



Library and Archives Canada

Directive on Litigation Support



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1. Effective date

This directive has been approved by Management Board and takes effect on May 7, 2019.

2. Application

This directive governs Library and Archives Canada (LAC) activities related to the research, discovery, examination and production of any records and publications in LAC's holdings for litigation.

This directive does not apply to:

- Corporate information resources created and managed by LAC in the course of conducting its mandated business; or
- Information required as part of a litigation proceeding to which LAC is a party, including the complaints to the Office of the Information Commissioner and the Office of the Privacy Commissioners; or
- Post-litigation activities. However, LAC can offer some post-litigation support up to operational capacities. Additional services and support are subject to negotiation and to cost-recovery.

This directive falls under the LAC [Stewardship Policy Framework](#) and the [Access Policy Framework](#). This directive should be applied in conjunction with the associated policies, directives, guidelines and tools, with LAC's *Procedures for Seeking Legal Advice*, and also with LAC's [Reference Services Charter](#), the process for securing [Departmental Researcher Status](#), for requesting [Access to Restricted Documents](#) and [Reproduction](#), as appropriate.

See [Appendix A: Related documents](#).

3. Definitions

See [Appendix B: Definitions](#).

4. Context

Litigation may require records and publications in LAC holdings to be collected, preserved and produced. The compulsory powers to order document collection, preservation or production are established in provincial rule of court, and federal laws such as the [Criminal Code](#), the [Canada Evidence Act](#), the [Competition Act](#) and the [Crown Liability and Proceedings Act](#). There is a

possibility of a court, a tribunal or other entity issuing an order compelling LAC to preserve or produce certain documents.

LAC is mandated through the [Library and Archives of Canada Act](#) (LAC Act) to acquire, to preserve and to provide access to documentary heritage of Canada. LAC is also mandated to be the permanent repository of government and ministerial records. LAC has the role to preserve and to facilitate access to government records transferred to its holdings. Under section 12 of the LAC Act, LAC has the role to consent to the disposition of government and ministerial records.

Occasionally, LAC also has in its custody documentary heritage material under its care in its storage facilities on behalf of third parties and under an agreement. This material can be compelled in judicial proceedings as well, but it is the responsibility of the third party who owns the material.

The temporary removal of original records from LAC's holdings constitutes a risk to the preservation and intellectual integrity of documentary heritage. LAC may produce certified copies or originals of records or publications under sections 19(1) and 19(2) of the LAC Act, while taking into account the risks implicit in the production of the original and the importance of its preservation and of continued access to it.

5. Purpose

The purpose of this directive is to facilitate litigation support while protecting the integrity of LAC's documentary heritage collection in the context of litigation.

This directive enables LAC to carry out its roles by setting out how LAC supports litigation-related activities involving its holdings regardless of who created or requested the records sought, while taking into account the risks to the preservation and intellectual integrity of documentary heritage. LAC offers the same options in terms of services for reference, reproduction and production to all parties in litigation. LAC neither identifies nor determines the relevance of records in a litigation context.

This directive outlines how LAC responds to production requests in the context of legal proceedings and orders to preserve records and publications in its holdings, from a court, tribunal, or any other entity with the power to compel, including the Information Commissioner and the Privacy Commissioner.

The expected results are:

- Documentary heritage in LAC's holdings or in its custody is protected.

- LAC's role and obligations are clearly established in providing support to the Crown or to other parties in litigation to locate, review and produce the holdings required for litigation.

6. Requirements

6.1 Subpoenas, court orders and undertakings

Subpoenas, court orders and undertakings may form part of the evidence discovery process in legal proceedings. Normally, subpoenas are served to the Attorney General of Canada.

When LAC is served a subpoena, asked for an affidavit, compelled by a judicial order, or otherwise contacted in a litigation matter or by a 3rd party's legal counsel, including for investigations by the Information or Privacy Commissioners, LAC will:

- Immediately consult with its Legal Services Unit (LSU) in accordance with its *Procedures for Seeking Legal Advice*; and
- Work with LSU to give effect to the request.

6.2 Administration of preservation orders and litigation hold letters (or notices) in Crown litigation

Courts and tribunals may issue orders for preservation, which apply to the party in litigation who is the subject of the preservation order.

From time to time, the Department of Justice (JUS) issues a litigation hold letter (or notice) about a subject in anticipation of litigation or when a matter is actually litigated. This letter (or notice) informs government institutions about the scope of the litigation, the matter under litigation and the documents to be identified, preserved, and collected by the government institution for the litigation. In both cases, the government institution is required to suspend the destruction, the movement, and the alteration of any document potentially relevant to the litigation.

6.2.1 Preservation orders and litigation hold letters (or notices) for dormant government records in the custody of LAC

- Government institutions must inform LAC if a preservation order or a litigation hold letter (or notice) is affecting their dormant records stored at LAC on their behalf.
- Government institutions are responsible for the implementation and monitoring of preservation orders and litigation hold letters (or notices) applicable to their dormant records in LAC's custody.

- Where LAC has not received the litigation hold letter (or notice) or the preservation order, government institutions shall be held responsible for any destruction of records in LAC's custody carried out at the institution's request.
- Where LAC has received the litigation hold letter (or notice) or a preservation order from Government institutions, LAC shall be held responsible for any destruction of the records in LAC's custody, even if destruction was originally instructed by the institution.

6.2.2 Preservation orders and litigation hold letters (or notices) for LAC holdings

- LAC implements and monitors the application of preservation orders and litigation hold letters (or notices) on records and publications in its holdings.

6.3 Research, review and copies

When documentary heritage material are required for litigation purposes, LAC may be required to produce them by applicable rules of procedures or by judicial proceedings, and LAC provides support in locating and producing relevant documents identified by the requestor.

In the context of litigation, when a government institution is compelled to produce records transferred to LAC's holdings, or dormant records in LAC's custody, LAC supports locating and producing the relevant records identified by the government institution.

LAC reference services, assistance and support for research in its holdings, on behalf of the Crown or of other parties in litigation for which material in LAC holdings may be required, are limited to the services listed in 6.3.1.

Additional services and support are subject to negotiation and to cost-recovery. Service agreements and cost-recovery mechanisms will be developed on a case-by-case basis between LAC and concerned parties in need of records or publications for litigation.

See also LAC's [Reference Services Charter](#), the process for securing [Departmental Researcher Status](#) and for requesting [Access to Restricted Documents](#).

6.3.1 Services for the location and examination of LAC holdings

Up to operational capacities, LAC provides the following access services in support to litigation:

- Basic reference: orientation, brief description of holdings and training (e.g., search tools and finding aids when available); and
- Specialized reference: support from specialists to locate a particular item, refine a complex query, or provide expert advice on the subject matter and intellectual arrangement of the records.

6.3.2 Additional services and support

Litigation is usually time-sensitive and can require a large quantity of documents. Services which are above and beyond the ordinary range of services available to any LAC user listed in 6.3.1, will be provided subject to negotiation and agreement, including cost-recovery when applicable. Here are examples of additional services:

- Providing a suitable space on LAC premises for a supervised examination or review of its holdings, beyond the consultation space normally available to all users, to meet specific needs;
- Providing circulation support to make large quantity of holdings available to researchers for litigation purposes;
- Providing preservation support for holdings that are not in a suitable condition to be consulted or reproduced (e.g. contaminated, deteriorated, unreadable format);
- Providing support for large-scale digitization requirements;
- Overseeing third party suppliers hired by external parties for the purpose of examination or review of LAC holdings in space provided on-site; and/or
- Providing advice and assistance in the indexing and preparation of descriptions and citations for documents.

6.3.3 Provision of copies of LAC holdings

LAC will, subject to negotiation of cost-recovery:

- Provide one (1) certified true copy of any archival record requested, in accordance with section 19(1) of the LAC Act;
- Arrange for or otherwise permit digitization of records, where preservation concerns permit and such records are required by the court, tribunal or other entity, but not already available in, digital format; and/or
- Provide uncertified digital copies of documents from LAC holdings.

6.3.4 Production of original of LAC holdings on a limited basis

LAC will produce a certified copy receivable in evidence in the same manner as the original without proof of the signature or official character of the person or persons appearing to have certified it, in accordance with section 19(1) of the LAC Act.

However, in accordance with section 19(2) of the LAC Act, LAC shall provide originals:

- If the court, tribunal or other entity determines that it is necessary; and
- Taking into account the risks implicit in the production of the original; and
- Taking into account the importance of its preservation and of continued access to it.

In making its order, the court, tribunal or other entity should ensure that any measures that are required to protect and preserve the requested records are taken; and that they are returned to the Librarian and Archivist as soon as they are no longer needed for the litigation purposes.

6.4 Records of former government institutions

When LAC has in its custody dormant government records of a former government institution under section 13(4) of the LAC Act, and those records are required for the discovery process in legal proceedings and production of documents for court, litigation, or other litigation-related processes, LAC will:

- Work with JUS to seek support from existing Government of Canada institutions that have previously taken over similar or equivalent functions as the defunct institution, and/or from parent institutions or central agencies, who are better placed to conduct research on the records;
- Where no such institutions exist, work with JUS to undertake the research.

7. Roles and responsibilities

Litigation support is a shared responsibility across LAC for ensuring timely response to litigation proceedings.

More specifically:

The **Deputy Librarian and Archivist of Canada** is responsible for:

- The implementation of the directive;
- The designation of an Operation sector lead for the coordinated management of the services and support provided to all parties involved in large-scale litigations against the Crown requiring LAC's holdings.

The **Corporate Secretary** is responsible for providing strategic advice and for the institutional coordination of the legal queries and legal advice with LSU, and for the centralised access to the preservation orders and litigation hold letters (or notices).

The **Directors General** are responsible for informing their staff of preservation orders and litigation hold letters (or notices) received by LAC.

The **Director General, Archives**, is responsible for LAC's response to preservation orders and litigation hold letters (or notices) received by LAC.

The **Director General, Public Services**, is responsible for the response to legal proceedings requiring the production of records or publications that are received by LAC.

8. Monitoring, evaluation and review

Strategic Research and Policy will monitor and review this directive after five years, or as required, with support from the operational areas responsible for litigation-related activities at LAC.

This directive will be reviewed for consistency with GC-wide approaches to litigation readiness with JUS.

9. Consequences

The consequences of non-compliance with this directive could include legal and liability risks for LAC.

Mitigation measures include working closely with JUS on an ongoing basis to ensure document production for court-related processes is managed and resourced.

Consequences of non-compliance may include informal follow-ups, or formal direction on corrective measures.

10. Information

Inquiries should be addressed to:
Director, Strategic Research and Policy
Library and Archives Canada
550 Boulevard de la Cité
Gatineau, Québec J8T 0A7
Email: bac.politiques-policy.lac@canada.ca

Appendix A: Related documents

[Access to Information Act](#)

[Canada Evidence Act](#)

[Competition Act](#)

[Copyright Act](#)

[Criminal Code](#)

[Crown Liability and Proceedings Act.](#)

[Library and Archives of Canada Act](#)

[Privacy Act](#) and regulations

LAC [Access Policy Framework](#) and associated policy instruments

LAC [Stewardship Policy Framework](#) and associated policy instruments

LAC Procedures for Seeking Legal Advice

LAC Services:

- [Reference Services Charter](#)
- [Departmental Researcher Status](#)
- [Access to Restricted Documents](#)
- [Reproduction](#)

Appendix B: Definitions

Access [Accès]

Access occurs when clients can find, identify, view, obtain and use holdings.

Care [Garde]

Legislated or contractual obligation to protect documentary heritage. This includes the maintenance and protection of documentary heritage from deterioration or destruction, including cleaning, storage and repair.

Content [Contenu]

Content is that which conveys information e.g. text, data, symbols, numerals, images, sound and vision.

Control [Responsabilité]

The right to manage, preserve and facilitate access to holdings. This includes the authority to make a decision about the maintenance, keeping, care, preservation or security of a record and how to facilitate access to the record.

Custody [Possession]

The physical possession of material. It does not require control or ownership. This includes the keeping, care, preservation or security of a record.

Discovery [Repérage]

The activity of identifying the existence of an information resource and distinguishing it from other information resources and/or contextualizing it in relation to other information resources.

Documentary heritage [Patrimoine documentaire]

Documentary heritage comprises publications and records of interest to Canada.

Dormant government records [Documents gouvernementaux inactifs]

Dormant is the state between a record's active use and its disposition. Dormant government records are in LAC's custody awaiting transfer into LAC's permanent holdings or return to the originating institution at the end of their retention period. They are kept until the end of their retention period, when they can be destroyed, be alienated or transferred to Library and Archives Canada because of their archival or historical value.

Evidence Discovery Process [Processus de communication préalable de la preuve]

The legal discovery process takes place after a claim has been made by a plaintiff, but before the trial begins. It is during this stage of litigation that the parties will "discover" facts about the case that is heading to trial. When

a claim is made, the parties (the plaintiff and the defendant) have legal obligations to identify, preserve, collect and disclose documents that are relevant to the trial. During the discovery process, the parties in a trial will exchange documents with each other (through documentary discovery). In addition, during the discovery process, each party will also have the opportunity to ask questions and get answers from the opposing party about the claim (through examination for discovery).

Holdings [Collection]

Holdings comprise documentary heritage brought under the control of LAC through the Library and Archives of Canada Act and Legal Deposit of Publications Regulations, and any master copies generated thereof.

Information resources [Ressources documentaires]

Information resources are any documentary material produced in published and unpublished form regardless of communications source, information format, production mode or recording medium. Information resources include textual records (memos, reports, invoices, contracts, etc.), electronic records (emails, databases, Internet, Intranet, data, etc.), new communication media (instant messages, wikis, blogs, podcasts, etc.), publications (reports, books and magazines), films, sound recordings, photographs, documentary art, graphics, maps and artefacts.

Litigation [Litige]

Litigation refers to any court, tribunal, judicial, or quasi-judicial proceeding in which documents and information can be compelled to be produced.

Litigation Hold [Préservation de documents en cas de litige]

Sometimes referred to as a "preservation hold", "litigation hold", "legal hold" or 'disposition moratorium'. A hold is a temporary measure initiated by a notice or communication from Justice Canada to Government of Canada institutions, that compels a suspension of the normal disposition (or destruction) of records that may be relevant to litigation involving the government institution or are reasonably anticipated to be relevant. It applies to both paper-based documents and electronically stored information.

Preservation [Préservation]

Preservation is all actions taken to retard deterioration of or prevent damage to holdings and ensure that its access, use and meaning, and its capacity to be accepted as evidence of what it purports to record are maintained over time.

Record [Document]

Any documentary material other than a publication, regardless of medium or form.