

The Disposition of Ministerial Papers

by TERRY EASTWOOD

Recent events in the United States have stimulated public discussion of the proper disposition of papers created and accumulated by politicians while holding elected office. The legal entanglement over the vice-presidential and presidential papers of Richard Nixon has broadened interest in this question beyond the "tiny fraternity of ineffective archivists"¹ who had been exercising themselves about it in isolation for years. An august Public Documents Commission has been established "to study problems and questions with respect to control, disposition, and preservation of records and documents produced by or on behalf of Federal officials."² Canadian observers cannot fail to wonder whether these American developments have any application in this country and, indeed, if as certain events suggest, however modestly, that the meaning of recent American experience is not entirely lost on Canadian politicians.

During its consideration of Bill C-225—an act respecting the right of the public to information concerning the public business—the Standing Joint Committee on Regulations and Other Statutory Instruments (the Forsey-McCleave Committee) called Dominion Archivist Dr. W.I. Smith as an expert witness. Although most of Dr. Smith's testimony concerned the role of the Public Archives of Canada in making available records already in the public domain, the matter of the papers of ministers of the crown was raised. While referring to the Nixon example in the United States, one of the Committee members, Mr. Ray Hnatyshyn, asked Dr. Smith: "Who owns those papers? . . . I would think that question must arise as far as we are concerned."³ Little did Mr. Hnatyshyn know

1 A phrase first used by H.G. Jones, and quoted in Gerald Ham, "Public Ownership of the Papers of Public Officials," *American Archivist* 37, no. 2 (April 1974): 357.

2 Quoted in J. Frank Cook, "'Private Papers' of Public Officials," *American Archivist* 38, no. 3 (July 1975): 323.

3 Canada, Parliament, *Minutes of Proceedings and Evidence of the Standing Joint Committee on Regulations and Other Statutory Instruments*, Issue No. 61, 16 March

that the question would arise less than a month later when, in April 1976, the ownership of ministerial papers became the subject of legislative and public debate in British Columbia. From the relative obscurity of a parliamentary committee, the issue was thrust briefly into the harsh light of partisan political debate.⁴

The conjunction of Hnatyshyn's query and the British Columbia episode were not simply coincidental, for it is difficult to imagine this question remaining forever in the obscurity to which it has been confined for so many years in Canada. The climate of public opinion with regard to public access to government information has altered dramatically in recent years, no doubt partly in response to American trends. Bill C-225 and similar private members bills in the provinces reflect politicians' sensitivity to the changing public mood. The question of the ownership and disposition of ministerial papers properly should be part of a discussion of the underlying principles and the means of access to government information. Of course, the question is one in which archivists take a special interest. Where these recent events and trends will lead is not clear, but the existence of public discussion raises questions about the role Canadian archivists have played and will play in preserving ministerial papers for eventual public use.

A discussion of the disposition of ministerial papers cannot be divorced from the political context in which these documents are created and accumulated. Three episodes in which ministerial papers became the subject of legislative and public debate illuminate the situation. The first of these affairs occurred in Saskatchewan in 1965. Newly elected Premier Ross Thatcher accused former provincial treasurer, J.H. Brockelbank, of having removed records of a public agency, the Government Finance Office, on leaving office. In the ensuing debate, the former attorney-general, R.A. Walker, defended the practice of ministers removing their files on leaving office by claiming that "ministers' files are the property of ministers. Government documents are filed with the Deputy Minister and with the staff of the department. . . . Previous ministers and previous

1976, p. 22 (hereafter cited as *Committee*, giving issue number and page). Bill C-225 was sponsored by the Progressive Conservative MP for Peace River, Mr. Gerald Baldwin. On 19 December 1974, the House of Commons referred the subject matter of the bill to the joint parliamentary committee, which was already sitting to consider changes in statutory regulations. The Committee held a series of hearings, lasting nearly two years, and called witnesses from inside and outside government to examine all aspects of "the question of freedom of information and protection of privacy." Similar private members bills have been introduced in several provincial legislatures. See, for example, Bills 33 (1976) and M202 (1977) of the British Columbia legislature.

4 A synopsis of the early stages of the debate may be read in *Archives Bulletin* 1, no. 2 (April 1976): 16. The details of the debate are examined later in this paper.

governments have taken their files.”⁵ The new attorney general, Darrel Heald, did not wish to press the government’s claim beyond the issue of clearly public documents of the Government Finance Office,⁶ which had been removed apparently in error when Brockelbank’s ministerial papers were transferred to the Saskatchewan Archives upon his leaving office. Because the records in question were in the Archives and because the Provincial Archivist was able to mediate between political rivals, the matter was allowed to lapse, although the records transferred in error with his ministerial papers were incorporated into public records, with Brockelbank’s approval.⁷

The second case arose in Manitoba on 2 September 1969 when the opposition demanded that the government table all correspondence between the minister and the province’s public utilities accumulated since the new government had assumed office on 15 July. In the course of his rejection of the proposal, Minister of Finance Saul Cherniak revealed that while it was possible to table the requested correspondence, he could not produce letters dated earlier than 15 July because the office that he had assumed contained no files. It was soon discovered that his predecessor’s files were in the Manitoba Archives. He did not presume to “quarrel with the decision of [his] predecessor that all the files in his own office were his personal files.”⁸ As in the Saskatchewan episode, the government did not challenge the concept of private ownership of ministerial papers, but before the matter died, government backbencher G.L. Molgat entered the debate by raising a further issue. Molgat did not question the existence of private ministerial correspondence, but he thought “that if ministers simply removed holus bolus all the files that were pertaining to public business then the question of openness of government . . . comes very much to the front.”⁹ Though he was told that copies of all correspondence rested with the utility, Molgat persisted: “It may be that we can get the information by going back to the utility, but what about other people who have correspondence with the minister . . . where it happens to be public business. . . . There’s a very grave question here about propriety in government. How are we conducting our affairs in this province?”¹⁰ When Molgat went so far as to propose that the order for tabling correspondence reach back beyond 15 July, Premier Schreyer interjected: “Does the

5 Saskatchewan, Legislative Assembly, *Debates and Proceedings*, First Session, Fifteenth Legislature, 10 February 1965, p. 145.

6 For Heald’s statement see *ibid.*, p. 212.

7 I am indebted to Allan Turner, who was Provincial Archivist of Saskatchewan in 1965, for details of the resolution of the case.

8 Manitoba, Legislative Assembly, *Debates and Proceedings*, vol. 16, no. 16, 2 September 1969, p. 347.

9 *Ibid.*

10 *Ibid.*, p. 349.

Honourable Member realize . . . that he puts us in a position of having to go on bended knee to a previous minister . . . asking him would he please agree to sign for release of files from the archives[?]'¹¹ The premier's words stifled Molgat's protests.

The third case took place in British Columbia in 1976. Of the three incidents, this one bore most directly on the ownership of ministerial papers. On 8 April, Economic Development Minister Don Phillips stated that his predecessor, Gary Lauk, had removed to his home "all correspondence between the minister and other government departments, agencies and boards," and that these files were "the property of the people of British Columbia."¹² Lauk insisted that all files removed were his personal property, a position supported in the debate by former Attorney-General Alex Macdonald, who asserted that copies of all correspondence relating to government business were "freely available" within the departments.¹³ Phillips eventually convinced the attorney general to investigate his accusation against Lauk by asserting that the papers were essential to efficient administration by government. The attorney general sought private advice on the legal ramifications,¹⁴ but so far has not proceeded against Lauk, nor seems likely to in the future.

The dispute between Phillips and Lauk became the subject of numerous newspaper editorials. The general line taken by the writers is summarized in the *Vancouver Sun*:

Obviously what exists here is a bad practice that has taken root in this legislature and no doubt others. Outgoing government ministers, with no guidelines spelling out with any precision what are the public's papers and what are personal, are seen to err on the side of all inclusiveness, packing off everything bearing their personal decision-making touch. . . . But what is evident is that direction is needed, along with a healthy dose of sensitivity from provincial politicians to the public interest — in particular those politicians given the trust of being ministers of the crown.¹⁵

If the dispute could not be resolved, the editorial recommended that the government produce legislation compelling ministers to deposit their

11 *Ibid.* It should be mentioned here that only two ministers in the departing cabinet deposited their papers in the Archives. The former finance minister, Gurney Evans, had also given the Provincial Archives the papers of his father, Sanford Evans, who had been leader of the opposition in Manitoba. (Information contained in a letter of 20 August 1976 to the author from John Bovey, Provincial Archivist of Manitoba.) The frequent reference in this paper to letters and other unpublished documents reflects the difficulty encountered in examining a largely neglected subject.

12 British Columbia, Legislative Assembly, *Debates and Proceedings*, 8 April 1976, p. 710; *Victoria Times*, 12 April 1976, p. 1.

13 British Columbia, *Debates and Proceedings*, 8 April 1976, p. 712.

14 *Victoria Times*, 24 June 1976, p. 1, and Norman Gidney, "Who Owns Lauk's Files?" *Victoria Times*, 3 July 1976, p. 4.

15 *Vancouver Sun*, 20 April 1976, p. 4.

papers in the Provincial Archives. Lauk adopted the attitude that until such legislation was in force, he was unwilling to place papers in the Provincial Archives for he believed that he had no guarantee the government would not demand and receive access to his confidential papers.¹⁶

These three episodes illustrate numerous aspects of the larger issue. Following the precedent set by former ministries, outgoing ministers habitually empty their offices of papers they consider to be their own property. Having removed their property, ministers determine the conditions of access to the papers. Incoming governments frequently may find the conduct of public business hampered by the absence of papers, whether those papers were removed to a private place or even to an archives. Nevertheless, governments seem reluctant to challenge ministers who remove papers despite any resulting administrative inconvenience. There appears to be no instance in Canada of the constitutional and legal issues involved ever having been tested in court. Certainly present legislation and public records policy does not address the problem. Finally, it seems that politicians caught up in the heat of partisan politics do not always have confidence that archives can or will protect their interests.

Though the current public and parliamentary debate on the appropriate degree of access to government information does not principally concern ministerial papers, the discussion does provide an insight into the constitutional framework within which a minister of the crown operates and therefore into the constitutional rationale for considering ministerial papers to be private property. One aspect is immediately clear: the proper disposition of ministerial papers is a question not ultimately susceptible to precise constitutional resolution any more than is the wider matter of access to all forms of government information. The constitutional principles at issue are largely unwritten and therefore subject to frequent refinement and interpretation in a field where there is, as one constitutional authority has stated, "a potential conflict between theories not quite rejected and practices not quite received"¹⁷ or, as might be applied to the question of ministerial papers, between practices not yet rejected and theories not quite received.

The debate usually focusses on the doctrine of ministerial responsibility to the prime minister, to other ministers in the name of so-called cabinet solidarity, and to Parliament. The efficient discharge of such responsibilities generally is regarded as demanding a certain degree of confidentiality.¹⁸ Without penetrating the complexities of this doctrine in

16 Gidney, "Who Owns Lauk's Files?", p. 4.

17 Geoffrey Marshall and Graeme C. Moodie, *Some Problems of the Constitution* (London: Hutchinson & Co., 1971), p. 110.

18 A third responsibility, through the Governor General to the monarch, is rarely invoked. See R. MacGregor Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1963), p. 188.

practice, it might be noted, for example, that a minister's correspondence may be exempted from production before Parliament on these grounds.

When he was Clerk of the Privy Council and Secretary to the Cabinet, Gordon Robertson elaborated the rationale behind the need for confidentiality, which he says

is especially necessary with a collective executive such as we have under our parliamentary system. Cabinet decisions must be by consensus, and reaching consensus requires discussion. In the course of such discussion, there must be ample room for exploring and probing possible lines of action without knowing whether they will, in the end, stand up to examination. Ministers must test ideas without any fear that they are going to be held against them or be thought to espouse them if the ideas turn out to be ridiculous or impractical. Cabinet ministers are no more perfect than the rest of us and, just as there is the right to personal privacy, since not all our actions are or should be exposable to the world, so ministers have a right to talk and argue, to be wise or foolish, with the knowledge that privacy is accorded them too.¹⁹

Moreover, confidentiality extends to public servants and other persons who may advise ministers, creating impartiality and civil service anonymity. Regardless of the source of advice, ministers alone are responsible. "It is the ministers who decide; the policy is theirs."²⁰

A corollary to the principle of ministerial responsibility is that the minister also decides how much information should be revealed about policy and its creation. In other words, the public interest is best judged by the minister accountable to Parliament and nothing should impede the means of ministers deciding and taking responsibility for policy. On such grounds, public access to information concerning the basis of cabinet deliberations and ministerial decisions is then inimical not only to the efficient and effective operation of government, but also to the protection of the principle of ministerial responsibility unless, of course, the cabinet deems it in the public interest to release information. In testimony before the Forsey-McCleave Committee, Mitchell Sharp confessed that neither he nor the government could devise any other effective mechanism controlling the release of information without violating the principle of ministerial responsibility.²¹ The government of the day judges what is the public interest, and must get its own way or be voted out of office. There is no contending legislative or judicial authority to balance the authority of the executive — "a shocking doctrine to Americans and Frenchmen and their camp followers, but it happens to be our system."²²

19 Gordon Robertson, "Official Responsibility, Private Conscience and Public Information," *Proceedings and Transactions of the Royal Society of Canada*, Series 4, vol. 10 (1972): 153-4.

20 *Ibid.*, p. 156.

21 *Committee*, Issue No. 13, p. 19.

22 Marshall and Moodie, *Some Problems of the Constitution*, pp. 87-88.

In this perplexing context, it must be asked if there is a connection between the increasingly debated issue of the "public right to know" and the ultimate disposition of ministerial papers. Robertson does suggest that papers deemed exempt from release while a matter is under active political consideration could be opened after "prescribed and substantial delay,"²³ but he does not refer specifically to papers accumulated in a minister's office. Cabinet minutes are now included within the scope of federal public records policy, but ministers will very likely continue to regard their duty as embracing the protection of cabinet colleagues, officials, and ordinary citizens who deal with them in confidence and will no doubt continue to defend present practice on the grounds of the private nature of their papers, just as Robertson defends the need of confidentiality for ministerial deliberations.

Balancing the public's desire for greater access to government information with the government's need to preserve its effectiveness, while also guaranteeing the right of privacy, presents serious practical problems to the structuring of public records policy. Beyond such practical problems, there are larger issues touching upon any consideration of the disposition of ministerial papers. The argument involving the fundamental principles and the rules underlying access to government records in a democratic state has long been manifested in the academic community, a realm of particular interest to archivists. The disagreement seems to fall basically into two camps. One group argues that public records policy and scheduling procedures eventually will bring the most satisfactory solution to the problem of access, and that too open access will lead to the production of records "with an eye to history", thereby obstructing "the purpose of promoting objective research."²⁴ This line of argument opposes freer access on apparently scholarly grounds rather than on the consideration of a public records policy attuned to contemporary public needs and desires. This reasoning also seems to ignore the fact that public records are created for compelling legal and administrative reasons. What these academics seem to want is a record faithfully reflecting the context of its creation. However, it is paradoxical to argue in favour of records promoting objective research, yet against records created in a context embodying the legal and administrative means of freer access. The notion that records will be created with a view to managing history will, if taken to its logical extension, destroy the very basis on which public records are produced, and presumes a deplorable departure from democratic principles.²⁵ In fact, this presumption provides a strong argument in favour of

23 Robertson, "Official Responsibility," p. 156.

24 K.W. Knight, "Administrative Secrecy and Ministerial Responsibility," *Canadian Journal of Economics and Political Science* 32, no. 1 (February 1966): 78-79.

25 Former Governor Scott of North Carolina has surmised that "an effort to color history will be just as unsuccessful as an effort to 'manage the news'," and so it ought. Robert

more explicit policy and guidelines for classes of records, such as ministerial papers, that are not now governed by public records policy. It is difficult to imagine how the haphazard preservation of records can promote objective research.

A contending academic group urges liberalized access in the interest of promoting public discussion. As Oxford professor Herbert Nicolas said in an address to the Anglo-American Conference of Historians in 1964: "Protection for life of public servants (elected or appointed) from public scrutiny of their actions is an unconscionable sacrifice of the public's right to know of its business, how ever much active public servants must be provided an environment free from excessive harassment."²⁶ This argument is aligned with the thrust for freer access, but states only part of the need for a "public right to know" enshrined in legislation and reflected in a records policy. It is here in the debate about general principles, and in the concern over practical problems, that the question of the disposition of ministerial papers must be placed.

Of course, the question of the ownership of ministerial papers extends beyond mere argument about the appropriate period of closure before opening documents to public scrutiny. Ministerial papers frequently do not reach the public domain, and when they do, it is only in a form and at a time decided exclusively by the minister or his heirs. Since governments decide on matters of legislation and public records policy, resolution of the question must await the decision of governments composed of enough ministers who deem it in the public interest to make their own papers at least in some measure part of the public record or who seek other solutions to the problem. Whatever political resolution is devised to meet the public need for greater access to government information, archivists might in the interim examine certain aspects of the present archival and administrative treatment of ministerial papers. In fact, the history of past treatment might call for a radical change in approach.

More than a quarter century ago, the Canadian Historical Association's brief to the Massey Commission recognized that "accepted practice" allowed the outgoing minister to dispose of his records as he wished. On

W. Scott, "Governor's Records: Public Records," *American Archivist* 33, no. 1 (January 1970): 9.

26 Herbert G. Nicolas, "The Public Records: The Historian, the National Interest and Official Policy," *Journal of the Society of Archivists* 3, no. 1 (April 1965): 5. Two articles by Donald Rowat, a political scientist at Carleton University, the first of which prompted and the second of which responded to Knight's article cited in note 24 above, argue along the same lines as Nicolas. Donald C. Rowat, "How Much Administrative Secrecy?" *Canadian Journal of Economics and Political Science* 31, no. 4 (November 1965): 479-98 and "Administrative Secrecy and Ministerial Responsibility: A Reply," *ibid.*, 32, no. 1 (February 1966): 84-93.

the grounds that ministerial papers “include many public documents and other records not of a strictly private nature,” the Association recommended, “if practicable, that arrangements be made for the segregation of the public documents coming into the hands of ministers, and their eventual transfer, under proper safeguards, to the Public Archives.” The Association also urged that ministers be alerted to “the importance of preserving their personal correspondence and records.”²⁷ In the intervening years, this “somewhat serious lacuna in Canadian records policy,”²⁸ as C.P. Stacey characterized it, has remained unchanged. The lacuna of which Stacey speaks existed under the stamp of habitual practice long before Canadian archives had developed methods and means for the regular and orderly transfer of public records to repositories equipped to make them available for research purposes. In other words, the lack of accepted constitutional or legislative provisions governing the disposition of ministerial papers was matched by the absence of archival facilities and administrative capabilities for proper treatment.²⁹ In this atmosphere, clouded by problems arising from the apparently mixed character of ministerial papers, it would indeed have been difficult to arrive at the “proper safeguards” recommended, but not detailed, in the Association’s report.

When questioned about the status of prime ministerial papers during the hearings of the Forsey-McCleave Committee, the Dominion Archivist suggested that so long as a minister’s papers reach the Public Archives of Canada, which holds both public records and private materials, it is of little moment whether the papers are considered public or private, for they would be preserved in either case. Dr. Smith continued:

It does become important, however, if they are disposed of in some way, or if a former prime minister decides that he wants to destroy his records and that he has a right to do so because they are private. . . . The fact is, probably a majority of these are, by their nature, in effect public records, because they are accumulated in the course of carrying out their duties as minister and so on.

Dr. Smith also alluded to the close scrutiny being given the disposition of the papers of elected officials in the United States, from which he felt Canada might derive some guidance; however, he did not feel that the solution would be found entirely in separate procedures for filing the

27 The brief is quoted in C.P. Stacey, “Canadian Archives,” in *Royal Commission Studies: A Selection of Essays Prepared for the Royal Commission on National Development in the Arts, Letters and Sciences* (Ottawa: King’s Printer, 1951), pp. 246-7.

28 *Ibid.*, p. 247.

29 In the American context, this observation is made tellingly in H.G. Jones, “Presidential Libraries: Is There a Case for a National Presidential Library?”, *American Archivist* 38, no. 3 (July 1975): 326; and *idem*, *The Records of a Nation: Their Management, Preservation and Use* (New York: Atheneum, 1969), p. 169.

public and private papers of a minister, because "in practice [it] did not really work as neatly as that."³⁰ Though Committee members had by no means exhausted the interest in the archival aspect of public records policy, Dr. Smith was not given time to respond in more detail to further questions.

At this point, it is worth examining what sort of record is accumulated in a ministerial office. Ministers occupy executive position at the very pinnacle of our system of government. Their offices are the place where decisions are recorded, directives to implement decisions are issued, and where reports on the execution of policies are filed. The public most frequently writes or submits petitions to ministers when addressing the government. No other single office in government quite duplicates the record kept in a ministerial office, and none, it might be said, documents such vital information about how Canadians are governed.³¹ A more detailed picture of the complexities of handling ministerial office records emerges from an examination of certain records procedures which, although now slightly outdated, still can serve as illustration in the federal government.³²

In 1967, the Management Information Branch of Treasury Board produced a revealing "Information Bulletin" on filing systems for ministers' offices clearly stating that "all correspondence and documents received by the minister *from the public* are originally the property of the minister."³³ If the letter or document is handled exclusively within the ministerial office, it remains the property of the minister. If the document, or a copy, is referred to a department or agency of government, it becomes part of the public record in the office or agency files and therefore subject to regulations governing public records. In effect, this system distinguishes between documents handled solely within a ministerial office and those referred to an agency of government. The bulletin recommends that "the minister's files be composed almost exclusively of his incoming and outgoing correspondence," which will be "consolidated into one system of classification and filing."³⁴ This scheme proceeds logically from the

30 *Committee*, Issue no. 61, pp. 22-23.

31 Speaking of the office of governor of an American state, Robert Scott has said: "Thus it is unique . . . the one place where records of decision, direction and execution come together. As such it is the most important recordmaking and recordkeeping office. . . ." "Governor's Records," p. 6. Virtually the same may be said of the collective Canadian executive.

32 A procedure paper on filing systems in ministers' offices is being prepared by the Office of Records Management Services, Public Archives of Canada.

33 Canada, Treasury Board, Management Improvement Branch, "Information Bulletin," 13 December 1967, no. 1967-4 (unpublished), p. 3. Italics added (hereafter cited as "Bulletin").

34 *Ibid.*

assumption that correspondence received by the Minister from the public is originally his property; yet there must be a great many documents filed in a ministerial office that do not originate with private citizens. Obviously, this sort of segregation does not preserve for the public record the whole of a minister's papers accumulated "in the course of his carrying out his duties as minister," as Dr. Smith phrased it, leaving us to reflect upon the problems inherent in the classification and filing of documents handled solely within ministerial offices.

The desired separation of the "public" from the "private" papers of ministers hinges on the possibility of constructing a classification system capable of distinguishing the one from the other. Even if there were legislation requiring the preservation for the public record of all documents created and accumulated in the course of ministerial duties, how ever that might be defined—yet another rather formidable problem—everything still depends upon classification and filing.

The Treasury Board's "Bulletin" further recommends a classification structure for ministers' offices encompassing the following file groupings: PERSONAL—"pertaining to the Minister's personal business"; OFFICE ADMINISTRATION; DEPARTMENT—"relating to department and agencies under jurisdiction of a minister"; CONSTITUENCY—"which relate to the constituency of a Minister and do not fall under subjects related to or referred to other departments or agencies"; PARLIAMENTARY—"dealing with business of the House of Commons, correspondence with the Prime Minister, Privy Council, Senate, Royal Commissions, etc."; FEDERAL/PROVINCIAL MATTERS; PARTY—"dealing with party organization, policies, activities, etc."; ASSOCIATIONS—"which correspond with the minister or with which he is actively engaged"; SUBJECTS OF SPECIAL INTEREST—"that cannot be incorporated within other groups".³⁵

Superficially, the system appears to distinguish between the private activities of ministers (PERSONAL, CONSTITUENCY and PARTY files, perhaps) and their public duties, but the actual implementation of filing would almost certainly obscure the distinguishing features of any hypothetical ministerial split personality. Moreover, questions arise about whole groups of files. For example, do the PARLIAMENTARY files reflect the "public" or "private" person? Do ministers have special obligations to personnel in their offices on whom files will be kept in the OFFICE ADMINISTRATION group? Do ministers have special obligations to maintain the confidentiality of federal-provincial negotiations involving other governments with widely differing public records policies? What do ministers do with a document that contains, for example, information concerning party or constituency affairs *and* departmental

35 *Ibid.*, Appendix A, pp. 1-2.

business? Is correspondence from cabinet colleagues “public” or “private”? It is no wonder that ministers shy away from acknowledging a “public” and a “private” *persona* insofar as their papers are concerned, and no less a wonder, given the prevailing notion of the private nature of their deliberations and the non-existence of guidelines, that they empty their offices on relinquishing ministerial duties.

As we have seen, ministers argue that records of a public nature are filed with the departments and agencies of the government, and Treasury Board advice to them reflects this view. Since it is difficult in practice to separate the “public” from the “private” activities of ministers, perhaps it is even unnecessary to argue that ministerial papers are private property. The public purse has supported the activities and office operation of the minister and, in terms of the preservation of the record, a convincing and attractive position can be maintained that public interest attaches to everything a minister does and therefore also to his record. As John Diefenbaker says of a prime minister, “privacy ends when he accepts the seals of office.”³⁶ Some arguments buttressing the assertion that ministerial papers should be considered as public records will be adduced in the conclusion to this paper in the context of the role archivists may play in proposing solutions to the problem. For the time being, it is enough to suggest that the separation of the “public” from the “private” as urged by the CHA so many years ago is probably a record keeper’s nightmare, and perhaps even a chimaera.

The Treasury Board “Bulletin” also makes an interesting reference to the facilities of the Public Archives of Canada: “Ministers and their registry staff should be made aware that the Dominion Archivist offers security storage for their files after they have gone out of office, or changed portfolios, which makes it unnecessary for ministers to decide hastily what they will retain and what they will destroy.”³⁷

The security storage programme introduced in 1957 had, as of August 1976, accommodated ten party leaders and forty-seven ministers, of whom twelve ministers then were in the cabinet. Fifteen individuals who used security storage subsequently transferred materials to the Archives.³⁸

A “security storage” system undoubtedly meets certain problems encountered in the administration of increasingly bulky accumulations of ministerial papers, especially for ministers changing portfolios. Nevertheless, in some respects it only obscures the essential issues and comes dangerously near to compromising the principles of a public archives’ mandate. When ministers avail themselves of security storage, no legal

36 John G. Diefenbaker, *Those Things We Treasure* (Toronto: Macmillan, 1972), p. 49.

37 “Bulletin,” p. 3.

38 Information in a letter of 23 August 1976 to the author from John Smith, Public Affairs Section, Manuscript Division, Public Archives of Canada.

transfer is involved. Ministers who leave office because of personal or party defeat at the polls or who resign may wish merely to postpone disposing of their papers until it is convenient. In the meantime, if their claim to ownership is accepted, these private citizens are provided storage at public expense for papers they have not donated to the archives. Ministers surely cannot have it both ways: using public services yet still retaining private ownership of their papers—an anomaly not eliminated by the PAC's mandate to hold both public records and private manuscripts. The inducement to the Archives is no doubt found in the contact made with ministers, who may, after all, decide to transfer their papers at some later time. Archivists must judge whether such a practice, with its attendant goodwill while ministerial papers are considered private, is worth the support it undoubtedly gives to the continued recognition of the whole of the record produced in ministerial offices as the private property of ministers.

Furthermore, security storage does nothing to satisfy the legitimate needs of incoming ministers for access to the record of public business conducted from their offices. In his testimony to the Forsey-McCleave Committee, Dr. Smith recognized that a minister who empties his office makes "things very difficult for his successor, who comes into the same portfolio, encounters the same problems and does not have the record because it is locked up."³⁹ Perhaps this difficulty is not aggravated by security storage, but neither is it alleviated. The public has an interest in an efficiently run government, an interest which is not being served by the present disposition of ministerial papers.

Should then archives insist on the legal transfer of ownership of ministerial papers before accepting them? In the present circumstances, while ministerial papers are considered to be private in nature throughout Canada, it would be churlish to ask archives to refuse the reasonable needs of ministers, who themselves are without clear policy or guidelines to follow. Canadian archives regularly offer private donors the option of restricting access to papers for a specified period of time, although it is usually recognized that deposit should entail transfer of ownership. Publicly funded archives are becoming increasingly loath to accept papers without transfer of ownership, as well they should be. By the same token, the signing of an agreement with a donor is hardly the substitute apparently suggested by John Archer (Provincial Archivist of Saskatchewan, 1957-62) for a well-defined policy ensuring the uniform preservation of ministerial papers. In 1955, an amendment to the Saskatchewan Archives Act added a clause allowing the Archives Board to place restrictions on material in its care "by agreement with the donor of private papers,"⁴⁰

39 *Committee*, Issue no. 61, p. 23.

40 Revised Statutes of Saskatchewan, 1974-75, Chapter 399, Section 11.

which “opened the way for deposit of ministerial papers”, thereby broadening the Act “to take in all classes of public records.”⁴¹ Archer perhaps inadvertently betrayed his judgement that ministerial papers ought to be public records, which an agreement with a private donor certainly does not create or affirm.

Nor should the exemplary record subsequently developed in Saskatchewan of persuading ministers to deposit papers be taken as a substitute for public ownership. In 1964, Premier Lloyd made it his own personal policy to support immediate transfer of papers to the Saskatchewan Archives, and urged his ministers to follow suit as they left office. The majority heeded the premier’s advice.⁴² Even so, individual ministers still decide what will be transferred; indeed, they may transfer nothing. The pity is that this statesmanlike gesture was not more closely defined in legislation (perhaps impractical at the eleventh hour of an administration) or executive order (a fine lame duck gesture, to be sure) to set a precedent, as Saskatchewan has in so many areas of public policy, for the rest of Canada to follow.

At least two federal government departments have had to grapple with the question of ministerial papers in an archival context. In arrangements developed in consultation with the Public Archives of Canada for the issuing of tax-credit benefits to donors of private papers, Revenue Canada arrived at a somewhat different view from that apparently propounded by Treasury Board in distinguishing between “public” and “private” categories of papers. In Revenue Canada’s terms, a minister’s public papers which *are not* eligible for tax purposes are those “created and accumulated during a period when the individual held public office and was paid from the public purse.” Private papers which *are* eligible for tax purposes are those created “while the individual was not in public office” or, as an exception, those created while in public office but in the pursuit of “a completely independent activity of national historical significance.”⁴³ This policy may not yet be firm, for individuals who are affected may appeal Revenue Canada’s ruling.⁴⁴

41 John Archer, “The Public Records of Saskatchewan,” *Journal of the Society of Archivists* 2, no. 1 (April 1960): 22.

42 Twelve of fifteen ministers in the Lloyd cabinet, including the premier, transferred papers to the Saskatchewan Archives directly upon leaving office. Some ministers’ files extended back into the previous administration of T.C. Douglas. Upon the defeat of the Ross Thatcher cabinet in 1971, eleven of fifteen ministers, not including the premier, transferred papers to the Archives. Three ministers who did not last to the end had already transferred papers. I am indebted to Allan Turner for this information.

43 Information contained in a letter of C.F. Brennan, Assistant Deputy Minister, Revenue Canada, to R.S. Gordon, Chief, Manuscript Division, Public Archives of Canada, 25 July 1974.

44 Letter from Bernard J. Comiskey, Audit Support Division, Revenue Canada, to R.S. Gordon, 21 June 1976. I am indebted to Mr. Gordon for sending me this letter and his own views on this subject.

A number of issues arise from the consideration of monetary or tax-credit values of papers created and accumulated by figures holding elected office. It appears that if a former minister or other elected official is prevented from obtaining a tax credit, nothing impedes his heirs from so doing. There is, however, likely to be an even more serious consequence than the possible withholding of papers until the death of their creator. Historically significant papers are increasingly acquiring a saleable value on the open market in Canada. Former ministers who are debarred from obtaining tax credit may well decide to sell their papers to the highest bidder. Besides other matters of principle raised by the prospect of former ministers choosing to sell or even donate, for that matter, "public" papers to repositories other than the archives designated by the jurisdiction in which they served, the records of a single administration are likely to be scattered throughout the country. This will create great inconvenience for those wishing to marshal the evidence for a study. Only by identifying ministerial papers as public can each jurisdiction naturally assume the proper responsibility for the care of its records. Biographers might be inconvenienced, but at least they would be assured that a record existed. The possibility of ministerial papers being sold on the open market is a particularly compelling argument against continuing present practices. Ministerial papers should be declared public property and should be deposited in the appropriate archives under orderly procedures. No other solution is satisfactory.

What should be the role of archivists in this question? Should we adopt the view aired by French archivist Robert-Henri Bautier that questions of access and ownership are political by nature, to be solved in the political arena, and therefore are beyond the sphere of archivists' concern?⁴⁵ Do Canadian archivists continue to mute their voices on this question of vital public and archival significance, or do they have something to contribute to the public debate?

One wonders why archivists might doubt that they have something to offer public debate. Are they reluctant because of some overriding need to remain impartial? As we have seen, politicians embroiled in partisan political debate do not always believe that archivists are impartial. Nor do archivists always convince users of archives that they can be entirely impartial. The eminent historian and confirmed friend of Canadian archives, C.P. Stacey, has probed to the heart of the matter:

Nobody, I am sure, will condone for a moment using denial of access to documents for the purpose of protecting a politician or a political party. Nevertheless, as long as archivists work for governments, and governments are composed of politicians, archivists I fear may be occasionally doing just that.⁴⁶

45 Robert-Henri Bautier, "Les Problèmes posés par une libéralisation brutale de l'accès aux documents. Appel à la prudence," *Archivum* 16 (1966): 48-49.

46 C.P. Stacey, "Some Pros and Cons of the Access Problem," *International Journal*

To be sure, Professor Stacey was speaking in the broader context of access to all public records and does not intend to suggest that archivists are responsible for politicians regarding their papers as private property to be disposed of as they wish. But his remarks point to the difficulty archivists face in maintaining professional impartiality. Archivists are far more likely to enhance their credibility and to inspire confidence if they have clearly defined policies to administer, and it should be recognized as part of their duty to urge the promulgation of such policies where they are lacking.

Perhaps archivists fear that they might themselves become drawn into purely political controversy. No one would deny that archivists must be careful when entering public debate, but to refuse to do so altogether presumes a narrow view of archivists' responsibilities. One might well agree with the view of an archivist's role taken by the American archivist, J. Frank Cook, who feels that archivists and historians act as a "conduit between public officials and the public."⁴⁷ If Canadian archivists truly believe that the public is not served well by the present disposition of ministerial papers, and it is difficult to think otherwise, do they not have a responsibility to inform the public of their views? If informed fully of the absence of adequate policies governing ministerial papers, would the public remain as unconvinced or unconcerned? Or would it find the present relationship between archivists and ministers to be, in Cook's words, "a rather cozy arrangement for a democracy"?⁴⁸

Of course, a precondition to entering the public forum is that Canadian archivists must examine more thoroughly the issues which clearly extend far beyond the scope of this paper. The ground ahead is becoming firmer as time passes. It was suggested above that public attitudes concerning access to government information have undergone marked change in recent years. The adoption of the thirty-year rule and provisions for even earlier access to certain classes of public records at the federal level have already contributed much to a more open society. Public pressure for greater access to government information can be analysed as a response to the impact of greater state intervention in our lives.⁴⁹ Old attitudes and practices are crumbling under weight of change. The devising of policies

20, no. 1 (Winter 1964-65): 49; Jones, *Records of a Nation*, p. 170; D.C. Watt, "Contemporary History: Problems and Perspectives," *Journal of the Society of Archivists* 3, no. 10 (October 1969): 520-1.

47 Cook, "Private Papers," p. 319.

48 *Ibid.*

49 See the testimony of Professor Maxwell Cohen in *Committee*, Issue no. 50, pp. 7-8; Eric Hehner, "The Public Servant and the Legalistic Mentality," *Canadian Public Administration* 13, no. 4 (Winter 1970): 325. Hehner argues that increasing complexity of government has thrust both the cabinet and public servants into a far greater interventionist role in society featuring what he calls "delegation of discretion."

ensuring the preservation of ministerial papers may be regarded as yet another step in reassuring the public of the democratic foundation of our government rather than merely providing an aid to historical research, which, of course, it will be, for historians will translate the benefits of the policy into public understanding.

It may be argued that the preservation of ministerial papers as part of the public record need not conflict with the requirements of confidentiality. "There is," Professor Maxwell Cohen, Macdonald Professor of Law at McGill University, has written, "no escape from confidentiality in the exercise of power. It is the degree, the timing and the correlative disclosures that mark the difference between a free political order where debate determines policy, and a silent tyranny where secrecy stands as a high barrier to any public share in, or surveillance over, decisions and their making."⁵⁰ Releasing ministerial papers to public scrutiny after thirty years, or whatever period is appropriate, can hardly be construed as a breach of the confidentiality necessary for the effective conduct of current business. The machinery of American government did not seize when Roosevelt's papers were made available for research, nor was Canadian government arrested when Mackenzie King's papers were opened, though private ownership applied in both cases.

Archivists should not be deterred by claims that ministerial papers are different from other public records because they are politically charged. Gordon Robertson, who defended confidentiality in government with considerable acumen, has also observed that "we seem to have recognized, whether by rational analysis or by intuition, that politics is the governing process of a free society and any solution that rules out politics rules out freedom."⁵¹ Political parties are an integral part of our system of government; we must be able to see and to reconstruct how politics have operated. To withhold the evidence of our highest public offices, steeped in politics though that record may be, from the documentary evidence bequeathed to posterity will rob Canadians of an understanding of the vital facet of our democratic system of government. We will be unable to understand how we govern ourselves. Archivists should make known far and wide what is at stake.

⁵⁰ *Committee*, Issue no. 50, Appendix, p. 32.

⁵¹ R.G. Robertson, "The Canadian Parliament and Cabinet in the Face of Modern Demands," *Canadian Public Administration* 11, no. 3 (Fall 1968): 273.

Résumé

L'auteur aborde le problème de la disposition des documents créés par des hommes publics durant leur mandat. Après avoir discuté brièvement de la dimension politique de la question au moyen d'exemples canadiens, il élabore sur les aspects plus proprement constitutionnel, légal, administratif et archivistique. Il conclut que les pratiques canadiennes en cette matière n'assurent aucunement la préservation de ce qu'il considère comme un type très important d'archives administratives gouvernementales.