

Court and Legal Records at the Archives of Ontario

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It is a fact, more or less well-known, that the Archives of Ontario over the past ten years has acquired a phenomenal volume of legal records — specifically court records. Its court records collection, which in 1969 amounted to less than one hundred cubic feet of records had grown by 1979 to total over nine thousand cubic feet and currently amounts to over twenty thousand cubic feet of records. These numbers sound impressive. Such a staggering volume suggests that the Archives must have everything ever produced by the courts in Ontario; this, of course, is not the case. It is fair to say that its court records acquisitions have become a very mixed blessing. It should also be obvious that court records represent only one side of the legal system in the province. The other side of the law in Ontario is documented by private legal records — the records of prominent lawyers, jurists, and the records of law firms. What follows is a brief overview of the Archives' court records collection and private legal collections. In conclusion, I will discuss the types of legal research being done with these records.

More than twenty thousand cubic feet of court records is at first telling very impressive. But sheer volume does not disclose the real story. There are problems with this collection. While on the face of it, twenty thousand cubic feet of records seem to promise much in terms of potential research, it delivers somewhat less. Further, it has created obvious problems for the Archives that has to store this volume of records. This massive collection has its roots in the creation of a records management programme for the Government of Ontario. Between 1975 and 1978, the Ministry of the Attorney General in liaison with the Archives of Ontario set up a series of records schedules for Ontario's court records which insured that the archives received regular transfers of court records having permanent historical value. While transfers under these records schedules include some valuable early court documentation, for the most part, the archives has been deluged by thousands of cubic feet of more recent records. On the one hand, the Archives does not have as much of some types of court records as it would prefer, while on the other hand, it has more records from certain courts than a researcher could possibly analyse in a lifetime. For example, less than one-quarter of the collection predates 1900 while close to half consists of Supreme Court and District Court files dating from 1950 on.

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What are the specific weaknesses of this collection? Certainly there are problems with nineteenth-century records. There are no Court of Appeal case files at all. There are no Supreme Court civil or criminal case files prior to the 1850s — and the files available from the 1850s onwards are not complete.¹ At the District Court and Sessions Court level, a better selection of pre-1850 documentation survives but after 1850 it becomes inconsistent. At the lowest court levels, especially the criminal courts represented by convictions by justices of the peace and the police courts, the records are very limited. In terms of twentieth-century records, again there are no Court of Appeal files until the 1950s. And at the Supreme Court level, while civil case files remain relatively intact, the criminal case files from the mid-1930s onwards were subject to post-trial “stripping” which left only the original indictment as a formal record of the case. Everything else was returned either to the local Police Department or to the Crown Attorney.² At the District Court level, civil case files seem to have been the target of destruction in most overcrowded courthouses while criminal case files now appear to have been nonexistent except for the record kept by the Crown Attornies.³ We have no record of the Juvenile Courts in Ontario thanks to the implementation of the Young Offenders Act in April 1985. The one set of court records which, remarkably, survived the ravages of time and court officials are the Surrogate Court records, or estate records. They exist right from 1793 into the twentieth century, a fact which surely points to the central importance of property to our society. They are the one set of records no court official had the audacity to destroy no matter how much space they occupied in overcrowded courthouses.

It would be wrong to be unduly critical of the collection. Despite its deficiencies, there are still valuable civil and criminal records series that can be put to research use. Furthermore, there is hope that early records still remain to be discovered. In 1982, for example, on a field trip to collect municipal records, the earliest records of the Bathurst District Court, dating from 1823, were found, stuffed inconspicuously in cardboard cheque boxes in a basement corner of the Perth courthouse. In 1984, the Niagara District Court of General Quarter Sessions records from 1828 were found in the attic of the old St. Catharines courthouse just before the building was turned over to a private developer. In January of this year, the justices of the Supreme Court of Ontario transferred to the Archives all of the Supreme Court judges’ benchbooks from 1827 to 1885. (The benchbooks are the judges’ detailed notes taken during the trial of Supreme Court civil and criminal cases.) In the absence of early court case files, the benchbooks will become an irreplaceable source of descriptive information on early civil and criminal cases in Ontario.

As we continue to try to find records which will fill the obvious gaps in the collection, we also have to deal with the enormous volume of records we have acquired for the more recent period. As was mentioned earlier, close to half of the collection are Supreme and District Court files dating from 1950 and beyond. The number of individual case files for just one decade is staggering: the Toronto Supreme Court office alone during the decade

- 1 Documentation exists for only fifteen civil cases and twenty-seven criminal cases prior to 1850. Supreme Court civil case files make their appearance during the mid-1850s after these files were to be stored in the local courthouses. Supreme Court criminal cases begin in 1859, but for reasons not yet known there are two major gaps consistent for all counties between 1864-79 and 1884-91.
- 2 An indictment simply records the formal charge against the accused. Detailed descriptions of the crime appear in the original depositions and examinations of those involved in the case. As exhibits, these documents are stripped from the case file after trial.
- 3 District Courts have only kept separate criminal case files since the Courts of Justice Act, 1984.

1950-59 created over 4,000 files per year. For the last three years the Ministry of the Attorney General and the Archives have been considering ways to reduce this volume. Currently, two solutions are under consideration: either to create a viable research sampling of these files, or to microfilm the total collection. A third possible solution could be the regionalization of court records storage since there is no necessity for the centralization of all court records in one repository in Toronto if acceptable regional institutions exist outside it.

Court records, however, represent only one side of the historical reality behind the legal system in Ontario. The other side is revealed by private legal records. Through the court records we know what issues actually came to court and from there succeeded or failed. It is equally important to know what issues never appeared in court. The decision to pursue a legal matter is dependent not only on what a lawyer thinks can succeed under existing laws, but also on the ultimate cost of prosecuting an action under existing laws. Another reason for finding and acquiring private legal records is the necessity to document historically the activities of the legal profession over time: what the average nineteenth- or twentieth-century lawyer did in practice. It is not enough to record the lives of prominent lawyers; there must also be documentation from ordinary lawyers.

At the Archives of Ontario, this collecting priority is relatively new. Until recently, the records of law firms and lawyers were not on the acquisition agenda unless the lawyer became a prominent politician. What legal records the Archives obtained were really mistakes, or accidental additions, to our court records accessions. In almost all cases, these documents were the early private practice records of lawyers who became local Clerks of the Peace, Crown Attornies, or Court Registrars for their counties. These men often brought their private practice records with them to the courthouse when they took up their official positions. After these men retired their private records were moved to the courthouse basements along with older court records to be found and transferred later along with the court documents.

Needless to say, this is not a systematic — even if an easy — way to acquire private legal records. A rational collection policy for legal records requires a considered plan for acquiring both the records of the legal elite — that is prominent lawyers and jurists — and a select set of records representative of the rank and file over time. In terms of the legal elite, a recent and valuable collection held by the Archives is the Osgoode Society collection of oral interviews with men and women who have left their mark on Ontario's legal system as judges, lawyers, Attornies General, or senior officials of the Law Society. The oral interviews are part of an ongoing oral history programme funded by the Osgoode Society. To date, the thirty-seven completed interviews include such legal figures as Joseph Sedgewick, Margaret Hyndman, Campbell Grant, Arthur Wishart, Willard Estey, and W.B. Common. It is the single most significant collection the archives has documenting the legal environment of the twentieth century.

On the other hand, documenting the rank and file of the profession is an effort that has hardly begun, and furthermore, could become problematic. Part of the reason I became involved in the Osgoode Society Legal Records Survey was my interest in discovering what was available to form the basis of a rank and file collection. Collecting these records is haunted by the twin spectres of solicitor-client privilege and the confidentiality rule in the Law Society's code of professional ethics. Even if an archives chooses to ignore the issues created by privilege and confidentiality, and attempts to acquire these records, a

planned collection effort may be frustrated by law firms whose partners are too cautious to deliver their records to an archives under any conditions. At this point, the only solution is to work towards a resolution of the issues of privilege and confidentiality but as well, in the interim, actively to pursue valuable legal collections despite the possibility that professional caution may frustrate the pursuit.

With all of this collecting — both of court records and of private legal records — what demand has there been for legal records? Canadian legal history is a relatively new field. My experience with legal records dates only from 1979. Over these six or seven years, research interest has focussed on the criminal records of the courts. Approaches have varied from studying both the nature of crime over a certain period and particular types of crime over a certain period to requests for specific criminal cases. The civil records of the courts have, by comparison, been neglected. There are a number of reasons for this neglect. For the most part, studies dealing with different aspects of the civil side of the law have relied on the cases recorded in the published law reports. Original early civil court records have been used twice: Richard Risk examined the records of the Supreme Court office in Hamilton from 1880-1915 and selected Supreme Court offices in Ontario from 1903 to find evidence of civil actions by injured workers against their employers prior to the creation of the Workers' Compensation Board. Currently, James Snell of the University of Guelph is examining the first decade of divorce files (1931-1939) from a selected number of counties in Ontario.

In part, the neglect shown the civil case files of the courts is a product of the relative youth of the field of legal history in Canada. If the development of American legal history serves as an indication of future demands to be made by Canadian legal historians on our records, the civil case files will not be ignored for long. With this in mind, our major work over the next few years will concentrate on removing the major stumbling block to the use of civil case files: the Archives has not yet properly processed or described these records for the benefit of researchers. The past five years have been spent organizing and describing the earliest records of the central Court of King's Bench, the local Courts of General Quarter Sessions of the Peace, and the local Surrogate Courts. The civil case files of the local Supreme Court offices, the local District Courts, and the central Court of Chancery are next.

Ultimately our goal at the Archives of Ontario is to create a balanced and comprehensive legal research collection. On the one hand, we must make a decision to reduce the overwhelming volume of court records over the long term, while on the other hand we must attempt to expand and refine our collection of private legal records. Resolving the problem of court records is important enough to require the combined efforts of Ontario's archivists, academics, court officials, judges, and lawyers. Together it would be possible to arrive at a working compromise in court records retention that would satisfy the demands of all groups. Private legal records are not so easily subject to a rational approach. Even after the problems of solicitor-client privilege and confidentiality have been laid to rest, it will take a considerable amount of time and effort to find and acquire appropriate legal collections in the future. At this stage, it is simply important to know what is the ultimate goal for a legal collection and the importance of such a collection. Achieving this goal will be the work of years.