Indigenous residential school records can be destroyed, Supreme Court rules…but should they?

By Caitlin Beresford

On October 6, 2017, the Supreme Court of Canada ruled, unanimously, that the collection of documents for the independent compensation assessment process (IAP), a part of the Indian Residential School Settlement Agreement, should be destroyed unless survivors choose to have their records preserved. The Court found that the IAP process was meant to be a "confidential and private process" that claimants and alleged perpetrators could confidentially rely on.

The Indian Residential School Settlement Agreement (IRSSA) stemmed from hundreds of years of physical, emotional, and sexual abuse against more than 150,000 First Nations, Inuit, and Métis children from across the country in Indian Residential Schools. These children were forced to attend these schools that were operated by religious organizations and funded by the Government of Canada.

As a result of the impacts of residential schools on these children, a number of individual and class actions were brought by survivors. In 2006, an agreement was reached and the class actions were consolidated into a single action.

The resulting Settlement Agreement sought to achieve "a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools and to promote healing, education, truth and reconciliation and commemoration by, among other things, financially compensating former students of residential schools."[1]

The IRSSA provided two forms of financial compensation to former students of residential schools. First, the Common Experience Payment, which was provided to eligible claimants with financial compensation based on the amount of time they were at the schools. Secondly, former students who were victims of abuse and wrongful acts resulting in serious psychological consequences could also bring a claim under the IAP process.

To initiate a claim under this process, claimants had to submit an application to the IRS Adjudication Secretariat, which entails disclosure by claimants of acutely sensitive particulars for examination by an adjudicator. This information was recorded in application forms, hearing transcripts, medical reports, reasons for decisions and other documents.

During the IAP process, the Chief Adjudicator of the IRSSA and the Truth and Reconciliation Commission (TRC) brought requests for directions to the Ontario Superior Court of Justice on the disposition of the IAP documents. The supervising judge found that the IAP records must be destroyed following the 15 year retention period during which individual IAP claimants could elect to have the records in their own file preserved.[2] The decision of the supervising judge was upheld

[1] *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at 5.
[2] *Ibid* at 6-7.

by the Ontario Court of Appeal and subsequently brought to the Supreme Court, where the SCC upheld the lower courts' decisions.

The issue in this case became whether the IAP documents could, or should, be destroyed. The supervising judge found that the negotiations of the IRSSA intended the IAP to be a confidential and private process; that claimants and perpetrators relied on the confidentiality assurances and that, without such assurances, the IAP could not have functioned properly.

From a historical perspective, keeping the documents would seem to support the argument of the TRC and government – for the purpose of "creat[ing] a historical record of the residential school system and ensur[ing that] its legacy is preserved and made accessible to the public for future study and use."[3]

From a legal and personal perspective, I can understand and appreciate the private nature of this disclosure and the need to keep the process confidential; maintaining the principles of confidentiality and voluntariness upon which the IAP was founded.

So which side "wins?" or "what is the right thing to do?" The tension between the mandate of commemoration and memorialization, and the privacy which IAP claimants were promised, lies at the heart of the appeal.

The IRSSA seeks to achieve a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" and aims to promote "healing, education, truth and reconciliation and commemoration."[4] By retaining the IAP documents how is the objective of the IRSSA met? How can healing and reconciliation be achieved when individuals who participate in the process, who are looking for closure, are not given a choice as to whether their documents and the information contained within them, are shared openly with the public?

In looking a deeper at the nature of the IAP process and the information that is disclosed, the amount of compensation depends on the number of "compensation points" resulting from the harm done; after assessing an individual's claim. It is a spectrum: on the lower end, abusive acts such as "one or more incidents of fondling or kissing."[5] On the top end of the spectrum, are acts that cause "continued harm resulting in serious dysfunction, which may be evidenced by "…personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy,…self-injury,...inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders."[6]

The SCC noted that "at the risk of understatement, the reluctance of claimants to undergo questioning by an adjudicator on these topics without assurances of absolute confidentiality is fully understandable."[7] The IAP documents that are created as part of the process amounts to "a very dark and very partial biography of a claimant's life from a very young age to the time of the

[3] *Supra* note 1 at para 11.
[4] *Ibid* at para 5.
[5] *Ibid* at para 46.
[6] *Ibid*.
[7] *Ibid* at para 47.

hearing."[8] The Court further found that disclosure of the contents of these documents could be "devastating to claimants, witnesses, and families…result[ing] in deep discord within the communities whose histories are intertwined with that of the residential schools system…."[9]

I think that is where the difference really lies: that these histories, these personal stories and impacts on these individuals named in the IAP process are individuals who, in all aspects of their lives, were truly and deeply impacted by the events that took place at residential schools. The trauma that is experienced is inter-generational; it is long lasting. We, as outsiders, can't even begin to imagine the impact that this personal information, the acts committed against these individuals, would have on individuals today at the community level. As one claimant stated, her community is "so small and close that she could be easily identified even where her name was omitted."[10]

From a legal perspective, it is apparent that these individuals who participated in the IAP process did so with the understanding that their information, their stories, would be protected and remain private. Applications even required survivors to sign a confidentiality agreement. "As a matter of contractual interpretation, destruction is what the parties had bargained for."[11]

From my perspective, it is clear, and understandable, that these records should be maintained, or destroyed, in a way that honours the survivors' memory and privacy. As for the argument that the records are important for "scholarly work," I think we can rely on the works of the TRC, like the Final Reports, to shed light onto this chapter of our history and recognizing that there is still a lot to be done to honour the past and move forward on the path to reconciliation.

[8] *Ibid*.
[9] *Supra* note 1 at para 47.
[10] *Ibid*.
[11] *Ibid* at para 16.