

Articles

Custody, Control, and Confusion: Legal, Historical, and Territorial Aspects of Court Records in Ontario



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RÉSUMÉ Ce texte analyse l'évolution des tribunaux supérieurs et correctionnels de l'Ontario ainsi que de leurs documents d'archives, dans leur contexte législatif d'hier à aujourd'hui. Il examine l'ambiguïté, la complexité, voire même la confusion totale qui entourent la garde, le contrôle et la conservation des documents d'archives des tribunaux. Il donne un bref exemple de la disposition des documents d'archives d'un tribunal correctionnel en Ontario – celui du comté de Middlesex – pendant la période de transition d'une autorité locale à une autorité centrale à la fin des années 1960 et au début des années 1970. Le texte conclut que le contrôle judiciaire des documents des tribunaux demeure un concept légal bien établi en Ontario comme ailleurs, bien qu'on assiste au renforcement du contrôle provincial qui, après quarante ans de centralisation tant de l'administration judiciaire que de la gestion des documents, remplace l'engagement local. Cette situation s'est produite malgré l'absence continue de références aux documents des tribunaux dans la législation ontarienne, qui devrait être corrigée selon les modèles d'autres provinces comme le Manitoba et le Saskatchewan.

ABSTRACT This paper explores the evolution of Ontario's superior and county courts and their records in their legislative context up to the present. It examines issues of ambiguity, complexity, and outright confusion that have surrounded the custody, control, and preservation of court records. It provides a short example of the disposition of the records of one county court in Ontario – the County of Middlesex – during a time of transition from local to central authority in the late 1960s and early 1970s. The paper concludes that judicial control of court records remains a firmly entrenched legal concept in Ontario as elsewhere, albeit alongside a strengthening provincial custodial role that has supplanted local involvement due to forty years of centralization in courts administration and records management. This has occurred despite the continued absence of references to court records in current Ontario legislation, which should be corrected based on models from other provinces such as Manitoba and Saskatchewan.

Introduction

In 1971, Ontario's Inspector of Legal Offices authorized the transfer of several sets of Middlesex County court records to the University of Western Ontario, despite the reservations of then-Archivist of Ontario Donald McOuat. How had the administration of court records evolved in Ontario to permit such an action? Only a few years before, the provincial government had assumed full responsibility for courts administration from Ontario's counties, and had begun to centralize judicial authority in Toronto. At the same time, the province had launched an ambitious records management program that would give the Archives of Ontario *de facto* authority over the appraisal and preservation of court records. Despite this, a pervasive lack of legislative clarity regarding responsibility for court records made possible a number of uncoordinated actions such as the shipment of Middlesex County court records to Western. How has the situation changed since then, and are matters any clearer?

This paper analyzes the evolution of Ontario's superior and county courts, and their legislative context up to the present. It explores the ambiguity and complexity of the ownership and control of court records in decentralized and centralized environments. It provides a brief analysis of the disposition and preservation of the records of one county court – the County of Middlesex – during a time of transition from local to central authority in the administration of courts and their records in the late 1960s and early 1970s. The paper concludes with a review of the current situation in Ontario, and makes some recommendations that would clarify issues of ownership, control, and preservation of court records.

In many Western countries, the courts are considered to be a separate branch (the judicial branch) of government, alongside the executive and legislative branches. In Canada, executive branches appoint the judiciary and provide it with certain administrative services, but judges are still considered to be independent of executive interference within the realm of adjudication.

Court records in Ontario, and elsewhere in Canada, straddle the boundary between judicial and administrative custody and control. In the common law tradition, records from "courts of record" play a crucial role as memorial and evidence of the development of the law. A "court of record" is one "... which has a permanent record of its proceedings maintained."¹ Courts of record are generally the superior courts in their given jurisdiction. On the one hand, judges control court records to a great extent; on the other hand, court records, like

1 Webster's New World College Dictionary, s.v. "court of record," <http://www.yourdictionary.com/court-of-record> (accessed on 30 December 2009). The question of exactly which court records must be maintained permanently to meet this requirement is one of a number of vital appraisal questions that are beyond the scope of this paper.

records everywhere, form part of the administrative overhead of their creators, and thus court administrators have a custodial role to play.

In addition, court records in Ontario, as elsewhere, span two spaces: the local and the general. Constitutionally, the courts are a combined federal–provincial responsibility, but there is a local aspect to most proceedings, courthouses and officials, and by extension the creation, custody, and preservation of court records. This local aspect was once very significant, no more so than in the case of Ontario's county courts, which existed for almost two hundred years between 1794 and 1984.

History of Ontario's Courts

Under sections 96 and 100 of the Canada *Constitution Acts* (1867 to 1982) (originally the *British North America Act*; hereinafter the Constitution), only the federal government may appoint and pay judges of the superior, county, and district courts in each province.² Notwithstanding the above, section 92 of the Constitution provides that the provincial governments are responsible for the administration of justice (both civil and criminal), the establishment of provincial courts, and civil law procedure.³ Responsibility for court administration is thus a provincial matter.

In 1867, superior courts in Ontario included a number of higher courts of record based on the English model: the civil and criminal Court of Queen's Bench (established in 1794); the equity⁴ Court of Chancery (established in 1837); the civil Court of Common Pleas (established in 1849); and the Court of Appeal (established in 1849). Alongside the superior courts in Ontario were the County and District Courts (hereinafter, County Courts), which were first established in 1794⁵ as courts of lesser, civil jurisdiction. However, County Court Judges acquired greater responsibilities over the course of the nineteenth century. After 1841, each County Court Judge served as Chairman of the (criminal) Court of General Sessions of the Peace, and of the Division (small claims) Courts; shortly thereafter, in 1845, County Courts became courts of record.⁶ After 1858, provincial legislation authorized the County Court Judge to serve

2 *Constitution Acts*, 1867 to 1982, <http://laws.justice.gc.ca/en/Const/index.html> (accessed on 16 May 2009).

3 *Ibid.*

4 Equity is a branch of law that is based on a judicial assessment of fairness. It is distinct from the common law.

5 Ontario Law Reform Commission, *Report on Administration of Ontario Courts*, part 1 (Toronto, 1973), p. 23. Municipal and court organization in what is now Ontario was based on local districts prior to 1850.

6 Ontario Courts Inquiry, *Report of the Ontario Courts Inquiry* by Thomas G. Zuber (Toronto, 1987), p. 17.

as Surrogate (probate) Court Judge.⁷ In parallel fashion, each County Court Clerk served as Registrar of the Surrogate Court.

In 1881, the Ontario government (using its constitutional power over administration of justice) enacted the *Judicature Act* unifying the four superior courts into the Supreme Court of Judicature for Ontario, consisting of two divisions: the High Court of Justice and the Court of Appeal.⁸ At the same time, each County Court Judge outside of York County began to serve as Local Judge of the Supreme Court, and each County Court Clerk became the Local Registrar. In addition, a myriad of provincial and federal legislation passed between the mid-1850s and mid-1960s gave County Court Judges a bewildering variety of not only adjudicative but also administrative responsibilities such as granting certificates of citizenship, or investigating municipal misconduct.⁹ The effect of all these changes was to make the County Court Judge a powerful local arbiter of federal and provincial statutory authority, while the County Court Clerk accumulated more and more corresponding recordkeeping responsibility.

Ultimately, however, centralizing trends compromised the administrative power of individual County Courts and eventually resulted in their dissolution. In 1962, Ontario established an office of Chief Judge of the County Courts. County Court Judges could now be assigned outside their home county.¹⁰ This was followed in 1984 by the passage of the *Courts of Justice Act*, formally unifying these courts into the District Court of Ontario.¹¹ In 1989, recognizing that the federally appointed courts in Ontario had begun to resemble one another (and following precedents established elsewhere in Canada), the provincial government unified them into one court, originally called the Ontario Court (General Division) but now styled the Superior Court of Justice. At the same time, the Court of Appeal again became a separate court, the highest superior jurisdiction in Ontario. While county and district courts have not existed since 1984, the Superior Court still retains a local presence that represents the legacy of the County Courts.

History of Courts Administration

The work of judges requires the support of officials and systems to manage court operations, including the receipt, filing, and disposal of court documents.

7 *Surrogate Courts Act*, S.C. 1858, c. 93. Confusingly, Surrogate Courts were not subject to federal authority; however, between 1867 and their abolition in 1989, federally appointed judges presided over them.

8 *Judicature Act*, S.O. 1881, c. 5. In 1913, this court became known as the Supreme Court of Ontario consisting of trial and appellate divisions.

9 See Ontario Law Reform Commission, *Report*, pp. 190–94 for a detailed listing.

10 Ontario Courts Inquiry, *Report*, p. 137.

11 *Courts of Justice Act*, S.O. 1984, c. 11.

Following Confederation, the Province of Ontario appointed officials such as Sheriffs, Clerks of the Peace, Clerks, and Registrars for each county or district to support federally appointed judges. However, between 1867 and 1968, the provincial government delegated responsibility for administration of justice to county governments in southern Ontario.¹²

In spite of being appointed by the province, County Court Clerks and Registrars were considered to be municipal employees until 1968.¹³ Nevertheless, after 1881, there was an official called the Inspector of Legal Offices within the provincial Attorney General's Department who provided administrative coordination to these local judicial officers.

Since 1968, the Government of Ontario has administered the justice system directly, although the province recently devolved administration of the *Provincial Offences Act* to municipal governments. Nonetheless, since 1968, it has been clear that all court services personnel supporting the superior courts are provincial, not municipal, officials. These officials are part of the court services program (the successor of the Inspector of Legal Offices) of the responsible Ontario ministry, the Ministry of the Attorney General.

Disposition of County Court Records

One key aspect of courts administration is the management and disposition of court records. In 1953, the Ontario Legislature approved an amendment to the *Judicature Act*, allowing a County Court Judge to order the Inspector of Legal Offices to destroy court documents that were no longer required.¹⁴ This amendment was significant for two reasons: it explicitly confirmed the independence of federally appointed judges with respect to the control of County Court records, and at the same time gave implicit preference to local (i.e., the judge) over provincial (i.e., the Inspector) authority.

At about the same time, newly appointed (in 1950) Provincial Archivist George Spragge began an attempt to influence the disposal of Ontario government records. At the time, the *Archives Act* (enacted in 1923) provided that all such disposals be approved by the provincial archivist¹⁵ but there was no systematic mechanism to do so and few such approvals had ever been sought. Additionally, a significant barrier to provincial archival authority over court records was that the Act only dealt with records of the provincial public ser-

12 For administrative and judicial purposes, Northern Ontario is divided into districts. The province has always directly administered justice in Northern Ontario because there are no district governments (except in the Muskoka District, which is arguably not in Northern Ontario).

13 Ontario Courts Inquiry, *Report*, p. 6.

14 *Judicature Act*, S.O., 1953, c. 50, section 2.

15 *Archives Act*, S.O., 1923, c. 20, section 7.

vice and the Legislative Assembly, thereby excluding the vast majority of court records that were subject to local judicial control. In 1951, Spragge introduced new disposal and transfer forms and, in 1959, drafted more assertive legislation regarding mandatory retention schedules. No concrete results were achieved, however, until the mid-1960s and legislative changes were not among them.¹⁶ The result was that the Archives of Ontario had very little to do with, and consequently received very few transfers of, inactive court records during the 1950s and 1960s.¹⁷

In 1968, the government further amended the *Judicature Act* to require an order of the Chief Judge of the County Courts, and to add to the term “destruction” that of “other disposition.”¹⁸ What this meant was that, even after 1968 (the year that Ontario assumed full responsibility for administration of justice), County Court records were considered to be judicial, not executive branch, records, because only judges could ultimately authorize their disposition. Additionally, it meant that a central authority (i.e., the Chief Judge) now had to approve the disposition of locally created records.

Between 1968 and 1984, county and superior courts in Ontario, as well as judicial centralization, became increasingly in need of a professional corps of administrators led by a central group based in the Ministry of the Attorney General. This was made necessary by the growth in volume and complexity of court business, and made possible by the increasing involvement of the provincial government in the administration of justice after 1968.¹⁹ A formal courts administration program within the Ministry of the Attorney General was officially in place by 1976.²⁰ The program’s intent was to develop a professional support staff of provincial civil servants who were equipped with the necessary procedures, systems, and skills to run a modern court system.

Part of this increase in centralization and administrative professionalization involved records management. The efforts of provincial archivists such as Spragge and his successor, Donald McOuat (appointed in 1963), and others concerned with administrative efficiency began to pay off when the Ontario government introduced a records management program in 1965. One aspect of this program was a provincial records centre established in 1966. By the early 1970s, the Ministry of the Attorney General began to schedule a considerable volume of inactive court records.²¹ Many of these records (mostly high volume

16 Barbara Craig, “Records Management and the Ontario Archives, 1950–1976,” *Archivaria* 8 (Summer 1979), pp. 3–33.

17 Catherine Shepard, “Court Records as Archival Records,” *Archivaria* 18 (Summer 1984), pp. 124–34.

18 *Judicature Act*, S.O. 1968, c. 59, section 5.

19 Ontario Law Reform Commission, *Report*, p. 22.

20 Archives of Ontario, Court Services Division, “Administrative History,” [http://ao.minisisinc.com/scripts/mwimain.dll?get&file=\[ARCHON\]search.htm](http://ao.minisisinc.com/scripts/mwimain.dll?get&file=[ARCHON]search.htm) (accessed on 9 October 2009).

21 Craig, “Records Management,” pp. 3–33.

case file series) were shipped to the records centre and eventually made their way to the Archives of Ontario, which saw a dramatic increase in its holdings of court records beginning in the late 1970s and early 1980s. These acquisitions were made possible by: the development of court records schedules during the 1970s; a dramatic reduction in the scheduled retention periods in 1979; and a conscious desire to create a comprehensive court records research collection.²² Nevertheless, during this same period, large volumes of obsolete records series, and crucial judgment and index volumes remained in county courthouse vaults; consequently, these were subject to ongoing local archival interest. Not surprisingly, ancient court records were often stored among, and understood to be part of, inactive municipal records, equally of local interest.²³

County Court Records, the Provincial Interest, and Local Archives: An Example

In the area of records disposition, County Court Judges and their clerks exercised primary (if not entirely independent) authority over their court records until the legislative change in 1968. In most cases, this meant the increasingly routine destruction of many inactive series of records. Even after 1968, however, the Archives of Ontario's actual and perceived authority over court records evolved gradually and entirely on the basis of the implementation of scheduled retention periods. As a result, in some cases, the power and influence of the local judges and clerks kept some records from being transferred to provincial custody.

In such cases, local judicial officials authorized or encouraged the transfer of court records to local or regional archives, where they professed an interest in such material. Two such examples were the transfer of Victoria County Court and municipal records to Trent University Archives, and the movement of the Prince Edward County Surrogate Court records to the Prince Edward County Archives.²⁴ It was not always clear whether these actions were taken with or without central approval. Another such case occurred in Middlesex County.

In 1960, then University of Western Ontario Librarian (and former Provincial Archivist) J.J. Talman expressed interest in the transfer of Middlesex County Court records to the University's developing regional history collection. Talman referred to a previous acquisition at Western of inactive Huron County

22 See Shepard's articles "Court Records as Archival Records"; and "Court and Legal Records at the Archives of Ontario," *Archivaria* 24 (Summer 1987), pp. 117–20.

23 The Archives of Ontario had a strong interest in the acquisition of municipal records during this period; however, that topic is beyond the scope of this paper.

24 See, for example, the Victoria County Court Fonds at Trent University Archives, <http://www.trentu.ca/admin/library/archives/90-005.htm> (accessed on 29 August 2009).

Court records, which evidently occurred with the approval of the Inspector.²⁵ While Middlesex County Court Clerk Donald Egener commented on the vast quantity of inactive court records cluttering up the London courthouse, nothing immediately came of the matter.

In 1970, Western's County Records Librarian, Edward Phelps, and Egener, still the County Court Clerk, renewed negotiations for the transfer of material, just prior to the relocation of the courts to the new courthouse in London. Egener clearly supported Western's desire for local preservation of these records. On 27 July 1970, he formally requested that the Inspector of Legal Offices, A.A. Russell, authorize the transfer of inactive County Court records to Western's County Records collection.²⁶ Egener had apparently received the consent of County Court Judge E.C. Colter, but there was no reference to approval of the Chief Judge in Toronto. Notwithstanding this statutory requirement, the decision seems to have been left in the hands of local officials negotiating with the Inspector.

The Inspector was apparently favourably disposed, because several sets of Supreme and County Court records were transferred to Western in June 1971. Correspondence between Egener and Phelps indicates that the Archivist of Ontario (then Donald McOuat) felt that these records should not leave provincial custody, presumably based on the legislative and administrative changes that began to unfold in the late 1960s. Nevertheless, Phelps expressed his conviction that "all records of Middlesex County could remain permanently here in the county."²⁷ This conviction amounted to a local expression of the principle of "territorial provenance" (i.e., that records should be preserved in the territory in which they were created, despite the fact that county courts were now administered by provincial officials), which would temporarily hold sway in Middlesex.

On 29 January 1973, Egener wrote to Russell again urging the local preservation of the Middlesex County court records. Egener referred to a conciliatory letter from McOuat expressing that, "... I would not wish to press legal rights too rigidly *as far as earlier holdings are concerned*."²⁸ McOuat seemed to concede that the Archives' authority over preservation of court records was a relatively recent phenomenon and that local arrangements already made should not be abruptly overturned. Clearly, however, he felt that his office should approve future archival retention of court records in local repositories. Until the late 1980s, this approval was either implicitly or explicitly granted,

25 University of Western Ontario Archives, Middlesex County Judicial Records Collection File, J.J. Talman to D.E. Egener, 12 December 1960 [hereinafter Middlesex County Judicial Records].

26 Ibid., D.E. Egener to A.A. Russell, 27 July 1970.

27 Ibid., E. Phelps to D.E. Egener, 2 February 1971.

28 Ibid., D.E. Egener to A.A. Russell, 29 January 1973; emphasis added.

or disapproval ignored, as Western's regional collection continued to receive deposits of Middlesex County court records.²⁹ By the early- to mid-1980s, the Archives of Ontario was straining under the volume of court records that it had received over the previous decade, and was actively considering the possibility of regional preservation.³⁰

Current Legislation Affecting Ontario Court Records

Meanwhile, in 1984, the new *Courts of Justice Act* (which abolished the County Courts) also gave the Ministry of the Attorney General still more say in the disposition of court documents. Section 79 provides that no court record be disposed of except under the directions of the Deputy Attorney General (with the consent of the relevant Chief Justice [of the Court of Appeal, of the Superior Court of Justice, or of the Ontario Court of Justice]). This shift in emphasis from the judicial branch to the executive branch, was significant in that it allowed the Ministry of the Attorney General to take the initiative on disposition of court records, reflecting the relative maturity of provincial courts administration and records management.

The *Courts of Justice Act* makes it clear that the Deputy Attorney General may take the initiative regarding disposition of court records. However, it does not identify archival preservation as a type of disposition. Furthermore, current Ontario archives legislation does not provide clear guidance on this matter. It is silent on the subject of the archival preservation of court records. While the provincial initiative respecting disposition is clear in the *Courts of Justice Act*, as is the overall principle of judicial control, the mandate for archival preservation is not. The present *Archives and Recordkeeping Act* (the long-overdue 2006 replacement of the eighty-three-year-old *Archives Act*), which establishes the mandate of the Archives of Ontario, still does not address the matter.³¹ While the legislation identifies "public bodies" (including the Ministry of the Attorney General) and the "legislative body," and requires that public bodies create retention and disposition schedules for their records, it does not explicitly include or exclude courts or their records, except in section 21, which excludes court records from the definition of "private records of archival value." Section

29 In 2008, the University of Western Ontario Archives (the successor body to the regional collection) negotiated the return of several hundred metres of Middlesex County court records to the Archives of Ontario. This was done not only to reflect the University's new, stricter, acquisition mandate and to respect provincial authority over court records, but also to free up space and rationalize holdings. For example, some records series had been split between the two repositories. Some microfilmed holdings were retained; any remaining original holdings will only be retained on long-term loan from the province.

30 Shepard, "Court and Legal Records," p. 119.

31 *Archives and Recordkeeping Act*, S.O., 2006, c. 34, schedule A, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_06a34_e.htm (accessed on 22 September 2009).

2 defines the characteristics of a “record of archival value,” including its relation to the activities of a public or legislative body, or a court. Thus, it seemingly renders the courts neither public nor private bodies.³²

In its ambiguity about court records, Ontario’s archives legislation resembles the province’s *Freedom of Information and Protection of Privacy Act* (hereinafter FIPPA). However, analysis of quasi-judicial rulings related to FIPPA reveals a different perspective on custody and control of court records. Ontario’s FIPPA became law in 1988. It does not explicitly include or exclude court records; nevertheless, the province’s Office of the Information and Privacy Commissioner (IPC) has issued several rulings clarifying that FIPPA does not apply to court records, although it applies to “court administration records.” In its reasoning, the IPC has relied both on the intent of the Ontario legislation and common law, but also on freedom of information statutes in British Columbia and Alberta, which are clear about court records. For instance, Alberta’s *Freedom of Information and Protection of Privacy Act*, section 4(1) states:

This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen’s Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the *Justice of the Peace Act*, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause.³³

The IPC issued Order P-994 on 5 September 1995, finding that the courts were not part of any Ministry, and not identified in FIPPA as institutions.³⁴ In this case, the Ministry of the Attorney General submitted that the records in question were not integrated with its records, and did not relate to its mandate and functions, although acknowledging the Ministry’s close relationship to the courts. The Commissioner ruled that the Ministry of the Attorney General does not have sufficient control of court records to subject them to FIPPA. Significantly, the ruling refers to the Deputy Attorney General’s authority over disposition in section 79 of the *Courts of Justice Act*, but gives implicit preference to judicial approval, which certainly supported the decision that the courts

32 By contrast, for example, Quebec’s archives legislation explicitly defines courts as “public bodies.” See *Loi sur les archives*, L.R.Q., c. A-21.1, annexe, http://www2.publications.duquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/A_21_1/A21_1.htm, (accessed on 30 December 2009).

33 *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, <http://foip.alberta.ca/legislation/act/section4.cfm> (accessed on 15 August 2009).

34 Ontario Information and Privacy Commissioner, *Order P-994*, http://www.ipc.on.ca/images/Findings/Attached_PDF/P-994.pdf (accessed on 14 September 2009).

control their own records.

The IPC issued Order PO-2739 on 4 December 2008. It relies heavily on Order P-994, but goes further in clarifying the distinction between court administration and judicial administration records. Specifically, it relates to offence statistics maintained on behalf of the Chief Justice of the Ontario Court of Justice. The Chief Justice has agreed to make the reports available to Crown Attorneys. Ministry representations referred to Nova Scotia court rulings, which recognized “the overall protecting and supervisory power of the court over all court records and documents.”³⁵ The Ministry also referred to the Canadian Judicial Council’s *Model Policy for Access to Court Records in Canada* (2005), which asserts the right of the judiciary to control court records relating to the judicial function.³⁶ Order PO-2739 deals with a broader class than court records – “judicial information” – that does not relate to any specific court proceeding, but is created and maintained by court officials for purposes of efficient judicial administration. All parties to Order PO-2739 agreed that the records in question were not strictly speaking court records (i.e., documents in a court file), but broader “court information.” Like Order P-994, the ruling also refers to British Columbia legislation that specifically excludes “records in a court file,” and judicial administration and support records (but not court administration records, which deal with non-judicial staffing and office management).

In his ruling, Assistant Commissioner Brian Beamish stated that:

The administration of justice and the courts are core, central and basic functions of the institution. However, as noted above, Canadian jurisprudence is very clear that any provincial statutory authority to carry out the ministry’s duty for the administration of justice and courts administration must be exercised within the context of constitutionally protected judicial independence, including court control over court records and documents. Any suggestion that ministry staff exercising their core function in support of the judiciary might be interpreted to compromise the institutional independence of the judiciary would have grave consequences for the ministry and the administration of the court system in the province.³⁷

Regarding access, Beamish stated that, “[a]ny access policy developed by the judiciary on the basis of [the CJC] model policy will be founded upon the

35 *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 SCR 175, and *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 SCR 671.

36 Canadian Judicial Council, Judges Technology Advisory Committee, *Model Policy for Access to Court Records in Canada* (September 2005), http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf (accessed on 25 September 2009).

37 Ontario Information and Privacy Commissioner, *Order P-2739*, p. 15, <http://www.ipc.on.ca/images/Findings/PO-2739.pdf> (accessed on 14 September 2009).

inherent jurisdiction of the judiciary to maintain supervisory and protective power over its own records.”³⁸

While court records are not subject to FIPPA, there is legislative provision for broad access to them. The *Courts of Justice Act*, section 137, provides that superior court records of civil and estate proceedings are open for public inspection, unless sealed by the court. Apart from the issue of judicial control, the rationale for excluding court records from FIPPA is that most court proceedings are of broad public interest, and are consequently already generally accessible, excluding certain matters relating to family or criminal law.

Given the apparent ambiguity in Ontario’s legislation, on what basis will the Archives of Ontario ensure archival preservation of court records that are disposed of through the systematic application of retention and disposition schedules? It cannot yet rely on its own governing legislation, but rather on its forty-year-old records management relationship with the Ministry of the Attorney General, which in turn must rely on the *Courts of Justice Act*. To comply with the latter, any Ministry retention and disposition schedule would require approval of the Deputy Attorney General and the relevant Chief Justice.

Conclusion

While Ontario’s current legislation is vague about court records, Ontario IPC rulings confirm that court records arise out the judicial adjudicative function and so are in the control of the judiciary. Court records are inextricably linked to, and are evidence of, the proceedings to which they relate. Nevertheless, as is the case with all records, there is a strong administrative imperative to the management of court records; thus, executive branch officials have an important role to play.

In Ontario as elsewhere, responsibility for creation, disposition, and preservation of County Court records has evolved from a context of both administrative and judicial decentralization to one of greater centralization. Nineteen sixty-eight was a watershed year as the provincial government took on full responsibility from municipalities for the administration of justice. Another important transition occurred in 1984, when the County Courts were abolished, and the provincial Ministry of the Attorney General acquired more say in the disposition of court records. Since then, previously existing local custody and preservation of court records has been largely supplanted by direct provincial administration. This has occurred alongside a general growth and strengthening of the provincial courts administration. Even as strong local feelings led to the deposit of the Middlesex County Court records at the University of Western Ontario in the 1970s and 1980s, administrative changes were underway at the

38 Ibid.

provincial level that would eventually undermine this sort of local preservation. Recent technological advances such as centralized case management systems and electronic filing, have only reinforced this trend in the area of records management, while digitization of selected archival court records may eventually overcome any remaining concerns about local preservation and access. Nevertheless, to the extent that there are still court records preserved outside the control of the Archives of Ontario, there would be value in the creation of a provincial report and plan for their ongoing preservation and accessibility.

While judicial control of court records in Ontario is still a firmly entrenched principle, the element of local judicial and administrative custody and control has been rendered largely irrelevant. The involvement of the Archives of Ontario in court records retention and preservation may be more secure than it was forty years ago. Nevertheless, there remain troubling gaps in provincial legislation in Ontario relating to court records, gaps that have already been filled in other Canadian jurisdictions. For example, section 4 of Saskatchewan's 2004 *Archives Act* does not risk offending judicial sensibility by defining court records as public records, but makes clear that they are to be treated in the same fashion for purposes of records management and archival preservation. Moreover, section 25 of this legislation balances archival and judicial control over disposition by granting equivalent authority to the provincial archivist and a judge of the relevant court.³⁹ Similarly, section 10 of the Manitoba *Archives and Recordkeeping Act*⁴⁰ provides for agreements between the provincial archivist and the chief judge of the relevant court. In short, these acts respect both judicial and provincial archival authority over court records. If Ontario's *Archives and Recordkeeping Act* were amended to make reference to court records (and its *Courts of Justice Act* changed accordingly), and if Ontario's FIPPA legislation were amended to entrench the conclusions of its relevant IPC orders about judicial control over court records (decisions that are based in large part on legislation in Alberta and British Columbia), then together, these changes would overcome almost a century of legislative exclusion and ambiguity.

39 *The Archives Act*, 2004, S.S., 2004, c. A-26.1, <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/A26-1.pdf> (accessed on 30 December 2009).

40 *Archives and Recordkeeping Act*, S.M., 2001, c. 35, <https://web2.gov.mb.ca/laws/statutes/2001/c03501e.php#10> (accessed 22 September 2009).