

“Be It Remembered”: Court Records and Research in the Canadian Provinces

by LOUIS A. KNAFLA¹

Introduction

The sky was filled with clouds on a warm summer day in Hanna, Alberta, 1975. The centre of a judicial district of eastern Alberta with a fine, wood-panelled court house which was constructed at the end of the Great War in 1919, Hanna, then called Acadia, served a wide area of agrarian society under a number of prominent judges, of whom J.D.R. Stewart of Prince Edward Island was its first. On this particular day in 1975, however, the task confronting the court house custodian was perplexing. Several years earlier, the provincial committee for public records had created a disposition schedule for the supreme, district, and provincial court records of the province, and this schedule included the destruction of a wide range of legal records. The clerk of the Hanna court, who had delayed the implementation of the schedule, finally gave in to his sense of responsibility and issued the custodian his directive to exterminate the records slated for destruction, which in this instance would be execution by fire. The custodian carted out the relevant boxes of records from the basement to a vacant lot east of the court house, spread them out, poured on some gasoline, lighted a match, and stood by with his rake to watch the records burn. Unfortunately the records, like a recalcitrant offender, refused to obey. The smoke from the gas and the burning loose files rose into the cloud cover above, but additional prompting with the rake produced only more smoke, and little fire. After several hours, the fire had smoldered, most of the files were unburned, and the clerk of the court's inspection of a now disfigured vacant lot resulted in a decision to spray the final embers with water, and later to rebox the remaining records and cart them back down to the court house basement. The handiwork of Judge Stewart and his successors, surviving an ordeal by fire, would now become part of Alberta's legal heritage.²

1 I would like to thank Mr. John Pope, Director of the Commonwealth Secretariat-Legal Division, the staffs of the Public Records Office, London, and of the Provincial Archives of Alberta, Edmonton, and my colleagues on the Alberta Legal History Project, for their various perspectives which have assisted me in the preparation of this paper; and Terry Cook, Gordon Dodds, De Lloyd Guth, Burton Glendenning, Indiana Matters, Catherine Shepard, James Whalen, and Douglas Whyte for their helpful comments and criticisms.

2 The names of the parties here have been withheld, and the event has been described as witnessed. The influence of maritime lawyers and judges on the early development of courts and the law on the prairies is a research subject of significant potential.

With the exception of Cape Breton and Quebec, the legal systems of the Canadian provinces have descended from England's common law tradition, and that tradition in Canada was nurtured by some of the finest judges in common law history ranging from Jonathan Belcher of Nova Scotia to John Beverley Robinson of Ontario and Matthew Baillie Begbie of British Columbia.³ The early concern with form and procedure was manifest in the records of the first common law province, Nova Scotia, where a court roll began not with the English words of "We command you" or "Be it commanded," but with the words of the pilgrim in an inhospitable land — "Be it remembered."⁴ And that concern with form and procedure, out of which grew the substance of the common law, came to dominate the courts of the Canadian provinces.⁵ It is appropriate that the Association of Canadian Archivists devoted most of their 1983 conference to legal records, for the records of the law are one of the largest, and least understood, groups of public records extant. The purpose of this paper is twofold: first, to outline the problems of preserving court records, and second, to make some suggestions for their resolution. Thus I will discuss in turn the subjects of preservation, alternative organizational systems, and users and the diffusion of information.

I. *Preservation Questions*

The English had long considered the language of the courts to be part of the living record of the legal system, and thus when the records were enrolled they were customarily retained by the clerk or officer responsible for their production.⁶ The ancient dictum was that the records of a court engrossed on parchment identified that court as a court of record, and the distinguishing feature of all common law courts — be they King's Bench, Common Pleas, Exchequer, or the Assizes — was that the engrossing of the records marked the judgments as those belonging to a court of record.⁷ The custodial aspect was changed amidst the law reforms of the early nineteenth century. The *Public Records Act* of 1838 brought the records of the common law courts under the guardianship of the Master of the Rolls, and a Public Records Office was constructed on the Master's estate in Chancery Lane, London.⁸

3 Charles J. Townshend, "Jonathan Belcher, First Chief Justice of Nova Scotia," *Nova Scotia Historical Society Collections* 18 (1914), pp. 25-57; C.W. Robinson, *Life of John Beverley Robinson Bart, C.B., D.C.L., Chief Justice of Upper Canada* (Edinburgh and London, 1904); and David R. Williams, *The Man for a New Country: Sir Matthew Baillie Begbie* (Sidney, B.C., 1977).

4 The Halifax Supreme Court, for example, RG 39/C (1750-58), Provincial Archives of Nova Scotia. For the common law context, see David Mellinkoff, *The Language of the Law* (Boston and Toronto, 1963), pp. 19-23, 91-94, 204-208. Writs began with similar words as "The King to the sheriff, greeting." The origins of the "Be it remembered" phrase stem from the formal pleading in a case of contract: "Whereas time is of the essence from the beginning of the world, be it remembered...."

5 These subjects are discussed and assessed by Terry Chapman and Louis A. Knafla, "Criminal Law Process and Justice in Canada: A Comparative Study of the Maritimes and Lower Canada 1760-1812," *Osgoode Hall Law Journal* 21 (Summer 1983), pp. 245-74.

6 Samuel E. Thorne, "Courts of Record and Sir Edward Coke," *University of Toronto Law Journal* 2 (1937), pp. 24-49.

7 M.T. Clanchy, *From Memory to Written Record in England, 1066-1307* (London, 1979). This excluded the records of conciliar and equity courts which were normally drafted on paper. Parchment became more widely used in early Canadian jurisdictions, both common law and equity.

8 The history of the legislation has been set out in the *Report of the Grigg Committee on Departmental Records* (London: Command 9163: 1954), Part I.

Pleas before our Lord the King at Saint John in the County of New-
 Brunswick in the twenty sixth year of the said King George the third -
 Witness George Duxsen Esquire - Clerk de la Cour
 Saint John to wit, James Bonney first in the place William Wally in the name against
 Andrew Hunter Stockton on a Plea of Parity on the Case -
 Saint John to wit, **Be it Remembered** that on the same Term before our Lord the
 King at Saint John came James Bonney by Robert Wally his Attorney and brought there unto the
 Court of our said Lord the King before the King himself then there he called on Will against Andrew Hunter
 Stockton being in the custody of the Sheriff of the County of the said Saint John and there on the said
 proceedings James Bonney and Hunter and Hunter's Attorney in their last Term about
 when the said James Bonney's Pleas of Andrew Hunter's Stockton being in the custody of the Sheriff
 of the County of the said Saint John before the King himself for that whereas the said Andrew Hunter
 Stockton on the same Day of the said Term in the year of our said Lord the King's said Term made and by the
 three at New York to wit at the City of Saint John in the County of the said Saint John made and by the
 in writing subscribed with his own hand and seal made and by the said James Bonney made a Cert. writ
 same Day and year by which said writ the said Andrew Hunter Stockton was removed to Saint John
 and James Bonney on the said Day of the said Term in the County of the said Saint John and the force of
 York County legal in Nature to make James Bonney's writ null and void in force the said writ of
 County of the said Brunswick after and on or before the said Day of the said Term in the County of the
 said Andrew Hunter Stockton being and eight by force of the writ of the said County of the said
 returned by force of the Statute and the act of the said Legislature in such case fully made and
 proved the said Andrew Hunter Stockton became liable to pay to the said James Bonney the said Term
 James Hunter Stockton and twelve pence of New York Currency equal in Value to twelve pence of
 Sterling and expense and one fifth part of the said Term of the said James Bonney and the said James Bonney

An example of the Canadian judicial salutation, "Be it remembered," taken from a Pleas of the Crown
 court roll. *Provincial Archives of New Brunswick, RS42/1785, Supreme Court Case Files, James
 Bonney vs. Andrew Stockton, ca. 1786.*

From this moment the common law records became the responsibility of an administrative department of state. The early Victorians had developed a keen appreciation of the past, and the purpose of this enactment was to create a permanent system for organizing, cleaning, repairing, and preserving for the future the court records of the past.

The Canadian experience with courts of record was that of the original pre-public records common law tradition. From Nova Scotia to Ontario, the records of the common law courts were retained by the clerks of the court, and this tradition was maintained in the provinces until the 1970s. Before that time court records were transferred to provincial archives haphazardly. Some were transferred when old court houses were abandoned, and others out of necessity after damage by fire or flood. The systematic acquisition of court records did not begin until the mid 1970s, and the common law tradition continues in the federal jurisdiction, where the records of the Federal Court and the Supreme Court of Canada are still retained in their own storage systems, and in many provinces, where the court records are retained for periods of ten to forty years before they are released to provincial archives or record management centres.⁹

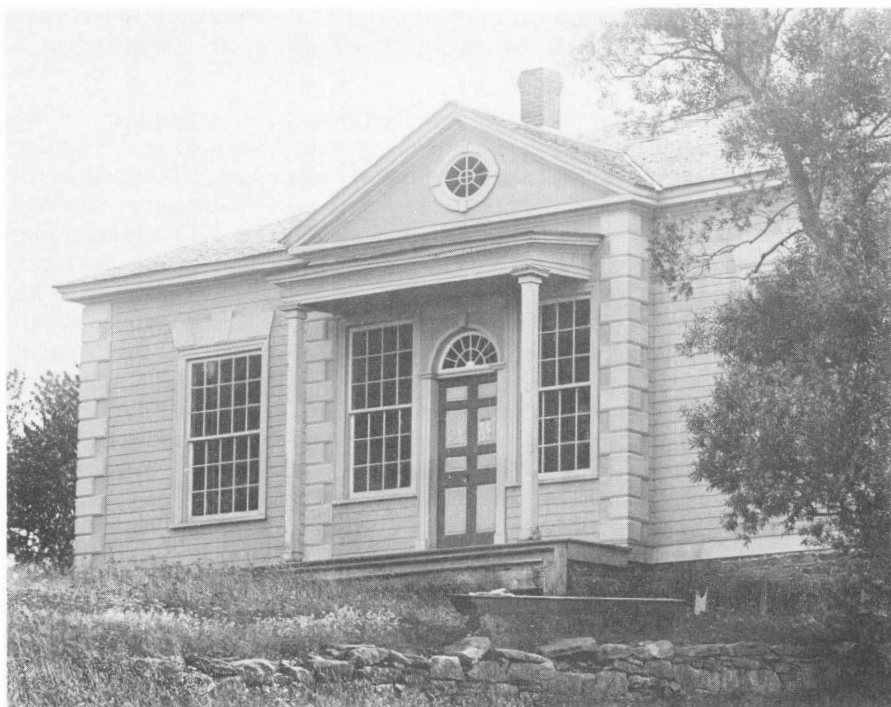
The volume of litigation was never large in the Canadian provinces from New France, Nova Scotia, New Brunswick, and Lower and Upper Canada in the eighteenth century, to the current provinces in the early twentieth. Not large, that is, by the sheer geographical magnitude of a land which supports by modern standards a relatively small population. The records were usually boxed and stored in the basements of the local court houses where they shared the fate of nature's calamities. Not even the purloining of the criminal law under the aegis of a federal department of justice at Confederation affected the preservation of court records under the guardianship of the local clerks of both superior and inferior courts of law, and no central mechanisms for federal documents were drawn until the extension of the "national policy" to record-keeping at the end of the century.¹⁰

A momentous change in the principle of preservation in common law countries was effected by the British Parliament in 1877. The *Public Records Act* of that year embodied a new principle of the burgeoning bureaucratic state: that he who has the responsibility for preserving a record has the concomitant responsibility for deciding its fate. The act of 1877 deemed many records of the central courts to be without value, and almost all the records of local courts to be utterly useless. It authorized Inspecting Officers to prepare for the Master of the Rolls destruction schedules for court records after 1715, which was later amended to after the Restoration of 1660.¹¹ This act established a new attitude to court records that has come down to recent times. Future acts in Britain would retain its fundamental assumptions, and the new Canadian provinces in the prairies who drew more closely on British traditions would adopt a similar attitude. The attempt of the Hanna custodian to destroy the

9 A useful discussion of the history of the archives in Canada is that of John Hall Archer, "A Study of Archival Institutions in Canada" (Ph.D. thesis, Queen's University, 1969).

10 The thesis of Hugh A. Taylor, "Canadian Archives: Patterns from a Federal Perspective," *Archivaria* 2 (Summer 1976), pp. 3-19 at pp. 7-8.

11 This and later relevant acts and orders were gathered as the *Reprint of Statutes, Rules and Schedules governing the disposal of Public Records by destruction or otherwise, 1877-1913* (London, 1914).



Sunbury County Court House, 1899. *Provincial Archives of New Brunswick, P5/84.*



Charlotte County Court House, ca. 1900. *Provincial Archives of New Brunswick, P11/185.*

judicial records of his court house to fulfil the mandate of the provincial government was simply part of the late Victorian tradition of a highly selective approach to the preservation of court records.

A Canadian destruction practice, however, was never established — due thankfully to the regional character and strong loyalties of its provinces. The court records which have survived are extant because they have escaped the vicissitudes of a hostile environment instead of having to cope with man's wanton destruction. In Nova Scotia, which was conquered by Britain from France in 1713, a general court was established at Halifax in 1738, and a common law system was created for the colony in 1749 and established fully by 1751.¹² The court proceedings, civil and criminal, date from 1749 with some gaps, and the extant records of the circuit courts are more irregular. Individual case files survive haphazardly. The records of county courts survive from a later period, the earliest being those of King's County from 1782, Colchester from 1805, and Shelburne from 1820. The Vice-Admiralty Court minute books are extant only from 1834, but there are scattered trial proceedings from 1749. Thus the court records for this earliest common law province have survived in a piecemeal manner. New Brunswick has been more fortunate. There, where the New England legal traditions were instilled at its formation as a Loyalist colony in 1782, long, consistent runs of its major judicial records have been preserved. These records include criminal and civil minute and process books for the Supreme Court and the Assizes from 1786, and case files from 1785. Other series of records such as summary judgments date from 1834, note books from 1841, and day books from 1853. Chancery and Probate Court records are fairly complete for the nineteenth century, and many county court records have survived as well, although these survivals have been more haphazard. New Brunswick represents the best example in the East of court records survival in the common law tradition.¹³

Quebec and Ontario have not been as fortunate in the survival of their judicial records. While the court records of New France are fairly complete, those of Lower Canada are scattered both as to series and as to place. Many of the King's Bench minute books have survived, together with isolated books of Quarter Sessions, but the process of pulling these and other records together, and organizing and identifying them at the *Archives nationales du Québec*, is still in progress. The existence of abstracts of King's Bench and Gaol Delivery records for Montreal, Quebec, and Trois-Rivières, and for the Gaspé and Eastern Townships for 1765 to 1817, and of sheriffs, prison, rebellion, and Montreal city police records for 1838 to 1858 in the Public Archives of Canada (RG 4 Series), together with assorted judicial correspondence and papers (MG 24 Series), indicates how many court records have survived in different places and how great is the need to integrate these materials with a national cross-referencing system. The problems which language, changing

12 A problem related to court records in Canada is the lack of studies on the history of its early courts. Older sketches by writers such as Charles Townshend and William Riddell have serious deficiencies. A recent example of the study of a province's courts is that of Margaret A. Banks, "The Evolution of the Ontario Courts 1788-1981," in David Flaherty, ed., *Essays in Canadian Legal History* (Toronto, 1983), II, pp. 492-572. For the early courts across the country, see my "Thirty-Nine Stripes": *A History of Criminal Justice in Canada to 1840* (forthcoming).

13 I wish to thank the staffs of Nova Scotia and New Brunswick Archives for their assistance in my visits, and to the staffs in the provinces noted below, some of whom gave freely of their time in lengthy exchanges of correspondence.

jurisdictions, and conflict imposed on the preservation of court records in Quebec were different in Ontario, but led to similar results. The law profession in Upper Canada did not become as esteemed as it was in the Maritimes, many judges lacked professional training, and courts and governments gave little attention to matters such as records preservation. While Ontario's first archive centre was opened in 1903, and a records management programme began in the 1960s, it was not until there was an archives initiative in the 1970s that the major work of collecting, preserving, and organizing the older court records to 1910 was instituted under the ministry of the Attorney General.¹⁴ The court records preserved, however, included a cross-section of the various jurisdictions. These included records of the Supreme and District Courts, the Courts of Chancery and of Probate, a long run of *Nisi Prius*, *Oyer*, and *Terminer* minute books from 1792, records of local Courts of Common Pleas from 1789 and of Requests from 1798, and Quarter Sessions books from 1800 in the Home, London, and Midland districts; later records are found in the Public Archives of Canada, the *Assize* minute books for 1842 to 1866 (RG 13 Series) being the most prominent example.

The Western provinces generally had better court records preservation in the old common law tradition. Manitoba has a virtually complete set of judicial records from 1870. These include most of the civil and criminal case files for the Queen's Bench and County Courts for the Eastern, Central, Southern, Western, Dauphin, and Northern districts. While still not fully accessible, these records are in the process of being collected at The Pas, Dauphin, Brandon, and Winnipeg for eventual transfer to the Provincial Archives. British Columbia also has a rich array of judicial records. One of the few provinces never to have a disposition schedule, the retrieval and sorting process began intensively in 1979. While the records noted here are in the Provincial Archives at Victoria, many other court records up to approximately 1940 are stored in a records centre at Vancouver. Material that is currently available includes the case files of the Supreme Court from 1864 for both Vancouver Island and the mainland, and, with a few gaps for outlying areas, a large number of County Court records, of which the Cariboo County Court books for sessions held at Kootenay, Quesnel, Lillooet, Richfield, and Soda Creek are among the most complete. In addition there are rich collections of local magistrate court books, coroners' inquisitions, inspector of gaol reports, provincial police reports, and the City of Victoria police records. Most revealing however are judicial papers and correspondence, ranging from the Supreme Court judges to Justices of the Peace. The Bench Books, diaries, correspondence, and notes of Matthew Begbie (1859-1880) and of H.P. Crease and his wife Sarah (1859-1900) are particularly noteworthy.

The survival of court records in the two prairie provinces created in 1905 was more chequered. In Saskatchewan the great bulk of records was destroyed over the years, most recently by floods. Scattered case files are extant for both the local district of the Supreme Court of the Northwest Territories (1886-1905), and for the Supreme and Provincial Courts. The best collections extant for local districts comprise those of Battleford, East Assiniboia, Moose Jaw, and Prince Albert from about 1890 to 1931. Located at the provincial archives offices in Regina and Saskatoon, much of

14 Barbara Craig, "Records Management and the Ontario Archives, 1950-1976," *Archivaria* 8 (Summer 1979), pp. 3-33. More records were accessioned in the 1970-75 period than in the previous sixty-seven years.

the organization and cataloguing of these records remains to be done.¹⁵ Alberta has fared much better. Due in part to the kind of luck and providence illustrated in the introduction to this paper, and to the concern of local scholars, some jurisdictions have almost complete runs of judicial records. These include the Supreme and District Court files for Calgary, Edmonton, and Fort Macleod from 1887 to the present, and the case files of the Supreme and District Courts of Grand Prairie, Lethbridge, Medicine Hat, Peace River, Red Deer, and Wetaskiwin. The Grand Prairie case files survived for years in a shed behind the court house. Most of the provincial court records, however, have been destroyed. The Provincial Archives at Edmonton became actively engaged in securing custody of court records in 1978 after an initially draconian disposition schedule of 1973 was revised. In addition to a good collection of allied records from the Attorney-General's Department, some scattered collections such as sheriffs and police records and seizure files are still extant.

Both nationally and provincially, Canadian jurisdictions have pursued a different course on the preservation of modern judicial records, and the interest at the federal level began at the turn of the century. Dominion Archivists Douglas Brymner and Arthur Doughty promoted the educative role of archives and the writing of Canadian history; officials such as Governor-General Lord Minto promoted a Public Archives and an Historical Manuscripts Commission; politicians gave the federal archivist the powers of a deputy minister.¹⁶ This approach was similar to that of the Public Record Office in London where the preservation and study of pre-1660 legal records led to the tradition of scholar-archivists. But the Canadian situation never witnessed the systematic destruction of the British; their destruction schedules of 1916 and 1941 jettisoned whole classes of records while others were slated for destruction after thirty, or in some instances, ten years while the cases were still fresh in the docket.¹⁷ The Canadian situation also did not bear the same social and non-legal stigma of the British, and it is important perhaps to relate those stigmas here in order that the children do not repeat the mistakes of their parents.

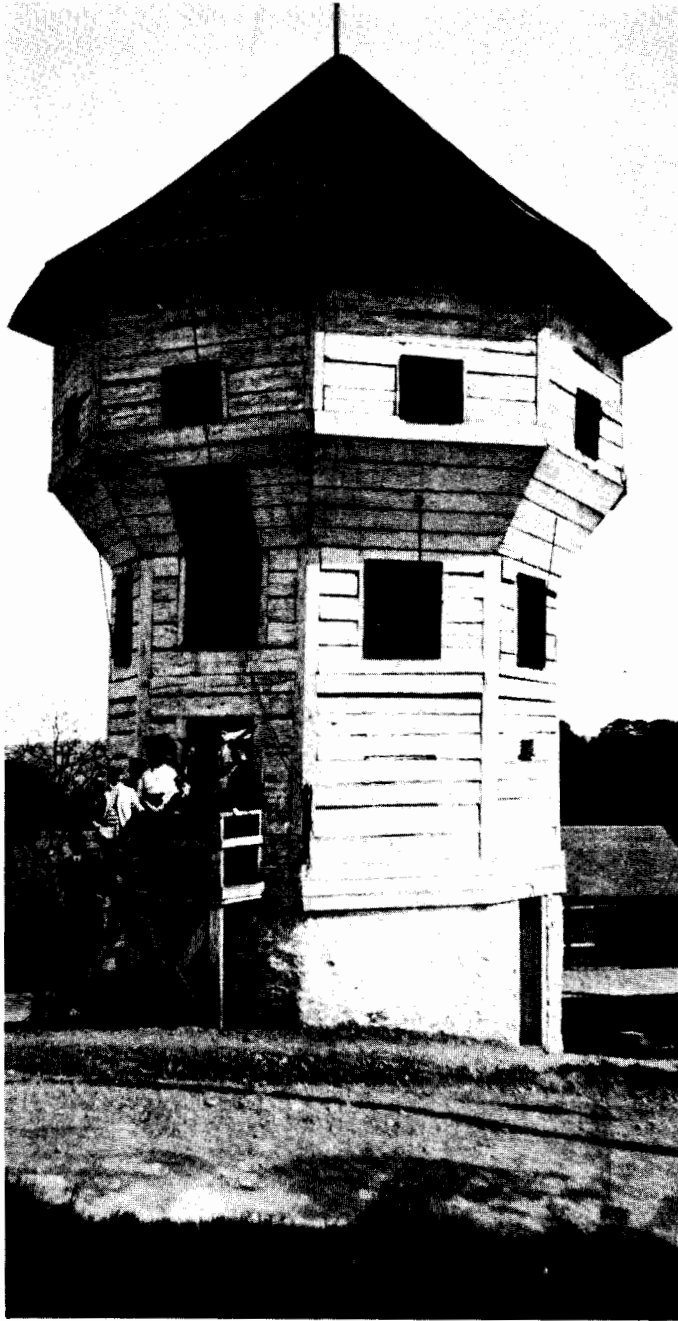
In Britain files were selected for retention, and those preserved involved cases of "public interest" such as treason, sedition, riot, and conspiracy. The elite of Edwardian society believed that only "class" crimes like treason and riot were the foundation of law and history, providing examples for future generations in moral persuasion and proper conduct. Also in Britain, some highly arbitrary and questionable decisions were made as to what kinds of judicial records should be preserved. These included decisions to keep indictments but not depositions, lists of grand jurors but not of petty jurors, and minute and court books but not rolls or dossiers.¹⁸ Why keep, for example, minute books which were usually drafted by a clerk after sessions and never seen or signed by a judge, and destroy the rolls and

15 Thomas Thorner, "Sources for Legal History in the Archives of Saskatchewan and Alberta," in Louis A. Knafla, ed., *The Canadian Society for Legal History / La Société de l'Histoire de Droit — Proceedings 1977* (Toronto, 1977), pp. 76-88. Many of the court records discussed there, however, are no longer extant.

16 Taylor, "Canadian Archives," pp. 3-8; and Jay Atherton, "The Origins of the Public Archives Records Centre, 1897-1956," *Archivaria* 8 (Summer 1979), pp. 35-59.

17 Hugh M. Walton, "Destruction Schedules: Quarter Sessions', Magistrates' Courts and Coroners' Records," *Journal of the Society of Archivists* 3 (1965), pp. 61-75.

18 *Ibid.*, pp. 63-65.



The guard house tower of the Hudson's Bay Company bastion at Nanaimo, British Columbia, 1909, which was used as a gaol and a court for summary criminal cases. *Glenbow-Alberta Institute, NA-3489-35.*

dossiers which alone have the accurate data recorded and validity as legal documents? Minute books without collaboration can be a very limited research tool, often lacking the age, occupation, and residence of the parties, the names of witnesses, the particulars of a charge or suit, and notices of appeal or dismissal. Yet in many Canadian jurisdictions, more care is taken of minute books than of the case files, a situation which reflects a loss of knowledge of the common law tradition.

The problem of preservation in Britain had become acute, however, by the second quarter of the twentieth century. For example, the records of the Supreme Court (civil actions) for 1875 to 1935, which were transferred to the PRO, measured over four running miles of shelf space, while original wills measured three miles. By 1958 the magistrate courts were hearing over a million cases a year, and the volume of court records was growing geometrically in spite of the destruction schedules.¹⁹ The "Report of the Committee on Legal Records" of 1966, called the "Denning Report," attempted to come to grips with the preservation problem by introducing the principle of "cost/benefit analysis."²⁰ Each class of legal record was evaluated by the cost of maintenance against probable future value, and all classes which failed the test were to be orderly and systematically destroyed. But court record classes representing the public interest in the Edwardian tradition were given a higher profile than others, especially when they concerned monied matters such as highways, railways, shipping, and bankruptcy in addition to treason and riots. Great emphasis was also placed on alternative sources of information which might be used in lieu of the original records: alternatives such as newspaper accounts, judicial statistics, and government documents.

In the Canadian provinces, the problem of a quantum leap in the number of files of court records did not reach the British level until the 1960s, and when the problem was recognized neither the British precedents nor experience was utilized. Whereas the British established an artificial date before which no records would be destroyed, and after which the destruction would be massive, some Canadian court houses may have simply destroyed the oldest, retaining the most recent files.²¹ Clerks naturally sought to retain those records most likely to be examined in current litigation, and the older the files were the less likely it was anyone would want to retrieve them. This anti-historical approach to court records preservation was facilitated by the dossier system of records organization which came to dominate some of the Canadian provinces. Since all records concerning a case in such places were filed in a single folder, the folder given a number, and all folders numbered consecutively beginning with the first case heard by a court at its inception, a clerk could easily eliminate feet of folders starting from the beginning to make room for current acquisitions. Archivists, however, devised a more historical approach and introduced the random sample in place of the select case. Either every nth case, or every nth year would be

19 I.R. Jacob, "Later Legal Records and the Historian," *Archives* 6 (1964), pp. 134-46; and Hugh M. Walton, "Some Comments on Destruction Schedules," *Archives* 6 (1964), pp. 147-53.

20 *Report of the Committee on Legal Records* (London: Command: 3084: 1966), pp. 1-16 and Appendices I-X.

21 While nothing has been published on this delicate subject, I have seen examples in rural Alberta court houses. The nature of some Nova Scotia and Ontario survivals suggests that this may have been a contributing factor in some of their court houses as well.

preserved by the anonymous hand of a public servant.²² While there is no published evidence that the random sample was implemented in Canada, it certainly has its attractions over either the select case or records group device (see below) as a preservation technique where the sheer length of records demands that some must go. And it is certainly superior to “natural selection” by fire or water. Floods destroyed early Queen’s Bench and Common Place records at Osgoode Hall in 1968, Exchequer Court records at Fredericton in 1973, and Supreme Court and Provincial Court records at Regina in 1978.

II. *Alternative Organizational Systems*

A fundamental problem which has concerned the preservation of court records is the organization of the records themselves. Originally, court records were not filed by case; instead, they were filed by document group. The writs, affidavits, jury lists, depositions, rolls of court proceedings, judgments, and pardons were filed in separate groups according to their provenance. The only record of a case was that which was entered on the court roll or minute book. This organizational system originated with the establishment of the common law courts in the twelfth century.²³ Later, in modern times, this form of organization was called the “records group” concept. The concept obviously reflected the way in which the various records of a court were drafted to meet the demands of court process.²⁴ Thus when in Britain the state took responsibility for the preservation of court records, it simply continued the ancient ways by filing and preserving records according to the provenances of their composition. The Denning Report itself reflected on the problem of users trying to gather together the records relating to a case, and suggested that the “dossier” concept which was being used in most Commonwealth countries was the most efficient one. The Report recommended that some attempt be made to sort the various record groups into dossier files for recent and current cases where the documentation was large and complex.²⁵

Most British courts, however, did not adopt the dossier concept because it was felt that the records group system was more reflective of legal process, and administrators considered it more attractive for the disposition of records. Some experts held that only a court minute book was necessary for preservation, and that most other court records could be destroyed. There were also those persons who believed that certain files (such as writs, depositions, and pardons) should be kept while others were unnecessary.²⁶ An attraction of this system was that it encouraged debate: people

22 The system was proposed and adopted in the Alberta court records disposition schedule of 14 December 1973, and repealed in the revised schedule of 27 April 1978. Peter Gillis has written that the random sample idea was in vogue in archival theory in the 1950s and 1960s: “The Case File: Problems of Acquisition and Access from the Federal Perspective,” *Archivaria* 6 (Summer 1978), pp. 32-39 at p. 33.

23 See Clanchy, *From Memory to Written Record in England, 1066-1307*, pp. 60-87 for a discussion of the types of legal records. A good recent edition is that of Donald Sutherland, *The Eyre of Northamptonshire 1329-1330* (London: Selden Society, Vol. 97 for 1981, 1983), I.

24 Gerald L. Fischer, “Letting the Dust Settle: Some Remarks on the Record Group Concept,” *Journal of the Society of Archivists* 6 (1973), 640-45, and the persuasive comments of Terry Cook, “The Tyranny of the Medium: A Comment on ‘Total Archives,’” *Archivaria* 9 (Winter 1979-80), pp. 141-49 at pp. 141-43, in a different context.

25 *Report of the Committee on Legal Records* (1966), p. 9, where this is suggested for the reorganization of the Chancery records.

26 Walton, “Destruction Schedules,” *passim*.

could openly agree or disagree on what files could be maintained or abandoned, and the result could be hailed as a bureaucratic decision logically reached in a democratic manner. The fact that many of these decisions have since been regarded as wrong decisions is no longer relevant. While the Denning Report has never been repealed, it is interesting to note that in the Public Records Office itself the report is no longer regarded as a guideline. Archivists are simply trying to preserve all the records they can until that future day when public monies will become available for more organization, retention, and finding aids.

In the Canadian provinces the dossier concept was adopted by pioneer judges as an easier way to maintain the records of the court. An advantage of this form of records organization was that it was easier to maintain and to use than separate files of record groups with accompanying court rolls.²⁷ Thus the ancient court rolls gave way to case files and a cursory notation of judicial process in paper minute books. Lacking a professional administrative framework and engrossed rolls, the separate case files were more logically retained in dossiers of the respective cases.²⁸ The result is that schemes to reduce the growing bulk of records in Canada can be based on the specimen file or the random sample, although neither of these approaches is desirable. Let us say, for example, that it has been decided that the court records preserved must be reduced by the arbitrary figure of 10 per cent. For the specimen file technique, someone would eliminate the "uninteresting" dossiers, which would be to follow the earlier British example and create a bias for what is preserved and what is destroyed. The random sample technique would either pull for destruction one out of every ten files, or the files for one out of every ten years. The former would be a less arbitrary form of sampling, but some truly major cases would be excised, and the latter would result in a year of recession or of major public upheaval being obliterated completely from the historical legal record.

Fortunately, Canadian legislators and archivists have not used the example of our mother country to meet the problems of preserving court records. The Denning Report was not to my knowledge consulted on this side of the Atlantic. While many of our court records have been lost to the ravages of time, very few have been lost to destruction schedules. But as provinces increasingly transfer the records of the courts from the localities where they are often guarded jealously to institutions of provincial archives and records management centres, systems of organization and maintenance must be developed not only with an eye to the preservation of the past, but also with an eye to the user of the future. Court records are no longer ancient documents with limited future use. They are rapidly becoming a significant area of public and private research.

III. *Users and the Diffusion of Information*

The law and its records are a prominent source for the study of a country's people, their culture and institutions. As legal memory, court records are an integral part of the legal system, comprising a tool for judges to define, interpret, and develop the

27 In New Brunswick, for example, loose documents have been indexed to the cases and wrapped bundles have been made into case files. Many courts keep the case file system in bundles instead of folders.

28 The dossier system has been assessed by Gerald L. Fischer, "Archival Development in South Australia," *Australian Library Journal* 18 (1969), pp. 69-79.



Halifax city prison and court house, with Sebastopol monument in St. Paul's cemetery, n.d. *Provincial Archives of Nova Scotia, Joseph Rogers Collection #45, n-1254.*

law to meet the exigencies of the present and to lessen the uncertainties of the future. Judges and court administrators can use them to evaluate their court's business, and its distribution pattern and problems. For the law profession, court records provide an unimpeachable source of detailed and accurate information about disputes, offences, orders, laws, and statutes, and the forms of court process. They enable the lawyer who has become steeped in reported cases to look at those many unreported judgments to bring a wider perspective to the meaning of judicial precedent. Indeed, detailed indexes of civil actions with recorded judgments could effect a virtual revolution in the practice of the law profession.

Court records form a major source of evidence for the genealogist and the family and local historian. Evidence of persons and places, occupations, family relations, friends and workplace and business associates is not often equalled by other records, and an index of names will enable these users to have a major new source of research. The family and local historian can also make good use of the files of Probate and Surrogate Courts for the study of demography and family structures, and Quarter Sessions records for matrimonial causes, the care of infants and juveniles, and problems of guardians. A related area is biography, and especially judicial and legal biography which has had strong early roots in this country but has lagged behind in recent decades because of the lack of accessible judicial records with finding aids. One author has stated that this deficiency has caused judicial and legal biography to fall significantly behind that of Britain and the United States, and represents one of the reasons why Canadians have so little public familiarity with the law and legal system, and why they show frustration with the governing process.²⁹

The students and practitioners of the new social, economic, and labour history, and of economics, psychology, medicine, and social welfare, are just beginning to use judicial records as research tools in their disciplines. Social historians are pioneering "aggregate usage" to study plaintiffs, defendants, witnesses, and jurors with place-names and occupations to examine the structure of society over long ranges of time.³⁰ Economic historians are beginning to use Quarter Sessions and Provincial Court records to examine the planning and construction of highways, canals, railroads, and public works, and the impact of these activities on society. Economists and historians can use the grant books and estate files of Surrogate Courts and the records of Common Pleas to show how business values and practices change over time, and legal historians interested in the interaction of the law and economy are writing increasingly on topics such as master-servant and employer-employee relations, and the role of judges in capital formation and the economy.³¹ Supreme and District Court files also contain cases arising over strikes which often are rich in evidence from depositions. The life sciences are becoming interested in the history of

29 David R. Williams, "Legal Biography in Canada: A New Field to Plow," *Law Society of Upper Canada Gazette* 14 (1980), pp. 329-38. The study of law professions is also entering a new records phase; see for example, the works cited in footnote 37.

30 Alan Macfarlane, *Reconstructing Historical Communities* (Cambridge, 1978), where the methodology is discussed.

31 A pioneering work on merchants, commerce, and the courts is that of William Newman Thomas Wylie, "Arbiters of Commerce, Instruments of Power: A Study of the Civil Courts in the Midland District, Upper Canada, 1789-1812" (Ph.D. thesis, Queen's University, 1980). See also the penetrating essays in the law and economics area by Paul Craven, R.C.B. Risk, and Wylie in Flaherty, ed., *Essays*, Volumes I and II.

diseases, of medicinal and surgical practices, of the use of chemicals and poisons, and of gynaecological practices including abortion and infanticide in which the depositions in criminal case files, and coroners' inquisitions, provide a unique body of evidence.³²

One cannot exclude the use of judicial records for the study of the law and legal institutions themselves. The field of legal history, or of law and history, is emerging as a major interest of professional study, research, and writing. The last few years have witnessed the birth of a periodical as well as major conferences at Halifax, Downsview, Calgary, Vancouver, and Victoria devoted to the history of the law in Canada.³³ Such scholars are now ravaging minute, docket, and bench books, and the depositions and judgments in case files to study jurisdictions, courts, judicial process, and the various branches of the substantive law. Here there is a real need to preserve some records from the local provincial courts, as well as the administrative records of the clerk of the peace, clerk of assize, crown attorneys, court clerks, and judicial correspondence.³⁴ One of the largest subjects of this research area is that of crime, which has touched the imagination not only of lawyers, historians, psychologists, and criminologists, but also of the general public. This subject has spawned mega-projects such as the Federal Corrections History Project under Dr. Gerald Woods of the Solicitor General's Department, and La Justice Criminelle au Québec, 1850-1914 project under Professors André Normandeau, M. Simard, and André Tremblay of the Ecole de Criminologie at the University of Montreal; in addition commissions have been created for the examination of subjects such as privacy, censorship, pornography, prostitution, sentencing, and security forces which, it is hoped, will promote hard-core research in judicial records. Individual scholars, meanwhile, are turning their attention to the detailed examination of individual crimes from court records evidence, and some of these studies are relevant not only to historians but also to future public policy.³⁵

Finally, the state itself is becoming a user of the records which it generates. The Solicitor General's Department publishes a series of *Bulletins* on topics such as crime victims and police administration which are based frequently on judicial records' evidence, and Statistics Canada issues the publication *Juristat* in which recent issues have been devoted to the compilation of judicial statistics on topics such as homicides and gaol committees according to ethnic origin, sex, occupation, and demography. These publications represent in-house research which leads to the

32 Some of these are noted in the provocative work of Brian E. McKnight, *The Washing Away of Wrongs: Forensic Medicine in Thirteenth-Century China* (Ann Arbor, 1981).

33 The bound newsletter *Now and Then*, edited by Graham Parker at the Osgoode Hall Law School.

34 The most recent assessment of the field, after the earlier statements of Professor David Flaherty, Richard Risk, and Graham Parker, is that of André Morel, "Canadian Legal History — Retrospect and Prospect," in *Osgoode Hall Law Journal* 21 (1983), pp. 159-64.

35 Especially the recent work of Constance Backhouse, "Nineteenth-Century Canadian Rape Law, 1800-92," in Flaherty, ed., *Essays*, II, pp. 200-237, and "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (unpublished paper, 1983); and that of Terry L. Chapman, "Sex Crimes in Western Canada, 1890-1920" (Ph.D. thesis, University of Alberta, 1984), and "An Oscar Wilde Type: 'The Abominable Crime of Buggery' in Western Canada, 1890-1920," *Criminal Justice History* 4 (1983), pp. 97-118. For a comparative overview, see M.L. Friedland, "A Century of Criminal Justice," *Law Society of Upper Canada Gazette* 16 (1982), pp. 336-49. A list and discussion of current work has been undertaken by Gerald Woods, "Criminal Justice History in Canada," *Criminal Justice History* 4 (1983), pp. 119-30.

gathering of historical statistics from judicial records.³⁶ This organizational approach to legal research has also affected the various law societies and foundations. In addition to institutions such as The Osgoode Society funding research in the judicial records, the history of the makers of the records has become a major area of renewed interest.³⁷ Thus no person can safely state which court books or files will no longer be significant for future users.³⁸ The law, which reached a peak in the public mind and cultural mosaic of the late sixteenth and early seventeenth centuries, and a nadir at the end of the eighteenth, is now returning to prominence throughout the Western world.³⁹

It is now appropriate to turn to the user, and to what archivists can do to make the records more accessible and useful to their constituents. First, we should encourage the movement to have all court records come under the purview of the archivist in a schedule which is relevant to each court's internal use of its records; this may fluctuate from five years for provincial courts to perhaps twenty-five years for probate.⁴⁰ The massive nature of current file accumulations, the poor paper and materials on which the record is produced, and the increasing demand of users necessitate that the records become the custody of professional guardians rather than honorary ones. The use of an intermediary home for court records such as the regional records management centres in Manitoba, or the central ones in Ontario and British Columbia, would relieve pressure on both court houses and archives and facilitate a records system approach for the accessioning and management of the records as they move from their creator to their final resting place. Secondly, procedures are needed to cope with the problems of confidentiality and statutes of limitations. In many jurisdictions, for example, adoption, divorce, and juvenile case files and orders must be sorted out before the court's records can be made available for public use. The number of "missing" files in criminal records suggests that in some instances the Attorney-General's Department has taken the problem of confidentiality into its own hands rather aggressively. The records of most inferior courts, however, pose no such problems. Scholars, of course, would like greater public access without many restrictions.⁴¹ But obviously the best situation is to draft a standing set of access agreements cognizant of the interests of all parties to the records, such as those used in the United States for census records data of a personal nature.⁴²

36 For example, the *Call Box*, a periodical for members of the Calgary Police Department, now features an article in each monthly issue on a historical topic in the criminal justice area.

37 W.H. McConnell, *Prairie Justice* (Toronto, 1980); W.F. Bowker, "Fifty-Five Years at the Alberta Bar," *Alberta Law Review* 20 (1982), pp. 242-95; and G.B. Baker, "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator," in Flaherty, ed., *Essays*, II, pp. 49-142.

38 A theme of J.R. Ede, "The Record Office: Central and Local," *Journal of the Society of Archivists* 5 (1975), pp. 207-214.

39 The subject is discussed in a Commonwealth context by Louis A. Knafla, "Legal Records: The Cultural Heritage," in *Meeting of the Commonwealth Law Ministers — Memoranda* (London: Commonwealth Secretariat, 1983), pp. 1-8.

40 Burton Glendenning has noted that the schedule for Probate Court records in New Brunswick is for twenty years, but that the registrars and court administrators with the support of local barristers have refused to adhere to the schedule. There is a great need to draw all the relevant parties into an awareness of their importance in the system established in order to make it function successfully. I have no doubt that this is a general problem.

41 Graham Parker, "Ministerial Policy on Access," *Now and Then* (Osgoode Hall, 1980), I, pp. 9-17.

42 David H. Flaherty, "Access to Historic Census Data in Canada: A Comparative Analysis," *Canadian Public Administration* 20 (1977), p. 482.

Once the custody and management of court records is established, and the rules for access are made, we can inquire into how they will be used.⁴³ Concerning criminal actions, where the bulk of records is not large, all the records should be preserved and none of them destroyed.⁴⁴ Minute books are useful as a guide to the court's proceedings, but they are no substitute for the basic documents which comprise the dossier of the case file and they can contain errors. For the first task there is a great need for an index of parties and offences. Many procedure books simply do not list this information. Produced on a card-file system, this data could then be incorporated into a personal name and topic index which eventually every provincial archive will have on computer tape. The second task concerns a need to provide a list of documents which are enclosed in each file in order that the items can be studied individually or in the original group which they devolved from. For example, one of the lasting virtues of the records group concept is that one can examine groups of records such as writs, depositions, judgments, and pardons. An index of the dossier based on the record groups which it comprises would enable the archivist not only to index the records, but also to restore the internal integrity of the court's record through the guise of finding aids that the court itself did not take the time to produce. As a model of the diffusion of knowledge, such an index would make the records more useable than the current organization of the records themselves. A third task is to ensure the retention of legal records supplementary to the criminal files, such as judicial and prosecutor correspondence, registers of conviction, interdictions and pardons, coroners' inquisitions, sheriffs' files, and provincial and municipal police records. All too often the researcher is unaware of information crucial to his study which may lurk in the labyrinth of these ancillary records.

Civil actions, however, present the most problems to the archivist. Here the documentation is extensive, the files are thick, and they breed like rabbits. And here the problem of preservation precedes that of diffusion of information. Certainly in the case of the superior courts all these files and their contents should be preserved. The files can, however, become more slim. For example, in leafing through the Supreme Court of Calgary files for 1960 to 1972, I noticed that some 20 to 30 per cent of the contents consisted of duplicated material, a result of those modern inventions, multi-carbon paper and photocopies.⁴⁵ These papers are superfluous, and research

43 The ideas below have been developed over the course of the last six years as Coordinator of the Alberta Legal History Project, which has drawn together representatives of the provincial and local archives, the Attorney-General's Department, the law profession, and the judiciary, and legal scholars, to plan and implement a research-oriented disposition schedule for all the court records of the province. The project has been generously funded by the Alberta Law Foundation.

44 Other jurisdictions with different criminal records face more pressing problems. For example, there are acres of federal criminal inmate files, and archivists must use a device to reduce the number of files for retention. A random sample technique based on surname initials that include the various linguistic and ethnic names prevalent could be used, a technique which has been applied to personal case files in social programmes, tax files, and military records. It is important, however, that techniques such as these be discussed by archivists across the country in order that the initials selected be used in all federal and provincial jurisdictions to enable the user to conduct comparative studies. In this manner the records, while reduced considerably in size, could still sustain quantitative as well as qualitative examination of the major issues and forces in society from the illusive macro perspective.

45 For example, Calgary Supreme Court, civil actions, 1960-1972, now in the Provincial Archives of Alberta, accession no. 77.318.

students have been adept in fishing them out. The storage problem of such records can be resolved with another Alberta example, namely, the microfilm of all Supreme Court records. But assuming that the costs of microfilm are too great to sustain, and that not all inferior court records can be preserved, how does the archivist decide what to keep? It is the legal scholar's view that no files should be specimened, or random sampled for destruction, either for superior or inferior courts. Instead, one should use as a last resort the principle of the records group concept intelligently. Thus, for all civil causes, one could retain in the dossier the statements of claim, the pleadings, depositions or discoveries, and judgments. In this way all the essential information of the file can be preserved to enable the multitude of potential users to receive the information relevant to their projects. The sifter could jettison court notices, clerk correspondence, appeal orders, exhibits, and perhaps interim notices and garnishment proceedings without losing any of the content of the case. Together with duplicated matter, perhaps close to 40 per cent of the dossier could be excised without any harm to the substantive and procedural material of the case. In record group selections such as this, a number of specimen files of all the materials in each year should be retained. The only item above which may contain information relevant to the case is that of exhibits, where some discretion would have to be exercised. It is important to add that supplementary legal records such as exhibit "books," fee books, execution books, process and docket books, court correspondence files, and court reporter notebooks should be retained and cross-referenced to the accession number of the court records to which they are complementary.

Finally, once the archivist has resolved the question of what will be preserved, he can then work on how to make this information more usable. Civil causes, unlike criminal ones, are usually (but not always) accompanied with good process books which may include the names of the parties and the action (and sometimes the witnesses), the amount or issue, legal counsel, the judgment, and costs. In fact these process books should be microfilmed so that there is no likelihood of accidental loss. The archivist's attention should be directed to having the equivalent of a process book drafted for any place where such a volume has been lost. Eventually the personal names and topics may be incorporated into the archives' computerized index.

Other information aids could be adopted. For example, archivists and users are often unaware of the changing jurisdictional boundaries of courts, and of the statutory jurisdiction of individual courts. This information is essential to enable court records to be organized and accessioned accurately, and to enable users with names and topics to research to go to the relevant records. Thus a brief outline of the history of the judicial districts and of the jurisdiction of the courts, accompanied with a glossary of legal terms and abbreviations, would be extremely useful. The records must also be in a shape to withstand usage. The considerable effort in identifying, reorganizing, and inventoring the various classes of court records is crucial. Sometimes this can lead to innovative organizational systems such as Ontario's Computerized Lands Records Index project, which lists land records and the basic information about each transaction, making the ordering and study of the records themselves unnecessary for most research tasks. Innovative indexing schemes are also possible. For example, New Brunswick is creating a name and subject index for the Supreme Court records from 1784 to 1815, and a case file index down to 1950. It is also cross-referencing the bills and answers of the Chancery to the court's record

books to 1892. British Columbia is developing a judge-legal counsel index for the Supreme Court records from 1930 to the present, and adding biographical notes. Alberta has proposed putting the contents of a single jurisdiction (Red Deer) on word processing with a programme to identify all the names, places, companies, and subjects in the records. The improving state of the accessibility and usage of court records is due to the increased dedication of archivists to master their holdings, and to the willing cooperation of scholars and law foundations to work for a common end.⁴⁶

In conclusion, the common law tradition has not come down to Canadians in a consistent or very coherent fashion. Appearing in different times at different places and in different shapes, the records of the courts across the country are not uniform. Canadians may never develop a model of court record-keeping, or of records management and organization. But we can develop systems to facilitate the diffusion of information in those records. Then the interesting stories such as that in Hanna can be remembered as amusing anecdotes in archival history.

46 Catherine Shepard and Peter Oliver, "The Osgoode Society, the Archivist and the Writing of Legal History in Ontario," *Law Society of Upper Canada Gazette* 14 (1980), pp. 192-202.