Legislative Summary **LS-471E**

BILL C-8: THE LIBRARY AND ARCHIVES OF CANADA ACT

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18 February 2004

Library of Parliament

Bibliothèque du Parlement

Parliamentary Research Branch

LEGISLATIVE HISTORY OF BILL C-8

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	11 February 2004	First Reading:	11 February 2004
Second Reading:	11 February 2004	Second Reading:	18 February 2004
Committee Report:	11 February 2004	Committee Report:	11 March 2004
Report Stage:	11 February 2004	Report Stage:	22 March 2004
Third Reading:	11 February 2004	Third Reading:	29 March 2004

Message sent to House of Commons: 30 March 2004
Concurrence in Senate amendments: 2 April 2004

Royal Assent: 22 April 2004
Statutes of Canada 2004, c. 11

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BACKGROUND

Bill C-8, An Act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence, was introduced and deemed to have passed all stages in the House of Commons on 11 February 2004.(1)

The bill creates a new institution by merging the National Library of Canada and the National Archives of Canada into one body, the Library and Archives of Canada. This unified institution will have a wider mandate than the two existing bodies, with the stated goal of better providing easy and integrated access to Canada's knowledge, information and documentary heritage.

Moreover, the legislation seeks to modernize the language and legal concepts used in it through the use of technology-neutral, less restrictive terms. For instance, the term "book" as used in the *National Library Act* is replaced in this bill with the modernized term "publication," which captures electronic books and journals as well as traditional printed and bound material.

At the same time, because this bill proposes the merger and updating of two existing institutions, much of the language in the legislation governing the two existing bodies is reproduced here, with slight modifications. For example, the present requirement that the Archivist of Canada consent to the disposal or destruction of government or ministerial records

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) By a motion adopted on 10 February 2004, the House of Commons provided for the reintroduction in the 3rd session of government bills that had not received royal assent during the previous session and that died on the *Order Paper* when Parliament was prorogued on 12 November 2003. The bills could be reinstated at the same legislative stage that they had reached when the 2nd session was prorogued. Bill C-8 is the reinstated version of Bill C-36, which died on the *Order Paper*.

under section 5(1) of the *National Archives of Canada Act* is continued and updated in clause 12(1) of this bill. Under Bill C-8, the Librarian and Archivist of Canada would have the additional power to request the transfer of government records believed to be at risk (through improper storage, for instance) in order to preserve the documentary heritage of Canada.

The bill also proposes amendments to the *Copyright Act*. Of particular note is the proposal that relates to deceased authors of unpublished works. Prior to the last comprehensive amendments to the *Copyright Act* in 1997, such works enjoyed copyright protection in perpetuity. The 1997 amendments ended this and introduced a transitional period of 5 years for unpublished works whose authors had been dead for more than 50 years. Such works would be protected to the end of December 2003, at which point they would fall into the public domain.

As originally drafted, Bill C-8's predecessor (Bill C-36) proposed to extend the term of protection for unpublished works whose authors died after 1929 but before 1949. In such a case, it was proposed that copyright protection be extended to 2017, allowing the heirs of a deceased author the time and opportunity to publish the previously unpublished work. If the work remained unpublished after that extended period, it would fall into the public domain. If the work was published during the extended period, copyright would continue for an additional 20 years following the end of the calendar year in which it was published.

This aspect of the bill, however, generated a great deal of debate and proved contentious enough to imperil what many felt was an otherwise laudable bill. Eventually a compromise was reached, resulting in an amendment made immediately prior to the bill's being read a third time in the House of Commons during the 2nd session of the 37th Parliament.

This amendment provides for a single term of protection – until the end of 2006 – for all works that were unpublished on 31 December 1998 and whose authors died at least 50 years before that date; that is, who died before 31 December 1948. This means that no unpublished works will fall into the public domain by the end of 2003. Copyright will now subsist in such works until the end of 2006, irrespective of whether the author died before 31 December 1929 or between 31 December 1929 and 1 January 1949, and irrespective of whether or not the work has since been published. Once this revised term of protection expires, the works will fall into the public domain.

This particular amendment represents a policy compromise that attempts to balance the interests of users and creators. On the one hand, groups such as archivists, historians and genealogists wished to see archival material, which could include unpublished works, come

into the public domain earlier. On the other hand, the heirs of deceased authors whose unpublished works were due (under the 1997 amendments) to fall into the public domain at the end of 2003 sought additional time to allow for the discovery and publication of unpublished works. This amendment to section 7 of the *Copyright Act* tries to reconcile these two competing interests.

DESCRIPTION AND ANALYSIS

The Preamble outlines the broad objectives of the bill. It affirms the necessity of preserving Canada's documentary heritage for present and future generations. It further affirms the need for an institution that facilitates cooperation among Canadian communities involved in the acquisition, preservation and sharing of knowledge. This new institution is to be a source of knowledge accessible to all Canadians, contributing to the cultural, social and economic advancement of Canada, and will serve as the continuing memory of the government of Canada and its institutions.

Clause 1 sets out the short title of the bill: the Library and Archives of Canada Act.

A. Definitions

Clause 2 contains several definitions of terms used in the bill. Of note, three new terms are introduced, while others are updated to more accurately reflect modern technology and practices.

The new terms are:

- "Documentary heritage," which is defined as "publications and records of interest to Canada."
- "Government record," which identifies records under the control of a government body or institution.
- "Librarian and Archivist of Canada," which refers to the new officer the bill proposes to create.

Updated terms proposed in the bill are:

- "Publication," which is given a wide and technology-neutral definition to include library matter made available regardless of its format, whether printed, recorded, electronic or on-line. This updates the previous word "book" as used in the *National Library Act*.

- "Record" is given a similarly broad and neutral definition, meaning any documentary material other than a publication, regardless of its medium or form. This modernizes the word as used in the *National Archives Act*.

Finally, "Minister" means the member of the Queen's Privy Council designated by the Governor in Council as the Minister for the purposes of this Act.

At the Committee stage, the French version of the bill was amended to include a definition of "administrateur général."

B. Establishment and Organization of the Library and Archives of Canada

The establishment and organization of the new institution to be known as the Library and Archives of Canada are proposed in clauses 4 through 6. Clause 4 establishes the body, to be presided over by the Minister and under the direction of the Librarian and Archivist of Canada, a new position created under clause 5. An Advisory Council to advise the Librarian and Archivist in making the documentary heritage known to Canadians and anyone with an interest in Canada, and facilitating access to it, is established in clause 6.

C. Objects and Powers of the New Institution and Officer

Clauses 7 through 10 set out the objects and powers of the Library and Archives of Canada and the Librarian and Archivist. The focus here is on the collection, preservation and dissemination of Canada's documentary heritage, including government and private-sector publications and records, regardless of the media used to create them. Emphasis is placed on making Canadians more aware of their documentary heritage and facilitating access to it (clause 7(*b*)). This particular idea is echoed in clause 8(1)(*e*), making explicit the Librarian and Archivist's powers for public programming and interpretation of Canada's documentary heritage, thus making it more accessible to Canadians.

These clauses also affirm the Library and Archives of Canada as the permanent home of the Government of Canada's publications and of government and ministerial records that are of historical or archival value. One of the fundamental objectives of the Library and Archives is to support the development of the library and archival communities, as set out in clause 7(*f*).

New to this legislation, and of particular note, the Librarian and Archivist is empowered by clause 8(2) to take periodic samplings of Internet material accessible to the public without restriction. These samples, gathered for the purposes of preservation, are to provide a glimpse into a day in the life of Canada at a particular point in time. A corresponding amendment to the *Copyright Act* will ensure that this practice does not contravene that Act.

The Librarian and Archivist are also empowered to dispose of or destroy any publication or record he or she deems is no longer necessary to retain (clause 9).

D. Legal Deposit of Material in the Library and Archives of Canada

The definition of publications that are subject to legal deposit in the Library and Archives in accordance with clause 10 is modernized to include electronic publications. In addition, provision is made for further regulations that will address, among other things, those types of publications of which only one copy must be deposited. For instance, the general requirement for two copies of a publication may not be necessary with electronic materials, given their particular format. At the Committee stage, this section was modified slightly to clarify the requirements for the legal deposit of publications that use a medium other than paper.

Clause 11 empowers the Librarian and Archivist to obtain a copy of a publicly available recording if he or she determines it has historical or archival value. The definition of "recording" is modernized to give it a wide and technology-neutral meaning so as to accommodate anything that requires a machine in order to be used, regardless of format or medium.

E. Government and Ministerial Records

Clauses 12 and 13 address government and ministerial records specifically. The Librarian and Archivist's consent is required prior to the disposition or destruction of a government or ministerial record, and he or she has the right to inspect any record prior to consenting to its disposition or destruction. This right of access is, in turn, subject to the consent of either the Clerk of the Privy Council or the head of the department in question when the record contains restricted information. In addition, the Librarian and Archivist and any person acting on behalf or under the direction of him or her must comply with any security requirements applicable to people with access to those records.

Notably, clause 13(3) of the bill proposes a new power for the Librarian and Archivist to intervene to request the transfer of government records he or she feels are at risk of serious damage or destruction. Such a risk might arise from their improper storage, for example, or from a possibility of deliberate destruction.

Surplus publications that are excess to the requirements of a government institution are to be placed in the care or control of the Librarian and Archivist (clause 16).

Clause 18 proposes that a Library and Archives of Canada Account be established in the accounts of Canada, and that any amounts required for the purposes of the Library and Archives of Canada Act be paid out of this account.

A provision permitting the Librarian and Archivist to make a certified copy of a requested record or publication is proposed in clause 19. This copy will be receivable in evidence in the same manner as the original. If deemed necessary, a court, tribunal or other entity may require that the Librarian and Archivist produce the original record or publication. The court, tribunal or other entity will ensure that measures are taken to protect and preserve the original and return it to the Librarian and Archivist as soon as it is no longer needed.

F. Offences and Penalties

Clause 20 proposes that anyone who fails to provide a copy of a publication as required in clause 10(1) of this Act or fails to comply with a request for a copy of a publicly available recording pursuant to section 11(1) is guilty of an offence upon summary conviction. The penalty upon conviction differs between individuals and corporations. An individual is liable to the fine referred to in subsection 787(1) of the *Criminal Code*, while a corporation is liable to the fine referred to in subsection 735(1)(*b*) of that Act. However, a term of imprisonment in default of paying the applicable fine may not be imposed upon recalcitrant non-depositors or non-suppliers.

G. Amendments to the *Copyright Act*

Certain amendments to the *Copyright Act* are proposed in clauses 21, 22 and 26. Clause 21 modifies the term of protection for posthumous works that had not been published by 31 December 1998[(2)] and of which author died on a specified date. “Publication” in this context means published, performed in public or communicated to the public by telecommunication.

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(2) 31 December 1998 is the date upon which the original amendments respecting the term of protection for posthumous works were proclaimed in force. Prior to these amendments, works that had not been published at the time of the author’s death were protected in perpetuity.

Clause 21 provides for a single term of protection for all works that were unpublished on 31 December 1998 and whose author died at least 50 years before that date; that is, who died before 31 December 1948. Copyright will now subsist in such works until the end of 2006, as long as the author died before 31 December 1948, irrespective of whether or not the work has since been published.

Clause 22 amends another provision of the *Copyright Act* concerning unpublished works deposited in archival institutions. At present, section 30.21 of the Act allows an archive to make a copy of an unpublished work deposited in the archive on or after 31 December 1998, provided the copying is for purposes of research or private study and the copyright owner has not prohibited the copying. Where an unpublished work was deposited in an archive *before* 31 December 1998, the work may be copied only if the copyright owner's consent is obtained. If, however, the copyright owner cannot be located, the archive may copy the work but it must observe certain conditions. Notably, it must keep a record of the copies made and must make such records available for public inspection. Clause 22 of the bill would change this by eliminating the special provisions that apply to unpublished works deposited before 31 December 1998, thus bringing the copying of unpublished archival material under a single set of rules, irrespective of the date of deposit. In practical terms, this means that archives would no longer have to shoulder the administrative and financial burden of tracking down the copyright owners of all pre-1999 deposits in order to obtain their consent; nor would they have to keep records of the copying in cases where the copyright owner could not be found.

Lastly, clause 26 of the bill proposes a consequential amendment to section 30.5 of the *Copyright Act* so that the Internet sampling for preservation purposes referred to in clause 8(2) does not contravene that Act. At the Committee stage, this clause was amended to ensure that this Internet sampling, done by the Librarian and Archivist of Canada, is for preservation purposes only. This clarification is to ensure that the samplings will not be made available for distribution.

H. Consequential Amendments to Other Acts of Parliament

Consequential amendments to other Acts of Parliament are proposed in clauses 23 through 51. These amendments modify 18 existing Acts to reflect the names of the newly created institution of the Library and Archives of Canada and the new position of Librarian and Archivist of Canada. For example:

- Where paragraph 8(2)(*i*) of the *Privacy* Act currently states "to the National Archives of Canada for archival purposes," this amendment will change that wording to read "to the Library and Archives of Canada for archival purposes."

- Similarly, where Schedule 1.1 of the *Financial Administration Act* currently refers to the "National Archives of Canada" and "National Library," these will be replaced by the words "Library and Archives of Canada."

- The *Parliament of Canada Act* is similarly amended to remove the references in section 75.1(2) to the "National Librarian" and the "National Archivist of Canada" and replace them with "Librarian and Archivist of Canada."

I. Transitional Provisions

Provisions to accommodate the transition from two separate institutions to one merged entity are provided in clause 52:

- Upon the repeal of the *National Archives of Canada Act*, the persons who held the titles of National Librarian and National Archivist of Canada cease to hold those offices.

- Existing holdings of the National Archives of Canada and the National Library are transferred to the Librarian and Archivist of Canada immediately before the repeal of the *National Archives of Canada Act*.

- Employees of the National Library and the National Archives of Canada continue as employees of the Library and Archives of Canada.

- Amounts held in accounts called the National Archives of Canada Account and the National Library Special Operating Account are transferred to the Library and Archives of Canada Account.

- Unless the context requires otherwise, references to the National Library, the National Archives of Canada, the National Librarian or the National Archivist of Canada will be read as the Library and Archives of Canada or the Librarian and Archivist of Canada, respectively.

J. Coordinating Amendments

Clauses 53 and 54 are coordinating amendments. They state that, should certain bills currently before Parliament receive royal assent by a certain date, the wording of those bills will be replaced to reflect the new institution of the Library and Archives of Canada and the Librarian and Archivist of Canada where necessary.

K. Existing Legislation to Be Repealed

Clauses 55 and 56 would repeal the *National Archives of Canada Act* and the *National Library Act*, respectively.

L. Coming Into Force

Clause 57 provides that the bill, other than clauses 21, 22, 53 and 54, would come into force on a day to be fixed by order of the Governor in Council.

COMMENTARY

The government asserts that other jurisdictions have passed, or are in the process of passing, similar legislation merging the two institutions of a national library and a national archive. Thus, this legislation is in accordance with modern international practice.

However, the merger of the National Library and the National Archives of Canada is not uniformly received as a positive move, nor are the objectives of the proposed legislation or the organization and infrastructure of the proposed merged institution without controversy. Indeed, several aspects of this bill have proved surprisingly contentious.

A. Objectives of the Institution and the Proposed Legislation

In commenting on Bill C-8's predecessor, Bill C-36, the Association pour l'avancement des sciences et des techniques de la documentation (ASTED), the Canadian Association of Research Libraries (CARL) and the Canadian Library Association (CLA), groups representing librarian interests, were of the view that the language of the bill detailing the objectives of the merged institution did not live up to the promise of the preamble. Specifically, representatives from these organizations felt there was too much emphasis on the preservation of the past and not enough on the significance of current use of library or archive material. They emphasized that it was important to recognize the role of the Library and Archives in information, innovation and learning for the present and future, as well as retrospective information.

Another specific concern was raised with respect to the objects of the bill. ASTED, the CLA and the CARL would like to see one of the objects in clause 7(*c*), which deals with government records, expanded to include a phrase to the effect "that the new Library and Archives of Canada would ensure that all Canadian citizens have free and equitable access to published government information."

A third concern related to the Depository Services Program (DSP). A representative from the Canadian Association of Research Librarians stated that this program has been somewhat of an "orphan," moving from one government department to another with no permanent home. She wished to see the DSP find a permanent home with the new Library and Archives of Canada, and that the services offered by the DSP be included within clause 8(1)(*g*) through (*i*).

Finally, the CLA, ASTED and the CARL would like to see the objects section of the legislation include a stronger reference to the national and international leadership role played by the Librarian and Archivist of Canada in terms of providing direction to Canada and the rest of the world in developing standards and protocols and facilitating access.

None of these concerns were addressed as proposed amendments to the bill as it moved through clause-by-clause consideration in Committee hearings.

B. Organization and Infrastructure Concerns

A concern was expressed regarding the lack of an overall detailed plan for the merger of the two institutions into one new entity.

In response to this, the Assistant Deputy Minister, Transformation, National Library of Canada/National Archives of Canada, stated that although there is no overall detailed organizational blueprint, the planning of the merger had been ongoing for more than a year and a clearer plan would be in place by the end of June 2003. She stated that it was necessary first to define what was to be done before drawing up an organizational structure, and this bill will give that necessary definition.

Another witness, representing the organization Public History Inc., raised concerns about the transition phase of the amalgamation. It was stated that if this was not done with foresight and a lot of direction, it will cause chaos for the end user, that is, the researchers who use the institution. This witness noted that undoing any of the mistakes that may be made over the next several years will be very expensive and time-consuming.

The same witness also raised the issue of funding, noting that there has been an extensive increase in the use of the National Archives and that even now demand for services is outstripping the capability of the Archives to respond. He said that the biggest concern of Public History Inc. is that funding will not be available now and in the future to ensure the provision of adequate services, not just to preserve the documents but to make them available and readily accessible to all Canadians.

The broad issues of accessibility and accommodation were raised by a spokesperson for the Canadian History Association and the Association of Canadian Archivists. This witness noted that the Library and Archives of Canada will need a dramatic increase in its operational budget if it is to preserve and make accessible such media as the new machine-readable-based audio-visual materials (film, radio, television, sound recordings, computer-generated records from databases, office systems and Web sites).

In addition, the deficiencies of the present facilities were noted, and it was suggested that a major new Library and Archives building be constructed alongside the current Gatineau Preservation Centre.

None of these concerns were addressed as proposed amendments to the bill as it moved through clause-by-clause consideration in Committee hearings.

C. New Officer Created by the Bill

The Information Commissioner of Canada appeared before the Committee to state that the appointment process and terms of office for the new Librarian and Archivist of Canada are flawed as currently structured under the bill. He suggested that the bill does not, in its present form, afford the officer the kind of independence from government necessary to ensure that this impartial institution will be "insulated from political meddling."

As a remedy, he suggested that clauses 4 and 5 of the bill be amended to provide Parliament with a role in approving nominations for the position of Librarian and Archivist and to provide for a fixed term of appointment during good behaviour, with the incumbent to be removed only with Parliament's approval.

Moreover, he asserted that no minister should preside over the Library and Archives of Canada; rather, the bill should require the Librarian and Archivist of Canada to report to Parliament directly, on an annual basis, to give an account of how the institution is meeting the goals and objectives of the legislation.

Proposed amendments addressing these concerns were defeated by majority vote in Committee hearings.

D. Composition of the Advisory Council Created Under the Bill

A concern was expressed that the Advisory Council that is to advise the Librarian and Archivist would be politically appointed by the Minister, and thus not independent and transparent.

The National Librarian responded by stating that he was himself appointed by the Minister and the only mandate he had been given was to raise the visibility of the National Library to all Canadians. The National Archivist said that he expects that the Advisory Council will be composed of professionals or people with the appropriate expertise "to present a balanced view of Canada and the different perspectives on the Canadian experience, and reflect the richness and diversity of Canadian voices throughout our public programming."

Other witnesses appeared before the Committee with specific recommendations for the role and composition of this council. A witness representing the Association of Canadian Archivists and the Canadian History Association suggested that the council deal not only with accessibility and public programming issues, but also with all aspects of the mandate and programs of the new Library and Archives of Canada. In addition, it was strongly urged that the council be composed of representatives of at least the communities of librarians, archivists, historians and genealogists. It was also suggested that the council include regional representation.

Proposed amendments addressing the composition of the Advisory Council were defeated by majority vote in Committee hearings.

E. Records and Information Management Concerns

During Committee hearings, the Information Commissioner of Canada raised a concern with respect to the definition of the words "government record" and "ministerial record" as used in the bill. He noted that the term "ministerial record" as currently defined in the bill could allow for too much discretion to be exercised by ministers in deciding which records pertain to their portfolio duties and thus should be treated as the property of Canada rather than as the private property of the minister. He strongly urged that the term "ministerial record" be dropped from the bill, and that a definition of "records of a personal or political nature" be included instead to clarify exactly which records ministers may treat as their private property. It was suggested that records such as party, constituency, electoral, caucus and other records not related to a minister's portfolio, duties and functions would fall into this category.

The Information Commissioner expressed some concern regarding the term "government record." Again, he felt that the current definition could allow too much information to escape the jurisdiction of the Librarian and Archivist. It was suggested that this definition be amended to read: "a record that is under the control of a government institution including a record of a minister of the Queen's Privy Council for Canada who holds the office of a minister and that pertains to that office."

A further concern was voiced by the Information Commissioner with respect to the definition of "government institution." He felt that this term as currently defined in the bill is too restrictive, and thus excludes many organizations whose records ought to be subject to the archival requirements found in this bill. It was suggested that a wider definition of "government institution" be crafted. This view was echoed by another witness as well.

Proposed amendments to the definitions of the terms "government record" and "government institution" were defeated by majority vote in Committee hearings.

It was noted that the Librarian and Archivist is empowered to require the transfer of government records at risk for their better safekeeping. This raised the question of record keeping in general, and concern was expressed that proper records might not be kept in order to avoid the requirement for archiving.

The National Archivist replied that the process of helping government departments properly preserve archival information is an ongoing one that is getting strong support from the senior levels of the public service. According to the National Archivist, this is seen as a very high-priority task across the public service. It is an issue of culture and understanding, and the Archives is making its requirements and expectations with respect to the archival record very clear right across the system.

This need to instil a stronger and more consistent culture of information and records management was echoed by other witnesses who emphasized the need to create a positive legal obligation for public officials to create records in the first place.

The issue of the protection of government records was raised by the Information Commissioner and by another witness. They expressed concern that the transfer of government records identified as having historical and archival value to the care of the Librarian and Archivist remains subject to negotiated agreements, as provided in clause 13. Both the Information Commissioner and the other witness noted that there is no compulsion on recalcitrant government institutions to negotiate any such agreement, and they strongly suggested this should be made compulsory. According to these witnesses, delay in transferring records at risk can amount to the de facto destruction of the record.

Moreover, although the bill provides for penalties for publishers and others who fail to deposit material or recordings in accordance with clauses 10 and 11 of the bill, there is no complementary penalty for those who fail to comply with a transfer request or who dispose of records in an unauthorized fashion. It was suggested that this oversight be remedied.

A proposed amendment requiring the transfer of records upon the request of the Librarian and Archivist was defeated by a majority vote in Committee hearings.

A spokesperson for the Association of Canadian Archivists and the Canadian History Association also discussed the appraisal of records and the fact that the bill is silent on this function. He recommended that this critical function be added to clauses 7 (objects), 8 (powers of the Librarian and Archivist) and 12 (destruction of records).

Another concern focused on private-sector archival records. Noting that the only records specifically mentioned in the bill are government and ministerial records, the representative of the Association of Canadian Archivists and the Canadian History Association suggested that the phrase "private-sector records having national prominence or representative significance" be included in the clauses of the bill relating to definitions, objects, powers, and depository requirements.

F. Copyright Amendments in the Bill

Two principal types of objections have been raised with respect to the amendments to the *Copyright Act* proposed in the bill.

The first focused on whether the amendments were advisable at all, given that the Standing Committee on Canadian Heritage would be undertaking a comprehensive review of the *Copyright Act* beginning in the fall of 2003. Citing this impending examination, mandated by section 92 of the Act, and underlining the complexity of the subject matter, some witnesses were of the opinion that the piecemeal amendment of the Act through the proposed legislation was not only inefficient but inappropriate.

The second stream of objections focused on the substantive provisions of the amendments. Within this latter group, two different concerns were raised: one with respect to the Internet sampling provisions proposed by clauses 8(2) and 26 of the bill, and the other regarding the amendments extending copyright protection of certain deceased authors' posthumous works, set out in clause 21 of the bill. While commentary on the Internet sampling provisions was fairly muted, the Committee heard from several witnesses either supporting or opposing the proposed amendments dealing with posthumous works.

1. Internet Sampling: Clauses 8(2) and 26

With respect to the powers of the Librarian and Archivist to take periodic samples of the Internet for preservation purposes, concern was expressed that these samples might be later distributed and made available, contrary to copyright provisions. Creators, in particular, are concerned that they might lose the ability to control or disseminate their work on their own terms, given the risks arising from the ease of digital transmission. An expert in copyright law appeared before the Committee to explain that the Internet sampling provision was a measure in line with international practice. The expert suggested that this is not a maverick provision; rather, it is a continuation and modernization of existing means used by archivists to preserve material.

A spokesperson for the Société professionnelle des auteurs et des compositeurs du Québec expressed the concerns of creators with respect to the term "without restriction" as used in clause 8(2). He feared this would permit the unfettered downloading of copyright-protected works, and urged that the term be narrowly restricted.

An amendment to the bill, clarifying that the Librarian and Archivist may take periodic Internet samplings for preservation purposes only, attempts to address this concern.

2. Copyright Term Provisions: Clauses 21 and 22

Witnesses supporting the creator and user communities appeared before the Committee to express their concerns about this aspect of the bill. Creators supported the copyright amendment clauses in the bill, while user communities such as librarians, archivists, historians and researchers opposed them.

Proponents of the bill, such as the Creators Copyright Coalition, the Writers' Union of Canada, Droit d'auteur/Multimédia-Internet/Copyright (DAMIC) and the Société professionnelle des auteurs et des compositeurs du Québec, felt that this was a fair compromise between the former perpetual protection that was given to unpublished posthumous works prior to the 1997 amendments to the *Copyright Act*, and the 31 December 2003 deadline introduced by those 1997 amendments. Proponents felt that the new extension offered by this bill was justified, in that the five-year transitional term introduced by the 1997 amendments was too short a period for the authors' heirs to find a publisher and exploit the works. They also expressed concern about potentially sensitive material in personal journals and letters that might harm still-living people, and cited that as a reason to keep the material out of the public domain for a longer period.(3)

(3) This point was also raised by the Writers Guild of Canada.

Proponents of the bill also emphasized that during the period of copyright protection, material could be accessed and consulted but simply not published, and thus academic or other research would not really be impeded. Finally, they asserted that with the 31 December 2003 deadline looming, time was of the essence and that once copyright was lost, it could not be regained.

On the other hand, opponents suggested that the public interest in gaining access to such material outweighs the private interests of the relatively few who would benefit by financially exploiting this work. They claimed that, if the copyright amendment clauses were retained, many historically significant unpublished works would remain beyond the reach of librarians, archivists, historians and other researchers, and thus unnecessarily impede and delay full understanding of the relevant people and their times.

Opponents of these amendments suggested, moreover, that the heirs of the deceased authors whose works were the subject of the amendments had known since 1997 that their copyright would expire at the end of 2003, and thus have had ample time to financially exploit those works. One witness stated that further extending this term would simply favour private financial gain over public knowledge. Another witness suggested that impeding and delaying public access to works for reasons of copyright could even be viewed as a form of censorship.

An earlier version of clause 21 would have provided copyright protection until the year 2017 for the unpublished works of authors who died after 1929 but before 1949. This proposal, however, proved to be sufficiently divisive to necessitate an amendment. That amendment extends copyright protection somewhat, but provides a shorter term of protection than originally drafted.

It is worth noting that while the amended term of copyright extension is shorter than that initially proposed (until the end of 2006 instead of 2017), it applies to a potentially broader field of deceased authors whose works were unpublished by the end of 1998. As it is currently written, this single term of protection applies to all works that were unpublished on 31 December 1998 and whose authors died before 31 December 1948, irrespective of how many years prior to the end of 1948. This means, for example, that an unpublished work of Sir John A. Macdonald or Sir Wilfred Laurier, who died in 1891 and 1919, respectively, would be protected by copyright until the end of 2006.

G. Media Coverage of the Bill

Media reaction to the proposed Library and Archives Act has generally been muted. The only issue that appears to have attracted any media attention is the proposal to extend the copyright protection of unpublished works of selected deceased authors. Indeed, this particular aspect of the bill was referred to by one copyright expert as the "Lucy Maud Montgomery Copyright Amendment Act,"(4) a reference to the author of *Anne of Green Gables*, who died in 1942. Under the *Copyright Act* as it currently stands, Ms. Montgomery's unpublished diaries and letters will pass into the public domain at the end of December 2003. Her heirs face the prospect of losing control of this potentially lucrative material if the proposed amendments do not become law by that time. However, Ms. Montgomery is not the only significant Canadian author whose unpublished works would be affected by this amendment. Stephen Leacock, Emily Carr, Archibald Stansfeld Belaney (Grey Owl) and Sir Charles G. D. Roberts also died during the critical 1930-1949 time frame and may have unpublished and exploitable works.

Nevertheless, another copyright commentator stated that this aspect of the proposed legislation "appears to put the rights of the few ahead of the general public."(5) This view was echoed by commentators sympathetic to the user communities, who suggest that such an extension would be contrary to public policy and would delay for several more years the publication of historical material, thus making it more difficult for "Canadians to tell their stories."(6) Although access to material may not be hindered by these provisions, publication would be. This means that materials, if made available, might be consulted and referred to by historians and other researchers, but they could not be published in their entirety. One commentator stated that "reading archival material is utterly pointless if it can't be shared."(7)

In addition, the amendments are defended as remedial conditions meant to address an unfairness created as a result of the 1997 *Copyright Act* amendments. Prior to 1997, unpublished works of deceased authors enjoyed copyright protection in perpetuity. Perpetual

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(4) Ian Jack, "Ottawa champions copyright – or some of it: Amendment to benefit small band of authors with unpublished works," *National Post*, 12 May 2003, FP 1.

(5) Michael Geist, quoted by Ian Jack, *ibid*.

(6) Howard Knopf, "Mouse in the House: A new bill in Ottawa appears to adopt U.S.-style copyright term extension," *National Post*, 7 June 2003, FP 11.

(7) Laura Murray, "Stop the Mickey Mouse," *National Post*, 16 June 2003, FP 23.

protection was ended with the 1997 amendments, and a transitional period of 5 years was introduced for unpublished works whose authors had been dead for more than 50 years. Such works would be protected to the end of December 2003, at which point they would fall into the public domain. This 5-year transition period has been criticized as failing to give reasonable notice or adequate protection to the authors or their heirs or would-be publishers;(8) the copyright provisions in Bill C-8 would redress the situation.

Another aspect of the bill that garnered some media attention was the way in which it was ultimately passed by the Committee.(9) As the bill progressed through the Committee stage, it was increasingly evident that the controversial amendments to the *Copyright Act* might defeat an otherwise laudable bill. However, after considerable debate, the Committee passed the bill with the original and lengthier copyright extension for posthumous works still intact, albeit with a slight technical amendment that did not affect the substance of the copyright extension. However, a further modification shortening the term of protection for unpublished posthumous works was passed by unanimous consent at third reading immediately prior to the passage of this bill in the House of Commons in the 2nd session of the 37th Parliament.

(8) Marian Hebb, "Modest changes to copyright debated," *National Post*, 17 June 2003, FP 11.

(9) See Kady O'Malley, "'Political Nightmare' awaits Libs on National Archives Bill," *The Hill Times*, 23 June 2003; and Ian Jack, "MPs battle over Lucy's copyright: 'Stacked' committee extends Montgomery heirs' claim to works," *National Post*, 24 June 2003, A 12.