# Who Owns the Archives?
# A North American Perspective on Issues of Ownership and Control over Holdings of Archival Repositories [1]

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## Introduction

All those who work in archival repositories do so under a set of assumptions and beliefs. One of the paramount beliefs is that the archive "owns" the records in its custody. Certainly, it may be known that certain collections may have restrictions placed upon them by the donors, but these restrictions have generally been understood and accepted by the archives, in essence carried out under the archival imprimatur[2]. In any event, the records are physically held by the archival repository, and there is an old dictum which states that in questions of ownership – "possession is 9/10th of the law" – implying that the key element in ownership lies with having physical possession of the material in question. The problem with this dictum though is the same found with all such dicta – it paints too broadly a picture, with strokes which attempt to cover too wide and area.

In the specific case of records physically held by an archival repository, even if we accept its base presumption, that possession is **the** key element in ownership, it still leaves sufficient "wiggle room" to provide much debate over the true definition of

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[1] The analysis of this paper is formulated and grounded upon eight years of experience by the author in the application of the *Access to Information* and *Privacy Acts* at the then-National Archives of Canada. During that period, and since, the thesis was further developed through discussions with many colleagues in the archival professions, including staff responsible for providing access to both governmental and private papers in the hands of the Canadian and American federal governments and four Canadian provincial archives. The argument was further refined through consultations with a number of authorities. Although some specific issues were discussed with a lawyer, this paper represents the observations and conclusions of a non-lawyer and layman. Earlier versions of this article were presented for discussion at the 2004 Annual Conference of the Archives Association of Ontario, and I-CHORA 3, the Third Conference on the History of Records and Archives, and comments made then have received due consideration in this text. Thanks are due for the assistance and advice of the following: M.J. Jones; K. Badgley; J. Gilbert; V. McCaffrey; B. Beavan; B. Murphy; G. McKeating; and special thanks to T. Dubé for his discussions on the nature of rights. Any errors or omissions are, of course, the fault of the author.

[2] A RAMP study on private archives has suggested that "[a]rchivists, in their natural enthusiasm to acquire important or valuable private archives, may find themselves agreeing to very restrictive conditions of access." Rosemary Seton, *The Preservation and Administration of Private Archives; A RAMP Study*, Paris, 1984, p. 16.

ownership, whether it be the owner of a car, a house, or, more to the point, a record held by an archives. The basic elements of this debate are rooted in questions as to the rights and responsibilities of archives as holders of archival records, and the effects on these rights of a changing legislative and judicial framework, as individuals assert their own rights, either legally or intellectually mandated, over records held by archival repositories. It is to examine some of these challenges, these changes of perception, of the altered legislative framework, and of newly asserted privileges, that this study has been undertaken. In examining some of the issues inherent in this debate, cases which have been before the North American courts have been the primary focus of attention, along with North American legislation dealing with the provision of access to information, and many of these examples deal with public or institutional archives as it is believed that the principles they illustrate may be universally applied to the archival community. By pointing out some of the myriad problems with a straightforward answer to the question -- who actually owns the archives -- we can more fully understand some of the depths inherent in this proposition. After all, as one Antipodean writer who recently asked the same question answered himself:

> "If this discussion has stirred anyone's consciousness it is hoped that it has done so in recognition that we still care for our collections, and collection uses, to acknowledge and accept that archives are about principals, cultural safety, due professional diligence, other's cultures and the advancement of communities. These things are what give collections, collection uses, archives, archivists, and communities a soul."[3]

**Defining the Problem**

In order to fully discuss this issue, it is crucial to understand the terms used. Perhaps then, the first thing to be done in examining the question of "ownership" of the archives is to establish a few definitions or guidelines. For the purposes of this paper, an "archival repository" is an institution or establishment which has as part of its intellectual mandate the collection and/or retention of records or documents (textual, graphic, and/or digital, etc), which are maintained as having an enduring value, whether historical, evidential or simply sentimental. This then is our loose, working definition for an "archival repository", or, more simply "archives".

"Ownership" is a more difficult issue to discuss as there are a number of factors to be examined, including intellectual ownership; legal ownership; custody and control; and the possibility of joint ownership. These factors reflect the problems of establishing

[3] Nick Tupara, *Whose Archives Are They?*, "Archifacts. Journal of the Archives and Records Association of New Zealand" (April 2005), p. 88.

a broad ethical definition to something which also possesses a narrowly-constituted legally binding component. To this end, it will be necessary to reflect further upon the concept of "ownership" as it applies in the archival context.

A dictionary is a good starting point for our examination of the meaning of "ownership". It suggests that the term "ownership" carries with it the implication of possessing a "right" of "control"[4]. Of course, for users of archives, familiar with the vagaries of such issues as copyright, it is obvious that there are a number of aspects of "ownership". What is clear is that "ownership" as a concept carries with it the ability to exert some form of control – physical or intellectual – over the material in question, and perhaps that should be the aspect followed herein - the owner of an archival record is everyone who can exert some form of control over that record, whether through the courts, through legal precedent, or even through moral suasion. It is therefore posited that there exist three types of "ownership" or "rights" which can be asserted: physical rights; legal rights; and moral rights. As can be seen these three types of "ownership" either individually, or in combination, affect all archival holdings.

Upon first examination, it seems that in a system as devoted to structure as archives, legislated rights should be paramount, and there is some validity to this supposition. Archives exist as part of a system of laws, precedents and procedures, and rights of control or ownership, which have been recognized by courts or mandated legislatively by governments, must take priority. Nonetheless, the other rights identified, those of physical control or moral interests, possess an aspect of "ownership" which may, in some circumstances, also be judicially recognized.

A physical right, for instance, is based upon the concept that physical possession of a record or document, or what Associate Chief Justice Marceau of the Federal Court of Canada has called "mere physical possession", implies a right of ownership over a document. That physical possession of a document also carries with it at least some degree of control cannot be denied, and has been recognized by the courts, although in Justice Marceau's case he insisted that for a document to be under one's "control" possession had to be accompanied by some form of legal authority over the record[5]. This was recently further articulated by another judge, this one American, who,

[4] *The Concise Oxford Dictionary of Current English* (ed. by J. B. Sykes), 7th edition, Oxford, 1987 defines "to own" as analogous to possession, while further defining "possession" as, among other things, having the "visible power of exercising such control as attaches to (but may exist apart from) lawful ownership". This definition is in accordance with legal dictionaries, which indicate that "ownership" may be a synonym for "control" – See entries for "ownership" and "control" in William C. Burton, *Legal Thesaurus*, New York, 1980 and in *Black's Law Dictionary; Definitions of the Terms and Phrases of American and English Jurisprudence*, 6th edition, St. Paul, Minn., 1990.

[5] Canada, Federal Court of Canada, *Canada Post Corp. v. Minister of Public Works and Michael Duquette and Information Commissioner of Canada)* (C.A.) (A-372-93). Marceau wrote the dissenting opinion in this case. The majority opinion, in an appeal of Federal Court of Canada ruling concerning the application of Canada's *Access to Information Act* (which applies to records under the "control" of a government institution), suggested that the issue of control should not be narrowly defined or interpreted.

in a case concerning ownership of an archival collection, wrote:

> "Ownership of the Documents appears to be the ultimate issue to be decided in this case. There is no dispute that Plaintiff has possession of the Documents, and that they appear to have been in the possession of his family since the conclusion of the Civil War. Since possession is prima facie evidence of title to personal property, Plaintiff has met his initial burden of proof. … The burden thus appears to shift to the State to prove superior title."[6]

In assessing such a superior title, the court may examine such factors as whether there are any legal rights to be considered, or whether any moral rights of ownership may be asserted.

A moral right of ownership is a difficult issue to define concretely. Archives are generally dedicated to documenting the history and heritage of an institution, a community, or a people, and as such their stature may have a moral component[7]. The dimensions of such a moral force, may, however, be difficult to assess, although instances of the assertion of moral rights over archives can be found.

In January, 1995, *The New York Times* carried an article concerning a defunct practice which had been carried out at some American university campuses of photographing incoming students in the nude or semi-nude. The article explained that the photographs, which were mandatory, were ostensibly used for correcting posture problems, although some were apparently taken to test a eugenics theory that one could detect moral and intellectual worth based upon aspects of physical structure. It further indicated that a search for such photographs at most institutions of higher learning had been fruitless as they had long since been destroyed. The author of the article was able to find a sizeable collection of such photographs (some 27,000 photographs of students, primarily taken during the 1950's-1960's) in the Smithsonian Institution's National Anthropological Archives[8].

Although the collection was held under tight control as the archives attempted to ensure that only "legitimate" researchers obtained access, the publication of the existence of this collection was a revelation to the many former students whose

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[6] United States, Bankruptcy Court for the District of South Carolina, *Thomas Law Willcox, Plaintiff, v. Rodger Stroup, Director, South Carolina Department of Archives and History; State of South Carolina ex rel. Henry McMaster, Attorney General for the State of South Carolina; John, M. Willcox, and Kathryn Willcox Patterson, Defendants*, C/A No. 04-09605-W, Decided 15 August 2005.

[7] James, H. Billington, "Preface", in *To Preserve and Protect; The Strategic Stewardship of Cultural Resources*, Washington, p. ix. Billington was referring to libraries, but the intent is easily extended to archives.

[8] Ron Rosenbaum, *The Great Ivy League Nude Posture Photo Scandal*, "The New York Times", January 15, 1995.

photographs were presumed to be included. In the following weeks, many of these former students wrote to the newspaper to express their concerns and discontent[9]. Shortly after the publication of this article, Yale University, 9,000 of whose students were included in the collection, requested and received confirmation of the destruction of their photographs. The request was made "[…] to protect the privacy of the former students, many of whom have become prominent in culture and politics."[10] Yale's request was an assertion of a moral right, one which overpowered, in this particular case, the physical and legal rights of the archival repository which held the photographs.

If we can agree upon these aspects of asserted rights, then the true topic of this paper changes from ownership of records held by the archives to control of those records, and we can then proceed to discuss how that "control" or "ownership" can be viewed from differing aspects. An understanding of that control is valuable for our understanding of archives in their cultural and legal milieu. After all, as George Orwell's Winston Smith was all too well aware, who controls the present controls the past, but he who controls the past controls the future[11]. Moreover, as Orwell also understood, control of the past is often linked to one of the main tools for understanding and interpreting the past – the archives.

**Some Different Types of Control - Copyright**

Issues of control over archival records are often a tangle of competing interests. For example, what do we do when the ownership of the record is shared; something which happens quite frequently, particularly with recent materials. Archivists deal on a daily basis with at least one form of such shared control, that of copyright law. Where copyright exists, ownership is shared between those who possess the physical media and thus assert their physical rights, and those who possess the legal rights (which in the case of copyright may also entail a moral right of ownership). These aspects of control may rest with the same or different entities. This is not the place for discussion of the complexities of these aspects of ownership[12] but it is sufficient here to point out that there is a form of ownership and external control which can affect archival records. This control is rooted in the concept that something as amorphous as the "manner" in which something has been expressed can be owned by someone who may not own the forum or medium wherein that idea is expressed. In these cases, the right to control duplication of the material rests with the holder of the copyright, who may be the creator of the document or who may have acquired the copyright through other avenues. This control or ownership of the copyrighted material generally applies to the most recent materials held in archives today, although the application of the copyright restrictions may vary

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[9] See as an example, the *Letters to Editor*, "The New York Times", February 5, 1995.
[10] *Nude Photos Shredded*, "The New York Times", January 28, 1995.
[11] George Orwell, *Nineteen Eighty-Four*, London, 1990, p. 37.
[12] For a discussion of the role of copyright in the Canadian archival milieu, see Jean Dryden's *Demystifying copyright: a researcher's guide to copyright in Canadian libraries and archives*, Ottawa, 2001.

over differing jurisdictions.

Copyrighted material, be it a literary manuscript or a letter of complaint, usually belongs to the person who created it, and the processes through which the law is applied are generally known and understood by archivists. It should be pointed out, however, that discussions with archivists from a number of different jurisdictions have indicated that the rules prohibiting the copying of copyrighted material are not always strictly observed[13]. Nonetheless, for at least that portion of the archival record where the copyright restrictions are respected there is an aspect of dual ownership of the archival record. All users of archives are familiar with this concept of mixed ownership or control over the physical record based upon who owns the copyright over information recorded therein.

**Some Different Types of Control – Personal Information**

It has been long suggested that the relationship between citizens and government constitutes a social contract by which the citizen gives up some of his/her freedoms in exchange for certain other rights or privileges[14]. One of the rights that is protected and asserted is the moral right to own or control some types of information. Most North American jurisdictions now permit access to the information held by government under freedom of information laws; common exemptions to such access are where it is asserted that the release of the information could harm the legitimate interests of the government in question, **and where there exists a prior claim of ownership.** (An interesting reflection on the power of "moral" rights is that they are often recognized by such freedom of information legislation.) It is important to note this distinction, since as many of us are well aware, freedom of information legislation can apply to the holdings of our respective archival institutions.

An example of external assertion of control over information held by government concerns certain kinds of corporate information. Corporations are often obligated to provide confidential information (financial, technical, trade secrets) to governments the dissemination of which could harm their competitive position. At the federal level in Canada legislation providing access to government information contains specific provisions to protect that information[15]. In effect, even though a corporation may be required to provide confidential information to the government, it does not

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[13] Informal interviews were conducted with representatives of the Canadian archival community from the federal, provincial, and municipal levels in the public sector, as well as the private sector. The information they divulged is anecdotal in nature, rather than quantitative. In a number of cases, archival staff admitted that the factors which governed their application of copyright restrictions were often linked to the degree of risk of being found out – for example, where there was a small risk of being held accountable staff were willing, with the approval of senior management, to ignore restrictions upon copying of copyrighted material.

[14] For an early examination of this doctrine see Jean Jacques Rousseau, *Du contrat social, ou principes du droit politique*, 1762. A translation of this, by G.D.H. Cole, is available online at http://www.constitution.org/jjr/socon.htm (accessed August 19, 2004).

[15] Canada, *Access to Information Act*, p. 20.

relinquish its interest in, nor control over, that information. Even when it has been transferred to an archival repository, it remains protected, in much the same way personal information might be protected. As Justice Harrington of Canada's Federal Court has observed, it is essential to the proper functioning of government and industry, in their interwoven net of responsibilities, that the right of the corporation to protect its own information must be preserved, even when it does not have physical custody of the information in question[16]. When these records are held in an archival repository, the assertion of these legal and moral rights helps to identify another ownership interest in archives.

What is far more frequently encountered in archives, though, is information related to specific individuals, their personal information, with what one RAMP study has called "[…] the emerging conflict between principles of open access to information and the protection of personal privacy"[17]. When Heather MacNeil published her 1992 groundbreaking work, *Without Consent; The Ethics of Disclosing Personal Information in Public Archives,* she explicitly addressed the interests or ownership of personal information held in archives. This issue, she wrote,

> "[...] has particular relevance for government archivists because a great deal of personal information collected and maintained by government agencies eventually ends up in their custody; leaving them with the unenviable task of reconciling legitimate but conflicting interests C the individual's right to privacy and society's need for knowledge."[18]

Of course, she was writing specifically about providing access to personal information held in government hands, but the issues and concerns she has raised are equally apt when placed in the context of non-governmental archival institutions. The point of primary interest here is that there is yet another type of ownership or control over information contained in archival records: i.e. ownership of personal information, over which the person to whom it relates retains a form of control outside of the archives. In other words, with the assertion of this moral right, another owner is identified.

Another question exists, however, as to what is meant by the words "personal information". MacNeil discusses various aspects of the concept of privacy, from control over the dissemination of information concerning oneself, to the right to make personal

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[16] Canada, Federal Court of Canada, *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, 2004 FC 959 (T-90-01, 6th July 2004).

[17] Gabrielle Blais, *Access to Archival Records; A Review of Current Issues; A RAMP Study*, Paris, 1995, 1.5.

[18] Heather MacNeil, *Without Consent; The Ethics of Disclosing Personal Information in Public Archives*, Lanham, MD, 1992, p. 5.

decisions without state interference[19], but any definition must and will change over time as society's concept of personal information changes When Canada's federal *Privacy Act* was enacted more than twenty years ago its definition of personal information was accompanied by a series of examples of kinds of information that were included, ranging from opinions, to medical history, from finances to education[20]. More recent Canadian legal definitions of personal information, such as that found in the new *Personal Information Protection and Electronic Documents Act* (*PIPEDA*), are both much more cursory and expansive[21], perhaps a result of increased influence by privacy advocates. The definition of personal information may vary, but generally, it refers to information concerning an identifiable individual that may be considered as relating or "belonging" to the individual alone. This can include a date of birth, unique numbers assigned to an individual, such as a Social Insurance Number, opinions expressed by or about the individual, or information related in some way to their ethnic, religious, educational, social, political or economic background/history[22].

So, who "owns" the personal information in the archives? Obviously, the person to whom it pertains is a potential "owner" of the information, but other factors must be examined to determine whether they might affect that ownership or control.

The Canadian *Privacy Act* recognizes a number of other parties who may be interested in obtaining access to government-held personal information, from police investigators to Members of Parliament (the latter can gain access to personal information if they can demonstrate that it will benefit the individual to whom the information pertains). There is even a special provision that researchers can get access to carry out historical or statistical research[23].

The drafters of this legislation have also made provision for the researchers at Library and Archives Canada (LAC) -- granting to that institution the right to give access to government-held archival personal information under certain circumstances[24]. According to the regulations established by the *Privacy Act*:

> "Personal information that has been transferred to the control of the Library and Archives of Canada by a government institution for archival or historical

[19] *Ibidem*, p. 10-16.

[20] Canada, *Privacy Act*, ' 3.

[21] "... 'personal information' means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization." Canada, *Personal Information Protection and Electronic Documents Act*, ' 2.1.

[22] See for example a discussion of personal information in Terry Cook, *The Archival Appraisal of Records Containing Personal Information: A RAMP Study With Guidelines*, (Paris: UNESCO, 1991): 15-16.

[23] Canada, *Privacy Act*, ' 8.2.

[24] *Ibidem*, ' 8.3. See D. M. German, *Access and Privacy Legislation and the National Archives, 1983-1993; A Decade of ATIP*, "Archivaria", 39 (1995), p. 196-213, for a description of the application of Access and Privacy legislation at that institution.

> purposes may be disclosed to any person or body for research or statistical purposes where (a) the information is of such a nature that disclosure would not constitute an unwarranted invasion of the privacy of the individual to whom the information relates; (b) the disclosure is in accordance with paragraph 8(2)(j) or (k) of the Act; (c) 110 years have elapsed following the birth of the individual to whom the information relates; or (d) in cases where the information was obtained through the taking of a census or survey, 92 years have elapsed following the census or survey containing the information. personal information.[25]

The logic of this regulation is quite internally consistent. It was apparently decided that any individual who reached the age of 110 years would probably not be as concerned with issues of personal privacy, and as one would normally be at least 18 when completing a census form, any who filled out such a form 92 years earlier would either be dead or 110. The sections referenced (8(2)j and k), deal with provision of access to support aboriginal claims, and for research where the nature of the records makes the removal of the personal information impractical (in the former case the information is only to be used to support the claim, and in the latter the researcher must sign an undertaking not to reveal any of the personal information to which they have been provided access.) The more problematic issue would seem to correspond to the question of what constitutes an "unwarranted invasion of privacy". To identify such information, Library and Archives Canada utilises a four-pronged test – considering the expectations of the individual at the time the information was collected, the sensitivity of the information, the probability of injury should the information be divulged, and the context wherein the information is held. Only if the information passes all of these factors is it released without restrictions to researchers[26].

Thus this *Act* recognizes a variety of circumstances in which various parties may have a valid interest in gaining access the personal information -- but accessing the information is not entirely a function of control or ownership, even though the ability to do so it may reflect a degree of control. Only those who possess the power to regulate or exercise a degree of control upon the archives can be said to "own" the archives. Of course, the differing levels of government may exercise some form of control over the records - directly when the archives is a government archives (and accordingly subject to the controls available to any employer) - or indirectly through the application of laws and regulations which may affect the holdings in archival repositories which are not directly supported by that government. An example of the latter can be found in the

[25] Canada, *Privacy Regulations*, §6: R.S., 1985, c. 1 (3rd Supp.), s. 12; 2004, c. 11, s. 52.

[26] National Archives of Canada, *Guidelines for the Disclosure of Personal Information for Historical Research at the National Archives of Canada*, Ottawa, 1995, p. 3-9.

Province of Ontario which permits personal information created or collected by health professionals to be transferred to archives, whether public or private, but explicitly provides that some degree of control over the use of this information remains in the power of the individual to whom it pertains, thus supplementing a moral right with a legal right[27].

It is common knowledge that police may utilize subpoenas and warrants to gain access to records held in a variety of repositories, including those subject to federal laws[28]. In addition to that general power, though, as mentioned above Canada's federal *Privacy Act* also permits police officers conducting lawful investigations to gain access to personal information held by the federal government without going through the judicial procedures[29]. To that limited extent, then, police forces, or rather the judicial system, may be said to be one of the owners or controllers of the archival record, since courts may force the disclosure of archival records even when the other owners of the records may not consent. While this is obviously an assertion of a legal right of control, it may also be considered that as the judicial system is acting on behalf of society, there may also be a moral right inherent in such activities.

This application of a judicial power of control is not limited to the Canadian judicial system. In a 1989 article, Harold Miller discussed efforts of the United States' Federal Bureau of Investigation to gain access to archival records, clearly demonstrating that the power to access documents, including from an archives, is recognized by other jurisdictions[30]. More recently other studies, such as Elena Danielson's account of the East German Stasi records and their attendant issues of access[31], and Tom Adami and Martha Hunt's study of the records created by investigations into the Rwandan

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[27] Canada, Province of Ontario, *Personal Health Information Protection Act*, 2004, '1 provides the individual to whom the information relates the right to correct or amend the information, thus providing them an element of control, while '42.3 makes provision for the transfer of records containing personal health information to the provincial archives, or to an individual whose function includes the collection and preservation of historical or archival material.

[28] Canada, *Privacy Act*, §8.2.c.

[29] *Ibidem*, '8.2.e permits the release of personal information "[…] to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed", while '8.2.c permits a similar release "[…] for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information". The author of this paper is personally familiar with an instance when a police force employed 8.2.e to gain access to information in Ottawa and then employed a subpoena under 8.2.c to present the records before a court in the Province of Newfoundland – the author having received a subpoena to present certified copies of the records in question before the court.

[30] See Harold L. Miller, *Will Access Restrictions Hold Up in Court? The FBI's Attempt to Use the Braden Papers At the State Historical Society of Wisconsin*, "American Archivist", 52 (1989), p. 180-190.

[31] Elena S. Danielson, *Privacy Rights and the Rights of Political Victims: Implications of the German Experience*, "American Archivist", 67 (2004), p. 176-193.

genocide[32], illustrate the continuing interest of governments and their investigative bodies in control and access to archival records. In many cases a moral right, that of providing accessibility to the records in question, may outweigh competing interests. Indeed these articles illustrate quite effectively the interweaving strands of moral/physical/legal rights as they have been asserted to protect or provide access.

There are also semi-governmental external bodies whose actions appear to impose control upon accessing some kinds of information, including information held in archives. In mid-1996, it was brought to the attention of the Canadian historical community that the three main Canadian funding bodies for research -- the Natural Sciences and Engineering Research Council of Canada, the Social Sciences and Humanities Research Council of Canada, and the Medical Research Council of Canada – had created new guidelines for research involving human beings which would affect the manner in which researchers gain access to archival records. It appeared that the guidelines in attempting to prevent unethical medical research asserted a moral right of ownership this information, but their extension to all forms of research involving humans seemed to have created an awkward fit, which in turn resulted in a number of expressions of concern by the Canadian researching public[33]. In their eagerness to protect legitimate interests, the Tri-Council intended to ensure that all interests of the individual being studied would be protected even past their death. Section 5.19 of the draft guidelines directed that:

> "In conducting research for the biography of a recently deceased person, the researcher must always get permission from the executor (or representative of the estate) to examine or distribute any papers and private documents previously belonging to the deceased [...]"[34],

a direction which did not consider whether the records in question might be found in an archive, where other rules for access might have priority. The appeals and recommendations seem to have borne fruit as the existing guidelines have only limited reference to issues of access to archival holdings[35]. Nonetheless, it is interesting to note such non-legislative attempts to control access through asserting a moral right to such a control, particularly when the access in question dealt with information "belonging" or pertaining to someone who was deceased.

Perhaps we can now consider whether the death of the individual should result

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[32] Tom A. Adami and Martha Hunt, *Genocidal Archives: The African Context – Genocide in Rwanda*, "Journal of the Society of Archivists", 26 (2005), 1, p. 105-121.

[33] Letter from Jim Miller, President, Canadian Historical Association to Tri-Council Working Group, 4 July 1996, found in H-Canada July 1996 logs at http://h-net.msu.edu.

[34] Reproduced in Message, J.M. Bumsted to H-Canada, 25 May 1996, found in H-Canada July 1996 logs at http://h-net.msu.edu.

[35] See Tri-Council Policy Statement, *Ethical Conduct of Research Involving Humans*, Ottawa, 2003.

in the annulment of their rights of control over their personal information. In Canada, death affects many things including the rights of the deceased. According to Canadian law, the deceased loses, for example, the ability to sue for slander, meaning in effect that *post- mortem* the deceased loses the ability to prevent lies being told about them[36]. In considering this fact, it seems all the odder that following one's death lies are permitted, or at least not prohibited by statute, but there is no accompanying release of factual information. It seems, therefore, that while it is true that one cannot slander or libel the dead (meaning that they possess no legal recourse), under our present system of laws it is not always possible to tell, or more correctly, reveal, the truth.

Under the Canadian federal *Privacy Act*, an individual's moral and legal rights to control access to their personal information are extinguished, not with their death, but rather twenty years after s/he dies. In addition, the *Privacy Regulations* enacted to support this legislation direct that, when the information has been deemed to be archival and is held by LAC, the individual may also lose their control over the information 110 years after their date of birth, even though they may still be alive[37]. So then, we have an anomaly, a person whose most private information is protected until twenty years after their death may actually have the information released while they are still alive, if that information is held by Library and Archives Canada and they have achieved more than 110 years in age.

Other forms of legislation appear equally contradictory; Canada's *PIPEDA,* for example, directs that personal information be protected for twenty years after death, or if their date of death is not known, for 100 years from the date of the creation of the document containing the information[38]. It is worthwhile considering that a document could be created about a person who is one hundred years old, presumably at some time they die, but the document will not be released until 200 years after their birth, while any information held in the government holdings of Library and Archives Canada may have already been released many decades earlier. For all intents and purposes, the person continues to control, and thus own, part of the archives long after their death. It should be pointed out that this confusion of conflicting standards over the release of information concerning a deceased person is by no means confined to Canada; Udo Schäfer's study of the various pieces of legislation affecting German archives indicates that the information may be released 10 years or 30 years after death, or 90, 100, 110 years after birth if the date of death is not known, or 60 or 70 years after the creation of the record if neither date of death nor birth is known, according to the particular legislation covering the archive in question[39].

Just to add to the confusion, it is a fact that some forms of personal information are considered more worthy than others of being protected. To continue with Orwellian

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[36] Allen M. Linden *Canadian Tort Law*, 7th edition, Toronto, 2001, p. 694-695.
[37] Canada, *Privacy Act*, ' 3; Canada, *Privacy Regulations*, ' 6.
[38] Canada, *Protection of Personal Information and Electronic Documents Act*, ' 7(3)(h)(i).
[39] Udo Schäfer, *Transfer and Access – The Core Elements of the German Archives Acts*, "Archival Science", 3 (2003), 4, p. 374.

inferences, all animals may be equal, but some animals are more equal than others[40]. So it is with personal information, where our laws and courts have decided that some forms of information deserve added protection. For example, the Canadian federal *Access to Information Act* specifies that personal information should not be released in general, but ***may*** be released if it is publicly available[41]. Now the use of the word "may" is interesting in this context, as it means that the release of this type of information is not mandatory, but rather is done at the discretion of the government department which holds the information.

It may seem strange to suggest that one "should" or "must" protect some information when it is publicly available, but there are some types of information which are almost always public knowledge, but at the same time quite sensitive. For example, let us consider an individual's criminal record. If someone has been convicted of a crime, it was usually before an open court, so the information itself can be located in open court dockets and, often, perhaps even in the newspapers. Despite this, the Canadian Parliament has decided to grant special protection to one's criminal record, establishing it as personal information[42], while the Supreme Court of the United States ruled in 1989 that providing access to the criminal record or "rap sheets" of an individual concerned in certain criminal enterprises could not be allowed, even though much of this information was part of the public record, for to release it would constitute an unwarranted invasion of privacy[43].

Yet another type of personal information which receives extra care in its treatment is medical information. The United States' *Freedom of Information Act* clearly states that this legislation does not provide a right of access to "[...] personnel and *medical files* and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"[44] (emphasis added). When the Canadian province of Ontario adopted its *Personal Health Information Protection Act* it specifically stated that the purpose of this legislation was:

> "to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care [...]".[45]

[40] George Orwell, *Animal Farm*, London, 1989, p. 90.
[41] Canada, *Access to Information Act*, ' 19.2.
[42] Canada, *Privacy Act*, ' 3.
[43] United States, Supreme Court, *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749(1989), Argued 7 December 1988, Decided 22 March 1989.
[44] United States, *Freedom of Information Act* 5 U.S.C. ' 552.b.
[45] Canada, Province of Ontario, *Personal Health Information Protection Act*, 2004, ' 1.a.

It further established that all information, no matter how innocuous, should be protected from public disclosure until the information was 120 years old or the individual to whom it pertained had been deceased for fifty years[46]. As there is no distinction made between the most severe of disease and most minor of afflictions, information concerning a case of psoriasis (regardless of the heartbreak) is protected as fully as does that concerning some more socially questionable diseases.

Still, for all of the inherent sensitivity of some types of personal information, we can be assured that eventually, at sometime after the death of the person to whom the information pertains, it can be released (if it survives). After all, who we may ask but the individual could, or would, have any legitimate claim upon such personal information? Well, unfortunately, as sometimes happens when a millionaire dies, the claimants to inherit what they owned can come crawling out of the woodwork, and this remains true whether we are talking about riches or even something as privately treasured as personal information.

Many who have dealt with the researching public for a period of time have experienced the wonder of the client who wants a record expunged, destroyed or hidden because some of the information it contains shows a relative in a bad light. Yes, the relative who does not want it known that a cousin, grandfather or uncle had committed a crime can be a problem, as they attempt to exert some form of control over the archives. But it is an attempt which should not work, because the information only belonged to one person and privacy rights cannot be inherited, although this has not prevented some patrons from asserting a moral right to such an inheritance. While Canadian law does not recognise such an inheritance[47], discussions with archivists from a number of Canadian jurisdictions have found that some admit that they have restricted access to information held in their archives for records, which would normally, under existing policies or legislation, be released. The reason given for hampering lawful access to these records is that they do not perceive the effort of resisting equal to the benefits reaped, that of providing access to the record. Unfortunately, every time that they grant the wishes of these relatives, they also give away part of the ownership of their archives[48].

It is possible, however, that in deciding to withhold such information, the archival staff were acting in accordance with some of the precepts of Canadian libel law. Although the old saw is still true that one cannot libel the dead, our laws do recognize

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[46] Canada, Province of Ontario, *Personal Health Information Protection Act*, 2004, ' 9.1.

[47] The Canadian *Privacy Act* may permit a relative acting as administrator of an estate to access personal information concerning a deceased, but only for purposes of settling said estate. Canada, *Privacy Regulations*, §10.b.

[48] Interviews were conducted with representatives of the Canadian archival community from the federal, provincial, and municipal levels in the public sector, as well as the private sector. Included in these interviews were staff responsible for providing legislatively-mandated access to government records held by four different Provincial Archives. Of the four Provincial Archives represented, staff at two admitted to unlawfully withholding personal information at the request of relatives of the person to whom the information pertained.

the potential of information concerning a dead person affecting the still living. As Justice Linden has pointed out:

> "Only living people can be defamed. Therefore, no action lies at the suit of the estate of deceased persons if defamatory things are said about them, or by their friends and relatives for injuries to their feelings. However, an imputation against the dead may reflect on the living, so that an allegation that the deceased was a whore may defame her family because they are personally defamed."[49]

This issue of protecting the real interests of the deceased family may have been under consideration in the American case of *National Archives and Records Administration v. Favish et al*, which was argued before the Supreme Court of the United States on 3 December 2003. In this case, access to autopsy photos held by the United States' National Archives and Records Administration was sought to prove or disprove a theory held by the requestor. The applicant was denied access to those photographs because the organization wished to protect the privacy, in this case not the individual who was deceased as his rights were extinguished, but rather the privacy rights of his family. The argument was made that revealing the photographs would subject the family of the deceased to further prurient scrutiny, a position which was upheld by the Supreme Court. While the interest of preserving the privacy of the family may be important, this case had already been widely publicized (the deceased, Vincent Foster, was White House Counsel at the time of his suicide), so to a non-lawyer there seems little legitimate interest in preventing anyone from viewing the records. Nonetheless, on 30 March 2004 the Supreme Court ruled in favour of the family's moral rights and against the release, and once more another owner of the archives, this time the relatives of potentially anyone mentioned in the archives, is identified[50].

So who do we have now identified as owners – those who supplied the information held in the archives, those who created it, and those whom it concerned. We also have the government as owner, whether directly or indirectly, and the judicial system, through its ability to impose controls upon the archives. So that would seem to be everyone concerned with archives identified as their owners, with perhaps a notable exception, that of the archives themselves.

**The Archival Institution As Owner – Part I: Defending the Archives**

According to the definition suggested at the beginning, the archival institution and the staff are one of the owners of the archives. We control access to our holdings,

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[49] Linden, *op cit*.

[50] United States, Supreme Court, *National Archives and Records Administration v. Favish et al*, No. 02-954, Argued 3 December 2003, Decided 30 March 2004.

whether through applying access policies, through describing materials so that they can be found, even through providing physical facilities for researchers to visit our holdings – we control access[51].

It is the task of the archival staff to locate records which should be held in our repositories, to make whatever arrangements are necessary to acquire these records, and when they arrive, to properly describe them and safely house them. Ethically, it is also our responsibility to resist attempts to infringe upon the integrity of these records, even when the threat appears to be in the public good.

An example of such a threat can be found in the case of Joseph Jefferson "Shoeless Joe" Jackson. A famous baseball player in the early part of the Twentieth Century, Jackson was implicated in the so-called "Black Sox" scandal in which accusations were made concerning cheating in the 1919 World Series. Although banned from playing professional baseball, Jackson remained a figure of importance to baseball fans[52]. As he was semi-illiterate, he signed few items, his will being a notable exception. Because of the rarity of his signature, coupled with the interest from the baseball community, his autograph is valued highly by collectors.

Following his death in 1951, his estate passed to his wife, and following her death the residue of her estate was primarily split between two charities, the American Heart Association and the American Cancer Society. There seemed little of great financial value in this estate until it was suggested that the among the assets Mrs. Jackson would have inherited from her husband was his interest in any documents he created, including his will, which pursuant to South Carolina law was held under the control of the Probate Court in the State's public records system. The two charities proceeded to sue the county in South Carolina where the will was deposited to gain control of the document. In 1997 the State Supreme Court of South Carolina heard the case, and held the record to be "[…] a public record and must remain in the care, custody and control of the Probate Court"[53]. Although the decision was based upon the legal rights of the state to establish and define public documents, it is worthwhile noting

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[51] One study of researchers' relationships with archival staff has pointed out the importance of the role of archival gatekeeper. According to this study, conducted primarily among members of the Canadian academic historical community, many felt that a personal relationship with the archivist was often necessary to gain access to archival holdings, with at least one respondent indicating that they felt that an unfavourable opinion on the part of the archivist could have a deleterious effect upon their prospects of accessing records. See Catherine A. Johnson and Wendy Duff, *Chatting Up The Archivist: Social Capital and the Archival Researcher*, "American Archivist", 68 (2005), 1, p. 113-129.

[52] For further information see Eliot Asinof, *Eight Men Out : The Black Sox and the 1919 World Series*, New York, 1987 [1963] and David L. Fleitz, *Shoeless: The Life and Times of Joe Jackson*, Jefferson, N.C., 2001.

[53] United States, State of South Carolina, Supreme Court, *American Heart Association, South Carolina Affiliate, Inc., and the American Cancer Society, South Carolina Division, Inc., v. County of Greenville, the Honorable C. Diane Smock, in her official capacity as the Probate Judge of Greenville County, and the State of South Carolina*, Opinion No. 24685, Heard 6 February 1997, Filed 2 September 1997.

that against the legal and "moral" claims of the charities, as well as a legal right the state's lawyer asserted an overwhelming moral right, claiming the victory was also one for the heritage community: "If they had ruled the other way, historical records would be virtually destroyed, as collectors and family members come and strip the vaults for their ancestors' stuff"[54].

It does not seem that this lawyer's declaration is excessive as there have been other assertions of legal ownership of valuable archival records which resulted in a court challenge as to physical ownership. The example of the de la Peña Manuscript at the University of Texas is an interesting case in point. This 19th Century account had great historical and financial value in part because one passage described 1836 siege of the Alamo, including the death of an American hero – Davy Crockett – in a manner inconsistent with the traditional legend of that event. In a case which also points out that ambiguities in agreements governing ownership of archival records may have unintended consequences, the manuscript was left at the University of Texas in the early 1970's on "permanent loan" by the legal owner. Upon his death, his rights of ownership passed to his son who later withdrew the manuscript from the archives and placed it on the market. In this case his claim of legal inheritance trumped the claims of the University to ownership based upon possession or upon any rights that might have been acquired by its long-term custody of the document. Happily, the purchasers of the de la Peña Manuscript donated it to the University of Texas so that the University now has added legal ownership and possession to any moral rights over the document. Nonetheless, the issue is clear, that archives must assert their rights over their holdings, for failure to do so could result in the loss of those holdings, with little hope for as satisfactory a resolution as followed the sale of the de la Peña material[55]. Obviously, too, there are times when attempts to gain ownership over the archives must be resisted at all costs. There is an ethical need here for archives to keep, guard and protect the archival records, to ensure that all of the records can survive for the sake of accountability and posterity.

**The Archival Institution As Owner – Part II: The Case for Replevin**

In carrying out this higher ethical need, archives must not only protect those records which they currently physically possess, but also those for which they hold a moral, or even a legal right. As was noted earlier, archives act as protectors and guardians of the history of a nation, an institution or a community. In fulfilling this mandate, archivists have often taken a leading role as proponents or advocates of archival preservation, which can be seen as a "public good". There is certainly nothing new, or distinctive in such use of an asserted moral right in this venue, but what is more

[54] Quoted in Jonathan Dube, *Shoeless Joe's Will, Valuable Name on it Not For Sale, Court Says*, "Charlotte Observer", September 3, 1997.

[55] Rick Lyman, *Story of Davy Crockett's Execution Hits the Auction Block*, "New York Times", November 18, 1998; Christopher Lee, *A legendary gift; Hicks, partner give diary to UT that disputes traditional tale of Crockett's Alamo death*, "Dallas Morning News", December 16, 1998.

interesting, and perhaps even a useful guide for future archival actions, is the new and increasingly used assertion by archives of a legal right to records which the archives does not have in its physical possession.

To some extent it may be claimed that archives almost always have at least a moral interest in the records generated by the institution they are mandated to support, be it a government, a corporation, or a community, but this moral interest does not always possess a legal component. Certainly there are laws that require that some records must be deposited with archives when their operational lifespan is completed. The Canadian province of New Brunswick, for example, has legislation which dictates that certain public records, identified as being of historic value, are automatically the property of the Crown and must be deposited in a repository where they can be preserved, presumably the Provincial Archives[56], while the legislation creating the new Library and Archives of Canada includes the power to seize records when in the opinion of the Librarian and Archivist of Canada they are "at risk"[57]. These powers have not yet been challenged, so it is uncertain as to how they will be judicially interpreted, but without wishing to raise any debates over the doctrine of post-custodialism, clearly this legislation can be regarded as asserting an archival or historical claim upon records while they are still in the hands of the creating entity. When the records have left the possession of this entity the task of legally enforcing the interest of the archival institution appears to become more problematic. Fortunately, in such cases Common Law has provided the mechanism of replevin.

According to Black's Law Dictionary, replevin is a legal action in which the owner of property reclaims possession of said property from any who might improperly hold the material[58]. Traditionally, this power has been utilized for the legal recovery of stolen material such as automobiles, but in the 1970's it entered the North American archival world with the North Carolina case of *State v. West.*

In this case the State Archives of North Carolina asserted a legal interest in certain 18th Century documents whose possessor had lawfully purchased them at auction. The State claimed that while the possessor had acted properly the sale was invalid as the documents had been illegally alienated from the State's custody, and this position was upheld by the State Supreme Court[59]. The reasoning behind the Court's

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[56] All the papers, documents and record books of the Courts of Sessions, of the Inferior Courts of Common Pleas, all municipal records prior to the establishment of the present system of municipal councils, and other such public documents or records as the Lieutenant-Governor in Council may hereafter declare to be of historical interest and worthy of preservation are hereby vested in Her Majesty the Queen in right of the Province, and the Lieutenant-Governor in Council is empowered to take possession of the same, and also to take proper measures for their permanent preservation and for placing them where they will be available for investigation and to students of history. Canada, Province of New Brunswick, Public Records Act, R.S., c.184, s.6.

[57] Canada, *Library and Archives of Canada Act*, §13.3.

[58] See entry for "replevin" in *Black's Law Dictionary*.

[59] United States, State of North Carolina, Supreme Court, *North Carolina v. B.C. West Jr.*, June 1977. See also the description of the affair on the website of the North Carolina Office of Archives and

finding is that regardless of the length of time which has passed since the documents were removed from the proper records system, the original owner retains a lawful claim based upon the lack of an original consent to the alienation of the record. This position was asserted again by the same archives in 2004 to assist in the recovery of an important state document which had been stolen in the 1860's, war loot taken during the American Civil War[60].

The utility if this tool has become so recognized, in the American archival community at least, that a number of state's public archives have explicitly been given the power of replevin in their creating legislation. An example of this may be found in Utah's *Government Records Access and Management Act,* which states:

> "To secure the safety and preservation of records, the state archivist or his representative may examine all records. On behalf of the state archivist, the attorney general may replevin any records that are not adequately safeguarded."[61]

The wording of this seems to imply something of the "at risk" provisions of the *Library and Archives of Canada Act*, but as with that legislation, until it has been judicially interpreted the effect limits of the legislation is unknown. Nonetheless, other states are also considering this power. In a 2002 speech, the State Archivist of Maryland made specific reference to employing replevin as a tool to recover documents[62]. The American concern over asserting a legal ownership over strayed archival records may be linked to a recent concern over the apparent ease in which documents have vanished from archival repositories, only to reappear for sale on various internet websites. The United States' National Archives and Records Administration website (www.archives.gov) now includes a listing of documents known to be missing and feared stolen, and in early 2004 three of the leading American archival associations issued a document entitled "Statement Regarding the Sale of Historical Public Records on eBay."[63] In this statement all the associations assert the importance of maintaining the

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History at http://www.ah.dcr.state.nc.us/centennial/features/replevin.html. It is also described in *Willcox v. Stroup*, *op. cit*. It may have been knowledge of this case which led to a compromise in a Louisiana replevin case a few years later. See Patricia Brady Schmit, *Compromise resolves fate of documents replevin avoided*, "Manuscripts", XXXVII (1985), 4, p. 275-282.

[60] Katherine Wisser, *President's Message*, "North Carolina Archivist", 69 (2003), p. 1-2; see also *Willcox v. Stroup*, *op. cit*.

[61] United States, State of Utah, *Government Records Access and Management Act*, Part 9, 63-2-907, Right to Replevin.

[62] Edward C. Papenfuse, Jr., State Archivist, *Preserving Municipal History*, A Speech made before the Maryland Municipal League, June 26, 2002. A copy may be found at http://www.mdarchives.state.md.us/msa/educ/speeches/html/mml062602.html.

[63] Council of State Historical Records Coordinators, National Association of Government Archives and Records Administrators and the Society of American Archivists, *Statement Regarding the Sale of*

records in their proper repositories. In a related move, the State Archives of South Carolina has posted on its website a similar statement, with an added section entitled "Why are sales of South Carolina state and local government records illegal, and what can be done?"[64]. It should be mentioned that while these examples have all been American, Canadian archives are not immune to theft[65], and should consider the issue of asserting a lawful ownership over records which have been unlawfully alienated.

**Conclusion**

So the paradigm of the ownership of the archives is not as simply constructed as we might like; a number of factors influence who internally control the records physically held by archival institutions, and at the same time said institutions themselves may be asserting their own claims of ownership, even upon records not under their physical control. The conflict between these differing influences can result in what can be called a cognitive dissonance, a disconnect in the harmonious chain of thought, as the law, our ethical responsibilities, and even our moralities intertwine into a jumbled mess which seems to surpass the Gordian Knot in its capacity for being impossible to unweave without the Alexandrian sword of further legislation or judicial review. In some ways, this review of the question of ownership, and how it should be re-examined, seems to place emphasis upon the words of the seventeenth-century writer, François, duc de La Rochefoucauld, who wrote:

> "Folly pursues us in every period of life. If any one appears wise, it is only because his follies are proportioned to his age and fortune."[66]

It all goes to return us to the initial proposition: that there can be many competing interests who interfere with plainly stating who owns the contents of our archives. It can only be hoped that by examining some of those problems we can better understand who controls or owns the archives, and thus, at least according to Orwell, the future.

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*Historical Public Records on eBay*, February 2004. Found at www.coshrc.org.

[64] *The Sale of Historical Public Records through Online and Other Auctions*, September 27, 2005. Found on the Website of the South Carolina Department of Archives and History at www.state.sc.us/scdah/DocumentSale.htm.

[65] The author has in his possession a copy of that most ephemeral of records, a print of a screen from an online auction site. In this case, the item offered for sale in 2002 was an 18th Century document. To provide some provenance for the item, the seller indicated that he had been assured that it had been stolen from a Canadian provincial archives in the 1970's.

[66] François, duc de La Rochefoucauld, *Maxims* (trans. A. L. Humphreys), Ware, UK, 1997, p. 30, Maxim 207.