

Archival Solitudes: The Impact on Appraisal and Acquisition of Legislative Concepts of Records and Archives

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Archival legislation, as policy sanctioned by an elected body, establishes a framework within which archival institutions carry out the functions of appraisal and selection, acquisition, arrangement and description, and making archival materials accessible. The soundness of its legislative framework will be an important determinant of the success which an archival institution has in carrying out these functions. Within the legislative framework, definitions of key terms such as "records" and "archives" create boundaries for the application of the law and give meaning to its provisions. They therefore have a profound effect on an archives' ability to carry out its functions, particularly appraisal and acquisition.

This article will examine how the terms "records" and "archives" are defined in current provincial and territorial legislative instruments, the historical development of the legislative definitions of these terms, and the potentially negative effects which current definitions might have on the appraisal and acquisition of archival materials. It will also suggest directions which archivists might take in order to avoid the possible negative consequences of current legislative definitions of records and archives. No new theory or methodology of appraisal will be enunciated; rather, the focus will be on the means by which the legislative framework for appraisal and acquisition can be strengthened.

The literary expression "two solitudes" is familiar to most Canadians. It has become a metaphor for the differences between Québec and the rest of Canada. The image of two solitudes is also an appropriate metaphor for the conceptual separation in most Canadian legislation between records and archives. Ironically, the conceptual solitude of the meaning of records and archives exists in all Canadian jurisdictions but one: Québec.

Looking first at definitions of the term "archives" in Canadian provincial and territorial archival legislation, one is immediately struck by the fact that fewer than half the acts provide definitions of the term. Only in Manitoba, New Brunswick, the Northwest Territories, Québec and Newfoundland are definitions found. Appraisal and acquisition become more difficult when one is not sure what is supposed to be appraised and acquired. It should not be assumed that the meaning of the term is so obvious that it does not need to be defined. In most glossaries of archival terminology, "archives" has

three distinct meanings: the institution, the building and the material. Definitions of archives as documentary material also vary, as will be shown later. Although the term “archives” is often not defined, it is used liberally throughout many legislative texts. Without a clear definition of statutory language, provisions of statutes become difficult to interpret. The absence of clear definitions of the term “archives” in provincial and territorial legislation points to and reflects a serious flaw in much of North American archival theory and practice: the conceptual solitude that isolates records and archives.

Also indicative of this conceptual solitude is the fact that definitions of archives in the legislation of the provinces and territories invariably appear well within the body of the text, among the provisions concerning custody of records by the archival repository, as opposed to appearing in introductory provisions defining key terminology. The explanation for the conceptual link between archives and custody lies in the fact that in all jurisdictions save Québec, the term “archives,” whether explicitly defined or defined by implication, refers to those records or documents in the care and custody of the provincial or territorial archivist or archives. It is usually a definition which describes archives as being only inactive records or documents of historical importance, preserved in archival institutions, as, for example, in the Manitoba *Legislative Library Act*, in which archives are identified as “all documents placed in the custody of the archives, and all public records transferred to the [archives].”¹ Such a definition of archives, which takes into account their cultural and historical qualities but not their functional nature, tends to draw a sharp distinction between active and semi-active records on one hand, and inactive records — archives — on the other. If one accepts the premise that at least some archival values are inherent in records at the time of their creation, then current legislative definitions result in an unnatural conceptual division. Records, which may in fact be archives in the sense that they have enduring value, but which are stored in their creators’ offices, are differentiated from archives, which consist of records of enduring value stored at another physical location — the archival repository. Even if one believes that archival appraisal is a process of value creation and not simply one of identifying values that already exist in records, one must still accept that the archivist can confer value on records not yet transferred to the archives.² Even Schellenberg recognized as much when he wrote that archives are “those records of any public or private institution which are adjudged worthy of permanent preservation for reference and research purposes and which have been deposited or have been selected for deposit in an archival institution.”³

In order to understand completely the implications for appraisal and acquisition of this conceptual schism between legislative meanings of “records” and “archives,” as well as to avoid the mistaken belief that the problem is merely one of semantics, it is necessary first to understand that legislation is a form of written communication and — as such — reflects the society and culture which brought it into existence. As one jurist expressed it:

As with human language, legal discourse is only a tool to express the thought of the speaker, in order that the listener may adequately comprehend the contents of his message. Since law is the result of the conscious and premeditated activity of its author, he [sic] will be deemed to have carefully formulated in his [sic] own mind the exact rule with reflection and premeditation, the words that best serve to express his [sic] ideas and intention. Thus, in construing an enactment we must first look at its wording.⁴

Keeping in mind the fact that legislation is a form of communication, it is also important to understand that archival legislation has seldom been the conscious product of archivists communicating archival theory; rather, it has been the premeditated product of politicians and bureaucrats expressing prevailing social attitudes and cultural values, and playing politics.

The earliest archives acts, from which the meaning of “archives” in most current Canadian archival legislation derives, evolved in the context of the late-nineteenth and early-twentieth centuries, when archives emerged in Canada as repositories for the preservation of material illustrating national and regional development. The desire to preserve such material in special repositories, or “arsenals of history,” was bound up with a rise in nationalism and historical consciousness. At the time, the focus was not so much on the material as on the place where it was kept. Hence, the term “archives” came to describe repositories of records and documents of historical interest, no reference being made to the precise nature or origins of these records and documents. Legislators did not see separate definitions as necessary because the acts of appraisal and acquisition were indistinguishable; the value of the material bound up with its physical placement in the archival repository. This accounts for the absence of a separate definition in so much of today’s archival legislation. In striving to legitimize archival repositories already in existence, early archives acts concentrated on legally establishing an archives, appointing an archivist and giving the archives or archivist a mandate. Naturally, the focus of these enactments, like the focus of the definition of the term “archives” itself, was institutional. The institutional focus of archival legislation and of definitions of archives, such as they are, remains evident in most current Canadian archival legislation.

As we approach the twenty-first century, the moment of appraisal and the moment of acquisition have become clearly distinct. The role of archivists in appraisal and acquisition is much more proactive — must be much more proactive — than when the ideas that form the basis of current definitions of archives came into vogue. In the late-nineteenth and early-twentieth centuries, the archivist could afford to play a more passive role in appraisal and acquisition, in large part because the media on which valuable information was recorded was more stable, and because — at that time — the act of appraisal was synonymous with the act of acquisition, or physically placing the records in an archival repository. The archivist passively awaited the transfer of records which no longer had any use to the creating agency. The *Ontario Archives Act* of 1923, while providing that no records could be destroyed without the approval of the archivist, still did not provide for a formal means of ensuring that records would be regularly transferred from government departments, nor for a systematic mechanism of identifying permanently valuable records prior to transfer.⁵ At the 1944 meeting of the Canadian Historical Association’s Archives Committee, W.K. Lamb, then Provincial Librarian and Archivist, said of the 1936 British Columbia *Document Disposal Act* that, as a result of the legislation, the archives “cannot be regarded at present as a full-fledged Public Records Office, as there are no regulations in effect requiring the government departments to forward their non-current files.”⁶ The role of the archivist in a formal process regulating the destruction of records of no enduring value, and the selection of those with lasting value, was legally established in the 1945 Saskatchewan *Archives Act*. The subsequent establishment — in 1951 — of a Public Documents Committee, by means of an amendment to Saskatchewan’s archival legislation, reflected the trend towards making appraisal decisions sooner after the creation of the records than ever before.⁷ As

records in government agencies continued to grow in both number and complexity, the legislation began to provide for planned programmes for the management of these records. Thus, in the Alberta *Heritage Act* of 1973, the Public Records Committee, on which the Provincial Archivist served, had a mandate to oversee the management of active and semi-active government records.⁸ Likewise, in many other jurisdictions, archivists now came to have a stake in the management of active and semi-active records, in addition to managing those records which had been transferred to archival repositories.

Archivists have found it increasingly necessary to develop closer ties to the creators of archival material, in part due to the problem of appraising and acquiring electronic records and in part due to the sheer volume and complexity of the records being generated. Many archivists have come to believe that playing the passive part of "keepers of the record" is no longer an effective strategy to ensure the preservation of records of enduring value. In response to the changing context of archival work, archivist Jay Atherton suggested, in his article "From Life Cycle to Continuum," that archivists adopt a more unified model of the life cycle of records, based on four rather than eight stages. Atherton identifies the four stages as being creation, classification, scheduling, and maintenance and use. He sees all four stages as "interrelated, forming a continuum in which both records managers and archivists are involved, to varying degrees, in the ongoing management of recorded information."⁹ The current information environment has also led the National Archives, as well as many other Canadian archives, to implement an acquisition strategy which involves the identification of records of archival value at the time of records creation.¹⁰

Although legislative provisions in some jurisdictions reflect the fact that the function of records appraisal now takes place earlier in the life cycle and that the archivist is an active participant, legislative definitions of archives still reflect earlier practices and attitudes. Nevertheless, other provisions of archival legislation in many jurisdictions establish the archives as an active agent in the care and management of active and semi-active records, and in three jurisdictions give the archives direct authority over the records management programme. However, definitions of archives, in an almost schizophrenic manner, still have an institutional focus. The emphasis in these definitions on physical placement sends the message that archival institutions are concerned solely with the preservation of inactive records already transferred to their custody. Such definitions, whether explicit or implicit, are almost anti-appraisal in nature. By separating active records on one hand and inactive records on the other into two solitudes, legislative definitions of archives conceptually sever the vital link between archival records and their administrative origins at a time when archivists' ability to be effective in appraising and acquiring archival material depends on closer ties between the two.

The fundamental problem, then, with current legislative definitions of archives is that they do not define the nature and function of archives but instead define archives in terms of their physical placement. An example of a functional definition of archives is the one provided by Michel Duchéin in his 1983 article in *Archivaria*, largely based on an early definition of fonds d'archives by the French archivist Natalis de Wailly. Duchéin defines archives as "the whole of the documents of any nature that every administrative body, every physical or corporate body, automatically and organically collects by reason of its function or of its activity and which are kept for reference."¹¹ Such functional definitions have the advantage of withstanding the passage of time, since the nature and function of archives remain constant. By contrast, however, definitions of archives in

Canadian archival legislation convey outdated attitudes about archives dating from the late nineteenth and early twentieth centuries. Such definitions can work at cross-purposes with the archivist who is trying to carry out the functions of appraisal and acquisition.

Ironically, North American archivists adopted the principle of provenance, which is contingent upon Natalis de Wailly's definition of the archival fonds in the early 1900s, and later incorporated it into North American archival theory in the form of the record or manuscript group. It has become the archivist's working definition of an archival fonds, as, for example, in the *Rules for Archival Description (RAD)*. Nevertheless, it is not the definition which forms the basis for those definitions of the term "archives" in legislation governing archival work in most of Canada.

A case involving Manitoba's archival legislation serves to illustrate why archivists should be concerned about the restrictive impact of current legislative definitions of archives. The case involved an attempt by Canadian Newspapers Company Limited, the owner of the *Winnipeg Free Press*, to obtain copies of offers of compensation to landowners whose land was being expropriated for redevelopment by the provincial government. The lawyer for Canadian Newspapers Company Limited argued that the offers of compensation should be made publicly accessible because, under the Manitoba *Legislative Library Act*, they qualified as public records. Initially, a Queen's Bench judge decided in favour of granting access; however, the Court of Appeal later reversed this decision. The Chief Justice did not dispute the fact that the documents in question were public records, but based his ruling to deny access on the scope of the Act. He argued that the statute was "nothing more than an Archivist's Act," and that it had no application to current records because the archives and public records of the province were defined in the Act as consisting of "all documents placed in the custody of the archives, and all public records transferred to the [archives]."¹² The Chief Justice's decision would not have been so very disturbing if he had argued that the Act does not provide for access to information and protection of privacy, which it clearly does not. However, the Chief Justice made his decision despite the fact that the legislation explicitly provides for the care and management of active records. Obviously, therefore, current legislative definitions of archives have the potential to cause more than just conceptual difficulties as a result of their tendency to isolate archives from the corporate mainstream.

While the conceptual solitude of records and archives engendered by current legislative definitions of the term "archives" is potentially detrimental to the appraisal and acquisition of archival materials, archives and records are essentially different. They are not made thus, however, by temporal or spatial considerations, by reposing in different physical locations or by being the product of different eras; they differ as to nature and function. It is these differences which legislative definitions of the terms should reflect.

Like current definitions of the term "archives," legislative definitions of the term "records" are not functional. Instead of defining a record in terms of its essential nature as, for example, the expression of ideas in a form which is both objectified (documentary) and syntactic (governed by rules of arrangement), and which constitutes evidence of an official transaction, as Luciana Duranti does in her series on diplomatics in *Archivaria*, current definitions elucidate the term by cataloguing the types of media which may constitute record material.¹³ Thus, one finds that Prince Edward Island's

legislative definition of the term "records" includes "magnetic tapes, discs, microforms, and all other documents and machine-readable records."¹⁴

Looking back, one finds that early common law definitions of the term "record" were functional in nature because they defined records as official memorials of transactions documenting rights and privileges of citizens. After World War I, however, there developed a need to dispose of accumulations of records created by a burgeoning government bureaucracy. The term "record" as defined in legislation, therefore, was altered to permit the disposal of certain types of documents. One may assume that it was in order to ensure that government officials knew precisely which records were subject to the provisions of the statute that legislators enumerated the various types of records subject to these early acts. Such descriptive definitions of records were, of course, in constant need of revision in order to accommodate new media of material. After World War II, the definitions came to be so encompassing, and the amount of material to be scheduled for disposal so great, that definitions had to be narrowed by excluding certain classes of material from the formal disposition process, as in the 1945 Saskatchewan *Archives Act*.¹⁵

Current legislative definitions of records also have a potentially negative affect on appraisal and acquisition. Definitions of records add to the confusion which exists around the relationship between records and archives. They do not address the precise function and nature of a record, but focus almost exclusively on physical form. Consequently, they are always in need of revision as new media emerge. When not revised, moreover, such definitions have the potential to throw into question an archives' right to acquire records in a particular form. Finally, there is the problem of definitions which focus on media in an environment which sees information or evidence of transactions becoming increasingly independent of any particular documentary form, largely due to computerization. Given solely media-based definitions of the term "record," it is possible to destroy the information on a diskette without contravening legislative provisions so long as the archives receives the physical carrier — in this case a blank diskette lacking its valuable information content.

A 1988 Supreme Court of Canada decision shows that such developments are not beyond the realm of the possible. In *Regina v. Stewart*, a union representative attempting to organize a hotel work-force approached one of the hotel security guards and offered him two dollars for the name, address and telephone number of each hotel employee. The union representative suggested to the security guard that the latter copy information from the hotel's personnel records by hand or by using a photocopier, so as not to remove or affect the original documents. The union representative was later charged with counselling to commit theft and fraud of information. In this case, however, the Supreme Court of Canada ruled that the conduct of the accused did not constitute theft or fraud because the information concerned was neither animate nor inanimate, nor considered property under the provisions of the Criminal Code. If, as is usually the case, archivists' primary responsibility is for the preservation of the informational content of records, then current Canadian legislation provides little protection for inactive records of enduring value.¹⁶

It must be qualified, however, that definitions which would exclude form, and focus entirely on function, may have consequences which at worst would be detrimental to appraisal and acquisition while at best would simply be illogical. Archivists must accept

the fact that only recorded information can be appraised and acquired, or face the prospect of managing information which exists nowhere but in someone's mind. Definitions which describe function without reference to form conjure up the image of an archives filled with row upon row of mobile shelving units stacked with little shrunken heads.

Form versus function is more a question of balance, or of where to place the greater emphasis. Physical form must be part of any definition of the term "record" but need not reduce such definitions to little more than litanies of general or specific material designations. A taxonomy of documentary forms is far too inflexible for legislation and is best left for inclusion in a policy or procedural manual. Legislative definitions need only acknowledge that records consist of information which is objectified or documented. In traditional functional definitions of archives, however, they consist of collectivities of records; thus, definitions of archives can remain purely functional without any reference to physical form.

There is a third element which must be factored into the definition-of-records equation and which is what Luciana Duranti refers to as "intellectual form," or internal structure. She states, "It is impossible to understand the message fully without understanding the makeup and articulation [by] which the author chose to express it."¹⁷ An illustration of this point is found in the relational database. Relational Database Management Systems have hierarchical file structures in which the relationship among data elements found in tables gives meaning to those elements. To destroy such relationships is to obliterate all, or at least part, of the meaning of the data. Thus, one finds in the diplomatic definition of documents or records a reference to syntax or rules of arrangement.¹⁸

As alluded to earlier, legislative definitions of archives and records in Québec differ from those in other Canadian jurisdictions. What sets Québec apart is that its legislative definitions of the terms describe the nature of archives and records. In a set of provisions at the beginning of the Québec *Archives Act*, archives are defined "as the body of documents of all kinds, regardless of date, created or received by a person or body in meeting requirements or carrying on activities, preserved for their general information value."¹⁹ This definition is consistent with the theoretical definition proposed by Michel Duchéin and commonly used by North American and European archivists alike to explain the archival fonds. It has the advantage of encompassing documents at all stages of the life cycle, regardless of physical form or location. In so doing, it does not deny the functional link that exists between records in an archival repository and the administrative origins of those records, as well as that between the archival repository and its sponsoring agency. Since archives, according to the definition provided in the Québec *Archives Act*, are not necessarily inactive records or situated in an archival repository, Québec's archival statute is less likely to be narrowly interpreted as legislation concerned solely with the custody and management of non-current records, as was the case with the Manitoba *Legislative Library Act*, or to marginalize the archives relative to its sponsoring agency.

The definition of a document provided in the Québec *Archives Act* is also exemplary. A document is defined as "any medium of information, including the data on it, legible directly or by machine."²⁰ Although this definition makes reference to the fact that information is conveyed on a medium, it is not exclusively a media-based definition. As it does not contain a list enumerating documentary forms, the Act will not require revision as new documentary forms emerge. Also, by referring to the fact that a document

includes the medium and the data recorded on it, the Act avoids the legislative loophole of media-based definitions. Its clarity, coupled with the equal clarity of the definition of archives, leaves no question unanswered as to the relationship between these two concepts.

How such definitions came to be included in the Act is as instructive as the actual definitions of archives and records found in the Québec legislation. One might assume that these definitions reflect Québec's civil law system, which is not bound by the same traditions as English common law. However, a review of the historical development of archival legislation in the province of Québec rules out its legal system as a contributing factor. Indeed, an early draft of the present Québec *Archives Act* included a definition of archives which hardly differs from those found in the rest of Canada. The draft bill, released by the provincial government in March 1983, defined archives as "les documents inactifs présentant un intérêt historique, reçus ou produits par un organisme public dans l'exercice de ses activités."²¹ It was the Québec archival community which lobbied for changing the definition. Several prominent Québec archivists made presentations to the Cultural Affairs Permanent Commission in May 1983. By criticizing the original bill's limited vision of archives, several Québec archivists helped directly to bring about the adoption of a broader definition.²²

At this point, it might be useful to recapitulate part of the quote given earlier regarding legislation as a form of written communication:

Since law is the result of the conscious and premeditated activity of its author, he will be deemed ... to have carefully formulated in his own mind the exact rule with reflection and premeditation, the words that best serve to express his ideas and intention.²³

Archivists need to ensure that it is their "conscious and premeditated" ideas about archives and records, based on current archival theory, which are expressed in the legislation through definition of key terms, not the ideas of late-nineteenth- or early-twentieth-century politicians and bureaucrats, or even of today's politicians and bureaucrats. This is not to say that political realities will not lead to revisions in the legislation. Undeniably, the drafting of legislation takes place in a political and social context in which differing interests collide and negotiations must occur. However, the Québec example shows that it is possible to introduce archival theory into archival legislation despite, or perhaps even with, the assistance of politicians. Until archivists take responsibility for ensuring that legislative provisions are based on archival theory, the legislation will continue to have a subversive effect on appraisal and acquisition, as well as on other archival functions. Those who have studied forms of discrimination will know that discrimination is often a structural problem built into a social system. Similarly, current legislative definitions of archives and records present a structural problem for archivists which they alone can solve by becoming actively engaged in the legislative process, in order to change the framework within which they must operate. Only then will archivists succeed in breaking down the walls of archival solitude.

Notes

- * An earlier version of this paper was presented at the 1991 Annual Conference of the Association of Canadian Archivists, Banff, Alberta, 25 May 1991. The author wishes to thank those who attended the session at which the paper was presented for their insightful comments and questions.
- 1 Manitoba, *Legislative Library Act*, Revised Statutes of Manitoba, 1970, c. L120.
 - 2 Brien Brothman, "Orders of Value: Probing the Theoretical Terms of Archival Practice," *Archivaria* 32 (Summer 1991), p. 81.
 - 3 Theodore R. Schellenberg, *Modern Archives* (Chicago, 1956), p. 16.
 - 4 F. GénY, *Méthode d'interprétation et source en droit privé positif, Volume I* (Paris, 1954), quoted in Pierre A. Coté, *The Interpretation of Legislation in Canada* (Cowansville, Québec, 1984), p. 194.
 - 5 Ontario *Archives Act*, Revised Statutes of Ontario, 1980, c. 28.
 - 6 Canadian Historical Association Archives Committee, "The Discussion of the Problem of Public and Historical Records in Canada," (*Report of the Annual Meeting, 1-2 June 1944*), p. 41.
 - 7 Saskatchewan, *Archives Act*, Statutes of Saskatchewan, 1945, c. 113; Saskatchewan, *An Act to Amend the Archives Act*, Statutes of Saskatchewan, 1951, c. 101.
 - 8 Alberta, *Heritage Act*, Statutes of Alberta, 1973, c. 5.
 - 9 Jay Atherton, "From Life Cycle to Continuum: Some Thoughts on the Records Management-Archives Relationship," *Archivaria* 21 (Winter 1985-86), p. 48.
 - 10 Eldon Frost, "New Strategy for Acquiring Government Archival Records," *The Archivist* (November-December 1991), pp. 4-5.
 - 11 Michel Duchéin, "Theoretical Principles and Practical Problems of *Respect des fonds* in Archival Science," *Archivaria* 16 (Summer 1983), p. 67.
 - 12 *Canadian Newspapers Ltd. v. Government of Manitoba* [Queen's Bench], *Western Weekly Review* 2 (1986), p. 393; *Canadian Newspapers Ltd. v. Government of Manitoba* [Court of Appeal], *Western Weekly Review* 2 (1986), p. 673; Manitoba, *Legislative Library Act*, Revised Statutes of Manitoba, 1970, c. L120.
 - 13 Luciana Duranti, "Diplomatics: New Uses for an Old Science," *Archivaria* 28 (Summer 1989), p. 15; *Idem*, "Diplomatics: New Uses for an Old Science — Part II," *Archivaria* 29 (Winter 1989-90), p. 9.
 - 14 Prince Edward Island, *Archives Act*, Prince Edward Island Statutes, 1975, c. 64.
 - 15 Saskatchewan, *Archives Act*, Statutes of Saskatchewan, 1945, c. 113.
 - 16 *R. v. Stewart*, CCH *Dominion Report Service* (1988), pp. 18-275.
 - 17 Duranti, "New Uses for an Old Science."
 - 18 *Ibid.*
 - 19 Québec, *Archives Act*, Statutes of Quebec, 1983, c. 38.
 - 20 *Ibid.*
 - 21 Québec, "Projet de loi [numéro] 3 : Loi sur les archives, Première lecture," *Papier d'Assemblée Nationale*, 1983, 42nd Legislature, 4th session.
 - 22 Denys Chouinard, Carol Couture, and Jean-Yves Rousseau, "Mémoire relatif au projet de loi [numéro] 3 intitulé loi sur les archives," *Archives* (Juin 1983), p. 26.
 - 23 F. Geny, *Méthode d'interprétation*, quoted in Coté, *The Interpretation of Legislation*, p. 194.