

From the Guest Editors: Archives and the Law



JEAN DRYDEN and LORYL MACDONALD

Twenty-five years have passed since *Archivaria* last devoted an entire issue to the theme of archives and the law. As the editor of *Archivaria* 18 stated in his introduction, “The relationship between archivists and ‘the law’ is intricate, varied, and largely unexplored.”¹ These words are no less true in the first decade of the twenty-first century. Our society operates within a rule of law, and archivists and their institutions function within society. In acquiring, preserving, and making available the documentary heritage of that society, archivists are subject to the laws of the jurisdictions within which they operate. Some laws require that certain records be created and preserved for particular lengths of time; others specify the legal and regulatory framework within which records can be used in order to achieve public policy goals such as ensuring access, or protecting privacy and other rights.

While legal issues affecting archivists have been further explored in the professional literature² in the intervening quarter century, the digital environment has introduced a host of new issues to be addressed, and has signalled the need for the profession to re-examine traditional approaches to long-standing practices. The rapid adoption of information and communication technologies has resulted in a digital revolution that has changed the ways in which information and records are created, transmitted, organized, located, preserved, and disposed of. In many arenas, digital technologies have challenged the ways in which laws apply to records and their use. Information can be created, used, and disseminated in ways that were never before possible, and laws have been (and continue to be) crafted to address a host of new situations. Furthermore, the ability of new information and communication technologies to support rapid and widespread diffusion of information at the touch of a button has resulted in

1 Terry Cook, “From the Editor: Archives and the Law,” *Archivaria* 18 (Summer 1984), p. 20.
2 See for example, the special issue of the journal of the Australian Society of Archivists, *Archives & Manuscripts*, vol. 26, no. 2 (1998). As well, individual articles in a host of professional journals have examined a range of legal issues affecting our profession.

a public demand for higher standards of ethics, transparency, and accountability in the public and private sectors. The recognition that reliable recordkeeping undergirds good governance has prompted governments and organizations to integrate specific record-keeping requirements within program mandates, policies, laws, and regulations. Archivists and their institutions, intimately involved as they are with recordkeeping, are deeply concerned about these public policy matters.

The articles in this special issue have been organized around broad topical themes, but they can also be viewed from the vantage point of jurisdiction, or one's relationship to archival records. Three themes are represented in this issue: the acquisition and preservation of records of the legal enterprise, archival holdings as evidence in legal proceedings, and laws that affect archival operations. The articles address aspects of these themes from regional (provincial/territorial or state), national, and international perspectives. While most articles explore issues in Canadian jurisdictions, we are pleased to include two articles with an international perspective from the Australian state of Victoria and from Iraq. The content can also be approached according to one's relationship to the records: that of a recordkeeper (that is, those who create and manage records) or that of a user of records.

The records of legal proceedings reflect an important aspect of society; two articles address the acquisition of legal materials by archives. Tom Belton explores the complexities of the history of the disposition of Ontario's court records and the resulting lack of clarity in the current situation, particularly regarding the status of such records and the authority of the provincial archives to acquire and preserve them.

Confusion may be the hallmark of the current situation regarding the custody and control of Ontario's court records. However, that situation is a model of clarity compared with the events surrounding the custody, control, and ownership of the Iraqi secret police files documenting the Anfal genocide against the Kurds in the 1980s, files that at one point were in the custody of the University of Boulder in Colorado. Bruce Montgomery's account of the seizure, relocation, and repatriation of these files provides a fascinating (albeit still incomplete) custodial history of these records. The article addresses the role of international law, specifically the treaties that address the seizure of cultural heritage in times of war, and the role of the international archival community represented by the International Council on Archives (ICA) and various national professional associations. The article also presents the conflicting issues related to the protection of human rights, and appropriate safeguards for the documentation of human rights.

Archival records are, of course, frequently used as evidence in legal proceedings. Two articles explore particular aspects of this matter. Rod Carter considers photographs, and the ways that courts and legal commentators have viewed this "new" technology, including the questions raised by the advent of

digital photography. The courts, of course, are concerned with issues of authenticity, and Carter points out the long-standing role that archivists have traditionally played in preserving and communicating authenticity, particularly through description.

Donald Force takes on a new issue occasioned by the ubiquity of digital record-keeping technologies: e-discovery, or the process of identifying, locating, and producing electronic records as part of a pre-trial process in which parties to a legal proceeding reveal evidence that they propose to introduce in court. Much of the legal literature pertaining to e-discovery emanates from the United States, and Force makes a valuable contribution by exposing how Canadian courts have addressed this issue. Force also argues convincingly regarding the key role that records managers and archivists must play in establishing sound records management policies and procedures so that lawyers can easily locate relevant records and unneeded records are systematically disposed of in the normal course of business.

Archivists and their institutions operate within a framework of laws that affect the operation of archival institutions, including access and privacy legislation, contract law, labour and employment laws, tax laws relating to monetary appraisal of acquisitions, and, of course, statutes that establish particular institutions and the legal framework within which they operate. Copyright is an issue that continues to bedevil archivists as they attempt to find the appropriate balance between making their holdings available and protecting the copyright interests of donors, record creators, and the archives itself. The digital environment presents exciting opportunities to make archival holdings more widely available than ever before; at the same time, the application of copyright law in the digital environment presents tremendous challenges. In this uncertain climate, it is essential that archivists have a good understanding of copyright law. Jean Dryden's study of Canadian archivists' copyright knowledge and where they acquire that knowledge reveals weaknesses in this area, and makes some recommendations to improve the situation.

Kathy Sinclair's article describes a different situation in which a new statute has had a significant impact on the archival operations of the Australian state of Victoria. The passage of the *Crimes (Document Destruction) Act 2006* (CDD Act) imposed a prohibition on destruction of documents, and Sinclair discusses the history, implementation, and parameters of the CDD Act within the broader context of the intersection of the law and the responsibilities of recordkeepers and archivists. Sinclair explores certain aspects of the role of recordkeeping as a means of achieving the intended legal outcomes.

The idea for this issue was born in a casual conversation in the lobby of the Robarts Library at the University of Toronto. However, transforming the idea into reality depends on the efforts and contributions of many others. As our task nears completion, it remains to thank the authors for their work in writing and revising their articles, and the peer reviewers who provided thoughtful

assessments of the manuscripts. We are grateful to the Law Society of Upper Canada Archives for providing the cover photograph. We also wish to thank *Archivaria's* General Editor, Carolyn Heald, for giving us the opportunity to serve as guest editors for this issue, and for her unfailing support and advice throughout the process.

While the articles in *Archivaria 69* address an array of important topics, this special issue does not claim comprehensive coverage of all matters that lie at the intersection of archives and the law. Despite our best attempts to include articles about a wider range of topics, significant issues such as privacy protection, access to information, and taxation and cultural property are not represented in this volume. While these and other issues will likely be addressed in individual articles in future issues of *Archivaria* and other archival journals, we hope that we will not have to wait another quarter century before *Archivaria* once again turns the spotlight on the complex and evolving confluence of archives and the law.