



Discussion Paper 3: After the Searches

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This discussion paper overviews several considerations that arise after a ground search has been conducted, and potential unmarked graves have been identified. The answers are not simple, and the decisions may vary depending on the goals and capacity of each community as well as other factors. Further, these considerations are interrelated, in that the decisions related to one area may have a bearing in the decisions related to another issue.

Consideration 1: Protection of Sites

One of the challenges regarding missing children and unmarked burials is the range of legal ownership of former Residential Schools sites, leaving some site unprotected and uncared for. This has implications for ground searches as there are needs to protect the sites during ground searches, but there are also considerations for longer term protection of the sites.

The TRC final report noted that “the residential school cemeteries and burial sites that the Commission documented are abandoned, disused, and vulnerable to disturbance.”¹ The TRC further noted a need for a national strategy for the documentation, maintenance and protection of Residential School cemeteries.

Key questions continue around **how to best develop a national legal framework for the protection of Residential School sites, including cemeteries? How can this national framework address the reality that different sites are under different legal jurisdictions? How are communities presently addressing and working around this gap? How can this framework ensure ongoing access to the sites for communities for research and other commemorative activities?** The TRC noted that “this work is complex and sensitive. Although former schools might be associated with specific Aboriginal communities, the cemeteries may contain the bodies of children from many communities.”²

Consideration 2: Role of forensics if remains are identified

Forensic pathologists are often engaged in the search for missing children once graves are identified. Communities often hope that forensics can be used to (1) identify the remains and (2) to assist loved ones and communities to get answers about how their loved one passed.

Unfortunately, the limitations of the science are such that these questions may continue to be unanswered. Like much of this work, forensics takes time: “Forensic experts say identifying the remains of Indigenous children and adults buried at former residential schools is a painstaking process that could take decades.”³

Identifying human remains involves a process of identifying the biological profile. This requires first extracting DNA from the remains, if DNA still exists. Collecting DNA from the remains often results in destroying the bone from where the sample is taken. Given the age of some of the remains, DNA may not always remain, or may not be high enough quality to extract the necessary information.

Being able to identify a person based on remains begins with the biological profile from living people who would be a suitable match:⁴ “In order to use DNA to identify a deceased individual, DNA collected from a typically small piece of their bone or tooth must be compared to DNA from living relatives.”⁵ **Given that many Residential School sites had children coming from various communities, how do we identify where these reference samples should be gathered? Once gathered, who will store the DNA and who will have access to it? How can the jurisdictional challenges (with each province having their own death investigation system) be overcome?** Overall, “DNA identification is not fool-proof”⁶ and the process for collecting DNA and the limitations of the current science must be discussed with community, and the community supported in their decision making processes.

Beyond identification of the remains, there are also limits to the science to try to identify the cause of death. **How can forensics work with communities to try to answer some of these questions based on their knowledge of what happened at Residential Schools?**

Consideration 5: Repatriation of remains

One of the key considerations surrounding missing children and unmarked burial research once the ground searches have identified possible remains is to decide whether there should be any work to exhume and repatriate the remains. In Canada, there is no national legislation that provides any guidance on this process. Here again, the UN Declaration on the Rights of Indigenous Peoples is relevant to the extent that article 12(1) recognizes that Indigenous peoples have a right to the repatriation of their remains.

When considering repatriation, there are several challenges to be addressed: **What communities should be involved in the decision-making processes? How to engage and respect Indigenous laws, protocols and customs surrounding death rituals and protocols regarding remains? What laws exist within the Canadian legal landscape that may have a bearing on exhumation and repatriation? How can this process be undertaken, while also preserving the sites for potential subsequent criminal investigation, if relevant?**

These questions must be addressed in connection with the other challenges discussed in this paper including desire for forensic testing, preservation and protection of the sites, potential criminal investigation and commemoration.

Consideration 4: Data storage and access

The work to locate missing children and unmarked graves leads to a large amount of data (archival, GPS, oral history testimonies, etc) to be collected. There are many questions that remain regarding best practices in data storage to preserve the data long-term. **What**

infrastructure is needed to best preserve this data for long-term use including potential litigation and other research? Who should have access to this data? For what purposes?

“Indigenous Data Sovereignty”⁷ refers to the right of Indigenous peoples “to govern the collection, ownership, and application of data about Indigenous communities, peoples, lands, and resources.”⁸ In accordance with the United Nations’ Declaration on the Rights of Indigenous Peoples, Indigenous peoples have “the right to determine the means of collection, access, analysis, interpretation, management, dissemination, and reuse of data pertaining to the Indigenous peoples from whom it has been derived, or to whom it relates.”⁹

Despite Indigenous peoples’ data being crucial to their well-being, “the current systems and structures are failing us,”¹⁰ said Kimberly Murray, Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Residential Schools. For example, the National Centre for Truth and Reconciliation is mandated to make records available and accessible to the public, but is bound by Canadian privacy law (*Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act*) under the *National Centre for Truth and Reconciliation Act*. **How can Canadian law be reformed to better support the NCTR in fulfilling its mandate “to make the Centre records accessible to former students, their families and communities ... in accordance with access and privacy legislation and any other applicable legislation” (NCTR Act sect 3(a))? How do privacy and access laws apply to Indigenous communities who hold data from ground searches? To what extent does Canadian privacy and access laws conflict and undermine Indigenous data sovereignty? What supports would be helpful for Indigenous communities to develop their own privacy and access laws that better reflect and promote Indigenous data sovereignty?**

Consideration 5: Criminal investigations

As noted by the TRC, children died at Residential School from a variety of causes including as a result of the failures of the federal government to establish an adequate set of standards and regulations to guarantee the health and safety of residential school students; the failure to establish and enforce adequate standards, coupled with the failure to adequately fund the schools; students were housed in poorly built, poorly heated, poorly maintained, crowded, and often unsanitary facilities; the lack of infirmaries and access to trained medical staff; the combination of poor housing, inadequate medical care, and poor diet left the students vulnerable to infections; failure to adopt and enforce fire- safety standards in the construction and maintenance of buildings, and to construct and maintain safe, accessible fire escapes; the failure to establish and enforce system-wide discipline policies left students subject to exceptionally harsh and often abusive punishment which increased stress levels and undermined resistance to disease; harsh discipline and physical and sexual abuse led many students to run away or complete suicide; and other causes that are not known.¹¹

The question that remains in connection to the unmarked graves is whether these deaths are the result of criminal activity, leading to questions about whether these sites should be treated as a crime scene. There are related questions surrounding jurisdiction to investigate the potential crimes. Justice Minister Lametti recently stated that “Criminal investigations in Canada are undertaken by police and jurisdictions.” **But this doesn’t address which police, and how will they work with Indigenous peoples. And given the long history of systemic racism within**

Canadian police forces including over-policing and under-protecting, how can communities have faith in Canadian police forces to undertake full investigations?

Some communities have called for prosecution before the International Criminal Court (ICC) in the Hague. However, the Court's jurisdiction is limited to crimes committed after 2002. The question remains, **is there a way to understand the crimes committed at Residential School as an ongoing crime to fall under the jurisdiction of the ICC? What evidence would be necessary? Who should be leading (and involved) the development of the theory of the case?**

Consideration 6: Commemoration

One of the ongoing considerations regarding Residential Schools is commemoration, especially with the identification of unmarked graves. The Truth and Reconciliation Commission's mandate included commemoration, which they defined as "initiatives that would honour, educate, remember, memorialize, and pay tribute to former residential school students, their families, and their communities."¹² The TRC notes the need for the "federal government to ensure that appropriate measures are undertaken to inform families of the fate of their children and to ensure that the children are commemorated in a way that is acceptable to their families."¹³

The TRC concluded that "Commemoration should not put closure to the history and legacy of the residential schools. Rather, it must invite citizens into a dialogue about a contentious past and why this history still matters today. Commemorations and memorials at former school sites and cemeteries are visible reminders of Canada's shame and church complicity. They bear witness to the suffering and loss that generations of Aboriginal peoples have endured and overcome. The process of remembering the past together is an emotional journey of contradictory feelings: loss and resilience, anger and acceptance, denial and remorse, shame and pride, despair and hope."¹⁴

The TRC also noted three key aspects to commemoration activities that were undertaken during the TRC:

First, the projects were to be Survivor-driven; that is, their success was contingent upon the advice, recommendations, and active participation of Survivors. Second, commemoration projects would forge new connections that linked Aboriginal family and community memory to Canada's public memory and national history. Third, incorporating Indigenous oral history and memory practices into commemoration projects would ensure that the processes of remembering places, reclaiming identity, and revitalizing cultures were consistent with the principle of self-determination.¹⁵

How can communities work together to continue the work to commemorate Residential Schools, Survivors, and their families? What supports are needed for communities to continue to engage in commemoration? How can commemoration work in communities support national dialogue and education on Residential School history and legacy? How can commemoration activities be undertaken with regard to the health of the natural environmental?

Key Questions to be Considered

- 1. Protection of sites:** How can the areas where potential unmarked graves that have been identified be protected in the short, medium and long-term?
- 2. Forensic investigation of remains:** What information can be gained through forensic investigation of remains?
- 3. Repatriation of remains:** What are the possibilities and constraints surrounding the repatriating remains?
- 4. Data storage and access:** Which information should be made public, or accessible to communities? How should data be stored for long term preservation?
- 5. Criminal investigations:** What are the possibilities for criminal investigations or other actions of justice surrounding the identification of unmarked graves?
- 6. Commemoration:** What are the variety of ways that communities may want to work to commemorate former Residential Schools and the children who attended these schools?

¹ TRC Executive Summary at p. 261.

² TRC Executive Summary at p. 261.

³ Yun, T. (2021) *This is what it will take to identify hundreds of remains in unmarked graves at residential schools*, CTV News, online: < <https://www.ctvnews.ca/canada/this-is-what-it-will-take-to-identify-hundreds-of-remains-in-unmarked-graves-at-residential-schools-1.5484190>>

⁴ Canadian Association for Biological Anthropology (2022) *What Comes Next? Considerations for Suspected Unmarked Graves at Former Residential Schools*, online: https://caba-acab.net/sites/default/files/basic-page/caba_rsg_-_faq_draft_-_2022-03-26.pdf at page 8.

⁵ *Ibid.*, at page 9.

⁶ *Ibid.*,

⁷ Rainie, et. al. *The State of Open Data: Indigenous Data Sovereignty*, online: < file:///C:/Users/carli/Downloads/The_State_of_Open_Data_9781928331957_web.pdf> at page 300.

⁸ *Ibid.*, at page 300.

⁹ Walter, M. & Suina, M. (2019) *Indigenous Data, Indigenous Methodologies and Indigenous Data Sovereignty*, [online], *International Journal of Social Research Methodology*, 22(3), 233-243.

¹⁰ Deer, K. (2022) *Access to residential school records an ongoing challenge, people tell unmarked burials gathering*, CBC News, online: < <https://www.cbc.ca/news/indigenous/residential-school-record-access-unmarked-burials-gathering-1.6583551>>

¹¹ TRC Final Report Volume 5: Missing Children and Unmarked Burials.

¹² The Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada*: at 33.

¹³ The Truth and Reconciliation Commission, *The Final Report of the Truth and Reconciliation Commission of Canada: Canada's Residential Schools: Missing Children and Unmarked Burials*, Volume 4, at page 27, online: https://publications.gc.ca/collections/collection_2015/trc/IR4-9-4-2015-eng.pdf

¹⁴ TRC Executive Summary at p. 283.

¹⁵ TRC Executive Summary at p. 284.