

**Information Bulletin #9**  
**Copyright for Archivists**  
**Canadian Council of Archives Copyright Committee**

**Donor agreements**

A donor agreement is a contract between an archival institution and a donor. A contract is a promise to do something by one party in return for valuable consideration from the other party to the contract.

In an archival donor agreement, the donor promises to donate material to the archival institution in return for the archival institution preserving the material in its holdings and providing access to it under negotiated, mutually agreed terms and conditions. If one or more of the terms or conditions in the contract is broken, the injured party can seek judicial remedies for breach of contract. The legal remedies for breach of contract include such things as money to compensate the injured party for damage caused by the broken promise and/or an injunction to stop the breach from continuing.

Contracts are binding and enforceable against the parties to them, with certain exceptions that have been established by law. A court can find a contract to be invalid because:

- a party to it is **incapable** of entering into it (for example, an infant)
- a **misrepresentation of fact** induces one of the parties to enter into the contract
- the contract was entered into under **duress or undue influence**
- the parties entered into the contract based on a **mistake** that would, had they known, stopped them from entering into it
- the purpose of the contract is **illegal** for public policy reasons.
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The last category, **illegal** contracts, is relevant to the issue of whether or not a donor agreement containing restrictions extending beyond the expiration of the term of copyright protection is **illegal** under contract law.

Contract law has a long history and it involves complex principles of law. For these purposes, it is sufficient to categorize the situations where courts have found contracts to be illegal because their purpose is contrary to public policy. The following types of contracts have been found by the courts to be illegal because their purpose is contrary to public policy:

- contracts to commit fraud, a crime or a civil wrong
- contracts which injure a country's relationship with other countries
- contracts tending to injure the public service

- contracts that pervert the course of justice
- contracts that abuse the legal process
- contracts contrary to good morals
- contracts affecting the freedom or security of marriage
- contracts affecting the discharge of a parental duty
- contracts which remove the jurisdiction of the courts and
- contracts in restraint of trade.
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None of these circumstances resemble a donor agreement in which the donor promises to donate material to an archival institution in return for the archival institution preserving the material in its holdings and providing access to it under negotiated, mutually agreed terms and conditions. Although contract law continues to evolve, and to be interpreted by the courts, it is clear that an agreement between a donor and an archival institution containing use restrictions extending beyond the expiration of the term of copyright protection cannot be considered **illegal** under any of the categories established to date by the courts as a basis for declaring contracts **illegal**.

Contract law and copyright law exist side by side. When an archival institution enters into an agreement with a donor to restrict an activity such as copying, the contractual obligation lasts for the length of time specified in the contract. The term of the copyright is something else altogether. The fact that something in its holdings is in the public domain does not mean that an archival institution must allow it to be copied. If a donor and an archival institution agree in a contract that copying will not be permitted by the archival institution, then that obligation continues under the contract regardless of whether copyright continues or has expired.

Donor agreements are an important part of archival practice. Archival institutions must be careful about the restrictions they agree to when they accept material into their holdings. They should not agree to restrictions unless there is a very clear justification for doing so. Although contract law does not preclude an archival institution from entering into donor agreements with restrictions extending beyond the term of copyright protection, such agreements are not desirable or recommended. In situations where a donation of archival material with historical significance will not be made unless restrictions beyond the expiry of copyright protection are agreed to, these restrictions should be weighed against the historical significance of the material and the cost to preserve material to which researchers will have restricted access.

If an archival institution agrees to restrictions of any type in a donor agreement, it must abide by the terms to which it agreed. If it does not do

so, an institution risks being sued for breach of contract and, just as important, ruining relations with present and future donors. As a matter of good legal and institutional practice, an archival institution must honour the terms and conditions of an agreement it has signed with a donor.