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Cultural Genocide in Canada? It Happened Here.

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Abstract: *This article explores the significance of the TRC's assertion that the establishment and operation of residential schools were a central element of Canada's Aboriginal policy that can be described as cultural genocide, against the backdrop of Canada's historical position on cultural genocide and in view of residential schools litigation. It analyzes the deliberations over the United Nations Convention on the Prevention and Punishment of Genocide (The Genocide Convention) in various United Nations (UN) organs, Canada's historical position, and the selective adoption of the Genocide Convention in Canadian law. My argument is threefold; first, I argue that the TRC assertion is indeed timely. Cultural genocide is not an inferior second-rate type of genocide, although it is not included in the Genocide Convention. Conceptually, cultural genocide is a full-blown genocide, even if it is not legally actionable. Second, Canada shielded itself legally above and beyond claims of genocide as it transplanted the Genocide Convention into Canadian law. Finally, while the cultural genocide phraseology may facilitate a wider scope of tort claims, the absence of appropriate legislation changes means Aboriginal people are likely to continue to view Canadian law as an oppressive settler-state mechanism.*

The first section of this article explores the notion of genocide as the destruction of cultures and the contextualization of the colonial experience within this notion. The second outlines briefly the drafters' justification for the exclusion of cultural genocide in the Genocide Convention, the Canadian position with regard to cultural genocide, and the selective manner in which the Genocide Convention was incorporated in Canada's criminal code. Section three analyzes residential schools litigation within Canada's narrow, individual-based tort law. Finally, the significance and implications of the TRC conclusion will be discussed.

Introduction

The June 2015 *Final Summary Report* by the Truth and Reconciliation Commission (TRC) of Canada states: "For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada" (Truth and Reconciliation Commission of Canada 2015b, 1). The first paragraph ends with the assertion, "The establishment and operation of residential schools were a central element of this policy, which can best be described as 'cultural genocide'" (Truth and Reconciliation Commission of Canada 2015b, 1). This claim is followed by a definition of physical, biological and cultural genocide. The report then defines cultural genocide as "the destruction of those structures and practices

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that allow the group to continue as a group" (Truth and Reconciliation Commission of Canada 2015b, 1).

In stark contrast to the reductive scope of individualized law-making, the TRC's timely and courageous report acknowledges the ontology of destruction experienced and construed by Aboriginal peoples according to their culturally specific meaning systems (Woolford 2009, 81–97). This article examines the implications of Canada's historical position on the notion of genocide and the subsequent partial, selective fulfilment of its obligations under the United Nations Convention on the Prevention and Punishment of Genocide (Genocide Convention) regarding its engagement with the redress of the residential schools' experience in tort law, class action lawsuits, the Indian Residential Schools Settlement Agreement (IRSSA), and TRC. It analyzes the deliberations over the Genocide Convention in various United Nations (UN) organs, Canada's historical position, and the selective adoption of the Genocide Convention in Canadian law.

My argument is twofold. First, I argue that when Canada transplanted the Genocide Convention into its criminal code, it shielded itself legally above and beyond claims of genocide. Second, Canada has yet to deal with the inaptness of its legal system to redress past wrongdoing. Canadian governments worked around these legal barriers by reaching settlement agreements with Aboriginal people, mainly via the IRSSA and in the matter of the 60s Scoop. While the TRC's cultural genocide phraseology may facilitate a wider scope of tort claims for Aboriginal people, Canadian law has remained an oppressive settler-state mechanism. The recent African-Nova Scotian demands for reparations for slavery are yet another reminder the need for legal reform.

The first section of this article engages with the notion of genocide as the destruction of cultures and its application to the colonial experience. The second outlines briefly the drafters' justification for the exclusion of cultural genocide from the Genocide Convention, the Canadian position regarding cultural genocide, and the selective incorporation of the Genocide Convention into Canada's criminal code. Section three analyzes residential schools litigation within Canada's narrow, individual-based tort law. Finally, the significance and implications of the TRC's conclusion will be discussed.

I. Genocide: The Destruction of Cultures

The Genocide Convention defined acts of genocide in terms of physical and biological destruction (Shaw 2007, 81). Early genocide scholars, following the legal definition, constructed a notion of genocide that placed stronger emphasis on physical and biological than on social and cultural destruction (Helen Fein 1979, 1978; Israel Charny 1994; Robert Melson 2002, 1992). Frank Chalk and Kurt Jonassohn's succinct definition is perhaps the narrowest: "Genocide is a form of one-sided mass killing in which the state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator" (Chalk and Jonassohn 1990, 23).

In the period after WWII, the initial focus on death camps, particularly Auschwitz-Birkenau as an icon of evil, contributed to the heightened Holocaust consciousness in North

America (Charny 1994; Stone 2010, 457; Stone 2008; Benvenuto, Woolford, and Hinton Laban 2014, 6). By the end of the Cold War, historians had expanded the discussion of the Holocaust by studying other forms of physical destruction than that wrought in the camps, such as the shooting massacres of Jews and the annihilation of Jewish communal life and cultural products (Snyder 2015; Bauer, 2000). Moreover, the Holocaust was situated within a transnational or world-historical context of imperialism and colonialism (Stone 2010; MacDonald 2007; Bauer, 2000, 1987). In parallel, Indian residential schools in Canada were increasingly framed as genocide by scholars, activists, and survivors (Paul 2006; Churchill 2000; Chrisjohn and Young 1997; Davis and Zannis 1973).

To understand the centrality of the destruction of cultures to the notion of genocide, one needs to take a closer look at the writings of Raphael Lemkin, the Polish-Jewish jurist who coined and contextualized the term "genocide." Lemkin wrote: "By 'genocide' we mean the destruction of a nation or an ethnic group … Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves" (Lemkin 2008, 79). It is a coordinated effort aimed at the annihilation of "essential foundations of the life of" a group with the intention of eradicating it. This coordinated effort targets the political and social institutions, culture, language, national sentiments, religion, and economy of the group. The crux of genocide is that it targets a group as such, although the genocidal acts are inflicted upon individuals. Such acts include the destruction of personal security, liberty, health and dignity, "*and even the lives of the individuals belonging to such groups*" (Lemkin 2008, 79, emphasis added).

Raphael Lemkin posited that "genocide can be committed either by destroying the group now or by preventing it from bearing children or keeping its offspring" (Lemkin 1951, n.p.). Lemkin referred to this practice as kidnapping (this was also the term used by the Nuremberg Tribunal in the United States v Greifelt et al., case number 8 (known as the RuSHA case). He claimed: "From the point of view of genocide or the destruction of a human group, there is little difference between direct killings and such techniques which, like a timebomb, destroy by delayed action" (Lemkin n.d.). This was also the majority opinion of the various UN committees engaged in drafting the Genocide Convention.

Genocide is a crime planned and committed by governments and powerful groups of individuals (Lemkin n.d.b, 1–3). In Lemkin's notion of genocide, the physical annihilation of the group is not necessary for determining whether a given case constitutes genocide. His book *Axis Rule in Occupied Europe* outlines various techniques of genocide based on Lemkin's analysis of historical cases. It is perhaps significant that Lemkin commenced with the less-obvious political, social, cultural, economic, and biological techniques of genocide before reaching plain physical genocide, and ended with two other non-physical types of genocide, namely religious and moral. Unlike the five acts enumerated in Article II of the UNGC, Lemkin's lists were not intended to be exhaustive (Lemkin 2008).

Given the bulk of Lemkin's writings, this ordering seems purposeful rather than arbitrary. For Lemkin, genocide is the annihilation of a group by a broader inventory of destructive acts that goes well beyond physical annihilation: "[T]he Nazi experience was not a sufficient basis for a definition of genocide for international purposes" (Lemkin 2013, 152). He wrote, "The concept of cultural genocide is of extreme importance … As far as law can help, this law will be useful … Europe could be helped … by proclaiming new principles of the type embodied in the concept of cultural genocide" (Lemkin n.d., 2)

Lemkin wrote that "[o]ne cannot describe a crime by one example; one must rather draw on all available experiences of the past" (Lemkin 2013, 152). The cultural techniques of genocide he outlined include means such as banning the use of the victim group's language in education, implementing policies and programs intended to inculcate target group youth through propaganda and restricting native [the occupied group] education (Lemkin 2008, 84–85).

The UNGC engendered a legal definition of genocide that it stripped of some significant constituents of Lemkin's initial ideas on the links between colonialism and genocide. Oriented toward the criminalization of the planners and perpetrators of genocide, the UNGC focuses on the perpetrators' specific intent—*dolus specialis*—to destroy a human group protected by the UNGC (Cassese et al. 2013; Quigley 2006; Schabas 2000).

Alternative, non-legal contextualizations of genocide that have become more pervasive in recent years focus on processes rather than on the perpetrators' specific intent. Thus, it has been argued that genocide is not a crime of unintended consequences, but rather that certain social, political, and legal structures can be used for cultural and physical destruction (Barta 1987, 239; Moses 2005). Hence, in settler states, the colonial takeover is a process rather than an event. Another contextualization of genocide focuses on genocidal moments that constitute a radicalization of dynamic processes that are potentially genocidal and that could, during crises, lead to genocide (Jacobs 2014, 189–207; Moses 2000, 91–93). Such genocidal moments can emerge from circumstances such as the victimized group's resistance to the processes (Benvenuto 2014, 212). These alternative conceptualizations of genocide point to the conceptual paring down of the legal notion of genocide at the UN that resulted from the politics of international treaty-making. The following section outlines the legislative history of cultural genocide in the deliberations of the various UN bodies on the UNGC.

II. Canada's Position on Cultural Genocide and the Genocide Convention

Though the Genocide Convention does not prohibit cultural genocide, Article II (e) protects child members of these groups from forcible transfer enacted with the intent to destroy the group. Canada's adoption of the Genocide Convention into its criminal code was fractional and limited to physical inflictions, and the country's engagement with these issues influences its ability to redress the residential schools experience properly. This section is divided into three sub-sections. The first unfolds the main arguments raised in opposition to cultural genocide; the second analyzes Canada's positions on genocide during the drafting process; and the final sub-section deals with the incorporation of the Genocide Convention into the Canadian criminal code and its upshot for residential schools litigation.

a. The Deliberations over Cultural Genocide

Those opposed to the inclusion of cultural genocide noted the difficulty of differentiating cultural genocide from policies of assimilation. The UN Secretariat's conclusion regarding policies of forced assimilation was that "[s]uch a policy, even if the notion of 'cultural genocide' is admitted, does not as a rule constitute genocide" (United Nations Secretary General, 2008, 232). In his capacity as international law expert for the Secretariat, Lemkin distinguished between forced assimilation by moderate coercion and cultural genocide: "[C]ultural genocide was much more than just a policy of forced assimilation by moderate coercion—involving for example, prohibition of the opening of schools for teaching the language of the group concerned, of the publication of newspapers printed in that language, of the use of that language in official documents and in court, and so on. It was a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings" (The United Nations Secretary General 2008, 235). This was articulated together with the concern that the definition of cultural genocide (along with the protection of political groups) provided an undue expansion in the scope of the UNGC, to the point of breaching the sovereignty of member countries in undertaking policies of assimilation or protecting their governments from insurgent groups (The United Nations Secretary General 2008, 223, 231; Amir 2015; MacDonald and Hudson 2012; Mundorff 2009). The Brazilian delegate, Gilberto Amado, articulated this concern during the deliberations at the Sixth [Legal] Committee: "Cultural genocide should be taken to denote the destruction by violence of the cultural and social characteristics of a group of human beings; care should be taken, when dealing with new countries, *not to favour minority movements which would tend to oppose the legitimate efforts made to assimilate the minorities by the Countries in which they were living* (Sixth Committee of the UN General Assembly 2008, 1291, emphasis added).

Some delegates were concerned that some of the practices employed in their home countries for dealing with Indigenous peoples, immigrants, and minorities would be considered genocidal. Hence, the New Zealand delegate argued that even the UN might be held accountable for cultural genocide under its own definition. He quoted a report by the UN Trusteeship Council on Tanganyika that said that "the existing tribal structure was an obstacle to the political and social advancement of the indigenous inhabitants" (Sixth Committee of the UN General Assembly 2008). Ironically, the South African delegate expressed the horror felt in his country at any attempt to destroy the culture of a group or to prevent it from making a contribution to humanity. Yet, like his New Zealand counterpart, he warned against "the latent danger in the provisions of Article III (cultural genocide) where primitive or backward groups were concerned" (Sixth Committee of the UN General Assembly 2008, 1513). The US Senate was concerned that lynching an African-American or Jim Crow laws would fall within the bounds of genocide (Lemkin n.d.a, 1–4; Cooper 2008, 338). This opposition pertained to the number of group members necessary to qualify for a group's destruction "in whole or in part" (United Nations General Assembly 1948).

The concerns of the countries delegates during the drafting process of the Genocide Convention reflected the dominance of the progress narrative in modern thought. This narrative cast Aboriginal people as uncivilized savages (Paul 2006). It is safe to assume that UN delegates shared the dominant views regarding the establishment of residential schools for Aboriginal children in North America and Canada, given the various mandatory school attendance laws, US Senate debates, and political engagement with the "Indian Problem." Whether they realized that infamous phrases like "kill the Indian, save the man" were virtually genocidal, whether they allegedly acted in good faith or out of benevolent motives, are well beyond the focus of this paper. Perhaps the use of bestial images in reference to Aboriginal people blinded them so they did not conceive of Aboriginal people as equal human beings.

b. Canada's Historical Positions on Genocide

Canada's positions on international human rights law in general and on the Genocide Convention specifically influenced the incorporation of its obligations as a signatory to the convention into its criminal code. In keeping with the "lack of human rights culture within the Department of External Affairs, Canada was strongly opposed to the inclusion of cultural genocide in the Genocide Convention" (Schabas 1998, 441). Both Canada and the Soviet Bloc abstained on the final vote over the United Nations Universal Declaration on Human Rights (UDHR) draft at the Third Committee, although it was adopted on December 10, 1948, one day after the Genocide Convention was adopted by the UN General Assembly.[1] Eventually, Canada voted in favor of the UDHR at the Assembly.

The principles of Canada's position about the Genocide Convention were outlined in a memo sent by the then-Secretary of State for External Affairs, Louis St. Laurent, to the Canadian delegation to the UN Economic and Social Council (ECOSOC) dated July 25, 1948 (Secretary of State for External Affairs, Canada). St. Laurent instructed the delegates to "support or initiate any move for the deletion of Article three on 'Cultural' genocide." He further advised that "[i]f this is not successful, you should vote against Article three, and if necessary, against the Convention" (Secretary of State for External Affairs, Canada, n.p.). St. Laurent's unrelenting opposition to the inclusion of cultural genocide did not leave any room for the delegation's non-compliance: "The Convention as a whole, less Article three, is acceptable, although legislation will naturally be required to implement the Convention" (Secretary of State for External Affairs, Canada n.p.).

Canada's position can be construed in light of St. Laurent's Gray Memorial Lecture, delivered at the University of Toronto on January 13, 1947, ten months before he was sworn in as prime minister. Indeed, as a lawyer, jurist, and Minister of Justice in William Lyon Mackenzie King's cabinet, St. Laurent presented himself as a strong supporter of the rule of law, both nationally and internationally. In his address, St. Laurent outlined the foundations of Canada's foreign policy: "[T]he freedom of nations depends upon the rule of

1 This "puzzling isolated position," as it was referred to by Lester B. Pearson, then Secretary of State for External Affairs, was out of line with the UK and US vote. It was also inconsistent with the clear majority of UN members. See Schabas 1998, 406.

law among states. We have shown this concretely in our willingness to accept the decisions of international tribunals, courts of arbitration and other bodies of a judicial nature, in which we have participated" (St. Laurent 1947, 17). Another element of Canada's foreign policy at the time was sustaining Canada's unity between its French-speaking citizens and those of broadly Anglo-Saxon descent. Aboriginal people were not considered part of this unity (St. Laurent 1947).

In practice, St. Laurent directed the Canadian delegation to follow the United States' position, outlined in UN Document E/794, and the General Assembly Resolution 96(1)—which said mainly that the prohibition of cultural genocide should be dealt with by other provisions for the protection of minorities (United Nations Social and Economic Council 2008a, 1110–60). Canada's delegate Hugues Lapointe stated that "[n]o drafting change of Article III would make its substance acceptable to his delegation" (Sixth Committee of the UN General Assembly 2008, 1510). Lapointe referred to the deep attachment of Canadians to the Anglo-Saxon and French elements of their culture. Canada, he continued, would strongly oppose any attempt to undermine the influence of those two cultures, as they would oppose any similar attempt in any part of the world. He therefore proposed that the protection of language, religion, and culture rest within the bounds of the UDHR (Sixth Committee of the UN General Assembly 2008). Nevertheless, because the Genocide Convention and UDHR were drafted at the same time, LaPointe must have been informed that the UDHR established only individual and not collective rights for groups or minorities.

The Canadian delegation's *Progress Report* to External Affairs dated December 1, 1948, confirms that "[a]ccording to instructions from External Affairs, the Canadian delegate had only one important task, namely to eliminate 'cultural genocide' from the Convention. He took a leading part in the debate … and succeeded in having his viewpoints accepted by the Committee. The remaining articles are of no particular concern to Canada" (Lapointe 1948).

Whereas the inclusion of cultural genocide in the convention was voted against, the prohibition of forcible child transfer from one group to another group was included in UNGC Article II (e). Lemkin considered this act, which he referred to as kidnapping, an existential threat to the continuity of groups (Lemkin 2013). Thus, the US delegate John Maktos argued that forcible child transfer was a form of physical or biological genocide. In his words, "a judge considering a case of the forced transfer of children would still have to decide if physical genocide were involved … [T]here was little difference between the prevention of a birth by abortion and the forcible abduction of a child shortly after its birth" (Sixth Committee of the UN General Assembly 2008, 1496). The Greek advisor to the delegation, Pierre Valindas, denied that Article II (e) referred to cultural genocide, and claimed that it was associated with the destruction of a group, namely, with physical genocide. The delegate from Uruguay made a similar argument, and claimed that forcible child transfer was an ongoing practice (Sixth Committee of the UN General Assembly 2008, 1496). With the removal of the cultural genocide hurdle, Canada signed the Genocide Convention on November 28, 1949 and ratified it on September 3, 1952. The following section deals with the way in which Canada has transplanted the Genocide Convention into Canadian law.

c. ***The Incorporation of the Genocide Convention into Canadian Criminal Law***

On May 7, 1952 the House of Commons unanimously approved the Genocide Convention as signed by Canada on November 28, 1949, and referred the resolution to the House Standing Committee on External Affairs (House of Commons Canada 1952a, 1957–58). A fortnight later, External Affairs Minister (later Prime Minister) Lester B. Pearson was highly supportive of the Genocide Convention, but referred to it as "nothing more than a pious aspiration just now" (House of Commons Canada 1952b, 2431).

After WWII, the human rights situation in Canada improved somewhat from a legal standpoint, yet in many ways Canada was a repressive society (Schabas 1998, 409–10). Yet, the legislators who defended the belated and partial incorporation of the Genocide Convention into Canada's criminal code asserted self-righteously that genocide could not happen in Canada. Gordon Graydon of the Progressive Conservative party said that the Genocide Convention was insufficient—in his words, "half a loaf rather than a full one" (House of Commons Canada 1952b, 2431). Graydon praised Canadian virtue in the matter: "I suppose there is no other country in the world whose people are more quickly outraged by news of this kind of mass extermination of groups. It is so foreign to the Canadian way of thinking" (House of Commons Canada 1952b, 2431–32). Lester Pearson was also of the opinion that legislation prohibiting genocide was unnecessary in Canada: "I am further of the opinion that no legislation is required by Canada at this time to implement this convention, inasmuch as *I cannot conceive of any act of commission or omission occurring in Canada as falling within the definition of the crime of genocide contained in this convention*" (House of Commons Canada 1952b, 2442, emphasis added).

The Special House of Commons Committee that studied the criminal code amendment bill was particularly concerned with hate propaganda, following the advocacy of the Canadian Jewish Congress (CJC) for the inclusion of provisions against such propaganda. The Committee was established to address the activities of anti-Jewish and anti-African-Canadian organizations in the 1960s, mostly in Ontario and Quebec, and the activities of US neo-Nazi and white supremacist groups.

Justice Minister Guy Favreau established the Cohen Committee in January 1965. Its mandate was to determine the nature and scope of hate propaganda in Canada. Its report, submitted to the Minister of Justice on April 14, 1966, suggested that hate propaganda in Canada was not a systemic problem, although "[T]he *individuals* promoting hate in Canada constitute 'a clear and present danger' to the functioning of a democratic society" (Canada 1966, 24, emphasis added). Censured Notwithstanding, chapter IV of the committee's report engaged with proposed changes to Canada's criminal code designed to protect groups against hate propaganda (Canada 1966, 52, 55, 59; Cohen 1971, 105–6; Valois 1992). Although it censured Canada's failure to incorporate the Genocide Convention into its criminal code, the Committee supported a narrow definition of genocide: "For purposes of Canadian law ... the definition of genocide should be drawn somewhat more narrowly than in the international Convention so as to include only killing and its substantial equivalents … *The other components of the international definition***,** viz**,** causing serious bodily or mental harm to members of a

group and forcibly transferring children of one group to another group with intent to destroy the group, *we deem inadvisable for Canada* (Canada 1966, 61, emphases added).

When Bill S–49 was introduced on November 9, 1966 Senator Arthur W. Roebuck argued that "Canadians … are a kindly and tolerant people … We have good will for all mankind, irrespective of colour, race, or ethnic origin" (Senate of Canada 1967, 1109). Yet, he warned that though the "purveyors of hate are few in number … their potential for mischief is very great" (Senate of Canada 1967, 1110). The proposed bill proceeded no further, but was reintroduced as Bill S–5 on 9 May 1967; it died in the midst of the proceedings of the Senate Committee on the Criminal Code (Hate Propaganda) due to proroguing of an unstable Parliament. Senator Martin reintroduced the Bill as S–21 on 9 December 1968, when it received first reading; it subsequently died on the Order Paper. In a brief submitted by the Canada Civil Liberties Association to the Senate Standing Committee on Legal and Constitutional Affairs on Hate Propaganda, on April 1969, the association held that "because Canadian Law already forbids most substantive aspects of genocide in that it prohibits homicide or murder vis-à-vis individuals, and because it may be undesirable to have the same acts forbidden under two different legal categories, *we deem it advisable that the Canadian legislation, which we urge as a symbol of our country's dedication to the rights set out in the Convention, should be confined to advocating and promoting genocide acts, which are not forbidden at present by the Criminal Code*" (Canada Civil Liberties Association April 22, 1969, 3, emphasis added).

On June 17, 1969 when Roebuck presented the work of the Standing Committee on Legal and Constitutional Affairs on Hate Propaganda in the Senate, he opted for a narrow definition of genocide (Senate of Canada 1969, 1607). Roebuck downgraded the act of "Causing serious bodily or mental harm to members of the group" enumerated in Article II (b) to an assault (United Nations 1948). In his words, "this act might well describe nothing more than an assault, perhaps, or even a common assault, and so it has proposed that this clause should be dropped" (Senate of Canada 1969, 1607). Roebuck presented an absurd argument about Article II (d), "deliberately imposing measures intended to prevent births within the group" (United Nations 1948). Roebuck argued:

> This comes dangerously close to the pill or the manufacture of contraceptives, and so we thought it should also be omitted. Then finally paragraph (e), 'forcibly transferring children of the group to another group'. Someone in the course of our debates actually suggested that this might cover the action of the Attorney General of British Columbia who was responsible for sending Doukhobors to boarding schools. Of course, this was not with any intent to destroy the group but rather with the intent of making good citizens of the children. However, we were of the opinion that the paragraph might well be omitted, and so we have reported accordingly (Senate of Canada 1969, 1607).

Involuntary sexual sterilization of Aboriginal men, women, and children in residential schools and Indian hospitals was legalized and legitimized in provincial laws passed in Alberta in 1928 and British Columbia in 1933 (Stote 2012; 2015). This absurd justification was intended to conceal the true reasons behind Canada's partial adoption of the Genocide

Convention by the Standing Committee on Legal and Constitutional Affairs on Hate Propaganda, and other governmental and non-governmental organizations such as the Canadian Civil Liberties Association, which held the hegemonic view that a court of law might consider compulsory integrated education as genocidal forcible transfer (Canada Civil Liberties Association April 22, 1969, 6).

The Indian Law, the operation of the system of residential schools, and forced adoptions were expressions of institutionalized hatred toward Aboriginal people (McKenna 1994, 159–85). Roebuck's references to the seizing and confinement of Doukhobor children in residential schools as a means of dealing with their parents' refusal to send them to public schools also display Canada's blind spot as to the scope and devastating consequences of its policies of removal of Aboriginal children from their families and communities.

In the Senate debate, those opposed to Bill S–21 restated some of the arguments of the Cohen Committee that favored a narrow definition of genocide to justify their opposition to this legislation. While members of both the Senate and the House of Commons were not opposed to the Genocide Convention as such, they were of the opinion that genocide could not happen in Canada and praised the freedom, tolerance, and good nature of Canadians (Senate of Canada, 1952, 311–15). Senator George H. White argued that "this bill is an insult to every individual Canadian. Are the citizens of Canada being put on a par with the Germany of Hitler and his gang of storm troopers and SS guards, and on a par with the people of certain other countries from which there are reports from time to time of acts of genocide?" (Senate of Canada, 1969, 1611).

After extensive deliberations and testimonies, Bill S–21 died when Parliament was adjourned in 1969. On October 27, 1969 Minister of Justice John Turner introduced Bill C–53, which, after Committee study in both Houses, received Royal Assent on June 11, 1970. Canada's criminal code was eventually amended, rendering hate propaganda a punishable offence in sections 318–20 of the Criminal Code (Law Reform Commission of Canada 1986). The legislation was passed by a divided Commons, 89 to 45, with 129 abstaining or absent (Rosen 1992, 40). The Canadian Criminal Code recognizes only Article II (a), namely, killing members of a group, and (b) causing serious bodily or mental harm to members of the group (Government of Canada 1985).

About thirty years later, Canada was the first country to incorporate the obligations of the Rome Statute into its domestic laws, on June 24, 2000. The *Crimes against Humanity and War Crimes Act* (CAHWCA) implements Canada's obligations under the Rome Statute of the International Criminal Court. The CAHWCA permits Canadian courts to determine international law on genocide independently, without having to follow the judgments of international courts. This flexibility can serve to expand or contract the scope of the act of genocide as defined and applied in Canadian law (MacDonald and Hudson 2012, 436).

III. Indian Residential Schools Case Law: The Inadequacies of Tort Law

As already noted, Canada's selective incorporation of the UNGC into its criminal code precludes claims of genocide under Article II (e), namely, forcible child transfer. Indeed,

the *TRC Final Summary Report* acknowledges that "[t]he Canadian legal system failed to provide justice to Survivors who were abused" and that its initial responses during the late 1980s were inadequate "in a way that often re-victimized the Survivors" (Truth and Reconciliation Commission of Canada 2015a, 7). Although many survivors refer to residential schools simply as "genocide," and the TRC's "cultural genocide" assertion addresses the survivors' experience, it also serves as means of avoiding legal debate over the applicability of the Genocide Convention. Such debate is likely to serve as a distraction from dealing with survivors' experiences (Woolford and Benvenuto 2015, 373).

Due to the definition of genocide in Canada's criminal code, residential schools litigation is restricted to tort law. A tort is a civil wrong, other than a breach of contract, resulting in injury or harm in which the injured party seeks remedy. A tort allows the courts to award remedies such as a mandatory injunction, a prohibitory injunction, or damages (Coleman 2003). Claims for physical or sexual abuse fall within the tort law doctrines of battery and assault. Battery is not permitted, nor is intentional harmful or offensive contact with another person (Burke and Corbett 2003, 28). It is a general intent offense; thus, the actor need not intend the specific harm that resulted from the unwanted contact, but merely to commit harm of some sort. Hence, a plaintiff in a case for battery does not have to prove an actual physical injury; contact, in and of itself, is considered injurious.

A defendant may be accused of assault if he or she intentionally places a person in fear of an impending battery. Hence, an assault is an incomplete battery. It is the apprehension of contact that is harmful or offensive. While intent is the same in both battery and assault, the difference between the two torts is in the result for the plaintiff (Burke and Corbett 2003, 29). If a person intended only to cause apprehension of an imminent battery, but a harmful or offensive contact occurred, the person has committed a battery and an assault. Alleged mental and emotional damages resulting from the assault and battery pertain to the tort of indirect infliction of physical and mental suffering (Horsey and Rackley 2013).

Residential schools litigation typically involved the plaintiffs, the perpetrator (if alive), the church or church organization that operated the school, and the government of Canada. This litigation has combined the torts of battery and assault with the doctrine of vicarious liability. Vicarious liability is the liability attached to a person or persons, or an object or rights, because of their relationship to the transaction and to the wrongdoer (Chodos 2000). Such claims transcend the liability of individual assailants and batterers, attributing the liability for the breach of fiduciary duty to the Crown and the denominational authorities that operated residential schools.

Normally, the plaintiffs would allege that the denominational authority and the state were in breach of their fiduciary duty to the plaintiffs. *Fiduciary* refers to the duty owed by one who is trusted to the one (or ones) who trusts him or her. A fiduciary duty consists in the obligations owed by a "trustee" or "fiduciary" to another regarding the subject of trust (Chodos 2000).

Fiduciary law has been part of common law tradition since 1726, although it developed unsystematically. Common law is incoherent regarding the nature of the fiduciary relationship, the justification for fiduciary duties, and the purpose of fiduciary remedies

(Miller 2011, 235). Initially, fiduciary duty was related to trust law, and had to satisfy three conditions. First was the intention of the settlor/testator to create the trust; second was the existence of a clearly identifiable subject of the trust; and, finally, there had to be an object of the trust, specifying who or what was to benefit under the trust (Glanville L. Williams 1940, 20–26). Over time, fiduciary law diverged from the law of trusts into the domain of non-trustees who occupied positions of trust, or who were entrusted by other but did not satisfy the above conditions (Rotman 2011, 925). Fiduciary law expanded to other significant social and economic relations of high trust and confidence, in which beneficiaries became implicitly dependent upon and peculiarly vulnerable to their fiduciaries' use or abuse of power over their interests (Rotman 2011, 926). Hence, fiduciary duty may arise by explicit agreement, when one party expressly undertakes such a duty to another, or when parties enter a relationship of which fiduciary duty is an incident (Chodos 2000).

Residential schools litigation and redress processes in Canada progressed along three different trajectories. Each of the three trajectories attempted to address some shortcoming of the others. Subsequent to the scanty civil law suits of the 1980s, through the swell of claims since the early 1990s, survivors turned to class action suits in the provinces and, later, nationally. The *Report of the Royal Commission on Aboriginal Peoples* in 1996 and the Report by the Law Commission of Canada, *Restoring Dignity: Responding to Child abuse in Canadian Institutions* published in 2000 recommended public inquiries, truth commissions, and redress programs as alternatives to civil litigation; these, however, were not pursued. The IRSSA, which was approved by courts across Canada on March 21, 2007, settled the largest class action suit in Canada.

Canadian courts recognized two sources of a fiduciary duty owed by the Crown to Aboriginal people, namely, the nature of Aboriginal title, and, second, the statutory framework for protecting and disposing of title (Cunningham, Jeffs, and Solowan 2008; Hurley 1985, 566). This fiduciary duty was established by Canada's Supreme Court in the landmark case of *Guerin v The Queen*[2] (S.C.R. 1984, 335). Justice Dickson has referred to the Crown's fiduciary duty to deal with surrendered Aboriginal lands for the benefit of Aboriginal people:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie … This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. (383–84)

2 In Guerin, the Musqueam Band surrendered reserve lands to the Crown for the purpose of leasing the land to a golf club. The lease terms obtained by the Crown were different from, and much less favourable than, those approved by the Band at the surrender meeting. The Supreme Court of Canada found that the Crown owed a fiduciary obligation to the Musqueam people with respect to the leased lands, and reasoned that the sui generis nature of Aboriginal title, coupled with the historic powers and responsibilities assumed by the Crown toward Aboriginal peoples, constituted the source of such a fiduciary obligation.

The *Guerin* Chamber asserted that the fiduciary duty is an equitable duty, enforceable in the courts. In Justice Dickson's words, "Equity will then supervise the relationships by holding him to the fiduciary's strict standard of conduct" (*Guerin* 1984, 384). If this duty is breached, damages in the amount of the actual loss sustained at the time of trial are due to the claimants (*Guerin* 1984, 398).

Whereas Justice Dickson left open the scope of the fiduciary obligations, in *R v Sparrow* the Court upheld its decision in the matter of *Guerin* and widened the scope of the Crown's fiduciary duty to Aboriginal people beyond the rights of land (*Sparrow* 1990, 1075). The Court found that the words "recognition and affirmation" in section 35 of the Constitution Act of 1982 "incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power" (*Sparrow* 1990, 1077).

The Crown's fiduciary duty and the obligation to protect Aboriginal children were applied inconsistently and hesitantly in residential schools litigation, even within a single province. This is evident in three well-known cases, *Mowatt v Clarke*, *Aleck v Clarke*, and *ERM v Clarke* as well as in *Blackwater v Plint,* all of which were litigated in British Columbia. These cases exemplify the inadequacies of Canadian tort law in remedying the residential schools experience. In all four cases, there were identifiable sex offenders who pleaded guilty to their crimes, were convicted, and were sentenced to time in prison. *Mowatt*, *Aleck,* and *ERM* involved the Anglican church and church organizations that operated St. George's Indian residential school in Lytton, and *Blackwater* involved the United church and church organizations that operated the Alberni Indian residential school. All four cases filed the claim against Canada.

In 1993 Floyd Mowatt sued the Anglican Church of Canada and the Anglican Diocese of Cariboo (the Anglicans), Her Majesty the Queen in Right of Canada, and Derek Clarke, claiming breach of fiduciary duty, negligence, and vicarious liability for sexual assaults he endured at St. George's Indian Residential School. Both the Anglicans and the federal government admitted fault before the trial began and negotiated a settlement (*Mowatt* 1999, 301). The trial concerned the liability of the defendants. Justice Dillon found that the Anglicans and Canada were jointly and severely liable to Mowatt for the sexual assaults committed by Clarke. Five other students testified that they were also abused by Clarke. Several people were informed of the abuse, among them school principal Anthony Harding, the local bishop, a local priest, and several teachers at a local school, as well as several parish members (*Mowatt* 1999, 301). Apparently, Harding, who was later charged with and convicted of child molestation, failed to report the abuse (*Mowatt* 1999).

In *Mowatt*, the Court apportioned the liability between the Anglicans (60 percent) and Canada (40 percent). Both were found negligent in their duty of care owed to Floyd Mowatt. The Court found that the state's guardianship over the children at the school, which was grounded in legislation, gave rise to Canada's fiduciary duty. While the Court did not hold that Canada was in breach of this duty, the Anglicans were held liable in both tort and the breach of fiduciary duty (*Mowatt* 1999, 356–57). In September 1999 the Anglicans' appeal on the alleged underestimation of Canada's liability was dismissed.

Blackwater v Plint is yet another example of the inadequacies of Canadian tort law in remedying the residential schools experience (2001; *Blackwater* 2005). The case was preceded by the sentencing and conviction of Arthur Henry Plint in multiple counts of sexual abuse of Aboriginal children at Alberni residential school in British Columbia between 1948 and 1968 (*R v Plint* 1995). In *Blackwater v Plint* the British Columbia Supreme Court found both Canada and the United Church owed a duty of care and were vicariously liable for the assault committed by Plint (*Blackwater* 2005, 13; Blackwater 2001b, 228). In 2001 the Court dismissed claims of negligence against the United Church and the government because there was no evidence that either had had actual knowledge of the sexual assaults. Chief Justice Brenner noted that "there was no evidence that the possibility of sexual assault was actually brought to the people in charge of the Alberni residential school" (*Blackwater* 2001, 85). Furthermore, Justice Brenner found that the children were not very clear in reporting the abuse and the adults did not realize they were reporting sexual abuse. In his words, "[W]hen measuring the conduct of defendants such as the Church and Canada in this case, the relevant time period is particularly important when dealing with the question of the foreseeability of paedophilic behaviour. This is because society's recognition and awareness of this deviant behavior has changed so markedly in recent years" (*Blackwater* 2001, 85).

Due to limitation, all claims except those based on sexual assault were dismissed. The Court upheld six of the seven claims relating to sexual abuse and awarded damages according to the frequency and severity of the abuse. (The seventh claim was from a woman whose allegations did not involve Arthur Plint. The Court found that her allegations were not well-established, and dismissed the claim.) The Court apportioned 75 percent of the damages awarded to the plaintiffs to Canada and 25 percent to the church (*Blackwater* 2001, 932).

All parties appealed to the British Columbia Court of Appeal, which held that the church was protected from liability by the doctrine of charitable immunity. The Court of Appeal found that all fault should be apportioned to Canada. In 2005 Canada appealed against the Court of Appeal's finding that the church was entitled to charitable immunity, and against the finding that it had breached a non-delegable statutory duty (*Blackwater* 2005, 16–17). The plaintiffs cross-appealed the decision that they had not established that both Canada and the United Church were negligent and in breach of fiduciary duty. One of the plaintiffs, Frederick Leroy Barney also appealed on the basis that the Court of Appeal's assessment of damages did not include harm other than that relating to the sexual assaults (*Blackwater* 2005, 16–17). The trial judge upheld that negligence had not been proven against either Canada or the church, and that the plaintiffs did not establish a basis for the finding of a breach of fiduciary duty (*Blackwater* 2005, 65, 73).

Indeed, Canadian courts interpreted the Crown's fiduciary duty quite narrowly and applied it only where the laws of contract, tort, and unjust enrichment were silent or deficient (Rotman 2011). In *Wewaykum,* Justice Beanie held that "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests" (*Wewaykum* 2002, 250). He further reaffirmed that the major purpose of the Crown's fiduciary duty to Aboriginal people was to protect them from exploitative bargains (*Wewaykum* 2002).

This duty was also a means of supervising the Crown as it administered the *Indian Act* and thereby impacted the lives of Aboriginal people. Justice Binnie held: "The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples" (*Wewaykum* 2002, 250).

One of the inherent faults of the narrow Canadian tort law is its rather narrow scope and individualistic focus. Thus, Canadian law does not recognize the loss of culture as a directly actionable tort (Cunningham, Jeffs, and Solowan 2008, 453). Claimants can have their day in court, provided they recognize their rights, have access to legal assistance, and can afford litigation costs. However, claimants face substantial procedural and doctrinal obstacles in tort law litigation (Torpey 2006; Llewelyn 2002; Sebok 2004). Furthermore, residential schools claims suffer from various evidentiary issues due to lack of documentation, cultural differences, the difficulty of testifying, and the fact that the battery and assault were perpetrated on children in the distant past. As a result, defendants often contest the claimants' memory and credibility (Feldthusen 2007; Olchowy 2003).

The landmark ruling that established Canada's fiduciary duty in *Guerin*, and several other cases litigated in the early 1990s, have opened the door for a series of class action suits by residential schools survivors, the first of which, *Bernard v Canada*, was certified in 1995. A class action suit, also known as class proceedings, is a suit brought on behalf of, or for the benefit of, numerous people who have a common interest. This procedural mechanism is intended to achieve redress for widespread harm or injury by allowing a single person or a small group to become a representative and file suit on behalf of the others (*Sparrow*1990).

The great majority of class action suits in Canada are provincial, because provinces have constitutional jurisdiction over civil rights, property, and the administration of justice. Section 5 of the *Ontario Class Proceedings Act* outlines five conditions for certifying a class proceeding. Similar conditions apply in other common law provinces (Quebec has a different class proceedings regime).[3]

Once certified, class action suits serve to a priori validate the claim and grant recognition to the wrong done to the group. Moreover, class action suits may work around some of the limitations of individual suits, such as the cost of the claim and the weight of the cost compared to the risks of losing the case, or the amount of damages paid in case of winning. Unlike the *Blackwater* case, in which only some claimants were awarded damages, a class action suit does not require that each case be substantiated separately, but rather the pattern is substantiated through the large number of similar cases.

3 These conditions are: the pleadings or the notice of application discloses a cause of action; there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; the claims or defenses of the class members raise common issues; a class proceeding would be the preferable procedure for the resolution of the common issues; and there is a representative plaintiff or defendant who would fairly and adequately represent the interests of the class that has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and does not have, on the common issues for the class, an interest in conflict with the interests of other class members (1992, c. 6, s. 5 [1]).

Class action suits in Canada became possible with the enactment of class proceedings legislation in Quebec in 1978 and in Ontario in 1992. The 1992 legislation was the first of its kind among common law provinces. In 1995 Nora Bernard organized 900 former students of the Shubenacadie residential school in Nova Scotia to file a class action suit against the federal government and the Roman Catholic Church. For the first time, the Department of Indian Affairs was among the defendants. Bernard claimed breach of fiduciary duty, sexual and physical abuse, and the loss of language and culture.

Residential schools class action suits worked around the major disadvantages of individual lawsuits, because the litigation of numerous claims by persons who have all suffered wrongs in the same or similar experiences is rendered more efficient and less expensive. Individual claims also privatize the wrong and strip the context of the notion of genocidal forced transfer as a crime perpetrated on groups. Forced transfer to residential schools was a common experience of 150,000 Aboriginal children across Canada for over 100 years. They were forcibly taken from their families and communities, not as individuals, but as members of a group.

The *Bernard* class action suit inspired other, similar class proceedings across Canada. In *Cloud v Canada,* the claimants eventually omitted reference to sexual abuse altogether, to emphasize "systemic negligence," resulting in loss of culture and language, as the alleged wrongs (*Cloud v Canada* 2004). *Cloud's* certification in 2004 paved the way for the certification of *Baxter* (*Baxter v Canada* 2006). Representing more than 80,000 Indian Residential Schools (IRS) survivors, the *Baxter* claim explicitly cited the Genocide Convention. In 2006 all class action suits were merged into *Fontaine v. Canada* (2006). Cultural loss as an actionable tort was never tested in a court of law, as the IRSSA of 2006–2007 brought both *Baxter* and *Cloud* to a close (Thielen-Wilson 2014).

The Genocide Convention has on occasion been invoked in residential schools litigation; however, the courts have sided with the defendants' arguments that these claims are not legally valid. For example, in *Raubach et al. v the Attorney General et al.,* the court ruled against a claim that the government was liable for breach of contract, and for instituting and operating residential school systems in contravention of the Genocide Convention. Regarding the breach of contract, Justice Scurfield of the Manitoba Court of Queen's Bench held that such claims are barred by the *Limitation of Actions Act* (C.C.S.M. c. L150; *Raubach et al. v Attorney General* 2004, 11). The claimants then amended their statement of claim to add a claim for false imprisonment. Justice Scurfield then found it "doubtful that even if proven such an allegation could sustain a cause of action … In any event, such a cause of action is barred by the *[Limitation of Actions] Act*." Nonetheless, the Court decided that "[a]ssuming that the plaintiffs can prove that some of the assaults they allege were part of a program of cultural genocide, a trial judge might consider the Convention to be relevant to the question of punitive or aggravated damages" (*Raubach* 2004, 12). Similarly, in *Malboeuf v. Saskatchewan* (2005), the plaintiffs filed civil actions over abuses at residential schools that had occurred prior to 1948. The Government of Saskatchewan successfully applied to the court to strike out of the statement of claim references to the Genocide Convention due to retroactivity; the Genocide Convention was passed in 1948.

On June 3, 2015, one day after the release of the *TRC Final Summary Report*, the Federal Court certified a class action concerning day students of residential schools (*Shane Gottfriedson et al. v. HMQ*, 2015). The IRSSA did not cover day students, although they could apply to the Independent Assessment Process.[4] The *Gottfriedson* class action suit was filed by day students of 140 schools covered by the IRSSA, who sought compensation from the Crown, and not from multiple church organizations only in order to make the case manageable. The plaintiffs addressed the intergenerational effects of residential schools going back five generations, including for unborn descendants. The Court, however, certified the descendants' class to the first generation.

Whereas the TRC affirmed Aboriginal claims that residential schools were genocidal, the doctrinal and procedural obstacles to proving this in Canadian criminal and civil law are still present. These have led many scholars to the conviction that redress of the residential schools experience can be best achieved outside courts of law (Mahoney 2014).

Conclusion

While the TRC's acknowledgement of cultural genocide highlights and recognizes the immense cultural losses and intense grief and anguish of Aboriginal people, its practical legal significance is scanty. Canadian law is not well-equipped for defining and addressing the injustices of the residential schools. To this effect, residential schools litigation needs to become increasingly creative to work around tort law in order to approximate the harm of loss of culture/cultural genocide/forcible child transfers.

Because of these hurdles, some scholars argue that these injustices should be redressed outside the courts (Mahoney 2014). Moreover, the adversarial setting of Canadian courts is particularly daunting for the plaintiffs. The legal procedures require the plaintiffs to relive the trauma, undergo psychological tests and assessments, and sustain attempts by the defense to undermine their credibility (Truth and Reconciliation Commission of Canada 2015a, 561–62). While alternative dispute resolution processes were not adversarial like the legal procedures were, they were hardly less offensive to residential school survivors (Hayes 2004, 44–45).

This paper argues that without changes to the civil and criminal codes, Canada's reception of the TRC conclusion may seem half-hearted. Upon recognition that cultural genocide had indeed been perpetrated in Canada, it should have been only logical to proceed to the full incorporation of the Genocide Convention into Canada's criminal code. The selective, not to say tortuous, incorporation of the Genocide Convention carries important ramifications not only for Aboriginal people, and not only within Canada, but also for the international community.

4 Day students were part of the Cloud class action, which was certified before the IRSSA was reached.

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