ontological force of property as it operates within *R v. Plint* is intimately interrelated with other forces and elements to the wider colonial force field within which it unfolds, and which it in turn, reinforces. It is but one site amongst many, wherein the collective struggle between settler and native for land and identity takes place. If extracting the elements of possessive individualism and the language of property as they operate within *R v. Plint* feels somewhat forced or alien to
the reader, one need only consider the wider colonial force field to understand how the racialized narrative and power dynamics of “property” commonly permeate contemporary everyday life in Canada. As the concept of white terror as colonial force-field entails, we must consider the cumulative effect of multiple simultaneously unfolding sites of struggle, wherein the “settler and native” relation is re-constituted. In settler – Indigenous relations, biopolitics and geopolitics are inseparable (Rifkin 2009).

4.5 The Colonial Present (1995–1998): “Let us face it, we are all here to stay.”

Traces of possessive individualism and the subject positions rendered possible in 

*Plint* are part of the wider landscape of British Columbia, a landscape awash in the legal discourse of private property and struggle over land. As Dara Culhane (1998) explains, the “question of who owns the land” has been disputed in B.C. for “the last two centuries” (1998, 111). One notable land claims legal case is *Delgamuukw v. British Columbia*, which took place during 1987 – 1991, and which was under appeal (during the time of 

*Plint*) until the final decision in 1997. The case was initiated by 48 Hereditary Chiefs representative of the Houses of the Gitksan and Wet’suwet’en nations, laying claim to a combined 22,000 square miles of land (Culhane 1998, 111)—the very geography to which Justice Hogarth refers. Culhane provides a detailed critical account of the trial. She shows how possessive individualism and colonial law’s ontological assumption regarding who can own property, required that the Gitksan and Wet’suwet’en prove that they occupied the territory prior to the assertion of Crown sovereignty (Culhane 1998). They needed to demonstrate that their social (and economic) organization was similar to European social (and economic) organization: that is, that they were (non-nomadic) nations with distinct
territorial boundaries and that they related to land as private property. The alternative was to be construed as more animal like, merely living off of the land for survival. Culhane notes that while Indigenous claimants pursued the land claim through Canadian courts, knowing they would be compelled to play by its rules, they always made clear that they were acting as independent nations. Culhane quotes Delgamuukw’s opening words:

“The purpose of this case ... is to find a process to place Gitksan and Wet’suwet’en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether our system might continue or not. It will continue.” (Culhane 1998, 115).

Judicial reasons regarding “aboriginal” as incompatible with “private property ownership” are delivered in the four year Delgamuukw trial (Culhane 1998). This lengthy and often heated trial was well publicized, especially given the not so subtle white arrogance of the trial judge, Justice McEachern, who discounted oral testimony as mere hearsay and not as documentation of occupancy prior to Europeans. This component to his decision would later (in 1997) be overturned by Justice Lamer (see below). While there is a particular connection, in that many of the plaintiffs in R v. Plint were from the Indigenous nations involved in Delgamuukw (for example, Willie Blackwater is Gitksan), it is important to contextualize the evictions and strategies of displacement as they occur in R v. Plint within these broader struggles over who can own the land (who qualifies for private property ownership). Land struggles are intimately tied to issues of sovereignty. What must it have been like for IRS survivors during R v. Plint to have been dehumanized as more akin to property, by the colonial narrative in law, at the same time their historical
connection to land (occupancy and claim to own property) was contested on myriad legal and political fronts, including *Delgamuukw*?

In addition to land claims litigation such as *Delgamuukw*, the B.C. Treaty process was launched by the Provincial Government and various Indigenous nations in 1990 in order to avoid the lengthy and costly litigation process. The BC Treaty process (framed by the *Indian Act* and Canadian law) denies possibility of private ownership of land to Indigenous nations; Indigenous nations are allowed to own land collectively, to sell their land only to the Crown and, to use their land only in ways compatible with furthering their collective interests (BC Treaty Commission 2010). Here too, possessive individualism as a regime of truth operates through law in the present to maintain power relations between settler and indigenous, relations which ensure settler occupancy of land and settler state dominance over land.

Plaintiffs from the criminal case *R v. Plint* went on to file a civil suit in 1996 (discussed in Chapter 5). In the nearly three year gap between Hogarth’s March 21, 1995 sentencing of Plint, and the start of the civil hearings in February 1998, many events related specifically to settler and Indigenous struggle over land occurred. I will mention but three: the 1995 Gustafsen Lake stand-off; the 1997 *Delgamuukw* decision, and the 1998 Nisga’a negotiations outside of the BC Treaty process (which led to an agreement in 2000). Taken together, these events illuminate what is at stake in deciding who is granted membership in the category of “property owner,” and the possessive individual imbued with the rational desire for accumulation.
4.5.1 “It sure felt like a war.”

In July through September of 1995, the 33 day “Gustafsen Lake Standoff” (in the Cariboo region/unceded Shuswap land) took place, followed by the 10 month trial of the Indigenous defenders who were sentenced in 1997 to four years in prison (ultimately for trespassing). This was the largest police deployment in response to a land reclamation in Canada’s history. In the words of one RCMP officer, “It sure felt like a war” (Mahoney 1997).

In July of 1995, eighteen Indigenous people, led by Elder and warrior “Wolverine” of the Ts’peten Nation, reclaimed a section of land from a local white rancher (Lyle James), where the Ts’peten had held their traditional Sundance Ceremony. They held their ceremony, but refused to leave the grounds. They were subjected to much taunting by the white local ranchers, including being called “red niggers” (Steele, 1997). The RCMP were called in to remove the eighteen defenders from the land. The RCMP spent between three and five million dollars on this effort (Haysom 1997, Steele 1997). They engaged in a smear campaign calling the defenders “terrorists” and “lunatics” in local news (SISIS 1995, Samuel 1996). Over 400 RCMP officers “equipped with stun grenades, automatic rifles, and armored personnel carriers [and helicopters] borrowed from the army,” encircled the 18 defenders. They used land mines to blow up vehicles and they fired thousands of rounds of ammunition during a shoot-out on the last day. No one was killed but tensions rose in the area (and across Canada, as this was close upon the heels of the Ipperwash Ontario incident and killing of Dudley George). In the end, only Indigenous defenders and their supporters were arrested, charged with attempted murder, but
convicted ultimately only of mischief, endangering life, assaulting a police officer, and trespassing. No RCMP officers were arrested.

During the first court appearance (Nov 11, 1995), elder Wolverine told the judge that the B.C. court did not have jurisdiction on Indigenous land, rather, that the law of the Ts’peten was sovereign. He was reprimanded by the judge and when Wolverine refused to be quiet, he (and his son who tried to defend him) were wrestled to the ground and beaten by court police. They were both brought in handcuffs to the next hearing. In 1997, Wolverine was sentenced to 4½ years in prison (Cernetig 1997).

4.5.2 “…we are all here to stay.”

In 1997 C.J. Lamer of the Supreme Court of Canada delivered the *Delgamuukw v. British Colombia* decision, which overruled key components to the 1992 McEachern *Delgamuukw* decision. Lamer rejected the trial judge’s (McEachern’s) exclusion of oral history which would have proven Indigenous occupation prior to colonial assertion of sovereignty, and Lamer ordered a new trial. He states:

[para 186] Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the
sovereignty of the Crown.” Let us face it, we are all here to stay. 

Lamer states that Aboriginal title does precede colonial sovereignty, and that Canada and the provinces must negotiate fair sharing of land. In the following often quoted passage (indeed it is quoted without context, on the INAC homepage as well as the BC Treaty Commission homepage), Lamer ends his decision with the statement, “let us face it, we are all here to stay.” We are reminded that the fact of settler occupation is not negotiable, but merely the terms on which it will continue, (echoing Delgamuukw’s own statement at the beginning of the original trial) terms which will never undermine Canadian sovereignty. The settler occupier re-asserts sovereignty, and does so at a time when settler anxiety and tensions between Indigenous and settler runs high.

4.5.3 “Here’s the rub…."

The Nisga’a nation was one of the nations in the *Delgamuukw* land claims case. In 1998, the Nisga’a treaty (negotiated outside of the simultaneously unfolding BC Treaty process) followed closely upon the Lamer decision. The government negotiated in part, because of Lamer’s recommendation to do so. On December 8, 1998, at the second reading of the Nisga’a Final Agreement Act, M.P.P. Gerry Janssen (NDP) relays the following to the B.C. Legislature, from his Port Alberni constituents (many of whom are Indigenous survivors of various B.C. IRS)⁷⁰:

Gilbert Johnson, now a 48-year-old Gitxsan father of three, emerged deaf and functionally illiterate after eight years at the Alberni Residential School. As Gilbert states: “At the age of 14, I had a bleeding ulcer from the constant fear. It was like a concentration camp. My main thought was: ‘Am I going to make it out alive?’” Willy Blackwater, another Gitxsan father, …and a group of aboriginal men gathered in a crowded Port
Alberni courtroom to face the man [Plint] who had tormented them decades earlier… For 20 years this man was allowed to torment native children. This torment was condoned by the authorities, by our society. Art Thompson, an acclaimed Nuu-chal-nulth artist who attended the Alberni school for nine years [said to Plint] “you’re a constant reminder of cultural abuse” […] Jerry Jack, a survivor of the Catholic-run Christie residential school, said … “They should give that land to us”—the very land we’re talking about in this treaty — “in compensation for the abuses we lived through at that school”…This treaty is a step in the right direction. It compensates the Nisga’a for the material loss of lands and resources. ..it can never redress the wrongs that were inflicted upon their children, upon them, just because they were native.”

Janssen argues extensively in favour of the Nisga’a settlement and reports that his constituents see a clear connection between the two historical wrongs of land theft and IRS. He is also responding against the growing momentum and demand for a B.C. referendum on land claims (the referendum took place in 2002) and in response to the following statement by Gordon Campbell (Lib) (made a day earlier): ...

We are fundamentally opposed to this new model of self-government that’s proposed in this treaty, because it too will divide British Columbians along ethnic lines. It will give the Nisga’a government special new rights and status under the constitution. It will give the Nisga’a government paramount powers that are not held by any municipal or aboriginal government in Canada—powers that include the constitutional authority to pass laws that are legally superior to federal and provincial laws in 14 areas of jurisdiction, shared powers that will duplicate areas of jurisdiction, creating a crazy patchwork of overlapping laws in virtually every key area of provincial authority.

…The question is: how will the rights of self-government that the Nisga’a will acquire in this treaty relate to the rights of individuals under the Charter? I am concerned that new powers of self-government protected as treaty rights might potentially be wielded in a way that can diminish the Charter rights and freedoms of all British Columbians.

…My concern is that the Nisga'a government will have a wide range of new powers, many of which will include jurisdiction to pass laws that are
legally superior to federal and provincial laws. One of those paramount powers will be the ability to pass laws to preserve, promote and develop Nisga’a culture and language. But again, culture is nowhere defined. Which takes constitutional precedence: the Charter right to pass cultural laws provided for in the treaty, or the Charter rights of individuals? What if the two are in conflict? Which form of Charter rights is superior?

…Some say that the powers proposed in the treaty are simply existing “inherent rights of self-government.” Indeed, that does appear to be the federal government’s position. The provincial government’s position is less clear. It is reluctant to defend the Nisga’a’s proposed governance rights as simply modifying existing rights—and for good reason. If the Nisga’a new treaty rights are really just a codified version of the rights they already have under the constitution, then they really do not need a treaty to exercise those rights in the first place. They can simply assert their rights and start passing laws. If they already have the paramount powers that we are led to believe are just “modified existing aboriginal rights,” then the Nisga’a already have the power to pass laws that are legally superior to federal and provincial laws. All they have to do is assert that power.

…Here’s the rub. If the Nisga’a already have such inherent rights to self-government, including the right to pass laws that take precedence over federal and provincial laws, then so does every other first nation in British Columbia. Were that true, it would be a recipe for chaos. First nations could simply declare that they have self-government rights and pass laws to give those rights form and content. Moreover, if the Nisga’a treaty’s governance rights are all just existing aboriginal rights, every other first nation would be able to demand similar rights in their settlements

…Surely this is not what the authors of the 1982 constitutional changes envisioned.

Campbell’s anxiety is tangible, but doesn’t interfere with his ability to state clearly what the stakes are for British Columbians and Canadians in general: sovereignty, the power to determine what is done with land, the power of law to protect their interests in resources and profit. The connection between IRS as genocide and land settlements, must be denied, as the well-being of an entire colonial order—a world divided in two (Fanon WE, 38)—hinges on this very denial.
As of 2010, despite the 1997 Delgamuukw Lamer decision (and several others as discussed in the next chapter) emphasizing Canada’s obligation to honourably consult and accommodate the interests of Indigenous nations, before entering into land and resource deals with corporations, this is rarely done (Grant 2010). As of 2010 the Nisga’a were still waiting (since 2006) for the Canadian government to fulfill its fiscal responsibility under the conditions of the Nisga’a agreement. No longer bound by the Indian Act, it seems that Canada could easily forget its commitment to a new economic relationship with the Nisga’a. In 2010, faced with impending poverty, the Nisga’a “opt” into Canada’s new land act, which allows for Indigenous governments not bound by the Indian Act to sell their land as private property. Taiaiake Alfred argues that this will result in the disaggregation of Nisga’a land, the ultimate dispossession of the Nisga’a and the assimilation and/or disappearance of Nisga’a. In 2010 those involved in the Gustafsen Lake Stand-off comment that nothing has changed on the land claims front. While they demanded a public inquiry, there is little hope of one. In the preceding 15 years, the RCMP and Indigenous people involved in the stand-off, including Wolverine, have worked to better relations between them. The RCMP gave wolverine a red pouch of tobacco with an RCMP medal on it in apology, and committed to understanding how historic abuse (such as IRS) affects relations today. According to one news report, the RCMP embarked upon “reconciliation” in order to ensure that no future stand-offs occur (Matas 2010).
Conclusion

As steward of white settler interests, Canadian law must ensure that the violence of sexual assault committed by individuals within IRS, remains conceptually disconnected from colonial strategies of land usurpation, specifically the genocidal policy of nation-building. The testimonies of survivors bring us perilously close to “seeing” the connection between sexual violence committed by individuals such as Plint, and land usurpation by a Nation such as Canada. (The very connection the recognition of which I suspect led to Hogarth’s anxiety.) To see this connection, is also to render possible that the sexual violence which individual settlers commit against Indigenous people in the present (e.g., the sexualized racial violence committed against Indigenous women of whom over 580 are missing, many from the region of BC where this IRS case unfolds), or other settler practices, such as land grabs or referendums, within a wider colonial force-field, is simultaneously colonial violence, one amongst many practices committed by many individuals which, taken together, produce the effect of destroying a people. The violence of the white settler collective was effectively suppressed in R v. Plint through rhetorical strategies which emphasize ultimately a biological cause of the violence of IRS, and by strategies which evict both perpetrator and survivor from the category of fully human individual (motivated by the rational desire for accumulation). A move which in turn, produces the white settler collective as both cleansed of any wrong-doing and rightfully occupants of the land.
Chapter 5 Re-asserting Sovereignty: Colonial Power and Judicial Reasoning in

Blackwater v. Plint

Interviewed by the Vancouver Foundation in 2010 (just prior to his unexpected death in 2011), retired BC Supreme Court Justice Donald Brenner unhesitantly identified Blackwater v. Plint as the “most difficult case” of his career:

Brenner found the testimony emotionally draining. “I listened to evidence of physical and sexual abuse that went back many years but which involved people who were children at the time. Basically these people were telling their stories. Trying to describe what it was like as a six, or seven or eight year-old to be forcibly taken from your family.” Besides being subjected to repeated physical and sexual abuse, former residents described how they were not allowed contact with their siblings at the same school, and beaten for speaking their native language. Several were far from home and could not afford to return to their communities during holidays. The school became their prison. “It was difficult hearing these plaintiffs tell their stories,” recalls Brenner who is a father of two, and who could not get out of his head the idea that these horrible incidents had happened to young children. “But my difficulty was nothing compared to what they had to go through. My job was to listen, hear the evidence and make a decision. But they are the ones who had to live it, to go through it. Listening to them tell their stories was very important. That was a large part of the process. They wanted to tell their story and be heard because in their view nobody heard them for a long, long time. No one listened.”

In 1996, the 27 male plaintiffs from the R v. Plint criminal trial, joined by more survivors of AIRS, including one female, filed a civil suit against Plint, past principals of AIRS, as well as the Government of Canada (Canada) and the United Church (Church). As the trial judge, Justice Donald Brenner, explains, civil or tort law “…relates to actions for damage in respect of injury to person or property, including economic loss, arising from injury, whether based on contract, tort, or statutory duty” (2001, para 266). The goal of civil tort law is to return (through compensation) the victim to the position they were in
prior to the wrong-doing in question (2001, para 327). What is the wrong-doing in question in IRS case-law? “Much is at stake” in how this is answered (Barney v. Canada 2005, SCCJ McLachlin). Put quite simply: if the wrong-doing is sexual abuse alone, then law need return the plaintiffs merely to their position prior to the abuse, and “not a better position” (J. Smith 2003). The position of the plaintiffs prior to Plint’s sexual violation of them, would be AIRS, an institution wherein myriad forms of racist violence were committed daily against Indigenous children. If the wrong-doing in question includes the Government’s removal of Indigenous children from their families and communities and their forced attendance and imprisonment at AIRS (just as Brenner recollects in the opening quote), the plaintiffs must be returned to “what their life would have been like” prior to the enactment of colonial policy aimed at the elimination of entire ways of Indigenous life (“cultural loss” or genocide). In such a case, might compensation require returning Indigenous people to their pre-colonized (political, economic) position in relation to land? If so, stakes would indeed be high for Canada. However, “loss of culture” was and is not an actionable tort in Canadian law. Struggling within law’s definitional constraints, Indigenous plaintiffs sought to bring “loss of culture” into consideration by suggesting that it served as the “aggravating conditions” for the sexual abuse they experienced at AIRS. Accordingly, plaintiffs claimed that Canada and the Church were liable for Plint’s sexual violence “on the basis of four causes of action:” negligence, non-delegable duty, breach of fiduciary duty and vicarious liability (Esson 2003, para 12). Justice Brenner divided the civil trial into three phases.75 Phase one addresses vicarious liability, and Brenner’s 1998 decision holds that both Canada and the Church are
vicariously liable for damages caused by Plint (later Brenner apports 75% liability to Canada and 25% liability to the Church). Phase two addresses the possibility of direct liability: negligence, non-delegable duty, and breach of fiduciary duty. In his 2001 decision, Brenner dismisses the claims of negligence and breach of fiduciary duty. Although he does find that Canada had a non-delegable duty, this component to his decision is later overturned by the Supreme Court of Canada (Barney v. Canada 2005).

Thus, at the end of this nine year litigation 1996–2005, vicarious liability for Plint’s sexual violence, is the only form of responsibility to which the courts will hold Canada.

Phase three (the main phase), also addressed in the 2001 decision, assesses damages and awards monetary compensation to the claimants (ranging from $12,000 to $190,000 per plaintiff) against Canada, the Church and, Plint.

Blackwater v. Plint is considered by some to be a victory for the Indigenous plaintiffs, given the vicarious liability ruling (considered a land-mark decision in IRS case-law), and given that plaintiffs were awarded damages. For others, including Chief Robert Joseph, executive director of the BC Provincial Residential School Project at the time, it was a deeply “disturbing” judgement both in terms of the strategy engaged by the defendants Canada and the Church, and in terms of the unusually low awards of compensation when compared to damage awards received by non-Indigenous survivors of institutional sexual abuse (in some cases more than $1 million per individual) (Barnsley 2001). In this chapter, I explore the disturbing aspects to Brenner’s decision. I suggest that, just as it does in the criminal case R v. Plint, law in the civil case calls both “settler and native” into being, and does so once again, through possessive individualism and categorizing
(“coding”) Indigenous people as property. As Mark Rifkin (2009) argues, “coding” the
“native” is but one amongst many strategies of modern colonial power and is integral to
the “production of national space” and sovereignty (Rifkin 2009, 95). Similar to Frantz
Fanon’s insights regarding settler colonialism, Rifkin reminds us that “biopolitical and
geopolitical dynamics work together” (95), which is to say that “…settler states regulate
not only proper kinds of embodiment…but also legitimate modes of collectivity and
occupancy” (90). Rifkin cautions that, in the case of Indigenous and settler relations, any
“…effort to think biopolitics without geopolitics …results in the erasure of the politics of
collectivity and occupancy” (94). In a sense, this erasure is precisely what Canadian law
and government attempt (if surreptitiously) in IRS litigation. In Blackwater v. Plint, as
with all IRS case law, the issue of sovereignty always “lurks [just] beneath the surface.”

In what follows, I show how the settler’s recognition that colonial policy was an
instrument of “loss of culture” materializes and disappears much as a “Cheshire Cat,”
depending on the settler interests at stake and law’s task in each of the three trial phases of
Blackwater v. Plint. That is, the settler’s recognition of colonial policy functions in a
sense, as a menacing re-assertion (if only whispered) of settler sovereignty. For example,
recognition of the policy of forced assimilation surfaces throughout phase one (regarding
vicarious liability), especially regarding the question “whose business is it?” The extreme
violence of the business of nation-building is conceptualized as the outcome of poor
business management (a relation of accumulation). In phase two (regarding direct
liability), recognition of the policy of forced assimilation fortifies processes of marking
the Indigenous survivor’s mind as not credible, and the Indigenous body as child-like and
as property, a collectivity therefore properly deemed “wards of the settler state” (Rifkin 2009). In phase three (regarding damages), although the Judge allows recognition of forced assimilation as an “aggravating condition” of sexual abuse, as requested by the plaintiffs’ counsel, this is then disturbingly embraced and used by the defendant Canada to undermine the direct causal connection between sexual assault and psychological trauma experienced by the plaintiffs. This results in less compensation for the plaintiffs, but more disturbingly, unleashes an even more pronounced dehumanization of the Indigenous plaintiffs, a move which in turn emboldens the settler’s collective sense of racial superiority in the present. Indeed I suggest that the more settler sovereignty is threatened, whether within IRS litigation or in the surrounding colonial force-field, the more pronounced and vicious is the settler’s eviction of the Indigenous collective from the category of rational individual/property owner. Throughout the trial decision, the fact of IRS as colonial policy related to nation and land (and thereby issues of sovereignty), operates as a menacing reminder of what colonial law and government are capable, a colonial violence untouchable through colonial law. In Blackwater v. Plint, Justice Brenner listens, hears the evidence, makes a decision and in the process, the story IRS survivors most want Canadian courts and citizens to hear, is not only silenced, but turned against them. While the strategy on the part of plaintiffs’ counsel (led by Peter Grant) to name “cultural loss” as an aggravating condition of sexual assault backfires against the plaintiffs in this case, Canada’s disturbing defence strategy of emphasizing (non-actionable) “cultural loss” as the primary cause of trauma, has the potential to backfire against Canada in future IRS litigation. That is, Canada’s strategy may expose settler
sovereignty to an even greater threat to come—direct liability for cultural genocide—a threat which is contained by Canada’s highest court in the appeal of *Blackwater v. Plint*, as well as by the nine superior court justices across Canada in the Cloud and Baxter class actions to come.

**5.1 Phase One: Vicarious Liability—“the cost of doing business”**

In defiance of his successful transplantation, in spite of his appropriation, the settler remains a foreigner. It is neither the act of owning factories, nor estates, nor a bank balance which distinguishes the governing classes. The governing race is first and foremost those who come from elsewhere, those who are unlike the original inhabitants, “the others.” (Fanon WE 40)

In this passage, Frantz Fanon reminds us that the settler is always a foreigner, always an occupier who comes from elsewhere and comes to stay (Wolfe 2006). Thus, a racial categorization always undergirds (or is intermeshed with) the settler’s rational economic organization of territory / land. Justice Brenner’s decision in phase one of *Blackwater v. Plint* (1998), erects an economic-legal frame of just this nature: that of vicarious liability. Vicarious liability is a legal concept which applies to an economic / business relationship. The historical root of vicarious liability is possessive individualism’s property law, and more specifically, the responsibility on the part of masters (or employers) for any wrong-doing committed by their slaves (or employees) (Watson 2002). Thus, the law of vicarious liability at one time applied to an explicitly racialized economic relation, elements of which I suggest recur in the present and create the conditions for the possibility of a division between kinds of (racialized) human beings. Rooted as it is in the master taking responsibility for his property (the slave), vicarious liability is liability
without fault (para 109, 419–420). That a master takes another human as his slave, is not at issue, is not considered unjust. As we are reminded numerous times throughout this nine year litigation, vicarious responsibility “does not arise from any misconduct or reprehensible conduct” (para 419) or malice, on the part of the employer. Vicarious liability, it seems, is simply a rational, fair economic principle, which:

[para 420] …represents a policy choice that sees, as between an innocent plaintiff and the innocent employer of a tort feasor, the loss allocated to the employer.

In order for an employer to be held vicariously liable for an employee’s wrong-doing, two conditions must be met. First, the criminal wrong-doing must be related to the employee’s work duties, i.e., committed in their capacity as employee (and not merely as result of an opportunity created by their employment). Brenner explains that this condition is met in the case of Plint, who:

[para 24] …as a dormitory supervisor, had the authority of a parent conferred upon him. He was not just a person into whose care children were placed for a relatively small portion of the day. He awoke the children and ensured they were readied to go to school. He met them when they returned from school, supervised their homework and in all respects functioned as their parent at AIRS.

Colonial policy ultimately conferred the status of “parentis localis” upon Plint, who was thereby “the most powerful person a child can know” (para 25). Moreover, Plint committed the sexual assaults in his office and in his bedroom at AIRS, and in the course of fulfilling his employment duties. Brenner concludes that Plint’s employer (whomever this turns out to be, Canada, the Church, or both) is indeed vicariously liable for damages relating to Plint’s criminal wrong-doing. The employer of Plint will be determined by
addressing the second condition for vicarious liability, viz., determining who “control[led] the method of work” of the employee. In clarifying the second aspect of the law, Brenner quotes from legal scholarship (*The Law of Torts 1967*) where Plint’s status as servant (rather than agent or contractor) and thereby the continued racialization of Plint, is made evident:

[para 108] “In the modern law there are three and only three relationships which satisfy the second requirement of vicarious liability namely that of master and servant, that of principal and agent, and that of employer and independent contractor.”

As both the Church and Canada claim that the other is the sole employer of Plint, Brenner looks at this issue very closely (para 113), and determines that both Canada and Church controlled the method of Plint’s work. The office of the principal at AIRS—held by Mr. Caldwell 1944–1959, Mr. Dennys 1959–1962, and Mr. Andrews 1962–1973—hired Plint and managed his employment. But as the principal is hired jointly by the Church and Canada, and as the Principal reports to both, Brenner decides that both the Church and Canada are the employers of the principal and thereby ultimately of Plint. Canada argued that the Church was responsible for the daily operation of the schools and was therefore most responsible for Plint. However, Brenner points out that Canada had both a de jure and a de facto involvement in the schools (para 31-56; 120-126). It is here that Canada’s colonial policy is first openly discussed by the Court, and where we see that it is a policy integral to nation building. The *Indian Act* (of 1927, para 32) which gave rise to IRS policy, gave Canada a statutory duty for the “education of Indian children” (para 123). Canada (through the *Ministry of Indian Affairs* office) was also involved in the daily
operation of the schools. For example, IRS policy required that Canada control admissions (para 73), transport students (para 75) and hire officers to ensure mandatory attendance (para 32, 34). Brenner states:

[para 32] [Canada ensured] mandatory attendance of Indian children [by hiring] truant officers to enforce attendance with provision for charges to be brought against any parent or guardian who failed to cause any Indian child to attend school as required.

[para 34] …[Canada] empower[ed] a truant officer to take into custody an Indian child and to convey the child to school “using as much force as the circumstances require.”

[para 73] …It was Canada’s policy to remove Indian children from their homes and home communities when considered appropriate by Indian Affairs. Canada also controlled the admission of children to the Indian residential schools including AIRS.

[para 75] …All costs of transporting the students to and from the school were borne by the Crown. It was [the principal’s] practice to involve a local Crown social welfare agency in the case of runaways.

Canada also set the standards for operation of the schools and inspected the schools for compliance (para 75), was involved in hiring the principal (para 79) and other staff (teachers and guidance counsellors) (para 87, 89, 90, 91), developed the training program for domestic workers (para 89, 103), set the guidelines for disciplining children (para 84), and financed the schools (para 85). Relatedly, both Canada and the Church owned school assets, Canada owned the building and the land it was built upon; the Church owned the nearby farm land (para 102). To further support his decision that the relationship of Canada and the Church to AIRS qualifies as a business partnership (the smooth running of which involved the practices described in the above quotations), Brenner draws upon the very terminology employed by both the Church and Canada in their historical
correspondence (para 92–107). The Church and Canada refer to their relationship as one of a “joint enterprise” (para 96, 107), as “partners in the great enterprise of the schools” (para 98), and as a “partnership in nation-building.” Brenner states:

[para 99] The United Church continued to view the relationship as that of a partnership as late as October 27, 1993 when it submitted to the [Royal Commission on Aboriginal Peoples (RCAP):] “The Residential School period coincides with the general partnership which existed between the established Christian churches and the Canadian Government in the process of nation-building, particularly the expansion of European-based settlement of the west and north. Church participation could be described as an inadvertent and unfortunate part of that shared nation-building project…”

Brenner concludes that, as business partners, both Canada and the Church are vicariously liable for Plint’s wrong-doing (para 120–136). To further support his finding that two entities can be simultaneously vicariously liable, Brenner applies the “organization test,” which is to answer the question “whose business is it?” Although he notes that the type of business relation that Canada and the Church have is not a typical one for “profit” (para 137), each nevertheless has interests that were met through the partnership (para 138–151):

[para 143] In my view the answer to the “organization test” or to the “whose business test” is the same. The “business” at AIRS was the business of both the Church and Canada. AIRS fulfilled parallel objectives: on the part of Canada to have its statutory duty under the Indian Act fulfilled by providing for the secular education of Indian children, and on the part of the Church to continue the work of the Church in ministering to its First Nations members by providing for the Christian education of the Indian Children.

Thus, as both Canada and the Church had sufficient joint control of AIRS (para 148), and the business of AIRS advanced the interests of each party (para 151), Brenner concludes
that both Canada and the Church are simultaneously vicariously responsible for the
wrong-doing of Plint. Later, in phase two of the trial (his 2001 decision), Brenner will
allocate fault 75% to Canada and 25% to the Church (para 326). His reasons are that,
given that under the Indian Act—i.e., colonial policy—Canada had a statutory duty for the
well-being of the children who attended AIRS (para 323), “Canada was the more senior of
the two partners in this enterprise” (para 324).

In the course of Brenner’s lengthy deliberation regarding the “whose business is it?”
test, we glimpse the kind of business at issue, as well as the kind of practices it required.
While Brenner describes the business interests of each in neutral terms such as (for
Canada) fulfilling its statutory duty under the Indian Act to educate Indian children, and
(for the Church) transmitting Christianity to Indigenous people, the link between this
“education” and the larger business of nation building is explicitly identified. Colonial
nation-building, a racial identity project, is openly acknowledged as conducted through
economic relations and values (relations of accumulation). The bottom line is a colour
line. Moreover, the fact that nation-building involves the settler’s coercion of the native, is
blatantly clear in the passages referring to enforced mandatory attendance at the schools,
jailing parents who did not comply with sending their children to IRS, and returning
children escapees to IRS. All simply good business practices. Brenner too quickly glosses
over the possible source of business profit for Canada, specifically, the control of land and
resources, and the creation of an exploitable and perpetual pool of labourers, both
explicitly stated goals of IRS policy (Milloy 1999) and both central to the settler’s
economic dominance and sense of racial superiority. In the course of framing the
relationship between Canada and the Church primarily in the language of a business or economic relationship, the deeply disturbing aspect of the pervasive violence that such a business venture required goes without comment. Despite detailing the systemic racial violence required for such a business venture, the focus is directed at the wrong-doing on the part of a single servant / employee, whose violence becomes a merely contingent effect of IRS, a violence from which Canada and the Church can distance themselves. At most, Canada and Church made poor business decisions in hiring corrupt individuals. Economic decisions are merely practical decisions motivated by the rational desire for accumulation. The business of nation-building and the colonial policy of assimilation (a collective wrong-doing), are openly acknowledged and yet, are not touchable through Canadian law. Although Brenner’s 2001 decision which apportioned vicarious liability was appealed (by both Canada and the Church for different reasons), this aspect of Brenner’s decision was ultimately upheld in the 2005 SCC ruling by Justice Beverley McLachlin. Reiterating and reassuring both Canada and the Church, that vicarious liability does not convey wrong-doing or malice on their part, McLachlin states: “The fact that wrongful acts may occur is a cost of business” (*Barney v. Canada* SCC 2005, para 20). In other words, the fact that racist, genocidal acts may occur is the cost to be expected in the business of nation-building. Racial hegemony and identity are thereby produced through the settler’s rational desire for “accumulation,” achieved originally through the mechanism of IRS itself, and now in the present, through law’s emphasis upon Canada’s economic motive, which serves to mask and ameliorate the nature of the violence (genocide) of the settler’s collective identity project.
5.2 Phase Two: Direct Liability for Historic Sexual Abuse? ... “Many of the alleged perpetrators are dead.”

The disaster of the man of color lies in the fact that he was enslaved. The disaster and the inhumanity of the white man lie in the fact that somewhere he has killed man. And even today they subsist, to organize this dehumanization rationally. (Fanon BSWM 231)

The rational organization of dehumanization, stemming from and justified by the desire for accumulation, continues to delimit the conditions for settler and native subject positions in phase two. Between phases one and two, the majority of the 27 plaintiffs (including Blackwater) settled out of court (all were encouraged by Brenner to negotiate a settlement). Two plaintiffs are believed to have committed suicide. Brenner’s division into three phases meant that the plaintiffs had to give testimony twice (Esson J. 2003 para 28). Perhaps the prospect of testifying a second time, and recounting the violation of their bodies/personhood, in an adversarial setting, was overwhelming for some.80 (This possibility calls into question Brenner’s 2010 claim that IRS survivors wanted only to tell their story and to be heard.) Seven plaintiffs remain with the litigation until its conclusion: FLB, RF, RJ, MJ, DS, MW1, MW2. In phase two of the civil case, Brenner must decide whether Canada and / or the Church is/are directly liable for Plint’s wrong-doing. Were they negligent? (Did they owe a duty of care?) Was Canada’s duty non-delegable (to the Church)? Did Canada breach a fiduciary duty? Direct liability depends upon whether Canada and the Church either knew or ought to have known about the sexual abuse at AIRS and failed to investigate or prevent it. Thus, prior to the start of this phase, plaintiffs’ counsel sought to introduce historical evidence regarding the purpose of IRS as
part of the assimilationist strategy of Canada’s colonial policy—policy already openly acknowledged by Brenner in phase one of the trial and interestingly, publicly alluded to in the 1998 “Statement of Reconciliation” delivered but one month earlier by MINA Jane Stewart (Lib.) Plaintiffs requested that expert testimony by historian John Milloy, in particular the report he wrote for the R_CAP, be entered into evidence (1998 para 4). Counsel for the plaintiffs cite Justice McEachern’s ruling in *Delgamuukw v. British Columbia* (of 1987–1991) regarding the use of expert evidence for determining historical context and fact. Counsel argued that Milloy’s historical scholarship documents that Canada and the Church were aware of problems, including sexual and physical abuse, throughout the IRS system for years even before Plint committed crimes at Alberni (para 5, 6). Thus, plaintiffs counsel must have thought it relevant to the question of whether Canada or the Church ought to have known about and prevented Plint’s abuse. After much consideration (Milloy’s report was over 300 pages) Justice Brenner denies the admissibility of the report on the grounds that Milloy scrutinizes the entire Indian residential school system, rather than the specific institution AIRS. Milloy’s report mentions AIRS only five times, and in ways not relevant to the case. Further, Milloy’s report offers a biased position:

[para 15] Dr. Milloy states that the residential schools: “…have been arguably the most damaging of the many elements of Canada’s colonization of this land’s original peoples....”

While colonization is explicitly acknowledged, Brenner clarifies that it is not his task to conduct an inquiry similar to that of R_CAP (para 17). In this way, the vast historical context of IRS and violence throughout the colonial system, and as connected to land, is
both acknowledged and yet deemed irrelevant to the specific case at hand, which deals with but one institution. Nor is the history of IRS policy as a mechanism for colonization, relevant to the questions raised in civil law regarding the wrong-doing of individuals such as Plint. As Brenner later (and frequently) states, “Canada enjoys immunity from claims based on flawed or inadequate policy…Canada is culpable [only] when it fails in the execution of such policy” (para 71, 79, 248). Thus Brenner reminds the court:

[para 17] This is a case involving allegations brought by the plaintiffs of physical and sexual abuse; it is not a land claims case such as Delgamuukw.

Thus while expert testimony regarding the historical context of Canada is relevant to land disputes (documenting historical occupation of land and sovereignty), it is deemed irrelevant to IRS litigation, which law has determined has nothing to do with land. Law must focus only upon the action of individuals (employees) and only specific forms of violence—“historic sexual assault”— rather than colonial (explicitly land related) policy and practices. In this move to sever the connection between IRS violence (and sexual violence in particular) and land, the life memories (expressed in testimony) of individual Indigenous survivors of IRS are also thereby severed from land. This epistemological move has an ontological correlate: in a sense, Indigenous people themselves are separated from land by the settler’s law. The (settler’s own) written historical account which (in the settler’s view) would lend credibility to individual oral testimony is disallowed. The magical power of the settler’s law determines both when the past, and whose account of the past, is relevant. In what follows we see how controlling what can be legally recognized about the past, impacts what can be seen in the present: the nature of the
wrong-doing considered, the identity of the perpetrators of the crime, and the type of context which produces both. In the opening paragraphs to the (2001) phase two decision, Brenner reminds the Court that:

[para 4] This is an historic sexual assault case….The events occurred many years ago, …Many of the alleged perpetrators are dead. Yet others who might have been available as witnesses have also passed away.

It is a case of historic sexual assault because this is the only wrong-doing (amongst those identified by the plaintiffs) recognized as actionable in civil law. Plaintiffs also named other harms (equivalent to “loss of culture”) related to IRS policy and the actions of other AIRS employees as part of the action, harms explicitly acknowledged (and taken as fact) by Hogarth in the criminal decision. Brenner states that the Plaintiffs allege:

[para 263]...isolation from family and community, prohibition of the use of Native language, religion and culture, use of racist epithets, physical beatings, abuse, degradation and humiliation, creation of an environment of coercion and fear, overcrowded and inhumane residence conditions, serving rancid food.

Brenner does not deny that this violence occurred, but reiterates that these harms are either statute-barred or time-barred. (Plaintiffs will later unsuccessfully appeal this portion of his decision.) Harms related to “loss of culture” are excluded because they arise from Canadian policy, and again, the law does not rule on policy. The law rules only on whether policy is properly carried out (para 71). Even if actionable, these harms would be time-barred. Brenner reasons that the best possible interpretation of the statute of limitations would give “a reasonable person” six years beyond the age of nineteen to file a claim.82
[para 278]…Time does not start to run until this reasonable person would conclude that someone in the plaintiff’s position could, acting reasonably, in light of his or her own circumstances, bring an action.

Given the lack of explanation or justification from the plaintiffs as to why they would wait beyond this amount of time—it seems no understanding of the barriers presented by contemporary racism and poverty are imaginable to Brenner—and given that Brenner believes the plaintiffs would fail even if they had offered such a justification (as “loss of culture” is not actionable), Brenner rules that only “misconduct of a sexual nature” is allowed as actionable (para 281) in this case.\(^8^3\) He does however construe misconduct of a sexual nature broadly, to include physical abuse in the course of the sexual misconduct. Thus, the court begins to constrain what can be heard from the testimonies of the Indigenous survivors.

While the court denies cultural loss as an actionable tort, Brenner will allow all of the above itemized harms to be considered as “aggravating conditions” when assessing damages for historic sexual assault (para 333), as requested by the plaintiffs’ counsel. As we will see in my discussion of phase three of the trial, this does not benefit the plaintiffs. Again, law decides not only what will count as an actionable tort, but (almost whimsically) whether and when the past is deemed relevant to the present. Legal principles of the past (such as vicarious liability) frame the entire litigation, and carry forth the old values of possessive individualism into the present, even resurrecting the figure of the “reasonable person” whose mind starts “time running.” Yet, while Canada’s past policy regarding IRS (and the resulting cultural loss) is asserted or acknowledged as given, as something that is historically and factually true, it is deemed untouchable in the
case at hand. Colonial policy as a subtly menacing Cheshire Cat symbolically materializes and then fades once more.

5.2.1 Undermining Indigenous Collective Credibility

The seven plaintiffs who remain in this phase of the trial, are plaintiffs for whom criminal charges against Plint were not yet confirmed (in the criminal trial). That is, Plint has not yet confessed to these specific allegations. In the vicarious liability phase of the trial, where the focus was less on what happened, than on which business partner would be responsible for the employer who committed the wrong-doing, Brenner simply accepts that each of the plaintiffs who claims to have been assaulted by Plint, likely was assaulted at least once. However, phase two of the trial deals not only with damages caused by Plint’s alleged wrong-doing (and the extent of the damages for which Canada and Church are vicariously liable), but with allegations against other employees of AIRS, and allegations of direct liability on the part of Canada and the Church. The plaintiffs claim that other employees of AIRS also committed physical and sexual abuse against them (as Justice Hogarth observed in the criminal case: “there was a lot of violence used in the school”). For example MJ, the only female amongst the plaintiffs, alleges that she was repeatedly raped by Principal Caldwell and assaulted by a dormitory supervisor, Mr. Peake, during the time that Plint was employed at AIRS (para 38–56). She also claims to have suffered a broken nose from being pushed down a stairway (para 666) and to have been slapped and locked in a dark room by a matron (para 699, 700). MJ does not make any allegation against Plint (consequently, her claim will be dismissed entirely). Still others claim that Principal Andrews physically abused them (para 20), that they were
beaten by Humchitt (para 450), or that Mr. Hindmarsh (a temporary dormitory supervisor) fondled them (para 24). All told of their experiences of “the gauntlet,” a method of punishing “troublemakers” organized by teachers and/or principals. Indigenous children were forced to form two lines and the child to be punished was forced to run between them, sometimes naked. The children in the lines, and often the teachers themselves, were required to verbally ridicule as well as physically assault the child as he/she ran through the lines.

Although this is a civil case where Brenner must weigh the evidence with merely the “balance of probabilities” in mind (rather than the more stringent standard of proof beyond a reasonable doubt as in criminal cases), this case regards “morally grave conduct” (i.e., historic sexual abuse) and:

[para 10] The more serious the allegations the greater the care that must be exercised when considering the evidence.

As none of the accused admit guilt (some are no longer alive at the time of the trial to answer to the allegations against them), Brenner must avoid potentially tarnishing the reputation of those wrong-fully accused of sexual and physical assault. Thus Brenner subjects these claims to greater scrutiny than claims regarding Plint (para 15-17). 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. That is, they deny that they (or their employees) knew or ought to have known about “pedophilic behaviour” at AIRS.
In order to make a finding of fact “as to what likely occurred so many years ago” (para 9), Brenner explains that he must assess the evidence and apply the appropriate standards of the day (i.e., standards of the past). Details regarding the number of times a child was sexually assaulted, how they were sexually assaulted (“severely” or not severely), where the assault happened, when it happened etc., become important to the court. It is presumed that the more specific the details conveyed by the plaintiff, the more accurate the plaintiff’s memory. Determining the nature and severity of the sexual assault will (in phase three) also impact the amount of compensation received, for it is assumed that the more details recalled, the more traumatized the victim. Throughout the decision, but most clearly late in the damages phase (para 337–359), Brenner clarifies that in historic sexual assault cases with such a great “passage of time,” very little in terms of evidence is “objectively verifiable” (para 338). The judge must rely upon “subjective evidence” of the plaintiffs and,

[para 338] …In such circumstances the reliability of such subjective evidence, and consequently the plaintiffs’ credibility, become central issues.

Thus the determination of direct liability hinges directly upon the Judge’s perception of Indigenous credibility. Credibility is (minimally) a question of one’s quality of mind, one’s motives, and the reliability or accuracy of one’s memory and knowledge claims. Whereas in the criminal sentencing decision, Justice Hogarth found no reason to doubt the veracity of the vivid memories of the IRS survivors, in the civil case, the credibility of the plaintiffs seems to melt away. Of course, plaintiffs in historic sexual assault cases have typically been women. Historically, European women were denied legal personhood and
were considered the property of men. As such, their bodies were presumed to be of lesser worth, inherently sexual and thus biologically deficient (perhaps even responsible for the sexual violation). Women’s alleged diminished intellectual capacity and their inability to control their appetite (sexual and otherwise) compromised their ability to obtain objective knowledge (moral truths and justice) (Mossman 1998, Showalter 1985). The minds of Indigenous survivors may be similarly feminized in Brenner’s reasoning. They are certainly represented as unstable, emotional and tormented by “unhappy memories.” An explanation is implied by Brenner’s emphasis on the inner turmoil of survivors, who are forced to remember events they would rather forget:

[para 5] The assaults described by the plaintiffs were extremely traumatic. They have spent many years and much energy in trying to put these events behind them. Then, for this litigation they have been required to recall these unhappy memories.

[para 7] The point I make is that the trial process in a case of this nature inevitably requires plaintiffs to dredge up from the distant past memories of extremely unhappy and traumatic events. This is so notwithstanding the fact that most have spent the better part of a lifetime trying to put these sad memories behind them.

Moreover, because sexual abuse is typically committed in secrecy:

[para 8] ... Rarely are there other witnesses who can be called upon to either corroborate or challenge the parties’ evidence of the assault.

The very legal definition of what will count as an actionable tort—historic sexual abuse—the presumed nature of the crime (committed in secrecy by individuals in the “distant past”), and the type of body (feminized and/or not fully human), undermines the plaintiffs’ credibility (individual and collective) from the outset. Violated as children, survivors now
speak as adults. Their word as to what they experienced as children is not sufficiently convincing to the court. In Brenner’s reasons we see that law entraps Indigenous plaintiffs (and survivors of historic sexual abuse generally) in both a psychological and an existential conundrum. The psychological conundrum is as follows. If Indigenous survivors forget they must be forced to remember. If they remember, they must force themselves to forget. In this mental struggle between forgetting and remembering, significant detail is blurred or lost and accuracy is jeopardized. Although the ability to give detail about an event is taken as evidence that the event probably happened, these events happened so long ago and this mental struggle happens over so many years that the adult Indigenous survivors’ memories of sexual abuse in childhood are, according to the psychology experts who testified for the defence, subject to “recall bias” (para 418 – 420). Something likely did happen to them, but what it was and who did it, may not be clear. While they “believe what they remember is true—that is, they [for the most part] are not lying—their evidence is subjective and unreliable” (para 340). The law questions the ability of a survivor of sexual abuse to know their own mind and experiences. That is, law undermines what adult survivors of IRS violence and sexual abuse, can be said to know about their own bodies in the present. The internal property relation (mind’s ownership of body) which is the foundation of political and economic rights according to liberal individualism, is contested by the court. The fact that Plint confessed to so many similar counts of wrong-doing, renders it probable (to the court) that the plaintiff’s memories are (for the most part) accurate when recounting how Plint violated them. Yet, while the plaintiffs’ memories are reliable regarding Plint, the same memories are considered
unreliable when the violence of other employees surfaces in the testimonies. It at first appears to be a contradiction (in settler logic) that the Plaintiffs memories are both reliable and not reliable. But there is no contradiction, as their reliable memories have only derivative credibility anyway, rooted in a (once) white, but now racialized monstrous, body (Plint). That is, the Indigenous mind/body is credible only to the extent that what they describe is similar to crimes to which Plint has already confessed. Survivors lose even this derivative credibility when the white collective body comes forth in full force to deny their claims. Indeed when weighing the credibility of plaintiffs and defendants (both those who are alive and those who are dead and thus cannot defend themselves), in every instance it seems to simply come down to whom and what Brenner is willing to believe (see the next section). With respect to the seven plaintiffs and what they claim happened to them, Brenner accepts their claims regarding Plint. However, all allegations of sexual misconduct on the part of AIRS employees other than Plint, are dismissed due to lack of sufficient evidence. The alleged physical abuse on the part of employees other than Plint, will be explained away as consistent with standards of the day regarding corporeal punishment (contrary to Hogarth’s opinion on this very point).

In assessing credibility, Brenner is not assessing the distant past at all. Rather, he is evaluating the claims of people as they are in the present, sitting before him in his court. The word of other people (either perpetrators or witnesses) who existed when the Indigenous plaintiffs were children is necessary to confirm what the plaintiffs claim to know about their past experiences. Many of the witnesses or alleged perpetrators who might confirm (render probable) their experiences are dead. Of the people who were alive
at the time and are alive today, the court summons (or at least listens to) only those who deny having knowledge of violation to the bodies of Indigenous children. All witnesses and plaintiffs are remembering the distant past from their position in the present. All witnesses could be subject to recall bias, but this is never considered. The absence of knowledge of harm done to Indigenous bodies trumps the knowledge Indigenous people claim to have of harm done to their own bodies. In terms of their epistemic position as knowers, Indigenous survivors are relegated to the domain of children, for adults in the present—like parents, the most powerful person a child can know—know better than they do.

As stated, historic sexual assault claims are claims that individuals now know what happened to them, and more specifically what happened to their body, in the past. I suggest that within European thought, and possessive individualism specifically, the assertion that bodily integrity/boundary was violated unjustly, is itself a form of asserting control over one’s body. Denying someone’s claim that they know what happened to their body, is thereby one way to subtly undermine their control of their body (in the present). Here is one way in which property as both an internal and external relationship becomes the site of discursive struggle (between settler and native/Indigenous) within this case. In so far as adult Indigenous survivors are denied the experiential knowledge (basis of existence) they claim for their own bodies, they are excluded from the category of “the rational individual” who owns their own body as property. That is, they are dehumanized in this process. Moreover, historic sexual assault claims in the case of IRS litigation are also collective claims: an Indigenous collective claims to know that a settler collective
violated their bodies sexually (among other ways), as part and parcel of a wider strategy of genocide and the usurpation of land (the latter explicitly acknowledged by the Court).

One way to respond to this collective claim is the settler’s time worn strategy of reducing the Indigenous collective to a “horde” or “mass of neediness” in need of improvement (Fanon WE, Said 1993b, Rifkin 2009), i.e., to emphasize the aftermath of attempted genocide without ever admitting intent to produce this destruction on the part of the collective perpetrator that carried it out. The subject position of the possessive individual as one rationally in control of one’s own body is denied to Indigenous survivors collectively through law. This eviction mirrors the historical and contemporary exclusion of Indigenous people from owning private property in land under the Indian Act, as we saw in the discussion of the BC Treaty process. The two evictions—symbolic and material—fit hand in glove. In settler logic, if the collective memory of Indigenous people is unreliable when it comes to claims about what happened to their own bodies, how much more unreliable is the collective memory of Indigenous people when it comes to experiences (such as the signing of treaties regarding territory) passed down to them through generations?

Ultimately, Brenner accepts that FLB was abused by Plint on four occasions (including forced anal intercourse, forced oral sex several times, numerous physical beatings) and that FLB was beaten by Principal Andrews on one occasion (para 18–21). As plaintiff RF provided very graphic details of the abuse he experienced in Grade 7 at the hands of Plint, Brenner accepts RF’s claim that Plint attempted anal intercourse, oral sex, mutual masturbation, physical abuse, and made threats that RF would never see his
parents. Brenner accepts that Plint further assaulted RF six times off of the AIRS grounds (para 22–30). Regarding plaintiff RJ’s allegation that he was sexually assaulted by Plint (genitals fondled, oral sex), Brenner accepts that there were likely more assaults, but he cannot be sure they were more severe in nature because RJ cannot give details (para 31–37). Brenner accepts that plaintiff DS was assaulted by Plint on two occasions (fondled genitals, plus frequent unwelcome and offensive sexual comment) (para 57–60). He accepts that MW1 (para 61–64) suffered many assaults over three years (anal rape, oral sex, fondling, physical abuse). However, Brenner does not believe that MW2 (para 65) was fondled and masturbated by Plint, because Brenner suspects that MW2 was influenced by the testimony of the other plaintiffs given the similarity in the wording of their testimonies.

Although MJ, the only female, testified to more “particulars” than did many of the male claimants, Brenner finds MJ utterly lacking in credibility. MJ is now an alcoholic, suffers from poor memory of other life events, including five accidents which Brenner claims she ought to remember (despite his earlier emphasis that abuse survivors want to forget), she had endured a couple of abusive relationships in adulthood, and waffled on the number of sexual partners she had after she left the residential school. Another witness (an Indigenous female survivor of AIRS, but one who was not a member of this action) undermined MJ’s testimony in her statement that she (not MJ) cleaned Mr. Caldwell’s office on the weekends (where and when the alleged assaults occurred). Brenner found this witness believable because she had nothing to gain from her testimony. Further, with
respect to the rape by Caldwell, Brenner notes that MJ claimed Caldwell took her to the infirmary:

[para 48] She also says that while she was in the infirmary the nurse did not ask what had happened to her. She says Caldwell suggested to the nurse that it was a touch of polio.

Foreshadowing the reasoning to come, Brenner states:

[para 48 cont’d]…It is difficult to accept that a nurse when presented with a child who was bleeding heavily would not make inquiries as to what had caused the child’s problems. It is also unlikely that a nurse would accept the explanation that the problem was due to a touch of polio.

Brenner finds it “difficult to accept” that a nurse would behave contrary to the interests of a patient. MJ’s credibility cannot benefit from Plint’s confession, since she does not claim to have been assaulted by Plint. Justice Brenner dismisses MJ’s allegations against Caldwell and other employees (para 38–56). Brenner’s dismissal of MJ’s claim will later in 2003, be overturned by Justice Esson who found an inconsistency (overlooked by Brenner) in the evidence given by the other Indigenous woman’s testimony. MJ is at that time granted a new trial. Nevertheless, by the end of Brenner’s reasoning in this portion of his decision, there is but one lone perpetrator: Plint.

5.2.2 White Settler Collective Credibility

The preceding concerns Indigenous credibility regarding what happened to their bodies (what crimes were committed against them) when they were children. What follows is what adults of the day can be said to have known or ought to have known about Plint’s sexual abuse. In the previous section I showed how the credibility of Indigenous
knowledge claims is undermined by a combination of the legal definition of what may count as a tort, the clinical psychology accounts and the judge’s assumptions regarding how memory of the distant past is distorted, and the presumed credibility of both other witnesses and of people (such as the nurse in MJ’s account) whom the judge never even meets. In this section, I show how the claims of the Indigenous survivors are “out-weighed” by the claims of witnesses who counter their claims, either those called by the defence or those from whom Brenner selectively hears, witnesses who simply do not remember. All of what was believable and unquestioned by Hogarth in the criminal sentencing of Plint, becomes unbelievable and questionable in the civil case. In this portion of the decision the contrast between Indigenous testimony as child-like, and a settler collective counter testimony as more objective, is solidified. Ultimately, it is Brenner’s imagination which assigns or withholds credibility to witnesses.

Brenner now considers whether Canada and the Church are directly liable on the grounds identified by the plaintiffs: negligence, breach of non-delegable duty of care, and breach of fiduciary duty. Although, Brenner holds that Canada and the Church both owed a “duty of care” towards the Indigenous children at AIRS, a duty which arises from policy (para 71–79), in Canada’s case, the colonial policy of the Indian Act, and that Canada’s duty was non-delegable (as the purpose of the Indian Act rendered Canada the senior business partner), neither Canada nor the Church, will be found negligent or to have breached a fiduciary duty. While both Canada and the Church owe a duty of care, the standard of care must be assessed according to standards of the day (the past), which are very low standards (AFN 2004).
The claim of negligence means that Canada and the Church either knew of the abuse (had actual knowledge of abuse) at AIRS or ought to have known about the abuse (had constructive knowledge of abuse) at AIRS and failed to investigate or prevent such abuse. In deciding whether Canada and the Church had actual knowledge about the abuse, Brenner weighs the probability that the children complained of abuse to teachers and others (para 92–32). In deciding whether Canada and the Church ought to have known about the abuse committed by Plint (even in the absence of actual knowledge) Brenner weighs what “a reasonable person of the day” can be expected to have known about child abuse (para 84, 91). He reminds the court that he must consider the time period in which the alleged negligence occurred and whether Canada had “foresee-ability of paedophilic behaviour” (para 85). He must be especially careful not to allow present day knowledge regarding child abuse to affect his assessment (para 84, 91).

All plaintiffs (the original twenty-seven, as well as the seven remaining plaintiffs) testified to “…their efforts to disclose both what they saw and experienced …” but, according to the plaintiffs, no one did anything about Plint. The plaintiffs gave details as to when they told teachers, police officers, RCMP officers, school nurses, AIRS principals, and parents (para 92–132). Yet Brenner does not find their testimony credible or probable. Rather, he finds it difficult to conceive, difficult to accept, and difficult to imagine, that the plaintiffs told others:

[para 98] It is difficult to conceive that an investigation into allegations of sexual abuse of children involving the RCMP would be conducted in this fashion, even in the mid-1960s. I consider it extremely unlikely that the RCMP would have allowed Mr. Andrews to conduct questioning during a criminal investigation or that such questioning would take place in a motel room.
[para 101] …whatever Mr. VJ may have told the public school teacher at G.W. Gray, there is no evidence that any of this information was passed on by the teacher to anyone at AIRS or anyone else employed by either Canada or the Church.

[para 104] It is difficult to accept that police officers would handle a complaint of such a serious nature so cavalierly. I consider it unlikely that Mr. J was as specific with the police as he now remembers.

[para 106] It is difficult to accept that a school nurse would have simply left a sick child in the infirmary, much less a child who had reported that he had been sexually abused….there is no evidence that this unidentified nurse reported to anyone else whatever it was that Mr. M told her.

[para 109] It is difficult to imagine that any individual, much less a nurse employed by the Department of Indian Affairs (or the equivalent of the day) at an Indian Hospital, would respond to a child’s complaint of being sexually abused at another Indian Affairs institution by stating that it was “none of her business.”

Although Brenner must refer to “the standards of the day,” he seems to impose his own understanding of professional character and ethics onto the professionals of the past. The balance of probabilities seems to come down to what Justice Brenner himself is willing to believe about the other AIRS employees, government officials, and members of the wider community. His imagination cannot fathom faulty police work, incompetent nurses, or racism amongst Canadians (professional or otherwise) of the past. The above passages essentially assert that such people are inherently good, well intentioned, responsible and trustworthy. Thus, Brenner’s imagination is the source of the collective credibility and integrity of these people. Brenner also fails to imagine that in the past, there may have been gender, social and economic power differences between nurses (likely female) and police, government officials, and principals (likely male) which could plausibly explain why female nurses and teachers (especially those with racist views) might not question
their superiors or might not be willing to take a risk on behalf of Indigenous children.

Brenner seems to simply declare that there is no evidence of racism at AIRS of the day.\textsuperscript{89}

Relatively, in deciding whether “it is more probable than not” that Principal Andrews as employee of both Canada and the Church, knew of the abuse, Brenner (contrary to Hogarth), finds the adult memory of an aging, deteriorating, white man regarding something that happened “more than 50 years ago” to be more credible than the Indigenous adult memory of child sexual abuse, or the words of a convicted pedophile. Plint testified that Principal Andrews knew of the abuse Plint committed (Stonebanks 1998), but Brenner dismisses Plint’s testimony as motivated by self-interest (para 119). Of Mr. Andrews, Brenner states:

\begin{quote}
[para 123] At this stage it is difficult to determine whether in fact John Andrews was ever told about Plint’s sexual assaults at AIRS. Although elderly, in failing health and virtually blind when he gave his evidence at trial, he resolutely and unequivocally denied that he had ever been told. Despite his advanced years and deteriorated physical condition, I found Mr. Andrews to be a man of firm conviction and one who I suspect was never much plagued by self-doubt.
\end{quote}

Mr. Andrews is thereby recognized as a rational individual, whose mind and knowledge claims are credible. Many of the plaintiffs testified that when they told Principal Andrews about the sexual abuse committed by Plint, Andrews accused them of lying and gave them the strap. Brenner (again contrary to Justice Hogarth) seems to accept that corporeal punishment, and the other physical violence, experienced by the plaintiffs was common and viewed as acceptable during the 1960s. In a strange twist of logic, Brenner uses this fact of physical violence to undermine the plausibility of the claim that children told Andrews about sexual abuse.
[para 124] [Andrews] served in the Royal Navy. It is likely that with his military background he ran AIRS with a very firm management style. He no doubt insisted on maintaining strict discipline and good order. As part of that, corporal punishment was administered liberally at AIRS, as it was also used in schools throughout British Columbia until its abolition by the provincial government in 1972.

[para 125] I believe that it would have been a daunting prospect indeed for any of the plaintiffs to have gone to Mr. Andrews and complained to him about the sexual depredation of Plint…

What child would dare raise the issue of sexual abuse if a beating was likely to ensue? But we could ask, what then were the beatings for, if not in response to allegations Andrews did not want to hear? Allegations about a man (Plint) who, given the army experience etc., seems to have had much in common with Andrews. We are left with the assumption that the plaintiffs must have received a beating simply for misbehaving. Ultimately, Brenner claims to know the minds of Indigenous children and adults, better than adult Indigenous people know themselves. Reiterating a patronizing move he made earlier, and one common in law, Brenner states:

[para 126] I conclude that those who testified about communicating the sexual assaults at AIRS hold an honest belief that, at the time, they reported these painful events as they described. […]

However,

[para 126 cont’d]…I also conclude that Mr. Andrews when he testified was equally convinced that he was never told about Plint’s sexual assaults before he fired him.

[para 132]…the plaintiffs carry the burden of proof on the issue, I am simply unable to conclude that it is more probable than not that any reports of the sexual assaults were communicated to Mr. Andrews or any of the other AIRS employees prior to Plint being fired.
On the other hand, (earlier in the decision it is made clear that) Principal Andrews knew enough to be suspicious of dormitory supervisors on occasion:

[para 115] Mr. Andrews says he fired Mr. Flynn, a dormitory supervisor, for being caught with a boy in his room.

Further

[para 120] [D.W.]…also testified about Plint’s departure from AIRS. He says that he and about half a dozen other boys went to Mr. Andrews and told him that Plint had sexually assaulted him in May or June, 1968.

Thus the plaintiffs’ claims that they told AIRS employees about the abuse, are credible only in instances when their telling resulted in the firing of employees such as Plint, that is, only in instances when the principal did the right thing. The possibility that it took many such tellings and beatings, and much time (Plint worked at AIRS for ten years) before Andrews acted on the complaints is not something Brenner considers probable. Ultimately, the stories of the many plaintiffs are undermined by what one white person (Andrews) is able to remember and by what another white person (Brenner) is willing to believe.

Deciding there was no actual knowledge of abuse on the part of Canada and the Church, Brenner now considers whether there was constructive knowledge. Brenner must consider what a “reasonable person could be expected to know at the time” the abuse occurred (para 188). Brenner concludes that a reasonable person (of the past) would not have known about sexual abuse at AIRS because:

[para 135] …the unspeakable acts that were perpetrated upon these young children were just that: at that time they were for the most part not spoken of.
Brenner bases his (circular) decision on the fact (according to expert testimony) that child abuse came to the attention of the Canadian public only after 1978 and Canadians did not know what to look for, prior to this date. Even if people were aware of sexual abuse (as isolated instances reveal before the court), they would rarely “talk about” it. As stated above, it seems likely to Brenner that each of the plaintiffs honestly believe they told officials about the sexual abuse but likely complained only about the physical abuse, which was common in the day. No one talked about sexual abuse back then, so how would a child even raise the subject. Yet there is a difference between not being aware of something “inappropriate,” (as some witnesses termed it) and being aware of it, but not talking about it or knowing what precisely to call it. There is also the possibility of being aware of the brutality and thinking that it is a justified or normal part of the civilizing mission. (Plint often beat the children he raped.) Bruised bodies might be the norm (a consequence of the daily gauntlet or corporeal punishment) and not a cause for concern, simply evidence that the mission is working, especially if the Indigenous children are portrayed as troublemakers.\(^9^0\) Brenner’s reasons equivocate between knowing when something inappropriate is going on, and knowing what sociologists / psychologists name it. He further suggests that even if the defendants knew about the sexual violence (which Andrews must have known at least in cases where he fired the employee), they cannot be blamed for not knowing the extent of it, nor for failing to intervene. After all, each plaintiff testified that they (as children) thought they were the lone targets of abuse (para 136). Further, plaintiffs told their parents but even their parents did nothing (para 148). \((Parents \ who \ could \ be \ jailed \ for \ keeping \ their \ children \ home.)\) After a lengthy portion of
the decision reiterating the same claims, Brenner simply declares that he finds it very
difficult to believe that other AIRS employees would have known about the abuse in such
circumstances. He states:

[para 147] it is difficult to see how it can be said that other adults without
the tragic benefit of such insight should have known that sexual abuse
was an ongoing problem at AIRS.

With great emphasis, Brenner then summarizes the evidence from eleven witnesses from
the wider Alberni community, who were once employed in the IRS and public education
system (para 155–169). I quote at length:

[para 155] Ms. Oliver noted that a lot of the children were unhappy; she
attributed that to being far from home.

[para 156] Jean Kidd …worked as a nurse…She was critical of the
children’s diet and medical record keeping at AIRS. She says she became
aware of one sexual assault while she was at AIRS…She arranged for the
boy to be seen by a doctor from port Alberni who after examining the boy
asked her if there were any homosexuals at the school. Ms. Kidd replied
in the affirmative.

[para 159] Claire Hunston was a guidance counsellor at AIRS. She
testified that…a dormitory supervisor reported to her that a night
watchman had “molested” a student during the night.

[para 160] Mr. Avery worked as a dormitory supervisor…Mr. Avery said
that there was nothing that would even cause him to suspect that sexual
abuse was going on.

[para 161] Ian MacMillan spent just under two years at AIRS…as a
secretary to Mr. Caldwell, then he became a boys’ supervisor.
Throughout he lived on the premises. …[ para 162]…he never heard or
observed anything which led him to suspect that children at AIRS were
being sexually abused….sexual abuse of children was not something
talked about back then; in fact he says it was never even thought about.
Brenner found the testimony of the doctor (Dr. Ross) who treated the children at that school especially convincing:

[para 169] In my view the evidence of Dr. Ross is very significant. He was at AIRS virtually every day. He was a trained physician. Yet he never suspected the sexual abuse that was occurring at the residential school.

The testimony of employees in the public school system (where some of the plaintiffs studied after all but religious education was delegated to public schools) also strongly influences Brenner’s decision (para 170 – 206). A teacher, Mr. Gilbert testified that:

[para 172] ….there was no sense that there were paedophiles loose in the school system. He did describe several incidents which today would likely be considered inappropriate behaviour.

Of the testimony by a principal in the same public system, Brenner states:

[para 178] Mr. Lyon testified that he never heard any reports of abuse of students who were attending AIRS. He did hear reports of physical or sexual abuse of other students but these were “pretty rare.”

[para 179] On cross-examination Mr. Lyon testified that he could recall two specific incidents involving inappropriate sexual behaviour towards a child on the part of a member of the teaching staff…

[para 181] Mr. Lyon testified that it never crossed his mind to think that children resident at AIRS were being sexually abused at that institution.

[para 185] Mr. Pearson testified that he never had reported to him by anyone that a native student had been physically or sexually abused.

[para 186] Mr. Iverson, who was involved with children in his Ministry and as a hockey coach, testified that the issue of sexual abuse was never in his mind.

Brenner concludes:
[para 187] In my view the foregoing rather lengthy review of the evidence from those who were in the Port Alberni community at the relevant time belies the proposition that the sexual abuse that was occurring at AIRS was known in the wider community.

It seems that these eleven testimonies, taken together, seal the fate of the plaintiffs’ and their failure to convince the judge. There is no concern that any of these witnesses may suffer recall bias. Brenner does not imagine possible explanations as to why these witnesses would have nothing to remember. Again, perhaps their lack of attention or caring about these Indigenous children can explain why they did not take notice at the time? A lack of memory of what happened to someone else again overrides someone’s memory of what happened to their own body. A lack of shared knowledge in the wider community renders it unlikely that AIRS employees ought to have known about the violence. Yet, confusingly, passages in the decision seem to indicate that people of the day did have knowledge of sexual abuse. IRS guidance counsellors, social workers and teachers give examples of abuse in their testimony (see para 115, 156, 159, 172, 178, 179, 189–198). Relatedly, the plaintiffs’ counsel point to Canada’s own reports which acknowledge such incidents (para 189 – 198). Brenner claims that:

[para 198] The issue is whether five incidents over a span of five decades, considered in light of the number of schools and residences across the country and the standards of the era in question, raised sexual abuse as a foreseeable risk in the system such that the Church and Canada ought to have done more at AIRS to prevent Plint’s depredations...”

However, Brenner simply declares:

[para 198]...I disagree. I conclude it did not. The incidents were relatively rare.
Brenner concludes:

[para 205] In my view there is insufficient evidence to support an inference that a reasonable adult associated with residential schools would have considered these instances to be suggestive of a systemic problem which required further investigation. In fact the only evidence is in many respects to the contrary: such reports were considered to represent isolated acts which could properly be addressed by removing the perpetrator from the institution.

From the preceding it seems that Brenner has selective hearing. If we assume that the plaintiffs did tell on numerous occasions, then there were numerous isolated acts which were not investigated. Brenner implies that if AIRS employees of the day had no conceptualization of isolated acts as systemic, that they therefore had no knowledge of the numerous isolated acts themselves, problems warranting investigation. Yet there were multiple firings. Relatedly, while numerous employees knew of abuse (or inappropriate behaviour) their inability to recall having a conversation with each other about it, entails that there was no collective knowledge of the abuse. Given the difference between past and present standards of knowledge and analysis regarding child abuse, there is no possibility of actual or constructive knowledge of sexual abuse on the part of past AIRS employees. Taken together, witnesses for the defence (professionals, adults) have a collective credibility outweighing the collective credibility of Indigenous plaintiffs (again perpetually infantilized). Brenner goes even further to cleanse the settler collective of guilt and responsibility when, relying upon the defendant Canada’s IRS reports of the day (para 207–227) he suggests:

[para 225] The reports from Canada’s inspectors suggest that, in fact, AIRS by the standards of the day, was a reasonably safe environment for the children.
Implicit in this insulting and perhaps terrifying statement as heard by Indigenous plaintiffs, is the fact that (as Hogarth phrased it) there was a lot of violence throughout the IRS system, and yet this passes for “reasonably safe.” Brenner dismisses the claim that Canada and Church were negligent (para 228–232). It seems likely to him that only the perpetrators knew of the abuse (para 229), which was conducted in secrecy. The story the plaintiffs tried to tell when they were children, is twice silenced when they try to tell it as adults in the present.

Brenner then briefly considers whether Canada or Church breached their fiduciary duty towards Indigenous people and children (para 233–248). This claim inches us closer to Canada’s colonial policy as wrong-doing. He will find no such breach. Brenner explains that:

[para 233 The plaintiffs’ breach of fiduciary duty allegations are a restatement of their negligence allegations with the addition of several claims specific to the breach of fiduciary duty allegations. The plaintiffs say that Canada breached its fiduciary duty by removing the plaintiffs from their communities, homes and families and causing them to be transported and placed at AIRS, depriving them of family love and guidance, friendship and support of their community, and knowledge of the language, culture, customs and traditions of their nation.

And by,

[para 234] …operating a residential school whose students and residents, including the plaintiffs, were systematically subjected to abuse, mistreatment, and racist ridicule and harassment, particulars of which include [isolation from family and community; prohibition of the use of Native language and their practice of Native religion..]

Brenner later clarifies:
To find a breach of fiduciary duty there must be conduct that is dishonest or is perpetrated for personal advantage in a relationship of trust and confidence. On the evidence in the case at bar is this what either Canada or the Church really did?

In my view the answer is “no.” There is simply no evidence of dishonesty or intentional disloyalty on the part of Canada or the united Church towards the plaintiffs which would make it permissible or desirable to engage the law relating to fiduciary obligations. I include in this conclusion the more general complaints of the plaintiffs relating to linguistic and cultural deprivation. In my view the plaintiffs have failed to demonstrate that either Canada or the Church were acting dishonestly or were intentionally disloyal to the plaintiffs.

This is not to suggest that the Indian Residential School policy in this country was not flawed. …However, even a badly flawed policy does not necessarily equate to a breach of fiduciary duty in law. It is only when the flawed policy contains within it the necessary indicia of dishonesty or disloyalty that the breach of fiduciary cause of action is engaged…

Any nation to nation treaty obligation / promise (if there was one) of offering education to Indigenous children in return for access to territory and sharing resources, but delivering programs of assimilation and cultural annihilation to serve the settler colonizers’ interest, is not considered dishonest or contrary to Indigenous interests, just “seriously flawed.” Collateral damage in the course of the business of nation-building is a serious flaw, but not one borne of malice or dishonesty. The claim that Canada had no intent to be dishonest or to act against the interests of Indigenous children and communities, undermines the Indigenous framing of IRS as genocide, for genocide is rarely accidental, especially when attempted consistently and continuously for over one hundred years. Further, the emphasis on isolated individual wrongdoing masks the collective nature of IRS violence and its imbrication with violence elsewhere in the community and the wider
colonial force field. With the exception of monsters like Plint—who failed their “parental” duties—settlers may rest assured that they occupy Indigenous lands with impunity.

Brenner does however, find that Canada (despite its business partnership with the Church) breached a non-delegable duty rooted in colonial power (para 249 – 255):

[para 254] In my view to answer this question one must consider the Indian Act as a whole and the nature of the powers conferred on Canada. I believe that the legislation is clear: Parliament intended Canada to have control over virtually every aspect of the lives of Indians. Control over their schooling was but one category.

[para 259] Given the very high standard of care imposed on Canada under the provisions of the Indian Act and given the virtual absolute control over the lives of native peoples conferred on Canada under that legislation, I conclude Canada failed to discharge its statutory obligations to the plaintiffs in this case. ...Canada in the case at bar owed a duty of special diligence to the plaintiffs. I conclude that it fell short of discharging its duty in this case.

The real purpose of colonial policy is openly acknowledged: the goal of controlling every aspect of Indigenous life, not merely through IRS but through other “categories” and mechanisms of control. The non-delegable duty means that Canada ought to have been more careful in its hiring, monitoring, and firing of employees, independently of the Church’s involvement in this regard. This component to the decision does not alter anything substantial in the damages phase. Canada and Church both remain only vicariously (no fault) liable for the sexual assault committed by Plint. However, Brenner’s wording—Canada’s “non-delegable duty”—connects IRS more directly to the operation of colonial power on the part of a sovereign nation (rather than a religious entity).

Colonial policy as menacing Cheshire Cat re-appears. Perhaps this is why, as previously
stated, the Supreme Court will in 2005 be quick to overturn this component to Brenner’s decision? I return to this point in the conclusion of this chapter.

Throughout this second phase, adult Indigenous minds and bodies are discursively constructed as child-like and unreliable sources of knowledge, as humans with little or no control over their own bodies or how violation to their bodies is to be remembered. Such consignment of Indigenous people to the category of child (with presumed underdeveloped intellect) is a common settler discursive strategy (Schaffer and Smith 2004, 111; Rifkin 2009). The process of dehumanizing the Indigenous individual and collective as property is firmly in place. In contrast to “the native,” the settler collective is in turn, constructed as adult/parent and rational knower (more powerful in relation to children/property). Possessive individualism operates as a regime of truth in Blackwater v. Plint in ways both reminiscent of, and dissimilar to, how it operates in R v. Plint. In the criminal trial the violence of colonial policy, the IRS system and the acts of many employees as revealed through Indigenous testimony (which Judge Hogarth found believable), generates anxiety for the Court. The rational individual and his property schema is called upon to quiet this anxiety. In the civil case, despite an even more pronounced recognition of the violence of colonial policy—one might even say the embrace of the fact of the violence of colonial policy, and thereby the violence of settler assertions of sovereignty—settler anxiety seems non-existent. This is perhaps because policy is immune from litigation, and perhaps because Justice Brenner refuses to find Indigenous testimony believable. Yet in the next and most important phase of the decision, the ontological force of property—the settler’s move to “lock” the native in
his/her body—becomes even more pronounced and pernicious. If not for the purpose of quieting white anxiety (as we saw in the criminal sentencing decision) then why? If the settler state is protected by law (colonial policy is not an actionable tort, the government’s business of nation-building is affirmed as rationally motivated), and the settler collective is reassured of its rightful occupancy of land, then what purpose does this enhanced time-worn practice of marking the collective Indigenous body as property serve? While the answer to this is embedded in the judicial decisions regarding Plint, the full force of the settler’s discursive strategies will not be understood until Chapter 6 and the discussion of the IRS class actions.

5.3 Phase Three: Damages—to Person or Property?

Below the corporeal schema I had sketched a historico-racial schema, the elements that I used had been provided for me…by the other, the white man, who had woven me out of a thousand details, anecdotes, stories. …

…”Look, a Negro!” It was an external stimulus that flicked over me as I passed by… “Look, a Negro!” It was true. It amused me. “Look, a Negro!” The circle was drawing a bit tighter. I made no secret of my amusement. “Mama, see the Negro! I’m frightened!” Frightened! Frightened! Now they were beginning to be afraid of me. I made up my mind to laugh myself to tears, but laughter had become impossible. (Fanon, BSWM 111–112, my emphasis).

Frantz Fanon has eloquently articulated his terror in the face of the settler’s logic and value scheme which transforms his body into an object, into property “out of a thousand details…” (BSWM 111–114). In the above passage, Fanon reveals how the settler’s marking of the native body generates fear in the settler. “Now they were beginning to be afraid of me.” We can sense Fanon’s wariness over the possibility of the violence to come.
Other anti-colonial theorists (e.g. Taussig 2004a) have also documented how the settler’s fantasy of the native as violent (something to be feared), is in turn used to justify the settler’s further violence against the native, in an effort to control the native’s body/land and to feel racially superior. In this third phase of *Blackwater v. Plint*, Justice Brenner must assess damages for harm to “person or property” which result from the historical sexual assault committed by Plint against the seven Indigenous plaintiffs. When he is finished, the Indigenous survivors who, throughout the decision, have been (woven out of a thousand details) deemed perpetually child-like, will be more explicitly portrayed as property in need of transformation and improvement. I suggest that the strategy of reducing Indigenous survivors to property becomes even more pronounced in this phase precisely because the settler freely boasts about the violence of settler sovereignty (the violence of IRS as a colonizing mechanism), violence for which the Indigenous collective must be seen as having “invited” (Said 1993b). We may wonder what further violence on the part of the settler is to follow in this seemingly endless cycle of marking.

In determining damage to person or property, Brenner reminds the court that:

[para 327] The fundamental principal [of tort law] to be applied …is that the plaintiff must be placed in the position he or she would have been absent the commission of the tort.

Law requires that plaintiffs prove (on a “balance of probabilities,” para 360) that the tort directly caused the damage. Are the psychological, physical and pecuniary harms claimed by the plaintiffs, a direct result of the sexual violations committed by Plint, or might they have been caused by other traumatic experiences in their life? Cases of historical sexual assault (in general) pose a difficulty for the court, as Brenner explains:
[para 365] In cases of historical sexual assault, the plaintiff is likely to be claiming for chronic injuries, often psychological in nature. It is not uncommon for the life history of a victim of a historical sexual assault to include numerous stressful, unpleasant experiences unrelated to the sexual assault. Individuals such as the plaintiffs in these matters, come before the courts with diagnosis of post-traumatic stress disorder, depression, substance abuse and other psychological conditions. Unravelling the question of causation in these cases arising as they do from torts committed so long ago is a daunting task.

While the above quote applies to all victims of historical sexual assault, the “life history” and “numerous stressful, unpleasant experiences unrelated to the sexual assault” in the case of IRS survivors, includes an array of violence committed in the course of forced assimilation and cultural genocide. Plaintiffs’ counsel argued that, although “loss of culture” is not a recognized actionable tort, the practices associated with it, should be considered as “aggravating conditions” for the sexual assault committed by Plint. For example, FLB described how he would wait in terror each night, wondering if on that night, Plint would snatch him from his bed and hurt him (para 479). In testimony such as this, we see how the organization of IRS/AIRS enabled the violence of people such as Plint. Brenner allows this move on the part of plaintiffs’ counsel, and openly acknowledges the other harms committed against Indigenous children, as rooted in colonial policy:

[para 332] It is shameful that these plaintiffs, along with so many other First Nations people, have a position which was in so many cases severely disadvantaged by the negative life-long effects of the simple fact of attending at an Indian Residential School.

Having noted the shameful simple fact of forced attendance at IRS, Brenner reminds the court that:
[para 333] …it is not the judicial role or function to engage in a consideration of such societal matters. My task is to apply principles of tort law and assess a dollar award for the injuries which the plaintiffs have suffered and which were caused by the proven sexual assaults. These principles require me to consider the fact of attendance at residential schools not as a basis for an award of damages in and of itself, but rather as a factor to be considered when assessing the impact of the sexual abuse. It must also serve as a baseline for a comparison of the effects of the sexual assaults which were committed [see also para 376].

[para 334] 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.

[para 336] My task is to set an award of damages sufficient to compensate the plaintiffs for the differences between the way their lives would have been, given what even the defendants concede placed them in a severely compromised position by reason of their forced attendance at AIRS and the way their lives have been, given the additional, but by no means insubstantial, fact of the sexual assaults. [see also para 375]

From the preceding, we see that there are two types of factors which may have had a psychological impact on the IRS survivors. First the sexual assault committed by Plint.
Second, “the simple fact of attending IRS” and all the harms to which it gave rise: forced removal from family and community, being prohibited from learning their language and culture, experiencing racism and the everyday violent practices within IRS (such as the gauntlet or the frequent corporeal punishment). In the course of Brenner’s decision, a third factor will be emphasized: the nature of the plaintiffs’ home-life prior to removal to AIRS, and the nature of their lives after leaving AIRS. While only the first (sexual assault) is an actionable tort, the second (the violence of IRS) must be looked at as contributing significantly to the resulting life trauma as claimed by the plaintiffs. The third (their home life prior to AIRS and their way of life after leaving AIRS) will be emphasized as a plausible explanation of damaged lives in adulthood and seems to mitigate the harm that resulted from the mere attendance at AIRS (attempted genocide). That is, the damaged life, damaged bodies, damaged culture which 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).

As noted, Canada and the Church engage in a “disturbing” strategy: they acknowledge and indeed emphasize, that the psychological trauma experienced by the plaintiffs likely resulted from mere attendance at IRS, or any of the other racist and assimilationist (genocidal) practices they experienced. They have engaged this disturbing strategy in order to blur the line of causation between the sexual assaults for which they are vicariously liable, and the psychological damage incurred to survivors, in the hope of decreasing the amount of compensation they will have to pay the plaintiffs for Plint’s violence. Brenner comments on this strategy at length:
[para 376] All parties in the case at bar agree that the plaintiffs’ original positions were significantly compromised position by reason of their compulsory attendance at AIRS.

[para 377] In their submissions Canada and the Church stressed all of the traumatic, non-sexual experiences the plaintiffs went through while at AIRS. While it may seem anomalous that the parties which ran AIRS would come to court and emphasize all of the negative aspects of the residential school (excluding the sexual abuse), such is the result of the plaintiffs’ non-sexual abuse claims being statute barred. The defendants also stress the plaintiffs’ background and life experiences before and after attending AIRS.

And later,

[para 458] I have earlier pointed to a stark incongruity in this case. The defendants, who were jointly responsible for AIRS, are in complete agreement with the plaintiffs’ depiction of their non-sexual abuse mistreatment at AIRS. By emphasizing the statute barred non-sexual abuse, the defendants seek to minimize the relative impact of the compensable sexual abuse. As distasteful as this may appear it is nonetheless the inevitable result of the Legislature’s decision to remove any limitation period for the tort of sexual assault while leaving all other limitation periods unchanged. (My emphasis.)

While the defence strategy on the part of Canada and Church is indeed disturbing, it is made more so by Brenner’s emphasis upon the third possible causal factor: the prior home-life of the plaintiffs and their life after leaving AIRS. As I will show, Brenner’s reasoning resurrects the old biological racism so core to possessive individualism, a move which scholars have noted becomes more pronounced when the legitimacy of the settler’s occupation is questioned (Anderson 2007, Fitzpatrick 2001). I suggest that the legitimacy of settler occupancy is questioned as a result of Canada’s acknowledgement of (non-actionable) genocidal practices. Brenner appeals to legal principle in order to justify this form of reasoning:
…with 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. In my view these are all factors that I must assess in this case in accordance with the principles in Athey.

According to the “thin skull” and “crumbling skull” rules of law (in Athey), a pre-existing condition (thin skull) which may result in the worsening of effects of the tort does not exempt one from liability, however, the defendant is not liable for effects which would have resulted from the precondition anyway (crumbling skull, para 362, 382). Where more than one wrong-doing (or set of causal conditions) occurred as revealed in the preceding passages, it becomes a challenge for the judge to siphon off the consequences of one harm from the other especially when the effects of the tort are psychological (that is, not objective). If a clear line of causation cannot be drawn between the wrong-doing and its damage, then the amount of compensation for the tort may be decreased. Another consequence of this reasoning is that the sexual assaults which are actionable torts are deemed less significant than other violence (such as running the gauntlet). Consequently, Brenner spends less time on the impact of the sexual assaults than on the impact of other violence experienced by the plaintiffs. He finds it difficult to pinpoint which aspect of the physical and sexual assault committed by Plint, gave rise to trauma.

[para 445] The sexual assaults were accompanied by violence. Plint would hold his hand over Mr. Barney’s mouth to keep him from calling out for help, punch him in the stomach and hit him on the head around the ears. Plint also threatened to kill him. Mr. Barney believed these threats and was understandably terrified.

[para 446] After the sexual assaults started there was no place at AIRS where Mr. Barney felt safe, and no one at AIRS with whom he ever felt safe. He lived in constant terror of seeing the omnipresent Plint.
The fact that the sexual assaults continued, and that he never knew when he would be assaulted, added to Mr. Barney’s anguish:…[How did it make you feel] “Helpless, horrified, sick. I lived in fear all the time, Peter. Whether it was happening or whether it was going to happen because it happened not just in his room, not just in his office, so it was—I didn’t know when to expect it. I didn’t know when to—there was no escape. That’s how I feel.

The violence associated with forced assimilation and genocide is conceptualized by law as unrelated to the sexual violence committed by Plint, and is explicitly acknowledged as having devastating effects on the plaintiffs. Plaintiffs are portrayed as responding to this terror with attempts of suicide and / or violence against others.

Shortly after arriving at AIRS, [FLB’s] head was shaved, depriving him of his long hair which he had been taught was his strength. After his hair was cut he lost his identity as a Native person. He described the significance of his removal from his family and Native culture as follows:

“I was deprived of the love and guidance of my parents and siblings for five years. I lost my Native language and Aboriginal culture and was removed from my family roots. The enormity of the loss of both my culture and my connection with my family feels overwhelming and the effects irreversible. I lost my identity as a Native person. I live with a sense of not knowing who I am and how I should be in the world. I lost the friendship and support of my friends and community. I suffered a loss of self-esteem…. [para 437] …I’m beginning to learn through programs, like for instance survival of the residential school program, being introduced to actual ideas of assimilation of my people, I’m angry about my loss of culture…It’s sickening. It was obvious the tremendous effect it has had on me as a person and yes, I get angry as hell.”

Many testified as to the terror of the gauntlet specifically. 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 (para 835, 847). After FLB’s first experience of the gauntlet, he “…tried to kill himself by jumping head first off the exterior stairs of AIRS” (para 440–441). As
Indigenous survivors testified regarding the daily terror to which they were subjected while imprisoned at AIRS, they would experience yet another terror in the Courtroom, in Brenner’s twisting of their experiences to undermine their claim. The vileness of the settler’s turning the fact of cultural genocide against the victim of genocide in order that the perpetrator of genocide (Canada and Church) could save some money, is readily apparent in Brenner’s logic. Thus I quote extensively:

[para 442] Mr. Barney’s reaction to this incident provides insight into the cause of his reactions to subsequent unpleasant events in his life. When asked how it made him feel to be forced to run the gauntlet for playing hide and seek Mr. Barney said:

“Very, very hurt, humiliated, terrified and even more significantly, I – because I didn’t understand what I was being punished for, I didn’t—I didn’t’ accept the punishment as right to me. It was hurtful in a way where I—I cried half the night […] And I got very tight. I was very sore and tight.

[para 450] Mr. Barney testified that the other physical violence, unrelated to the incidents of sexual assaults, which he experienced and witnessed at AIRS had a lasting effect on his personality. He said the he was beaten by Humchitt, Plint and Andrews as well as by other boys while running the gauntlet and that those beatings started within a few months of his arriving at AIRS. Each time he ran the gauntlet he felt terror and hurt.

[para 454] It is questionable as to whether Mr. Barney’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. He responded with violence to any individual who was angry or insulting to him. The unfortunate consequence, as he recognizes, is that his willingness to resort to violence has caused his social isolation…

[para 457] While Plint sexually brutalized Mr. Barney while he attended AIRS, I conclude that the non-sexual brutalization he suffered also had a significant impact.
[para 519] At AIRS, Mr. Barney 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. Barney 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.”

[para 520] At AIRS, both before and after he was sexually abused, Mr. Barney regularly fought with other boys. He did so because he became terrified when somebody got angry with him, and “it was meanness that took over me.” This instinctive “meanness,” and the overwhelming urge to resort to violence, pre-existed the sexual assaults and continued unchanged following the sexual assaults….

[para 522] … The fact that Mr. Barney 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.

[para 555] … Mr. RF was asked about other factors that were responsible for his increased drinking. He testified “Well, the many memories, horrible memories, of being confined against my will, I was in prison.” It is significant that Mr. RF did not connect his drinking pattern with the sexual assaults. Rather he linked the increased drinking to his memories of his confinement at AIRS.

[para 616] Mr. RJ agreed that he was terrified for the entire ten-year period he was at AIRS. That terror related to the “jail atmosphere” at the school and the loss of freedom. He also lived in fear of the other boys and the violence that they might do to him. Violence among the boys was a daily event and Mr. RJ recalls being was beaten.

[para 616] Mr. RJ…believed that he was regularly subjected to racism by the supervisors. He says that they were always calling him “stupid.”

[para 626–627] Mr. RJ’s own words demonstrate the profound impact on his life and emotional well being caused by the ten-year separation from his family while he was at AIRS.

[631] Mr. RJ described his difficulty in adjusting to life after AIRS as follows:

“…ever since I got out of that school [AIRS], it seemed I couldn’t fit in anywhere ...I came from a foreign country and went into Gitsan country, and they treated me like a foreigner because I spoke English, didn’t speak Gitsan…”
[para 760] Mr. Colby agreed that it was Mr. DS’s personal view that his sense of depression had nothing to do with sexual or physical assaults; it was caused by Mr. DS’s dissociation from his culture.

[para 784] …[MW1] His experience with racism appears to have started at the public school in Port Alberni rather than with the sexual assaults committed at AIRS by Plint.

[para 834–835] Mr. Colby did not know that Mr. MW1 had behavioural problems before AIRS; that he was a troublemaker and prone to act out. He had no information about Mr. MW1 being admitted to hospital and being strapped to the bed because he would not behave. Mr. Colby conceded that such experiences “could” have some long-term impact on Mr. MW1…

[para 846–847] Much of Mr. MW1’s anger and tendency to resort to violence is based on his impression that he is being singled out because of his race. This seems to be unrelated to the sexual assaults. … While he was at AIRS, Mr. MW1 endured traumatic events quite apart from the sexual abuse.

Unlike the male plaintiffs, MJ had difficulty convincing Brenner that her life experiences were significantly impacted by her attendance at AIRS:

[para 690] 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].

Brenner is also irritated by MJ’s tendency to explain her inconsistencies in memory or her life choices, with the claim that she “was in pain” (para 663, 669). Brenner mentions this in a dismissive tone on several occasions. The trauma and pain in survivors’ lives can only be attended to in a way which undermines their position. Brenner dismisses MJ’s claim in its entirety. Throughout the above passages, Brenner’s alleged compassion for child victims of sexual abuse, is clearly compatible with his contempt for adult Indigenous survivors of childhood sexual abuse. As Michael Taussig reminds us, the “narratives are
in themselves evidence of the process whereby a culture of terror [is] created and sustained” (Taussig 2004a, 45).

From the above details of violence experienced by the plaintiffs as children, Brenner weaves another story: one of plaintiffs who are prone to violence themselves, characterized by an instinctive meanness, troublemakers who are angry as hell, and (later) who resent dominant culture, are of bad character, and lack their own sense of identity. Brenner’s account implies that this is due to the plaintiffs coming from violent Indigenous cultures. Indeed, what are later to be called the “intergenerational” impacts of IRS are interpreted in this decision as proof of biological defect and cultural inferiority. Consider the following passages wherein Brenner points to the “considerable violence” in the early lives of the plaintiffs (para 429):

[para 431] I conclude from his evidence that before he went to AIRS he was living in a home environment that was uneven. He did have support from an extended family as well as his parents. However his father was also an alcoholic prone to acts of violence. Mr. Barney witnessed violent physical attacks by his father on his mother including rape. His father seriously beat him.

[518] Mr. Barney came from a violent household, where he witnessed the worst possible familial violence: his father raping his mother….Mr. Barney was often the target of his father’s violence, being hit or beaten so often that he had marks or feared his father. His father’s excessive drinking often caused problems even before Mr. Barney went to AIRS.

There is no understanding on Brenner’s part, that the violence engaged in by FLB’s father, is violence also in response to the colonizer’s dehumanization of him. Perhaps FLB’s father was also a survivor of IRS? Brenner concludes:

[para 517 ] Given Mr. Barney’s family background, his life prior to AIRS, and the other traumatic experiences which he went through both at
AIRS and afterwards, it is probable that Mr. Barney, in all likelihood, would have experienced significant psychological difficulties in any event of the sexual abuse at AIRS.

Brenner makes similar remarks regarding the other plaintiffs:

[para 537] Mr. RF had six older siblings or stepsiblings who were at residential school during the winters while he was young. When his older siblings returned in the summers Mr. RF did not really like them: they seemed “quite mean” and he did a lot of crying when they were around.

[para 585] [RF had] resentment towards the dominant culture, [and] difficulties in establishing [his] own sense of identity

Again notes Brenner, such difficulties are most likely the result of “simply bad character” and not primarily the result of the sexual abuse (para 587). Brenner’s biological racism constructs the Indigenous survivors, their families and communities, as biologically damaged. As stated, this masks what will in the looming class actions be termed the “intergenerational” effects of IRS. In masking the intergenerational effects (of past attempted genocide), the real nature of the colonial present glimpsed throughout the Indigenous testimonies, as a world divided in two, is also obfuscated.

5.3.1 The Colonial Present Materializes

Throughout the judicial reasons and the judge’s quoting from plaintiff testimony, the present day colonial world—the nature of “business as usual”—comes into full view. We see the nature of the settler’s economy, the logging business, the cannery, the fisheries, and so on. For example, FLB worked as a logger, and is now on disability pension (para 423). FLB’s three brothers are / were loggers, his six sisters worked in the cannery at seasonal jobs. Many of his siblings (and other relatives), dropped out of school, collected welfare, were alcoholic, and were suicidal (FLB had tried to kill himself several times).
The life conditions of the other plaintiffs are similar. Whereas Indigenous plaintiffs were
telling of a colonial world and the impact of colonization over generations, Justice
Brenner sees dysfunctional families, low intelligence, bad character and substance abuse.
Consider these excerpts from Brenner’s reasons:

[para 528] The fact is that Mr. Barney, for reasons totally unrelated to the
sexual assaults by Plint, is physically disabled from working as a logger. He lacks the intellectual capacity to retrain for less physically demanding jobs.

[para 737] [MJ is] of at least average intelligence

[para 738] [MJ is] definitely below average in intellectual capacity

Throughout the judgment, Brenner notes the substance abuse amongst the plaintiffs. In the
following passage, he does not consider that those with logger’s behaviour may be
Indigenous men who have survived IRS as well.

[para 529] Throughout his adult working life, Mr. Barney continued to
abuse alcohol and marijuana and get into fights. …it is unlikely that this
widespread logging camp conduct can be related to childhood sexual abuse.

[para 530] Mr. Barney’s father was an alcoholic. The sister closest to him
died of a drug overdose. At least seven of his siblings have had
significant alcohol and drug abuse difficulties. …virtually all his family
members have relationship difficulties.

[para 531] I cannot conclude that at any time in his life Mr. Barney
suffered from PTSD as a result of the proven sexual assaults by Plint.

[para 532] …It is likely that his drinking began from his social
association with other like-minded individuals, a phenomenon not
unheard of in the wider teen community beyond just those who attended
Indian residential schools.
Relatedly, lack of intellect is implied with the family history of low educational achievement (it is as though all previous acknowledgement of the IRS as a “seriously flawed failure” to “educate” Indigenous children, is forgotten by Brenner):

[para 580] Mr. RF’s father had a grade 2 or 3 education and was a fisherman. He believes that his mother went to school for five to six years. She never worked outside the family home. Mr. RF had a total of 15 siblings, three of whom are deceased. Of the 12 living siblings, all have suffered from a dependency on alcohol.

[para 581] Mr. RF’s eldest brother had a Grade 8 education and only worked at odd jobs in fishing and berry picking. The next eldest brother had a grade 6 education and never worked due to health problems. His eldest sister had a grade 8 education and worked as a fish plant worker and chambermaid. The next sister had a grade 8 education and worked as a barmaid.

[para 582] The next eldest child, a brother, had a Grade 8 education and has been unemployed for the last ten years having previously worked in fishing and logging. He has recently started back to work. The next eldest sibling, a sister, had a grade 10 education and never worked. Another brother had a grade 8 education and has worked as a logger since age 17. Another brother had a grade 10 education has worked as a journeyman carpenter. Mr. RF had a sister with Grade 12 education who worked as a barmaid and fish plant worker as well as selling Indian art. He has another sister with a grade 10 education who has never worked. Finally, Mr. RF has two siblings with grade 12 education. One, a brother, is an office administrator for an Indian Band, and the other, a sister, is a Band office worker and community health nurse.

The judge implies that FLB and his siblings (and the other plaintiffs) have low paying jobs because their intellectual abilities are low or average, they simply were not capable of more, in part because they dropped out of school. (Consequently, they will not be awarded damages for loss of income). The family history is taken as evidence of biological mal-adaption and predispositions toward suicide. Brenner re-inscribes the claimants as from an inferior culture (where alcoholism and violence are the norm anyway) and where it’s
difficult to siphon off the damage from Plint’s sexual violation of their bodies, from the
damage their bodies were born into. Brenner says nothing about the colonial world, a
world divided in two, which limits their options and violates their humanity. One plaintiff
claimed not to have any psychological problems (he survived the attempted genocide with
his self-esteem and identity in tact) and therefore received a lower award. (This is a no
win situation. Psychological damage is proof of inherent inferiority, so the award is low.
No psychological damage is proof of no harm (from attempted genocide) so the award is
low). Brenner awards damages as follows (the plaintiffs appeal, but the amounts are not
changed significantly in the higher courts):

- FLB was awarded 145,000 + 40,000 against Plint, + 5000 for counseling
- RF was awarded 85,000 + 20,000 against Plint
- RJ was awarded 20,000 + 3000 against Plint
- MJ (female) dismissed
- DS was awarded 10,000 + 2000 against Plint
- MW1 was awarded 125,000 + 20,000 against Plint, +5000 for counseling
- MW2 was awarded 15,000 + 5,000 against Plint

Higher compensation was awarded to those who suffered “more severe” sexual assault,
which is interpreted as anal rape, not vaginal rape (as in MJ’s case), and not other forms of
bodily violation even if experienced numerous times. (This helped generate the “point
system” used in future IRS and ADR cases, and in the current IAP of the IRSSA.) Placing
a dollar amount on degrees of bodily violation, and emphasis on anal rape as the most
brutal form of rape, correlates with the perception of undermining the rational (male)
individual’s control of his body, which means that the violation renders the person closer
to property (more damaged or dehumanized) than property owner. That is, higher awards
(compensation for loss of property) are given the more the body itself is rendered object.
This may turn on what the judge considers dehumanizing. The body becomes object becomes property. As Fanon explains:

There are times when the black man is locked into his body. Now, “for a being who has acquired consciousness of himself and of his body, who has attained to the dialectic of subject and object, the body is no longer the cause of the structure of consciousness, it has become an object of consciousness.” (Fanon BSWM 225, embedded quote is from Merleau-Ponty)

In the judicial reasoning, not only is the Indigenous mind/body relation undermined, but both mind/body are represented as naturally or inherently damaged, and in need of improvement. The lack of collective credibility on the part of the plaintiffs is emphasized perhaps in response to what becomes visible through Indigenous testimonies, in particular what in later case law is referred to as “intergenerational” harm. With emphasis on intergenerational harm, the workings of the wider colonial force-field of the past encroaches upon/into the present. Combined, these “sightings” threaten to expose the settler occupier as alive and well in the present, busy with the everyday work of nation building, of which this court proceeding is a part. In the next section we see how law responds to these sightings of the white settler collective.

5.4 The Colonial Present: “A more general issue lurks beneath the surface” (Law as Steward of Settler Sovereignty)

The originality of the colonial context is that economic reality, inequality, and the immense difference of ways of life never come to mask the human realities. When you examine at close quarters the colonial context, it is evident that what parcels out the world is to begin with the fact of belonging to or not belonging to a given race, a given species. In the colonies the economic substructure is also the superstructure. The cause is
the consequence, you are rich because you are white, you are white because you are rich.” (Fanon WE 40).

As discussed at the end of Chapter 4, the wider context within which *Blackwater v. Plint* (1996–2005) unfolds, is one wherein multiple physical and legal struggles between settlers and Indigenous people over land (and identity) are on-going, both within B.C. and Canada generally. While Indigenous leaders have always tied the violence of IRS to Canada’s colonial project of land usurpation, the government of Canada has done all it can to sever this connection. If “loss of culture” is named as the wrong-doing, then we inch closer to naming colonization as the cause of the harm, and to revealing the connection to land which settlers currently occupy. In addition to monetary compensation for an array of damage to individuals: psychological, emotional, physical, cultural and economic (ongoing lost revenues from land and resources), when viewed collectively, these same harms may be interpreted as the aftermath of an unjust war (attempted genocide) against a people. The settler colonizer may then be legally required to return stolen goods—the land itself—to the original owners. Canadian sovereignty would be in jeopardy.

When *Blackwater v. Plint* 1996 through 2001 unfolded, Canada (likely) assumed that “loss of culture” would never become an actionable tort in IRS litigation, as several class actions which attempted to name “loss of culture” were denied certification. As previously described, the fact that “loss of culture” was not an actionable tort allowed the defendant Canada—in an effort to decrease the amount of money Canada would have to pay the plaintiffs for Plint’s sexual violence—to agree that colonial policy and “loss of culture” constituted “aggravating circumstances” in assessing the trauma caused by Plint’s sexual
violations. Moreover, Canada argued that the violence associated with cultural loss, still conceptualized as distinctly separate from the sexual violence committed by Plint, was likely the predominant cause of the life-long trauma experienced by the plaintiffs. It seems that Canada’s defence team was not thinking ahead to a possible time when “loss of culture” would itself become actionable, for surely their argument in *Blackwater v. Plint* could then be used against them in such a future case? Yet the time when “loss of culture” might be actionable, was beginning to materialize when the later appeals to *Blackwater v. Plint* were heard.

Following Justice Brenner’s 2001 decision, the plaintiffs filed an appeal which was heard by Justice Esson. The plaintiffs’ appealed Brenner’s dismissal of the negligence and breach of fiduciary duty (direct liability) claims. Further, with respect to damages, they claim that “the trial judge erred in failing to award damages for loss of native language and culture arising from their attendance at AIRS” (Esson, J. 2003, para 65). The plaintiffs also argue that Brenner relied too heavily on credibility issues in assessing the likelihood of whether the Church or Canada knew or ought to have known about the abuse at AIRS. One of the applications for intervenor status in this appeal stage (heard by Justice Donald), was the Nuu-chah-nulth Tribal Council. Their affidavit “discusses the Tribal Council’s efforts to make the residential school issue part of treaty negotiations” (Blackwater et al. v. United Church of Canada et al. 2002 BCCA 621, para 7) and “submitted that because the plaintiffs are individuals, they cannot easily bring to light the collective dimension of the residential school experience” (para 9). The Tribal Council sought to have their own research documenting the experiences of 110 IRS survivors from
the Port Alberni area, considered as background information which would bring this collective dimension and the connection to land into view for the court. While the Tribal Council was granted intervenor status, the Council’s research was not allowed to be heard (para 5–13). Thus, for a second time, the voice of the Indigenous collective is silenced (as it was when Milloy’s report was excluded), and yet the trial judge (Brenner) relies heavily upon the voice of the settler collective in his decision.

Justice Esson’s response to the plaintiffs’ appeal is interesting, coming as it does in the tone of a reprimand, and delivered at a time when the Cloud and Baxter class actions were gaining momentum, both actions which emphasize the Indigenous collective, de-emphasize the sexual violence, and emphasize the direct liability of Canada for the violence of IRS. Esson affirms that Brenner was right to consider the level of “community knowledge” (2003 para 70) and degrees of credibility, and reminds the plaintiffs that the reasons included in a Judge’s decision do not necessarily touch upon all of the evidence he reviewed or considered in the making of his decision (para 71–72). That is, a judge’s judgement may be more reasonable and fair than conveyed through his reasons.

As to the plaintiffs’ claim that Justice Brenner erred in deciding that Canada had not breached fiduciary duty, Esson comments that whether Canada can be held liable for its policy is still a question to be decided (alluding perhaps to the upcoming class actions), but that Brenner reasoned correctly in this case, as “loss of culture” is/was not an actionable tort at this time. Esson emphatically separates sexual abuse from “loss of culture”, and reprimands the plaintiffs for seeking legal judgement with respect to the IRS system itself:
[para 76] …all of the seven remaining plaintiffs have advanced in this court a claim for damages flowing from loss of their native language and culture as a consequence of being required to attend the residential school and by the rules and treatment to which they were subjected while there.

[para 79] At other points, the appellants submitted that the abusive treatment of the children in residential schools, and their alienation from their parents and the native community generally, should be treated as an aggravating factor in fixing aggravated damages for the sexual abuse. That approach was presumably taken in an attempt to bring the matter of loss of language and culture within the scope of damages for sexual abuse, but it is clear that the basis for the claim is essentially an attack upon the system of residential schools and its overall effect on all students. The attempt to link that subject to sexual abuse, the only cause of action in respect of which in this province there is no limitation, is strained at best.

Esson reinforces the separation between the sexual violence and the practices arising from Canada’s colonial policies and practices, and goes on to say that the issues of limitation periods on cultural loss is a “constitutional question” (para 81) and “not open to the plaintiffs to raise” here (para 82):

[82] …They say that they are not seeking to advance “loss of culture” and language as an independent cause of action, but that is clearly the substance of what they seek to do. That might have been done by an appropriate pleading before trial to which the defendants no doubt would have pleaded the Limitation Act and the plaintiffs would have responded by raising the constitutional issue. I agree with counsel for Canada that, as matters stand, this court cannot properly entertain these issues. I would dismiss this ground of appeal.

Justice Smith (the only female justice) was also part of the judicial panel led by Esson. While the panel members agree with Esson’s reasons, Smith writes a lengthy contribution to the decision, wherein she emphasizes that Canada was not found guilty of any independent actionable wrong (2003 para 116). Moreover, she reminds us that the trial
judge (Brenner) concluded “that the conduct that rendered Canada vicariously liable for the wrongs committed by Plint was not deserving of condemnation.” Again, Canada and Church are (continuously) reassured that despite their vicarious responsibility for Plint’s actions, they are not themselves guilty of anything. In the following passages Smith slowly directs our attention away from colonial policy altogether, reminds us that emotion should not taint legal judgement—implying that the attempt to link Plint’s sexual violence to colonial policy is generated by emotion—and redirects our attention to the damaged lives and bodies of the Indigenous claimants. I quote at length from Justice Smith’s reasons:

[para 127] These appeals are coloured by the context in which they arose. Young Indian children, who were taken from their homes and made to reside at AIRS, detached from their families, their communities, and their culture, were subjected to appalling treatment by some of the adults responsible for their custody and care. This treatment excites feelings of sympathy, disgust, and anger in all reasonable persons. However, such natural emotions cannot be allowed to distort the application of general legal principles. The trial judge confronted this difficulty and responded appropriately…

[para 147] …he [Brenner] was to be guided by the fundamental principle that damages in tort are awarded in order to restore the injured plaintiff to “the position he would have been in had the sexual assaults not occurred, with all of its attendant risks and short comings,” and not a better position.

[para 152] In the plaintiffs’ submission, their original positions for purposes of the assessment of non-pecuniary damages were the positions that they were in when they were taken from their homes and placed in the school. I cannot agree.

[para 153] …the purpose of damages is to place the plaintiffs in the positions they would have been in had the sexual assaults not been committed. It would, accordingly, be wrong to fix the benchmark as the positions they were in when they entered the school, a time that preceded the sexual assaults…
[para 154] Second, the plaintiffs contend that, since the sexual assaults occurred contemporaneously with emotional abuse, racism, isolation, and hunger experienced by the plaintiffs, the trial judge erred in law in separating the effects of the sexual assaults and in awarding damages only for those effects. In their submission, these events and their consequences are inextricably intertwined and, as a matter of law, the trial judge was required to award damages without reduction for damage caused by events other than the sexual assaults.

[156] Here, Canada is liable to pay compensatory damages only for the effects of the sexual assaults and is not liable to compensate the plaintiffs for aspects of their present conditions that are causally unrelated to the sexual assaults. Whether the consequences of the sexual assaults can be separated from the consequences of the other unrelated causal factors is a question of fact, not a question of law.

[para 162] …thus the trial judge recognized that these factors made the plaintiffs more vulnerable to damage from the sexual assaults.

Smith then reiterates the details of the sexual assault, a reiteration which seemingly serves no purpose in the decision other than as spectacle and support for the colonial magical thinking that Indigenous peoples are, and would have been, damaged anyway.

[para 201] In the case of FLB …the trial judge found that the sexual abuse at the hands of Mr. Plint began when he was 7 years old and in his second year at AIRS and ended when he left school at age 12. He found that Mr. Plint forced the plaintiff to perform fellatio on three occasions and that Mr. Plint anally raped him once. He concluded that it was likely that Mr. Plint sexually assaulted the plaintiff on other occasions. There were serious aggravating circumstances, including the obvious vulnerability of the plaintiff. The four assaults were violent and brutal and were accompanied by threats of death. Mr. Plint covered FLB’s mouth with his hand to prevent his calling for help, punched him in the stomach, and struck him in the head and ears. The trial judge found that, as a result of the assaults, FLB suffers from a personality disorder that inhibits development of personal relationships and produces impulsive behaviour and an inability to manage anger. As well, he has impaired self-esteem and has difficulties in formulating an identity. However, the trial judge concluded that FLB would have suffered from significant psychological difficulties anyway, given the traumatic events in his family background.
and in his life prior to entering AIRS, and the other unrelated traumatic experiences that he suffered at AIRS and afterwards.

Despite emphasis on the horrific sexual assaults, Smith, like the other justices, simply reasserts that FLB would have had psychological difficulties anyway. FLB’s underdevelopment, inability to manage anger or “form an identity” is a result of his family background and life prior to, during, and after AIRS, everything but the sexual assault she has just detailed. In this dizzying (circular) settler logic, we are left with the image of bodies which were already thoroughly damaged by the time they arrived to AIRS. Again, a settler strategy (I suggest) in response to (even implied) challenges to settler sovereignty.

The plaintiffs go on to appeal Esson’s 2003 decision, to the Supreme Court of Canada. During this time, 2003 through 2005, the legitimacy of settler sovereignty becomes even more contested both within IRS litigation and within the wider colonial force-field. Significant changes are happening on the IRS litigation front, for the Cloud class action (with 1400 claimants) which identified “‘loss of culture’” (after eventually dropping sexual assault from its claim) was certified in 2004. The Government of Canada appealed Cloud’s certification and in May 2005, the courts denied Canada’s appeal. Thus, Cloud would be allowed to go forward (though it would not likely succeed). This fact would guarantee the certification of the Baxter national class action (with 90,000 claimants), which identified “‘loss of culture’” resulting from IRS as contrary to International conventions, including the convention against genocide. Relatedly, following upon the failure of Canada’s appeal of the Cloud certification, and after a decade of growing pressure from Indigenous leaders, Canada’s political leaders sat down to
negotiate the “Kelowna Accord,” an agreement which included acknowledgement of the devastations of IRS, but which focused on economic improvement of Indigenous nations’ quality of life. (I address this all in detail in the next chapter.) However, not only had the legal and political landscape regarding IRS litigation shifted by the time the appeal of *Blackwater v. Plint* (now titled *Barney v. Canada*) reached the Supreme Court of Canada, but other key decisions by the SCC explicitly regarding land, had been delivered. I contend that if read within a wider context of land negotiations and issues of sovereignty—the wider colonial force-field—the October 21, 2005 SCC decision, *Barney v. Canada*, takes on new meaning: law can be seen to operate within IRS litigation as steward of settler sovereignty.

I will note one important decision: the 2004 SCC Haida Decision led by SCC justice Beverley McLachlin, and then return to McLachlin’s 2005 SCC decision regarding *Barney v. Canada*. In the 2004 Haida decision, aimed at producing a “general framework” regarding Canada’s duty to consult and accommodate with Indigenous nations before their rights claims have been heard regarding land and resources (para 11), McLachlin begins by acknowledging the Haida’s argument that the forests are vital to their economy and they cannot be deprived of them without risking their own existence as a people. Recognizing that “the stakes are huge,” McLachlin reiterates her guiding principle that relies on the concept of the “honour of the Crown.” She acknowledges that “Canada’s Aboriginal peoples were here when Europeans came, and were never conquered” (para 25) and that Crown sovereignty rests on mere assertion (implying that it is thereby precarious or fragile):
[para 17] The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. 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” [citing Delgamuukw 1997].

From this basis, she is able to invoke the Crown’s fiduciary duty, but qualifies that the term “fiduciary duty” does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Indigenous peoples…but only “in relation to specific Indian interests” (para 19). The Haida decision notes that Canada’s sovereignty rests on mere assertion, and that fiduciary duty requires that the Crown act honourably, albeit with qualifications. What could be more dishonourable than attempted genocide, the very claim that the Cloud and Baxter class actions will soon put forward? It is within this context of literal struggle for land, that the Barney v. Canada 2005 SCC decision, also led by SCJ Beverley McLachlin, is delivered. I suggest that McLachlin’s decision in Barney serves to cover the tracks of the white settler collective and its “sharp dealings,” tracks which have been surfacing throughout IRS case law. Moreover, McLachlin’s reasoning must be informed by the disturbing strategy employed by Canada: emphasizing damage from “cultural loss” to lessen the amount of money it would have to pay for sexual assault. Now addressing the appeal of the 2003 Esson decision regarding AIRS, McLachlin states:

[para 9] A more general issue lurks beneath the surface of a number of the specific legal issues. It concerns how claims such as this, which reach back many years, should be proved, and the role of historic and social science evidence in proving issues of liability and damages. For example,
to what extent is evidence of generalized policies toward Aboriginal children relevant? Can such evidence lighten the burden of proving specific fault and damage in individual cases? I conclude that general policies and practices may provide relevant context for assessing claims for damages in cases such as this. However, government policy by itself does not create a legally actionable wrong.

While upholding and restoring most aspects of Brenner’s original decision, which had been altered by the 2003 Esson decision, and while denying further the appeal of the plaintiffs, McLachlin’ decision went further. She ruled (where no one else had) that the original trial judge (Brenner) had “erred in finding a non-delegable statutory duty to ensure the safety and welfare of the students at the school” (SCC 2005, para 5). Recall that this was the only thread of direct liability on the part of Canada (the only thread which points to Canada’s business of nation-building), which Brenner’s decision acknowledged. Relying upon the slippery wording of (the defendant Canada’s) Indian Act, she finds no non-delegable duty to ensure the safety of Indigenous children, for the Indian Act uses the word “may,” as in “The Minister may provide for …” and thus:

[para 50] “The Indian Act falls far short of creating a mandatory duty to ensure the health and safety of children in residential schools.”

McLachlin then elaborates upon why Canada has not breached any fiduciary duty, “…of loyalty and an obligation to act in a disinterested manner that puts the recipient’s interest ahead of all other interests” (para 57), and in the process brings into view what is really at issue here.

[para 61] Beneath this specific argument, a second broader argument focussing on Aboriginal children collectively can be discerned. This is 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.

This second basis of fiduciary duty, i.e., duty which arose from agreement between collectivities (nations), and where violation of the duty would open Canada up to claims of forced assimilation and attempted genocide in its nation-building project, remains untouchable through law. McLachlin’s decision regarding the nature of the fiduciary duty which the Crown/Government owes Indigenous nations, a duty which is breached only through “dishonourable or disloyal” conduct on the part of the Crown, a Crown whose sovereignty hangs on a mere assertion, connects the judicial decisions and the government practices concerning IRS and land. This connection has been articulated and insisted upon by Indigenous leaders, and equally denied by Canadian Government and law. As previously stated, the move to keep separate the sexual assaults committed within IRS and the cultural violence (across generations) of IRS, is a move which obscures the connection between IRS genocide and land. Land seized and occupied through dishonourable means. This SSC 2005 decision clears the way for the Crown to “negotiate” with the appearance of honour.

Some legal scholars (e.g. Bruce Feldthusen 2007, Sheila McIntyre 2009) seem perplexed as to why the SCC would rule as it did in Barney v. Canada. Feldthusen states:

Unfortunately, it is difficult to explain why the (Supreme) Court …seemed to retreat from purposeful lawmakering to employ doctrinal formalism to limit recovery for the residential school plaintiffs. Canadian tort law has failed to address the unique national debt we owe to Aboriginal people arising from residential schooling. Our federal government, the body ultimately responsible for the residential school enterprise, has taken the aggressive lead in defeating their claims in court. (89–90)
But Feldthusen seems to miss what is really at stake here, viz., the issue of settler sovereignty and the collective claim to the right of occupancy and control of land. Land and white settler identity today, are integral to IRS litigation. The task of law in Indian Residential School litigation, is to disconnect the violence of IRS with Canada’s colonial project of land theft of the past in order to protect sovereignty in the present. White settler subjects must be established as collectively innocent, not only without a history, but without a present living history, of land theft and racial rule. The settler needs to NOT return the native to the pre-colonized original position. The settler needs to NOT give the land back, but merely “consult and accommodate” in the settler’s on-going business enterprise of rational accumulation. Whatever “debt” is repaid to Indigenous nations, it will be done in a manner which does not upset the settler’s over-arching sovereignty (and collective identity). This fact is itself a violence, enabled through the settler’s values and law. If we situate the events of this chapter within the wider colonial-force field of which Canada’s response to IRS is a part, we see a colonial world wherein it is business as usual. Lawyer Peter Grant (counsel to plaintiffs in Blackwater v. Plint) explains that as of 2010, judicial decisions (among them the 1997 Delgamuukw and the 2004 S.C.C. Haida) have not changed the “sharp dealing” engaged in by Canada, the provincial government and corporations who seek to reap profit from natural resources on Indigenous land.

Law has indeed functioned as steward to white settler interests, securing settler occupancy through the dehumanization of Indigenous collectives, accomplishing the one small yet thoroughly violent idea articulated by the Right Honourable SCC Chief Justice McLachlin in a 2004 public speech.92
It is my humble hope that I may leave you with at least one small idea which may prove of interest. It is this. A nation's law is the sum of its history; and a nation's judges give voice to the values that are the sum of that history.
Chapter 6: Re-Colonizing Concessions: The 2006 Indian Residential School Settlement Agreement

...the native [knows what the settler is thinking of]. Those hordes of vital statistics ...hysterical masses, those faces bereft of all humanity, ...that mob without beginning or end, those children who seem to belong to nobody, ...The native ...laughs to himself, for he knows that he is not an animal; and it is precisely at the moment he realizes his humanity that he begins to sharpen the weapons with which he will secure its victory. (WE 42 – 43, my emphasis.)

This chapter addresses the 2006 Indian Residential School Settlement Agreement (IRSSA) between the Government of Canada and various churches, and the Assembly of First Nations (AFN), along with representatives of the Inuit Tapiriit Kanatami, the Metis National Council, The Congress of Aboriginal Peoples, and the Native Women’s Association of Canada.\(^93\) The IRSSA is the politically negotiated legal settlement to Baxter v. Canada, the national class action which represented between 80,000 and 90,000 Indigenous claimants (survivors of IRS and their families) in a class action against the Government of Canada and various Churches. This “Historic Settlement Agreement” brought to an end the eleven class actions, 15,000 individual civil litigations, and the 5000 Government Alternative Dispute Resolution (ADR) cases regarding the sexual and physical abuse of Indigenous children within Canada’s IRS.\(^94\)

The IRSSA is heralded internationally as an example of a settler state taking responsibility for the nation’s colonial past and wrong-doing. In this chapter, I give an alternative reading of the IRSSA. I read it as part of an on-going struggle between settler and native, over sovereignty and land. There is a beautiful and moving visual in the Haudenosaunee video “Sewatokwa’tshera’t” (2007), regarding the Six Nations’ land
reclamation near Caledonia, which captures the powerful shift in the meaning of the Indigenous collective body (and in turn the settler collective body), over the decades of IRS litigation. A Six Nations’ woman tells of the day when the small number of Indigenous defenders stood arm in arm and, walking towards a greater number of armed RCMP officers, peacefully backed the RCMP off their land. The video image conveys not only what the Indigenous people felt, but what some RCMP officers (shaking) claim they saw: the presence of a great number of Haudenosaunee ancestors on horseback and foot, coming in peaceful defiance, to support the Indigenous defenders. This is symbolic of what happens between Indigenous and settler collectives in the years leading up to the IRSSA. Having endured decades of relentless dehumanization by the settler in IRS litigation, Indigenous people who (echoing Fanon) know they are human, sharpened their weapons. Their weapons consisted not only of the force of the more than 80,000 claimants in the Baxter class action, and the 2004 certification of the Cloud class action which paved the way for Baxter, but the settler’s own miscalculations and missteps in previous IRS litigation. As the previous chapter explains, Canada’s defence counsel perhaps blundered in arguing in Blackwater v. Plint (as in other IRS cases) that the mere attendance at IRS and racist violence endured while the children were held captive, resulted in their “loss of culture,” and was the primary cause of the Indigenous survivors’ psychological trauma. This defence potentially opens the door to proof of direct liability for the tort alleged in Baxter, not merely the vicarious liability for the wrong-doing of unsavory employees. The cause for action in Baxter was explicitly identified as genocide. The damage done to the collective Indigenous body, would now be evidence of the violence and psychopathology
of the collective settler body. Baxter, if certified, would sue Canada for 100 billion (and the Churches for 100 billion) in damages. Agreeing to the IRSSA, which required Canada to pay only 5 billion, might seem like a wise business decision. But more is at stake than money. The Baxter class action had the potential to call into question the legitimacy of Canada’s sovereignty. A nation built on genocide is a nation with an undeniably illegitimate claim to sovereignty. This causes great anxiety for the settler collective. Yet I argue that there was another threat to Canada’s sovereignty embedded in Baxter, for Baxter threatened to connect the past to the present, revealing that the colonial world of yesterday is very much in place today. The Indian Act itself secures this continuity, but so do the myriad practices of the settler collective which goes about the business of fulfilling its rational desire for accumulation and land. As the notion of colonial force-field conveys, terror operates through myriad practices of dehumanization and dispossession. Baxter had the potential to bring the white settler collective and its continuing practices of eliminating the native into view, leading perhaps to heightened resistance (even violence) from the Indigenous collective in response. Thus, Canada was motivated to sign the IRSSA not out of compassion for the Indigenous collective (children or adults), but rather, out of self-preservation backed by law (Monture-Angus 1999). In this way, the IRSSA, while a victory of sorts for the Indigenous collective, ultimately enables Canada to recuperate or reinstall “settler and native” within a contemporary colonial order. The IRSSA is a re-colonizing concession on the part of the settler (Dudas 2004, Fitzpatrick 2001).
6.1 The Cloud Class Action: From Sexual Abuse to Systemic Neglect

Class actions were part of the civil landscape since the beginning of IRS litigation in the 1990s. The Government of Canada (Attorney General) as Defendant, was kept busy filing statements of defence and appealing the applications for certification throughout the decade. By 2003, there were eleven class actions in the court system at various stages of application for certification and appeal of judgments denying certification (in addition to 12,000 individual civil suits). Cloud v. Canada represented 1400 survivors from the Mohawk IRS in Brantford Ontario. It first applied for certification in 1998 but was not successful. It reapplied in 2001 and again failed. It appealed this decision and in 2004 the Ontario Court of Appeal overturned the previous rulings, making Cloud the first and only IRS class action to be certified until the Baxter national class action. This is why the Cloud class action is identified alongside (technically excluded from) the Baxter class action in the IRSSA, rather than being subsumed under Baxter as were most other class actions which had not yet been certified. Cloud’s certification was a significant victory and it rendered it likely (though not certain) that the other IRS class actions and Baxter in particular, would also be certified.

The quest for class action certification was difficult and drawn out (8 years for Cloud). It was ironically very difficult to persuade the settler’s court and government, to recognize Indigenous survivors of IRS as a legal collective (a “class”). The early rejections of the Cloud application are telling. There are five conditions which must be met in order for a class action to be certified. There must be a cause of action, an identifiable class, a common issue. Further, it must be preferable to proceed as a class
rather than as individual claimants, and there must be an appropriate representative of the class. Among the criteria to establish whether class adjudication is preferable to individual adjudication are the issues of enhancing access to justice for the claimant, judicial economy for the courts, and behavior modification for the defendant (Goudge 2004, para 21). The reason Cloud’s application for certification was denied in 1998, and again on appeal in 2001, was primarily because judges could not (would not) “see” a common issue among IRS survivors and therefore could not see a class of claimants (and vice versa) even though survivors came from the same institution. A class is identifiable in large part if individuals can be seen to share a common issue (the circularity of this requirement is noted by J. Goudge 2004 who ultimately certified Cloud). In its first application Cloud sought “to recover for the harm said to have resulted from attending the school” (Goudge 2004, para 1). With “systemic negligence” as the cause of action, the harms for which damages were sought included sexual assault, physical assault, wrongful confinement, and “loss of culture,” language, and family connection. J. Haines 1998, denied certification on the grounds that because not every claimant had experienced sexual abuse (the only actionable tort) the experiences of the claimants differed considerably and a common issue could not be seen. Moreover, sexual abuse was viewed as the more serious harm in comparison to any common experience each of the claimants may have had by virtue of being placed in the school (Goudge, para 16-18). While the legal conceptualization of sexual abuse as distinct from a larger collective colonial project, is consistent with what unfolds in other IRS litigation, unlike individual IRS litigation, in this class action “loss of culture” is trivialized as less harmful than sexual abuse. This is likely because, now that
“loss of culture” is a candidate for actionable tort, Canada must argue that the sexual violence was more severe (contrary to its strategy in Blackwater v. Plint.) Frustrated, the Cloud claimants re-filed for certification in 2001 and omitted reference to sexual assault altogether, in order that “loss of culture” and language would be fore-fronted as the main and only candidate for a common issue. This time their application was denied on the grounds that “cultural loss” is not an actionable tort, and therefore there was no common issue and no common class. (The circularity of settler logic is blatant.) The claimants appealed this decision and in 2004, the ruling was reversed in the Ontario Court of Appeal. In his reasons for judgment, J. Goudge drew upon the 1998 opinion by J. Cullity who was the only judge who dissented from Haines’ ruling. Drawing on Cullity, Goudge argued that in this case the cause of action “systemic neglect” created the class and (given the policy of operating IRS) created the common issue of “loss of culture.” In Goudge’s words:

[para 66]…the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the school created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the school as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the school in this way.

Regarding cultural loss, Goudge agreed with Cullity that the mere fact that cultural loss had never been recognized as a common issue in the past was not sufficient reason to prevent this “new harm,” from being considered so now. Goudge then states that there
was no need for the claimants to have omitted the sexual abuse from among the named harms in their reapplication after all. Granting application for certification means only that a case may proceed, it does not mean that it will succeed. Indeed, judges generally agree that a class action on the common issue of “cultural loss” would ultimately fail, and this opinion predominates in the 2006 judicial reasons regarding Baxter.

Cloud’s contribution to the evolution of IRS litigation is extremely important. The value of arguing systemic neglect as the cause of action, is that it both recognizes IRS survivors as a collective and brings into view harm caused by the IRS system itself, rather than merely harm caused by individual perpetrators of sexual abuse employed within the system (Hall, 2006). Importantly, focus on “systemic neglect” also brings into view an entirely different set of perpetrators: those individuals involved in operating the institutions (government, church, and their employees) in addition to individuals who committed sexual abuse. As J. Goudge states in the Cloud ruling (para 71): “The focus of the common trial will be on the conduct of the respondents as it affected all class members, and how and for what purpose they ran the school.” However, I suspect that systemic neglect would prove to be an insufficient cause of action in that—despite the phrase “for what purpose they ran the school,” the focus is narrowly restricted to the IRS system (and the specific components of the Indian Act which gave rise to IRS policy) and the individuals associated with that system. It does not extend beyond to a wider social and political system (colonialism past and present) which is itself unjust. That is, while Cloud allows the courts to see that the purpose of the system of Indian residential schools was to assimilate Indigenous children into Euro-Canadian society, we are still unable to
point to a wider network of political colonial policy which would explain why and how Canada sought to assimilate Indigenous people in the first place, viz., as a strategy to gain control of their land and resources. As stated, Indigenous peoples have always been clear about the land connection. Moreover, the injustice of forced assimilation may not be apparent to dominant subjects (past and present) who assume that assimilation is merely a generous invitation to share equally in dominant culture and society. While Cloud opened the door for a legal argument regarding the ultimate purpose of IRS policy as part of a wider colonial project, it was Baxter which would make the case, and name it explicitly as genocide. 96

6.2 The Baxter National Class Action: from Systemic Negligence to Genocide

The Baxter v. Canada application for certification was initiated in 2000, and was contested by the Attorney General from the start. However, in May 2005, the Ontario Superior Court under J. Winkler, informed by the 2004 certification of Cloud, dismissed the Government’s most recent appeal of the Baxter claim. Baxter could now proceed with its application for certification, and as stated above, Cloud’s certification rendered it likely that Baxter would also be certified and allowed to proceed with a court hearing. Immediately upon the May 2005 rejection of the Government’s appeal of both the Cloud certification and the Baxter application for certification, the Government appointed retired Supreme Court Justice Iacobucci as its Federal representative to negotiate an IRS resolution with Indigenous representatives and claimants. An out of court settlement would prevent Baxter from moving forward in the courts. According to various sources, during the May 2005 through to the November 2005 negotiations to reach an Agreement
in Principle (AIP), the negotiation between Iacobucci and Indigenous representatives was “difficult” (J. Ball, Sask. 5, AFN 2004). Interestingly, Indigenous claimants and their lawyers requested that the IRSSA be overseen by the courts as they did not trust the Government of Canada to administer the terms of the agreement, given the various moves the Attorney General made in past litigation to preserve its interests. As Baxter represented claimants from across the land, the IRSSA needed to be approved by lead Justices in all nine judicial jurisdictions. Ultimately, the certification of Baxter was conditional upon the acceptance of the IRSSA, which means that had the IRSSA not been endorsed, Baxter would need to return to the phase of applying for certification.

_Baxter v. Canada_ challenges the constitutionality of the _Indian Act_, and claims that the Crown breached numerous Treaty obligations (treaties are legal agreements between nations), as well as the United Nations Genocide Convention, the “Convention against torture and other civil, inhuman or degrading treatment,” and International Conventions regarding the rights of the child (_Baxter Amended claim 2006_, page 14). Thus, although Baxter points to systemic negligence as did Cloud, it points to the wider colonial policy and legislation which gave rise to the IRS institutions, and claims that this policy and legislation is itself a violation of human rights, a form of genocide. This brings us much closer to issues of sovereignty and collective identity. Baxter cites Van der Peet, concerning the nature of fiduciary duty between Crown and Indigenous nations (Monture-Angus 2002) and will argue that the Crown breached this duty. Canada is said to have intentionally, knowingly and maliciously carried out the eradication of Indigenous cultures through the abduction of children against their parents’ wishes, the separation of
siblings within the IRS, and the everyday beatings / punishment of children for speaking their Indigenous languages. Baxter emphasizes the “Intergenerational effects of IRS” in order to demonstrate that culture, language, and family connection was “lost” by an Indigenous collective (rather than just by many individuals). Baxter’s forceful wording throughout the claim indicates direct responsibility (rather than mere vicarious responsibility) on the part of Canada.

The Baxter 2003 application for certification, identifies three classes: the survivor class, the deceased class and the family class. It lists thirteen common issues for the survivor class, six common issues for the family class. Foremost for the survivor class (and the first three also apply to the family class) are the issues of whether the Crown:

- breached Aboriginal rights to enjoy, practice, and transmit Aboriginal languages, culture, customs and traditions
- breached its fiduciary duty with respect to its conduct regarding the purpose, operation, management or supervision of the IRS
- was systematically negligent and/or in breach of its non-delegable duty in failing to take reasonable measures to protect the health, safety, well being, language, culture, customs, traditions, and education of survivors
- breached treaty rights regarding maintaining “schools” and quality of education
- breached fiduciary duty by unlawfully apprehending and confining children, and separating children from family, community
- breached International United Nations Conventions regarding the rights of the child, genocide; the International covenant on civil and political rights, crimes against humanity and War Crimes Act

In their expansion of the “particulars of the negligence and breach of duty” fifteen more issues are identified, ranging from the hiring of immoral and incompetent staff, failure to train and supervise, failure to report physical, sexual, psychological abuse, failure to
provide the necessities of life, knowingly covering up the existence of abuse, depriving children of their religious beliefs and languages, depriving children of a healthy childhood, useful education, and contact with family, to the “conspiracy to eradicate aboriginal culture” through the IRS system, the assault and battery of children. To support its claims that Canada had constructive knowledge of the practices required for this assimilation project (something denied by Justice Brenner in *Blackwater v. Plint*), expert witnesses point to what a “reasonable” person ought to have known. For example, the fact that so many children kept trying to run away ought to have been reasonable grounds or sufficient information for school operators to investigate and find out what was causing children to attempt escape.

Finally, the application sought compensation or damages for over twenty-five harms resulting from the IRS system, with emphasis on the intergenerational impact: from the isolation from family and community, prohibition of use of language, forced confinement, assault and battery, sexual, physical, emotional, psychological abuse, impairment of health, disability, and a propensity to addiction, all the way through to an impairment of the capacity to function in the work place. The Baxter claim may be read as the Indigenous collective “speaking truth to power” by challenging the settler collective’s fantastical narrative of biological and cultural (“inherent”) defect. Rather, Baxter identifies the structures of colonialism as the cause of damaged Indigenous collectives. This and the charge of breach of International conventions would indeed be threatening to a colonial government, as would airing this claim in public during a (lengthy) court process regardless of the final verdict. Indeed, the Attorney General’s March 10, 2003
statement of defence made the typical and expected move seen elsewhere in IRS litigation, of appealing to statute of limitations and the lack of precedent for “loss of culture” as an actionable tort. It again argued that the IRS institutions and policies were supported by the *Indian Act* and that the standards of the day meant that UN Conventions are not retroactively applicable, (e.g., residential schools were used globally, and corporal punishment was used liberally in settler culture back then). The Attorney General claims:

[para 15] It was never the intention of the Crown to eradicate Aboriginal language, culture, or spiritual beliefs through the residential school system.

[para 16] The policies implemented with respect to the education of Indian children were formulated with a benevolent intent and were in accord with the accepted wisdom and standards of the time, both domestically and internationally. As societal views evolved over time, so too did the views of governments and educators in general throughout the developed world.

Thus, as recently as 2003, Canada fails to show compassion for the survivors of IRS. Further, the Government’s defence points to individual instances of sexual assault as irreducible to a common issue, the very argument that was made by J. Haines in his 1998 rejection of the Cloud application for certification. Again, the conceptualization of sexual abuse as aberrant behaviour on the part of individuals, rather than rape as a war crime, was utilized in the class actions just as it had been in the civil suit to obscure the settler collective. Although the Government argued that there was no common class and no common issue, Justice Winkler was now able to draw from the Goudge and Cullity decisions to argue otherwise and, as stated, in May 2005 Winkler dismissed the Attorney General’s appeal primarily on principles of process, such as judicial economy.
6.2.1 How “Intergenerational” Testimonials Reveal the Lost White Collective Body of the Past

Baxter emphasizes intergenerational harm, an emphasis which brings both the Indigenous collective and the settler collective, past into present, into view. Intergenerational harms were conveyed through the affidavits of Uncle and Nephew: Charles Baxter and Elijah Baxter. Baxter Sr. later had 11 children of his own, all of whom were required to attend IRS. Baxter’s emphasis on the intergenerational effect of IRS was meant to support the argument that IRS disrupted the transmission of culture between Indigenous generations in a way that was contrary to International conventions regarding human rights—and thus the Indigenous testimony in Baxter is organized significantly differently than the testimony of “unrelated” survivors in other previous IRS cases (likely to prevent the judge from interpreting these as “defective cultures”). While the focus is on the impact or effect on generations of Indigenous people—that is on Indigenous people as a collective over time—the ever widening pool of perpetrators thereby becomes visible as well. That is, the testimonies of the survivors—when taken together—reveal a wider white collective body invested in securing its own occupancy of land and intimately involved in the everyday regulation of indigenous bodies. The colonial world of the past is revealed where survivors’ tell of authorities (RCMP) who took them from their parents’ side to the planes (flown by pilots, accompanied sometimes by future PMs) that would fly them to the trains (driven by conductors) that would transport them to remote northern regions of the province and so on. The network of dominant bodies engaged in the work necessary for this colonial project expands beyond the individuals who would later sexually and
physically abuse many of the children. The term “intergenerational,” forces us to look back and in looking back, earlier generations of both Indigenous and settler collectives are inched closer to the original usurpation of land on the part of the Crown (the illegitimacy of which many do not question).

Ironically, the Attorney General’s defence statement in response to Baxter, also supports this notion of a network of dominant subjects engaged in the daily processes of managing Indigenous populations. Indeed, the Attorney General points to this fact as evidence that the Government of Canada should not bear sole responsibility for IRS. At paragraph 29, the Attorney General points to “other governments, institutions, and organizations” involved, such as “provincial and territorial governments,” curriculum designers, school inspectors, local school boards, child welfare agencies (who were responsible for admissions policies and procedures), and of course the various churches.

The collective activity required to maintain the occupation of Indigenous lands takes place over decades. Each era had a well-organized network of dominant subjects in place to carry out this project. Each of those dominant subjects had family and friends, a community to which they returned after a hard day’s work.

6.2.2 How “Intergenerational” Testimonials Reveal the Lost White Collective Body of the Present

Thus, the term “intergenerational” also forces us to look forward, connecting both Indigenous and settler collectives of the past to those of the present. The size of the Baxter survivor class—80,000 bodies—implies that a very large white settler collective is alive and well. That is, the white settler collective body of the present is brought into view
merely through the recognition of the intergenerational Indigenous collective. Survivor testimonies reveal the intergenerational transmission of European white culture and the violent practices required to transmit settler culture. We see this white collective in every survivor’s story. It may be easy to believe that the white collective of the past no longer exists (“many of the perpetrators being dead”), and yet the structure of colonialism and a world divided in two, clearly persists, as revealed in all Indigenous testimony regarding the impact of IRS on their lives. Just as the colonial psyche requires a structural presence, the reverse is also true (Fanon WE). The assumption that the settler collective has either died off or changed its ways, is rooted in two flawed assumptions. First, it is assumed that if Indigenous children were targeted by adult perpetrators, now that the Indigenous children are elders, the perpetrators must be dead. This is questionable, given that IRS operated until 1986 (or 1996) and a 30 year old teacher in 1986 might still be alive today. Indeed we heard many such settlers give testimony in Blackwater v. Plint. Second, it is assumed that those who qualify as perpetrator are only those individuals who had direct contact with Indigenous children within IRS. But this is the very narrow vision which results in the refusal to see IRS institutions as part of a wider colonial system and a colonial culture. The notion of a colonial force field helps us to see continuity between past and present settler occupations, and the myriad practices within each. The bodies of survivors are marked by the white collective body, but this marking is done in the present just as it was done in the past (as we will see most forcefully when we come to the judicial reasons in the certification of Baxter and approval of the IRSSA). Someone is applying the Indian Act against the desires of Indigenous people today. Thus, in part because Baxter
involves 80,000 claimants, this collective of subordinated Indigenous bodies implies a settler collective of the present. Baxter then, threatens not only to ask questions about the purpose of the colonial policy and IRS institutions, but to reveal “how” (and through whose hands) the eradication of native culture remained a Government practice (if not policy) for over 100 years, and continues today through other means. While the phrase “loss of culture” allows us to view Indigenous peoples as collectives who somehow lost their cultures, Baxter (and all Indigenous testimony) has the potential to show how culture was stolen from Indigenous peoples—beaten out of them—and that the violence of annihilating Indigenous culture, was part of a continuing colonial project. Unlike the threat posed by the 15,000 individual (isolated from each other) civil suits in the courts and ADR system, and even beyond the threat of proving systemic negligence as fore-fronted in the Cloud class action, Baxter posed a unique threat to the Canadian government and its citizenry. Baxter threatened to expose white terror related to land and nation building, at the heart of colonialism of the present. More specifically, Baxter had the potential to expose the settler occupier as illegitimately in control of Indigenous lands.

6.3 The Indigenous Collective: A Growing Willingness to Join the Resistance

As previously mentioned, in 2003 Canada created the Alternative Dispute Resolution process (ADR) as a way to deal with the growing number of IRS legal claims. However, the ADR process continued to be framed by Canada’s legal definitions of harm and standards of proof, and hearings were conducted in an adversarial manner (AFN 2004). Indigenous frustration thereby grew regarding Canada’s handling of both IRS litigation and the IRS ADR process. Many Indigenous survivors of IRS decided to join the
Baxter national class action, and directly voiced their intention to the Standing Committee on Aboriginal Affairs and Northern Development (AAND) in the evidentiary hearings of February 15, 17, and 22 of 2005 which aimed to evaluate the Government’s ADR process. These political hearings occurred after the 2004 certification of Cloud (but before the Government’s appeal was denied.) Thus, during these hearings, the members of the Government committee are fully aware that the Baxter national class action would also likely be certified in time. Various people gave testimony to this committee: individual Indigenous IRS survivors, representatives of several IRS survivor groups such as Spirit Wind, representatives of the Aboriginal Healing Foundation, political representatives such as the Assembly of First Nations (AFN) National Chief, lawyers of Indigenous claimants; and Indigenous members of the Canadian Law Society. After the hearings, the AAND wrote a report recommending to Government that it negotiate a settlement regarding IRS, and bring the civil litigation and ADR process to an end. This motion was passed in Parliament on May 17, 2005 (one week after the Government’s appeal of the Cloud certification was dismissed.)

While there was some disagreement amongst those who gave evidence to AAND, as to the appropriate solution to the “IRS legacy,” there was overall agreement that the Government’s ADR process was and would likely continue to be, a complete failure, and that the real injustices of IRS were not addressed in either the court system or the Government’s ADR program. Those who gave testimony were clearly angry with the Government. Though stated in various ways, most were in agreement in their naming of the violence of IRS and in their demand (here in Dennis Toniak’s words) that:
…the Government of Canada [stop] hiding behind legalisms and platitudes …[and]… immediately negotiate a fair, efficient, comprehensive and binding settlement…[to address]…the “greatest human rights injustice in our history.”

Mr. Jeffrey Harris, Chair of the National Aboriginal Law Section of the Canadian Bar Association, states that the violence was a result of “…a system that was designed to eradicate culture,” which, in Chief Robert Joseph’s words:

…created a complex group of symptoms that exceed the regular post-traumatic stress disorder cluster. Add in cultural discontinuity and racism, a genocidal cocktail ensues.

*Spirit Wind* representative Raymond Mason states:

... the horrors and devastation caused by the deliberate and systematic genocide against us must not be covered up and forgotten.

AFN National Chief Phil Fontaine reminds the government committee of the connection between IRS and land:

[Tues 22, 43–44] As national chief, I represent the people who have occupied this land from time immemorial. These are the same people who were targeted by Canada’s residential school policy. The policy was designed to solve the Indian problem by removing us from our homes and families to prevent us from learning about our culture, our languages, and our fundamental connection to the land. Canada set out to destroy our connection to the past so that we could have no future.

Mr. Michael Cachagee critiques the settler’s pathologizing of IRS survivors:

[Tues 15] I am a survivor. I spent over 12 years in three different schools in northern Ontario, and I take offence to being deemed as having a mental health issue of some sort or other. As survivors, we are neither emotional misfits nor are we mental incompetents on the verge of self-destruction, as many of those in the Indian residential school industry want us to believe. We are your elders, teachers, caregivers, and leaders of your first nations and our nations, and we demand that we be treated
with the same respect and honour due such persons. …To diminish what we endured at those Indian residential schools to something that is classified as a treatable mental health sickness is a re-victimization of the survivor and shows an extreme lack of respect.

Thus, mirroring the strategy of the Baxter class action, most of the speakers de-emphasize sexual assault and emphasize the intergenerational impact of the IRS system in order to support their claim of “loss of culture” which they understand as cultural eradication, coerced assimilation, and genocide. Indigenous people have always been clear in their naming the violence of IRS as part of a larger effort on the part of Canada to obliterative Indigenous cultures, in order that Canada could gain control of this land and its resources. Indigenous people have never faltered in this account, and they have always disagreed that IRS wrong-doing could be reduced to the (albeit brutal) sexual and physical violence against Indigenous children. Why will the Government of Canada not listen? As past AFN National Chief Phil Fontaine states:

[Tues 22, 43–44] Many of the former residential school students have died over the years without justice and reconciliation—20,000 since 1991. The rest of us are still waiting—waiting for the Government of Canada to come to grips with the worst human rights violation in this country's history; waiting for it to do the honorable thing, the right thing, the decent thing; waiting for Canada to clean up its shameful past and begin to travel down the long road towards reconciliation with the first peoples; waiting for Canada to stop hiding behind phony arguments, denials, and unconscionable delays, allowing more and more people to die empty-handed, without the redress and healing they deserve and are owed. For ten years I lived through the residential school experience. I know well what my brothers and sisters, our mother and father, my aunts and uncles, my cousins and friends lived through. I know what over 150,000 of the people I represent lived through, and I resent the need for us to tell our heart-wrenching stories over and over again in order to convince you of their truth. I resent being told that Canada can't afford to pay the survivors the compensation we are owed. (My emphasis.)
Still other Indigenous witnesses testify to the intergenerational impact of IRS, helping to flesh out for the settler, the fact that the issue is the terror and crime of genocide. Flora Merrick, her stepdaughter Grace Daniels, and her granddaughter Ruth Roulette, all spoke to their individual experiences of terror at IRS, the intergenerational effect of the IRS, and the gross inadequacy of the Government’s ADR process. Flora Merrick:

[Thurs 17] I told this story during my ADR hearing, which was held at Long Plain in July 2004. I was told that my treatment and punishment was what they called “acceptable standards of the day.” I was raised in a close and loving family before I was taken away to a residential school, and being strapped until I was black and blue for weeks and being locked in a dark room for two weeks, to me, is barbaric.

Grace Daniels:

[Thurs 17] Starting at age ten, I started to speak up for other children, especially the younger ones, who were severely strapped and in some cases beaten for no apparent reason. For this, I was strapped and beaten more severely to break my spirit and to make an example out of me…One time I received a very bad beating from the principal of the school. I was taken into a private room, told to take my clothes off, and was beaten severely all over my body with a strap for about a half hour. It was very painful and I suffered a lot of bruising and swelling all over my body that lasted for days. The only reason he quit was that he was too exhausted to continue…The principal who abused me ruled the school with a reign of terror, always keeping the children frightened and scared. He had peepholes in all the doors so he could spy on the children and try to find something they were doing that he could punish them for.

Mr. Alfred Beaver points to the settler’s strategies of dehumanization, including paternalistic indifference:

[Tues 15, 34] Who cared? It was only Alfred. This was, again, at the hands of people who were supposedly developing me into a human being, because according to the priests and the nuns I was a savage.
[p 39] I was not a favourite. I was not picked for this purpose because I was sexually confident. I was picked because nobody would know, nobody would care. I was picked solely for the sexually depraved gratification of the sisters, of those two I named. That’s all. I was never picked because I was chosen. I was picked because I was a victim who nobody cared for anyway.

I became a sexual victim of Father Rainville, the priest who hit my mother on the first day when I was introduced to mission life. They weren’t afraid to make me their victim, why should I be afraid to mention their names?

Throughout the hearings, survivors reiterated that they were losing patience with the government and that they intended to join the ever growing numbers in the Baxter class action. As Raymond Mason, survivor and member of Spirit Wind argues, class action is the only approach to which Canada will “listen.” A legal approach he says, will “ensure that the federal government is kept honest.” Craig Brown, lawyer in the Baxter class action pleads:

[Tues. Feb 15] …. the obvious, logical, and humane solution to the problem [is] to bring all of the interested parties together, particularly now that the studies and reports have been done, the ADR program has been launched and failed, and we have the decision of the Ontario Court of Appeal—the Cloud decision—saying that this problem is amenable to class action litigation. It is logical for all the parties to get together and try to negotiate a humane, comprehensive settlement. … We have been asking the government to do that and our requests have fallen, so far, on deaf ears. Any assistance that anyone can bring to this problem would be welcome.

The 2005 hearings were instrumental in forcing the Government’s compliance with the demands for reparations for IRS. Although several AAND members expressed concern over Canada’s vulnerability to further litigation even if a “comprehensive settlement” was achieved, they ultimately recommend to the Government that the ADR process be
abandoned and that a global compensation (reparation for all members of one class) for IRS survivors be implemented.

While the specific content of the IRSSA was negotiated over a six month period leading to an Agreement in Principle in November 2005 as a precursor to the political negotiations regarding the Kelowna Accord 2005, Canadians should know that the IRSSA is the product of over a decade and a half of Indigenous activism unfolding simultaneously on both political and legal fronts (J. Ball, Sask. 79; IRSSA, Baxter appendix A; Fontaine affidavit). Canadians should also know that the Government of Canada (whether Liberal or Conservative) fought it all the way. Political representatives of Indigenous peoples (such as, but not exclusively, the Assembly of First Nations), as well as various independent IRS survivor groups in existence since the mid-1990s, were vocal critics (as conveyed above) of the Canadian Government’s legal approach to addressing IRS. They offered alternative approaches which were for the most part rejected by the Government. For example, AFN National Chief Phil Fontaine—representing many though not all Indigenous survivors and groups has, since 1990 personally advocated for a political solution emphasizing reconciliation and global reparation, akin to the reparations Canada paid to Japanese Canadians for wrongful internment during WWII, and similar to the Irish government’s reparations to the survivors of its non-Indigenous residential schools. The Government of Canada always rejected the idea of global reparation for IRS survivors. Instead, as previously mentioned, it created its own ADR process over which it had complete control.97
Indigenous activism also took place independently of the AFN, through Indigenous survivor groups which united in 2003 to form the *National Residential Schools Survivors Society*. This society includes persons who had been involved in civil litigation, such as William Blackwater of *Blackwater v. Plint*, the Association of Survivors of the Schubenacadie IRS in Nova Scotia (led by Nora Bernard), and other survivor groups such as *Spirit Wind* (from whom we heard above). While supportive of the idea of an IRSSA and especially reconciliation and healing initiatives when led by Indigenous people, these organizations have always kept a critical eye on the Government and on the AFN with which it eventually partnered. For example, while they initially worked with the Government on the *Gathering Strength* initiative and initially supported the Government ADR process because it was supposed to embrace Indigenous approaches to justice and spare the survivors the scrutiny/interrogation to which civil litigation subjects them, they quickly critiqued (as previously stated) the tight control the government had over the process and the reality that the ADR mirrored Canada’s adversarial legal system despite assurances to the contrary. They further noted the insulting compensation amounts. For example, Flora Merrick (introduced above) was beaten by a nun and locked in a closet for two weeks as punishment for trying to escape the IRS. Merrick was trying to make it home in order to attend the funeral of her mother. The ADR process awarded Merrick $1200 for the beating and wrongful confinement. Government then appealed this small award. In comparison to the small amounts of compensation commonly awarded to claimants, the Government would spend tens of thousands on each survivor’s claim to
investigate its validity, and sometimes to appeal, as in the case of Merrick (AAND 2005, AFN 2004).

Finally, lawyers have also played an important role in challenging the government’s adversarial legal approach to IRS. The Law Society of Canada has written reports which recommend alternatives to civil litigation. The National Aboriginal Law section of the Canadian Bar Association offered a critique of the ADR process and advocated a global reparations approach. The individual lawyers for Indigenous claimants in civil suits have been instrumental in shaping the ultimate political and legal agreement by virtue of persisted attempts to have “loss of culture” addressed in civil litigation. They also appeared at government committee meetings and spoke passionately of the inadequacy of the legal system, the nasty and irresponsible moves on the part of government regarding refusal to take “loss of culture” into account or to consider a global compensation solution to IRS claims. As one judge noted, these lawyers took political risks with their own careers, given that “Canada was not an ordinary defendant” (McMahon, Alberta para 77). This “not ordinary defendant” required a unique legal strategy: the Baxter class action. As mentioned, Baxter was first filed in 2000, and was amended in 2003 to become the Baxter National class action, representing 80,000 claimants, organized and represented by a “national consortium of lawyers,” an impressive coming together of lawyers from 19 law firms across Canada led by Thompson and Rogers (Ontario), joined later by the Merchant Law Group (Alberta).

Thus, the actions of each of these three groups—Indigenous leaders and representatives, IRS survivors, and the legal counsel for Indigenous claimants—informe
the other, all influenced the eventual content of the IRSSA, and all played a role in pressing the ever resistant government to consent to the IRSSA. While the political and legal battle was a lengthy and messy one (as stated above), two legal decisions in May 2005: one on May 12, dismissing the Government’s appeal of the certification of Cloud, and another on May 30 dismissing the Government’s appeal of the Baxter National Class Action application for certification, likely compelled the Government to negotiate a settlement. This long period of Indigenous activism, the force of the demands made by the Indigenous collective, and the legal and existential threat to the settler contained in the Baxter class action, is often forgotten in public discourse regarding the IRSSA, where the focus becomes the compensation package itself.

6.4 Containing the Baxter Threat: The IRS Settlement Agreement

The IRSSA requires that the Government of Canada—without admitting to any of the wrong doings identified in the Baxter claim—commit 2 billion dollars towards a Common Experience Payment (CEP), a base payment to each survivor of IRS of $10,000 plus $3000 for each year spent in the IRS system, amounting to around $23,000 per survivor. The CEP is meant to address the common issue (or common experience) of being required to attend IRS, and it is the CEP component which is sometimes referred to as the “global reparation” for “forced assimilation,” “loss of language” and “loss of culture.” The settlement also requires that individual survivors who experienced “serious” sexual or physical abuse be able to pursue these claims via a revised ADR process called the Independent Assessment Process (IAP) for which the Government must set aside 1 billion dollars. Compensation for damages here is to be paid 100% by the Government
and may reach up to $275,000 per individual survivor. Further, if loss of income or opportunity of employment can be proven, the survivor may be awarded up to an additional $250,000 (although high amounts are not likely, for the same reasons discussed in Chapter 5). At the time of the signing of the IRSSA, it was estimated that 15,000 claims would proceed through the IAP. Canada is required to process a minimum of 2500 of these claims each year for five years (2006–2011). The IRSSA also requires Canada to devote 60 million towards an Indigenous run Truth and Reconciliation Commission (TRC)—modeled on the South African TRC—which will create forums for survivors to tell their experiences of IRS in order to promote healing amongst Indigenous communities and reconciliation between Indigenous people and non-Indigenous Canadians. Survivor experiences will be documented and commemorated in events and ceremonies for which 20 million has been earmarked. While the focus is on Indigenous healing, this component also aims to educate future generations of mainstream Canada as to this “dark chapter in Canadian history” so that it will “never again” occur. The government will also continue to fund the Aboriginal Healing Fund program (125 million for five more years) which began with the “Gathering Strength” initiative launched after the January 1998 “statement of regret” by then Minister of Indian Affairs, Jane Stewart (Lib.) (Canada 1998). Although the November 2005 Agreement in Principle (signed in Kelowna by the Liberal government)99 secured a commitment on the part of Canada to offer a Nation to Nations apology in Canada’s House of Commons, this component was dropped from the legal agreement. However after much political pressure, Prime Minister Harper followed through with the apology on June 11, 2008. (I comment upon this in Chapter 7.) Finally,
Canada must pay the legal fees of all the lawyers (more than 20 law firms) who have worked for over a decade and a half on IRS litigation. The 80 million dollars paid to lawyers results in an average of $4000 per claim. For the IAP which will unfold over five years, lawyers cannot charge more than 30% of the damages awarded to their client, and Canada must pay 15% of this lawyer fee, the remaining 15% to be paid by the claimant.

The IRSSA also prohibits IRS survivors who agree to the settlement, from pursuing further legal action against the Government of Canada and the Church organizations who are signatories to the final agreement. The IRSSA includes only students of federally (vs. provincially) run, residential (vs. day) institutions, operated under the Indian Act. Institutions for Metis’ children were not included in either the IRSSA or the apology. At the time of this writing (2011) the AFN is considering class action on behalf of these excluded survivors (AFN website). While Canada is immune to litigation from all who agree to the IRSSA, individual perpetrators are not immune to prosecution. In total, the IRSSA requires Canada to pay 5 billion dollars (not including the individual IAP claims), much less than the 100 Billion dollars Baxter would seek from Canada.

In important ways, the IRSSA can be viewed (from the perspective of many Indigenous survivors and leaders) as the result of successful Indigenous resistance to a colonial regime. For example, the AFN argued that resolving the IRS issue would allow Indigenous people to devote energy to addressing land claims, poverty, self-government and sovereignty (AFN 2004). Other Indigenous survivors believe that the IRSSA is flawed, but accept it as “the best deal they will see in their lifetime” (J Richards, 2006 NWT). Many people, both Indigenous and non-Indigenous, see the IRSSA as an
important and hopeful step towards “reconciliation” and the creation of a “new relationship” between Canada and Indigenous peoples. In particular, the CEP for having attended an IRS, is seen by some as an indication that Canada is willing to acknowledge the past wrongs of government policies of assimilation. While the IRSSA is viewed as a victory by some Indigenous people, other Indigenous peoples, perhaps echoing the analysis of Indigenous scholar Roland Chrisjohn et al. (1997, 2002, 2006, 2008) are critical of the IRSSA, arguing (in part) that money cannot compensate for what is really at issue, but what was never named in the public account of the IRSSA, viz., the Canadian state’s sustained attempt at the genocide of Indigenous peoples during colonization, for the purpose of control of land and nation.

6.5 Judicial Reasons: Marking the Indigenous Collective Once Again

Baxter posed a significant challenge to the legitimacy of Canada’s sovereignty. The settler state manages to pre-empt this threat by signing the IRSSA. As steward of white identity and protector of settler sovereignty, law, through the decisions of the nine Justices who approve the IRSSA, must now re-assert the legitimacy of sovereignty and restore the colonial relation between settler and native. Law accomplishes this through the time worn strategy of marking the Indigenous collective as thoroughly damaged property. In 2006, nine Superior Court Justices, one from Ontario (J. Winkler), British Columbia (J. Brenner), Saskatchewan (J. Ball), Manitoba (J. Schulman), Quebec (J. Tingley), Alberta (J. McMahon), the North West Territories (J. Richard), Yukon (J. Veale), and Nunavut (J. Kilpatrick) rendered decisions which certified the Baxter national class action and simultaneously approved the IRSSA as a just and fair deal for the Baxter claimants.
Baxter v. Canada was thereby brought to a close, and its claim of genocide would never be heard in a court of law. As Baxter was filed in Ontario, J. Winkler (Ontario) is the lead Justice, and most of the other reasons concur with his. As well, J. Ball informs us that the nine justices were encouraged by all parties to the settlement, to meet and discuss their reasons in order to ensure consistency. Most of the judicial reasons do not vary from Winkler’s reasons. In what follows I show how the collective white body disappears and how possessive white dominance is reproduced in the judicial reasons. Similar discursive strategies (of displacement, evasion, etc.) to those identified in Chapters 4 and 5, will surface here. The nine judges continue to obscure the triadic relation of land—violence—white collective by: quarantining IRS and its violence in the past, separating IRS violence from land, separating IRS violence from a wider white collective. Now that systemic negligence is on the table, they openly acknowledge IRS policy. They now emphasize the system (not the nation), the policy (not the humans) as the source of harm, and the purpose of IRS as education (not land usurpation) is given new life. When “loss of culture” is addressed, it is not conveyed as genocide, but the silence intimates that this is what is at issue. If genocide is mentioned, it is relegated to the distant past. If the present is the focus, then violence is absent. As in chapters 4 and 5, the Indigenous body is marked as overly emotional (not rational), bitter and mentally unstable (prone to violence), and utterly damaged. The settler, through law’s voice of reason, again renames the intergenerational impact of genocide as evidence of a dysfunctional culture. As earlier chapters show, the Indigenous collective is jettisoned back to a pre-modern position which in turn marks the settler as modern. Judges will (as in Chapters 4 and 5) express a blend of
compassion and menace. They are moved by damaged bodies, and they certify the Baxter application because it is a fair compromise, but as they do so, they remind the plaintiffs that it is a good deal for the plaintiffs because if they proceed with the claim they will lose. Despite certification, it is not likely that the courts will recognize “loss of culture” as actionable. Specific aspects of the decision are discussed below.

6.5.1 Failed Fiduciary Duty: A Lesser Wrong Committed in a Less Modern Time

For the most part, the nine Judges describe the purpose of IRS in ways that differ from the description in the Baxter claim and the Indigenous affidavits. Most of the Justices follow Winkler’s brief description of the IRS system, as “schools” which were “largely operated by religious organizations” and merely supervised by Canada, and which merely encourage Indigenous people to “abandon” their culture. When pointing to the Indian Act and the IRS policy, they ambiguously refer to the latter as a “seriously flawed failure” (echoing Brenner). What could it mean to say that a policy of genocide is flawed? Any mention of violence resembling genocide is followed by the paternalistic phrase that the IRSSA is for the benefit of the “students” so that they can bring closure to this issue, and a distancing between settler behavior of the past and present. As J. Tingley (Quebec) states:

[2] Upon review by the Royal Commission on Aboriginal Peoples, it was found that the children were removed from their families and communities to serve the purpose of carrying out a “concerted campaign to obliterate” the “habits and associations” of “Aboriginal languages, traditions and beliefs,” in order to accomplish “a radical re-socialization” aimed at instilling the children instead with the values of Euro-centric civilization. The proposed settlement represents an effort to provide a measure of closure and …relief intended to address the harm suffered by the Aboriginal community at large.
[4-5]… In addressing the spiritual, mental, and physical harm resulting from these long-standing policies and practices, the …Settlement Agreement seeks to resolve outstanding…claims…and to bring a measure of closure to these Survivors and their families…

Similarly, J. Schulman (Manitoba) states:

[1-2] For more than a century the Government of Canada …implemented a policy …designed to reengineer Aboriginal people into a European model by educating them to abandon their language, culture and way of life and adopt the language, culture, and religions of other Canadians. Looking back on the policy in 2006, it is an understatement to say that it is well below standards by which we like to think we treat other people and created problems for the Aboriginal people which require being addressed on a pan Canadian basis. (My emphasis.)

Despite all the testimonies which they will have heard, judges frame the IRS as failed attempts of carrying out fiduciary duties (not between nations, but between guardians and children). Thus a wrong is acknowledged, but it is a lesser wrong than genocide: the government had an obligation to educate Indigenous children (an obligation that arose from the unjust imposition of colonial values and legislation such as the Indian Act) and failed to come through on its (self-imposed) colonial obligation. Indeed, this sentiment of regret at having not been good fathers surfaces elsewhere in the judgments, for example when J. Brenner (B.C. para 14) cautions us to “avoid another exercise in failed paternalism” with respect to the IRSSA itself. The unspoken question is “Why eradicate Indigenous culture?” and the answer is because the colonial project of land theft and nation building required it. The discursive strategy of containing the wrong-doing in the past arises time and again in the judicial reasons and gives rise to contradictions. No one really questions the fact that IRS operated for “over a 100 years,” which entails that IRS
operated in “modern times.” The IRSSA states that IRS closed in 1996. Yet “modern times” are time and again portrayed as separate from the era of IRS. Emphasis is placed on IRS as the practice and product of well-intentioned but less modern Euro-Canadians (less modern than we are now). No one observes that the dark period was literally yesterday. Acknowledging the pain—“Have you ever heard a whole village cry”—the cause of it remains in shadow. J. Veale (Yukon):

[para 6]…It is not possible to do justice to the stories of 90,000 aboriginal people in this judgement. Suffice it to say that although there were some benefits, the majority of the survivors found it to be a devastating experience. It was all the more so for those who suffered physical assaults, sexual assaults and psychological harm.

[para 48] From a common law point of view, the Common Experience Payment is an extraordinary resolution to a complex political and cultural dispute. It is inconceivable that a court would provide a remedy that compensates all Indian Residential School survivors with a financial benefit without proof of loss, by simply proving that a survivor attended an Indian Residential School.

And while “behavior modification” of the respondent in a class action is one of the reasons for certification, all but one of the judges believe that behavior modification is irrelevant because the behavior in question is localized in the institutions of IRS themselves. Only one judge, J. McMahon (Alberta para 34) mentions the possibility of deterrence, “if deterrence is needed.”

6.5.2 Common Issues: Enough for Certification, but Genocide is Not Actionable

In the certification of Baxter which coincides with the approval of the IRSSA—and which now constitutes public record and what the public will be allowed to know—the common
issues identified are reduced from the list we saw in the Baxter application to three, and with no particulars identified, other than “actionable physical or mental harm”:

a. By their operation or management of IRS (1920-1996) did the Defendants breach a duty of care they owed to the Survivor class to protect them from actionable physical or mental harm?

b. By their purpose, operation or management of IRS… did the Defendants breach a fiduciary duty … or the Aboriginal or Treaty rights of the survivor class to protect them from actionable physical or mental harm?

c. (same as B, owed to the family class)

d. Can the court make an aggregate assessment of damages?

The class is identified as “All persons who resided at an IRS in Canada between January 1, 1920 and December 31, 1997, who were living as of May 30, 2005.” Winkler certifies the Baxter Class Action (contingent upon both sides agreeing to the IRSSA), on the grounds that continuing with the individual litigation may compromise access to justice for those who cannot afford litigation or who are elderly and in ill health. As well, returning to the ADR process would be to return to an inherently unfair process, given that the Government had complete control over the conditions and could unilaterally terminate the proceedings. These reasons for preferring class to individual litigation are then used to argue that the IRSSA agreement is a reasonable compromise for the claimants. Thus law can be seen to watch out for the marginalized. And yet, it follows up with a contradiction: law would ensure that the class action would fail. All judges, drawing almost verbatim from the Attorney General’s statement of defence in Baxter, argue that if the Baxter class action were to proceed through the courts it would likely fail because of legal definitions and rules. Most important is that the claim of action that Canada’s policies regarding IRS
break international conventions regarding rights of the child and genocide, would likely be dismissed as “non-judiciable” and that “any cause of action based upon an attack of this government must fail for this reason” (Kilpatrick, Nunavut para 44). Relatedly, as law cannot apply present law to past actions, genocide is not an actionable tort and “loss of culture” would likely continue to not be recognized in law as an actionable tort. Others argue that that even if it were recognized as such, there would be a likely statute of limitation attached (no exception would be made for this historic wrong or its uniqueness.)

In the words of Justice Brenner (BC para 9):

A repeated theme in these cases is the effect that attendance at Indian Residential Schools had on the language and culture of Indian children. These were largely destroyed. However, no court has yet recognized the loss of language and culture as a recoverable tort. Even if such a loss was actionable, most claims would now be statute barred by the Limitation Act, RSBC 1996, c. 266. The CEP can therefore be viewed, at least in part, as compensation for a loss not recoverable at law. In my view, this presents an important advantage to the class. [Brenner, J. British Columbia, para 9]

Further, in agreeing to the IRSSA, states Brenner, “Canada has recognized its past failures with respect to the Indian Residential Schools” (para 36). If the central claim is not actionable, what then can be done? The court proposes that “an apology would be an extremely positive step and would assist in the objective of all parties in achieving the goal of a national reconciliation” (Brenner, J. BC 36). An apology becomes even more warranted in the Court’s view when Indigenous dysfunction is made manifest. An apology will fix the damage. Thus, throughout many of the nine decisions regarding IRSSA, the ontological force of property and the marking the body of the survivor as damaged returns, as in J. Kilpatrick (Nunavut decision, para 1):
There is a brooding resentment for a life that is damaged. There is anger for a childhood that is lost. There is profound emptiness and a sadness that comes from the loss of an opportunity to be raised in a nurturing family environment. There is only a memory of survival; a memory scarred by pain, anxiety and humiliation. Then there is the loneliness, a solitude caused by years of isolation from language, culture, and extended family. Michelline Ammaq is left with a great yearning to know a life that has never been lived. These feelings are the unfortunate legacies, the bitter byproducts, of a residential school experience.

This eloquent paragraph is a successful obfuscation of any white colonial force which produced the damaged life. We are told the damage is a mere by-product of the IRS system. And, perhaps even more significant, given their pain and dysfunction, no amount of money will fix the problem. Justice Richard (NWT, 14-15) reflects:

I was impressed, and moved, by the oral presentation made to the Court on October 3-4 by survivors of the IRS system. These survivors were very articulate in explaining the impact on them individually of their experience in the IRS system many years ago, and the impact on their lives since that time. It is impossible not to be moved by these presentations. [14]…[15] I respectfully agree with the comment made by many of the survivors that the $10,000/$3,000 Common Experience Payment to be provided in the proposed Settlement Agreement is insufficient compensation for what they endured; however I add that no amount of money could fully redress the injury to them, e.g., loss of culture, loss of language. These survivors are victims and cannot be made whole by this Settlement Agreement or any settlement agreement. No one, and no amount of money can undo what has been done to them.

These same sentiments are repeated by most of the nine judges:

No amount of monetary compensation can ever restore what has been lost by the Inuit survivors of the “Indian” residential schools and their families. No settlement agreement has the power to undo what has been done in the past. No price can be put on the many lives that have not been lived or on the many missed opportunities for advancement of life [63]…The proposed settlement does not try to do this. It does provide a means for moving forward. …At a national level, it offers an opportunity for reconciliation, and an opportunity to learn from the mistakes of the past. Justice Kilpatrick [Nunavut, 63-64]
Rather than money, the court emphasizes the role of healing and “wishes them every success in the healing journey that lies ahead” (Justice Kilpatrick, Nunavut, para 90).

6.6 The Colonial Present: Land, Terror and White Collective Identity

The negro is a slave who has been allowed to assume the attitude of the master. The white man is a master who has allowed his slaves to eat at his table. … The master laughs at the consciousness of the slave…what he wants from the slave is not recognition, but work. (BSWM 219; 220 ftnt. 8)

As stated, the Government of Canada (whether Liberal or Conservative) resisted a global resolution to IRS and used aggressive tactics during litigation for over a decade (AFN 2004). It is not until May 2005, when the Supreme Court of Canada dismisses the Attorney General’s appeal of the certification of the Cloud class action— which would likely guarantee the certification of the Baxter class action—that Canada agrees to sit down to negotiate a global settlement to the IRS class actions with Indigenous leaders. The negotiation for the IRSSA was difficult for the six months prior to the 2005 AIP. The IRSSA was one issue addressed during the round table economic negotiations between Indigenous leaders and Canada’s federal and provincial governments, negotiations which also began as a result of years of pressure placed on Canada by Indigenous leaders, and years of difficulty on the BC treaty negotiation front. The economic negotiations and resulting agreement, known as the “Kelowna Accord” (Canada 2005b) may be read as part of Canada’s on-going project to legitimize its claim to sovereignty. It was agreed that if an AIP regarding IRSSA could be reached during the Kelowna Accord negotiations, that this would be an important step to re-establishing trust for the wider economic
agreements regarding Indigenous land, resources, poverty, education and health, which were the focus of the accord. As most of the nine judges remind us, the IRSSA—like any legal settlement—was a compromise. This must be remembered when we consider the following words of Prime Minister Paul Martin in his opening address to the Kelowna Accord November 24, 2005:

We face a moral imperative: In a country as wealthy as ours, a country that is the envy of the world, good health care and good education should be taken for granted; they are the tools leading to equality of opportunities—the foundation on which our society is built. … We are here today because the descendants of the people who first occupied this land must have an equal opportunity to work for and to enjoy the benefits of our collective prosperity. Today, the majority do not—because of gaps in education and skills, in health care and housing and because of limited opportunities for employment. Put simply, these gaps—between Aboriginal Canadians and other Canadians, and between Aboriginal men and women—are not acceptable in the 21st century. They never were acceptable. The gaps must be closed. (Canada 2005b, My emphasis.)

While Martin’s statement skillfully alludes to a pre-colonial time (“descendants of the people who first occupied the land”), it simultaneously omits mention of the colonizer’s ancestry and the colonizer’s collective violence (for how was the “collective prosperity” of those who now occupy the land achieved?) Martin’s statement makes clear that the “new partnership” between Indigenous and settler, will consist of one framed by the still colonial values of “our” liberal capitalist society. Gaps in “equality” with regard to education, health care, housing, and “economic opportunity” are to be filled. The ability to “manage their own lands and resources” and to benefit from the jobs generated by this investment, is to be encouraged. The government embraces the “moral imperative” to improve the “Other” through “assimilation” (an invitation into this economic system), to
share in “our collective prosperity.” The Canadian nation remains dominant among nations. Sovereignty is re-asserted. Once dominance (renamed generosity) in the present is established, it is safe to return to the past. Martin ends his speech by stating:

Not far from here, in Kamloops, nearly 100 years ago, the Chiefs of the Shuswap, Okanagan and Couteau … Tribes delivered a letter to Prime Minister Wilfrid Laurier. …[describing]…the trust and the spirit of mutual respect that had shaped their first encounters with the people of Europe. That letter was a call from the heads of three nations to another, for a relationship to be set aright; for First Nations to be recognized in a young Canada as partners in its future. … Over the course of our history we have heard this call from all First Nations; from the Inuit and the Metis Nation.

Yet for too long we have been only negotiators, sitting across the table from one another. … Today we sit down on the same side of the table, as partners. We have taken our rightful places. Now we must begin the hard work together.” (Canada 2005b, My emphasis.)

Here again, Martin implies that the present is no longer a colonial context, and that restorative justice has been set in motion. We have taken our rightful places. Yet the settler’s anxiety about the illegitimacy of settler sovereignty is a constant. It is important to appease Indigenous nations who know that the settler’s sovereignty is illegitimate.

In 2006, shortly after the 2005 Kelowna Accord, the Conservatives came into power, forming Canada’s New Government. P.M. Harper rejected the Kelowna Accord and was critical of the IRSSA. He initially refused to deliver an apology to IRS survivors, but eventually succumbed to pressure to do so. Paul Martin and other Liberals continued to push the Conservative government to honor the Kelowna Accord. Martin proposed a private members bill to implement the Kelowna Accord and this was given Royal Assent on June 18, 2008, one week after Harper’s apology (Martin 2006). But the Conservative
Government refused to act on it, which is the Prime Minister’s prerogative regarding private member’s bills. The refusal to implement the Kelowna Accord, increased the frustration of Indigenous leaders who publicly condemned P.M. Harper. Once again, the potential for Indigenous resistance gives rise to anxiety on the part of the settler. We see this in the exchange between two liberal members of Senate: Larry Campbell and Romeo Dallaire. They discuss the possibility of an armed uprising on the part of Indigenous people in the face of this latest show of disrespect from Canada. Dallaire is worried, because he has seen these uprisings elsewhere both globally and in Canada. Campbell is less worried, as our education has successfully taught Indigenous youth about the settlers’ ways and rules: negotiation rather than armed struggled. In the March 27, 2007 Senate second reading of the Kelowna Accord Implementation Bill, land—violence—white identity become explicitly linked. Chair of the Senate Hon. Larry W. Campbell (likely employed as an RCMP member during the time of Gustafsen Lake) reminds the committee that the 5.1 billion over 10 years promised by the Kelowna Accord would address the “Third World living conditions” of Indigenous peoples and would put an end to the “cyclical relationship between poverty, dependence, and frustration” (1700). He goes on to say that if water, housing, poverty, education, health issues etc. are not addressed, conflict in the form of land reclamations may ensue, and he seems to understand the settler is in the wrong:

The younger generation [of Indigenous people] will not be as willing to wait for piecemeal solutions from government. We will continue to see more conflicts such as Oka, Ipperwash, Caledonia…. The younger generation now is better educated and better understands how to deal with us without going to the barricade. They know how to use courts and public opinion, they are on the side of right. That’s what people don’t
understand. They are on the side of right at Oka, Caledonia and Ipperwash. We took their land and we told them to go and take a powder.

He goes on to acknowledge that they are separate nations. Senator Romeo D’Allaire (the man who was traumatized by genocide elsewhere in the world), sees the Kelowna price tag of 5 billion a small price to pay to maintain law and order, for if Indigenous nations mobilized, the country would come to a standstill. He has witnessed first-hand the white aggression against Indigenous people, and he senses that a literal war is possible:

The First Nations, the Aboriginals, numbering about a million, are in more than 600 locations in the country. If they ever coalesce, they could bring this country to a standstill in no time flat, for there is no capability that we have to stop it. .. I have seen White Canadians prepared to kill Aboriginals in Oka if they had had the chance, but the only problem was that they did not have the weapons to do it.

The Government’s task is also to prevent aggression on the part of white settlers regarding land. As Fanon argues, the colonizer makes concessions when he fears violence from the native.

That same year will see the newly elected Conservative Government, who initially criticized the IRSSA, begin to see its true value as a mechanism for nation-building (and strengthening Canada’s sovereignty). On June 14th, 2007, MINA Jim Prentice launched the first TRC pre-conference reminding us that:

Oftentimes when we think of nation-building in democratic countries we think of the role of the judiciary, economic policy, citizen participation and how different levels of government will interact. Sometimes we fail to recognize that nation-building is not only something that happened in the past; nation building, in my view, is an on-going exercise. When we become complacent we fail to recognize that our actions as governments and citizens are part of a continuous exercise in nation-building….100
Prentice’s cabinet portfolio will be taken over by Chuck Strahl, who carries on the project of sovereignty through economic development. In 2008, just prior to P.M. Harper’s June 2008 Apology to IRS survivors, Chuck Strahl as Minister of Indian Affairs and Northern Development (AAND 2008), reassures the Standing Committee on Aboriginal Affairs and Northern Development regarding “…the implementation of the historic Indian residential schools settlement agreement…” that:

This government is delivering on its commitment to a fair and lasting resolution to the legacy of Indian residential schools. …This brings me to the point I would like to leave you with this afternoon. There is a great deal at stake as we move forward on aboriginal and northern issues. The fact is, as we’re all aware, Canada is facing a labour shortage as the baby boom generation retires. Mr. Chairman, the solution to this shortage is right here before us. The aboriginal population is young, growing, and eager to play an important role in the labour market in the Canadian economy. (My emphasis).101

Ten days later, on May 15, 2008, Strahl delivers a similar speech to The Empire Club, adding that there is “only one economy, and the more that First Nations…contribute to that economy, the better for all Canadians” (Strahl 2008a). Strahl’s reassurances to his community of political and economic elites, is both curious and chilling. Curious, because when the Conservatives initially came to power they refused to honor the Kelowna Accord and the Liberal Government’s Agreement in Principle with Indigenous, Metis’, and Inuit representatives, including all elements related to the IRSSA. Perhaps the fine print in the Baxter class action changed their position? Chilling, when one recalls that among the original Government goals of the Indian residential system was the creation of a cheap labour force of agricultural and domestic workers (Milloy 1999). As Fanon states, what the settler wants from the native, is a worker (BSWM 220 n.8).
In previous chapters I suggested that when settler sovereignty is challenged, whether in IRS case law, or the wider colonial force-field, the settler’s eviction of the Indigenous collective from the category of rational individual or property owner becomes even more pronounced. In this chapter I have shown how this move is compatible with efforts on the part of the settler state to engage in damage control, through gestures to the native of “sharing in the settler’s prosperity.” As Fanon teaches us, we should be suspicious of the settler’s recognition of the humanity of the native, and the settler’s willingness to share in economic prosperity, when this does nothing to destabilize the structure of colonialism or the settler’s sense of racial and economic superiority in relation to Indigenous people. We should be especially suspicious when this recognition is extended as a way to control the native’s threat to settler sovereignty. It seems that, as Foucault notes, “we are always writing the history of the same war” (1997, 16).
Chapter 7: Reconciliation: Restoring Settler Legitimacy Through Canada’s Apology to “Former Students of Indian Residential Schools”

...decolonization is always a violent phenomenon...the possibility of this change is equally experienced in the form of a terrifying future in the consciousness of ... the colonizers. (Fanon WE, 35-36)

When it does happen that the Negro looks fiercely at the white man, the white man tells him: “Brother, there is no difference between us.” And yet the Negro knows that there is a difference...he wants the white man to turn on him...Then he would have that unique chance—to “show them...” But most often there is nothing—nothing but indifference or paternalistic curiosity. (Fanon BSWM, 221)

Frantz Fanon offers much insight into, not just the violence of colonization but also, the violence of decolonization. The above passages point to three themes that I want to emphasize from Fanon. First, that the prospect of relinquishing complete control of “the native” is a terrifying experience for the settler. It is terrifying because the settler’s “control over virtually every aspect of the lives of Indians”\(^\text{102}\) is intimately tied to the settler’s enactment of his/her/their own identity. To lose control of the native, is to lose control of settler identity. Second, connecting the first passage to the second passage, in the face of potential revolt from the native (and the possible complete overthrow of colonial relations), the settler may manage his terror regarding change and loss of identity and power, by repackaging in “cunning” (Povinelli 2002) and “magical” (Samson 1999) ways, the colonial relation between settler and native as one of “equality.” This repackaging is made possible by what Fanon elsewhere calls the “liberal intentions of colonialism” (WE 69) enabled by the “detached complicity between capitalism” and colonialism (Fanon WE 65), for example, as captured by past P.M. Martin’s (Lib.) invitation to Indigenous people to “share in our [the settler’s] prosperity.”\(^\text{103}\) In
contemporary liberal democratic states characterized by internal colonialism, invitations to equality with the settler are announced through invitations to citizenship, multicultural programs, economic partnerships, capital development programs, and political and legal recognition of Indigenous self-government (vs. outright sovereignty) (Samson 1999, Povinelli 2002, Short 2005, Coulthard 2007, Rifkin 2009, Johnson 2011). This invitation to equality is one which simultaneously leaves intact the subordination of Indigenous sovereignty to settler sovereignty (i.e., inequality between settler and indigenous nations remains). Insofar as this strategy of reconciliation leaves settler sovereignty overarching in relation to Indigenous sovereignty, it may be viewed as a form of “repair” (recuperation of) settler and native relations. That is, contrary to liberal accounts of reconciliation which view it as a form of restorative justice which repairs or “corrects” relations between the victims and the perpetrators of state violence in order that they may move forward together in a renewed partnership (Short 2005), reconciliation which leaves settler sovereignty dominant over Indigenous sovereignty merely repairs the perception of illegitimacy on the part of the settler state. Genuine decolonization has not occurred. Third, the above passages remind us that there is a violence inherent to these gestures on the part of the settler, gestures motivated by fear, whether invitations to equality (which both presuppose and re-inscribe inequality (Farley 2005)) or through the settler’s liberal, fair minded, or rational demeanor of “indifference or paternalistic curiosity.”

These themes may be traced in the gestures of reconciliation on the part of liberal democratic settler states, including the gesture of “apology.” As Pierre Nora (1998, 609) claims, we live in an “era of commemorative bulimia” and “apologia,” wherein, as
Damian Short (2005) notes, settler states around the globe—in response to the growing Indigenous rights movement and in the interests of continuing the economic business of nation-building—seek to repair damage to their reputation by apologizing for historical colonial injustices of the past (including mass atrocity). Short argues that such gestures of reconciliation are contradictory for settler states wherein colonial relations are on-going (i.e., where the colonial wrong-doing is not merely “historical” but continues in the present). Thus, in settler contexts the distinction Jason Edwards (2010) draws between “apologia” and “collective apology” is bogus. Edwards defines apologia as “a rhetoric of self-interest …[for the purpose of] defending and repairing one’s public image” for wrong-doing in which one is temporally more closely connected, i.e., it is a “speech of self-defence” (Edwards 2010, 60–61). Collective apology he claims, is rather, a statement of apology for the purpose of “repairing, healing, and rebuilding relationships harmed by historical injustice” (61). Reconciliation as repair comes in many forms. Michael Humphrey (2005) critiques reconciliation in the form of a “therapeutic strategy” as this problematically places the focus of repair on a collective victim and its pathology, whereas, as Roland Chrisjohn (1997) has argued (and echoing Fanon), this serves to take the focus off repairing the pathology of the collective perpetrator. The collective perpetrator can continue to go about its business (in this case, of securing settler sovereignty). Therapeutic strategies construct the Indigenous collective as a “horde of vital statistics” (Fanon WE) and “a needy mass” (Rifkin 2009) inviting “improvement,” and its correlating violence, from the settler collective. We have already seen this in the
case of how IRS survivor testimony is taken up in the settler’s court. Strategies of repair may thereby re-inscribe racial hierarchy and colonial structures.

Interestingly, Edwards places Canada’s 2008 apology to “former students” of IRS in the category of a collective apology (rather than apologia). I consider Canada’s apology to be a mix of both apologia (self-defence) and collective apology, primarily the former. I suggest that in the case of Canada’s Apology to survivors of the IRS system, apology is simply another “cost of doing business.” Canada apologizes for the past in order to enable the settler collective to get on with the business of nation-building. Apology for the past must be done in a way which does not reveal the on-going nature of the settler’s wrong-doing. Other scholars argue similarly (Chrisjohn et al. 2008, Henderson and Wakeham 2009, Dorrell 2009, McCready 2009, Johnson 2011). For example, Michael Dorrell’s (2009) discursive analysis of Canada’s apology exposes a “narrative of progress” which implies “closure” to the IRS issue, quarantining “the abuse of the residential school system to the past…while removing the contextual information needed to understand the school system as a critical component of a layered and continuing colonial project” (2009, 30). Reconciliation as repair is subject to the same critique as that of “recognition” when extended to the “native” on the settler’s terms and within the settler’s political and economic structures (Fanon 1967, Coulthard 2007). Both are merely strategies of re-colonization: strategies which aim to recuperate collective settler dominance in relation to Indigenous collectivities and land (Rifkin 2009), strategies which quell settler anxiety and keep the “native” threat of revolution at bay. It is within this context, and bearing in mind Fanon’s insights about the violence of decolonization and the settler’s “generosity” (i.e.,
the invitation to equality), which I read Canada’s 2008 Apology delivered by P.M. Harper in the House of Commons. Canada’s apology, I suggest, is born of fear on the part of the settler, fear of a terrifying future where settler sovereignty is dismantled, fear generated by the Baxter class action. In the previous chapters I showed how the settler collective may respond to challenges to its sovereignty with a more violent dehumanization of the native. In this chapter, I emphasize Fanon’s claim that the violence of indifference or paternalism towards the native may also be a response. I then (in the conclusion to this chapter) place the apology alongside other settler strategies of recognizing the native—specifically, the 2008 extension of Canada’s human rights legislation to Indigenous people who remain subject to the Indian Act, Canada’s 2010 signing of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), and Canada’s commitment to economic development programs (including programs which appear to allow Indigenous nations to own private property after all). I show how the apology and these other invitations to equality and humanity, together reinstall the settler occupier as the rightful owners of the land.

7.1 The Call for Apology

Indigenous leaders have for over a decade requested that an apology for Canada’s colonial policy of forced assimilation (cultural genocide) be delivered by the Prime Minister of Canada in the House of Commons, constituting a Nation to Nations apology for the Indian Residential School System. Canadian Governments (Liberal and Conservative alike) resisted such an apology, arguing that the 1998 Statement of Reconciliation (aka “Statement of Regret”) delivered by a Minister of Indian Affairs
(Jane Stuart, Lib.) in the absence of the Prime Minister of Canada (Jean Chretien, Lib.) should suffice. Indigenous people persisted. One example of the Indigenous call for Canada to apologize to IRS survivors is from Chief Robert Joseph, in his presentation to the Aboriginal Affairs and Northern Development evidentiary hearings of February 15, 2005 (from which I quoted at length in Chapter 6). Chief Joseph gave evidence against the government’s IRS ADR process, and argued that a comprehensive reparation along the lines suggested in response to the looming Baxter class action, was a more appropriate approach (AAND 2005). Apology was considered a vital component to such a reparation. Joseph outlines what form an apology between nations should take:

…As you can see, I [am] wearing my ceremonial robes as a sign of respect for your parliamentary traditions and the standing committee, of course. [...] There are times in our lives when we as men and women are called upon to do the extraordinary, times when we must do the honourable thing [...] These are such times. We call upon you and Canada to do this with us. [...] For us and Canada to turn the page on this chapter of our mutual history we need a broader response than what ADR can deliver. So here we must heed the survivor voices. For the past ten years over 40,000 survivors in over a thousand focus groups and workshops in British Columbia have told us what that broader response should be: an apology, compensation, funding for healing, and future reconciliation.

With respect to the apology, survivors want and need a full apology delivered by the Prime Minister on the floor of the House of Commons. [...] Such an apology would provide much-needed recognition, validation, and acknowledgement of abuses suffered in schools, a necessary step for the healing process to begin.

For an apology to work, it must be understood and performed symbolically in terms of the ritual that it is. It must offer the potential for transformation of all involved. With a nationally imposed system like the residential school system, transformation cannot occur unless the key players in the ritual are involved—the apology, the Prime Minister, and
the House of Commons. Anything less would be like a priest delivering
the Pope's Easter Sunday message in a chapel.

With respect to lump sum compensation, survivors are entitled to and
want financial redress for the pain and suffering—loss of language and
culture, loss of family and childhood, loss of self-esteem, addictions,
depression, and suicide—we’ve endured. The residential school system
failed to educate aboriginal peoples, condemning us, for the most part, to
the ranks of the unskilled labourer, the resource industries, and the social
welfare system. […] Add in cultural discontinuity and racism, and a
genocidal cocktail ensues […] The task then is left to us—mostly to you,
but to us as well. My task is to tell you what happened to me, to tell you
what I’ve seen, to tell you what I have heard. We don’t want to go to our
graves without having heard that this was not our fault or our parents’
fault. We need you to stand today and tell us now that you hear us, and
that you’re sorry this happened. We need you to look beyond the bottom
line at the grandmother who will never speak of her pain but whose
children can bear silent witness to its daily enactment. We need you to
look at the men who drank and drank until their pain could no longer be
killed by drink, so they had to kill themselves to end the pain. We need
you to look at our children, who have been hit over and over by unseen
blows extending down from the long arm of discipline and pain in those
schools. We need you to look, listen, and do something….

In the above excerpts Joseph’s language conveys the need for the expression of
respect between separate nations. While pointing to the psychological impact of IRS, he
frames this with reference to cultural loss and genocide to capture the nature of the wrong-
doing, a crime committed by one nation against other nations. At various points
throughout his presentation, he reminds Canada that its concern regarding the economic
“bottom line” needs to be set aside in order to do the right thing. In response, Pat Martin
(NDP) also calls upon the P.M. to apologize and states, “If he hears you as we heard you
today, I don't see any barrier, obstacle, or reason that it shouldn't be done without delay.”

In November 2005, the Agreement in Principle (the preliminary version of the IRS
Settlement Agreement to the Baxter national class action) signed by then P.M. Paul
Martin’s Liberal government as a precursor to negotiations over a wider project of new economic partnerships (between Indigenous leaders and all provincial leaders under the Kelowna Accord), included the plan for a formal apology on behalf of Canada delivered by the Prime Minister in the House of Commons. However, the apology was the only component of the Agreement in Principle which was excluded from the final IRS Settlement Agreement (inherited and implemented) by the Conservative Government in 2006. Thus the apology, (unlike the Truth and Reconciliation Commission), was not legally mandated. Indeed, upon taking office in 2006, PM Harper openly stated that he had no intention of honoring the Liberal Government’s promise of an official apology to survivors of IRS. Perhaps his refusal had something to do with the beliefs he expressed in his July 2006 speech to the United Nations, wherein he acknowledged Canada’s colonial past, and went on to say that Canada’s colonial policies “while far from perfect, were some of the fairest and most generous of the period…the actions of the British Empire were largely benign and occasionally brilliant.”

In May 2007, with still no commitment to a formal apology on the part of the Government, Indigenous MP Gary Merasty (Lib. Desnethe-Missinippi-Churchill River) motioned:

That this House apologize to the survivors of Indian Residential Schools for the trauma they suffered as a result of policies intended to assimilate First Nations, Inuit and Métis children, causing the loss of aboriginal culture, heritage and language, while also leaving a sad legacy of emotional, physical and sexual abuse. (House of Commons 2007)
Merasty spoke at great length in a reprimanding tone towards the Harper government. He suggested that the government’s refusal to apologize trivialized the injustice of IRS and colonial policy. He drew upon scholarship to argue that Harper was re-writing history (in Harper’s public speeches where, as quoted above, he spoke of a benign colonialism) and inducing a “national collective amnesia.” To correct this perception, Merasty detailed the nature of the wrong-doing of IRS, clarifying that it was a crime committed against children in order “to undermine nations” (House of Commons 2007, 1030), a crime “aided by the force of an unjust law.” His people “withstood the terrible attacks” of “The Government of Canada…and… the overall policy guidelines that attempted to educate and colonize a people against their will” (Ibid., 1025). While Merasty does not use the word “genocide,” his account strongly implies genocide as a colonial “national crime.”

Merasty claims that the need for an apology is clear, and yet the Government withholds an apology. Merasty questions Canada’s refusal to extend compassion to IRS survivors:

First nations, Métis and Inuit people sacrificed much to establish this country that we are all very proud of and call home. Canada is a country that attempts to be the most humane and generous in the world. People come to this great land to experience Canada's compassion and are proud to become new Canadians. It is ironic that the compassion that this country is known for, compassion first extended by the original peoples of this land, will not be extended to them by this government (1030).

Merasty uses language that implies Indigenous dual citizenship (in contrast to Chief Robert Joseph’s language of separate nations), nevertheless, his words attest to the strength of Indigenous collectives in surviving Canada’s project of colonization and genocide, and he insightfully names the perniciousness of the indifference on the part of a settler state that refuses to extend compassion to its victims. Other (non-Indigenous) MPs
also speak at length about the need for a formal apology. Their contributions commonly emphasize IRS as a past injustice for which the present Government must be held accountable. Conservative MPs sometimes couch accountability in economic terms, looking to future economic growth in Indigenous communities (putting the native to work) as proof of the settler taking responsibility for the past. Throughout the discussion, the only injustice perceptible in the present, is the injustice of not apologizing for past wrong-doing. Many MPs relay personal stories of IRS survivors from their constituency. In the course of conveying these experiences, the term “cultural genocide” is used by two MPs. Pat Martin (NDP) states:

The history of the Indian residential schools in this country was cultural genocide, plain and simple. Let us not use the words “an attempt to assimilate.” Let us call it what it was. It was to beat the Indian out of these kids. It went on for year after year. The Government of Canada knew, the Government of Canada directed it, and it contracted this work out. The sooner we all look at the truth of what happened there, the sooner both sides can begin to heal (1655).

MP Maurice Vellacott (PC) then “gently chides” Martin to be careful of the language he uses, (mistakenly) claiming that “forced taking of children” and “intergenerational breakdown” does not constitute genocide by the UN definition (1700). Pat Martin replies:

I will not modify my remarks one iota. The term “cultural genocide” is entirely appropriate. In fact, cultural genocide is a systematic pulverization of a people’s culture. It is a methodology frankly (1700).

Martin then conveys one experience relayed to him by Matthew Coon Come. Coon Come and his younger 6 year old brother, were enjoying their first experience of a shower upon arrival at IRS:
His little brother asked if he should wash between his toes. A priest swooped into the room and beat him with a stick for speaking his own language. …On their first day they were beaten while standing naked in a shower…Imagine their fear. If that was not a deliberate attempt at stamping out a culture, it was a graphic illustration and it is important that we recognize it today. (1700).

In this discussion amongst parliamentarians it is clear that Canada knows that IRS enacted cultural genocide, the “pulverizing” of a people. It is not clear that all the MPs understand (as does Merasty) that such genocide is connected to issues of land and sovereignty. The meeting ends with the unanimous passing of Merasty’s motion (absent the word genocide), 257 to 0. Parliament would call upon the Prime Minister to apologize “for the trauma” IRS survivors “suffered as a result of policies intended to assimilate” and “causing the loss of aboriginal culture, heritage, and language” and the “sad legacy of emotional, physical and sexual abuse.” After such pressure, P.M. Harper agreed to deliver an apology at the end of the five year Truth and Reconciliation Commission (TRC), waiting, he implied, to see what exactly he was apologizing for. Under further pressure from political colleagues, Indigenous leaders, Residential School Survivors, and even BC Supreme Court Justice Donald Brenner in his (earlier, often publicly quoted) 2006 decision regarding the Indian Residential School Settlement Agreement (IRSSA), PM Harper eventually agreed to make the apology near the start of the TRC, recognizing “…that the absence of an apology has been an impediment to healing and reconciliation” (House of Commons, 11 June 2008).

How might we make sense of this lengthy delay of an apology on the part of Canada? When Canada does apologize, will the apology satisfy the criteria identified by Chief
Joseph as an apology for a crime between nations, an apology that has the “potential for transformation for all involved” (AAND 2005)? Will it name the crime of genocide, as acknowledged by Canada’s members of parliament? As with the 1998 Statement of Reconciliation, analysts suggest that legal liability was the reason for the Government’s initial reluctance to apologize. The 1998 Statement of Reconciliation was indeed identified in the Baxter class action as evidence of acknowledgement on the part of Canada that it was responsible for IRS policy and its devastating effects upon Indigenous cultures. Yet, the 2006 IRSSA brought closure to most civil litigation and gave legal immunity to both Canada and the churches (although individual perpetrators of abuse may still be prosecuted). Thus fear of further legal claims within Canada—at least with respect to the vast majority of federally run IRS—was not likely the reason Harper resisted the apology. Moreover, the IRSSA, as with all legal settlements, brings closure to litigation without those accused of wrong-doing admitting to the alleged crime. Had the Baxter class action proceeded through the courts, it would claim that Canada is directly (rather than merely vicariously) responsible for cultural genocide. In signing the IRSSA the Government of Canada explicitly withholds admitting to the crime of cultural genocide. Perhaps the Prime Minister found it problematic to apologize for a crime for which Canada’s law has just allowed Canada to remain silent?107 This may also explain why the phrase “cultural genocide” will not be included in Canada’s formal apology of June 2008, despite a clear understanding on the part of Government that IRS policy was a policy of cultural genocide. In remaining silent about genocide, Canada’s apology also protects Canada from possible future charges of genocide in an international court of a law, for as
Chrisjohn (2008) points out, there is no statute of limitations on genocide in international law.

I suggest that the possible repercussions for a nation built on genocide versus actual compassion for the victims of genocide, are what ultimately—at long last—compel the Government of Canada to deliver a formal apology to Indigenous peoples. As I argue in the previous chapter, Canada’s sovereignty is illegitimate, resting as it does on mere assertion. It would be illegitimate even if no genocide (cultural or otherwise) was committed in the course of nation building. The fact that Canada’s IRS system was a mechanism of genocide, simply renders explicit and undeniable, the illegitimacy of Canadian sovereignty. The illegitimacy of sovereignty calls into question the legitimacy of the Crown’s present ownership of land. Agreeing to the IRSSA allowed Canada to silence the Baxter threat to expose that Canada’s sovereignty rests upon a mass atrocity, a grave violation of human rights. Yet, having silenced that threat, Canada must still repair the perception of the illegitimacy of a sovereignty grounded in the mere assertion of the Crown. According to journalists Bill Curry and Brian Laghi (2008), one of the pressures on Harper to apologize came from past Minister of Indian and Northern Affairs, Jim Prentice, who “argued that the government needed to apologize for the abuses of residential schools if it wanted to accomplish other things for native Canada, such as resolving land-claims disputes” (Curry & Laghi, 2008, A4). Perhaps Harper was moved to apologize in order to appease Indigenous people, make land negotiations go smoothly, and bolster the perception of Canada as “behaving honorably” in “all relations” with Indigenous people? Whatever Harper’s reasons for agreeing to offer a formal apology, the
Apology must be read as part of the context of what Prentice (as quoted in the previous chapter) calls the “on-going exercise of nation-building” and the legitimacy of the settler state’s sovereignty in relation to Indigenous lands and people. The apology of 2008 functions as self-defence and repairs the perception of the illegitimacy of Canadian sovereignty in two ways, first by creating the public perception (amongst Indigenous and non-Indigenous) that Canada takes full responsibility for past injustices, and second by obfuscating the fact that Canada continues to dispossess Indigenous people today, enabled by the very legislation which gave rise to IRS—the Indian Act. The apology (and its content) protects the settler collective’s interests in land today. I now turn to a close examination of P.M. Harper’s apology. As the text illustrates fully the colonial character of the apology, I include the entire speech.

7.2 The Apology

The June 11\textsuperscript{th}, 2008 parliamentary session of Canada’s House of Commons opened with the entrance of eleven distinguished guests—Indigenous national leaders and representatives, elders, survivors—escorted onto the “committee” floor of the House (outside the formal boundaries of the House decision making). The House business began with the passing of a motion which would allow Indigenous leaders to respond to the statements delivered by the Prime Minister as well as the leaders of the opposition parties. Only five of the distinguished guests were identified by name in the motion:

…Phil Fontaine, National Chief of the Assembly of First Nations, Patrick Brazeau, National Chief of the Congress of Aboriginal Peoples, Mary Simon, President of the Inuit Tapiriit Kanatami, Clem Chartier, President of the Métis National Council, and Beverley Jacobs, President of the Native Women's Association of Canada…
The other six guests (including George Erasmus and the eldest female survivor of IRS) went unacknowledged for almost the entire session (unlike the respect shown by Chief Robert Joseph to Canada’s parliamentary AAND committee). This opening insult was compounded by Harper’s first words. With no formal acknowledgement of the Indigenous dignitaries and elders in his presence, Harper begins his speech with “Mr. Speaker, I stand before you…,” speaking to the Indigenous guests indirectly through the House Speaker (as is House practice). This had the effect of speaking past the Indigenous guests. In a rather light spirit unfitting for the occasion, Harper begins with lengthy congratulatory remarks to other members of the Canadian parliament who “deserve credit” for convincing him that the time was right for an apology. Stated in both English and French, this back patting lasted close to four minutes out of the entire 13.5 minute speech. Referring only to portfolios, he thanks both Strahl (PC) and Prentice (PC) for their “strong and passionate” advocacy for both the IRSSA and the apology. He thanks Philip Mayfield and Jack Layton (NDP) as well. He does not thank the Indigenous people who fought for decades for such an apology, although he acknowledges them later in his speech. Harper then launches straight into reading the apology.

[Para 1] [Mr. Speaker] I stand before you today to offer an apology to former students of Indian residential schools. The treatment of children in these schools is a sad chapter in our history. For more than a century, Indian residential schools separated over 150,000 aboriginal children from their families and communities. In the 1870s, the federal government, partly in order to meet its obligations to educate aboriginal children, began to a play role in the development and administration of these schools.

[Para 2] Two primary objectives of the residential school system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.
These objectives were based on the assumption that aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as was infamously said, “to kill the Indian in the child.”

In the first passage above, the colonial purpose of the Indian residential institutions is masked as a “school” project, borne of a federal obligation to “educate” aboriginal “students.” Here Merasty’s claim that it was education against the will of Indigenous people is forgotten, as are the testimonies of IRS survivors (before judges, senate, and MPs) that the institutions were like prisons. Harper does not mention that the purpose of this education was to disrupt the transmission of Indigenous knowledge and ways of life related to nationhood and land. The federal government’s participation in this “education” project is also mitigated. It is implied that, rather than the architect of the project, Canada merely joined in on a process already underway; it “began to play a role.” The much used metaphor of but one sad chapter in an otherwise longer much happier book, quarantines both the purpose and the violence of IRS in the (possibly fictional) past. The obligation to educate (to “improve the native”) is separated off from the (never named) Indian Act which is still law today, and which gave rise to the obligation and the “methodology” of improvement.

In paragraph 2, while pointing to forced removal of children and their assimilation, Harper does not clarify why this was done. The opportunity to name the IRS policy of assimilation as cultural genocide mandated by the Indian Act for the purpose of land-usurpation, is evaded. Repeating the strategies we saw in law of the past two decades, the wrong-doing is placed upon the shoulders of only “some” whose individual actions had the impact of destroying a collective. We are redirected to think positively, for today we
understand that the policy of assimilation (based in racist attitudes rather than the settler’s law) has no place in “our country,” again despite the fact that the wider legislation of which it was a part, remains well entrenched:

[para 3] Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country. [Lengthy applause in the House.] One hundred and thirty two federally supported schools were located in every province and territory, except Newfoundland, New Brunswick and Prince Edward Island. Most schools were operated as joint ventures with Anglican, Catholic, Presbyterian and United churches.

[para 4] The Government of Canada built an educational system in which very young children were often forcibly removed from their homes and often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First nations, Inuit and Metis languages and cultural practices were prohibited in these schools. Tragically, some of these children died while attending residential schools, and others never returned home.

[para 5] The government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

In paragraphs 3 through 5, the IRS system is again emphasized as an educational system.

Despite the methodical rational organization of dehumanization that must have gone into building and running 132 institutions (for over 100 years) in the joint business venture between Canada and the Churches, it is implied that even the Canada of the past was not so bad. The fact that the entire country (save three provinces) believed forced assimilation (cultural genocide) was appropriate, must indicate that it was what reasonable people of
the day believed and practiced. All the major religious organizations in Canada considered it morally appropriate behaviour on the part of the settler. The daily violations of 150,000 Indigenous children, and the torment of at least an equal number of parents, seem a logical consequence of the “standards of the day” (the settler’s logic of elimination embedded in the Indian Act legislation). Harper’s words imply that Canadians of the past cannot be blamed for not actually (or constructively) knowing better.

While missing another opportunity to identify cultural loss as genocide in the first line of paragraph 5, the last line in this passage obliquely points to one of the claims of the Baxter class action: i.e., that mere attendance at IRS (required by the Indian Act policy) was a violation of human rights. Harper’s words cast doubt upon this claim, mere attendance may or may not have been a negative experience in and of itself, given that (we are told) some survivors had good experiences (perhaps like Coon-Come’s initial experience of the shower). Harper’s language reassures Canadians of today, that our government recognizes that the impact of IRS (whatever the intention of this “education”) was “profoundly negative” for Indigenous collectives. His sentiment echoes that of the nine court judges in Baxter v. Canada, who saw IRS as a “seriously flawed failure” (albeit whether a failure at education or assimilation is unclear). In the end, Harper again directs our attention to the actions of the pathological individual perpetrators we glimpsed in IRS case law and Indigenous testimonies, whose individual actions “overshadow” the impact of the requirement of mere attendance. The government of today, now recognizes, now understands, as would any reasonable person of the present, the horror of what the children experienced at the hands of misguided professionals and monstrous individuals.
To explicitly identify *Indian Act* legislation (which the apology never does), would be to explicitly link the past to the present. Harper’s words manage to avoid this linkage. He first separates the past from the present (through words and phrases such as “legacy” and “we now recognize”) and then shifts our attention from the past to only a portion of the present: the Indigenous collectives who remain devastated by IRS. This is followed by the generous gesture on the part of the settler to apologize to the Indigenous collective in order that the latter may heal from abuse (rather than genocide), and settler and native may embark upon the road to reconciliation (i.e. negotiations regarding land).

[para 6] The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today. It has taken extraordinary courage for the thousands of survivors who have come forward to speak publicly about the abuse they suffered. It is a testament to their resilience as individuals and to the strengths of their cultures. Regrettably, many former students are not with us today and died never having received a full apology from the Government of Canada.

[para 7] The government recognizes that the absence of an apology has been an impediment to healing and reconciliation. Therefore, on behalf of the Government of Canada and all Canadians, I stand before you, in this chamber [so vital] so central to our life as a country, to apologize to aboriginal peoples for [the role the Government of Canada played] Canada’s role in the Indian residential schools system.

Harper next apologizes for very specific harms—such as the aforementioned forced removal of children from their homes and the mysterious deaths mentioned in paragraphs 4 and 6—all of which relate to practices recognized by the United Nations as cultural genocide (which remains unnamed). Harper’s language masks the true nature and seriousness of the crime. Rather than stating that nations were decimated through the abduction, imprisonment, beating and murder of their children, we are told that children
were removed from “vibrant” cultures, child—parent bonds were “separated” over
generations, causing “voids” in families and communities.

[para 8]To the approximately 80,000 living former students and all family
members and communities, the Government of Canada now recognizes
that it was wrong to forcibly remove children from their homes, and we
apologize for having done this.

[para 9]We now recognize that it was wrong to separate children from
rich and vibrant cultures and traditions, that it created a void in many
lives and communities, and we apologize for having done this.

[para 10] We now recognize that in separating children from their
families, we undermined the ability of many to adequately parent their
own children and sowed the seeds for generations to follow, and we
apologize for having done this.

[para 11] We now recognize that far too often these institutions gave rise
to abuse or neglect and were inadequately controlled, and we apologize
for failing to protect you. Not only did you suffer [these] abuses as
children, but as you became parents, you were powerless to protect your
own children from suffering the same experience, and for this we are
sorry.

The negative impact of IRS is narrowly construed as the inability of generations
within Indigenous collectives to parent their own children. Such a portrayal will call upon
the settler to act paternalistically. Indeed, the settler state as colonial father now appears (a
point to which I later return). Harper concludes by emphasizing that the attitudes of the
past are no longer acceptable in the present (although, again, the Indian Act remains in
operation). Present day Canada is unlike the Canada of the past, a point we are reminded
of nine times in the course of under fourteen minutes, largely through repetition of the
words “we now recognize.”

[para 12] The burden of this experience has been on your shoulders for far
too long. The burden is properly ours as a government, and as a country.
There is no place in Canada for attitudes that inspired the Indian residential schools system to ever again prevail.

[para 13] You have been working on recovering from this experience for a long time, and in a very real sense we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the aboriginal peoples of this country for failing them so profoundly.

We are sorry.


[para 14] In moving toward healing, reconciliation and resolution of this sad legacy of Indian residential schools, the implementation of the Indian residential schools settlement agreement began on September 19, 2007. Years of work by survivors, communities and aboriginal organizations culminated in an agreement that gives us a new beginning and an opportunity to move forward together in partnership.

[para 15] A cornerstone of the settlement agreement is the Indian residential schools truth and reconciliation commission. This commission represents a unique opportunity to educate all Canadians on the Indian residential schools system. It will be a positive step in forging a new relationship between aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.

God bless all of you. God bless our land.

Harper neglects to mention that the legal force of the IRSSA is part of what has propelled the Government (kicking and screaming) to accept the “burden” of the IRS legacy. While acknowledging (in paragraph 14) the Indigenous demands for justice which he (and past governments) refused to hear for years, Harper refocuses on the future and the hopefulness of “education” initiatives aimed at building a “stronger Canada for all of us.” Re-assertions of sovereignty, if only whispered—“our country,” “our life as a
country,” “ours as a country,” “our land”—pepper his speech, reminding us of whose country (land) it is. Rather than a nation to nations apology, this apology is from the dominant (and only) nation to an array of communities and cultures (“strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us”). Settler and native may now move forward together, under one sovereign nation (Canada), one land (ours), one god. The very assimilation for which he has apologized and from which Indigenous people are recovering, is seemingly still underway.

An apology is genuine only if the wrong-doing in question ceases (Alter 1999). What exactly is the wrong doing addressed in the Apology? Forced removal of children? The policy of assimilation? A failed education system? Being deprived of care and nurturing? The prohibition of language and culture? The sexual abuse of children? Deaths of children? Racist attitudes on the part of politicians? It seems easy to promise that none of the above will ever again happen within the institutional setting of IRS, given their physical dismantling. But what of the “bigger picture” and the connection between IRS, land and sovereignty—a connection Indigenous people insist upon? What of the wrong-doing of the continued assault on Indigenous nations, currently backed by law? Canada did not apologize for this (a point which Chrisjohn (2008) eloquently makes). Many scholars note that the word “colonization” is curiously absent from Prime Minister Harper’s apology (Henderson and Wakeham 2009, Dorell 2009, Chrisjohn et al. 2008). Others emphasize the absence of the phrase “crime of genocide” (Chrisjohn et al. 2008, 2009). Equally important, the Indian Act and land are only obliquely referenced. In refusing to mention colonialism and the Indian Act, Harper joins the long tradition of
settle states who name only the effects of a past violent colonial project of nation-building. In refusing to name genocide and land theft, he perpetuates the myth of the benevolent colonizer. As Chrisjohn et al (2008) argue, Harper successfully disconnects IRS from the myriad means of genocide and colonialism, the (old and new) laws, policies, and practices of today’s colonial government, engaged in to secure settler sovereignty. The colonial present and the settler occupier (the white collective) who has come to stay, are obfuscated, allowing the settler’s identity project to continue.

Opinion leaders also spoke on June 11, 2008 and offered apologies to Indigenous people. Stephan Dionne (Lib.) did not use the words genocide or Indian Act, but did apologize for the “attempt to eradicate your identity and culture” and “erasing” identities. Gilles Duceppe (Bloc.) emphasized the lost childhoods, but called upon the Harper Government to endorse the United Nations Declaration of the Rights of Indigenous Peoples, and invited Indigenous people to forge a relationship of “mutual respect” “between nations.” Jack Layton (NDP) respectfully acknowledged the elders and Indigenous leaders and survivors present in the room before speaking (in contrast to Harper), and acknowledged that “It was this Parliament that enacted, 151 years ago, the racist legislation that established the residential schools” which resulted in denying Indigenous people equality as humans and the “basic freedom to choose how to live your life.” Layton’s use of the word “racist” received an outburst of cheer from a few people in the House. Layton also said “There can be no equivocation. The laws consciously enacted in the House put the residential schools into place and kept them going for many years.” And yet, none of the opposition leaders openly identified the Indian Act (present Canadian
law) or used the words colonization, genocide, land. All apologies were therefore consistent with the wording of apologies by other settler states (in this era of apologia—the settler’s self-defence). Indeed, whether Conservative, Liberal, or NDP there is a narrative common to all apologies offered in Canada’s House of Commons. Despite mention of “our collective history,” there is no mention of collective perpetrators or the settler’s occupation of land. Moreover, the “legacy” of IRS which apparently affects only Indigenous peoples, is something which can be remedied through economic partnership and the “fair and generous” gestures of the colonizer. Thus, as Fanon so eloquently suggests:

The settler makes history and is conscious of making it…the history which he writes is not the history of the country which he plunders but the history of his own nation in regard to all that she skims off, all that she violates and starves. (WE 51)

7.3 Indigenous Responses to the Apology

Of the responses on the part of the five Indigenous leaders to Canada’s apology, perhaps the most powerful was the speech by AFN Grand Chief Phil Fontaine, who placed the victory for an apology (and compensation for IRS survivors) squarely with Indigenous people and their decades long struggle.

…this day testifies to nothing less than the achievement of the impossible…

…the significance of this day is not just about what has been but, equally important, what is to come. Never again will this House consider us the Indian problem just for being who we are. We heard the Government of Canada take full responsibility for this dreadful chapter in our shared history. We heard the Prime Minister declare that this will never happen again. Finally, we heard Canada say it is sorry. Brave survivors, through the telling of their painful stories, have stripped white supremacy of its authority and legitimacy. The irresistibility of speaking truth to power is real. …What happened today signifies a new dawn in the relationship between us and the rest of Canada. We are and always have been an
indispensable part of the Canadian identity. Our peoples, our history, and our present being are the essence of Canada. The attempts to erase our identities hurt us deeply, but it also hurt all Canadians and impoverished the character of this nation. We must not falter in our duty now. Emboldened by this spectacle of history, it is possible to end our racial nightmare together. The memories of residential schools sometimes cut like merciless knives at our souls. This day will help us to put that pain behind us. But it signifies something even more important: a respectful, and therefore, liberating relationship between us and the rest of Canada. Together we can achieve the greatness this country deserves. The apology today is founded upon, more than anything else, the recognition that we all own our own lives and destinies, the only true foundation for a society where peoples can flourish. …¹¹² (My emphasis.)

Fontaine’s words make it clear that it has been a difficult, almost impossible, battle against the settler, and that Indigenous truth “stripped white supremacy of its authority and legitimacy.” Is this a specific reference to the white supremacy which created the IRS system, or is it a reference to a wider authority and legitimacy at the root of settler occupation? Is it a specific reference to the force of the testimonies in Baxter, and the threat to strip Canada of its legitimate sovereignty? Fontaine’s claim that Indigenous people, their history and present being, are the essence of Canada, may be read as a counter-marking of the settler as one whose identity rests on blood ties to land through genocide, that which shall remain un-named. The “present being” and survival of Indigenous people is a reminder to the settler that his/her racial-economic project (genocide in the name of nation-building and rational accumulation) failed. It seems possible to Fontaine that the “racial nightmare” between settler and native can be brought to an end. And yet, he closes with reference to the settler’s recognition of the native, and he extols the settler’s values (which “cut like a thousand knives” (Fanon), as do his
memories of IRS) and the ontology of the free individual who owns his own life and
destiny.

While Fontaine seems to accept Canada’s apology, other Indigenous people reject it.
Writing the day after the apology, Indigenous scholars Roland Chrisjohn, Andrea
Nicholas, Karen Stote, James Craven, Tanya Wasacase, Pierre Loiselle and Andrea O.
Smith (2008), insightfully note that the particularities to which Harper apologized
(removal of children, sexual abuse, etc.) allowed him to evade apologizing for the larger
crime of genocide. They suggest he was trying to avoid saying “I’m sorry the Canadian
government committed genocide against you. It was a criminal action on our part” (2).
They also document that Canada (as other settler states) are well aware they are open to
the charge of genocide under International law, and that settler states have known this
since the 1980s. Canada has taken steps (such as ridding domestic law of any legislation
against genocide) to protect itself. They point out that in international law there is no
statute of limitation for genocide. While Chrisjohn et al. mention the IRSSA, they don’t
mention the content of Baxter v. Canada, which if considered, would fully support their
analysis that Canada needs to avoid apologizing for genocide. Importantly, Chrisjohn et al
remind us that “genocide involves a host of interrelated and interwoven policies and
programs,” most of which are still in operation. Chrisjohn et al. do not emphasize enough
what is really at stake for Canada (aside from having many contemporary politicians,
priests, and teachers charged with crimes and sent to prison), and that is, the legitimacy of
Canada’s sovereignty which Baxter would have called into question. As previously stated,
genocide tarnishes the Honour of the Crown, and taints negotiations over land. In previous
chapters I show how the settler responds with a more violent marking of the collective Indigenous body when settler sovereignty is threatened. However, in the shadow of the Baxter class action (the force of which rested in part on the settler’s previous boasting of causing harm through cultural genocide in *Blackwater v. Plint*), the IRSSA (which enables Canada to avoid admitting causing harm through cultural genocide), and possible future charges of cultural genocide in the International court, this pronounced violent marking of the Indigenous body as the settler’s damaged property, is replaced with the rhetorical strategy of “curious paternalism.” The settler’s time worn strategy of infantilizing the indigenous collective (Rifkin 2009), resurfaces through a discourse of the colonizer’s parental (fiduciary) obligation for its Indigenous children (property).

7.4 Marking the Indigenous Collective: Damaged Parents and Children

Reducing Indigenous survivors of colonization and settler nation-building to children is a common move on the part of settler states (Schaffer and Smith 2004). Infantilizing Indigenous collectivities prepares their nations for domestication by the settler state (Rifkin 2009). It is interesting to compare Harper’s apology to the Australian government’s apology to “Aboriginal and Torres Strait Islander” Indigenous people for “the Stolen Generations” in that context. Prime Minister Kevin Rudd apologized on February 13, 2008:

There is something terribly primal about these firsthand accounts. The pain is searing, it screams from the pages. The hurt, the humiliation, the degradation and the sheer brutality of the act of physically separating a mother from her children is a deep assault on our senses and on our most elemental humanity. … They are human beings; human beings who have been damaged deeply by the decisions of parliaments and governments. … Let us remember that the removal of children was still happening as
late as the early 1970s. The 1970s is not exactly a point in remote antiquity. …It is well within the adult memory span of many of us. The uncomfortable truth for us all is that the parliaments of the nation, individually and collectively, enacted statutes and delegated authority under those statutes that made the forced removal of children on racial grounds fully lawful.

Unlike Harper, Rudd points to the brutality of colonial policy—enacted by individuals—and reminds non-Indigenous Australians that this violent history is recent. He identifies race/ism as integral to the laws of their nation building, and refers to Australia as a “settler society”. Yet in the end, he makes the same re-colonizing move commonly generated by the settler’s logic of elimination. Despite proclaiming Indigenous people to be “human,” his apology marks the Indigenous body in expected ways: as primal and as damaged. The old assumption at the heart of possessive individualism appears, all are human, but some are more human than others. Rudd then “invites” Indigenous people into the dominant economy with the promise of a materially improved life, and the ability to participate in decision making under the terms defined by the dominant nation, one country, Australia:

First Australians, First Fleeters, and those who first took their oath of allegiance just a few weeks ago—let’s grasp this opportunity to craft a new future for this great land, Australia.

Using the language of “First Australians” (rather than the Indigenous names for Indigenous nations) and, “First Fleeters” (rather than invaders), Rudd thereby concludes his speech with the familiar assimilationist invitation couched within the language of a “new (egalitarian) relationship.” As we saw, Harper’s apology also ends with such an invitation, inviting us all to forge “…a new relationship based on knowledge of our shared
history” and “a stronger Canada for all of us.” Both settler apologies echo Justice Lamer’s 1997 pronouncement: “Let us face it, we are all here to stay.”

There are also interesting differences between the two apologies. While Rudd’s discourse starkly marks the Indigenous body (mother—child) as primal and damaged, a “curious paternalism” frames Harper’s apology. Harper will resurrect a more subtle (yet still vile) dichotomy of parent and child to mark the Indigenous collective. He positions himself as parent—“the most powerful person a child can know”—in relation to Indigenous people who were harmed as children (adult survivors, their parents and their children). Harper’s paternalism is evident when he apologizes for “failing” Indigenous people: failing to educate them, failing to protect them from the harms of IRS. These failures of course correspond to the legal decisions regarding IRS: Canada—having evaded direct liability by shutting down the Baxter class action—remains merely vicariously (no-fault) responsible for the harm it now promises to repair. Canada had a fiduciary duty to the individual children who were in its care, rather than a fiduciary duty to their nations (a distinction drawn in McLachlin’s 2005 SCC regarding Blackwater v. Plint). The trope of Canada as colonial father is mobilized by Harper.

In Blackwater v. Plint the intergenerational harm experienced by parents and children was interpreted as proof of biological and cultural defect by Justice Brenner. In Baxter v. Canada, the intergenerational harm was re-articulated by counsel for Indigenous plaintiffs as evidence of the brutality of Canada’s colonial project and genocide. In Canada’s Apology, the intergenerational harm is now once more re-presented by the settler as biological, “familial” (not political). But now it is a biology expressed also by the settler,
offered as evidence that the settler is human, is capable of human behavior towards the native, capable of a caring concern towards children (unlike the teachers, nurses, principals, police, and pedophiles of the settler’s past). The trope of parent—child allows the settler to convey that, as parents capable of loving children, settler and Indigenous are in one sense equally human, and yet not. Indigenous people are portrayed as damaged parents as a result of being damaged as children. They are as damaged as adults, as they were as children, and they now participate in damaging their own children today.

Canadian elites on the other hand, are rhetorically distanced from the kind of people who can harm children. Settlers are construed as parents who could not bear for any child to be abused. They fall apart at the realization that the violence was against children, recall Hogarth, Brenner, and the various Justices who caution that emotion for children must be kept under control in order that the rational individual may objectively apply the principles of law. Now government officials (such as Chuck Strahl below113) cry in public, to show that the rational individual is human too. All of this emotion obscures the present colonial context, cleanses the white collective body of the present, for only pedophiles (not parents) target children. The settler is positioned alongside the native parent to protect “our aboriginal children.” Canada is now capable of protecting the interests of children as any good parent should. Canada as parent can therefore be trusted in land negotiations. The settler will listen, hear the evidence and do something.

On June 16, 2010, then Minister of Northern and Aboriginal Affairs, Chuck Strahl gave a speech to open the first Truth and Reconciliation Committee ceremony (Strahl 2010). In addressing the primarily Indigenous audience, Strahl states:
Being here this morning again with so many survivors, I’m struck again and touched by the suffering that you have endured, what you and your families have experienced as a result of the residential school policies. As a father and as a grandfather, I can’t begin to imagine what it was like to have been separated from your loved ones, often for years and years. How can I understand that? But I want to understand…

He goes on to say that:

..While the story of the residential schools tells of an education policy gone wrong, one that deprived too many Aboriginal children of their language and culture and exacted too high a cost—we cannot be deterred from our clear goal: to improve the educational outcomes of our Aboriginal children.

As a father and grandfather he is like them, but not, as he cannot imagine separation from loved ones (by which he must mean, he cannot imagine separation from generations of his children abducted and made sick, impoverished or dead by an invading warring nation). Strahl’s own connection to colonial policies and practices is buffered by a poor imagination, the settler’s cunning and magic fail him. He reiterates the very story of the Apology spoken two years earlier, the story of “an education policy” gone wrong (genocide disappears) and which “exacted too high a cost.” Does Strahl mean the human cost, or does he mean it was too expensive (a reference perhaps to the 5 billion dollar IRSSA), evidence of poor business judgment? He positions himself as parent again, in relation to “our Aboriginal children.” He asserts “our” goal (at this first Truth and Reconciliation ceremony) as one that improves educational outcomes. Later in his speech we understand why education is so important to him “…we all know that education enables individuals to succeed, communities to flourish, and economies to prosper,” echoing his earlier glee at the prospect of the IRSAA’s creation of a pool of exploitable labour (see Chapter 6). A variation of forced assimilation. Finally, Strahl announces the
Government’s intent to repeal the section of the *Indian Act* which allows the forceful removal of children from Indigenous homes and communities. Canada applauds. Yet while he announces this, he is in the midst (since April of 2010) of using section 74 of the *Indian Act* to impose a Band Council electoral system upon the Algonquin people of Barriere Lake (300 km north of Ottawa), attempting to displace their customary or hereditary form of governance. They are being monitored by the Quebec police force (the Surete du Quebec) as he delivers his speech. Much like Nault’s 2003 FNGA, the settler’s objective is to force forms of government upon Indigenous peoples that are compatible with settler sovereignty and control of land and resources. Another variation of forced assimilation. Through both Harper’s apology and Strahl’s “economic” initiatives, settler and native are again called into being, with little “transformation” of either, contrary to the hope of Chief Robert Joseph in 2005. Yet lead negotiator for the AFN on the IRSSA, lawyer Kathleen Mahoney, praises the IRSSA and the June 2008 Government Apology as “a clear and unequivocal affirmation of the entitlement of Aboriginal citizens to full civil, political, economic, social and cultural rights *within the Canadian identity*” (Mahoney 2008, 49. My emphasis). The racial nightmare continues.

### 7.5 The Colonial Present: Recognition and Invitations to Equality

The colonies have become a market. The colonial population is a customer who is ready to buy goods …. A blind domination founded on slavery is not economically speaking worthwhile ...what the factory-owners and finance magnates …expect from their government is not that it should decimate the colonial peoples, but that it should safeguard with the help of economic conventions their own “legitimate interests.” (Fanon WE 65).
Post-apology and the “ Honour of the Crown” restored, Canada can now continue with the business of nation-building and securing its “legitimate interests.” The settler’s goal is to ensure that the “colony becomes a market,” with the willing participation of the native. This is accomplished in part, through the settler’s (self-serving) recognition of the native’s humanity. Regarding the self-serving nature of this recognition Glen Coulthard (2007) states:

…the reproduction of a colonial structure of dominance like Canada’s rests on its ability to entice Indigenous peoples to come to identify with profoundly asymmetrical and non-reciprocal forms of recognition either imposed on or granted to them by the colonial state and society. (2007, 439)

That is, Indigenous peoples may internalize the settler’s values and notions of “white liberty” (450), and thereby become complicit in tethering their freedom to settler economic and political structures and values. With this in mind, I trace the interrelatedness between the apology and a wider colonial force field through three recent examples of Canada’s invitation to Indigenous peoples’ to “humanity”; the 2008 change to Canada’s Human Rights legislation; the 2010 signing of the UNDRIP, and the various on-going strategies of economic development. As we will see, these moments of recognition are compatible with the continued marking of the Indigenous collective as more akin to property than to property owners. That is, while the settler deems the native “human after all,” this is compatible with the settler’s continued paternalism towards the native, and compatible with an inequality amongst humans (as discussed in chapter 2).

On June 18th, 2008 (one week after Canada’s apology to IRS survivors), Minister of Northern and Aboriginal Affairs, Chuck Strahl, announced a change to Canada’s Human
Rights Legislation (HRL) (INAC 2008b). The legislation now applies to “First Nations citizens governed by the Indian Act” (Brazeau quoted). For thirty years, Canada’s HRL—which protects individual rights from discrimination on the basis of eleven grounds, including, race—did not apply to “First Nations citizens.” This change to the HRL was initiated November 13, 2007, two months following Canada’s refusal to sign the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). As such, it was likely intended to bolster the Government’s claim that there was no need to sign the UNDRIP, as Canada’s domestic laws already protect the rights of Indigenous people.

After a three year transition period for implementation of the legislation, the Human Rights Tribunal issued its first decision January 1, 2011. It ruled that the Ministry of Northern and Aboriginal Affairs (MINA), under Minister Chuck Strahl, engaged in race discrimination regarding the individual right of James Louie (a member of the Okanagan Indian Band), to economically develop his land. This land was allotted to him by the band council, and under the Indian Act, he is free as an individual to private ownership of portions of the reserve land for purposes of economic development consistent with the needs or collective interests of the reserve community or band. As the Crown retains underlying title to the reserve land, this gives rise to a “special relationship” which means that the Crown has the right to oversee decisions made by the individual property owner. (Thus, it is a variation of individual private ownership of property.) According to the tribunal decision, James Louie, rented land to his spouse Joyce Beattie for a nominal fee of $1 with a lease of 49 years. Beattie planned to build a house on the property and then sell it. She would bear the burden of the cost to develop the property and, upon selling the
house, would share the profit with Louie (2/3 for him, 1/3 for her). Louie “applied to the 
BC Region of INAC for a locatee lease under section 58(3)” of the Indian Act.”

Alarmed at the nominal fee of $1 for 49 years, INAC insisted on doing an assessment of
the market value of the land Louie planned to develop. (It was mentioned that the market
value was 300K). They implied in correspondence with him, that (despite his 25 years of
business experience) he must be incapable of assessing the market value of the property or
making a rational decision about it. They claimed that he was acting against his own
economic interests (as well as the band council’s, whom they eventually informed about
the $1 lease). INAC insisted on guiding Louie/Beattie through this process of determining
an appropriate lease. Louie viewed the interference of INAC as paternalistic, racist and an
affront to his dignity. Louie/Beattie and INAC battled through legal correspondence for
two years. The following passage is representative of Louie’s response to INAC:

In my view the principal matter in contention is not particularly
complicated. The INAC administration either respects, or does not
respect, the fundamental entitlement of Indian persons to be presumed to
be competent human beings to determine their own economic self-
interest in respect to their personal interest in reserve land.

With development stalled for months, Louie/Beattie eventually wrote directly to Minister
of Northern and Aboriginal Affairs, Chuck Strahl, a “man of integrity” and asked him to
intervene. The following is an excerpt from the very lengthy and eloquently written letter
which identifies Louie’s perception of racist paternalism on the part of INAC:

It is quite obvious to me that most of the negative aspects of the existing
lease application process derive from an archaic and entrenched racist
mindset that perceives all Indians to be incompetent to determine their
own economic self-interest and who are therefore inherently in need of
the degrading paternalism that INAC officials euphemistically call a "special relationship."

According to the Tribunal decision (2011, 34) “On May 15, 2008 [less than one month prior to Canada’s Apology], Hon. Minister Chuck Strahl replied to Mr. Louie”:

…As a matter of law, there is a special relationship between a Certificate of Possession holder and Canada. The underlying title to reserve lands remains with the federal Crown, while the benefit of those lands and the right to possess them belongs to the Certificate of Possession holder. This is not the usual case for a private landholder. This is a special circumstance, giving rise to a "special relationship." A fiduciary relationship is created between the Certificate of Possession holder and Canada, when Canada enters into Certificate of Possession leases. This is based on Canada's unilateral discretion over the Certificate of Possession holder's Indian interest. Nothing short of legislative reform can extinguish or alter this relationship. …

Strahl goes on to say that under the Indian Act, Canada’s underlying title to the land gives Canada unilateral power to override decisions about leases. He mentions to Louie that there are options available to First Nations to get out from under this aspect of the Indian Act for the “management of lands,” through the “First Nation’s Land Management Act, self-government and treaty.” That is, First Nations can more closely approximate the full rights to private property through these paths.

The Tribunal judge rules against MINA, claiming that Strahl misinterpreted the Indian Act and acted paternalistically in a racially discriminatory way towards Louie. The Tribunal ruling is interesting, as it points to several contradictory layers of paternalism within the Indian Act. The Tribunal points to the “irony” that Canada’s Indian Act legislation, “criticized for its paternalistic spirit,” extended to “the individual Indian” the individual freedom and right to private ownership of land for the purpose of economic
development and profit. The Tribunal finds further irony in Strahl’s insistence that, despite this individual freedom, the MINA is justified in asserting unilateral authority over the individual. The Tribunal judge claims that Strahl is mistaken in his interpretation of the *Indian Act* on that point. The Tribunal judge then notes yet another layer of irony in that Louie is now able to use Canada’s HRL to protect his right to individual profit of economic development granted under the paternalistic *Indian Act*, and that the very Minister who brought the HRL into effect is the minister who is alleged to have engaged in discrimination on the basis of race. The Tribunal judge then states:

[58] While it was not raised in evidence before me it is noteworthy that on June 18, 2008, [one week after Canada’s Apology] little more than a month after writing to Mr. Louie, the then Hon. Minister announced that legislation extending human rights protections to all First Nations communities had received Royal Assent. “Passage of Bill C-21, An Act to amend the *Canadian Human Rights Act* marks a significant turning point in the relationship between First nations and the Government of Canada,” said Minister Strahl. “It underscores this government’s strong commitment to protecting the human rights of all Canadians.” The announcement, however, had no apparent effect on INAC’s position regarding the complainants’ applications. *Nothing changed, and the complaint before me is the result.* (My emphasis.)

The Tribunal’s decision illuminates how the settler’s invitation to equality (individual human rights protection, ability to own private property to satisfy the rational desire for accumulation and profit) is consistent with the settler’s persistent paternalism and domination of Indigenous collectivities. While the HRL (which protects the rights of the individual) allowed Louie to win his case this time, it is important to note, that the very notion of “human” at the base of human rights legislation stems from possessive individualism’s ontology which presupposes and requires racial, formal and substantive
inequality between humans (Fitzpatrick 2001, Macpherson 1962) and which is core to the wider racial economic capitalist system which serves the settler’s interests. Similarly, “allowing” Indigenous individuals to own private property is an age old strategy of assimilation on the part of the colonizer. A quagmire of contradiction is generated through the settler’s “recognition” of the native. However confusing, in the end, one simple truth remains: settler sovereignty remains dominant even when the colony has become a market, and the native a consumer.

A second example illustrates the preservation of a colonial structure, apologies and invitations to equality notwithstanding. The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) is a document in the making for over twenty years (Joffe 2010). Four settler states (Canada, Australia, New Zealand, USA) have long refused to sign this declaration which acknowledges the collective rights of Indigenous peoples to their traditional lands usurped through colonization. Canada justified its refusal on several grounds (Indian and Northern Affairs Canada 2008a). Its main concerns echo the very concerns articulated by politicians during the Nisga’a treaty negotiations (as touched upon in Chapter 4). The UNDRIP clauses regarding Indigenous rights to traditional lands may not be “reconcilable” with treaties and “there could also be attempts to use such language to support Aboriginal claims to ownership rights over much of Canada, even where such rights have been dealt with lawfully in the past” (Ibid., 2). Canada was also concerned about the “concept of free, prior and informed consent….This provision could be interpreted as giving Aboriginal peoples a veto over virtually any legislative or administrative measures that may affect them” (Ibid.). Canada states that the UNDRIP
text is “not balanced” and “suggests that Indigenous rights prevail over the rights of others” (Ibid.).

In 2007, the above mentioned four settler states refused once again. Under pressure from a growing global Indigenous rights movement, including from Indigenous leaders such as Chief Edward John (2009) who argued that “Canada’s policy of denying Aboriginal title and rights is premised on the very same attitudes that Prime Minister Harper referred to in his residential school apology” (John 2009, 6), all four settler states have now become signatories. Canada signed in November 2010. The government explained that “…it was better to endorse the declaration and explain its concerns, rather than reject the whole document.” (Canada 2010). However, all four settler states placed conditions upon their signing, emphasizing that the UNDRIP is not legally binding. Instead, it must be considered an “aspirational document” abided by only when it is consistent with domestic law. In Canada that includes the Charter s. 35, but also the Indian Act. As of May 2011, international indigenous leaders attending the Permanent Forum on Indigenous Issues, note that nothing has changed since the signing of the UNDRIP by these settler governments (Atleo 2011, Deer 2011). Kenneth Deer reports that the “free, prior and informed consent” is being interpreted as “free, prior and informed consultation.” The “lesser standard” of consultation allows governments and corporations to act in their own interests (Deer 2011, 2), despite the fact that in Canada the Supreme Court of Canada (Haida 2004) has reprimanded Canada, cautioned Canada to avoid sharp dealing and to go beyond mere consultation in negotiations. AFN National Chief Shawn Atleo states:
Some states, such as Canada and the United States, are dishonouring their endorsements of the declaration at home and abroad. They are interpreting UNDRIP in a manner that contradicts its terms and adversely affects indigenous peoples worldwide. They are reneging on their international obligations to respect, protect and fulfill Indigenous people’s human rights….(Atleo 2011).

In a final example of what Fanon has so aptly termed the “violence of indifference and paternalism,” I consider the Government of Canada’s land and economic development programs in partnerships with Indigenous peoples. While these programs have been ongoing (at least since the 1970s), as of the 2008 Apology to “former students” of IRS, the government discourse now portrays economic development as evidence that the government is taking responsibility for the IRS legacy and building new relationships on the path to reconciliation. For example, the Aboriginal Affairs and Northern Development Progress Report (2010) begins with this:

“Our Government recognizes the contributions of Canada’s Aboriginal people. Too often their stories have been ones of sorrow. Our Government will continue to build on its historic apology for the treatment of children in residential schools” (Quoting Speech from the Throne, March 3, 2010).

The AAND progress report then documents how the government has implemented the “five-point plan” of education, reconciliation/governance/self-government, economic development, empowering citizens and protecting the vulnerable, resolution of land issues. On the reconciliation point, the government documents everything that it is doing on the IRSSA and TRC front (neglecting to mention that these initiatives are legally mandated). The report identifies the 2010 Olympic Winter Games as “Real evidence of a renewed relationship between Aboriginal and non-Aboriginal Canadians” (2010, 6).
Under “governance and self-government” the report points to various efforts to improve the BC Treaty process (6–7) and after listing several signed agreements, notes:

During the last year, five new First Nations obtained community ratification of their lands codes and subsequently became operational under the First Nations Land Management Act. (2010, 7)

The First Nations Land Management Act, is considered one component of “self-government.”118 It enables First Nations to opt out of the section of the Indian Act related to the management of land, thereby changing the “special relationship” as in the Louie HRL case above. The Crown retains underlying title to the reserve land, and the land cannot be sold, but the Indigenous nation controls the laws and system of managing the land. The remainder of the Indian Act continues to apply to the First Nations in this case. While the AAND Report conveys that this is evidence of their five point plan objectives since the apology, the First Nations Land Management Act has been in effect since 1999. Relatedly, “economic development programs” which benefit the interests of the settler state are described as being undertaken in order to benefit Indigenous peoples. As of June 2009, Strahl’s “Federal Framework for Aboriginal Economic Development” aims to increase aboriginal involvement in the economy by “strengthening Aboriginal entrepreneurship; developing aboriginal human capital; enhancing the value of aboriginal assets; forging new and effective partnerships; and focusing the role of the federal government” and has committed “$200 million over four years.” This is characterized as benefitting Aboriginal people by helping them find permanent work in the resource industries (AAND 2010, 9). Strahl also introduced the “First Nations Commercial and Industrial Development Act” to “enable First Nations…to develop commercial real estate
on reserve land” (Ibid., 10). The shortest section of the government report regards the “Resolution of Land Issues” (Ibid., 15–17). The Government is working towards “impartiality and fairness, greater transparency, and faster processing.” Of the 141 specific claims, 12 have been settled through negotiation (Ibid., 16). The Government is extremely busy with respect to land and resource development. Although Canada undoubtedly profits, this report portrays these initiatives as improving the lives of Aboriginal Canadians. After the decades long insistence by Canada that IRS had nothing to do with land (land-theft and genocide), this report now conveys the opposite message. Land becomes explicitly relevant to healing the historical wrong of IRS, not in the sense of returning usurped traditional territory to Indigenous nations, but rather, merely in allowing Indigenous nations to do the work and derive some profit from reserve lands, while satisfying the settler state’s rational desire to accumulate. Clearly, forms of Indigenous self-government “recognized” by Canada, are only those which allow Canada’s sovereignty to remain dominant. One explicit example of dominance exercised through the language of partnership is the claim that “Aboriginal” people are invited to “play an important role” in “Canada’s Northern Strategy,” a key goal of which is to ensure the “exercise of Canada’s Arctic sovereignty” (Ibid., 7). The Indian Act has long been acknowledged as an “identity document,” as Canadian law defines who qualifies as an “Indian” etc. Yet insofar as it enables the settler to have “complete control” over the life of the native and better secures the settler occupancy of land, it also defines settler identity. One may predict that the Indian Act will be dismantled only when the settler is certain that the structure of colonialism can continue to operate without it, as the settler’s
identity is internal to the structure of colonialism and vice versa. Fanon warns of the day when “the colony becomes a market” and the “native becomes a consumer” and, we can add, an entrepreneur.
Chapter 8 Conclusion: Towards a Critical Pedagogy of Recognition

I as a man of color do not have the right to seek to know in what respect my race is superior or inferior to another race. I as a man of color do not have the right to hope that in the white man there will be a crystallization of guilt toward the past of my race. [...] I recognize that I have one right alone: that of demanding human behavior from the other. (Fanon BSWM; 228, 229)

In liberal accounts of “truth and reconciliation,” reconciliation typically means a new relationship based on mutual respect between those who have harmed others and those others who have been harmed. Recognition is considered a prerequisite for reconciliation: recognition of the “humanity” (and inherent human rights) of all involved. We saw in the previous chapter how the settler’s extension of human rights to the native, when “human” is rooted in possessive individualism’s ontology, is not only compatible with leaving “colonial structures of dominance” in place (Coulthard 2007, 438), but is a time worn strategy on the part of the settler for just that, for “repairing” or strengthening settler legitimacy and dominance in relation to the native. In Canadian law, reconciliation between Indigenous people and settlers typically means something more specific and less romantic than a renewed relationship grounded in mutual respect. It typically means balancing competing (racialized economic) interests in the face of two facts recognized by law: first, the fact that the sovereignty of Indigenous nations pre-existed European arrival and continues today, and second, the fact that Europeans (the British / Canadian Crown) (merely) asserted sovereignty over Indigenous lands. As Bradford W. Morse notes:

Over 95 percent of Canadians trace their origins to other lands, and benefit from Canada’s wealth with almost no regard to its illegitimate and immoral foundation as a nation. Canada is also home today to over 630 Indian First Nations whose sovereign independence was originally
recognized but later ignored. …The traditional territories of Indigenous peoples…in Canada… were often improperly usurped by Crown representatives through force of circumstance, though never by conquest… (Bradford W. Morse 2008b, 41)

I suggest that reconciliation (whether in law or politics) has really meant balancing “settler and native” interests, in the face of three facts. In addition to the two facts stated above, a third fact is that the settler occupier has no intention of leaving (no matter how illegitimate, unjust or immoral our occupation). As Justice Lamer (Delgamuukw 1997) so clearly and menacingly asserted on behalf of the settler: “Let us face it, we are all here to stay.” It is the contestation of this third fact, which I suggest should ground a Fanonian inspired critical pedagogy of recognition targeted to settler colonizers. Fanon’s suspicion of the settler’s recognition of the native is instructive: recognition must be done in a way which dismantles the settler’s house.119 If it does not, then it is merely a re-colonizing move. Recognizing re-colonizing moves, or learning when “someone or something present has been encountered before”120 is central to this pedagogy, which elicits the settler’s complicity in decolonization. A pedagogy which targets collective settler identity in this way, may be considered a companion pedagogy to the “transformative praxis” targeted to Indigenous people as advocated by Glen Coulthard (2007, 449). Coulthard recommends that Indigenous people cultivate “anti-colonial agency” (453) and simply disengage from “the colonial project” altogether:

…the colonized must struggle to critically reclaim and revaluate the worth of their own histories, traditions, and cultures against the subjectifying gaze and assimilative lure of colonial recognition. [Indigenous individuals and collectives must]…initiate the process of decolonization by recognizing themselves as free, dignified and distinct contributors to humanity.” (454)
Given that settler identity is rooted in the settler/native dichotomy, it will be interesting to see what happens when Indigenous people withdraw from the colonial project. I suspect that the settler collective will respond as it usually does when its identity is threatened, with violence. Thus, settlers too, must be enticed to acquiesce in the process of our own re-making, an “ontological revolution” which aims to “get rid of the settler problem.”¹²¹

Parallel to what Coulthard recommends when he advocates that Indigenous people not look to the settler for recognition of either humanity or sovereignty, I recommend that settlers challenge our own assumption that we rightfully and unquestioningly belong on this land and that we rightfully have the power to grant humanity and/or sovereignty. If, as Mark Rifkin (2009) argues, biopolitics and geopolitics are inextricably intertwined when it comes to settler / Indigenous relations, then a change in one necessitates a change in the other, and vice versa. Settlers cannot change who we are—that is, we cannot begin to engage in human behaviour towards the other—without first recognizing and addressing how land (and its usurpation justified by a rational desire for accumulation) is central to white settler collective identity. The goal of a critical pedagogy of recognition—in keeping with Taiaiake Alfred’s (2009) suggestion—is to produce anti-colonial agency on the part of settlers and to bring about the dismantling of colonial institutions, a redistribution of power and a return of land and resources to Indigenous nations. But the shift in consciousness required for genuine decolonization, hinges upon the settler’s ability to understand that he/she (individually and as a collective) does not rightfully belong here.
Settlers must examine who *we* are as a collective, how settler identity is tied to land, how our bodies remain occupiers, and how occupations always require violence. This thesis has identified some Fanonian theoretical and methodological tools which may inform a critical pedagogy of recognition aimed to produce the settler’s anti-colonial agency within the colonial present. In particular, the notion of white terror as colonial force field, structured by the triadic relation of land—terror—white collective identity, is useful for aiding the settler in locating him/herself within the colonial present, and tracing one’s interconnection with the myriad seemingly disconnected forces and practices which bring “settler and native” into being. Recognizing possessive individualism may provide a thread for the settler to trace his/her imbrication in the identity making practices which produce the collective colonial subject and its psychopathology (Hook 2005, 2008). I suggest that three *interrelated* questions function as epistemological touchstones for the settler collective’s examination of the colonial present:

How did we get *here*? What violence allows us to stay? When will we be *leaving*?

The first question—how did we get *here*?—is about *land* and the *assertion* of sovereignty. While it points to the importance of exposing, analyzing, addressing and being accountable for the historical truths of how settler states are created, it is not primarily a historical question. Rather, it is to be taken literally. The settler must ask and investigate how he/she came to be “here” (where “here” is in all probability, Indigenous land). This is a question concerning the physical “here” of every white settler body, the space each settler body now occupies. I envision the settler using the framework of white terror as colonial force field to map his or her own imbrication amidst the “network of
racialized power relations.” While learning facts is not sufficient for a shift in consciousness, it is necessary, especially if one is to visualize multiple sites simultaneously unfolding within a colonial force field. Learning of the fact that Canada’s sovereignty rests on mere assertion (of the kind to which any child might respond “who died and made you king?”), is a first step in understanding how Canadians qualify as “usurpers” today. As Albert Memmi (1965) simply puts it: those who occupy land illegitimately are usurpers. Answering ‘how did we get here?’ requires addressing the processes of colonial subject formation, of seeing how old racial formations persist in the present, how “settler and native” continue to be reproduced (often through law) and how racial hierarchy is often constructed through (and simultaneously obfuscated by) relations of “accumulation” to which possessive individualism and the ontological force of property are core.

The first question bleeds into the second question—“what violence allows us to stay?”—and is a question about violence and eviction from humanity. This question points to the necessity of understanding how the present as a colonial force-field, a network of myriad seemingly “isolated” events and practices of settler terror and domination, operates. It requires understanding the violence not merely of fist-to-face interaction, but the violence of law, and processes which evict some humans from the realm of “property owner.” It requires recognizing the violence of recognition and false or contradictory invitations to equality. Most importantly, it requires understanding how this violence reconstitutes the white settler collective as legitimate occupiers of land (over and over again), as the settler occupier comes to stay (Wolfe 2006). It is not as though when the
first colonialists die off, their sons and daughters somehow live on without violence. Many forms of violence—intricately interconnected with law, both enabled and required by law—are always necessary to maintain an occupation. Fanon reminds us of the violence of settler values (including possessive individualism), rationality and, capitalism. To understand that colonialism remains the order of the day in Canada is to recognize that the violence of colonialism continues and more importantly, that those who commit the violence—the settlers, the colonizers—remain alive and well.

We can learn much from the settler’s self-preserving activities within the realm of law, as I hope to have shown in chapters 4 through 6. Whether in response to the threat of exposing the settler collective as active participants in the violence of genocide or in response to challenges to the legitimacy of settler sovereignty, the settler collective typically responds with violence, i.e., by dehumanizing the native as property. Through discourse, law, and government policy, the settler defines the Indigenous collective as children, as biologically, culturally, psychologically damaged, i.e., as property (akin to land) in need of improvement by settlers motivated by the rational desire for accumulation. “Improvement” (and its violence) will be enacted through diverse means, including invitations to equality and the settler’s economic system.

The third question builds upon the first two, and is inspired by Joyce Green’s reminder that “when classical colonial relationships end, the colonizers go home” (1995, 15). The third question—“When will we be leaving?”—is about the white collective body/identity. It is, I believe the most important question as it has the potential to disrupt the white settler arrogance about “rightful belonging” and being the “rightful owners of the
land.” It is this question which challenges the legitimacy of Canada’s sovereignty, whether a sovereignty built on the violence of mass atrocity (the violation of 150,000 Indigenous children and their families) or a sovereignty built on the violence of mere assertion. The unwillingness or inability to even imagine leaving, indicates that one does not truly understand oneself to be an unjust occupier of another peoples’ lands. The unwillingness to challenge the assumption or declaration that “we are all here to stay”—is trace evidence of white settler supremacist / colonial / race superiority and the possessive individual’s presumption that land is transformed and improved through the settler’s mere presence. If the present settler occupation is unjust, we (settlers) must be prepared to leave. Perhaps if we practice “human behaviour” long enough, then we may in time negotiate the conditions of re-entry. These are simple but serious questions for the settler, the answers are all variations on “give back the land.”

Some may think this third question is ridiculous because it will never happen. Why will it never happen? Because the settler has no intention of leaving. The logic is circular. We know from the examples of the colonial force-field provided throughout this thesis, that settlers consent only to those changes that leave them as well or better off than they were before the agreement. But this is exactly the problem. As Patricia Monture-Angus argues, if Canada and Indigenous nations were to create respectful relations between nations, we would first need to:

...eradicate all traces of the preoccupation—overt and embedded—that the Crown and the people represented by the Crown have had with superiority. If this is not possible, then the full legal potential of the fiduciary relationship will not be realized. (Monture-Angus 2002, 158–159)
This has implications for Damian Short’s (2005) view. Short argues that in liberal
democratic states marked by internal colonialism, only one form of genuine reconciliation
is possible, and that is reconciliation which avoids absorbing Indigenous nations under
Settler nations, but rather aims for “simple coexistence and equal respect” between
Indigenous nations and settler nation (275–278). Short provides (as do others, such as
Green 1995) a set of very practical guidelines for decolonization and the transition into
respectful coexistence between separate sovereign nations. But, as Patricia Monture-
Angus (2002) reminds us, this respectful coexistence (or genuine decolonization) would
be possible only if processes which construct racial hierarchy are eliminated first. There is
no shortage of Indigenous scholars, leaders and advocates who echo Short and Monture’s
call for simple co-existence and respect. In his September 2010 report to the Senate
committee overseeing the progress of Canada’s Truth and Reconciliation Commission
(TRC), for example, TRC Chair Justice Murray Sinclair states:122

The residential schools have had such a dramatic impact upon Aboriginal
people in Canada that sometimes people believe it is an Aboriginal
problem. It is not an Aboriginal problem. It is a problem that all people
in Canada need to think about and address. In residential schools,
Aboriginal people were told that their culture and language were not
worth protecting. They were told that their customs had no value and
were irrelevant to the future of this country. Honourable senators, non-
Aboriginal school age children in this country heard the same message.
Racism became a prevalent part of the residential school system and we
must see that racism played a part in the public school systems of this
country throughout the years as well. While Aboriginal people in
residential schools were taught that they were inferior, in the same way,
unconsciously, non-Aboriginal Canadians were taught that they were
superior.

That image and that relationship have flawed the nature of the contact and
the experience that Aboriginal and non-Aboriginal people have had over
the years. *We need to understand that if the discussion about reconciliation is to have any merit, we must find a way to resolve that flawed relationship and establish a new sound relationship.* That is the challenge that we face at the Truth and Reconciliation Commission. (My emphasis.)

What prevents the settler collective from hearing this call for a new sound, anti-colonial, relationship? What prevents the settler collective from hearing the Indigenous demand that the settler engage in “human behaviour” towards Indigenous peoples? I believe that settlers have not been willing to confront the simple fact that we do not rightfully belong here. But confronting this fact is exactly where we need to begin. This thesis is a contribution towards recognition of this fact, a contribution towards accountability on the part of the settler collective.

Endnotes

1 I first encountered the idea (and phrase) of colonialism as on-going from Ward Churchill’s *A Little Matter of Genocide* (1997, 250). His work documents the on-going genocide of Indigenous peoples from 1400 to present. He argues that settler states are inherently violent and more specifically, inherently genocidal.


4 I use the following terminology throughout this thesis. I use “settler” and “white collective” interchangeably. I use “Indigenous” rather than Indian, First Nations or Aboriginal as these latter terms have their source in settler law and government policy. I use these terms only when the sources I quote use these terms. Most importantly, I often use the (potentially offensive) term “native” in this thesis, but only when I employ a
Fanonian analysis or sensibility. On Fanon’s account, settler refers to the colonial subject who comes from elsewhere to occupy native land. As such the settler is always a “foreigner.” “Native” refers to the people whose presence on the land preceded the colonizer, and who are the target of colonization. Important to note is that on Fanon’s view both the settler and the native are brought into existence by the settler’s ontology and fantasy. In Fanon’s context of analysis, settlers were the French and natives were Blacks from Martinique and Muslims from Algeria.

5 The Truth and Reconciliation Canada official website states that Canada’s federal government became involved in IRS in the 1870s, and that the last IRS closed its doors in 1996. Historian John Milloy (1999) provides the date range as 1879 – 1986.

6 Only survivors who were not included in the Baxter or Cloud class actions, such as Metis survivors, students who attended “day schools,” or those who were included or eligible but opted out of the IRSSA (less than 200 of the then estimated 80,000 survivors) have opportunity for legal redress. The exclusion of Metis is under review. Survivors of day schools have begun the process of filing a class action (AFN homepage). The exclusion of the survivors of day schools and schools for the Metis, exposes Canada’s unwillingness to acknowledge IRS as a colonial crime, versus a crime of failing to hire decent employees, the latter for which the courts have been held Canada vicariously liable.

7 See Chapter 6 for details and analysis of this IRSSA and Chapter 7 for my analysis of the apology.

8 Among those present in the Indigenous circle on the floor of the House who were allowed to respond to the Apology, only Beverley Jacobs—president of the Native Women’s Association—used the actual word “colonization.” Nor was the word uttered by any of the leaders of Canada’s political parties who responded to the P.M.’s apology. Rather, words such as “racism” and “assimilation” were used. Interestingly, the 1998 “Statement of Reconciliation” delivered by then Minister of Indian Affairs Janet Stewart (Lib.), uses the words colonialism and land. That statement however, also emphasized that the wrong doing was committed only by past governments and policies. Because of this and the fact that the statement was delivered by a mere minister, in the absence of the Prime Minister (Chretien (Lib.) who refused to be present, the statement was not well received by many Indigenous peoples and survivors of IRS in particular.

9 Consider the statement by then Liberal P.M. Jean Chretien in the House of Commons on January 31, 2001, when in reference to the legal cases regarding violence within Indian residential Schools, Chretien stated: “Quite frankly, I am concerned that in the case of Aboriginal people, we may be spending too much time, too much energy, and too much money on the past, and not nearly enough on what is necessary to ensure a bright future
for the children of tomorrow.” (Chretien, Hansard @ 1650). Interestingly, as Minister of Indian Affairs, Chretien was in the plane that took Indigenous children (such as the young Matthew Coon Come) from their communities and delivered them to IRS (TRC news coverage interview with Matthew Coon Come, June 2010).

10 Re-launch of the Truth and Reconciliation Commission, 15 October 2009. Michalene Jean’s speech is available on the official website of the Truth and Reconciliation Commission Canada www.trc-cvr.ca/, accessed 30 July 2010. The TRC was re-launched following the resignation of the first lead commissioner Justice Harry La Forme. La Forme critiqued the power that the Government and the AFN had to delimit the TRC process. He argued that Indigenous survivors and people (not just the AFN) should have more control of the process. News coverage mentioned merely that he resigned because he did not feel respected by the other two commissioners and that he felt the process could not move forward. The other two commissioners also eventually resigned. CBC news story 15 October 2009 online: http://www.cbc.ca/canada/story/2009/10/15/indian-truth-commission015.html accessed 30 July 2010.

11 As my mentor Sherene Razack stated long ago in her graduate seminar on Race, Law and Education, “All non-Aboriginal Canadians must think seriously about their relation to the land beneath their feet.” See Bonita Lawrence interview (Rutherford 2010) for discussion of the fact that many people who immigrate to Canada are themselves fleeing colonial contexts, and thus share an understanding with each other as colonized and with Indigenous peoples here. On the other hand, many people who take up residency on “Canadian soil” via Canadian immigration law, may do so without recognizing that the land belongs to Indigenous peoples here. As such, they too are “settlers” and are thereby implicated in perpetuating the colonial reality of Canada. See Miranda Johnson (2011) for a discussion of the sense in which non-Indigenous people of color qualify as settlers. However, I believe that among non-Indigenous Canadians, those of European descent have the most clearly problematic relation to this land, for Euro-Canadians were the intended beneficiaries of colonization past and present. As I am a Euro-Canadian, I assume primarily this category of readers as my target audience. This is not an essentialist claim, but a Fanonian claim (as explained in Chapter 2). For, whether our bodies have a literal and direct bloodline to actual colonizers of the past or not, our white skin secures our membership—both symbolically and materially—in the nation Canada and announces our sense of belonging and entitlement (ownership) of the nation. This sense of belonging and ownership is not (easily) extended to non-white, non-Indigenous people of color. This sense of belonging and ownership is central to the illegitimate settler claims to sovereignty, and must be critiqued.

12 This UNDRIP was ratified by the U.N. in 2007 but without the settler states of Canada, USA, Australia and New Zealand as signatories. Canada signed on November 12, 2010. Harper’s Conservative Government frequently stated that it would consider signing the
UNDRIP only once it ensured that Section 35 of the Constitution would not be undermined. See Paul Joffe (2010) for a meticulous analysis of Canada’s years of refusal to sign the UNDRIP. Joffe’s critique however, emphasizes the role of the Conservative Government in thwarting the signing of the declaration, whereas all Governments of Canada have refused to sign this in the past. See Chapter 7 of this thesis for a brief commentary on this issue.


14 With regard to Indigenous and settler relations within Canada, the word “recognition” usually refers to the call for the Canadian Government and Law to recognize Indigenous title to land and/or Indigenous nation status (sovereignty) as preceding colonial contact and British sovereignty. Some argue that formal recognition is conveyed in the 1763 Proclamation, 1982 Canadian constitution, Section 35, and elsewhere. Others emphasize the ambiguity of these documents. In any case the word “recognition” is used in such a way as to suggest that the power to acknowledge Indigenous nation identity and land rights, rests with the Colonial power (See Coulthard 2009 for a Fanonian critique of this). I intentionally use the word recognition in “pedagogy of recognition,” to target and challenge the settler colonizer/colonial power to recognize itself for what it is: a still colonial power whose legitimacy in terms of identity and land are questionable. I use the term “sovereignty” in this thesis, but it is important to note Taiaiake Alfred’s (2001) claim that this concept is specific to European ways of ruling. European notions of sovereignty are historically exclusive regarding territorial boundaries to a nation. “Sovereignty” in this sense is not typical of Indigenous nations which historically consider sovereign nations capable of coexistence (with nation to nation treaties) on the same territory. Alfred suggests that traditional modes of governance among Indigenous nations is better referred to as “tribal governance” or “tribal self-governance” (Alfred 2001). These different concepts of sovereignty or ruling relations may mean that when settler and Indigenous nations negotiate “self-government,” the settler nation considers Indigenous self-government to be of a lesser form than sovereignty, and assumes “domestic nationhood,” that is, subsumes the Indigenous nation under settler sovereignty.

15 I thank Sherene Razack for this conceptualization of Fanon’s anti-colonial project.

16 I borrow this phrase from Jeanette Haynes Writer (2002).


18 See Adam Barker (2009).
The Globe & Mail’s Shawn McCarthy (Sept 8, 2001) reports that Chretien “angrily rejected Mr. Coon Come’s denunciation of Canadian policy towards natives…” McCarthy quotes Chretien’s explanation of his anger: “it’s because Mr. Coon Come said we have an apartheid system with reserves. We offered them to abolish the reserves [in 1969] and they said, “no, it’s a cultural genocide”.”

I borrow the term “everyday racism” from Philomena Essed (1992).


As many or most of these cases of missing and murdered Indigenous women are unsolved, there is no certainty that all or even most of the violence was committed by white settlers. However, of the solved cases, the violence is known to have been committed by whites. Helen Betty Osbourne’s murderers were several young white men who were supported by their white community; Pamela George’s murderers were several young white men who were supported by their white community (Razack 2000); the murder of more than 26 of the Indigenous women from Downtown East Side Vancouver was committed by Robert Pickton, a white farmer who was enabled by several of his white friends and, some argue, the police; a white man, John Crawford, was the murderer of five Indigenous women from Manitoba and Saskatchewan. This sexualized racial violence is theorized by Indigenous women as explicitly and directly related to land (see Finding Dawn 2006, “Highway of Tears Report” 2006, A. Smith 2005).

Legal and political agreements between Indigenous and non-Indigenous peoples beginning with the 1763 Proclamation, several treaties, the 1982 Constitution (Charter Section 35 in particular), and several judicial decisions regarding land and resource claims (1997, 2004, 2008) emphasize that Indigenous nations must be consulted in the decision making process regarding use and sale of their traditional territories and resources. Provincial or federal governments are usually at fault for failing to abide by these laws and agreements. It is important to note that although Indigenous peoples often refer to the Charter section 35 as evidence of Canada’s acknowledgement of First Nations’ nation status, most Indigenous leaders and scholars critique the charter and the presumption upon which it rests. Not all Indigenous nations were consulted in its creation. The charter is imposed upon them. The charter is based on Canadian values (primarily the protection
of individual rights, not collective rights). This is similar to the Indian Act which was also simply imposed upon Indigenous nations. While Indigenous leaders call for an end to the Indian Act, they want to ensure that the inherent right to (tribal) self-government is first guaranteed and that the treaties regarding land and resource sharing are honored. Past efforts on the part of Canada to abolish the Indian Act (most notably Trudeau and Chretien’s 1969 white paper) were efforts to assimilate Indigenous nations into Canadian society and its legal, political, and economic system based on individual rights. There were no guarantors of nation status and cultural / collective rights. On this, see Ovide Mercredi 1994.

Nault’s proposed legislation is another explicit example of the re-colonizing strategy of legal recognition. Indigenous nations are recognized as self-governing but ultimately subsumed under Canadian sovereignty and rule of law.

Despite Indigenous peoples protest and critique of this legislation, it advanced to a second reading in the House, but died when then P.M. Chretien prorogued parliament on November 13, 2003. While First Nations’ peoples took their protest against FNGA in a march to the Federal Government, news coverage of both the issue and their march was fleeting. At the time, I actively searched for coverage of this issue, and found only a single one minute clip on the local news. The clip was of the march itself and failed to provide any information as to why Indigenous people were protesting. Nor did it question what the FNGA would mean for all of our lives. In contrast, on the very date of their protest—and for over a week on either side of the date—media bombarded us with coverage of the issue of whether marijuana should be legalized in Canada. People expressed very strong opinions on either side of this legalization of marijuana issue, claiming it had great significance for our most basic civil liberties. It also seemed to matter deeply to Canadians in terms of our national sense of identity and independence of the USA. Yet a piece of legislation which would essentially re-inscribe Euro-Canadians as present-day colonizers at the expense of the inherent rights of Indigenous peoples seemed to mean little to mainstream Canadians.

The issue of IRS likely was on Nault’s mind at the time of his statement, as the number of civil cases regarding IRS abuses continued to grow. Moreover, in the summer of 2001, AFN Chief Matthew Coon Come stated that 20,000 to 60,000 survivors not involved in litigation have “unsettled issues arising from [IRS]” concerning “loss of culture,” and that the AFN was looking into the possibility of redress along the lines of the reparations Canada made to Japanese Canadians (Mofina 2001). Moreover, the Government of Canada was aware of Justice Brenner’s decision in Blackwater v. Plint which was delivered July 10, 2001, just one month prior to Nault’s reprimand of Coon Come. Brenner issued his landmark decision rendering Canada 75% vicariously responsible for IRS violence. In Chapter 5 of this thesis, I analyze the colonial moves in Brenner’s decision.
Nault remained in his position until 2003. While in office, he followed through with his threat to make business negotiations difficult for Indigenous nations that did not support the FNGA. He slashed Federal funding of the AFN. He was sued by Pikangikum First Nation (near Kenora Ontario) in 2000 for assigning a third-party (not from the community) to manage their funds (Fox 2003). He withheld funding in the amount of $40 million for their economic development projects (infrastructure, housing, water) during the trial (Thom 2011). The SCC December 2010 decision dismissed the case against Nault. Today Nault heads a corporation, and is a lobbyist negotiating land and resource deals between Indigenous nations and the Canadian government. Matthew Coon Come was replaced by Phil Fontaine in the very next AFN election for National Chief. During the election campaign it was intimated that the AFN needed a Chief who was capable of negotiating with Ottawa. The pressure to replace Coon Come is indicative of the Canadian Government’s power to delimit the terms of negotiation between Indigenous nations and Canada.

Pointing to such commonalities need not obliterate important differences amongst either “the colonized” or “the colonizer.” Indigenous peoples throughout the world, Black Americans, and others colonized or enslaved by Europeans, have unique histories, knowledge, experience of and resistance to European domination. Relatedly, cultural and strategic differences exist amongst European (British, French, Spanish, Dutch, Italian) colonizers (Murphy 2006). Even within a single colonizing nation (e.g., Britain), different roles in the colonizing process were played by elites vs. whites of lower economic class and, men vs. women (Carter 1997, Lowe 2006). The same colonizing nation used different strategies for dealing with different non-European peoples, and different strategies at different times for dealing with the same people targeted for domination, depending upon what they wanted from them. The desire for land required the dispossession of Indigenous peoples and this was attempted through various means, including displacement, apartheid, genocide and / or assimilation. The desire for a pool of unpaid labour on this usurped land was accomplished through the abduction, enslavement and genocide of Black Africans. Moreover, Indigenous and Blacks of African descent have a unique and varied experience with each other which must be analyzed (Lawrence 2010, hooks 1992). The historical (and present day) contexts and experiences of Indigenous and Black people are complexly interconnected, not just within the same white settler location, but globally. Lisa Lowe (2006) explains how, after Black slaves in Haiti revolted against the French colonial power, US and Britain took steps to avoid similar slave revolts. This was a key motive in their legal abolishment of black slavery. Yet they still needed an exploitable labour force, so they imported Asians (using the same slave ships) as indentured labourers, falsely called “free men,” and “free labour” and to serve as a protective “racial buffer” between newly emancipated Black slaves and white colonials (Lowe, 201). Today, similar pools of exploitable and indentured labour are supplied by migrant labourers from the South (Lowe 2006). Lowe argues that the four continents of Europe, America, Africa and Asia are
historically and today intimately interconnected specifically through the emergence of “modern liberal humanism” (Lowe, 193) which now must obscure or forget the violence of genocide, slavery, and indentured labour which constitutes the conditions for its own possibility and vice versa (Lowe 205–206). Thus, whether within the white settler states of Canada and the USA or globally, Indigenous peoples and Blacks can be said to share a (different) experience, but of a common (European) colonizer. That there are commonalities amongst European colonizers should not be surprising, given that European Imperialist nations of the past—though themselves culturally diverse—shared beliefs and values about European cultural, racial and moral superiority which framed their rules of competition and trade with each other and both motivated and mandated their colonial conquest over non-European territories and peoples (Said 1997, Fitzpatrick 2001, Wolfe 2006, 390).

29 Similarly, the triadic relation of land—terror—white identity is embedded in the meaning of the term “settler sovereignty.” Sovereignty is a territorial claim (national boundaries), achieved through the violence of assertion (enabled by the rule of law) and maintained through occupation by a collective (settler identity).

30 Other scholars, such as David Scott (1995) argue that “the politics of our critique of colonialist discourse cannot be the same as it was for Fanon” (Scott 1995, 215 fn4). I believe this type of claim which rejects or de-emphasizes the “political rationality of exclusion” follows from the de-emphasis of sovereign forms of power in modern contexts. Scott emphasizes Foucault’s notion of governmentality in his analysis of settler states. I think scholars such as Scott underestimate the permanence (in Hill Collins’ sense of the term) of Sovereign power in contemporary settler states. As Adam Barker (2009) argues, settler states are hybrid-states, where sovereign power and other modes of power operate simultaneously. I believe this is also consistent with Foucault’s analysis of power, that is, that modern modes of power do not displace old sovereign modes entirely, but operate in tandem (Foucault 1997).

31 Macpherson (1962, 47 – 51) distinguishes a full market society from two other forms, “customary or status society” and “simple market society.” He claims that only (and all) full market societies (which justify surplus accumulation) presume possessive individualism. Only full market societies commodify both products and labour. Labourers who do not own the means of production, still own their own body. They may alienate their labour, thereby transferring ownership of the product of their labour to the capitalist. Possessive individualism begins with the assumption of natural equality amongst male humans, and also both explains and justifies the economic inequality amongst humans, as a product of the law of nature: i.e. reason. It is most rational to desire to accumulate surplus wealth.
Kay Anderson (2007) compellingly argues that the species dichotomy between human and non-human animal is at the base of racist Enlightenment conceptions of the free individual.

Theorists such as David Goldberg (2002) claim that Locke was therefore not a naturalist, but a more progressive historicist, in his explanation of inequality amongst humans.

For example, “white skinned” Irish were deemed black because property less (Noel Ignatiev 1995), whereas “dark skinned” Mexican were deemed legally white in New Mexico for periods of time when colonizers wanted to buy their land (Laura Gomez 2007).

2nd Canadian Distinguished Annual Address, Center for the Study of Canada Plattsburg State University, Plattsburg, New York, April 5, 2004.

Canadian national narratives romanticize the relations between First Nations peoples and Europeans during the 200 year period known as the era of the fur trade. Yet there were practical reasons—European self-interest—which explain why these first years of contact may have been “congenial.” European men were highly dependent upon Indigenous peoples for survival and intimacy (Lawrence 2002, Stevenson 1999). The land was rugged and harsh. This was a period of time when white settlers (the white collective body) were few in number, and were outnumbered by Indigenous peoples. Second, the ongoing battle between the French and the British (which ended only in 1751 with England defeating France) was also a time when Europeans were preoccupied with fighting each other. Both sides needed tobefriend and enlist the wisdom and muscle of Indigenous nations against their opponent.

See M. Osiel (2000) and C. Kukathas (2003) for such an argument.

While the claim that the very “analytic structure” of the concept of law “implies force” and the “possibility of enforcement,” may be true of all modern / liberal law rooted in concepts of private property, it is not necessarily true of all law, for example, Indigenous notions of “customary law.” Robert Yazzie (2000, 42 - 44) claims that “Traditional Navajo law is based upon equality and consensus…When there is a problem, people look to someone who has wisdom, experience, and spirituality to teach and to give advice. The best decision is made by the agreement and consensus of everyone involved in a problem.” Yazzie provides the example of how Western law and Navajo Nation law address domestic violence differently. See Yazzie, “Indigenous Peoples and Postcolonial Colonialism” (2000, 39–49; 43). See also, James (Sakej) Youngblood Henderson’s (2000a) critique of European law and how Indigenous legal systems differ.
39 See also, Sally Engle Merry’s Human Rights & Gender Violence (2008, 225–228).

40 Macpherson notes that even 17th Century theorists, such as Thomas Hobbes, recognized that “there is scarce a commonwealth in the world whose beginnings can in conscience be justified” (Macpherson 1962, 20-21). Whether sovereignty is established by conquest or by the imposition of institutions, what made it just was compact or contract agreement to be bound by a common sovereign.

41 Blomley examines how three spatializations central to colonialism—the frontier (especially as vacant land which invites taming by Europeans), the practice of surveying (measuring and mapping territory as a precursor to usurping it from Indigenous peoples), and dividing land into grids for private ownership and occupation—persists today in the geography (urban and rural) of Canada. As we saw with Fanon, the colonial psyche requires a structural presence.

42 Relatedly, David Goldberg concurs, historically modern colonial states “give way to the colonized’s self-governance” only after the colonized nation “exemplifies progress” (2002, 67) in this way. Jeffrey Dudas (2004) claims that while European colonials sought to impose their rule of law onto Indigenous peoples, they often allowed Indigenous peoples to retain some of their own customs where compatible with colonial rule, when doing so would make colonial rule more efficient. By acknowledging these customs, Europeans in a sense acknowledged that other cultures may have a system of rules or laws, but considered law based in custom or culture as less evolved than the European “rule of law” rooted in rational thought. That is, when dual systems of law are acknowledged, customary law is regarded as inferior (by the settler) because seen as a product of an inferior race or culture. Racist assumptions about a people, precede and inform the definition of their law as “primitive.” Thus, even the acknowledgement of Indigenous systems of law may continue to function as eviction, replicating the civilized/less civilized distinction at the heart of colonial imperialism.


44 Milloy’s research was commissioned by RCAP, and later became his book A National Crime (1999).

45 This is the number of residential schools recognized in the IRSSA. This number does not include day schools. See IRSSA website.
I do not focus on the role of organized Christianity in the administration of the IRS in Canada because I want to forefront the national project. I do understand the instrumentality of Christian religions in the national project, and the centrality of Christianity to European Imperialism and colonialism more generally, as documented and explained by Robert A. Williams Jr. in his book *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990). Williams provides a historical account of the conquest narratives from Medieval times and the Crusades, onward.


Initially commissioned in response to the “Oka Crisis” of 1990.

The 1999 Law Commission paper on institutional child abuse states that “…residential schools for Aboriginal children were first established in Canada in 1880…In 1920, the Indian Act was amended to require” aboriginal children’s attendance (1999: 14–15).

“Loss of culture” is a euphemism for genocide, and a particularly pernicious euphemism as it not only trivializes the crime of genocide, but blames the victim for losing culture (as though through a hole in a pant pocket). Culture was not passively lost, it was beaten out of children by perpetrators who remain invisible and nameless through this wording. Thus throughout this thesis I place “loss of culture” in quotation marks every time I use the phrase, rather than merely upon first use.

See *Rape: A crime of war* (NFB Canada, 1997) for an account of the recent international feminist legal effort to have the rape of women during war be prosecuted as a war crime and a weapon of genocide under International law and UN Conventions.

Prior to the deluge of IRS litigation in the early to mid–1990s, as well as the class action litigation regarding orphanages run by religious organizations, there was much cultural backlash towards individual women who claimed to have repressed memories of
childhood sexual abuse. They were subjected to theories and accusations of “false memory syndrome” and were undermined by both the courts and the public. Mainstream culture recoiled at the possibility that a vast number of normal male family members (versus pedophiles or strangers unrelated to the family) could be sexual predators of children. Once the collective experience of Indigenous adults regarding the “childhood sexual abuse” of IRS surfaced, this backlash regarding “false memory” seems to subside, or at least retreat from the public discourse. The term “historic sexual assault” is now used in law to address abuse which occurred in an adult individual’s childhood.


54 I speak in present tense because the IRS Settlement Agreement brought to a close only those cases which were included in the Baxter and Cloud class actions.


56 Indian Residential School Statistics available from the Government of Canada Ministry of Northern and Indian Affairs website.


58 According to the IRSSA homepage, the first case launched was Aleck in 1988, regarding the St. George IRS. It went to trial in 2000 and was settled in 2004 (16 years later). The second case launched was Mowatt in 1996, regarding the same IRS (IRSSA, 49)


61 Indigenous survivors of AIRS continue in the litigation process, for example, in 2010, “Donald Raymond Olan was sentenced to two years in a federal prison for sexually abusing five First Nations boys while he was a teacher…” at AIRS (Winks, 2010). Other survivors of AIRS deal with on-going racism from the wider community. For example, while employed in the kitchen of Brentwood College (an elite boarding school for grades 9–12), Corrine Baker was subjected to repeated racist acts by her manager, including being told that “all Indians are dirty filthy pigs.” She filed a complaint with the Human Rights Commission (Barrera 2010).

62 As Justice Hogarth explains [para 28] “The concept of an indecent assault …no longer exist[s] in our law. It is now under the auspices of sexual assault. Indecent assault was an offence [in the criminal code] at the time these matters arose that attracted a maximum of ten years imprisonment…”

63 In sentencing Plint, Justice Hogarth must take into consideration the seriousness of the offence, the impact on its victims, the effect of deterrence to others and the accused, similar sentencing decisions, whether concurrent or consecutive sentences should be applied, the significance of any lapse of time between the commission of the offence and the hearing, the circumstances of the accused, and the arguments by counsel [para 18–28].


65 This phrase is borrowed from the 1999 Law Commission Report on institutional child abuse, including IRS.
I thank Dr. Kari Dehli and Dr. Tanya Titchkosky for suggesting this connection.


My description of this event is taken from the following mainstream, alternative, and Indigenous news sources: “Hopes rise for ending armed standoff: Two natives leave Gustafsen lake Camp” (Mark Hume, Vancouver Sun, August 31, 1995); “Gustafsen lake Standoff: RCMP find bullet-ridden vehicle, 200 km no-go zone around Indian encampment” (Kim Pemberton Sept 5, 1995); “Gulf War military technology reaches Gustafsen lake Standoff” (The Canadian Press, Sept 13, 1995); “Headway made in native standoffs: Ottawa, natives reach deal on Ipperwash land while Gustafsen lake natives closer to ending standoff” (The Windsor Star, Sept 14, 1995); “Gustafsen lake, B.C.: Rebel standoff ends peacefully, Medicine man coaxes group to leave ranch” (Steven Mertl, The Ottawa Citizen Sept 18, 1995); “Standoff fed BC fire says head of new organization” (The Canadian Press Sept 19, 1995); “Siege of Gustafsen lake Sacred Shuswap Sundance Grounds” (SISIS Sept 11, 1995); “Trial begins for 18 accused in Gustafsen lake standoff” (Windspeaker Aug 1, 1996); “Wolverine’s War: How a 65 year old man stopped a multi-force invasion” (Stephen Samuel 1996); “Who’s on Trial? Gustafsen Lake Saga Continues (Lisa Harding, The Peak SFU, January 20, 1997); “Gustafsen lake: Standoff trial tests limits of patience, public purse: RCMP image takes beating in long-running trial” (Ian Haysom, the Ottawa Citizen, February 7, 1997); “Sundancers on Trial: The Mounties say Natives at Gustafsen lake are Unsuccessful Murderers, the Natives Say the Media are Patsies” (Bell Mahoney, Terminal City, February 14, 1997); “Verdicts in Gustafsen lake Standoff” (The National CBC, May 20, 1997); “Gustafsen Lake Stand-off: 15 Charged” (Scott Steele, Maclean’s June 2, 1997) “Judge Tough on Native Protesters: Gustafsen Lake Hurt Democracy” (Miro Cernetig, BC Bureau, Globe and Mail, July 31, 1997); “Jail Terms Infuriate Natives: Prisoners’ backers promise retaliation and call for inquiry” (Gail Johnson, The Vancouver Province, July 31, 1997); “Gustafsen lake trial ends—Native Indian supporters call for a public inquiry into police actions during the standoff” (Gerry Bellett Vancouver Sun, July 31, 1997) “Gustafsen lake” (The Current, CBC Radio 2005); “How the RCMP Sought Trust After Gustafsen Lake” (Robert Matas September 17, 2010).

For an insightful and detailed discourse analysis which compares mainstream vs. alternative news coverage of this event, see Sandra Lambertus (2003).


I borrow this phrase from SCC Justice Beverley McLachlin’s 2005 decision regarding this case.

See Alan Watson (2002) for an insightful account of the complexity of vicarious liability for “thinking property” i.e., humans as property.

Even when vicarious liability is couched in terms of employer / employee, the terminology preserves the historical Lockean notion that wage labourers are of lesser human status, lesser rationality, than those who own their labour and its product. Locke held that labourers were virtually slaves (Macpherson 1962).

This move is typical of Canada in IRS litigation. That is, Canada either denies outright or blames the Church.

See the 2004 AFN report which claims that the adversarial approach by the courts and the ADR process was humiliating and overwhelming for survivors.

Milloy’s book A National Crime is based on this report.
For an insightful discussion of the tensions between universal abstractness and specificity in the notion of a “reasonable person” in criminal law, see Diana Young (2008).

This is typical of all IRS case law until the 2004 certification of the Cloud class action. See Chapter 6.

This assumption is now challenged in research on sexual violence (Crown et al. 2007).

I say “seems” because as Esson J. [2003] points out, a judge is not obligated to record all of the evidence that informed their decision.

If John Milloy’s research report which documented sexual and physical and other forms of violence throughout the IRS system, had been allowed as evidence, would the testimonies of each Individual survivor have been rendered “more probable”? This question is raised by the SCJ McLachlin in her 2005 decision, and left unanswered.

In 2006, just prior to the IRSSA MJ was still pursuing justice through Canada’s courts. See various accounts of her walks for justice, e.g., via http://socialwork.uvic.ca/indiginit/activities.php


Similar words will be uttered by MINA Robert Nault (Lib) one month later when he asserts “there is no evidence of racism in modern times.” See Chapter 2.

This may be analogous to the deeply embedded belief within Western culture, that prostitutes cannot be raped.

The 2003 appeal decision led by Justice Esson, overturned Brenner’s decision that Canada was 75%, and the church 25%, vicariously responsible for the damages caused by Plint. Esson J. held that Canada was 100% responsible, because the Church was equivalent to a charitable organization and thereby had “charitable immunity” from fault. The 2003 ruling also increased the damages award for one claimant by $20,000. Canada appealed the 2003 decision to the SCC. In 2005, SCC Justice McLachlin restored the original trial judge’s division of vicarious liability between Canada 75% and the United Church 25%, arguing that the status of charitable organization should not render one immune to fault. The S.C.C. allowed the increase of $20,000 to stand.

2nd Canadian Distinguished Annual Address, Center for the Study of Canada Plattsburg State University, Plattsburg, New York, April 5, 2004.
For an overview of the IRSSA, the criminal and civil suits it brought to a close and the implications of Canada’s solution for Australia, see Bradford W. Morse 2008b. For a detailed account of the IRSSA written retrospectively from the perspective of the AFN, see the Official Website of the Indian Residential School Settlement Agreement: http://www.residentialschoolsettlement.ca/English.html

Individual sexual and physical abuse cases will proceed through the IAP. Some IRS for the Metis’ and / or day schools were excluded from the IRSSA, and are currently either suing or negotiating with Canada.


To date then, there is no IRS related class action which has been successful on the grounds of systemic neglect.

The AFN, as well as the National Aboriginal Law section of the Canadian Bar Association, and lawyers involved in civil litigation, separately offered detailed legal critique of the short-comings of addressing IRS injustices through Canadian law or ADR (AFN 2004, Canadian Bar Association 2005).

The IAP Adjudication Secretariat statistics for November 1, 2011, indicate that 23,903 claims have been received to date, 10,826 claims have been settled, and compensation to date equals $1, 241,096,278. According to the 2010 Annual Report of the Indian Residential Schools Adjudication Secretariat, applications for the IAP may be made until September 19, 2012. The Secretariat expects that more than double the originally expected number of IAP applications will be received. They estimate that they will need well into 2013 to complete all of the hearings. This information is available under the update link on the official IRSSA website or directly via http://www.iap-pei.ca/nwz-stat-eng.asp

The IRSSA is considered both a political and legal agreement because its content and conditions were negotiated in the six months leading up to the 2005 Kelowna Accord, and resulted in an “Agreement in Principle” (AIP) which was signed by the aforementioned Indigenous representatives and the Government of Canada represented by retired Supreme Court Justice Frank Iacobucci. The IRSSA is not technically part of the “The Kelowna Accord” which is a wider political agreement outlining a “new partnership” (primarily economic) between the Government of Canada, the Provinces, and First Nations, whereby Canada would commit 5 Billion (a fund separate from the IRSSA) towards addressing economic, health and education needs among First Nations’ communities. Reaching an AIP regarding “the IRS legacy” was thought to be a prerequisite to the success of a new economic relationship which was the focus of the Accord. This political component to the negotiation should not mask the fact that it is a legally binding agreement.
The Honourable Jim Prentice (PC), then Minister of Indian Affairs and Northern Development and Minister Responsible for Indian Residential Schools Resolution Canada. June 14th, 2007.

Hansard, 39:2 Committee Evidence - AANO-17 (2008/3/5) at 1530.

To borrow Justice Brenner’s words regarding the purpose of the Indian Act (Blackwater v. Plint 2001, para 252).

Prosperity and accumulation resulting from the settler’s usurpation of Indigenous lands.

Lest the state be mistaken for the parent who apologizes for hurting the child he/she is in the midst of spanking.

Speech quoted by MP Gerald Merasty, May 1 2007 House of Commons @1020.

See John Milloy (1999).

I suspect this was why the apology was not mandated by the legal settlement.


Of Williams-Lake, B.C. Past United Church minister, and past MP (Reform / Alliance) 1993 – 2004. From the Parliamentary biography and photo, he appears to be of European descent.

I have replicated the text verbatim, adding in brackets any difference in the delivery of the speech. Much of the speech was delivered in both French and English. I have assigned paragraph numbers for ease of reference in my analysis to follow.

This point is also made by Chrisjohn et al. (2008).


As reported by Kusch and Welch (2010), Chuck Strahl was present during a survivor’s healing circle, at the TRC event: “Clearly affected by the harrowing stories, Strahl said they were a call ‘to any of us that have any influence’ to ensure that ‘the record is complete’ and that ‘you can have some peace’…He then paused more than 20 seconds before he regained sufficient composure to continue. As he did so, a couple of residential
school survivors who were part of the sharing circle patted his shoulder, offering him comfort.” Available on-line: [http://media.knet.ca/node/8051](http://media.knet.ca/node/8051) This was also aired on TVO during an interview with TRC Chair Justice Murray Sinclair. Interview available on-line: [http://ww3.tvo.org/video/164888/murray-sinclair-truth-and-reconciliation](http://ww3.tvo.org/video/164888/murray-sinclair-truth-and-reconciliation) Both accessed October 15, 2011.

114 In Chapter 3, I quote from the statement delivered by Matthew Coon Come to this TRC Commemorative event where he corrects the euphemism “residential schools.”

115 When then Minister of Indian and Northern Affairs Chuck Strahl announced this change, there was no audible collective gasp across the nation at the realization that, up until 2008, the human rights of Indigenous people were not protected by Canada’s Human Rights legislation.


117 As John Milloy explains in his discussion of the goals of IRS leading up to the 1857 Gradual Civilization Act. The Canadian government sought to train Indigenous boys in agriculture so that upon leaving the IRS, Indigenous boys would desire to own land as individuals, in order to grow crops etc. upon the land. Individual ownership of land would disaggregate Indigenous communal ownership of land. Private property ownership was thereby seen as stage in the IRS process of the ontological revolution of Indigenous peoples, transforming Indigenous boys into Canadian citizens as they would thereby lose their status as “Indian.” As Milloy notes, this strategy was never completely successful (1999, 17–22).

118 See the Aboriginal Affairs and Northern Development Canada homepage for details of this act. Available on-line: [http://ainc-inac.gc.ca/eng](http://ainc-inac.gc.ca/eng)


120 *Webster’s Collegiate Dictionary* (10th Edition), 976.

121 My wording here is meant to mirror John Milloy’s (1999) characterization of the goal of IRS policy as the “ontological revolution” of Indigenous peoples, the re-making of Indigenous peoples in the settler’s image (assimilation), in order to “get rid of the Indian problem.”
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Case Law, legislation and government committee hearings


Blackwater et al. v. United Church of Canada et al. 2002 BCCA 621 (10 p) Donald, J.


