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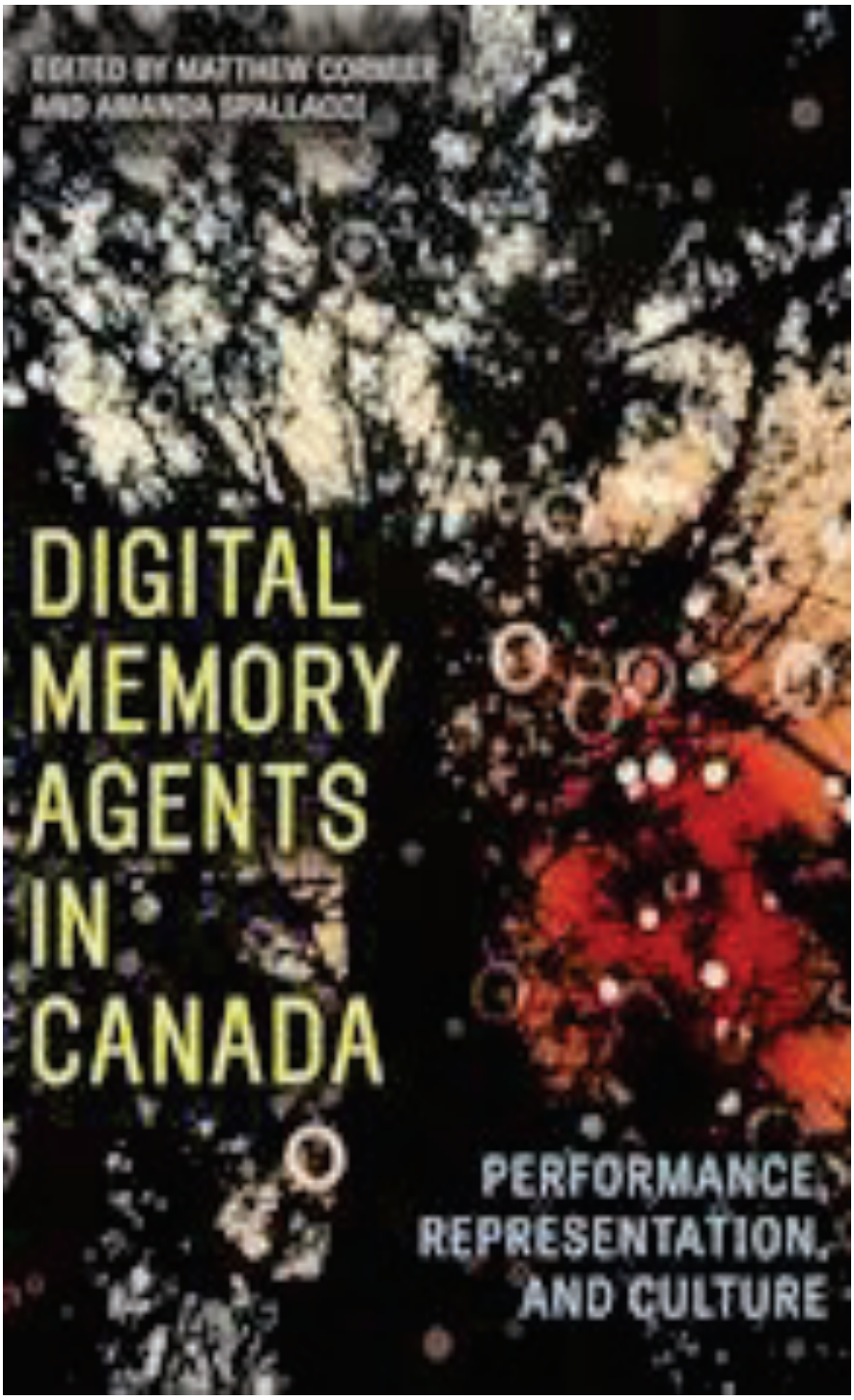

I wrote my chapter contribution to this book in service of truth before reconciliation. It is as much a critical analysis of administrative law and digital technology as it is a form of witnessing.Many people might inquire as to why, I, as a first generation settler Canadian, would write a book chapter about the IRS system and the legal processes that emerged from the Indian Residential School Settlement Agreement (IRSSA). My connection to the questions posed in this chapter is intergenerational and longstanding. My father worked for the federal government in

what was then called, Health and Welfare Canada, Indian Affairs Branch and my mother coordinated a Native Medical Students Programme at the University of Alberta for twenty years. My father's role as Assistant Regional Director of Community Health Programs in Alberta was to work with community to develop meaningful and culturally relevant data driven health programs.

In 1989, he worked closely with the Piikáni, creating a team to collect hair samples before and after the Napi (Old Man) River Dam was built to ensure that it was not leading to mercury poisoning (Wagg, 1989). That same year, on the advice of a number of Indigenous leaders, he also worked in and with community to head an investigation into the over-prescription of opioids among other drugs. He described the investigation as follows: "it was really a community initiative that triggered me doing it. That shows concern on behalf of the communities. They want to do something about it" (Wagg, 1989, 3). Unfortunately, despite the findings and the prosecutions against overprescribing physicians, some of whom traded drugs for sex in a uniquely coercive form of sexual violence, the opioid crisis is still routinely headline news across Alberta today, and in Lethbridge in particular.

My mother worked as a coordinator for the Native Students Medical Programme at the University of Alberta for twenty-years. She started before the last residential school was closed. In 1993, she gave testimony to the Royal Commission on Aboriginal Peoples (RCAP) (Hodes 1993). Prior to working in Alberta, my childhood was spent living in Indigenous communities from one end of Canada to the other. The most enduring of my childhood memories come from Inuvik where, when I was five and six years old, I attended Sir Alexander Mackenzie (SAM) School from 1980 to 1982. SAM School was constructed in 1959 as a Federal Indian Day School with residences at Grollier Hall and Stringer Hall. My experiences as a non-Indigenous student were dramatically different from those forced to go back to the residences at the end of their school day. I was not subject to physical or sexual abuse from staff, although fist fights with other students and name calling were part of my experiences. Many of the students who were forced to live at Grollier and Stringer Hall, however, have testified to the TRC about the sexual and physical violence they experienced in the residences. As a result, my research program arises directly from my own lived experiences and the intergenerational trauma that is part of the IRS system's ongoing genocidal legacy. If you have gotten this far, I hope you take the time to read it as part of the collective work that needs to be done on, before and after September 30th.

References:

Anglican Church of Canada. "Building the Federal Day School at Inuvik, Mackenzie Delta. Inuvik means 'The Place of the People' an Inuit Word [ca.1959]" P7530 Diocese of the Arctic Fonds, #100, General Synod Archives, Anglican Church of Canada, https://www.anglican.ca/archives/ (Accessed April 27, 2023).

Hodes, Anne-Marie. 1993. RCAP Testimony, vol. 159, Treaty 6, University of Saskatchewan Native Law Centre, Library and Archives, https://data2.archives.ca/rcap/pdf/rcap-375.pdf (Accessed April 27, 2023)

Wagg, Diana. 1989. "Dam site Monitored for Mercury Level," Windspeaker, Volume 7, Issue 11, 1989, p. 5 https://ammsa.com/publications/windspeaker/dam-sitemonitored-mercury-level (Accessed April 27, 2023)

Wagg, Diana. 1989. "Drug Abuse Probed," Windspeaker, July 28, 1989, p. 3 http://data2.archives.ca/e/e449/e011201764.pdf (Accessed April 27, 2023)

My sister and I wearing the Inuit adaptation of Mother Hubbard dresses. These were made by our neighbour in Inuvik.

My first-grade class picture from SAM school. I am the third from the right with the short hair between the girl in pigtails and the boy in the striped sweater.

CHAPTER 3

"I make *in rem*—Against the World—the following order":

Survivor Agency and Refusal in the Independent Assessment Process' Digital Memory

The fear of digital technology as a tool with the potential to increase policing and surveillance often forms the basis of criticism suggesting that the rapid and efficient electronic processing and sharing of large amounts of information will facilitate state incursions into personal lives (Ball and Snider; Cosgrove; Deleuze; Graham). These criticisms are matched by those who offer celebratory narratives suggesting that the creation and availability of digital media will not only democratize the archive, but usher in a revolutionary era in which direct democratic participation is the norm, and church and state will be made accountable for their collective crimes (Rheingold; Schuler). The question that emerges from each of these accounts is to what extent

does the mediation of information via digital technology lead to both yet neither of these outcomes simultaneously?

In this chapter, I examine a case that tests a limit between two spheres that are endemic to both the law and the debates surrounding the dangers and virtues of digital technology: the public and the private. In this case, representation in settings where testimonial speech is recorded, preserved, and verified through documentary evidence and transcribed into text creates a peculiar series of files that can be understood to produce collective memory due to the iterative nature of the law. However, they also describe personal experiences that ought to remain private. What happens when courts become spaces of memory-work that promise privacy and confidentiality even while demanding the expansion of the self to stand in for others? How is agency both circumscribed and used to challenge institutional constraints through this process?

With respect to these questions, the Supreme Court ruling in *Canada (AG) v. Fontaine* (2017) is notable for a number of reasons. The first among them is the Court's decision to uphold a destruction order for thousands of residential school records; the second is the Court's admonition of its own decision as "having no significant precedential value" (para. 35). The Court thereby creates an exception out of this case that brings the oppositional structure of public and private to its crisis. Reading these proceedings along their archival grain provides a valuable inroad into how litigants become digital memory agents whose claims collectively and publicly demonstrate how law exceptionalizes the memory of its own originary violence--the violence of settlement--yet meticulously documents the crimes of both church and state through a series of administrative acts.

Although this case complicates the digital debate, the labyrinthine nature of its preservation relegates it to an object, a site of memory, that has been thrown into a partial, public

and transnationally-available digital archive that is no more easily accessible than its paper counterparts (Hodes). Jennifer Wemigwans has observed that, despite the Truth and Reconciliation Commission of Canada's (TRC) inclusion of a section on "Media and Reconciliation" in its final report, it "completely missed any discussion of the internet" (6). The proceedings examined in this chapter are illustrative of two consequences of this omission: significant gaps in the truth and legal impediments to reconciliation.

The Case and the Files

On 15 December 2006, the superior courts in nine Canadian provinces approved the Indian Residential Schools Settlement Agreement (IRSSA), thereby concluding what has been described as "the largest and most complex class action settlement in Canadian History" (Fontaine 2014 ONSC 4585 para. 1). Residential school survivors initiated lawsuits beginning in the 1980s, and by 2005 the number of cases had grown to an estimated 18,000 (TRC 560). In 2006, these cases were merged into a single class action named after Phil Fontaine, who acted as the representative Plaintiff for both the residential school survivors and the Assembly of First Nations (AFN). Despite successfully negotiating the IRSSA, adversarial proceedings continued as part of the Independent Assessment Process (IAP), a mechanism through which residential school survivors could apply for compensation above the minimum amount granted to all class action members. *Fontaine v Canada* is, therefore, the name given to the files produced and created as a result of these proceedings.

Three sets of files are central to this chapter. The first was subject to Justice Perell's destruction order at the request of the Assembly of First Nations, Independent Counsel for the IAP Claimants and the Catholic entities party to the IRSSA. The courts ruled that the files at

issue in the case were highly confidential and were meant to remain in the control of residential school survivors as part of the IRSSA. They are accessible only if the survivors provide their explicit, informed consent because they document the impact, type, and details of the violence experienced by those who volunteered to be a part of the process. Despite being part of what is described as a non-adversarial, highly confidential process, Canada's appeal of Justice Perell's destruction order made these files the subject of both media controversy and public, adversarial litigation—the results of which ended up digitized and available online.

The second set of files comprise the court records of both sets of proceedings. These are subject to the open court principle, making them accessible to the public. To obtain some of them, I travelled to the Ontario Court of Appeal registry in Toronto, where I located a range of different documents and correspondence outlining the arguments of the parties, testimony and the exhibits introduced into evidence with respect to the third set of files.

The third set of files were not directly the subject of Justice Perell's destruction order or the Supreme Court of Canada's 2017 decision; however, they put into question the reach of the destruction order and whether documents produced in civil proceedings pertaining to residential schools could be subject to it (*Fontaine* 2018 paras. 185-188). These are referred to as the "Cochrane Files" named after the town in which civil proceedings were held against Canada and the Catholic Church for the abuses at St. Anne's residential school prior to IRSSA negotiations. They include Ontario Provincial Police (OPP) records that were part of both the civil proceedings against Canada and criminal proceedings against the staff. The lawyer acting on behalf of St. Anne's survivors requested these files to support them in their IAP hearings.

The proceedings under consideration in this chapter do two things. First, the IRSSA and judicial interpretations of its contents and authority set limits that include questions of public and

private law, property, access, publication, reproduction rights, and classification protocols that are central to the debates surrounding digital technology. The second thing that these proceedings make clear is the agency of residential school survivors to both refuse and to force the reinvention of the limits set out by the law.

Throughout the proceedings, the IRSSA is identified as a contract that creates new rules and new institutions. Therefore, the file that sets the limits also brings forth the files at issue in the case and some of the institutions that lay claim to them. Conversely, those same files are used by survivors to force the interpretation of the IRSSA, thereby generating new files in the form of orders and decisions that both enforce, recreate and extend the limits of the agreement to different regulatory regimes outlined in various kinds of legislation. The files that both create and are the subjects of these proceedings therefore point to the intersections of memory, history, digitization, survivor agency, and state power that were left out of the TRC's 2015 report and reinforce the mutually constitutive relationship between the material and the symbolic in law's digital archive.

The Destruction Order

The IAP hearings were meant to be inquisitorial and non-adversarial: they were closed to the public and presided over by specially trained adjudicators who were expected to conduct them in ways that were respectful to claimants and that provided an environment conducive to hearing a full description of their experience. Counsel for Canada and perpetrators were not permitted to cross-examine claimants. The proceedings were all transcribed in the event of the need for rehearing and to facilitate report writing. The transcriptions of the adjudicators' decisions were all redacted to remove the names of perpetrators. Only claimants were entitled to have copies of

their transcripts; however, if they consented to it, their testimonies and the adjudicators' decisions could be preserved and memorialized (Fontaine 2016 ONCA paras. 8 and 48).

There is no explicit protocol in the IRSSA outlining what was to become of the supporting documents that were produced as evidence after the hearings concluded. As a result, two requests for directions were brought to the Ontario Superior Court of Justice. In the first, the Chief Adjudicator, Independent Counsel for the Survivors, the Assembly of First Nations, the Catholic Entities party to the IRSSA, and the Sisters of St. Joseph who owned and operated St. Joseph's residential school all sought the destruction order. The TRC, the National Centre for Truth and Reconciliation (NCTR), and the Government of Canada all requested that the IAP documents be archived at Library and Archives Canada with redacted copies of the IAP hearings also archived at the NCTR (*Fontaine* 2014 ONSC 4585 paras. 93 and 94). In the second, the parties requested an order that would establish a notice program to inform claimants of the option to archive their documents, but each had different stipulations regarding who needed to consent and who would administer the program.

In response, Justice Perell issued a destruction order for the documents after a fifteen-year retention period, during which time the survivors could decide whether they wanted their documents preserved. He also elaborated on the terms of the notification program that would instruct survivors on how to opt-in to archiving their documents. At the time of the hearing, the TRC had gathered approximately 6,200 oral statements; by contrast, 37,847 people had submitted applications through the IAP. Of the 7,000 IAP claimants who had chosen to volunteer their testimony to the TRC, forty percent wished to anonymize it (*Fontaine* 2014 ONSC 4585 paras. 207, 208 and 244).

The Attorney General of Canada, The TRC, and the NCTR cross-appealed Justice Perell's directions, thereby turning the files produced through an inquisitorial and private process into the subjects of public, adversarial litigation—the results of which are digitally archived and publicly available. In the 2016 Ontario Court of Appeal ruling, Chief Justice Strathy articulated that prior to 2012, it was considered "common practice for adjudicators to give assurances to claimants and alleged perpetrators that their testimony would be kept confidential to the people in the hearing room" (para. 49). When it became apparent that the government of Canada and the TRC's requests for the documents would be before the courts, the Chief Adjudicator issued a direction to all adjudicators requesting that they not "give iron clad assurances of confidentiality" but instead advise claimants and the other participants in the hearings that the information would be handled securely and only be seen by those who needed to see it (*Fontaine* 2016 ONCA para. 49), thereby breaking the first in the long line of broken promises that shape both these proceedings and those surrounding the Cochrane files.

Both the TRC and the Attorney General of Canada argued that the IAP documents were under government control and thereby ought to be archived as part of the memorial function of the TRC, an argument that if upheld in court would have breached the confidentiality promised to survivors. The government of Canada made an additional series of arguments that also reproduced the originary violence of residential schooling by casting doubt on the credibility of survivors. They argued that the documents ought to be preserved in order to ensure "public confidence in the integrity of the IAP," "transparency in the use of public funds" (*Fontaine* 2016 ONCA para. 219), and to "protect itself from re-litigation of released claims" (*Fontaine* 2014 ONSC 4585 para. 237). Finally, in an additional cross-appeal, the Catholic Entities who were party to the IRSSA were supported by Independent Counsel in their attempt to argue that the

survivors should not be the only ones to decide whether to archive their documents, an argument that would have, if upheld in the courts, granted perpetrators a veto over the survivors' choices, a position further complicated by the fact that some of the perpetrators are also survivors themselves.

The submissions of the Assembly of First Nations (AFN) and the Chief Adjudicator both supported the destruction order. They argued that the personal accounts of abuse belong to the survivors alone and if their documents are to be archived, a notice plan that would ensure their free, prior, and informed consent would have to be put into place. At the Ontario Court of Appeal, Chief Justice Strathy writing for himself and Justice MacFarland, upheld the destruction order, the retention period, and the notice plan, thereby granting residential school survivors' control over their documents. Nevertheless, in a dissenting opinion, Justice Sharpe instead followed Canada's submissions, concluding that the documents were public records subject to public law and that they thus ought to be archived.

Despite disagreements in the outcome, all the appellate court judges unanimously dismissed the Catholic Entities cross-appeal. In October of 2017, the Supreme Court of Canada dismissed Canada's arguments and upheld Chief Justice Strathy's ruling. Turning their attention to the survivors who had died prior to the ruling, the Supreme Court of Canada articulated that despite the possibility that the order would be inconsistent "with the wishes of deceased claimants who were never given the option to preserve their records [...] the destruction of records that some claimants would have preferred to have preserved works a lesser injustice than the disclosure of records that most expected never to be shared" (*Canada* para. 62).

The Court's stated desire to "work a lesser injustice" in their final ruling, however, did not take into account the structural violence inherent in the movement of the IRSSA between

public, private and Treaty that required the ruling in the first place. In its role as adversary to the survivors, Canada, with the support of the TRC and Justice Sharpe, attempted to legally sanction a breach of contract to justify the expenditure of public resources and preserve public memory. In order to prevent a total breach of contract by giving the survivors control over their own documents, and preserving some vestige of the confidentiality they had originally been promised, in the end, the IRSSA simultaneously became analogous to a private, commercial contract and a Treaty. The result of this was the simultaneous reduction of redress to the corporate form and the removal of government control over the documents. In doing so, however, the Honour of the Crown became a vehicle through which the courts presumed Canada's integrity and legitimacy at the same time as it provided the survivors a means to challenge both.

The Contract and the Exception: Both Public and Private

Justice Perell's destruction order both unselfconsciously records the existence of files describing detailed memories of the crimes of individuals, church, and state at the same time as it leads to their eventual destruction if the survivors either choose to have their records destroyed or are unaware of the option to preserve and archive them. Despite the public outcry and the divisions among survivors that the order generated, this process neither preserved nor destroyed memory; instead, it reconstituted it through a series of administrative acts. The complexity of this process becomes most apparent through the disagreements between the judges about whether to apply public law, private law, or both, beginning with Canada's challenge to the TRC's standing to request directions from the courts. Tracing the movement of the IRSSA between public, private, and Treaty, the digital record of this labyrinthine set of proceedings reveals how rules are

generated by the courts through the production of an exception that is brought into public memory by the wishes and challenges of the survivors who acted as the primary claimants.

Despite Canada and the TRC sharing an interest in archiving the IAP documents, Canada submitted a separate request for directions asking the Ontario Superior Court to strike out the TRC's previous request on the grounds that it did not have the standing or legal capacity to ask the courts for an interpretation of the IRSSA (*Fontaine* 2013 para. 2). Justice Goudge concluded that the TRC did not lack standing, and in doing so, he situated the IRSSA somewhere between public and private law.[1] In contrast to Justice Goudge's simultaneous application of public and private law, Chief Justice Strathy instead relied primarily on precedents that were the result of private commercial litigation (*Fontaine* 2016 ONCA para. 96). He concluded that Justice Perell's decision should stand (*Fontaine* 2016 ONCA paras. 84-89), and that "there will be no future cases like this one…" (*Fontaine* 2016 ONCA para. 96). This conclusion led Justice Sharpe to question his reasoning and his choice of standards of review in a case that involved the expenditure of public resources and that would impact the production and preservation of public memory.

In his dissent, Justice Sharpe instead supported Canada's argument, concluding that the IAP documents were government records. For him, the Chief Justice had made a mistake by using the court's authority to limit the use of documents to the purposes for which they were produced (*Fontaine* 2016 ONCA para. 317): that is, in civil litigation, courts are generally bound

[1] See *Fontaine* 2013 per Justice Sharpe at paras 34 and 56: "[The] Settlement Agreement…is not a commercial agreement that arose after a short sharp negotiating session between two corporate entities […] I am not sure the Settlement Agreement can be said to be simply a private contract […] There are arguably aspects of the Settlement Agreement that seek to structure the relationship between Canada and Aboriginal People […] the TRC itself […] is established by an Order-in-Council which sets out its mandate. These two considerations raise the possibility that the Settlement Agreement can be viewed through the lens of public law as well as private law."

by a rule that they are "not to use… documents…for any purpose other than securing justice in the civil proceedings in which [they] were compelled" irrespective of whether they contain incriminating or confidential information (*Fontaine* 2016 ONCA para. 275). This is generally referred to as the "implied undertaking rule." Justice Sharpe took issue with Chief Justice Strathy's decision to rely on *Andersen Consulting* to extend this rule to the IAP documents as *Andersen* is a piece of private commercial litigation that Justice Sharpe deemed to be inappropriately applied to what he considered a question of public law.

The *Andersen* Court answered the question of whether the government could retain control of documents containing "a great deal of sensitive commercial information which should not be made available to [a company's] competitors" (*Andersen* para. 3). The Federal Court ruled that the documents were subject to the rule that they not be used in any other context as they were compelled prior to being in the government's possession, thereby negating government control. Chief Justice Strathy decided that because the IAP files were obtained and created through a court-controlled process, they could only be used in that context: once it "had run its course the documents had to be returned [to the survivors] or destroyed" (*Fontaine* 2016 ONCA para. 196).

In contrast, Justice Sharpe was unequivocal that the IRSSA fell squarely within the ambit of public law, and that the case before them was "radically different than the decision of an arbitrator resolving a dispute between two private commercial entities" (*Fontaine* 2016 ONCA para. 293). Describing it as "a contract with an overwhelmingly public law flavour" (*Fontaine* 2016 ONCA para. 294), he concluded that the IRSSA

> […] is an agreement that bound the government of Canada to establish one of the most important public inquiries in Canadian history and to spend over two billion dollars of

> public funds […] The agreement relates to a pressing issue of public policy and the righting of a dreadful historical wrong […] (*Fontaine* 2016 ONCA paras. 292 and 294).

Despite the role of private commercial litigation in upholding the destruction order at the Court of Appeal and in keeping with Justice Sharpe's account of the "public law flavour" of the agreement, Justice Perell had originally chosen to follow the Chief Adjudicator's submission that the IRSSA, while not a Treaty, is "at least as important as a treaty." As such, the interpretation of the agreement ought to be consistent with the Honour of the Crown (*Canada* para. 14; *Fontaine* 2014 ONSC 4585 para. 88).

As a legal principle, the Honour of the Crown has been derided as not being of much help "in resolving specific issues about specific rights" (*Lefthand* para. 75); as "the alchemical conjuring of state sovereignty" (Borrows 537-596); and as a concept that transforms Canada into a "benevolent patriarch" charged with the role of "protecting the Indians [from] greedy settlers and racist provincial governments" (Valverde 967). The courts generally interpret this legal principle to mean that "the Crown must act with honour and integrity, avoiding the appearance of sharp dealing" in negotiations with Indigenous Peoples (*Haida Nation* para. 19). In Justice Perell's formulation, the IRSSA becomes comparable to agreements that have accrued constitutional status through s. 25 of the *Charter* and s. 35 of the *Constitution Act*, leading him to conclude that given the choice between "an honourable interpretation and a dishonourable interpretation […] it would be wrong to interpret the IRSSA in a way that dishonours Canada" (*Canada* para. 14; *Fontaine* 2014 ONSC 4585 para. 88).

Like the movement of the IAP proceedings from private to public through the process of appeal, in Justice Perell's directions, the IRSSA moves from the confines of contract and private commercial law into the realm of public, constitutional law through Treaty. Each judge's choice

to apply private or public, or both private and public law dramatically changed the result. In the end, the decision to collapse public into private reduces redress to the corporate form by relying on private, commercial litigation yet retains pretences to reconciliation and a concern with state accountability through the invocation of Treaty and the Honour of the Crown. Through this process, regardless of whether the survivors choose to archive their stories, they remain in the national imaginary as present absences documented in digitally available public records. Nevertheless, while the IRSSA, the proceedings, and the transmuted memories of the survivors who testified in the IAP hearings may be simultaneously public and private, the IAP documents themselves are neither public nor private.

"I make in rem*—Against the World—the following order": Neither Public nor Private*

Justice Perell invoked the ability to control the files *in rem* to issue his destruction order (*Fontaine* 2014 ONSC 4585 paras. 17 and 19). *In rem* rights are proprietary rights that not only implicate the survivors but are also enforceable against the world, including all parties and non-parties to the IRSSA. They are therefore neither public nor private (*Fontaine* 2014 ONSC 4585, para. 338).

At the Ontario Court of Appeal, Chief Justice Strathy made it clear that the IAP was never a federal government program (*Fontaine* 2016 ONCA para. 168). He elaborated that despite Canada's status as a defendant in the class action, it was the only entity with the administrative and fiscal infrastructure to carry it out. For this reason, it was vital to all parties to the IRSSA that "the court and not Canada be in control of the process" to "ensure that the defendant, *qua* administrator, [was] not able to manipulate the administration of the settlement for its purposes" (*Fontaine* 2016 ONCA paras. 161 and 170). He thereby rejected the outcomes

of two access to information rulings. The first concluded that a government institution can control a record irrespective of whether it is in physical possession of it if "a senior official of the government institution…should be able to obtain a copy of the record" (*Fontaine* 2016 ONCA para. 160). The second concluded that irrespective of the confidentiality agreements outlined in contracts, they may still be under government control as "the *Access to Information Act* […] applies to any record or information in a record which happens to be within the custody of the government regardless of the means by which that custody was obtained" (*Fontaine* 2016 ONCA para. 161).

Instead, Justice Strathy concluded that the IRSSA gives control to the IAP claimants and their documents inhabit a liminal space between public and private where they are governed by neither sphere's legal conventions (*Fontaine* 2016 ONCA para. 188). As such, the documents are controlled by the survivors under the supervision of the courts because the IRSSA took "the preservation of the history of residential schools out of the hands of Canada, which bore responsibility for [them], and [put it] into the hands of the survivors under the oversight of an independent body" (*Fontaine* 2016 ONCA para. 229).

As a result, through the agency of survivors, without whom none of these files would exist, the judges in these cases are prompted to reconsider how the IRSSA is implemented and interpreted. In the next set of proceedings under consideration in this chapter, the requests for directions made by and on behalf of survivors draw out the structural divisions in the pre-existing law that delimit the possible discourse around what should be done with their records while they simultaneously challenge the legitimacy of the state, the Honour of the Crown, and the legal system in the process.

Digital Memory Makers: Damning, Toxic, and Scandalous Allegations

In his order, Justice Perell identified the "collective purpose" of the IRSSA as one that addressed "the fact that the Indian residential school system was a systemic violation of human rights that had significant impact on the collective rights of Aboriginal peoples" and as such, "went against the goal of achieving privacy and confidentiality for individual Claimants and for Defendants" (*Fontaine* 2014 ONSC 4585 para. 143). This contradiction not only shaped the disagreements outlined in the proceedings discussed earlier but also draws into question the Honour of the Crown. Canada's failure to disclose the Cochrane documents and make truthful reports, in addition to characterizations of its conduct in court as less than honourable, are the subjects of the second set of the *Fontaine* proceedings that I will be discussing in greater detail here.

The Independent Assessment Process was originally distinguished as one that is supposed to privilege oral testimony over documentary evidence in addition to prohibiting cross-examination of the claimants. Justice Perell described it as a process intended to be respectful and conducive to hearing the experiences of survivors (*Fontaine* 2015 para. 71). In a dramatic contradiction to these earlier acknowledgements (*Fontaine* 2014 ONSC paras. 64 and 67), in both the proceedings concerning lawyer Fay Brunning's alleged misconduct and those surrounding the disclosure and production of Ontario Provincial Police (OPP) files that precipitated it, Justice Perell describes "the IAP's search for truth" as one that is in service of adjudication, "not for the purposes of reconciliation" (*Fontaine* 2015 para. 69).

In this formulation, like its documentary record, the IAP itself moves from a private, inquisitorial process into a public, adversarial one (*Fontaine* 2015 para. 3). The complexity of implementing the IRSSA, combined with ongoing court proceedings and the challenges that arise from what Justice Perell referred to as Canada's multifarious and conflicting roles as

administrator, funder, and adversary to the survivors, have thereby resulted in misunderstandings and what Justice Perell acknowledged as "ongoing acrimony and bitterness" (*Fontaine* 2017 ONSC para. 5). All of this shapes the outcomes and escalation in the requests for directions concerning the disclosure of the OPP files and requests for re-hearings of St. Anne's IAP claims.

Brunning has been representing St. Anne's IRS survivors since 2012. St. Anne's IRS was an institution whose staff were among the perpetrators who had committed some of the most egregious forms of violence against students (*Fontaine* 2018 para. 14). Brunning successfully obtained re-hearings for a number of IAP claimants as well as court orders requiring Canada to disclose Ontario Provincial Police (OPP) files in support of IAP Claimants who had been forced to attend the school. These proceedings, however, culminated into a series of allegations against Brunning and the survivors that reproduce law's originary violence at the same time as they record it in a digital archive. In January of 2018, Justice Perell released a case management direction admonishing Brunning for what he and the Crown variously referred to as "damning," "scandalous," "toxic," and "discredited" allegations that "slandered the court" (*Fontaine* 2017 Factum of the Respondent para. 5), a violent conclusion to an almost thirty-year battle for some kind of redress for the survivors of St. Anne's.

Between 1902 and 1976, First Nations children from Winisk/Peawanuck, Attawapiskat, Fort Albany, Moose Factory, and Moosonee were removed from their homes and forced to attend St. Anne's residential school. In 1992, the Keykaywin Conference took place in Fort Albany, providing survivors a forum to disclose what had happened to them during their time at the school. There, they began the process of seeking redress for the extensive abuse they had been made to suffer in the school. In the context of what had been disclosed as part of later IAP hearings, Justice Perell described their stories as "horrific" (*Fontaine* 2018 para. 22). This school

was both funded by the federal government of Canada and run by Canada directly from 1970 to 1976 (*Fontaine* 2018 paras. 12 and 14). Between 1992 and 1997, the OPP took witness statements from hundreds of survivors and gathered the necessary documentation to initiate criminal proceedings. Ontario's Ministry of the Attorney General brought criminal prosecutions forward in Cochrane, Ontario, where charges were laid against teachers, staff, and supervisors (*Fontaine* 2018 para. 18); other perpetrators died before their trials (*Fontaine* 2017 ONSC paras. 23-26). In 2000, 154 students brought civil proceedings against Canada and the Catholic Church Entities. As part of the Cochrane civil proceedings, Canada filed a motion to obtain the OPP records to proceed to trial. That same year, the OPP was ordered to release the documents to Canada (*Fontaine* 2017 ONSC paras. 27-32) in order for the state to construct its response. These OPP documents contain such deeply incriminating evidence that the Canadian government spent $3.2 million dollars between 2013 and 2020 fighting the survivors of St. Anne's only to be forced to produce what have been described as the "heavily redacted" documents that were in its possession (Johnson).

In the same year that Justice Perell issued the destruction order for the IAP documents, he also provided a production order in a request for directions concerning Canada's failure to disclose the files that it had obtained as part of both the civil and criminal proceedings against it, the Catholic Church entities, and the staff at St. Anne's as part of the Cochrane proceedings (*Fontaine* 2014 ONSC 283). The following year, he heard another request for directions concerning Canada's failure to disclose an assault that took place in a girl's dormitory at Bishop Horden Residential School that resulted in criminal charges leading to the dismissal and the replacement of the supervisors at the school (*Fontaine* 2015). Canada's obligations under the IRSSA include the requirement that it produce documentation pertaining to students and staff,

and any allegations of sexual or physical abuse that were made against staff, and all documents mentioning sexual and physical abuse that had taken place at the school (*Fontaine* 2017 ONSC 2487 para. 60). Failure to disclose is considered to be a breach of the IRSSA and thereby a breach of contract.

In the first case, Justice Perell outlined that the IRSSA grants the court jurisdiction to order Canada to produce any court and police records that it has in its control to facilitate the process. He elaborated that if the records in Canada's control would facilitate IAP hearings, using its discretion, the court could ignore the rule that documents compelled and produced in one case cannot be used in different cases (*Fontaine* 2014 ONSC 283 para. 12). As a result, he ordered Canada to produce the over-12,000 documents that were in its possession. In the second case, the claimants drew attention to the incomplete narrative that Canada had produced, omitting the assault at Bishop Horden Residential School and the criminal proceedings that followed. Again, Justice Perell found Canada to be in breach of contract and compelled the state to conduct additional searches with the RCMP to locate documents relevant to the assault (*Fontaine* 2015 para. 80). Following each order, Canada produced the documents at issue. Despite being a non-party to the IRSSA, Justice Perell ordered the OPP to produce the documents that were not also part of the collection that the government had in its possession, subject to review by the court's lawyer who would assess whether any of them were privileged or otherwise immune from production (*Fontaine* 2014 ONSC 283 para. 241).

Up until this point, Brunning, a sole practitioner with a part-time legal assistant and limited resources who had been working almost exclusively for St. Anne's survivors for the five years prior, had successfully secured the Cochrane trial transcripts and OPP documents and obtained orders for Canada to conduct additional investigations and produce a more accurate

narrative of St. Anne's residential school. She had also successfully re-opened IAP hearings, securing compensation for IAP claimants who had previously been denied. Less than a year before, she was given an additional 8,000 pages of discovery and filed more requests for directions in support of other IAP claimants who had come to her seeking the re-opening of their claims. She eventually secured assistance from members of another law firm, but the events leading up to the appellate court decision in her appeal to access discovery transcripts in the cases preceding the IRSSA reveal yet another level of structural violence, further drawing both the Honour of the Crown and IAP process itself into question.

In December of 2017, Justice Perell heard an additional set of requests for directions from IAP Claimant C-14114 and Angela Shisheesh. In their written submissions, they both contended that Canada's legal positions constituted "an abuse of process and a breach of the Department of Justice's (DOJ) professional obligations" (*Fontaine* 2018 para. 10). They also submitted that "the courts of Ontario and British Columbia are biased toward Canada and not doing their job in enforcing the IRSSA" (*Fontaine* 2018 para. 10). Addressing what he referred to as "these damning allegations" (*Fontaine* 2018 para. 11) in his ruling, Justice Perell dismissed all but one of the requests (*Fontaine* 2018 para. 9).

Claimant C-14114 requested the re-opening of her IAP application, orders directing the operation of the IAP, and an order "compelling Canada to make 'admissions'" about what the school staff had done and, in her case—a case of student-on-student abuse—its role in creating the conditions and environment for this abuse (*Fontaine* 2018 para. 190). Similarly, Angela Shisheesh was seeking compensation with respect to the IAP and against a law firm that had represented her prior to the implementation of the IRSSA. She questioned the firm's legal competence, as they had not advised her to wait for the outcome of the settlement negotiations

because, despite being eligible for the common experience payment under the IRSSA, she was not eligible to make an IAP claim as she had already been compensated in the context of the Cochrane Civil actions against St. Anne's (*Fontaine* 2018 paras. 29-32). She also asked if the destruction order, retention period, and option to archive IAP documents extended to the Cochrane and other civil action files.

Justice Perell dismissed all of Claimant C14114's requests, paying particular attention to the request for admissions that he defined as statements "acknowledging the truth about something" (*Fontaine* 2018 para. 199). In Justice Perell's assessment, as "voluntary acts of free will," admissions could not be compelled, coerced, or made compulsory, nor could they be mandated by a judge (*Fontaine* 2018 para. 199). This not only led him to conclude that the evidence showed that Canada had kept its promise to make admissions as part of an unenforceable obligation or "agreement to agree" (*Fontaine* 2018 para. 200), but also to characterize Claimant C-14114's interpretation of the word "admissions" as one that was "incongruous, self-contradictory [and] oxymoronic" (*Fontaine* 2018 para. 199). He also dismissed all but one of Angela Shisheesh's requests on the grounds that the court had no jurisdiction to decide on those matters. With respect to her third request regarding the destruction order, he required her to begin again and to produce a freshly amended request for directions that was focussed exclusively on that question (*Fontaine* 2018 para. 9).

The repeated failures to re-open IAP hearings and Justice Perell's order against disclosing the discovery documents in the pre-IRSSA cases, led Brunning to send a series of emails describing both Claimant C-14114 and Angela Shisheesh's characterizations of Canada's legal position. These emails drew the Honour of the Crown into question and articulated that the court was biased in favour of the Crown. Despite Justice Perell's admonition of the second claim as

one that discredits the court, he himself had articulated four years earlier that given a choice between "an honourable interpretation and a dishonourable interpretation […] it would be wrong to interpret the IRSSA in a way that dishonours Canada" (*Canada* para. 14; *Fontaine* 2014 ONSC 4585 para. 88). In keeping with Justice Perell's earlier statement, Brunning wrote:

> While the Courts presumes [*sic*] the Government is always being truthful, and the Court does not require evidence from Canada, this Claimant and myself did not make up these facts. It took a lot of courage for this very vulnerable and suffering survivor, to go to the Court, and the Court neglected to enforce its own orders against Canada for her re-hearing (*Fontaine* 2018 para. 27).

In her factum outlining the arguments that she made on behalf of this survivor and one other claimant who was also seeking redress from the court because of their treatment throughout the Individual Assessment Process, she wrote:

> IRSSA class member/IAP claimant C-14114 reserves her objection that the Government of Canada ("Crown"), being only [sic] other "party" participating in IAP Claim C-14114, is being given preferential treatment by the Superior Courts […] St. Anne's IRSSA class members have already proven concealment of documents by the Crown and failure to make truthful reports, which have proceeded before the Ontario IRSSA Judge since September 2013 (*Fontaine* 2018 para. 12).

In January of 2018, Justice Perell responded with a case management direction admonishing Brunning for the "scandalous," "toxic," and "discredited" allegations that both he and the Crown concluded had "slandered the court" (*Fontaine* 2017 Factum of the Respondent para. 5). Brunning later filed a recusal motion against Justice Perell for reasonable apprehension of bias. He did not recuse himself. Instead, Canada sought costs against Brunning for the recusal motion,

and in January of 2019, Justice Perell ordered her to personally pay Canada $28,911.04. This series of decisions underscore former Chief of Fort Albany First Nation, one of the organizers of the Keykaywin Conference and St. Anne's survivor, Edwin Metatawabin's conclusions that Justice Perell's orders may have sent a "chill to other survivors and lawyers" whose claims were still in process (Barerra N.P.). They also show the tenacity and resilience of survivors who refuse to acquiesce in the face of the Canadian state's ongoing and ruthless attempts at concealing records essential to their claims against it.

Conclusion

As lawyer Patricia Barkaskas has articulated, many Canadians assume that the IRSSA and the Independent Assessment Process were part of a good and worthy process designed to address the truth of past and ongoing settler colonial violence; that they provided ways to seek pathways to justice and healing for Indigenous Peoples and communities. In keeping with her experiences with these mechanisms for redress, however, this chapter tells a story of broken promises, law's violence, Canada's concealment of documents and its failure to tell the truth in its role as adversary (See Barkaskas & Hunt).

This is not the only story recorded in these fragments of the *Fontaine* proceedings. While the memory of law's founding violence moves from presence to representation through abstraction in the files that record it, this is not part of what Jacques Derrida might refer to as an "amnesiac loss of consciousness" about its own origins (Force of Law 55). The legal proceedings that were generated and called upon as a result of Justice Perell's destruction order may not have accrued what the courts deem to be "precedential value," but these hearings and court proceedings create as much as they preserve memory through the agential acts of survivors that

are transmuted into both physical and digital files. They are illustrative of the simultaneously symbolic and material force of law's digital archive to both facilitate state incursions into the private and personal lives of survivors at the same time as they demand accountability and restitution for the crimes of both church and state; yet, they neither permit government control nor signify the democratization of the archive and they in no way signal an end to law's originary violence. As digital memory agents, the survivors of both residential schools and these legal proceedings, no matter their wins or losses, have created a digital record of resistance, resilience, and refusal in the face of the Canadian state's necropolitical regimes of colonial power.

Works Cited

Ball, Kirstie, and Laureen Snider, editors. *The Surveillance Industrial Complex: A Political Economy of Surveillance*. Routledge, 2013.

Barkaskas, Patricia, and Sarah Hunt. "Truth Before Reconciliation: Reframing/Resisting/Refusing Reconciliation." *YouTube*, uploaded by the Institute for the Humanities, Simon Fraser University, 10 March 2017, https://www.youtube.com/watch?v=mB_7odACIpI.

Barrera, Jorge. "Judge Says Lawyer 'Slandered Court' for Favouring Canada in St. Anne's Case." *CBC News*, 16 January 2018, https://www.cbc.ca/news/indigenous/judge-st-anne-s-residential-school-lawyer-reprimand-1.4490498. Accessed 6 May 2021.

Borrows, John. "Sovereignty's Alchemy: An Analysis of Delgamuukw v British Columbia." *Osgoode Hall Law Journal*, vol. 37, no. 3, 1999, pp. 537-96.

Cosgrove, Lisa, et al. "Digital Phenotyping and Digital Psychotropic Drugs: Mental Health Surveillance Tools that Threaten Human Rights." *Health Human Rights*, vol. 22, no. 2, 2020, pp. 33-9.

Deleuze, Gilles. "Postscript on the Societies of Control." *October*, no. 59, Winter 1992, pp. 3-7.

Derrida, Jacques. "Archive Fever: A Freudian Impression." *Diacritics* vol. 25, no. 2, Summer 1995, pp. 9-63.

Derrida, Jacques. "Force of Law: The 'Mystical Foundations of Authority'." *Deconstruction and the Possibility of Justice*, edited by Drucilla Cornell, et al., Routledge, 1992, pp. 3-67.

Graham, Stephen. "Spaces of Surveillant Simulation: New Technologies, Digital Representations, and Material Geographies." *Society and Space*, no. 16, 1998, pp. 483-504.

Hodes, Caroline. "The Case, The Registry and the Archive: Reflections on Truth, Reconciliation and Retrieval." *Settler Colonial Studies*, vol. 10, no. 2, 2020, pp. 149-175.

Johnson, Rhiannon. "Ottawa has Spent $3.2 M Fighting St. Anne's Residential School Survivors in Court Since 2013." *CBC News*, 20 November 2020, https://www.cbc.ca/news/indigenous/ottawa-st-anne-residential-school-court-costs-1.5809846. Accessed 6 May 2021.

Mawani, Renissa. "Law's Archive." *Annual Review of Law and Social Science,* no. 8, 2012, pp. 337-65.

Mbembe, Achille. *Necropolitics.* Duke UP, 2019.

Mildon, Drew. "Archiving Force: Ethics and Consignation." *Indigenous Law Journal*, vol. 16/17, no. 1, 2018, pp. 67-84.

Rheingold, Howard. "The Great Equalizer." *Whole Earth Review*, vol. 71, no. 6, 1991, pp. 95-104.

Schuler, Douglas. *Liberating Voices: A Pattern Language for Communication Revolution.* MIT Press, 2008.

Simpson, Audra. "On Ethnographic Refusal: Indigeneity, Voice and Colonial Citizenship." *Juncture*, no. 9, 2007, pp. 67-80.

Stoler, Ann Laura. *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*. Princeton UP, 2009.

Truth and Reconciliation Commission of Canada (TRC). *The Final Report of the Truth and Reconciliation Commission of Canada.* Truth and Reconciliation Commission of Canada, 2015.

Valverde, Mariana. "'The Honour of the Crown is at Stake': Aboriginal Land Claims Litigation and the Epistemology of Sovereignty." *UC Irvine Law Review*, vol. 1, no. 3, 2011, pp. 957-74.

Vismann, Cornelia. *Files: Law and Media Technology*. Translated by G. Winthrop-Young. Stanford UP, 2008.

Wemigwans, Jennifer. *A Digital Bundle: Protecting and Promoting Indigenous Knowledge Online*. U of Regina P, 2018.

Cases

Andersen Consulting v. Canada, [2001] 2 FC 324.

Canada (Attorney General) v. Fontaine [2017] SCC 47.

Fontaine v. Canada (Factum of the Respondent AG Canada in the matter of request for directions by IAP Claimant H-15019 pertaining to St. Anne's Residential School and in the matter of the request for directions by Edwin Metatawabin and by IAP Claimant K-10106, October 26, 2017).

Fontaine v. Canada, (2018) ONSC 103.

Fontaine v. Canada (AG.), (2017) BCSC 946.

Fontaine v. Canada (Attorney General), (2017) ONSC 2487.

Fontaine v. Canada (AG), (2016) BCSC 2218.

Fontaine v. Canada (Attorney General), (2016) ONCA 241.

Fontaine v. Canada (Attorney General), (2015) ONSC 3611.

Fontaine et al. v. Canada (Attorney General), (2014) MBCA 93.

Fontaine v. Canada, (2014) ONSC 4585.

Fontaine v. Canada (Attorney General), (2014), ONSC 283.

Fontaine v. Canada (Attorney General), (2013) ONSC 684.

Fontaine v. Duboff, Edwards Haight & Schacter, (2012), ONCA 471.

Haida Nation v. BC [2004] SCC 73.

Larry Philip Fontaine, et al v. Canada (AG), ONCA, November 22, 2017 (Book of Authorities of the Intervenor Nelligan, O'Brian Payne LLP, Joint Direction of Justices Brown and Perell, November 25, 2014).

Tsilhqot'in Nation v BC, (2007), BCSC 1700.

R. v. Lefhand, (2007), ABCA 2016.