Court Records as Archival Records

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Perhaps more than any other group of archival holdings, court records can place archivists between the proverbial "rock and a hard place." On the one hand, there is a growing scholarly demand for court records as research sources; on the other, archivists are facing administrative pressures which affect their ability to meet that demand. Combined, these two factors carry with them an urgency that discourages an archivist from standing back from the daily work to consider the nature of court records as archival records. Yet surely this kind of enquiry is essential if archives are going to develop archival techniques appropriate to such records.[1] Understanding court records as historical records is not enough; archivists must also be concerned with the characteristics of these records as an archival record.[2] Specifically, they must recognize those characteristics of court records which will affect the archival administration and use of the record. Having done this, they will be better equipped to develop the necessary administrative techniques and research tools appropriate for court records. What follows is an examination of three of the most obvious characteristics of court records: first, their apparent complexity of language and form; secondly, their potential sensitivity; and thirdly, their physical volume.

Court records are not simply one particular type of legal record. They are not simply the public legal record as opposed to the private legal record: court records also represent the official legal records of a judicial system. This fundamental difference sets court records apart from legal records which have no official status. Essentially, the characteristics of the court record are determined by its status as an official legal record. First, the apparent complexity of the record arises from the use of unfamiliar legal language and from the complexity of the judicial system itself. Unlike private legal records, court records are created to suit the official requirements of the judicial system: this determines their language, form, and organization. As well, the potential sensitivity of court files, or documents with a

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1 I wish to thank Gordon Dodds of the Provincial Archives of Manitoba for his initial suggestion concerning the direction of this article. He, of course, bears no responsibility for the final product.

2 For articles on court records as historical records, see Rayman L. Solomon, "Legal History and the Role of Court Records," *American Archivist* 42, no. 2 (April 1979), pp. 195-98; Seymour V. Connor, "Legal Materials as Sources of History," *American Archivist* 23, no. 2 (1960), pp. 157-66; William R. Petrowski, "Research Anyone? A Look at the Federal Records Centers," *American Archivist* 30, no. 4 (1967), pp. 581-92; David H. Flaherty, "The Use of Early American Court Records in Historical Research," *Law Library Journal* 69, no. 3 (August 1976), pp. 342-46.

court file series, comes under a different set of conditions than those of private legal records which are governed by solicitor-client privilege. And finally, the enormous physical volume of court records is a characteristic not as yet represented in private legal records, but is certainly a product of the official status of court records. All of these characteristics of the court record will affect subsequent administration and use of them as archival records. Most especially, any attempt to deal effectively with the potential sensitivity and physical volume of court records must be within the parameters defined by their official status.

Initially, the most daunting characteristic of court records, apart from their physical volume, is their apparent complexity. Legal vocabulary invests the records with that mystique of the law that legal language generally tends to produce in the minds of laymen. It is the mystique of a specialized language that the archivist must go beyond to form an understanding of the records themselves. Finding and using the sources on legal terminology and legal procedure is one of the keys to understanding these records.[3] As well, the archivist must become familiar with the judicial structure as it has developed from its earliest period to the present day. Once the language and structure of a judicial system is understood, it becomes easier to recognize that the types of records created by the courts have remained consistent over time. This consistency is a product of their character as official records: as the only recognized authority on past judicial decisions, certain specific types of information had to be maintained by the court system in a prescribed form. For the archivist who has already become familiar with the provincial court structure, this consistency established by the requirements of the judicial system makes it relatively easy to identify and establish, among the mass of court documentation, standard official record series. Furthermore, these basic series remain consistent from the lowest to the highest level courts over time.[4]

What records series are standard depends on whether a court is exercising criminal jurisdiction or civil jurisdiction. Criminal courts produce fewer official series than the civil courts. Essential series for criminal courts are the minutes of the court and the corresponding case files.[5] Together these two series constitute the official record of the court. Minutes are the official record of court business at each court sitting. Case files contain the original criminal indictments, informations, depositions, and record of conviction and sentence. Civil courts, however, produce a wider range of official series. Like criminal courts, the civil courts produce minute books and case files. Civil court minutes serve the same function as criminal minute books. Civil case files contain all the documentation filed with the court to

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3 For legal terminology, a reasonably priced legal dictionary is John Burke, *Osborne's Concise Law Dictionary* (London, 1976). Also useful, especially for non-current legal terms, but far more expensive is Hugh Campbell Black, *Black's Law Dictionary* (St. Paul, Minn., 1968). An entertaining introduction to terminology and procedure is Glanville William's *Learning the Law* (London, 1978). In Ontario, the standard civil procedure text is W.B. Williston and J.R. Rolls, *Law of Civil Procedure* (Toronto, 1970). For criminal procedure, there is Roger E. Salhany, *Canadian Criminal Procedure*, 2nd edition (Agincourt, 1972). For an introduction to the Canadian judicial system, see Gerald Gall's *The Canadian Legal System*, 2nd edition (Toronto, 1983).

4 Note the possible exception of early lower courts which were not courts of record.

5 Trial transcripts can be considered an essential record. In Ontario, however, transcripts are not automatically included as part of a case file. Hard-copy transcripts of trials were only produced on request — usually for the purposes of appeal.

conduct a civil action from the plaintiff's original statement of claim to final judgement. In addition, the civil courts also maintain series of official judgement books, order books, process books, and procedure or index books. A special type of civil court, the Probate or Surrogate Court, which is responsible for estate matters, produces separate standard series in keeping with its specialized function. These include registers of grants of probate and administration, registers of applications for grants, estate files, guardianship registers, and guardianship files.

Needless to say, these records produced by the courts were all created to suit the needs and requirements of a legal system. Language, form, and organization of these records are dictated by the requirements of that legal system. Methods of indexing and organizing these records within each court is limited to the requirements of legal searches by case name. They also assume a knowledge of the various jurisdictions of the component parts of the legal system. Once these court records become archival records, however, they come within a much wider range of research use which will include business, legal, labour, and social history as well as biography and genealogy; these new uses, which require subject access and specific nominal indexes, will not be accommodated easily or accurately by simple case name indexes. As well, archival users of court records are less likely than court and other legal personnel to understand the various legal jurisdictional distinctions within the judicial system. Although researchers intending to use court records should come equipped with a rudimentary knowledge of the law and the legal system, the archivist must still be able to explain the peculiarities and particularities of a province's court records, in addition to indexing and describing them so as to meet a wide variety of research needs. In order to do this, the archivist will have to be concerned with making the content of court records accessible to research. Beyond the work of organizing court records series lies the work of content analysis for the production of subject indexes, guides, and detailed lists.

Two examples from Ontario's court records illustrate the type of work that could be done. The first concerns the reprocessing and indexing of Ontario's earliest court records — the records of the local Courts of General Quarter Sessions of the Peace. The second concerns the creation of a subject index for the case files of the Court of Chancery. Of the two, the latter project is the most innovative in archival terms; when completed, this index will represent one of the most comprehensive research tools yet available for any series of court records.[6]

Reorganizing the records of the Courts of General Quarter Sessions of the Peace was the first project undertaken when work began on a new court records inventory in 1980. Between 1969 and 1979, the court records collection at the Archives of Ontario grew from a relatively small collection of very early court records to a far more comprehensive collection which included records from all court levels into the twentieth century. Although an inventory of the small pre-1970s collection had been available since 1966, it was inadequate to organize and describe the range of information contained in the collection by 1979. Combined with the need to integrate the new accesssions into an inventory and the growing research interest in court records, work on a second inventory began in 1980.

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6 Creation of this subject index was the work of Gordon Dodds during 1974 as the archivist responsible for court records at the Archives of Ontario.

From the outset, the records of the early Courts of General Quarter Sessions of the Peace were scheduled for detailed reorganization and content analysis. The records of these local courts spanned the period from 1789 to the twentieth century. Prior to the creation of local District (now County) Councils in 1841, the Courts of General Quarter Sessions of the Peace were both the judicial and administrative authority in each of the early districts of Upper Canada. Apart from its criminal jurisdiction, the Court controlled all aspects of district finances and administration, including the collecting of assessments, taking the census, allocating money for roads and bridges, licensing taverns, building the local courthouse and jail, providing support for paupers and the insane, and paying official accounts from district funds.[7] With a wide range of responsibility affecting almost all aspects of early local life, the records of these courts could provide valuable documentation for a period when detailed local information is scarce.

Of all the early districts, two had significant collections of early Sessions court records.[8] Research use of these records, however, was hampered by the fact that, with the exception of the tavern and road records, the rest of Sessions documentation, including criminal records, were massed into one general series described as "Municipal and Judicial Records." Most researchers confined their interest to the information to be found in the court minutes — avoiding the painstaking task of ploughing through page after page of seemingly random documentation. Clearly a detailed reorganization and analysis of these records was required.

Ultimately from this one general series of "Municipal and Judicial Records" a number of standard records series emerged. Judicial records became two series: criminal case files and criminal filings.[9] Although these series were not original to the Court, they provided the most useful way of ordering the documents for research use. Not being original series, standard procedures were established to maintain the consistency of both series. Case files were created from criminal documents that matched case entries in the Sessions minutebooks. Those criminal documents filed with the court which did not result in a trial before Sessions became criminal filings. Municipal records divided into a larger number of series. One series in particular, the accounts series, represented a significant administrative function of the Sessions court. Once this series had been pulled back into its original order, a complete picture of district financing emerged from hundreds of documents which in dispersal had lost their significance. Essentially two approaches were taken to the reorganization. Where recreating an original series both was possible and would serve a research purpose, this was done. Where original series order could not be established or needlessly complicated research use of those documents, an archival order was imposed.

Simply reorganizing the Sessions records, however, was not adequate in terms of information retrieval. This was especially true for the relatively larger series

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7 See J.H. Aitchison, "Development of Local Government in Upper Canada, 1783-1850," (Ph.D. thesis, University of Toronto, 1953).

8 Newcastle District (Cobourg) and Johnstown District (Brockville). In the Fall of 1983, the records (from 1828) of a third early district, the Niagara District, were discovered in the attic of the Shaw Festival Theatre, Niagara-on-the-Lake.

9 Case files would include the original indictments, presentments, informations, depositions, and recognizances.

represented by the criminal case files and the accounts. Accordingly, for criminal case files, a case file listing indicating name and charge was created. For the accounts series, listings of significant accounts highlighted the presence and location in the series of significant documents which researchers might not expect to find among accounts records.[10] Apart from these listings, created as part of the records inventory, subject and name card indexes for these records were added to the archives' manuscripts card catalogue to alert researchers to the existence of the varieties of documentation available in the Sessions records series.

This kind of work has continued beyond the records of the Sessions courts. Eventually all the records of the early courts will be processed and indexed in this fashion. Subject indexing will become particularly useful for the court case files which become more extensive after the mid-nineteenth century. A trial subject indexing project has been created for the early Court of Chancery case files. The comprehensive nature of this indexing project will, in effect, translate a large group of court case files into manageable research material.

The Court of Chancery no longer exists in Ontario as a separate court. In its time, however, the Court of Chancery exercised superior court jurisdiction over a wide range of legal issues involving land, business, and family matters. Chancery's jurisdiction derived from its function as a court of equity. This set it apart from the two other Ontario superior courts of King's Bench and Common Pleas which were courts of common law.[11] Although the Court of Chancery existed in Upper Canada from 1837, the Court's case files start in 1869.[12] Given the jurisdiction of this court, its files are a potentially rich source for social and business history as well as, of course, legal history.[13] Extensive use of these records, however, is inhibited without an adequate descriptive index to these records. Existing indexes listing cases by case name and year were adequate for use in and by the Chancery Court; they are, however, obviously inadequate to describe these records as archival or research documents. In response to this need, a subject indexing project for Chancery Court files was developed in 1974.

In its final form, the indexing project for the Chancery files included a subject index, an "actions begun" index, a "lands location" index, and special nominal indexes. All these indexes were designed to provide access to the case files given any number of research approaches. Within the subject index were two separate indexes.

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10 Often attached to accounts or presented as accounts were criminal warrants, informations, inquest notices, lists of jail prisoners, affidavits relating to poor relief or the support of the insane, and building and maintenance records for the courthouse and jail.

11 The distinction between courts of law and courts of equity was abolished by the *Ontario Judicature Act* of 1881 (22 Victoria, c. 12). Prior to 1881, the Court of Chancery for Ontario had jurisdiction over matters involving fraud, accident, trusts, co-partnerships, estates including the estates of "idiots and lunatics," staying waste, specific performance, land patents, alimony, custody, guardianships, and others (*Consolidated Statues for Upper Canada*, 1859, c. 12).

12 Partial explanation for this may be the coincidence that in 1868 responsibility for keeping Chancery records was transferred from the Registrar of Chancery to the Clerk of Records and Writs. See *The Consolidated General Rules and Orders of the Court of Chancery ... 23 June 1868* (Toronto, 1868).

13 For example, the importance of specific performance is mentioned in Richard Risk's "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective," in David Flaherty, ed., *Essays in the History of Canadian Law* (Toronto, 1981), vol. 1, pp. 88-131. Staying waste is discussed in Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge, 1977), pp. 54-58.

The first subject index referred to specific subjects such as alimony, fraud, and mortgage. Strict vocabulary control was maintained over the development of subject headings since the usefulness of the index depended on insuring that it was both consistent and specific. The means of control was a "subject descriptor" list created as a reference tool for indexers, but which would, of course, also be of use to researchers who would use the index. The second subject index card, in effect a "case descriptor" card, summarized each case separately. The case descriptor card listed the parties to the dispute, the chronological coverage of the file, the subject or subjects of the litigation, and a brief summary of the case. With the first subject index, a researcher could obtain a ready listing of all the cases involving a particular subject. With the second index, the case descriptor cards could be consulted to determine whether an actual examination of the file would prove valuable.

In the course of developing these basic analytical subject indexes, additional indexes were created to add further flexibility to the index. An "action begun" index noted the venue of each case. Although all documents in the cases in this series were filed at the central Chancery office in Toronto, not all of these cases originated in Toronto nor were the trials all held in Toronto.[14] Since it had been discovered that local Supreme Court offices also held early Chancery case files, there was a distinct possibility that these locally held Chancery files could be matched with the central office cases whose venue was outside of Toronto. To facilitate this connection, the actions begun index contained separate cards for each judicial district with a listing by case number and year for actions begun in that district. A second additional index was the "lands location" index. Documents in a case involving land usually indicated the exact location of the land in dispute. Covering the period when Ontario was still a land-based economy, these case files would be important as a source of data to determine patterns of land ownership and for both thematic and local histories. The lands location index was therefore organized to provide access to the relevant Chancery files by county and township. A third and last index was a nominal index divided into a personal nominal index and a corporate nominal index. Chancery cases dealt with disputes between a number of individuals and companies. Often the title of the case did not indicate all of the individuals or companies involved in a case before Chancery. As a result, nominal and corporate indexes were created to include not only the parties to the dispute, but also the names of other individuals or companies which appeared in the case documentation.

As comprehensive a project as the Chancery subject index requires years of intensive work. To this point, the index is only partially completed: it will be many years before the project is finished. Unfortunately, economic and administrative realities dictate other priorities. In the case of the Chancery index, the pressing nature of other archival work has relegated this index to the level of a luxury item. Yet this kind of work should not be considered a luxury: it is an essential component of the process of transforming court records into accessible research material.

Resolving the apparent complexity of court records and providing the necessary indexes represent only one problem in the administration of court records. The second characteristic of the records — the potential sensitivity of selected documents in court files or whole series of court files — will be an irrevocable influence on how

14 From 1857, the judges of the Court of Chancery were required to go on circuit to try cases in county towns as was "practicable for the convenient administrative of justice" (20 Victoria, c. 56).

these records can be made accessible. Sensitivity, or confidentiality, cannot be separated from court records' character as an official legal record since it was as an official record that these documents were originally included in a court file. Describing the court record as a public record is a misnomer: not every court record is a public record in the colloquial sense. Access to court records can be governed, and thus restricted, by specific statutes or rules of court. The archivist must be aware of these restrictions and deal with them. Where restrictions represent an unnecessary handicap to historical research, the archivist must work for the removal of them. Conversely, where such restraints have a continuing validity after the court record has become subject to public research as an archival record, the archivist must attempt to negotiate a limited access which allows research use while maintaining confidentiality.

Certain types of court files, such as adoption files and juvenile files, are inherently confidential given the nature of the documentation required by the courts. This confidentiality is recognized by the specific statutes originally creating these files which include closure provisions as part of the statute.[15] Perhaps more importantly, these closure provisions are respected in actual court office practice. Other court files can present an archives with a less clear cut access policy. In Ontario, those court files not covered by a particular statute are theoretically governed by the province's *Judicature Act*. In actual practice, this meant until recently that these court files were open to the public. Until 1980, it was common practice in the court offices to allow unrestricted access to the civil case files of the Supreme and County Courts. During 1980, however, senior officials at the Ministry of the Attorney General revived a little known, and unused, section of the *Judicature Act* which applied conditional restrictions on access to civil case files. In doing so, established practice was upset, and local court officials were thrown into confusion. While some court officials closed files according to the act, others continued the customary practice of open access.[16]

Prior to 1979, this confusion would not have created an immediate problem for the Archives of Ontario. Holdings of Supreme and County Court case files ended in 1905. Interest in these files by both the legal profession and the research community was negligible. During 1979, however, one year before the Ministry's new access policy, the Archives received record transfers from the local court offices which brought case file holdings up to 1959. With files only twenty years old, the Archives now performs duties similar to that of the local court offices.[17] Along with this new responsibility came the unresolved problem of access. Unless it is resolved, the Archives will have no choice but to follow a strict interpretation of the *Judicature*

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15 *Revised Statutes of Ontario* (hereafter *RSO*), 1980, c. 66 (*Child Welfare Act*), part IV, ss. 71, 80; *Revised Statutes of Canada*, 1970, c. J-3, (*Juvenile Delinquents Act*), s. 12. Sections of both acts require that both proceedings be held *in camera*, or with the public excluded; as a result the case files are not a public record. Other sections require the sealing of all documents (*Child Welfare Act*), and the prohibition against the publication of the child's name, or the parents' or guardians' name in any publication (*Juvenile Delinquents Act*).

16 *Globe and Mail*, Toronto, 13 February 1981, "Court Clerks Differ Over Which Records Public Allowed to See"; *RSO*, 1980, c. 223, s. 129 (the *Judicature Act*). This section effectively restricts access to lawyers and parties to the action only. Other persons, not parties to the action, must demonstrate that they are affected by a case in order to be given access to the file.

17 Making files available to lawyers as well as copying and certifying court documents.

Act. This is not to accept the situation as a *fait accompli*: permanently restricting access to Supreme and County Court files according to the *Judicature Act* would render these files inaccessible to researchers, thus defeating the Archives' purpose in keeping them. An appropriate access policy would provide for a gradual opening of case files once they had become archival records.

Given what is known to be contained in these civil cases, gradual access to case files is preferable to a return to open access. Ostensibly the current situation resulted from the *Family Law Reform Act* of 1978. Cases begun under this act are interfiled as part of the Supreme and County Court files. As a result, from 1978 onwards, confidential personal information would be found in case files over which there were no apparent access restrictions. Reviving the conditional access section of the *Judicature Act* was the Attorney General's response to public complaints about open access.[18] From examining case files prior to 1978, however, it becomes clear that confidential information appears in certain types of civil case files well before the *Family Law Reform Act*. For example, included with the civil case files of the local Supreme Court offices are divorce actions (from 1931) and incompetency matters. Not all documentation submitted in the course of these cases can be considered public documents. In divorce actions, where the family includes children under sixteen, a copy of the Official Guardian's reports held by the Ministry of the Attorney General are permanently restricted.[19] Logically, this should also apply to the reports in the divorce files. In incompetency matters, files may contain medical or psychiatric reports.[20] Certainly this documentation is highly sensitive and cannot be considered a public record. Furthermore, both divorce files and incompetency files — or any other file — might contain sealed documents which can only be opened by a judge's order. With these types of records interfiled with the civil case files, establishing a structure of graduated access is an obvious archival solution.

Negotiating such a structure becomes the responsibility of the archives acting on behalf of the research community. While at this point, research interest in any but the earliest court records may appear negligible, this is not likely to remain so.[21] Interest in court records, specifically court case files, will grow as scholars continue their search for new quality sources for the varieties of research they undertake. Clearly, a reasonable and well-defined access structure must be in place well before this research demand materializes. Unfortunately, achieving an appropriate access policy is complicated by the current concern for individual privacy.

Recent federal legislative developments related to the juvenile case files of the courts may be symptomatic of the prevailing concern for privacy. Previous legislation had closed juvenile case files indirectly by requiring *in camera* proceedings in juvenile matters and by prohibiting publication of a juvenile's name. New federal

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18 *RSO*, 1980, c. 152 (*Family Law Reform Act*); Toronto *Globe and Mail*, 13 February 1981.

19 Ontario Ministry of the Attorney General Records Schedule #66-00-1..

20 *RSO*, 1980, chap. 264 (*Mental Incompetency Act*), s. 10, ss. 2.

21 Canadian legal history is a new field. Most published research to this point has relied on reported cases. American legal history, in two major works published in the 1970's, has moved to unpublished court records (see Rayman L. Solomon, "Legal History and the Role of Court Records," *The American Archivist* 42, no. 2 (1979), p. 195). Canadian social historians are already using original court documents see David Gagan, *Hopeful Travellers: Families, Land, and Social Change in Mid-Victorian Peel County, Canada West*. (Toronto, 1981), pp. 50-60.

legislation embodied in the *Young Offenders Act*, which supercedes the old *Juvenile Delinquents Act*, contains express provisions for the destruction of most classes of juvenile case files including those created under the old act.[22] Unlike other court records, juvenile court files will be placed beyond an archives' authority to retain for historical research. This means that the only historical record of juveniles before the courts in Canadian society will be restricted to court-produced statistics. Although these statistics for Ontario will have some historical value, they are essentially case-load statistics meant to assist in operational planning. As they are currently produced, these statistics are no substitute for case file information.[23] Without proper statistics, the destruction of the juvenile case files will have disastrous consequences for any future research into juveniles and the courts in Canadian society. Although juvenile court files could quite rightly be considered a special situation, this federal legislative precedent combined with the revival of restrictive access practices on the provincial level underlines the difficulty of establishing an archival access policy acceptable to all concerned parties.

Paradoxically, at the same time as the archivist must be prepared to push for the preservation of certain types of court records, the considerable physical volume of twentieth-century court records impose the need for discretion in both the selection of those records an archives chooses to keep and the fashion in which they are kept. Eventually, any provincial archives taking court records will have to resolve this problem of volume. At this point, the official character of court records becomes significant: certain records of the courts must be maintained permanently as an official record; others will be maintained solely for their research value.

Part of the solution, obviously, is to be initially selective concerning those court records considered necessary to retain. Given the multiplicity of sources for twentieth-century history, certain series of court records will retain only marginal historical value compared to their volume; these same series may also be of limited or no legal value after a stated period. In Ontario, for example, the Archives will not retain Sheriff's records from the twentieth century,[24] the lower court records of the Provincial Courts (Criminal and Civil Divisions), or the records of Small Claims Courts.[25] Yet even eliminating the high volume lower court records still leaves the large volume produced by the Supreme and County Courts. Restricting archival accessions only to the records of these courts will still produce a strain on the resources of any archives.

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22 29-30-31 Elizabeth II, c. 110 (*Young Offenders Act*). This act only went into effect 1 April 1984.

23 This suggests that one solution to the problem of juvenile case files would be to ask for the modification of court statistics to reflect historical and sociological needs as well as current operational needs.

24 Sheriff's records are duplicated in the records of the Courts and the Land Registry Offices. See A.C. Caldwell, *Office Practice for Sheriffs...* (Hamilton, 1949), pp. 35-36; and Janet M. Globe, *Title Searching in Ontario: A Procedural Guide* (Toronto, 1981), p. 67.

25 In 1972 alone, the Provincial Courts (Civil Division) and Small Claims Courts (outside of Toronto) handled 148,000 claims. In 1971 alone, the Provincial Courts (Criminal Division) disposed of two million cases. Most of these cases were minor infractions involving parking violations, violations of the *Highway Traffic Act* (speeding, littering, driving a noisy vehicle, etc.). See Ontario Law Reform Commission, *Report on the Administration of Ontario Courts* (1973), Part II, p. 2, and Part III, pp. 343-46.

Two traditional solutions to problems of volume have been microfilming and sampling. Given the official character of court records, both solutions have to be undertaken with care. In the past, one of the foremost objections to microfilming court records, apart from the enormous cost involved, was the question of microfilm's admissibility as evidence in a court of law. Although precedents had been established in the courts during the 1970s for the acceptance of microfilmed evidence, the *Canada Evidence Act* did not formally recognize microfilmed evidence. Recent revisions to the act, now pending in the federal Parliament, will remove this objection on the basis of the "best evidence" rule.[26] Yet this still leaves the cost of microfilming as an important deterrrent. This is especially true if the records to be microfilmed have reached the point where their value is primarily historical rather than official. In the case of the civil courts, for official purposes, the essential records to retain permanently are the minutebooks, order books, and judgement books. Case files, from an official viewpoint, might be considered disposable after given number of years. An archives, of course, will consider the case files as the most informative record for historical purposes. Unfortunately, money for microfilming court files which have no long-standing official value will be difficult to obtain. As a result, archives may be forced into the second solution which is to sample court case files.

It is not proposed here to lay out a sampling procedure for court case files. Appropriate sampling procedures will be relative to each province. What is valid for one province's case files may not be valid for the records of another province. An appropriate sampling procedure depends on how the records were organized, how much random destruction has already taken place, and the jurisdictions allowed to different court levels. As various as the actual sampling techniques may be, they will, or should, have one element in common: a sophisticated understanding of what constitutes a statistically valid sample.

An example of perhaps the most ambitious sampling project for court case files has been the Massachusetts Superior Court Records Project.[27] Set up under the auspices of the Massachusetts Judicial Records Committee, the project examined the applicability of sampling theory to court documents, specifically, the Superior Court case files from 1859 to 1959. The authors of the subsequent report on the sampling project insisted that they had no interest in proving whether sampling would, or would not, work. Yet it seems that there were not many alternatives to preserving the state's court records if sampling was rejected: the volume of these records in the local courthouses had become unmanageable and microfilming of all court files had been rejected in an earlier administrative report. In fact, destruction appeared to be inevitable; it was only a question of how it would be done. In this alone, however, the project was unique. Aside from its specific sampling recommendations, the project's coordinated, interprofessional approach to creating a sampling technique for court records should serve as the model for other jurisdictions.

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26 Senate of Canada, Bill S-33, 1st Session, 32nd Parliament, 29-30-31 Elizabeth II, 1980-81-82 (An Act To Give Effect, For Canada, To The Uniform Evidence Act Adopted By the Uniform Law Conference of Canada).

27 Micheal Stephen Hindus, Theodore H. Hammett, and Barbara M. Hobson, *The Files of the Massachusetts Superior Court, 1859-1959: An Analysis and a Plan for Action* (Boston, 1979).

Briefly, the Superior Court Records Project involved all those groups likely to be affected by any decisions concerning sampling of court files. Responsibility for the overall coordination and review of the project's work was the job of a Judicial Records Committee composed of representatives from judicial administration as well as the state archival and legal communities. Rejecting an "in-house" approach to sampling decisions, the project established an advisory board composed of scholars from the fields of legal history, social history, minority history, demography, criminology, and statistics. Together, the project staff and the advisory board arrived at a sampling technique which both agreed would preserve historical information for future scholars while significantly reducing the volume of court documents.

This technique included a basic sample using a sliding scale of sampling percentages for common law cases (20 to 5 per cent) based on age and county: depending on the file population in the various county courthouses, a larger percentage of nineteenth-century files were retained, while the more voluminous and routine twentieth-century files were assigned a smaller sampling percentage. Equity case files, which contained more historically valuable information than common law cases, were given a standard sampling percentage (30 per cent) throughout the period. For those county courthouses whose total Superior Court file population was small or where records destruction had already occurred, no sampling was allowed. To this basic sample, the project staff added an "oversample" group of all divorce files and "fat" files. Although the retention of divorce files can be readily understood, the "fat" file concept has an unfortunately unscientific ring to it. Nevertheless, the project staff found that files proportionately "fatter" — or thicker in comparison to others of the same period — were more likely to contain historically interesting information. To ensure that these files would be preserved, they were included as part of the "oversample."

In working with court records, the archivist must carefully pick his way between a variety of conflicting interests. Faced with the physical volume of court records, the archivist is caught between an administrative imperative to reduce costs and scholarly fears of records destruction. For those court records which become archival records, the question of access must be balanced between the need to maintain privacy and the research demand for full access to such records. And finally, even with physical access to court records decided, it is still necessary to establish appropriate methods of intellectual access to those records within an archival environment hard pressed by economic reality. Dealing with court records within an archival context is both challenging and frustrating, but the first step towards resolving the problems created by such holdings is to fully understand the nature of the record.