From the Editor

ARCHIVES AND THE LAW

The relationship of archivists and "the law" is intricate, varied, and largely unexplored. The law in its many manifestations — constitutional framework, acts and codes, common law precedents, judicial process and interpretation, enforcement — is an extremely important and complex field of study, and one which is having a growing impact on archivists, their institutions, and their records — to say nothing of the collection, organization, and use by archivists and researchers of the voluminous legal and judicial records created by those involved in "the law" in its broadest aspects. For these reasons, it seems appropriate to devote a special thematic issue of *Archivaria* to "Archives and the Law."

The articles in this issue break down into four sections, bookended by related although somewhat different pieces by Hugh Taylor and Ray Grover. Hugh Taylor begins by reminding us that the relationship between what might now be called lawyers and archivists was traditionally a close one until the advent of "historical" archives with the French Revolution. Before that and on back to the Middle Ages, the law officers of the Crown and other creators of the legal and state documents underpinning the national administration on the one hand and the official custodians of such records on the other had a close, organic relationship. There was no break between past and present, old and new, historical and active. The keepers of the great rolls — sometimes centuries old — were an integral part of the administrative process, not sidetracked onto an "historical shunt" as most modern archivists, in Taylor's eyes, seem to be. He argues that archivists must reclaim their rightful heritage in the administrative and legal structures of the state.

The first seven articles following Hugh Taylor's introductory essay deal with the impact of particular laws on archives and archivists. Jerry O'Brien surveys the Canadian scene, comparing and contrasting various types of archival legislation, ordinances, and bylaws — the legal mechanisms which archivists themselves have erected to legitimize their own work. Robert Hayward analyzes the federal *Access to Information* and *Privacy Acts*, paying particular attention to the profound changes this new legislation will have in the relationship of archivists with both creators of records and their users. The ATIP law is also a useful illustration of the benefits of effective lobbying by archivists and researchers with legislators to get desirable changes made in draft legislation. Following some of O'Brien's leads, Kathy Hall investigates the legal underpinnings of archival acquisition activity in Canada and not surprisingly finds much of it to be wanting, although she sensibly warns

(especially within the context of this volume!) that new legislation is not the great panacea that it is sometimes made out to be. As the former Archivist of the Northwest Territories and drafter of the NWT *Archives Ordinance*, David Leonard is well equipped to pen a case study of the legal foundations of a Canadian archives. The various regulations of Revenue Canada have a significant impact on archives; the tax credit system which seemed like a godsend a few years ago in stimulating archival acquisitions is fast becoming, Dave Walden argues, a burden as much as a blessing. And finally copyright, the perennial hornet's nest for archivists. Jim Keon details from the insider's perspective the ongoing revision of Canada's ancient and nearly unworkable copyright legislation, indicating again the happy results for archivists of their effective lobbying to shape legislation to meet archival priorities. By contrast, the Americans have a new copyright law and the results, so Karyl Winn informs us, are not entirely to archivists' liking; she points out explicitly several pitfalls for Canadians to avoid. Legislation for archives or in other spheres affecting archives (taxation, copyright, freedom of information) is obviously one area where the law and archives intersect.

The next four articles deal with the collection of legal records by archives — Louis Knafla and Cathy Shepard look at court records from the historian's and archivist's perspectives; Jim Whalen investigates problems concerning legal records created by governments; and Doug Whyte writes on the acquisition of lawyers' private papers. Legal records, especially court records, are at the centre of social relationships, of where the citizen interacts with the state. So much human activity has a legal dimension — from holding property to regulating commerce, from interpreting constitutional dictums to controlling prostitution, from family relations (divorce, adoption, estates) to public calumny. Such activities generate legal records which tell us what a society at any given time assessed to be "normal" and what it thought to be "deviant," of what should be rewarded and what should be punished. Few better archival sources exist to reveal the *mores* and *mentalités* of a people. As Knafla in particular shows, the scope for not only historical, but also sociological, anthropological, psychological, legal, biographical, genealogical, and many other fields of research is indeed great among such records. Yet dealing with them from an archival perspective is not easy; their bulk, their difficulty to sample properly, the intricacies of their legal language, their requirements for extensive indexing, and their special problems of solicitor-client privilege render legal records a thorny challenge for archivists.

The next three articles turn the whole legal question around and show how archival records themselves may be used as evidence before courts of law or other legal bodies. In a piece of detailed legal research and law reform advocacy, Ken Chasse analyzes how the requirements of various evidence acts and court precedents concerning the admissibility — or otherwise — of documents as evidence depends to a great degree on the careful control by records managers or archivists of the creation of records and the integrity of their storage and use. While he focuses primarily on computer-generated and microfilm records, the implications of his argument extend to all media. Mark Hopkins argues similarly that the judicial implications of records keeping are grave indeed; significant changes are needed if records are to have any weight in court and their custodians any status as expert witnesses. Rod Young looks at the same problem in his case study of the evidentiary and probative value of trade union records, and clearly draws out the implications such legal realities have for

records management and archival practices. Chasse, Hopkins, and Young warn archivists, in short, that they can no more ignore the legal implications of the records in their care than they can the conservation, arrangement, description, or research aspects of records keeping.

The articles by Robin Skelton and Kathy Garay, with the commentary by Jean Tener, focus on literary archives, on problems of ethics (which are but moral "law") and copyright, on provenance *versus* authors' rights to make a buck. They look in varying degrees at legal issues and at problems which no Solon could possibly solve. Whether it is copying collections for research use or dividing up an author's archives for the highest bidders, they remind us that common sense is often one of the most useful of archival laws.

Ray Grover provides the other bookend of the article section of this thematic issue of *Archivaria*. He shows how the New Zealand National Archives had its roots in the legal affairs of the state, of how the first treaties with the Maori and the documents flowing out of their legal administration formed the historical context out of which a national archives eventually evolved. As with Leonard's Northwest Territories Archives, the New Zealand National Archives were not born easily or without legal tribulations.

These articles should instruct, or at least remind, readers that archives and archivists interact often and intricately with "the law." The law establishes the very mandates under which for better or worse archives operate; it creates all kinds of pressures (access, copyright, etc.) which impinge on archival activity; it generates records which are among the most essential and most difficult for archivists to collect and describe; and it creates legal and judicial criteria for records management and archival records control which archivists can only shirk at the expense of their professionalism.

Although one would not want to push the analogy too far, there are some recent parallels between the legal and archival professions in Canada. Unlike chemists or mathematicians or history professors, archivists and lawyers — like teachers and dentists — are a "practical" profession with a scholarly fringe. Despite a presently healthy *Archivaria* and several legal journals, despite the new graduate programme of archival studies at UBC and various Faculties of Law in Canada, most archivists and most lawyers are mainly concerned with getting on with the job, rather than reflecting, researching, and writing about it. This was a central criticism of the legal profession in *Law and Learning*, the report of a consultative group sponsored by the Social Science and Humanities Research Council, which was issued in 1983 and is reviewed elsewhere in this issue. (The lawyers also had their Wilson Report!) Based on two years of study by a group of leading legal experts headed by Harry Arthurs of the Osgoode Hall Law School in Toronto, *Law and Learning* argued that lawyers are trained too well for practical day-to-day tasks such as drafting mortgages and wills and yet hardly educated at all to deal with such complex needs as legal reform or research into the interrelations of society and the law. "It is a question," one contributor wrote, "of moving to a broader analysis of the law in society." Law schools too often "ignore or denigrate" the scholarly approach to the law; the academic is seen as antithetical to the practical. Instead of studying purely from

received doctrine and actual precedent, there is a pressing need for lawyers to explore the whole question of legality within a broader social perspective if the law as a profession is to remain dynamic.[1]

All this has a very familiar ring to archivists as a sister "practical" profession. Indeed, such a central criticism was levelled at Canadian archivy by George Bolotenko in *Archivaria* 16, and it is repeated even more forcefully in his Counterpoint in this issue as he responds to his critics. The debate over scholarly *versus* practical, over research *versus* mastery of technique, has rattled through the Association of Canadian Archivists for nearly a decade. On such central issues as the proper scope and thematic approach of the annual conference (an expansive part of the Learned Societies or an inward-looking social gathering), the content and focus of *Archivaria* (a scholary research journal or a practical "how-to" magazine — a controversy now thankfully quiet), or the need for and nature of archival education *versus* archival training (both loaded keywords), two almost-armed camps of archivists have lined up across the very same divide now facing lawyers.

Perhaps a conciliation may follow the lines being worked out by the legal profession. *Obviously* lawyers need to know how to make wills and mortgages and how to function in court; dentists need to know how to freeze gums and perform root canals; and archivists need to master computer skills, records management techniques, conservation procedures, and methods of sorting, arranging, and indexing. But if lawyers, dentists, and archivists left it at that, then all three professions would be sterile, spinning their wheels but moving nowhere. As *Law and Learning* makes clear, lawyers must through research and scholarship move their profession forward to change the law to be more compatible with and part of dynamic social reality. (The work of the Osgoode Society described by Peter Oliver in this issue is a promising start.) Dentists similarly must always be searching for new ways to prevent or cure mouth and tooth diseases; otherwise they are false to their oath and ethics as doctors and their patients will suffer accordingly. And archivists must continually probe through scholarly research the nature of the records in their care, the evolution of records over time, the historical relationship of administrative bodies and functions to the creation of records (a great gap in our knowledge Hugh Taylor rightly bemoans), the internal structure of present and past records-keeping systems, the impact now and in history of social change, technological innovation, and new ideologies on recorded information — even McLuhanesque questions of the philosophical nature of knowledge and media, for what a society records (or doesn't record) in its archives is an acute barometer of social attitudes and values, and who better to study such than the archivist?

Not all or even most archivists, dentists, or lawyers will be actively engaged in these scholarly pursuits — the day-to-day work must go on. But *all* archivists, like all dentists or lawyers, must strongly support those who are so engaged: encourage research in our institutions and by our employees, maintain vehicles for its expression in journals, conferences, and seminars, read carefully the published results, and integrate the findings, after proper debate and reflection, into our professional practice. It is the only sound prescription for professional health and dynamism, for maintaining the long-term social relevance of our work.

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1 The above comments are based on "A Push For Scholars," *Saturday Night*, 21 November 1983, p. 58 ff.

As the articles which follow on "Archives and the Law" by archivists, lawyers, librarians, historians, policy analysts, and others make clear, many useful steps down this road of scholarly understanding have been made. Let the journey never end.

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