Abstract:
In October 2017, the Supreme Court voted unanimously to allow the destruction of the records of the Independent Assessment Process, an aspect of the Indian Residential Schools Settlement Agreement (2007). The destruction of the records was not only legally correct but also morally justified, in consideration of conventional archival ethics and an “archives for justice” attitude. This paper will explain my reasoning for this conclusion by analyzing the process which created the records, the legal arguments of the Supreme Court case and its precedents, and a history of the legal and archival theories on privacy and confidentiality. This paper further explores the issue by considering a hypothetical scenario in which the Supreme Court arrived at the opposite decision, resulting in the archiving of the records at the National Centre for Truth and Reconciliation (NCTR). With this hypothetical case study, I will examine the NCTR’s privacy policies and challenge the notion that the NCTR would be able to adequately uphold the promise of privacy for residential school survivors whose testimony was given in the IAP.

Keywords:
Truth and Reconciliation, Privacy, Archival legal issues
In October 2017, the Supreme Court voted unanimously to allow the destruction of the records of the Independent Assessment Process, an aspect of the Indian Residential Schools Settlement Agreement (2007). Through an analysis of the case and its background and an application of contemporary archival theory, this paper will demonstrate that the decision to destroy these records was justifiable. This recent history also provides a unique case study for archival ethics as applied to current issues in Canadian society.

1. Introduction: History of TRC

For over a century, the Canadian government collaborated with Anglican, Catholic, and other denominational churches to implement a nation-wide policy of residential schools for Indigenous children. Systemic abuses occurred in these schools, centered on the colonial doctrine of ‘killing the Indian to save the child.’ Psychological and physical punishment was used to discourage the children’s Indigenous language and identity in what can be termed cultural genocide. The children’s dehumanization at the hands of priests, nuns, and lay-teachers, created an environment in which sexual abuse was rampant (Fontaine, 2015, p. 28-31). By the mid-1990s, when the last schools closed, approximately 140 schools had been in operation across Canada, housing over 150,000 children (Niezen, 2013, p. 1-2).

In the early 2000s, there were thousands of legal cases filed against the government and the churches regarding the residential school experience. In August 2005, the Association of First Nations (AFN) launched a class action lawsuit against the federal government seeking billions in cumulative damages. As a result, the Indian Residential Schools Settlement Agreement (IRSSA) came into effect 19 September 2007. The agreement sought two forms of compensation: the Common Experience Payment (CEP) which applied to everyone who as a child resided in a recognized Indian Residential School; and the Independent Assessment Process (IAP), which allowed for former students to seek compensation by testifying about specific abuses (sexual, psychological, and severely physical). A total of 38,098 claims were received by the IAP (Indigenous and Northern Affairs Canada, n.d.). In a private adjudication process, survivors delivered their testimonies without the presence of their alleged abusers whose names were recorded in the course of the hearing. The testimonies were then assigned numerical scores under three categories, “Acts Proven,” “Consequential Harm,” and “Consequential Loss of Opportunity,” which could be converted into a dollar amount for compensation (Niezen, 2013, p. 45-46). According to the Chief Adjudicator of the IAP, Dan Shapiro, the survivors who gave testimony, “were promised that the details of their most intimate and painful memories would not be shared outside the IAP hearing room without their consent” (Indian Residential Schools Adjudication Secretariat, 2017, para. 1).
Section ‘N’ of the IRSSA initiated the Truth and Reconciliation Commission of Canada, which would facilitate a process of truth-discovery and national healing for the survivors of the residential school system. It achieved its goals through national and community events in which survivors could share their stories (statement gathering/truth sharing), promoting public awareness and education, and collaborating with archives to collect documents about the residential school system for the historical record (Truth and Reconciliation Commission of Canada, n.d.). It was guided by principles which included the following: accessibility, a victim-centered approach, confidentiality, and a commitment to do no harm (preamble). The commission would be completed with the release of a report which included recommendations to the Government of Canada concerning the history of the schools, their effects and consequences (including intergenerational harm), and their ongoing legacy (1.F).

In July 2014, the Chief Adjudicator of the IAP brought a Request for Directions to Judge J. Perell, seeking an order that the IAP Documents be destroyed; the Chief Adjudicator of the TRC sought a counter-request that the documents be archived at Library and Archives Canada. The National Centre for Truth and Reconciliation (NCTR) also submitted in the same hearing that it is well-positioned to preserve the documents and “protect the privacy interests of all affected parties” (Fontaine v. Canada, 2014, 9). The NCTR, which is housed by the University of Manitoba, was created by the IRSSA as a repository for documents created and collected by the Truth and Reconciliation Commission.

The hearing, presided over by Judge Perell, pitted two sides against one another: the Assembly of First Nations, a congregation of Catholic church entities, the Sisters of St. Joseph’s, and the lawyers representing IAP Claimants, supported a court order for the destruction of records; and the Government of Canada, the TRC and the NCTR, which argued that the records are government records and should be retained by Aboriginal Affairs and Northern Development Canada before disposition at LAC or the NCTR (Fontaine v. Canada, 2014, 12-14, p. 94). Judge Perell sided with the former group and ruled that the records be destroyed after a period of 15 years, during which time living survivors would be given the opportunity to request that their records be archived at the NCTR (Fontaine v. Canada, 2014, p. 18). Perell based his decision on the fact that the documents are governed by the IRSSA and are not court records or government records and that the court “has the in rem (against the world) jurisdiction to direct how the IAP Documents may be retained, archived, or destroyed after the IAP is completed.” Perell states further that the destruction of the records is ultimately the correct choice because “it is more likely to foster reconciliation ... is what the parties contracted for under the IRSSA ... [and] is what the common law and equity require” (Fontaine v. Canada, 2014, p. 19). After a motion to the Ontario Appeal Court upheld Perell’s decision in August 2014, the case was submitted to the Supreme Court of Canada. The Supreme Court reached a decision in October 2017, also upholding the original decision.
The decision was received divisively among spectators who had been following the case. Those who advocated for the documents’ preservation expressed disappointment. The Director of the NCTR, Ry Moran, stated, “[some survivors] feel like this is a win for all of the abusers” (Morin, 2017, para. 2). In contrast, the Assembly of First Nations National Chief Perry Bellegarde described it as a “good and fair decision” (Morin, 2017, para. 26). Several other commentators have discussed the unfortunate loss to Canada’s historical record, now that these records will not be preserved (Cosh, 2017, para. 1).

From an archival ethics perspective, the issue regarding the justice of the decision should be quite clear: the principles of presumed consent and confidentiality would be violated if the records were allowed to be preserved against the will of those who gave testimony. In the case of records which contain third-party privacy, the argument of ensuring a complete “historical record” is out of the question. To delve deeper into this topic and elucidate my position, I would like to briefly discuss the history of privacy legislation and the more recent literature on ‘presumed consent’ as a principle of archival ethics.

2. History of Privacy and Presumed Consent in Archives

A person’s right to privacy was first articulated by Louis Brandeis and Samuel D. Warren in an 1890 issue of the *Harvard Law Review*. Brandeis and Warren use copyright law as a precedent for their assertion of the right to privacy, arguing that every person has a right to their own ideas and the right to choose to make them public. They cite a 1769 English court decision, Millar v. Taylor, in which the court argued, “Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly ... [they] are under his own dominion” (Millar v. Taylor, 1769, para. 2378). The case established, briefly, a copyright law which held intellectual property as permanent, although the permanence of the copyright was reversed in a court case in 1774 (Rose, 1993, p. 5). Brandeis and Warren expand on the idea of an author’s entitlement to decide whether their expression should be given to the public. They write that an author’s right to have a private idea is lost only when the author publishes it; otherwise, the publication of a private idea by someone else would be a violation (Warren & Brandeis, 1890, p. 199).

The explicit argument in privacy law, and its antecedent, copyright law, is that a person has the right to choose what information is shared to the public and how. Daniel J. Solove (2013) has termed this concept privacy self-management, which he defines as an individual’s right to “decide for themselves the costs and benefits of collection, use, or disclosure of their information” (p. 1880). As in the case of the IAP documents, issues related to privacy and the release of personal information rests on consent. In nearly every case, writes Solove, the acquisition of an individual’s consent can legitimize almost any collection, use, or disclosure of personal information (p. 1880).
Consent is an important aspect of archival work. Archives often collect records from government or private sources, which can contain extremely sensitive personal information about people. In situations where individuals allow their information to be recorded as part of a governmental record, perhaps in the case of applying for welfare or unemployment insurance, some might argue that the freely given admission implies the individual's consent. However, as Heather MacNeil (1991) argues, if the individuals did not know that the information disclosed would be used in different contexts, “their capacity to protect their interests was clearly impaired when they consented to provide the information in the first place” (p. 140). It should be presumed that the individual only consented to the use of their personal information with regards to the exact context in which they are asked to reveal their information.

During the IAP adjudication, the presumption was that personal stories of sexual abuse were told for the sole purpose of providing evidence for the compensation process. Those who participated were told that their stories would not be shared outside the IAP hearing room, that is, without another formal request for consent (Indian Residential Schools Adjudication Secretariat, 2017, para. 1). In contrast to the private adjudication process of the IAP, the TRC national and community statement-gathering events were public and unambiguously conscious of the creation of the historical record. The participants were asked to consent to the collection, use, and disclosure of their personal stories in all future contexts, including for the historical record. At the TRC events, leaflets were placed on every seat which read:

The media or someone with a cell camera or recording equipment may record what you say and they may use the recording as they choose ... Your personal information, including your image, is not confidential if you choose to participate in this public forum ... What you say publicly during these events, along with a photograph or video of you, may be used in books, films, audio clips or in any other multi-media presentations (Niezen, 2013, p. 87-88).

The IAP adjudication hearings did not ask for consent beyond the use of the information for the compensation process. The context in which the records were created held the promise of confidentiality, and therefore, disregarding that expectation of confidentiality is the same moral violation as breaking a promise (MacNeil, 1992, p. 169).

However, the above argument has not been adopted by the Association of Canadian Archivists or the Society of American Archivists as a guiding principle for archival ethics. The ACA Code of Ethics asks that archivists “make every attempt possible to respect the privacy of the individuals who created or are the subjects of records,” and the SAA, similarly, states that access restrictions should be placed on records to “ensure that privacy and confidentiality are maintained.” (Association of Canadian Archivists, n.d., C2; Society of American Archivists, n.d. para. 25). As Mary-Beth Gaudette (2003) writes, both codes are discretionary and not backed up by legal or professional strictures, leaving archivists to “struggle to divorce their own sense of values from the problem at hand” (p. 24). Some
archivists favour limits determined by mandatory periods, while others argue that restrictions should be
determined according to the sensitivity of the material (p. 24). In contrast, Mark Greene (1993) argues
that the archivist is not in the best position to make judgement regarding a promise of confidentiality
between the donor and a third party. Greene states that the responsibility should remain with the
donor, who has the best knowledge of the promise of confidentiality, and that the archivist should err
on the side of access (p. 37-38). Neither the Association of Canadian Archivists’ nor the Society of
American Archivists’ codes of ethics provides a sufficient guideline for which approach is best.

With regards to the IAP records, concerns were raised during the initial Ontario Court
hearing regarding both a time-based restriction period and a process of anonymizing the records. The
AFN criticized the Attorney General’s request to have the records housed at LAC because the Access
to Information Act (1985) and the Privacy Act (1985) would allow the release information to third
parties “for research for statistical purposes, for native claims, or in the public interest.” Furthermore,
there was concern that the stipulation of opening government records even a century after the birth of
the individual would allow personal information to be disclosed during the lifetimes of the survivors’
descendants (Fontaine v. Canada, 2014, para. 15). The decision to destroy the records after fifteen years
solves the problem of how to protect the survivors’ privacy.

I have illustrated the reasons why the decision to archive the IAP records would violate the
archival ethic of presumed consent. But consider hypothetically, what would the consequences have
been if the Supreme Court decision had arrived at the opposite conclusion? During the initial hearing
of the case, the NCTR argued that it would be the best repository for the IAP records because it
was “well-positioned to protect the privacy interests of all affected parties and able to ensure the
perspectives of Aboriginal peoples are brought to bear on the preservation of the documents” (Fontaine
v. Canada, 2014, para. 9). It may easily be argued that the NCTR would be a better repository for the
records than the LAC because of its relationship with Indigenous leadership. However, what legal
capability would the NCTR have to protect the privacy of the IAP records? This question will be
answered in the following section.

3. Scenario: IAP Records Transferred to the NCTR

The privacy policy of the NCTR is simple. All records are placed in three categories: Public Records,
which are fully accessible; Redacted Records, where portions of the records are redacted to respect
privacy and collective rights; and Restricted Records (National Centre for Truth and Reconciliation,
n.d., para. 7-9). The final category includes “records for which no consent for public release was
obtained and culturally sensitive records” (para. 9). The policy states that these records will not be
publicly available, but may be available on a case-by-case basis to certain individuals within strict protocols (para. 9). Presumably, the IAP records, had they been allowed to enter the NCTR’s custody, would be placed within this category.

The records are further protected by the University of Manitoba’s access and privacy policy. According to the University of Manitoba’s access and privacy policy (2015), disclosure of personal information means “making information known, revealing, exposing, showing, providing, selling, or sharing the information with any person or entity outside of the University” (2.1.B). The University of Manitoba also falls under the Freedom of Information and Protection of Privacy Act (FIPPA), which was enacted in Manitoba in 1998. FIPPA stipulates that a public body shall refuse to disclose personal information “if the disclosure would be an unreasonable invasion of a third party’s privacy,” which is determinable by assessing several factors including the information’s level of sensitivity, whether the information was obtained in explicit or implicit confidence, and whether the disclosure of information is consistent with the purpose for which the information was obtained (17.1, 17.3). These clauses would ostensibly be the grounds by which the personal testimony is protected.

However, it is possible to imagine scenarios in which access might be requested, and granted, with justification found within FIPPA legislation. Clause 48 of FIPPA allows records to open for research use if they were created over 100 years ago. Again, the issue of a time-based restriction was criticized by AFN during the Perell hearing in 2014, as it is likely that the stories of traumatic abuse would be damaging to the descendants of survivors. It is plausible to assume that a research request to open a record which is over 100 years old could be allowed, according to FIPPA legislation, which supersedes the privacy policy of the NCTR.

Consider an extreme, but plausible scenario in which an alleged abuser at a residential school enters a defamation lawsuit to clear their name. The defendant could request a subpoena to access IAP records retaining to them, possibly in an effort to discredit the testimonial, which could be upheld in court according to FIPPA: “A public body may disclose personal information only … for the purpose of complying with a subpoena, warrant, or order issued or made by a court, person, or body with jurisdiction...” (44.1.m). The order would supersede the NCTR’s privacy policy for “Restricted Records,” would be legally justifiable, and could result in a traumatic confrontation between victim and abuser.

FIPPA also allows for the disclosure of personal information for research purposes if the head of a public body is satisfied that there is no likelihood that individuals will be harmed by the release of information and “the benefits to be derived from the research ... are clearly in the public interest” (47.4.B.IV). It would not be unreasonable to expect that stories of sexual abuse, if accessible, could be repurposed as raw material for works of art, museum displays, or historical fiction. Retelling stories of sexual abuse could arguably be legally justifiable, under the copyright law assumption that ‘copyright does not include historical facts.’
A recent legal battle in Canada provides an interesting example of what could happen if the records are archived. On May 10, 2016, the Federal Court of Canada rejected a lawsuit by three filmmakers regarding a breach of copyright and infringement of moral rights caused by Jennifer L. Witterick, author of the book *My Mother’s Secret*. Witterick’s book, *My Mother’s Secret* allegedly lifted specific details from the filmmaker’s documentary, *No. 4 Street of our Lady*, which itself drew from details contained in a diary kept by Holocaust survivor, Moshe Maltz. Maltz’s granddaughter Judy Maltz, co-produced the film. The Applicants alleged that Witterick’s book “copies personal family stories as well as the structure and narrative devices of the documentary” (Maltz v. Witterick, 2016, para. 5). The respondents claimed that there was no copyright in facts. York University Historian, J. L. Granatstein, in support of the applicants, submitted an affidavit which distinguished “large” facts, (e.g. that Poland was invaded in September 1939) versus “small” facts, (e.g. a soldier’s diary which described a personal event during the invasion). The applicants argued that “small” facts, i.e. personal facts, should be protected by copyright law (para. 18). The court sided with the author, defending the idea that historical facts, even personal stories, were not covered by copyright law. In the case of the IAP records, the argument favoring archiving the records rested on the importance of the records’ “historical value.” It is not difficult to imagine a scenario in which a historical fiction novelist might benefit from retelling stories found in the IAP records, claiming their contents as ‘historical fact’ and dismissing the claimants’ respect to privacy.

4. Conclusion

The concerns which I have outlined above were made redundant by the decision to destroy the IAP records after the 15 year waiting period. The Supreme Court’s unanimous decision ensures that the records will be destroyed, and any privacy concerns regarding the records will also be extinguished. But the hypothetical scenario in which the records were archived without the survivors’ consent is valuable to consider in anticipation of potential similar cases in the future. The danger of the records being retained was palpable, given the adamant arguments by the TRC, NCTR, and the media. Furthermore, in the aftermath of the decision, many people have continued to express regret over the outcome despite acknowledging that it was the right decision or the “lesser injustice” (Harris, 2017, para. 17-18). The understandable but reactionary opinion that the loss to the “historical record,” should be interrogated in the event that such a crisis arises again – which it inevitably will. There is no moral justification for disregarding the privacy of individuals with regards to severe traumatic experience in the name of “the historical record.” To do so in this case would have been an affront to the victims of the residential school system, would benefit only the Canadian colonial system, and would be to the detriment to the archival profession.
References


