

The Osgoode Society Survey of Private Legal Records in Ontario

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Why has the documentary heritage of the legal profession suffered such great losses? The answer is in part neglect. Solicitors deal with vast quantities of paper in their careers, literally thousands of linear feet, much of it documents detailing routine transactions. As a rule they have neither the time nor the inclination to concern themselves with their documents' potential historical value. Even if a lawyer were aware that elements of a firm's records possessed enduring value and should be deposited in an archives, there are serious constraints preventing action on this awareness. These include the common law rule of solicitor-client privilege and the ethical rule of confidentiality. The evidentiary rule of solicitor-client privilege, the better known of the two, dates from the sixteenth century and dictates that communications between a client and a solicitor cannot be introduced as evidence in a court of law and in effect are closed to all other eyes in perpetuity. Once the privilege exists it always exists, and survives even the death of the client. The privilege exists for the benefit and protection of the client and can only be waived by the client. Beyond this is the ethical rule of confidentiality as laid out in Ontario in Rule Four of the Rules of Professional Conduct of the Law Society of Upper Canada, which states:

The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client, and he should not divulge any such information unless he is expressly or impliedly authorized by his client or required by law to do so.

This ethical rule is wider than the common law rule and applies without regard to the source of the information or the fact that others may share the knowledge.

The Osgoode Society, Ontario's legal history society, has worked for some years to realize a relaxation in solicitor-client privilege and a revision in the confidentiality rule in order to permit solicitors to deposit their records and make them available for research. Opinion was sought from counsel and discussion was commenced regarding amendment of Law Society rules. A draft bill was drawn up in 1983 outlining a possible mechanism to permit deposit of records with safeguards on use in the form of committee review of access. In the course of these analyses it became apparent that there was little real appreciation of the records situation in the field. What, for instance, were the common records retention practices of law firms? For years stories circulated about bonfires of records by major law firms or vast warehouse caches of records retained. Certainly the cache legends presented a major incentive to investigate the situation.

In 1983 it was proposed that a survey be conducted of firms in Ontario to determine the volume and nature of records of archival value extant, develop appraisal criteria, and assess the urgency of action needed to preserve records. If a large quantity of important

* An earlier version of this paper was presented at the Annual Meeting of the Ontario Association of Archivists in Barrie, Ontario, May 1985. See also articles by Hay and by Shepard in this issue.

material was discovered this information could be used as a lever to secure legislative action. On the other hand, if no records survived, a case could also be made for action to ensure future preservation. A Legal Records Committee of the Osgoode Society was formed, chaired by Christine Kates, a lawyer and the Director of Oral History for the Society, and composed of Cathy Shepard, the archivist responsible for administration of justice records at the Provincial Archives of Ontario, and Roy Schaeffer, Archivist of The Law Society of Upper Canada.

The committee decided to conduct the survey through personal, on-site interviews. A mailed questionnaire or a phone survey would not have given the committee the kind of detailed information needed nor provided direct contacts with firms. The survey was divided into two phases: first, a survey of the twenty oldest firms in Toronto, and second, a survey of all major communities in the province. The old, established Toronto firms are generally among the largest and most important in the province. They conduct business on local, provincial, national, and even international levels and handle major corporate and governmental clients. The committee was not optimistic regarding the possibility of finding a significant volume of older records in these firms; they are very cost conscious, face chronic space shortages, and by and large do not have a great deal of historical sensitivity. We had much higher hopes for phase two, firms outside of Toronto. The Osgoode Society received a generous grant from the Ontario Ministry of Citizenship and Culture for the second phase and the Legal Records Committee was able to cover most of the province including northern Ontario. Many of the firms visited outside of Toronto were small — usually under ten partners — often over one hundred years old, sometimes in the same family for generations, and even in the same location.

One of our first tasks, and not always an easy one, was identifying older firms. Except for a few firms with long-established and static names, such as McCarthy and McCarthy, most firms change names with changes in partners and often disappear or merge without a record or a trace. One Ottawa firm, for instance, can claim origins in forty-eight predecessor firms. Using the published law lists, a directory of firms, we could occasionally trace a firm's "genealogy." It was often safer, however, simply to contact all the firms in a community.

A survey form was designed to permit us to gather information on the origins of the firm, its age, size, specialization, and records management policies. We wanted general information on the types of records they maintained, concentrating on their inactive or semi-active records, their volume and age. We also made particular note of significant clients or cases the law firm might have handled. We mailed out announcements of the survey to all the firms, signed by the President of the Osgoode Society, and then called the firms to arrange the interviews and provide further information as to our purposes. The on-site survey began with interviews of the major partners and, where possible, an actual examination of the records. Many of the lawyers contacted were sufficiently sensitive to the question of privilege that we were not allowed direct access to the files. On the whole, we met with great cooperation and even encouragement. The survey began early in 1984 and ended in the fall of 1985. By that time members of the committee had visited 129 firms in forty-four communities.

The findings of the survey are not entirely straightforward. Much of what we gained was a greater, but still an incomplete, appreciation of the workings of a law office and the archival value of private legal records. We found that the holdings of active and semi-active records are enormous, but only a small percentage has obvious research value.

Certainly the records of major or representative civil and criminal cases would provide insights into historically significant decisions or events and the handling and preparation of certain types of actions. They allow a greater appreciation of the skills of certain prominent barristers. The administrative records of the firms themselves, their ledgers and dockets, contain useful information on the management of firms and the changes in types of business over the years. The value of private legal records however, goes beyond the realm of legal history. Corporate and commercial files contain information valuable for local and national business history. Depending upon the nature of the practice and the clients, there may also be municipal records, including minutes of meetings and major land transactions, labour-related records such as collective agreements, even architectural plans and inventories. Lawyers' activities touch on every aspect of community life, whether social, economic, or political.

In terms of material that has been preserved, we found that many firms, particularly in Toronto, have long-standing corporate clients and the records maintained for these clients are almost never destroyed. They may contain copies of incorporation documents, agreements, patents, and building plans. Fasken and Calvin, a major Bay Street firm, for instance, has kept records of the Toronto-Dominion Bank and its predecessors for over one hundred years. It also served for many years the Gooderham family of distillery and life insurance fame.

We discovered a few firms in the smaller towns that have maintained their records virtually intact from their inception. Blake, Cassels, one of the largest firms in the country, has kept the original letter books of its founders, William Hume Blake, one of the giants of the law in Ontario in the mid-nineteenth century, and his son, Edward Blake. Tilley, Carson, in Toronto retained files from the 1920s and 1930s including case files for the *I'm Alone* affair, a case that involved the sinking of a Canadian rum runner by the U.S. Coast Guard and embroiled the Mackenzie King government in a diplomatic dispute. The firm also handled certain of the legal actions resulting from the Charles Millar will. Millar, who was himself a Toronto lawyer, left a portion of his estate to the woman who produced the most children in the ten years after his death, setting off a so-called Stork Derby which ended in a series of court wrangles over the credentials of the winner.

Many of the finds were interesting and perhaps even important, and many were largely unexpected. On the down side, however, we found that on the whole, firms do not keep records more than twenty to thirty years. This applies even to the small town firms which do not experience pressures of space to the same degree as the larger firms. In fact, the committee found that old family firms, which might have been expected to have a greater sentimental if not a cultural attachment to their records, were among the most active shredders. The only records that were consistently retained were the ubiquitous real estate and estate files. Litigation files, particularly criminal files, are rarely kept for more than ten years. Only occasionally did we find systematic and formal records management procedures. As a rule the lawyers themselves decide on a case by case basis whether the files should be kept, and files are often indiscriminately destroyed with only a cursory review. Many firms feel they cannot afford to spend lawyers' time on a thorough review of the files prior to disposition and decisions are left to support staff.

We were quite often told that we were five years too late, and we did encounter horror stories. An example is the case of Weir, Foulds, a major Bay Street firm, which the committee was informed had been holding all of their files from 1882 in a warehouse. When

the partner responsible for records management made phone calls to arrange a visit to the warehouse, he discovered that without his knowledge all the records prior to 1948 had been destroyed a year before. During the course of the survey, McCarthy and McCarthy, one of the largest firms in the country and one of the oldest, destroyed all of their records, with the exception of corporate records, prior to 1957. Our only comfort was that with all of the firm's moves and structural changes it was unlikely that many files from the nineteenth century would have survived to the 1980s. The major factors that law firms consider in retaining files are the demands of Revenue Canada, the long-term needs of their clients, and liability. In the event of litigation regarding a file, a lawyer may feel it necessary to have documentary evidence, both for his client's protection and his own. Generally, the press of space is the primary incentive to destroy. The lawyers we spoke to were not universally indifferent to the archival value of their records. Quite a few were sensitive to the roles their firms had played in the lives and development of their communities and the legal profession. They were also invariably sensitive to the need to protect confidentiality. This is true particularly in the smaller towns where clients are not transient; they are often long-established families or businesses that have used and trusted a firm and its predecessors for generations. Even when positive about ultimate deposit in archives, law firms made deposit conditional on some changes to the solicitor-client privilege and confidentiality rules, and warned that they did not have space to retain files while awaiting some resolution of the problem. They also made it clear that they had neither the time nor the expertise to select archival material or to chase release waivers from clients and ex-clients.

After the survey the committee began researching possible precedents for action on solicitor-client privilege and confidentiality in other common law jurisdictions. Unfortunately, there are no ready-made solutions waiting for our adoption. I should also mention that the trend in the development of the privilege rule has been toward its extension, not its limitation; and what is more, organizations protecting the interests of lawyers, notably the Canadian Bar Association, have served notice that they stand on guard against any encroachments on the privilege rule — though the warning was not directed against limitation for the purposes of historical research.

Despite these obstacles, the Osgoode Society is committed to action on amendments to solicitor-client privilege. Barring this, it will seek some more informal system of preservation of private legal records, with rigorous time restrictions on use and some form of data use agreement to be administered by the archives that would permit researchers to examine files but protect the identity of the client. Work is also under way on a set of guidelines to lawyers on the identification of records of archival value. This will not be a records management manual, but a handbook identifying those records generated by law firms, which are unique, have significant research value, and should therefore be maintained and made available. The guidelines will also, we hope, benefit archivists and scholars by ensuring that only genuinely valuable records from the tens of thousands of feet generated are deposited.

At this point the question of the preservation of private legal records in Ontario is in the hands of the executive of the Osgoode Society, composed of distinguished lawyers (including the Attorney General of Ontario and the Secretary of the Law Society) and academics. We trust that some action will be taken soon to ensure that this element of our documentary heritage does not continue to be lost.

Author's note: Guidelines for the disposition of private legal records in Ontario have recently been approved by the Osgoode Society. An acquisitions programme coordinated by the Archives of Ontario will commence in 1987. The guidelines will be published in the forthcoming issue of the Law Society of Upper Canada Gazette.

ERRATA

The article entitled "Notes on Microfilm," published in *Archivaria*, No. 23 (Winter 1986-87) pp. 179-184 contains two typographical errors: in footnote 6 on p. 181 the threshold value for residual thiosulphate is $0.7\mu\text{g}$ (micrograms) per cm^2 , instead of mg/cm^2 . Likewise, the thiosulphate content in Table 2 is expressed in μg (micrograms) per in^2 , instead of g/in^2 .