

# *Archives and the Law: A Brief Look at the Canadian Scene*

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Archivists and archives are almost always subject to some form of legal authority which influences how they carry out their roles and responsibilities. The scope of that authority varies depending upon the type of archival institution, the degree of administrative autonomy, and the way in which the institution fits into the larger organizational whole. The extent of independence accorded by formal, legal, and administrative instruments determines the success or failure of an archival programme. It is those formal instruments, ranging from statutory laws passed by legislators to the more informal instructions and procedures contained in the memoranda from vice presidents of administration or executive secretaries, that will be briefly examined here. Included will be a look at how this body of law affects the basic archival activities of acquisition, appraisal, and access, and use of collections, both in public and private archives. The term "the law" is used throughout in its broadest sense and includes such instruments as statutes, regulations, bylaws, policy guidelines, and directives.

It barely needs mentioning that there has been a tremendous leap forward in the creation and use of information during the last two decades, and archivists, as custodians of information, have been swept up into the new and larger world of information management. The traditional functions of the archival profession were suddenly and permanently changed, and archivists everywhere found themselves thinking about and doing things that had been vague ideas only to a few of their more visionary predecessors. And as this revolution progressed, it became obvious to archivists that, if the essential theoretical and practical principles of archives were to remain intact as they adapted to these changes, they would need to examine the legal foundation of their institutions and decide how best to prepare for the new order. Most archives are part of larger organizational entities and, in Canada at least, have traditionally had their origins in government. With few exceptions public archives are this country's oldest repositories. Since the Second World War, they have grown from meagre record offices into large multi-media archives with different aims and added responsibilities. Despite this growth in size and the

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simultaneous impact of technological developments, there was in most cases no supportive legislation to give a legal basis for the new role. As a result, most government archives limped along on a legal basis of outdated or inadequate statutes, a regulation or two, perhaps a handful of orders-in-council, and, undoubtedly, a mishmash of guidelines and procedures. This loose administrative and legal framework was adequate so long as the need to respond to rapidly changing demands on services remained minimal, but when it became necessary to make an effort to keep pace with these rapid changes, the legal foundations of most archives were found to be woefully weak. A knowledgeable observer of Canadian archival legislation came to this conclusion two decades ago:

The pattern of legislation is as diverse as the country itself; its features reflect the differing historical traditions, governmental practices and degrees of public interest in history, which characterize the several provinces and regions of the nation.... One advantage of the federal system of government is that it encourages different experiments in legislation and administration.<sup>1</sup>

He went on to remark that the most serious deficiency in existing legislation was in the area of records management, that archives operating without such provisions in legislation should attempt to make the required amendments.<sup>2</sup>

A review of archival law in 1983 seems to indicate that the records management aspect has received due recognition over the past twenty years. In many instances, the old "dumping-ground" or "warehouse" perception of archives has been replaced by complete records management programmes authorized by specific legislative provisions. One need only compare the section of the *Public Archives Act* which permits archival material to "be *taken from* (author's italics) the custody of any department of the government and *removed to* (author's italics) the Archives Building in the City of Ottawa established *for the purpose of containing* (author's italics) such records, documents and material,"<sup>3</sup> with the sixteen sections specifically devoted to modern records management responsibilities appearing in the new archives and records legislation passed by the House of Assembly of Newfoundland and Labrador in December 1983. This act gives wide powers for the collection of any kind of public or private archival material relating to Newfoundland. It spells out in detail the scope and direction of archival activities without forgetting recent technological advances in the field of recorded information. Among other things, the legislation divests the Provincial Archives of its responsibility for the management of historic sites and museums; transfers the Archives from the Minister of Tourism to the Minister responsible for Culture, Recreation and Youth; appoints a provincial archivist, enumerating that person's duties in eight subsections; establishes a records management branch to be the responsibility of a records manager under the general direction of the Provincial Archivist; appoints a Public Records Committee which assumes responsibilities formerly exercised by the Lieutenant Governor in Council; forbids unauthorized destruction of records; provides for compulsory records scheduling; and advocates the use of records centre storage facilities. In addition, the

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1 Lewis H. Thomas, "Archival Legislation in Canada," Canadian Historical Association, *Annual Report* (1962) pp. 101-15.

2 *Ibid.*

3 *Revised Statutes of Canada*, 1970, c. P-27.

act provides for extensive regulation-making powers relating to such matters as what constitutes a public record, preparation of schedules, matters of access, government bodies covered by the act, organization and operation of a records centre, and the duties of the Provincial Archivist, the Records Manager, and the Public Records Committee. A description would not be complete without mentioning Section 13 which states that:

- 13(1) The Minister may apply to a judge of the Trial Division for an order requesting a person wrongfully in possession of or withholding public records to deliver them to the proper custodian or to such person as is named in the order.
- (2) The judge may grant an order referred to in sub-section (1) or issue a summons to the person named in the application for the order to appear before him.<sup>4</sup>

Furthermore, to unlawfully damage, destroy, or withhold any record is an offence liable on summary conviction to a fine not exceeding one thousand dollars and, in default of payment, to imprisonment for a term not exceeding three months or to both the fine and the imprisonment. Any archivist contemplating draft legislation would be well advised to consider the new Newfoundland act in such deliberations.

Is it possible or even desirable to draft a typical law that will serve equally creators, donors, administrators, staff, and users of archives? Archives are administrative as well as cultural institutions, with responsibility for safeguarding heritage items in both the private and public sectors. Can a model law be developed in Canada that takes into account the diversity of cultural aspirations, political jurisdictions, and demands of sponsors for efficient management of recorded information, and at the same time upholds and fosters basic archival principles? Attempts have been made at the international level to provide a prototype law for use in establishing archival programmes in emerging nations. This draft model refers to inadequacies prevalent in any such archival legislation as being

...due to the fact that legislation is drafted in government offices or legal offices by civil servants whose administrative background makes it difficult for them to appreciate the cultural and professional aspects of archives.<sup>5</sup>

Since most archives are established by a parent body of some kind, it is not difficult to apply this bureaucratic concept to any group of administrators.

One might well ask archivists who operate under a set of rigid legal instruments, such as those in force in many provincial, city, county, corporate, and university archives, if they feel dominated by an emphasis on administrative efficiency at the expense of professional autonomy and the fulfillment of heritage and cultural aims? Whether they feel hampered in this way or not, they undoubtedly see the necessity to acquire the basic bureaucratic skills needed to ensure survival in the inevitable and constant administrative power struggle. This is not to suggest that archival principles

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4 *An Act Respecting the Provincial Archives and the Management of Public Records*, 32 Elizabeth II, c. 33.

5 S. Carbone and R. Gueze, *Draft Model Law on Archives: Description and Text*, UNESCO, (Paris, 1972), p. 14.

should be abandoned, but that acknowledgement be made of today's realities. Both the Public Archives of Canada with its seventy-two-year-old bare-bones statute and the Provincial Archives of British Columbia which has no legislative authority, except for a confusing documents disposal law, have been able to grow and prosper throughout most of this century. Nevertheless, both these institutions would no doubt benefit from new legislation designed to provide their current activities with a modern comprehensive legal foundation.

Certain archives in the private sector could also profit from a more clearly defined status, unless the instrument authorizing their present establishment and operational policy is considered adequate. During the 1970s several church, corporate, city, and university archives were set up in Canada by means of such diverse authorities as minutes or a recommendation of the governing body, a letter from the president, committee directives and guidelines, bylaws, memorandum or regulation of council, or by part of the overall administrative responsibilities implied in a university act. Some of the authorities establishing archives and defining the nature and scope of their operations now require examination in light of recent changes in archival roles and functions.

Of the three principal archival activities, acquisition is the one best provided for in law. Publicly-sponsored archives are authorized to acquire the records of their parent bodies and, in many cases, to supplement the official record with private collections in an effort to document as fully as possible all aspects of the history of the area or jurisdiction served by those archives. For the most part, laws governing the acquisition activities of provincial and municipal archives include elaborate definitions of "records," with a stress on "all records," the most recent definition reflecting the multi-media nature of documentary material "regardless of physical form or characteristics." Although most modern laws seem to imply that the archives is to be the sole repository for records of permanent value created within its jurisdiction, government records archivists may doubt this in the same way that they suspect the absence of managerial control over some types of recorded information in government bodies, especially audio-visual and machine-readable records. The legal obligations regarding records acquisition have been clearly defined at the level of local government in most parts of this country. County, city, and university archives are subject to statutes and regulations passed by provincial legislatures. Together, the provincial statutes and local bylaws and policies determine acquisition strategy. Municipalities may even be required by law to yield some of the more significant records, or copies, to the repository of a higher level of government or to enter into an agreement whereby one archives provides storage space for the records of another. Provincial authorities can impose formal constraints upon the acquisition and custodial functions of archives at the local level. In Ontario, for example, the *Municipal Act* specifies which records must be kept and specifies that bylaws be passed establishing records retention and disposal schedules.<sup>6</sup> With certain exceptions, the act also provides for the inspection and copying of local records by members of the public and for the destruction of other records. While it may be true that some of the requirements imposed on municipal records-keeping

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6 *Revised Statutes of Ontario*, 1970, c. 284.

practices appear to reduce the degree of flexibility of archival programmes, the existing legal framework goes a long way to ensuring the permanent preservation of the most important records of local government.

University archives operate in accordance with policies established by their boards of governors and generally enjoy relative autonomy in carrying out their mandates. At the University of Alberta, the legislative basis for archival operations comes from the *University Act*,<sup>7</sup> section 15 of which gives the university board of governors responsibility for general management and control of the university along with the power to make regulations necessary to discharge those responsibilities. Furthermore, subsection 15(2) states that "It is a duty and function of each university to contribute to the educational and cultural advancement of the people of Alberta...." Based on the powers conferred in this section, the board of governors passed a resolution in 1969 which contained a policy statement regarding a university archives. The policy, revised in 1974, refers to the archives as "the official memory of the university and represents the accumulated experience of our educational community...."<sup>8</sup> The policy goes on to deal with matters of appraisal, location and arrangement, functions and responsibilities of the archivist, transfer requirements, guidelines for retention and disposal, and access rules.<sup>9</sup> From this can be seen that, unlike municipal institutions, university archives, in Alberta at least, enjoy considerable freedom from outside constraints on their activities. Furthermore, they are considered to be not merely records management units, but cultural assets.

It should not be concluded from the examples just cited that there is in this country a solid legal basis guaranteeing a steady flow of highly valuable historical material onto archival shelves. There exists a variety of impediments blocking the acquisition of such material by all archives, even though it should not happen. There are counteracting influences — including statutory prohibitions — against the acquisition and retention of certain records.<sup>10</sup> Limits on the disclosure of sensitive information collected under some federal acts are interpreted to mean restricting access for scheduling purposes. Nor are the administrators of the restrictive legislation swayed by archivists' arguments calling for the application of a passage-of-time concept to such sensitive records and thus for permission to effect their eventual transfer to the archives. Other obstacles, not always as noticeable as a subsection in an act or regulation but no less effective, include sponsors' ignorance and mistrust of archives and of archivists' motives, lack of administrative or political clout on the part of archivists, and a general misunderstanding of the role and usefulness of archives. In spite of tax incentives for private donors and export restrictions imposed by legislation, and the encouragement offered by historical, heritage, and other research groups and by the expenditure of large sums of public money, archives still have difficulty in preventing the loss of valuable archival material.

Before leaving the subject of the positive and negative effects of "the law" on acquisition, attention should be drawn to the issuance in early 1983 by the Treasury

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7 *Revised Statutes of Alberta*, 1970, c. 378.

8 "The University of Alberta Archives," 1969; "The University of Alberta Archives Policy on Documents Retention and Disposal," 1974 (brochures).

9 *Ibid.*

10 For example, the federal *Income Tax Act*, *Statistics Act*, and *Criminal Records Act*.

Board of a comprehensive records management policy for the Government of Canada, better known as "Chapter 460" of the *Administrative Policy Manual*.<sup>11</sup> It is the first and most fundamental of several policy chapters on the management of federal government information scheduled to be issued during the next year or so. Chapter 460 is important because it spells out clearly and forcefully the roles and responsibilities of creators, users, managers, and preservers of federal records. It consolidates the authority of the Dominion Archivist and makes the Public Archives of Canada the linchpin of the federal records management programme, granting it control over the destruction of records, extensive advisory and administrative powers, an evaluation role for government records, and, to an extent not found in previous legislation and directives, full responsibility for archival records. The PAC is designated the sole repository for these records. Similar policy chapters regarding micrographics and machine readable records are expected soon and taken together these will apply to the management of all recorded information under the control of the federal government.

The development of this body of policy over the past three years as well as the passage of the federal access and privacy legislation illustrate how archivists and users of archives have been influential in shaping both the statutes and the ensuing policies. One can argue about the precise degree of influence over the appropriate politicians and public servants exercised by such groups as the Canadian Historical Association, the Social Sciences Federation of Canada, the Eastern Ontario Archivists Association, the Association of Canadian Archivists, and the Public Archives of Canada, but the fact remains that the statutes and policies finally produced are very different from those first proposed — and the changes almost always favoured archives and researchers.

The requirements imposed by law on archives regarding the type of archival material to be kept provides an interesting study in contrasts. Some archivists have almost complete freedom of choice while others are constrained by elaborate instructions. Legislation often contains definitions of records, forbids unauthorized destruction, refers to the need for proper classification and arrangement, calls for the provision of economical storage facilities, and requires the production of appropriate descriptions and finding aids, but fails to specify, except in a general way, which classes of records must be kept permanently. Archivists are left to apply whatever appraisal and selection criteria they deem appropriate, constrained only by their professional responsibility to ensure that only the best is kept. In some institutions, the degree of independence of choice is restricted by law. It is in this sphere of activity that the potential for problems exists. As archivists become more accountable to the public for the conduct of their affairs, particularly when supported with tax dollars, internal administrative methods and procedures become subject to outside scrutiny. Users as well as sponsors of archives may well demand a review of the appraisal and selection criteria upon which decisions concerning the retention of archival records have supposedly been carefully based. Indeed, rights conferred on citizens by access and privacy legislation place a legal obligation on archivists: they must be prepared to justify in a court of law their retention and disposal decisions in cases where citizens or corporations consider themselves to have been deprived of their legal

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11 Chapter 460, "Records Management," Treasury Board of Canada, *Administrative Policy Manual* (Ottawa, 1983).

right to information. How many archival institutions in Canada are in possession of a set of appraisal and selection criteria that would stand up to cross examination in court? Well-intentioned laxity concerning general legal requirements is one thing; defending informal, inadequate, or non-existent archival procedures or selection standards before a judge is quite another.

Business records have been singled out for special legislative attention. Corporate archivists have little discretion in appraisal and disposal matters, for banks and corporations are subject to a host of federal and provincial laws and regulations specifying records retention requirements for legal and financial purposes. These requirements comprise a formidable body of legal instruments affecting scheduling, retention periods, records *versus* microfilm, admissibility of evidence as it pertains to corporate accounting, taxation, and personal records. For years, the federal government required businesses to keep a great number of records without specifying either retention periods or the length of time it would be advisable to retain information for financial and legal purposes. This lack of retention policy allowed businesses to dispose of records the moment they were no longer required as evidence in legal proceedings.<sup>12</sup> Companies were aware, however, that when records are kept for use in possible legal proceedings, retention periods must be related to limitation periods applicable to the proceedings, and that care must be taken to ensure that the periods of retention are not less than the limitation periods — all of which led to “the development of a widespread rule of thumb that many business records be kept seven years, adding one year to the six-year limitation period governing commercial litigation in most provinces....”<sup>13</sup>

In the fall of 1982, in an effort to reduce the burden of record-keeping requirements, a six-year retention period was applied by federal statute to certain business records, after which they could be disposed of without the written permission previously required by federal acts. As part of Ottawa's regulating reform programme, Bill C-118 was passed in September 1982. It contains amendments to seven statutes which provided either for the removal of the condition of obtaining a minister's written permission prior to the destruction of records or for a specific retention period for records. The result is that

All records maintained by the private sector, pursuant to federal legislation, must now fall into one of seven categories. Most fall into the first four and do not have to be retained beyond six years. Exemptions are banking documents, which must be kept for 10 years under the Bank Act; health and safety records of a long-term nature; and a minimal number of administrative records.<sup>14</sup>

Custodians of business records now know exactly what must be kept and for how long. In addition, regulations issued under other statutes are to be reviewed by federal authorities and amended where necessary.<sup>15</sup>

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12 *Records Retention and Destruction in Canada: A Guidebook*, Financial Executives in Canada (Toronto, 1980), p. 2.

13 *Ibid.*, p. 29.

14 Treasury Board of Canada, “Report on Regulatory Reform,” no. 4, Office of the Coordinator Regulatory Reform, (August 1982).

15 *Ibid.*

The matter of public access to material preserved in archival institutions has been the object of much recent activity in most western democracies.. The nature of the activity has varied from country to country and, here in Canada, from province to province. Basically, it involves the legal right of access to information under the control of public institutions. It is beyond the scope of this paper to examine this subject in detail, but it would be useful to reflect for a moment on the possible ways in which access legislation can be expected to have an influence on the acquisition and custodial operations of archives.

All archives have in place some sort of policy, however expressed, governing access to their holdings. Corporate archives protect their financial information and thus their competitive interests; religious archives do not seem to have rigid access policies — an interesting contrast to the restrictions in place at the Vatican Archives. Universities restrict access to departmental records for a specified number of years; access to city and county records is usually controlled by municipal acts or local access bylaws; records at the federal and provincial level are subject to a variety of statutes, directives, and guidelines. Use of private collections in all archives is subject to donors' wishes. Current research trends and interests in contemporary issues have resulted in mounting demands on archives and their sponsors to make available information traditionally considered closed. In the 1960s in Canada, the fifty-year access rule became the thirty-year rule, only to be superseded in some jurisdictions by freedom of information legislation. Where such legislation has not yet been introduced into provincial assemblies, it has been the subject of considerable study. Ontario's royal commission on freedom of information is one significant example. This commission's findings have not yet persuaded the government to adopt legislation, but do provide an extensive and thorough examination of the topic.<sup>16</sup> Access legislation passed in Ottawa, Nova Scotia, and New Brunswick has had repercussions on archival activities in those locations. Public servants in those places, concerned about the release of information even after thirty years, are now faced with the awesome prospect of seeing their own scribbles reproduced on the front page of tomorrow's newspaper. Archives serving parent bodies that have adopted rights of access to information are faced with the real possibility of receiving less than the total story from creating departments. Archivists in these institutions are also faced with the need to develop solid appraisal and selection criteria, and to be prepared to act as middlemen between suspicious fellow public servants and an aggressive researching public exercising its newly-won access rights. Until the impact of access legislation on acquisition and custodial activities can be assessed adequately, one can only guess at its real effect. Yet the legislation cannot be dismissed easily, and its presence provides archivists with a real opportunity to improve service to their clientele. It may take years to measure the true impact of access legislation on archives.

It can be said that there exists in this country a considerable body of law concerning public and private records, and archives and information in general. And there seems to be an awareness among custodians of information, including archivists, of the influence that "the law" has on the management of information in their custody. In addition, information managers are learning that some parts of that

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16 See Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (Toronto 1980).



body of law are helpful and others are prejudicial to their programmes and goals. The Association of Canadian Archivists was concerned enough to devote an entire annual conference in 1983 to the subject. Why? Perhaps it is because archivists realize that it is their professional responsibility to provide public service not only according to self-imposed principles, but also in conformity with external legal and administrative requirements. Few new archivists give much thought to the legal aspects of their work, and it is only later on that they come to realize that beneath the calm surface of archival operations lurk legislative, regulatory, and administrative hazards. And even though it is not always clear what must be done to navigate safely around these hazards, it is certain that there is need for a professional response if archival principles are to be upheld.

When dealing with "the law," archivists are not much different from other laymen: legal matters are viewed with awe and bewilderment. However, this cannot be used as an excuse, particularly since archives exist and operate on a legal foundation. Despite this, there has been an apparent reluctance on the part of many archivists to come to grips with this serious facet of archival affairs. It is interesting to note that both the Commission on Canadian Studies and the Consultative Group on Canadian Archives failed to deal seriously with the matter of archives and the law. The Symons Report of 1975 mentioned the need to revise the *Public Archives Act* and to amend the *Copyright Act* so as to recognize material as archival and to allow for its use for research purposes.<sup>17</sup> The Wilson Report five years later went just a step further and recommended amending the *Public Archives Act*, the *Cultural Property Export and Import Act*, the *Copyright Act*, and the *Income Tax Act*.<sup>18</sup> At this moment, none of these perennial favourite legislative targets has been revised.

All this is not to say that there is no hope of changing present laws or influencing future legislation. Changes and improvements were made to the federal access and privacy legislation as the result of representations by various interest groups and not the least by the commitment and direct involvement of Public Archives of Canada staff. The positive results of this contribution at the drafting and policy development stages demonstrate that archivists need not be passive spectators in the administrative and legal process. Similar changes and improvements could undoubtedly be made elsewhere, especially if archivists were to investigate at length the influence of laws on archival activities. Studies of legal questions affecting archives could be the task of a committee on legal affairs established by the ACA, AAQ, or both. In addition such a committee could be given the responsibility to monitor and report on proposed legal instruments likely to affect archives. There is, for example, a continuing need to assist corporate archivists in their constant scrutiny of acts and regulations affecting business records. Expert legal advice should be sought as required.

While it is true that archivists have in the last few years gained much valuable experience in coping with the effects of acts and regulations on their activities, it is also painfully obvious that much remains to be done.

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17 T.H.B. Symons, *To Know Ourselves*, the Report of the Commission on Canadian Studies (Ottawa, 1975).

18 *Canadian Archives: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Canadian Archives* (Ottawa, 1980).