THE RECORDS OF LAWYERS: ARCHIVAL APPRAISAL AND ACCESS

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ABSTRACT

Despite the importance of lawyers as persons within the legal system, their activities have not been well-represented in the documentary heritage of society as preserved in archives. The primary reason behind this situation is the principle of solicitor-client privilege, which traditionally protects the lawyer-client relationship from disclosure. The privilege has not only barred the archival acquisition of and access to client files for research purposes but has also apparently prevented any in-depth study of the records lawyers create.

This study attempts to shed light on the records created by lawyers and their possible disposition. First, the thesis uses the concepts of diplomatics and an analysis of the historical development of lawyers to categorize their work. The functions it defines include maintaining a legal practice, contributing to the profession and providing legal services to clients.

The thesis then examines the central function of providing legal services by analyzing an actual lawyer's fonds and comparing it with related records in court registries. This analysis illustrates how lawyers records fall both into functional categories and diplomatic phases. It also reveals that, contrary to certain observers, few of the documents in the lawyer's file appear in the court registries and even fewer are preserved in archives as a result of records management decisions by the registries.

These findings provide grounds to consider archival appraisal of lawyers' records. First, it is argued that concerns about solicitor-client privilege need not inhibit preservation and access to lawyers' records in archival institutions. With this impediment removed, archivists can proceed to acquire the fonds of lawyers on a selective basis both among and within fonds. In terms of appraisal for selection, certain records resulting from the activities within the functions of maintaining a legal practice and contributing to the profession are worthy of permanent preservation and have no access restrictions on their use. For the function of providing legal services, a statistically-valid sample of these case files should be preserved to illustrate this aspect of a lawyer's work. However, it is vital that lawyers and archivists must work together on finding mutually acceptable policies that both respect the privacy of clients and allow access to the record of legal practice for future generations.

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This thesis is dedicated to my family, whose constant support of my education has made completion of this thesis possible.

INTRODUCTION

All societies are governed by some form of law, whether these laws are based on tradition, religion, secular philosophy or perhaps even force. Defined as "a body of rules for the guidance of human conduct which are imposed upon and enforced among the members of a given state,"[1] law defines the rights and obligations of all persons within society, regulates their interactions, and provides a means to resolve disputes. Although the concept of law in the industrialized western world usually brings to mind images of thick volumes of statutes, unwritten tribal customs in non-industrial societies regarding succession of leaders or the inheritance of property must also be considered a form of law.[2]

Law itself does not constitute a legal system. A legal system requires persons, both natural and juridical, to create laws, to interpret their meaning, to adjudicate claims that laws have been transgressed, and to pass judgement on those who have broken the law.[3] Gall identifies three categories of persons who make

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[1] Gerald L. Gall, The Canadian Legal System 3rd ed. (Toronto, 1990), p. 3.

[2] Jean Barman, The West Beyond the West: A History of British Columbia (Toronto, 1991), p. 15-17 provides examples of the juridical systems of the indigenous peoples of British Columbia, including matrilineal inheritance of property.

[3] A physical person is simply a human being. Luciana Duranti, "Diplomatics: New Uses for an Old Science," Archivaria no. 28 (Summer 1989), p. 25, note 20, defines a juridical person as "an entity having the capacity or the potential to act

up the legal system and are relevant to this study.[4] The first category of person is the court, the juridical person who interprets the laws of society to adjudicate disputes. Courts are presided over by judges, the juridical persons who wield the power of the court. The second category of person is the lawyer, who acts as a juridical person representing either physical or other juridical persons. The third and final category includes the various regulatory bodies, agencies, departments, and additional juridical persons with discrete legal powers and duties to perform. All these elements are interrelated in terms of their mandates and, consequently, their records. One could consider extending the boundaries of the definition of a legal system to include the creation of laws and the enforcement of the judgments of the system, but these are related aspects to the legal system with a separate existence, not integral components of the system itself.

The critical role of a legal system in regulating transactions among persons obviously affects the nature of its documentary heritage. In societies dependent on documents to record information about these transactions, the mandate of the archivist is to preserve those documents of the legal system which maintain its

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legally and constituted by either a collection or succession of physical persons or a collection of properties." Examples of juridical persons provided by Duranti include states, corporations, committees, positions filled by individuals, or estates of deceased persons.

[4] Gall, Canadian Legal System, p. 184. Gall identifies a fourth category, specialized administrative personnel, such as paralegals, who assist lawyers and judges. However, only the three categories discussed below have the right to exercise power within the legal system and, therefore, are of interest to this discussion of the legal system.

accountability and documentary heritage. Therefore, it is incumbent upon archivists to understand the nature of the records produced by the legal system in order to ensure that the records appropriate to these ends are preserved.

Within the body of archival literature, there are some sources pertaining to legal records. However, in the introduction to her thesis examining the concept of legal value, Heather Heywood notes a certain vagueness about what constitutes "legal records" and a distinct lack of scholarly exploration into the subject.[5] Although many historians have expounded on the value to their work of various types of records pertaining to the operation of law in society, archivists have not, for the most part, pursued detailed studies of the records generated by all facets of the legal system.[6]

This situation is gradually changing as archivists examine what is meant by "legal records". Using diplomatics and law, Heywood determined that legal value could be conferred upon any record, depending on its relationship to a juridically relevant event, the admissibility of the record in court, and the effectiveness of the record in representing the facts at hand.[7] Throughout her study, Heywood clarifies

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[5] Heather Heywood, "Appraising Legal Value: Concepts and Issues," (Unpublished M.A.S. thesis, University of British Columbia, November 1990), p. 8-9.

[6] Some detailed studies have been conducted, notably Barry Cahill, "Bleak House Revisited: The Records and Papers of the Courts of Chancery of Nova Scotia, 1751-1855," Archivaria no. 29 (Winter 1989-1990): 149-167, and Michael Stephen Hindus et. al., The Files of the Massachusetts Superior Court, 1859-1959: An Analysis And A Plan For Action (Boston, 1979).

[7] Ibid., p. 131-133.

the concepts behind the legal values that any record could have, thereby illuminating some of the issues surrounding "legal records".

Heywood does not specifically examine the various categories of records generated by the legal system. For the most part, there have been few in-depth studies of these records creators. Daisy McColl's thesis pertaining to the Supreme Court of British Columbia is one exception. It blends a history of the court and its record-keeping procedures with a brief examination of the nature of its records and their appraisal.[8] The nuances and intricacies of the records of many elements of the legal system await exploration.

This thesis sets out to examine the records of lawyers, one of the classes of persons involved in the legal system. As the representatives of physical or juridical persons in the complex modern legal system, lawyers perform an important role in society through their advocacy of their clients' interests. In addition, many persons prominent in the political, corporate and other fields have been lawyers by profession. Many legal and social historians, as well as archivists, regard the records of law firms, particularly the client case files, as an untapped source of information about the law and society.

The problem of providing access to these records presents a conundrum to archivists, lawyers and researchers who would use such records. By virtue of the

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[8] Daisy McColl, "An Administrative History of the Supreme Court of British Columbia with Particular Reference to the Vancouver Registry: Its Civil Records, their Composition, and their Selection for Preservation," (Unpublished M.A.S. thesis, University of British Columbia, October 1986).

common law tradition of solicitor-client privilege, neither clients nor their lawyers are obliged to reveal the nature of any communications between them. This privilege is a basic tenet of the common law system and has evolved in order to protect the rights of the client. Violating solicitor-client privilege can even lead to the disbarment of the lawyer who transgresses this fundamental principle. Despite this impediment to secondary use, some records of lawyers have found their way into archival institutions.

The difficulty of resolving the access question is the starting point for this examination of the records of lawyers. Lawyers' professional obligation requires them to protect their clients' confidences, yet preserving these records in an archival repository implies that access will be provided. On first glance, the protection of the client's interests and archival access appear irreconcilable.

In order to study this issue, the overall functions and activities of lawyers must be characterized as the first step of an understanding of the complete range of records created by lawyers during their conduct of legal practice. Only with this characterization of the records in mind can the problem of archival appraisal, preservation and access be addressed.

To attain the necessary understanding of what constitutes lawyer's records, the first chapter is devoted to developing a conceptual model of the functions and activities undertaken by lawyers. It uses archival theory as well as study of the historical development of the legal profession to determine the functions and activities. This method of functional analysis has been used previously by other,

parallel studies of artists, university professors, and universities.[9] Although this method of analysis is in its infancy, at least in the English-speaking world, it has already been demonstrated that it provides a useful basis for classifying and explaining the records of a given type of creator.

The second chapter will employ the conceptual model of a lawyer's functions and activities to analyze the records of a lawyer. In all previous studies using functional analysis, the authors developed their analysis in theoretical terms but did not apply their results to existing records. Only by applying the model to an actual fonds can its true worth be accurately assessed. This chapter of the thesis will also examine the relationship between court records and those contained within the lawyer's fonds. Although lawyers often justify the destruction of their files on the basis that related official records maintained by court registries contain all the information that is needed, a comparison of the linkages between the records generated by lawyers and the records of the court system has never been attempted to determine how much duplication exists between the lawyers' files and those of the court registries, a fact which may affect the archival appraisal of lawyers' records.[10]

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[9] Victoria Blinkhorn, "The Records of Visual Artists: Appraising for Acquisition and Selection," (Unpublished M.A.S. thesis, University of British Columbia, May 1988); Frances Mary Fournier, " Faculty Papers: Appraisal for Acquisition and Selection," (Unpublished M.A.S. thesis, University of British Columbia, May 1990); Donna Irene Nisbet Humphries, "Canadian Universities: A Functional Analysis," (Unpublished M.A.S. thesis, University of British Columbia, Spring 1991); Helen Willa Samuels, Varsity Letters: Documenting Modern Colleges and Universities (Metuchen, N.J, 1992).

[10] See Brian Bucknall, "The Archivist, the Lawyer, the Clients and their Files," Archivaria no. 33 (Winter 1991-1992): 185-186 for a lawyer's viewpoint on the

Building on the information provided by the test of the model, the third chapter discusses appraisal of lawyers' records for both acquisition and selection. It presents a set of ideas aimed to represent lawyers' records in the documentary heritage, in the sense that no aspect of human activity should be hidden from the possibility of continuing scrutiny. It then addresses how the perennial problem of access to client files can be managed, as this has often clouded consideration of the matter.

Ultimately, then, this thesis has three objectives. First, the study will characterize the functions and activities conducted in contemporary legal practice to create a model for analyzing lawyers' records. Then, it will test the model against the reality of one body of records preserved in an archives. Then, it will discuss the related problems of appraisal and access to lawyers' records. The aim is to provide a comprehensive view of the lawyers' role in the legal system, the kinds of records they produce, and the role archivists can play in preserving a record of legal practice in society's documentary heritage.

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preservation of documents in the public domain.

CHAPTER ONE

THE FUNCTIONS AND ACTIVITIES OF LAWYERS

In their article, "The Power of the Principle of Provenance", David Bearman and Richard Lytle propose a new form of archival information retrieval systems. One component of such a system is the use of functions to provide better access to records.

> Functions are independent of organizational structure, more closely related to the significance of documentation than organizational structures, and both finite in number and linguistically simple.[1]

Bearman and Lytle point out a number of advantages of analyzing functions. Because records follow function, functional studies illuminate the character of activities and the records they produce in general terms and avoid the inevitable complications bestowed upon records systems by the variety and change of organizations. Therefore, this chapter will establish a conceptual basis of a functional study, explain the methodology necessary to conduct a functional analysis, and use this methodology to analyze the work of lawyers.

A function can be defined as "all of the activities aimed to accomplish one

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[1] David A. Bearman and Richard H. Lytle, "The Power of the Principle of Provenance," Archivaria no. 21 (Winter 1985-86): 22.

purpose, considered abstractly."[2] The concept of function has been present in the writings of several archival theorists since the nineteenth century. The 1898 manual of Muller, Feith, and Fruin links functions to the phenomenon of administrative change, a theme also expressed in the writings of Margaret Cross Norton and Peter Scott.[3] While these authors focus mainly on the difficulties created for the identification of archives as a result of organizational change, Michel Duchein directly addresses the reason why the concept of function is relevant to archivists. He states that "the archival document is present in the heart of a functional process, of which it constitutes an element, however small it may be."[4]

When comparing Duchein's statement to the definition of a function, the common factor between them is the interplay between activities and documents. The comparison indicates that both activities and documents occupy the same position in terms of their relationship to a function. Logically, the activities which make up a function must also be the point of origin for the creation of documents. Therefore, because documents result from activities, the discipline of diplomatics,

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[2] University of British Columbia, School of Library, Archival and Information Studies, "Select List of Archival Terminology," s.v. "function" (p. 8).

[3] S. Muller, J.A. Feith and R. Fruin, Manual for the Arrangement and Description of Archives (New York, 1940), p. 22-25; Margaret Cross Norton, Norton on Archives: The Writings of Margaret Cross Norton on Archival and Records Management (Carbondale, 1975), p. 110-113; P.J. Scott et. al., "Archives and Administrative Change," Archives and Manuscripts 7, no. 3 (April 1979): 151, 154.

[4] Michel Duchein, "Theoretical Principles and Practical Problems of Respect des Fonds in Archival Science," trans. Kay Brearley and Louise Ouellette, Archivaria no. 16 (Summer 1983): 67.

which studies the creation, form, transmission and context of documents, can be used to study activities. In terms of diplomatics, activities can be viewed as procedures which can be categorized and broken down into distinct phases.[5]

These inferences indicate the usefulness of functional studies to archivists. By connecting functions, activities and documents, archivists can achieve an increased understanding of how an archives is generated and what its substance is. This fundamental understanding directs the entire treatment of archives. Because they are abstract by nature, functional studies can establish generic classification schemes or models applicable to any number of classes of juridical or natural persons without reference to the peculiarities of the way they administer their affairs.

These contributions are evident in the number of functional analyses which have been completed. Victoria Blinkhorn's study of the records of visual artists identified a number of functions and activities, linked them to records series, and discussed a plan for acquisition and appraisal.[6] In a similar manner, Frances Fournier's study of professors established the functions of university faculty members, characterized the classes of records series in each function, and then formulated a framework for acquisition and appraisal of professors' records.[7]

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[5] For a more detailed explanation of the use of phases in diplomatics, see pg. 29.

[6] Victoria Louise Blinkhorn, "The Records of Visual Artists: Appraising for Acquisition and Selection," (Unpublished M.A.S. thesis, University of British Columbia, May 1988).

[7] Frances Mary Fournier, "Faculty Papers: Appraisal for Acquisition and Selection," (Unpublished M.A.S. thesis, University of British Columbia, May 1990).

Clearly, such studies greatly assist the work of archivists by establishing an analytical framework applicable to a class of fonds. Studies of various actual examples can then test the framework of ideas to confirm or alter it.

Although described as functional analyses, such studies must reach beyond functions in order to begin. The starting point for a functional analysis in these general terms is the mandate, which might be described as the authority of the class of entity in question to administer a matter.[8] A class of organization or occupation performs the same overall role or mandate. This mandate is expressed by the functional responsibilities which are commonly assigned to all organizations or persons within that class. In essence, a mandate permits an occupation or organization to undertake a function or set of functions and activities in society.

An organization or occupation can receive a mandate from several different sources. Society at large can grant a mandate either through long-lived customs or as a matter of law. An organization such as a voluntary organization or a business may establish its own mandate, which is then recognized by the members who join the organization and, perhaps, by society itself in some formalized way. In systems of government similar to those in Canada, the sovereign power creates the mandates of agencies by delegating functional responsibilities to them through legislation or by providing legislation to govern the affairs of classes of organizations or occupations.

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[8] Lewis J. Bellardo and Lynn Lady Bellardo, compilers, A Glossary for Archivists, Curators and Records Managers, SAA Archival Fundamentals Series (Baltimore, 1992), p. 21.

The functions within the mandate can be classified as either substantive, encompassing the activities typically performed by the organization or occupation, or facilitative, including those activities required solely to sustain the organization or occupation.[9] Once functions have been established, the activities encompassed within each function can be identified and linked to series when the model is applied to a particular fonds. If necessary, these activities can be broken down into the procedural phases identified by diplomatics, a step which leads to the documents themselves.[10] Using this methodology, the remainder of the chapter will focus on a functional analysis of lawyers.

The role of lawyers in society originates from two sources. The first source is a form of social mandate. After centuries of tradition and inculcation, society has recognized that lawyers are necessary participants in proceedings where the exact determination of legal rights is in question. As a result of this tradition, persons appoint lawyers to act as their agents.

The second and more tangible mandate is set down in legislation. In Canada, provincial governments have passed legislation for a number of professions, including pharmacists, doctors and lawyers, that establishes professional organizations. These organizations determine the proper conduct of their members

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[9] This classification of functions is taken from T.R. Schellenberg, Modern Archives: Principles and Techniques (Chicago, 1956; reprint, Chicago, 1975), p. 54.

[10] Some activities may not be worth analyzing at the level of procedural phases. Setting particular policies, auditing finances, and other activities common to many organizations would not normally be worth taking to this level. Activities unique to an organization are likely candidates for such detailed analysis.

and are largely self-regulating. For example, British Columbia's Legal Profession Act creates the provincial law society and establishes procedures for its governance.[11] Although no specific mandate is defined for the functions of individual lawyers, the law society itself is given several duties which might involve individual lawyers, including preservation of rights and freedoms of all persons, maintenance of the integrity of its members, establishment of professional standards, regulation of the practice of law and protection of its members.[12]

The next step is to determine the functions necessary to accomplish the mandate. Essentially, there are two sources to consider when defining the functions undertaken by lawyers. First, there are the various acts which establish the provincial law societies and create the rules for the conduct of modern lawyers. The second source is the history of the legal profession, which indicates distinct historical traditions in terms of the lawyer's activities. Examining these sources, three functions become apparent: maintaining a legal practice, contributing to the profession, and providing legal services to clients.

In terms of their classification, both substantive and facilitative functions are present. Maintaining a legal practice is a facilitative function, while the provision of legal services to clients is substantive. Contributing to the profession is neither a facilitative nor a substantive function. While clearly not facilitative because of its

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[11] British Columbia, Revised Statutes of British Columbia (Victoria: Queen Printer for British Columbia, 1988), c. 25.

[12] Ibid., s. 3.

unique professional focus, contributing to the profession is not substantive because it is not found within every legal practice or firm. Since the function is an optional, avocational pursuit associated with the profession, it is related more to the individual member and cannot be considered in the same vein as a substantive function required by all the members of the profession.

Maintaining a legal practice is clearly one of the basic functions of the lawyer. In order to conduct business effectively, the lawyer must establish and maintain a basic infrastructure found within any office setting. Some elements of this function are common to any business, necessitated by the rules prescribed by British Columbia's Company Act. For example, some aspects of the conduct of an incorporated lawyer, including the filing of annual reports with the government, are governed by the provincial Company Act.

Other parts of this maintaining function are specific to the legal profession and are required by the law society, particularly the requirement for the law society to certify lawyers practicing within its geographical limits. Perhaps the most important aspect of this maintaining function within the legal profession is the concept of the law firm. One type of law firm is the individual practice in which a lawyer practices law alone. While this type of practice is more prevalent in the United States than in Canada, the number of individual practitioners is declining in both countries.

The dominant trend in the legal profession is towards partnerships. A partnership consists of two or more lawyers, usually bound by formal partnership

agreements pertaining to the division of the firm's income and the control of management decisions, working in the same office or in various branch offices of the firm. In the United States, over 50 percent of all practices are law firms involving two or more lawyers.[13]

The concept of the partnership is a relatively recent innovation in the legal profession. In England, partnerships were rare prior to the mid-eighteenth century and evolved only as the professions of solicitor and attorney were formally recognized.[14] These partnerships were small and involved either two or three persons. Although solicitors worked closely with barristers, it appears that firms incorporating the services of both barristers and solicitors did not evolve in the English legal tradition.

The concept of partnership evolved significantly in North America. Prior to the Civil War, American law firms remained small. Lawyers treated the firm fluidly, moving on to form other firms and taking their clients with them. After 1870, law firms began to grow significantly larger. The expansion of industrialization, the increased legal needs of corporations, and the rise of cities all contributed to this growth. In 1872, only four law firms in one city could boast of a complement of five or more lawyers. By 1893, sixty-seven firms in twenty-one cities ranged in size

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[13] Barbara A. Curran, "American Lawyers in the 1980s: A Profession in Transition," Law & Society Review 20 (1986): 29.

[14] William Cobb, A History of Grays of York, 1695-1988 (York, 1989), p. xiii.

from five to eleven members.[15] This growth was facilitated by a new type of law firm, pioneered by Louis Brandeis and Paul Cravath. These men hired graduates fresh out of law school and paid them to work exclusively for the firm's clients. These graduates would remain with the firm unless they could not become partners. In addition, these firms adopted the latest office technology and techniques, such as telephones, typewriters and standardized filing systems, to increase productivity and efficiency. This new type of law firm, known as the "law factory", had spread throughout the United States by the 1920s.[16]

Recent developments in the structure of law firms have gone beyond the law factory to create enormous law firms. Establishing branch offices of the same firm in various cities has created law firms of nearly three hundred lawyers.[17] Another trend is to merge law firms, either within cities or across a nation. One of the most ambitious programs of growth was undertaken in the late 1980s by the Toronto law firm of McCarthy and McCarthy. In a relatively short period of time, McCarthy and McCarthy merged with a firm in Montreal, absorbed law firms in Vancouver, Calgary and Ottawa, and established offices in Hong Kong and England to create a multinational legal conglomerate that cuts across the boundaries of nations,

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[15] Wayne K. Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915, " in The New High Priests: Lawyers in Post-Civil War America, ed. Gerard W. Gawalt, Contributions in Legal Studies no. 29 (Westport, Conn, 1984), p. 11.

[16] Ibid., p. 19.

[17] See Marc Galanter and Thomas Palay, Tournament of Lawyers: The Transformation of the Big Law Firm (Chicago, 1991), Appendix A for figures on the size of various American law firms.

languages and even legal systems.[18]

In spite of the enormous differences between individual practices and multinational practices, the basic activities involved in maintaining a legal practice remain largely the same because law firms all require similar infrastructures. Obtaining certification from the law society is an essential starting point in order to practice law within the society's jurisdiction. Incorporating a legal practice is an activity which may occur for a number of purposes, such as the limitation of taxation or liability. With the establishment of these elements, other office-related activities can be undertaken. Hiring and maintaining salaried staff may not occur in the practice of an individual lawyer but is an especially important activity for larger law firms. Setting policies and procedures, such as those pertaining to billing or cases to be accepted, may also be considered part of maintaining the law practice. Placing advertisements and conducting marketing surveys are additional activities which law firms may pursue.

Several activities within the function of maintaining the legal practice pertain to the partnerships which have become so common within the profession. Forming the partnership establishes the rules and the exact relationship between the partners. Adding partners naturally occurs as a result of the growth of a law firm over time. Conversely, removing partners may occur with the resignation or death of a partner.

Additional activities result from the financial aspects of maintaining the legal

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[18] Vancouver Sun, 31 January 1990, p. D9.

practice. Paying debts is an obvious activity related to the ongoing existence of the firm. A related activity is receiving payments for services rendered by lawyers to their clients. This activity would include money received in trust either as a retainer or pending the settlement of a legal action. Another basic activity is distributing profits from the law practice. The final activities pertaining to financial matters are paying taxes or auditing finances, essentially summarizing all financial activities for a specified period of time.

The second function performed by lawyers is **contributing to the profession.** This function concerns all those activities related to serving the profession or promoting further understanding of it among the general public, students, and other lawyers. While undertaking this function is not a requirement of being a lawyer, a certain percentage of lawyers include it as a normal part of belonging to their profession.

There are a number of activities which constitute this function. Writing articles for publication either in scholarly journals or newsletters is perhaps the most obvious activity. Speaking publicly before other lawyers or the general public is also part of this function. Conducting seminars may also take place before the public or other lawyers. Acting as a law society official, perhaps as an elected official or on a committee, is another important activity.

Before discussing the final function of lawyers, there are two functions which may be associated with lawyers but truly belong to other professions. First, lawyers may act as professors and teach courses rather than short-term seminars. Teaching

is essentially another occupation and is a function of the institution whose mandate is to provide education in a certain subject. Secondly, lawyers who are appointed judges become members of that profession. The mandate and, therefore, the function of judges belongs with the court system established and monitored by the government.

The most important function of the lawyer is the one most closely associated with the legal profession, **providing legal services to clients.** In a complex legal system based upon an exacting and complicated body of law, precedent and procedure, lawyers undertake this function and use their expertise to represent the interests of their clients. This function clearly addresses the one aspect of the mandate suggested by British Columbia's Legal Profession Act, namely the preservation of rights and freedoms of all persons. Although rather wide-ranging, this phrase does define the role of the legal profession in society. All other functions and activities are facilitative and largely secondary considerations to this function, which is the reason for the existence of a separate profession.

In order to understand the basis of the activities undertaken in providing legal services, some historical background regarding the development of the profession is necessary. The legal profession had its beginnings in Ancient Greece. Initially, there was no separate profession which could be defined as lawyers. In presenting a case before a magistrate, litigants were required to speak and present

their case in person.[19] Although the litigant was obligated to speak at some point during the proceeding, he could obtain the permission of the jury to allow other persons, usually relatives, to speak either in place of the litigant or provide a conclusion to the litigant's speech. With the precedent set by a dying man who was unable to speak in his own defense, cases gradually began to be handled entirely by persons other than the litigant, whether these persons were relatives, friends or someone experienced in legal proceedings.[20] By the middle of the fourth century BC, the pretense of some form of association with the litigant was abandoned, and advocates, the precursors of our modern profession, became "a well-established factor in litigation."[21]

The growth of the Roman empire witnessed the coalescence of the legal profession into four distinct areas of activity. First, procurators spoke on behalf of their clients before magistrates. The main functions performed by the procurator were "to frame the issues to be tried" and influence the creation of the magistrate's judex, which was essentially "the pleadings of the parties and directions as to what judgement to render in case certain issues were found or not found."[22] Second, advocates or orators spoke on behalf of their clients during the actual trial phase of

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[19] Robert J. Bonner and Gertrude Smith, The Administration of Justice from Homer to Aristotle (Chicago, 1970), vol. 2, p. 7.

[20] Ibid., p. 8-9.

[21] Ibid., p. 12.

[22] Roscoe Pound, The Lawyer from Antiquity to Modern Times, with Particular Reference to the Development of Bar Associations in the United States (St. Paul, 1953), p. 42.

the legal proceeding. Third, jurisconsults acted on behalf of clients as "an advisor as to wills and conveyances, and formal transactions, and as to [client's] legal rights and duties."[23] It was this category of legal practitioner acting as teachers and jurists that perpetuated the legal profession through Roman times. Finally, there were notaries, who wrote and formally witnessed the signing of legal documents.[24]

With the disintegration of the Roman Empire, this division of labour in the legal system collapsed. The traditions of self-representation and customary law returned. The only circumstances which called for a lawyer-like presence were representation in ecclesiastical courts and the creation and notarization of documents recording the existence of transactions.

With the revival of a formal judicial system in twelfth century England, litigants soon won the right to be represented by another person in court.[25] Those who represented and advised a person during a legal proceeding were known collectively as pleaders. By the middle of the thirteenth century, two distinct classes of pleaders had emerged. The preeminent class of pleaders was the serjeant. Experienced pleaders who spoke before the Chancellor and Court of Common Pleas, serjeants formed the pool from which judges were chosen. Although it was a predominant feature of the English legal system for four hundred years, this class began to decline in the sixteenth century when its monopoly on judicial

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[23] Ibid., p. 55.

[24] A.M. Carr-Saunders and P.A. Wilson, The Professions (London, 1933), p. 55-56.

[25] Ibid., p. 31, 32.

appointments ended. The position of serjeant existed until it was formally abolished during nineteenth century reforms to the judicial system.[26]

The second class of pleader was known as an apprentice. Members of this class formed the group from which serjeants were chosen. In the medieval era, apprentices were trained at law schools, such as Lincoln's Inn or the Inner Temple, which were collectively known as the Inns of Court.[27] Having completed his legal studies, the apprentice was then called to the bar of that particular Inn, which exercised disciplinary control over the conduct of the apprentice.[28] By the fifteenth century, the term "apprentice" had been replaced by the word "barrister". This term is still applied in England to that class of lawyers who pleads cases in court or other tribunals.

The pleaders and later the serjeants and barristers formed one branch within the legal profession. A second branch had been established by the fourteenth century, when a class known as attorneys began to act as agents for clients requiring any kind of legal advice or assistance. Although apprentices often acted as attorneys at this time, "a wholly separate branch of the profession"[29] had emerged by the seventeenth century to manage legal affairs outside litigation in the courts. As a class, attorneys were trained by apprenticeship rather than education

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[26] Ibid., p. 34-35.

[27] Robert N. Wilkin, The Spirit of the Legal Profession (New Haven, 1938), p. 41.

[28] Pound, The Lawyer from Antiquity to Modern Times, p. 85.

[29] Ibid., p. 86.

and had no professional disciplinary organization. With the development of written rather than oral pleadings, the attorney began to focus on "the use of common forms of procedure and the practical processes of obtaining legal results."[30] The attorney acted as an intermediary between the client, who presented the legal difficulty for the creation of the pleading, and the barrister, who was actually retained by the attorney to argue the case on the basis of the prepared pleading.[31]

As the work of attorneys became more specialized, another type of lawyer, known as a solicitor, emerged by the middle of the fifteenth century. Solicitors took over the role as agents for all the legal business for a particular client without acting as a barrister or attorney. This function was especially important with the growth of the courts of equity at Westminster.[32] Solicitors could present petitions for clients unable to travel to the sitting of this court. Although solicitors lacked formal status in the legal system, they gained a measure of recognition as a profession at the beginning of the seventeenth century.[33] By the mid-eighteenth century, there was no legal distinction made between attorneys and solicitors. The profession of attorney lost its legal status in 1874 when members of this profession assumed the

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[30] Ibid., p. 103.

[31] Ibid., p. 104.

[32] Gerald L. Gall, The Canadian Legal System 3rd ed. (Toronto, 1990), p. 54 explains that courts of equity were established to award extraordinary remedies beyond the written letter of the law. These courts, eventually known as courts of chancery, were merged with common law courts in the late nineteenth century.

[33] Ibid., p. 109.

name solicitor by an act of the British Parliament.[34] The term "solicitor" is still used in England to define those members of the legal profession who draft documents for clients and retain barristers to argue cases in court.

In addition to the barristers and solicitors, a third branch of the legal profession, notaries, also existed in England. Initially, notaries merely drafted the legal documents for clients but soon specialized in the preparation of contracts and similar documents required by the English trading profession.[35] This intrusion into the work of solicitors resulted in a legal decision that resulted in "all ordinary conveyancing pass[ing] into the hands of the solicitors."[36] The activities which were left to the notaries included the preparations of wills, powers of attorney, articles of partnership and related documents.

The introduction of English legal institutions in North America had differing results in the United States and Canada. The American colonies preserved the English distinction between attorneys and barristers until the American Revolution, after which the differences between them were gradually removed.[37] The legal profession in Canada emerged from a different source. While Canada was a French colony, there were no divisions between barristers, advocates, notaries and land

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[34] David A.A. Stager and Harry W. Arthurs, Lawyers in Canada (Toronto, 1990), p. 20.

[35] Carr-Saunders and Wilson, The Professions, p. 56.

[36] Ibid.

[37] Pound, The Lawyer from Antiquity to Modern Times, p. 147-148, notes that distinctions between the professions in various colonies, such as Virginia, began to decline after the American Revolution.

surveyors.[38] The English maintained the French system after the Conquest, even with the introduction of English law. Beginning in 1785, attempts were made to separate the professions; an act of that year stipulated that barristers and attorneys could not act as notaries.[39] The work of barristers and attorneys were officially defined and, the two professions were separated in 1857, but most members of one profession ultimately qualified to act in the capacity of the other.[40] Since the late nineteenth and early twentieth centuries, the work of barristers, solicitors, attorneys and their predecessors has ultimately evolved into what society recognizes as the lawyer of present day.

Throughout the historical development of the legal profession, there are obvious common threads which indicate the activities that modern Canadian lawyers perform in the course of providing legal services. To varying degrees, they are involved in forming legal opinions, drafting legal instruments, and representing clients.

These activities are worthy of closer analysis because of their central importance to the profession as its only substantive function. The analysis will present a generalized view of the phases in each of these activities. Analyzing the activities in this way will provide the framework necessary to examine the fonds of

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[38] William Renwick Riddell, The Legal Profession in Upper Canada in its Early Periods (Toronto: Law Society of Upper Canada, 1916), p. 5.

[39] Ibid., p. 6.

[40] Ibid., p. 22. Riddell notes that, of all practicing lawyers in Canada in 1870, only 4 percent were not barristers and only 2.5 per cent were not attorneys or solicitors.

a lawyer.

Diplomatics identifies six distinct phases or steps of any procedure, which will be equated with activities in this study.[41] The first phase is the initiative, which starts the mechanism of the procedure or activity. Following this phase is the inquiry, which collects the information necessary to evaluate the situation. The third phase is consultation, which consists of advice and opinions based on the information gathered in the previous step. The activity then passes into the deliberation phase, in which final decisions are made. Deliberation control is the penultimate phase, in which decisions are reviewed by a supervising entity before final action is taken. Finally, there is the execution phase, the point at which the action is made official and carried out.

Usually, the first activity in providing legal services to a client involves the lawyer in forming legal opinions, an element of the traditional professions of jurisconsults and solicitors. The initiative phase of this activity occurs when a client realizes a need for advice on a proposed action that may have legal overtones. The inquiry phase occurs when the lawyer and the client meet to discuss the client's problem, and during subsequent gathering of all the relevant facts of the matter. Although some legal issues could be answered immediately and would not require research, the lawyer may review precedents or speak with other lawyers as part of

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[41] This discussion of phases and procedures is taken from Luciana Duranti, "Diplomatics: New Uses for an Old Science (Part IV)," Archivaria no. 31 (Winter 1990-1991): 14-15.

the consultative phase. The deliberation phase would occur as the lawyer decides which precedents are relevant and prepares a comprehensive legal opinion to guide the client's action. The deliberation control phase would not likely occur in the case of a solo legal practice, but in some law firms a senior partner or committee might review the opinion before its presentation to the client. Finally, the lawyer presents the legal opinion to the client, resulting in the execution phase of this activity.

The second activity within the function of providing legal services is drafting legal instruments, an activity performed either by solicitors or notaries. The parties to a matter often require a legally-binding document to formalize the relationship between them. The initiative phase of this activity occurs when the parties realize the necessity of such a document and request that the lawyer produce it. The inquiry phase takes place when the client and the lawyer determine which elements are to be included in the document. As with the activity of forming legal opinions, the consultative phase may result only if the complicated nature of the document requires evidence about the state of properties or research into preceding documents of a similar nature. The deliberation phase occurs as the document is drafted, and the deliberation control phase is exercised as the client reviews the document to determine if it is to the client's satisfaction. The activity reaches the execution phase when the client accepts and signs the document.

The final activity of providing legal services is representing clients, an activity carried out in the past by procurators, advocates, pleaders, solicitors, and barristers. The basis of this activity is a client's need for the lawyer's understanding of the

complex procedures and rules of various courts and regulatory bodies. The initiative phase occurs when a person retains the services of a lawyer to represent that person before a body with the competence to resolve an issue involving the person. The inquiry phase consists of the collection of all information relevant to the issue, which may include interviews with persons other than the client. The consultative phase occurs as the lawyer submits the information to the body competent to resolve the issue in the according to the procedures required by that body. The phases of deliberation, which decides the issue at hand, is exercised by the competent adjudicating body. The phase of deliberation control occurs as the client decides to appeal the decision.[42] The execution phase occurs when the final judgment rendered by the adjudicating body is carried out.

Although the three activities of providing legal services have been described in a clear, linear fashion, the distinction between them may be difficult to ascertain in practice. During the activity of representation, a client may need advice on what action to take in response to information which arises during preparation of the case. Upon receiving advice, a client may want a document created. Additionally, numerous individual documents result from the process of gathering the relevant information required to represent a client. The point to understand in this delineation of activities is that, while each activity can be interwoven with the others, each activity has a different result. The legal instrument itself is the final

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[42] Although the decision to appeal the decision is part of this activity, the actual process of appealing the decision is a separate activity of representing the client.

purpose of the drafting activity, seeing a client through the completion of a legal proceeding is the ultimate result of the representation activity, and the provision of advice, either verbally or by documentary means, is the culmination of the activity of forming legal opinions. Elements of other activities, such as drafting a document during the representation activity, exist as phases within that activity. In representing a client, the goal is not to draft a single document but to complete the legal proceeding, of which the document is only one part. Ultimately, each document can be seen to fit into one phase in one particular activity. Overall, this explanation should clarify the distinction between the activities and the phases which are part of those activities.

Of course, this analysis of functional activities in terms of these procedures has avoided any discussion of the actual records generated by the work of lawyers. When developing a model, theory summarizes the generalities of practice. Consequently, the creation of this framework has relied largely on legislation and legal text books without reverting to an examination of records. Obviously, relying on these sources has produced an explanation of the work of lawyers which may or may not be evident in the actual records generated by a lawyer during legal practice.

CHAPTER TWO

TESTING THE FUNCTIONAL MODEL

The previous chapter developed a model to explain the functions and activities of lawyers. Because it is based upon legislation and historical sources rather than actual records, the model itself may be considered an idealistic conception of how lawyers work. To counter such criticism, the logical course of action is to test the model against an actual body of records. Therefore, this chapter will apply the model to a fonds of a particular lawyer to determine the model's effectiveness in predicting what is found in the fonds.

This comparison has three aims. First, it will test the workability of the functional approach. Second, it will examine individual files to indicate the strength of the relationship between the ideal phases of activities, established in the previous chapter for the primary function of providing legal services, and the actual documents which represent them. Third, it will assess the difference between the documents preserved in the lawyer's file and those in the corresponding court registry file preserved as part of the public record. This last element is necessary as a means of assessing the opinion held by many people that all the important information of enduring value pertaining to a legal matter is preserved in the public

record.[1]

The test will take place in three parts. To ascertain whether the entire model is workable, the series of a fonds will be analyzed in terms of the functions established within the model. Next, to determine the viability of using phases to understand the contents of the file, a representative sample of client case files will be analyzed using the activities and phases for the function of providing legal services, as described in the previous chapter. The final part of the test will be the comparison of the representative sample of client files to their counterparts in the public record.

Before the application of the model, some basic information is necessary about the fonds which is to be the basis for the test. The fonds was created in the course of the activities of Thomas Grantham Norris, a lawyer who practiced in British Columbia from the 1920s to the 1950s. Born in Victoria, British Columbia in 1893, Norris undertook his articles[2] at Barnard, Robertson and Heisterman, a firm located in that city. After serving in the Canadian military, Norris completed his articles and was admitted to the British Columbia bar in 1919. He first worked as a solicitor for the Soldier Settlement Board in Kelowna and then entered private

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[1] See Brian Bucknall, "The Archivist, the Lawyer, the Clients and their Files," Archivaria no. 33 (Winter 1991-1992): 185-186.

[2] Articles of clerkship refer to the one-year period following law school during which a law student studies under an experienced lawyer. Once this period is over, the student then writes bar examinations to become a member of the law society of the province in which the exam was written. Gerald Gall, The Canadian Legal System 3rd ed. (Toronto, 1990), p. 187.

practice. He received the designation of Queen's Counsel in 1935. He left Kelowna that year in order to practice in Vancouver, where he was one of the founders of the firm of Norris, Cumming and Bird. He practiced in Vancouver from 1945 to 1959. Throughout this period, he was active in the Law Society of British Columbia, serving as a treasurer, bencher, and, later, life bencher. He was appointed a judge of the Supreme Court of British Columbia in 1959. During his tenure as a judge, Norris also headed an industrial commission of inquiry into Great Lakes shipping in 1962. He retired from the judiciary in 1968 and died in Vancouver in 1976.[3]

The Norris fonds, including records pertaining to his personal and career activities, was donated to the Special Collections Division of the University of British Columbia Library in 1989. The records have been arranged by the Special Collections Division into six series called **professional files, judicial subject files, case files, personal papers, miscellaneous papers,** and **Norris commission files.**[4] The fonds represents all spheres of Norris' life, including his activities as a private person, lawyer, judge, and commissioner. In accordance with the wishes of the donor, the fonds is open to researchers without any restrictions on use or access to the material. In fact, this is an unusual situation given the sensitive nature of the

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[3] These biographical elements have been drawn from the Norris fonds and from G.S.C, "Nos Disparus: The Honourable Thomas Grantham Norris, M.C., Q.C.," The Advocate 35 (December-January 1977): 69-70.

[4] The two accessions of the Norris fonds were described in a different manner. In determining that six series are present, the five series described in the second accession have been adopted, with the material in the first accession placed into these categories. The sixth series, the Norris commission files, is the only series from the first accession not found in the second accession.

material, and such access has made the following analysis possible. If other fonds had been available for study, more than this one could have been chosen for the test of the model.

The first step in applying the model to the fonds is to eliminate from the examination that material for which the model was not designed. For example, records pertaining to Norris' personal life, as documented in the series of personal and miscellaneous papers, were excluded. The series of judicial and commission files resulting from his juridical roles as judge and commissioner were also set aside as they document activities outside the sphere of lawyer's work. Although this fonds is clearly that of an individual who carried out a variety of personal activities and held more than one public office, only the records of Norris' practice of law are of concern to this study.

Therefore, the two remaining series, professional files and case files, are the object of the application of the model to the Norris fonds. The series of professional files, which relate to the conduct of his legal career, has distinct numeric file codes. The series of case files has no file codes but contains material similar to that in the other series. Therefore, it is these two series which will be analyzed in terms of the functional model and phases of procedure. The first test of the model is to ascertain the extent to which functions and activities of the model are represented by documents within the two series. All three functions are represented in the two series, but the professional files series contains documents arising from functions of maintaining a legal practice, providing legal services and contributing to the

profession. The file coding system used by Norris indicates that he did not distinguish records in these functional terms. It is not know why the files in the case file series were not coded, although this is undoubtedly why they were treated as a separate series by Special Collections.

Some activities predicted in the model are not apparent or occur rarely in documents in the fonds. Although Norris was involved with at least one partnership during his legal career, the activity of maintaining a partnership was not represented by any of the records. In addition, there were very few records pertaining to the administration of finances within the firm, such as financial statements or audited accounts.[5] The absence of records resulting from these activities likely occurred because they were retained by the law firm. That Norris considered other records which were also generated by the law firm in which he worked to be his property indicates that even lawyers often have difficulty determining what is theirs and what belongs to the firm, the tradition being that the lawyer may keep custody and, presumably from this case, determine the disposition of the files of the cases for which he or she provided services to client.

The second test of the model consisted of choosing specific files within the records to see what documents exist for the phases in the activities of providing legal services. Although using diplomatics and the concept of phases provides an ideal view of the way a procedure should unfold, the question remains as to what

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[5] University of British Columbia, Special Collections Division, Thomas Grantham Norris fonds, box 17, file 4 (original file 927). This file contains correspondence pertaining to Norris' purchase of law books.

phases are actually documented within the files. This comparison between the ideal phases and the actual files will attempt to determine the validity of using phases to explain the procedures and the types of documents which exist for the phases.

Because of the mixture of files representing the various functions of Norris' legal practice, the first step was to segregate case files in the professional files series from all other files within that series and add them to those files found within the case files series, resulting in 159 case files. This process provides the correct population necessary to study the function of providing legal services. To avoid bias, a scientific method was used to determine the sample of files which would be used in this examination. First, each client case file segregated from the legal profession files series was assigned a number. After determining the total number of client case files in the series, a formula was used to calculate the size of a sample of files which would be representative of the series with a confidence level of +/- 15%.[6] Having calculated the proper sample size, a random number table was consulted to determine which of the numbered client case files would be chosen to represent all of the files in the series.[7] Within the chosen files, each document was

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[6] The formula $n = \frac{N}{1+Ne^2}$ was used to calculate the sample size, where n=sample size, N=population size and e=sample error. A sampling error of +/- 5% is most common, but a larger error of +/- 15% was tolerated because of the exploratory nature of this study and the need for baseline data.

[7] The sample consisted of the following files (by code): 288, 297, 377, 562, 775, 777, 822, 835, 911, 917, 929, 943, 952, 973, 1004, 1007, 1020, 1027, 1030, 1031, 1054, 1069, 1079, 1081, 1097-E, 1109, 1155, 1163, 1195, 1246, 1285, 1361, 1378. One case file was chosen which had no number originally and was numbered 99. A second case file consisting of 3 separate numbers (963, 964, 965)

counted, analyzed and categorized as to the appropriate phase of activity it fell under. Any documents which could not be assigned a particular phase were described as unknown or other. The results of the analysis are summarized in table one on page thirty-seven.

In terms of determining which procedures predicted by the model are accurately reflected within the files, the study provided a number of interesting insights. Perhaps the most striking finding is the high percentage of documents which fit into the diplomatic analysis. Only fifty-eight, or approximately about two percent, of the total documents in the files could not readily be placed into one phase or another. These documents were classified as "other". Documents in the execution phase include many which were properly part of the financial activities of Norris' practice. Although they strictly do not fall into the execution, they represent actions to close the matter,and so are put together in this final phase. Perhaps predictably, the inquiry phase is most frequently represented. It is the phase during which lawyers are gathering information and evidence to construct their case. The relatively small number of documents in the consultative phase indicates that few copies of court registry or other public records were present in the files. Documents bearing on the phases of deliberation and deliberation control formed a relatively small portion of the file, probably because these phases are largely out of the control of the lawyer and are the domain of the client, who approves drafts of documents, or the adjudicator of the dispute, who makes final

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covering one legal action was counted as a single case.

TABLE ONE: PHASE/DOCUMENT COMPARISON

PHASE	TOTAL DOCUMENTS	AVERAGE # PER FILE	* PERCENT OF FILE
Entire procedure	3,975	114	100%
Initiative	200	6	5%
Inquiry	1,796	51	45%
Consultative	452	13	11%
Deliberation	400	11	10%
Deliberation Control	108	3	3%
Execution	961	28	24%
Unknown/Other	58	2	2%

* Percentages are rounded off.

decisions on the facts presented. Finally, the initiative phase forms a very small portion of the file. This fact is to be expected, as it would only take a single document or a verbal request to authorize a lawyer to begin a legal procedure.

Another facet of examining the case files was to examine the actions found within them, as defined by the model and represented by the documents. In the thirty-five case files which comprised the representative sample, there was a total of sixty-six actions contained within them, approximately two actions in each file. The model had predicted the activities of forming a legal opinion, drafting legal documents and representing clients in legal procedures, but the proportions of these actions found within the files was surprising. The overwhelming majority of these actions were representing clients in legal procedures, comprising fifty-three of the sixty-six actions, or over eighty percent of the total actions. The activity of forming a legal opinion occurred in the records on a less frequent basis, with only ten of sixty-six actions, or only fifteen percent of all actions. The activity of drafting a legal document was represented by only three of the sixty-six actions, totalling approximately five percent of actions.

There were two other aspects of the case files which are worthy of note. First, the number of documents in the file ranged from a low of four to a high of over six hundred, indicating that all case files are not necessarily bulky and cumbersome. Second, the completeness and comprehensiveness of the file varied from files containing hardly enough documents to determine a procedure to files with a number of actions that are documented comprehensively from the initiative

to execution phase. Overall, the model was relatively successful in establishing the phases of procedures and identifying documents within these phases. Although there were examples of forming legal opinions and drafting legal documents, there was an overwhelming preponderance of the activity of representing clients in some legal action. This breakdown is a reflection of the legal needs of Norris' clientele at the time. In order to fully test the effectiveness of this part of the model, similar research on other fonds must be conducted.

The final test of the model is a comparison of the lawyer's file to that maintained by the court registry. In defending the destruction of their case files, lawyers often argue that all the important information of enduring value pertaining to an action has been preserved at the registry of the court which heard the case, making their version of the file redundant.[8] The remainder of this chapter will consist of testing this claim by comparing the sample of case files in the Norris fonds chosen during the previous test against their counterparts in the public record.

Of the thirty-five case files selected in the random sample, it was determined that only seventeen cases, approximately fifty percent, had a counterpart file created in the public domain. This determination was based upon whether documents had identifying file codes or cause numbers which were recognizable as being generated by a court registry. The eighteen files which contained documents that exhibited no trace of file codes were considered to have no counterpart in the public domain, because there is virtually no other means to determine where the corresponding file

[8] See footnote #1.

may be located.

Since all the court files in question are over forty years old, custody of the files has passed from the court registries to the British Columbia Archives and Records Service (BCARS). Before the results of the research at BCARS can be discussed, it is necessary to examine the archival appraisal criteria developed by BCARS for court registries around the province and how it has affected the preservation of records at court registries.

The Public Documents Committee, which administers the Public Documents Disposal Act for the Legislative Assembly of British Columbia, first examined the issue of the archival appraisal of the records of a court registry in 1962, when the Registrar of the Supreme and County Court registries in Rossland sought permission to destroy various records dating back to the 1890s.[9] The decision of the Committee was to allow the destruction of all supreme and county court case files which had been inactive for over forty years, and to allow the destruction of discontinued, dismissed or certain other cases after ten years. The Committee determined that all orders, judgments, decrees and books of record were to be preserved and transferred to the Provincial Archives of British Columbia after forty years had elapsed. In subsequent records schedules developed in the late 1970s, this appraisal decision was modified slightly so that the Provincial Archives could

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[9] British Columbia. Public Documents Committee. Approved application for destruction of County Court of West Kootenay records, 12 March 1962. Photocopy in possession of Catherine Henderson, Court Records Archivist, BCARS.

perform selective retention of various court records series, including case files.[10]

In April 1993, the Operational Records Classification System (ORCS) for the Court Services Branch of the Ministry of Attorney-General, which includes the court registries, was completed by BCARS and approved by the Chief Justice of British Columbia.[11] Although this ORCS incorporates previous appraisal decisions, the new system also redefines what BCARS will preserve from court registries. Under this ORCS, orders, reasons for judgement, probate case files, wills and Court of Appeal case files will be retained in full by BCARS for their legal and historical value. Selective retention will be performed on any remaining case files opened prior to 1950. For cases opened after 1950, the Prince Rupert Registry will be retained in full, as the cases heard there are deemed to cover all facets of the law and amount to a one percent sample of all case files opened in the province. In addition, notable cases from the Supreme Court of British Columbia will be preserved on a selective basis, with a law librarian making the determination as to what cases were notable. For example, nine legal actions conducted in British Columbia in 1992 were defined as notable, and their case files at the court registry have been marked for permanent

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[10] For an example of a court records schedule of this era, see Daisy McColl, "An Administrative History of the Supreme Court of British Columbia with Particular Reference to the Vancouver Registry: Its Civil Records, their Composition, and their Selection for Preservation" (Unpublished M.A.S. thesis, University of British Columbia, 1986), Appendix B.

[11] British Columbia Archives and Records Service, Operational Records Classification System: Court Services Branch Schedule 100152 (Victoria, 1993), form ARS 008, page 2.

preservation.[12]

Given these appraisal decisions, the results of a comparison between the Norris fonds and the public record are not surprising. Of the seventeen files, comprising fifty percent of the original sample, which could conceivably have had a file in the public domain, only eight files, or twenty-five percent of the original sample, had a corresponding court registry file which had been selected by BCARS. These files were then examined to determine the amount of duplication between them and the lawyer's file. The results are summarized in table two on page forty-three.

On the whole, the consultative phase of the activities formed a relatively small portion of the documents contained within the file. In addition, the documents which are generated within the consultative phase and preserved in the court registry are necessarily precise summaries of various legal points and decisions as befits the context of their creation. The fact remains that, out of a total of nearly four thousand documents generated by the lawyer's activities, only 140 were permanently retained within the public domain.

Obviously, simple numerics and the destruction of almost all case files in British Columbia do not provide the entire answer to the debate of what information is preserved in the public record. If a researcher desires to reconstruct the outcome of a court case, one could argue that all that is required is the

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[12] Conversation with Catherine Henderson, Court Records Archivist, BCARS, June 26, 1993.

TABLE TWO: COMPARISON TO PUBLIC RECORD

LAWYER'S FILE	COURT REGISTRY FILE	DOCUMENTS IN COMMON
216	7	5
14	38	0
50	10	4
54	6	4
49	10	8
22	24	1
114	20	5
366	25	14

information contained within the orders and judgments which BCARS already preserves, as well as the bench book of the judge, should the archives have received it. However, the judge's bench books, which are currently under the personal disposition authority of judges, may never reach BCARS. Although the appraisal decision formulated by BCARS makes sense in terms of preserving the decisions and precedents established by British Columbia's courts, it makes reconstruction of an individual case, from start to finish, particularly difficult. Ultimately, as the figures in table two demonstrate, the lawyer's file is the most complete version of what transpired between a lawyer and a client. Although all the phases of the procedure may not be as well documented as others, a lawyer's file is worthy of archival appraisal because it documents the perspective of the lawyer-client relationship in regard to the procedure at hand. The preservation of the documents showing the process of the legal action is of as much importance as the preservation of those documents representing the outcome of the action. Indeed, the documents generated by the courts serve its needs and arise solely from its role in adjudicating disputes. The court records provide the public record of that dispute and very little of what transpired between its beginning and its arrival in the public legal system.

Clearly, the research of this chapter has shown that the functional model of lawyer's work can be applied to analyze an actual fonds. It has also demonstrated that lawyers files contain unique information not documented elsewhere. Therefore, with this understanding of the nature of lawyers' records, one can now address the question of archival appraisal of the records of lawyers.

CHAPTER THREE

ARCHIVAL APPRAISAL AND ACCESS TO THE RECORDS OF LAWYERS

Appraisal is the most important and complex duty undertaken by the archivist. The process of appraisal is essentially an evaluation of records for the purpose of determining which are worthy of continuing preservation. The result of appraisal builds the documentary heritage of society, a vital part of the image of our civilization which will be passed on to future generations. Using the functional analysis established in the first chapter and the statistical examination compiled in the second chapter, this chapter will focus first on appraisal for acquisition, to illuminate the problems faced by archives in acquiring the records of lawyers and making them available to researchers. The chapter will conclude with an examination of appraisal for selection of documents within fonds.

The concept of archival appraisal implies that the process of evaluation will exclude some documents from continuing preservation. These excluded materials are not essential to the documentary heritage and are subsequently destroyed. The sanctioned destruction of archival material can be criticized on several fronts. For instance, for historians and lawyers, any document could potentially provide evidence relevant to their research. For archivists, appraisal for selection is a conundrum because the destruction of material eliminates the essential archival

bond among documents in a fonds by destroying evidence of their interrelationships.

Although the result of appraisal appears to be antithetical to preservation of an adequate memory of society, the continuing preservation of all the documents created by every records creator would soon overwhelm us. Even if storage space existed, the mass of recorded information would prove overwhelming, indecipherable and, to some measure, redundant. Therefore, the duty of the archivist in the appraisal process is to preserve a residue of records which account for societal activities and accomplishments. Selection not only preserves the documents which a given society views as important to its continuing progress but also illustrates the opinions and perspectives of the society which chose to preserve those documents. Although the result of appraisal inevitably provides a less comprehensive view of society, it is also true that "archives constitute the memory of society and memory must be selective in order to be functional."[1]

There are two forms of archival appraisal. One form is appraisal for acquisition, in which an archival repository determines whether or not to add a particular fonds to its holdings. In this process of appraisal, the archives assesses the importance and completeness of the fonds and its relevance to the acquisition policy of the archives. Other questions, such as conservation problems, copyright issues and access concerns, are also addressed at this point. The actual acquisition of the fonds will take place if the archives is satisfied not only that the archival

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[1] Victoria Louise Blinkhorn, "The Records of Visual Artists: Appraising for Acquisition and Selection" (Unpublished M.A.S. thesis, University of British Columbia, May 1988), p. 31.

material falls within the jurisdiction of its acquisition policy but also that any problems inherent in the material are reasonably manageable by the archives. If neither of these conditions is satisfied, the archives likely will not acquire the fonds. Although another archives might acquire it, the fonds may not ultimately be preserved in any archival repository. Although this portion of society's documentary heritage would be lost, the decision not to preserve a particular fonds is an expression of society's values at that time and, on those terms, cannot be faulted by a later age.

The second form of appraisal is appraisal for selection, which preserves a portion of the documents within a fonds acquired by an archival repository. The process of appraisal for selection begins with an analysis of records to determine their context of creation and use. With this understanding of the context, the archivist can then determine the necessity of permanently preserving the records. The final product of this analysis is an appraisal decision which has traditionally tried to assess the various needs, often expressed as values, that the records may serve.[2] T.R. Schellenberg categorizes these values as being either primary or secondary. Primary value refers to the capacity of records to serve the continuing administrative, financial and legal needs of the records creator. The other value is described as secondary value, which refers to the capacity of records to serve the needs of persons other than the creating organization. In Schellenberg's scheme,

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[2] T.R. Schellenberg, "The Appraisal of Modern Public Records," in A Modern Archives Reader: Basic Readings on Archival Theory and Practice, ed. Maygene F. Daniels and Timothy Walch (Washington D.C., 1984), p. 57-70

secondary value is divided into two components consisting of evidential value, which refers to the capacity of the records to provide information about the creator's activities, and informational value, the capacity of the records to provide information about persons, places, events or things about which they speak. There has been relatively little literature on the subject of appraisal of lawyers' records until recent years. The actual practice of appraisal would appear to be haphazard. According to a survey of Ontario law firms conducted between 1984 and 1985, the most common appraisal practice was the complete destruction of records, sight unseen, by the lawyer, the law firm or an archivist.[3] Few archives have been involved in the acquisition of lawyers' records, and those archives which have added such records to their holdings immediately become involved in myriad access problems which have yet to be resolved.

Discussions of various issues pertaining to the retention and destruction of lawyer's records have appeared in records management, archival, and legal publications. Although these studies address a number of important appraisal and ethical concerns, few of them have addressed all the issues. In addition, there has been a lack of quantitative information about the nature of lawyers' records and their relationship to public court documents. With the information resulting from the study of the Norris fonds, the remainder of this chapter will examine first appraisal for acquisition and then appraisal for selection.

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[3] Roy Schaeffer, "The Osgoode Society Survey of Private Legal Records in Ontario," Archivaria no. 24 (Summer 1987): 183.

Although an archival repository may be interested in acquiring the records of a lawyer, there are several impediments which prevent the archives from acquiring complete legal control over the entire fonds. For certain records series, there are no significant problems of access associated with their acquisition. Lawyer's records generated under the functions of maintaining a legal practice and contributing to the profession could be placed in an archives without any restrictions other than those imposed by the donors themselves. These records are simply business and personal records much like those created by a person in any other profession. The problem with a lawyer's fonds arises with the case files generated as a result of the function of providing legal services. Normally, solicitor-client privilege prevents the transfer of these records to any archives.

The concept of solicitor-client privilege consists of three separate parts. The first and most familiar component is the concept of privileged communication between solicitor and client, one of the oldest traditions in the history of law. In Roman times, an imperial decree stated that trial lawyers were not capable of testifying for or against their clients during the process of a trial.[4] Testimony for the client would obviously be biased, and acting as a witness against one's own client "would brand the attorney as an unsavoury individual."[5]

This tradition of privileged communication also exists in English common

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[4] John William Gergacz, Attorney-Corporate Client Privilege (New York, 1987), p. 1-4.

[5] Ibid.

law. The first cases documenting this concept occurred in Elizabethan times and were based again upon the honour of the attorney.

> The oath and honour of the British trial attorney as a gentleman provided the basis for the privilege, for gentlemen were bound by their word and it was thereby a point of honour to keep client confidences.[6]

Since the eighteenth century, the concept of privileged communication has undergone a gradual refinement. At first, the privilege belonged to the lawyer and concerned matters related "only from the beginning of the litigation in connection with which the communication was made and for its purposes only."[7] Through a series of court cases, this privilege grew to include communication made either prior to litigation or with the intent to pursue future litigation. By the late nineteenth century, privilege had been extended to all communications "made during any consultation for legal advice."[8] In addition to this expansion of privilege, the ownership of the privilege shifted to the client, with the lawyer claiming it on behalf of the client. Since the privilege belongs to the client, "it cannot be breached without the express consent of the client."[9]

Because of its roots in British common law, a similar situation exists in

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[6] Ibid.

[7] R.A. Kasting, "Recent Developments in the Canadian Law of Solicitor-Client Privilege," McGill Law Journal 24 (1978): 116.

[8] Ibid.

[9] Richard Klumpenhouwer, "Another Look at Legal and Social Ethics of Archival Access to Lawyers' Records," (Unpublished paper presented at ACA Conference, 1990), p. 2.

Canada. A Canadian court ruling established a standard, concise definition of privileged communications:

> Communications by a person to his solicitor or counsel in any capacity . . . are privileged and . . . neither the solicitor nor the client can be compelled to disclose the content of the communications where they are intended to be confidential.[10]

The essential premise behind solicitor-client privilege is that the clients will reveal information relevant to their legal needs more readily if that information is held in confidence between the lawyer and client. The privilege focuses on the communication of the information; if the information is freely available elsewhere and is subsequently discovered, privilege cannot be claimed just because the information was conveyed to a lawyer.[11] In addition, the privilege lasts beyond the death of the client and may be claimed by the client's lawyer, heirs, next of kin, or any other successors to the client.[12]

With the evolution of privileged communications, several conditions have been identified which must exist in order for communications to be considered

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[10] Ibid.

[11] This discussion is largely based upon Edna S. Epstein and Michael M. Martin, The Attorney Client Privilege and the Work-Product Doctrine (Chicago, 1989), p. 14-15.

[12] Ronald D. Manes and Michael P. Silver, Solicitor-Client Privilege in Canadian Law (Toronto, 1993), p. 177. According to Doug Whyte, "The Acquisition of Lawyers' Private Papers", Archivaria no. 18 (Summer 1984): 147, the then Public Archives of Canada was considering contacting the literary executors of clients whose files were among the Diefenbaker papers in response to this situation.

privileged.[13] A communication must be made between privileged persons in confidence for the purpose of seeking, obtaining or providing legal assistance. A communication is considered to be in any form, written, oral or even body language. Privileged persons include the lawyer, the client, the employees of the lawyer, and any communicating agents, such as translators or typists. The communication must relate to and be necessary to a client requesting the legal advice of the lawyer; privilege may extend to some but not all non-legal undertakings.

While preconditions exist for the existence of the privilege, there are also several ways in which to test whether privileged communications have lost their confidential status.[14] The client may waive the privilege of his or her own accord. If the communication is revealed in court or to other people outside the privileged relationship, confidentiality is also removed. If the lawyer or client uses a privileged document in court to recall incidents, this document is no longer confidential. In all these instances, the confidentiality of that communication is permanently revoked when the privileged nature is first removed, and it cannot be reclaimed. Other exceptions to the rule of privileged communications, which permit the lawyer to breach privilege in certain instances, include the disclosure of items involving a lawsuit between shareholders and a corporation; a future or ongoing crime; or a lawyer's self-defense in malpractice, disbarment or criminal proceedings.

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[13] This discussion is largely based upon Epstein and Martin, The Attorney Client Privilege, p. 13-58.

[14] This information is taken from Epstein and Martin, The Attorney Client Privilege, p. 59-80.

While the concept of privileged communications is a major component of solicitor-client privilege, the second part is known as work-product doctrine or litigation privilege. This provision asserts that a lawyer must have some privacy in terms of his preparation for the case. Therefore, material collected and prepared by the lawyer for litigation is protected from discovery or examination by the opposing side.[15] This concept has been recognized in Anglo-Canadian law since the 1880s, and the British Columbia Court of Appeal recently determined "that there [was] no distinction between the solictor-client privilege and the lawyer's work product."[16]

The third and last aspect to solicitor-client privilege is the professional ethics of the legal profession. Bar associations and law societies maintain the principle that lawyers will not reveal confidential information received from their clients. In addition to forming the basis of a proper ethical code, this principle also appears to be a vestige of the situation when the privilege belonged to and concerned the honour of the attorney. This professional commitment is nonetheless a strongly held belief within the legal profession. Punishment for lawyers who reveal confidential communications is severe and may include professional disciplinary action, disbarment or a civil suit from the client and any others involved in the disclosure of the information.[17]

Solicitor-client privilege would appear to make providing access to lawyers'

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[15] Epstein and Martin, The Attorney Client Privilege, p. 102.

[16] Manes and Silver, Solicitor-Client Privilege in Canadian Law, p. 107-108.

[17] Klumpenhouwer, "Another Look", p. 3.

records in an archives virtually impossible. Lawyers clearly consider the fact that "all communications between the lawyer and a client must never be disclosed as the foundation upon which the entire legal system operates."[18] As Klumpenhouwer notes, "the professional rules seem ironclad; the legal consequences of contravention, ominous; the weight of tradition and corporate culture supporting them, impressive."[19] It would appear that archives and the researchers they serve would have very little chance of acquiring or gaining access to lawyers' case files.

There is one final aspect of the problem of case files which must be considered. Aside from the concept of solicitor-client privilege and its ethical concerns, it must be recognized that an individual has a right to privacy, and these rights must be protected. Some legal actions are among the most personal and wrenching emotional events that people may experience, and the persons involved may not want others to know of these experiences. The logical extension of this argument is that "the right to privacy supersedes the scholar's freedom of inquiry,"[20] implying that archives should not invade this area of confidentiality. MacNeil states that "our acceptance of limitations on the pursuit of knowledge, in the interest of a greater common good, is what distinguishes us, finally, as moral beings."[21] Given

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[18] Ibid., p. 2.

[19] Ibid., p. 1.

[20] Heather MacNeil, "In Search of the Common Good: The Ethics of Disclosing Personal Information Held in Public Archives," (Unpublished M.A.S. thesis, U.B.C., 1987), p. iii.

[21] Ibid., p. 161.

the opinions of the legal profession regarding the fundamental nature of solicitor-client privilege, many lawyers and legal professional associations would agree with such a statement.

Theoretically, no archives in Canada should have lawyer's case files among its holdings, as this goes against the basic principles of protecting privileged communications. According to an informal survey, lawyers' records are found in at least nineteen archives in Canada.[22] Whether these records were acquired without knowledge of the restrictions or in spite of them, the fact is they have been acquired. These archives have each developed policies towards the issues of access to these materials. By categorizing and examining the approaches taken by these archives, there may be a means of balancing the concerns of lawyers and their clients with the needs of researchers.

The first approach is to acquire the fonds of lawyers but not to make the records available to researchers for an extended but undetermined period of time. In that way, the records are preserved without immediately breaching the confidential nature of the material. For example, access to case files held at the Law Society of British Columbia Archives and the Glenbow Institute is closed to researchers. For now, this seems to be a practical measure imposed until the matter of access is resolved or can be resolved at a later date. In the long term, however, this measure could not be justified if the material might never be made accessible. The function of an archives is not to act as a records storage centre, and if records

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[22] Whyte, "The Acquisition of Lawyers' Private Papers", p. 146.

become part of the holdings of an archival repository, there must be a definite means by which that material eventually becomes accessible.

The second approach towards the problem of confidentiality is to overlook the ethical issues posed by providing access to the records. In the instance of the Norris fonds at the University of British Columbia, all records are accessible without restriction, a condition imposed by the donor of the records. Similarly, records dating from the 1950s of Blake and Redden, a British law firm which handled Canadian legal cases in Britain, are available without restriction at the National Archives of Canada.[23] Among other things, this approach apparently does not take into consideration the privacy concerns of the client. Given the requirement that clients or their representatives must waive the privilege before privileged communications can be revealed, archival institutions permitting access to case files are party to breaking an agreement between a lawyer and a client regarding the revelation of information.

While extreme measures are clearly not acceptable, solutions to the problems of confidentiality and privacy are conceivable. At the Public Archives of Nova Scotia, an agreement exists between the archives and a Nova Scotia law firm to deposit client files which may eventually be made accessible.[24] The agreement, made in 1957, ensured that files would be restricted for at least fifty years, with

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[23] Blake and Redden fonds, MG 28 III 35, Manuscript Division, National Archives of Canada.

[24] Whyte, "The Acquisition of Lawyers' Private Papers", p. 150.

perhaps further restrictions imposed for more sensitive materials. Another method of providing access to case files was developed by the University of Saskatchewan regarding the papers of Canadian Prime Minister John Diefenbaker. After determining that immediate full access to the papers dealing with Diefenbaker's legal practice could not be granted, the archives created a list of documents coming under privilege likely to be found in the case files. The case files were examined according to these criteria, and the privileged documents were removed and placed in secure storage. Confidential information was also deleted from copies of microforms of the Diefenbaker papers.[25] Even with these provisions, researchers are required to sign a form giving the undertaking not to disclose any personal identifiers in published works. According to Whyte, "the benefits of this solution allow the original documents and unaltered microfilm to be reintroduced at some future date if circumstances change."[26] However, such intensive and costly work can only be undertaken and justified for the fonds of very important individuals, perhaps only for the papers of prime ministers or eminent members of the legal profession. While the entire process of microfilming and examination of voluminous files is beyond the means of many archives, the practice of removing identifiers and

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[25] There may be a similar solution to the problem of solicitor-client privilege. In providing access, the archivist of the law society could act as an extension of the lawyer's office. As well, the use of automation can eliminate identifiers from the records. Although solicitor-client privilege would be preserved under this arrangement, some lawyers would argue that any access other than that of the lawyer and his staff would destroy that confidentiality.

[26] Whyte, "The Acquisition of Lawyers' Private Papers", p. 148.

striking agreements to preserve confidentiality may be the main feature of a solution to the problems of access. However, some lawyers may still view this as a breach of privilege, since the information is still revealed to persons outside the privileged relationship. While the solution to the problem presented by Diefenbaker papers may represent a victory for access, it does little, in the long run, to resolve the situation. The legal profession as a whole will have to recognize such measures as satisfactory, or otherwise contribute to recognizing a solution in conjunction with archival institutions.

Throughout these approaches to providing access to lawyers' papers is the notion that, after time, the records may be made available. Other confidential archival records, such as census returns, are made available long after their creation, in some cases nearly a century after their creation. Archivists have determined that, despite the confidential and personal nature of such records, the passage of time and the research potential of the records justify the retention and eventual removal of access restrictions to the records. A similar argument could be made for lawyers' records. The eventual death of both lawyer and client would, at a minimum level, satisfy that the communication had remained privileged during the lifetime of both parties to the communication. This reasoning is at the basis of a bill drafted in Ontario which would have allowed case files to be opened a century after the most recent document in the file.[27] This approach is similar to that of the British

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[27] This draft bill was produced for the Osgoode Society, a legal history society in Ontario, for the purposes of internal discussion rather than for the Ontario Legislature. Christine J.N. Kates, "The Osgoode Society: Preservation of Legal

Records Association, which encourages the deposit of solicitors' records in archives in Britain. Under this program, waivers are sought from clients who are still living, but

> there is, however, an assumption that where the file is at least one hundred years old, there is little or no need for concern regarding privacy or privilege.[28]

Apparently, there have been no reports from British archives who have received material under this assumption. Overall, this approach balances the concerns of the clients and lawyers with the needs of researchers. The revelation of the inner workings of a legal matter completed a century earlier would not seem to endanger the foundations of the legal system of today. If the British model were followed, only the earliest records of some active Canadian law firms would be made available at the present time.[29] If complete access at a point far removed from the action still made lawyers uneasy, archivists and lawyers can formulate research agreements which permit access to the records under specified conditions, which would protect the privacy of clients.

There are objections to this compromise. Obviously, the clients whose files would become open to researchers had, at the time the file was created, no knowledge that their files would become accessible. The legal profession would no doubt be more comfortable if it could obtain waivers for all client files before

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Records," Law Society of Upper Canada Gazette 21 (1987): 61.

[28] Ibid., 62.

[29] According to The Business in Vancouver Book of Lists 1992 (Vancouver, 1992), p. 18, there are four law firms in British Columbia whose establishment predates 1894.

releasing them for research purposes, but that solution is impractical and unlikely to succeed. Asking for such a waiver would imply that the lawyer was promising not to reveal confidential information in one instance while ensuring its eventual disclosure in the future. From this point of view, one can understand the legal profession's resistance to archival accessibility of case files.

From the lawyer's point of view, complete destruction of all case files is the only option. According to Schellenberg, the destruction of everything created by an organization is "a drastic course [appealing] only to the nihilist, who sees no good in social institutions or in the records pertaining to them."[30] However, lawyers have been assuming that clients would prefer their privacy, and that destruction of the file is the easiest and best means of preserving that privacy. In a number of instances, the clients may want the files preserved as an illustration of the way the legal system has treated them. The National Archives of Canada has acquired the case files of a lawyer involved in the claims of the descendants of Japanese-Canadians interned in the Second World War.[31] Although access to them is now restricted, the files will eventually provide an insight into an important episode in the history of civil rights in Canada and will complement the records of all government departments involved in the matter. For all their talk of protecting the rights of clients by destroying case files, lawyers, who are ethically required to

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[30] Schellenberg, "The Appraisal of Modern Public Records", p. 57.

[31] The Saul Mark Cherniak fonds (MG 30 E 266) contains correspondence and case files pertaining to Cherniak's role in assisting Japanese-Canadians seek compensation for their internment during the Second World War.

protect persons' rights, should consider the record of carrying out that responsibility to be important to the social memory.

Despite the complexity of the issues involved, some conclusions can be distilled from the various arguments. Given their social role, archivists should preserve a record of the activity of the legal profession as part of society's documentary heritage. This documentary heritage either must include the case files which naturally result from the lawyer's work or become entirely biased by their removal. Indeed, members of the legal profession have recognized that the preservation of legal records in general is essential to studying the development of the profession and its impact on society.[32] Although all personal identifiers might be removed from the file to make it available without jeopardizing the confidentiality of the file, this procedure would destroy the linkages between any existing public record and the case file. The best means to make the case files available is to limit the life of the privilege to a recognized period of ultimate liability or to the lives of the lawyer and client, a rule which could be made through legislative amendments.[33] Essentially,

the biggest concern of the legal profession with limitations to the

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[32] Consultative Group on Research and Education in Law, Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada (Ottawa, 1983), p. 159.

[33] This approach, attempted in Ontario, was also suggested in British Columbia by the Law Society of British Columbia. According to the Statutes of British Columbia (Victoria, 1988), chapter 25, section 25 (k) of the Legal Professions Act empowers the benchers of the society to make rules for access to lawyers' records in archives. Their conclusion was that legislative action was necessary.

> privilege relates to procedures for obtaining and using evidence, and the effects these would have on the conduct of legal services at the time when the evidence was still directly relevant.[34]

This statement clearly indicates that the most important purpose of solicitor-client privilege relates to protecting the client during the legal action in progress. There is no consideration of the ultimate fate of these privileged documents. Klumpenhouwer posits that

> when used in a context unrelated to the original legal matter, and after a considerable lapse of time, the privilege is, for all intents and purposes, no longer relevant.[35]

After a century, the only threat posed by the release of privileged documents is a challenge to established or preconceived notions of history and the lawyer's role in society.

Once acquired by an archival repository, the records of the legal practice would likely be subject to appraisal for selection, which would determine what parts of the fonds would be preserved permanently. The archives would examine the records in terms of their primary and secondary values. An examination of each function and the records likely to result from it show that different values exist for each function.

For the function of maintaining a legal practice, the records have enduring primary and secondary values. Law society certificates, minutes of meetings, partnership agreements, incorporation documents, and financial statements are some

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[34] Klumpenhouwer, "Another Look", p. 8.

[35] Ibid., p. 9.

of the records series which have continuing value in terms of ensuring the accountability of the lawyer or law firm. In the event that questions arose concerning any aspect of the status of the lawyer or the law firm, these records would provide definitive answers to those questions. Conversely, certain records series also generated by this function have a short-term primary value. These records series can include cancelled cheques, purchase orders, and files pertaining to routine office administration. As these records form part of the activities of any business, they are subject to certain legal requirements as to their retention. These records have a definite primary value to the legal practice, but once this value has expired, they have little or no secondary value. As noted by Donald Skupsky, these records can be handled by a traditional records management program.[36] Because these records facilitate other activities, it is likely that the information is summarized in other, more valuable records series. Consequently, these more mundane records can be destroyed without a significant loss of information.

The secondary values of the records of the maintaining function is low. These records exist only as an expression of the activities of the individual or organization and contain little information about individuals, organizations or events apart from the lawyer or the law firm. Although low in terms of informational value, the strength of the evidential value inherent in the records

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[36] Donald J. Skupsky, "Records Retention Requirements for Law Firms and Legal Departments," Records Management Quarterly 25, no. 2 (April 1991): 36. See DeLloyd J. Guth, "Retention and Disposition of Client Files: Guidelines for Lawyers," The Advocate 46 (1988): 240-242 for retention guidelines.

ensures that they will be preserved.

The next function, contributing to the profession, also has strong primary and secondary values. The records resulting from the activities within this function illustrate the development of an individual's personal philosophy, the general progress of legal thought, and the changes occurring within the legal community. These records complement those of professional organizations. In addition, the records provide a more complete picture of the legal profession by preserving the positions and ideas of individuals; these ideas are obviously different than those expressed by legal organizations, whose positions are necessarily reached by consensus. The records generated by this function express the values, culture and intellectual development of the individual lawyer and, consequently, the legal profession itself. Clearly, these activities reflect on the legal profession's impact on society at large and should be preserved to show its evolution.

The final function of providing legal services is perhaps the most complicated to assess, partly because of confusion between primary and evidential value. One can firmly state that all records series pertaining to the function of providing legal services have only a short-term primary value. Indeed, while a case is before a court or a regulatory body, the case file generated by the lawyer has ongoing primary value, for the file contains all the information received or created by the lawyer in the conduct of the case. However, once the lawyer has completed the case, the primary value begins to decline as the file gradually becomes inactive. Once statutes of limitation have expired, legal retention periods have ended or

avenues of appeal have been exhausted, the case file has no primary to the law firm and its ongoing activities.

However, there is difficulty in determining exactly when the case file becomes inactive. The Supreme Court of Canada has ruled that the limitation period for an action against any person, including a solicitor, begins when the material facts have been found.[37] According to the British Columbia Limitations Act, there are a number of limitation periods ranging from two to ten years.[38] For some actions, including those pertaining to questions about the ownership of land, there is no limitation period. In addition, the start of any limitation period can be delayed if the cause for the action is not discovered until later or if the person capable of bringing the action is somehow disabled and unable to begin the action. These facts prompt lawyers to preserve the case file in the event their conduct of the action is questioned. However, the probability of such an action arising clearly declines with the passage of time, and the file finally becomes inactive. The categories of limitation periods suggest that a period of ten years is sufficient for most if not all actions which could be brought against lawyers in relation to their conduct of a particular action. This inference suggests that a case file whose action has been completed becomes truly inactive at this point.

Ultimately, once the primary value has passed, there must be an assessment

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[37] Guth, "Retention and Disposition" p. 229.

[38] British Columbia, The Revised Statutes of British Columbia (Victoria, 1979), c. 236, s. 3.

whether there is any secondary value to the case files. From the perspective of an archivist, both evidential and informational values are strong and permanent. Evidential value exists pertaining to the practices and activities of the lawyer in the conduct of the case. The way in which a lawyer handled a particular case may be of interest to other lawyers and individuals. Informational value exists in terms of what can be learned about the clients who seek a lawyer's services. In a recent article, a lawyer attempts to discourage that notion. Under the heading "The Archivist's Delusion", the lawyer writes that "lawyers' work over the past century would more often be dull than distinguished", noting that, in his own experience with case files, "I would be hard pressed to think of documents not already in the public domain which would be significant."[39] This statement, which implies that lawyers' case files are eventually worthless and should be destroyed, comes close to the nihilism Schellenberg mentions. First, the legal profession may find case files of continuing value for a number of reasons. They can be a source for education of lawyers in the conduct of legal services and a source for research into legal practice.

Lawyers' records, as much as the records of any other profession, form an important part of society's documentary heritage. As shown by their pivotal role in the administration of any legal system, "lawyers' activities touch on every aspect of

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[39] Brian Bucknall, "The Archivist, the Lawyer, the Clients and their Files," Archivaria no. 33 (Winter 1991-1992): 185.

community life, whether social, economic or political."[40] This role is reflected in the records generated by their work, namely their case files. In addition, the case files reflect their preparation for cases, participation in the legal system, and interaction with clients from a unique perspective that is not documented in the records of the courts, regulatory bodies or government departments. Using the Norris fonds as an example, files generated by the work of the lawyer provide a richer and more detailed source of evidence and intelligence of the actual conduct of legal practice than that found in the public record. The collection of evidence, whether it is receipts, photographs, or depositions, provides an expanded insight into the case and the direction chosen by the lawyer in providing the particular service. Correspondence between opposing lawyers provides an additional understanding of negotiating tactics and the background to any settlement which was reached, details of which would not be documented elsewhere. The public record reveals how cases were resolved in law and what their precise outcome was; the lawyer's record reveals the wider context of the case touching upon social and other factors not always found in the public record. As shown in the Norris fonds, much more of the entire legal procedure was present in the lawyer's file as opposed to the public record, which contained little but succinct summaries. Therefore, for the researcher, using such case files presents

> a vivid sense of the human drama so often lacking in the official court records. The records of a lawyer or law firm contain information

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[40] Schaeffer, "The Osgoode Society Survey", p. 183.

about the impact of the law on the individual or on society itself.[41]

This type of information is critical to our understanding of the law and its overall effects on society. A recent study of legal education observed that, because of the continuing destruction of lawyers' records, "we may never learn much about what lawyers did a hundred years ago, or do today."[42] Shepard and Oliver note that

> while we know that lawyers and legal matters have had a substantial impact on the Canadian political, economic and social systems, and that the nature of the legal influence changed considerably as Canada underwent its transition from a rural-commercial society to an urban-industrial one, we remain entirely unable to analyze with any precision the nature and extent of the legal influence.[43]

The decision regarding the nature of the legal work of the past century, whether dull or distinguished, should be made on a more substantial basis than the impressions of lawyers in the late twentieth century, and the objective study of case files is the only means to establish that fact.

In addition, the preservation of case files may provide evidence of discrimination in one form or another. For example, government case files pertaining to the internment of Japanese-Canadians in the Second World War were used by descendants of the internees to obtain compensation. In addition, a study of juvenile court case files from the 1920s through the 1960s has revealed gender

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[41] Whyte, "The Acquisition of Lawyers' Private Papers," p. 152.

[42] Consultative Group on Research and Education in Law, Law and Learning, p. 125.

[43] 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): 194.

inequities in the treatment of juvenile delinquents. The preservation of these case files, which might have been destroyed because of the personal information contained within them, has actually helped individuals and society at large by preserving their rights and providing a means of auditing a social system.[44] It is not unrealistic to assume that similar studies could be conducted on the case files generated by lawyers to assess their role in the conduct of legal affairs in society.

Finally, the statement that all significant information is in the public domain is questionable. The analysis of the Norris fonds suggests otherwise. The claim that the public record provides the essential evidence and information about the conduct of the legal profession is based on a narrow view of society's interest in understanding how legal disputes are resolved. In addition, some legal issues are resolved without even resorting to the courts or a regulatory body, leaving no public record at all.

In addition to the lawyer's conduct of a particular case, the informational value of records of the function of providing legal services also pertains to the lawyer's clients and their relations with the legal system. Although referring to social welfare case files, one historian has noted that case files often document the lives of persons who do not necessarily leave other records.[45] Although narrow in focus, the case file may provide considerable information about the situation of the

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[44] Danielle Laberge, "Information, Knowledge and Rights: The Preservation of Archives as a Political and Social Issue," Archivaria no. 25 (Winter 1987-1988): 49.

[45] G.J. Parr, "Case Records as Sources for Social History," Archivaria no. 4 (Summer 1977): 122-136.

person and its ultimate resolution. Speaking subjectively, the case files from the Norris fonds provide a valuable insight into social and economic conditions in the Okanagan Valley in the 1930s. The files provided significant insight into water rights, marketing of produce, aboriginal issues, and even the nature of single motherhood and divorce during the Depression.

Despite the fact that the series may have informational value, an individual case file may not have these qualities as a result of incompleteness or lack of context. A subjective judgement could be made on the thickness or perceived interest level of a particular file, but this is not necessarily a guarantee that such files are worthy of preserving. The survey of private legal records in Ontario revealed that "the holdings of active and semi-active records are enormous, but only a small percentage has obvious research value."[46] The examination of the Norris fonds also revealed files ranging from those fully documented cases to those which contained so few documents that any understanding of the procedure at hand was nearly impossible.

For those reasons, and because there are simply too many lawyers' records to preserve them all, archives will have to conduct sampling of these records.[47] However, for anyone other than the lawyer or law firm to pick and choose files on a subjective basis is inappropriate, because the preservation of case files on an

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[46] Schaeffer, "The Osgoode Society Survey", p. 182.

[47] For an examination of the various methods of sampling, see Terry Cook, "'Many are called but few are chosen': Appraisal Guidelines for Sampling and Selecting Case Files," Archivaria no. 32 (Summer 1991): 25-50.

individual's subjective criteria creates a skewed portrait of the work of the lawyer. The only appropriate method is to take a random sample of the case files, preserving only those which are chosen as part of the sample. This sample would be a statistically valid representation of the entire series of case files, ensuring that an accurate reflection of the lawyer's work will be preserved.

Although the sampling process would provide an accurate portrait of the lawyer's work, it may result in the destruction of important case files. Because the sampling process is objective, certain case files may be destroyed which contain information about important persons or events. It seems misguided that files with recognizable research potential should be destroyed purely on the principle of maintaining an accurate archival portrayal of a lawyer's work. The most simple answer to this problem is to make subjective selections of the more important case files based on the contents of the file. If the representative sample is kept intellectually separate from the subjective sample, the impartiality of the one sample will not be tainted by the subjectivity of the other sample.

Essentially, this is the approach taken by the Legal Archives Society of Alberta in its guidelines for the preservation of legal archives. In addition to providing advice about the preservation and destruction of other firm records, the guidelines provide a format for sampling client files. All files closed before 1945 are preserved, apparently as a means of redressing the dearth of files from the years prior to World War II. All files heard before supreme court levels are preserved, most likely because linkages can be made between the lawyer's file and the case file

preserved at the courthouse or archives. Then, all other files are separated into categories of legal practice, with one closed file from each category chosen every five years to serve as an example of the practice of law in that area. Finally, an exceptional selection is made of any case files which are deemed significant on the basis of "political, economic, social or cultural prominence of the client, project or case."[48]

Although a means of dealing with the case files of a lawyer or law firm, there are some theoretical problems with this particular approach. By separating the cases into categories, the sample which results may over-represent particular categories. If there was only one case involving a particular area of law, that case would be chosen as the example; conversely, many cases involving another area of law will be reduced to a single file. Although one area of law may have been much more significant than the other in terms of the lawyer's or law firm's work, both areas are given equal weight in terms of what is preserved as the archives of that individual or firm. Although difficult in practice, the only means of preventing over-representation is to conduct the random sample of the all case files first, with any exceptional selection of certain files taking place afterward.

In summation, this discussion of appraisal for selection has shown that the functions of lawyers produce records with high evidential and informational value. Although some records are relatively worthless and can be destroyed, other records

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[48] Legal Archives Society of Alberta, Selecting Law Firm Records of Archival Value: Guidelines for Lawyers (Calgary, 1992).

series merit permanent preservation in their entirety. In terms of the client files, the best method of preserving them is to take a representative sample of all the files first, followed by a more subjective sample to ensure that significant cases are not lost as a result of the impartial sample.

In concluding this discussing of the archival appraisal of lawyers' records, it is apparent, despite the opinions of some lawyers, that the documentary heritage of lawyers is worth preserving in an archival repository. Some records produced by lawyers, notably those pertaining to the administration of their practice and their professional activities, would be immediately welcomed in any archives which holds complementary records. The problems arise with the case files, which are essential to understanding a lawyer's work but have an ethical, restrictive obligation attached to them. Clearly, both the legal and archival professions must devise a policy, likely based on legislation, which respects the ethics of solicitor-client privilege but ensures that researchers of the future will be able to study the history of the law, its impact on society, and the people who interpret it.

CHAPTER FOUR

CONCLUSION

The analysis presented in the preceding chapters leads to a number of conclusions or recommendations. The first conclusion is that further research should be conducted into the records of lawyers, particularly the fonds of law firms. Further tests are necessary, particularly an analysis of the records of a law firm as opposed to an individual practice. Further research may result in refinements or adjustments in that particular aspect of the functional model.

A second, more wide-ranging conclusion derives from the archival appraisal decisions made by lawyers and those responsible for court records. Archival appraisal should take into consideration the records complementary to the overall process reflected by the records. In the instance of records created by lawyers and the courts, lawyers have apparently assumed that court registries would maintain all court records into perpetuity, releasing them from the need to maintain their own records. While this is a fatally flawed decision from the perspective of maintaining the accountability of a person or organization, it also proved incorrect, at least in British Columbia, where archival appraisal by the records creator resulted in the destruction of almost all court case files.

This situation is difficult in that it involves two different records creators. If only one organization or records creator were involved, the problem would be solved by analyzing the records, preserving the records in question in one particular series and sanctioning the destruction of similar records elsewhere within the organization. However, when responsibility for a particular process is divided amongst two or more records creators, the records reflecting that process are subject to the records management decisions of each organization, which could vary and may even result in the destruction of a vital link of the overall process.

The third conclusion pertains to appraisal for acquisition. In keeping with their social role of preserving a documentary heritage, archival repositories acquire lawyers' fonds with the understanding that all records within them will ultimately be made available to researchers. The Canadian archival community should attempt to follow the example of British archives. In Britain, the understanding that waivers are obtained for more recent case files and that privilege lasts for approximately a century has permitted archives to preserve portions of that country's legal heritage. A similar method should be feasible in Canada, where limitation periods on other forms of sensitive, personal information also extend to the century mark. Making the files available after a century will not harm the fundamental structure of the legal system or the long-dead persons originally involved in the case. If the legal profession is uncomfortable with complete access to the records even after this extended period, some form of standard research agreement designed by archivists

and lawyers should be designed. To complement this, further research is required to examine various types of research agreements and assess their effectiveness in protecting the privacy of individuals, studies which may reassure the legal profession about providing access to case files. Lawyers themselves should examine the possibility of having waivers signed by clients at the time a file is opened. This waiver would not only protect them from potential liability if the file is wrongly destroyed but also allow archival appraisal of the file after its primary purpose has been served.

In keeping with the preceding conclusion, archivists and lawyers together should formulate mutually acceptable guidelines for the preservation of the records of lawyers and law firms. Given the current circumstances of preservation of such records, archivists must educate the legal profession about the role archivists play not only in maintaining the accountability of an organization but also in protecting individuals against unwarranted release of personal information. When lawyers understand that archivists appreciate their concerns about solicitor-client privilege and personal privacy, the issue of access to these records can be approached in a manner that respects the opinions of both sides of the issue. This discussion should take place at the level of the provincial law societies, with input from national legal organizations to assure that the concerns of all persons are heard and addressed appropriately. At this stage, legislative action could codify any decisions resulting from this evaluation, giving both archivists and lawyers a concrete, legally-defined

basis from which to work. This legislation should include definitive statements that lawyers may donate all their records to an archives, that certain time-limited restrictions must be imposed on recent case files, and that, ultimately, the restrictions will be lifted when a particular period of time has passed. Whatever conclusions are reached should be publicized, so that lawyers and archivists within the area represented by a particular law society are aware of whatever decisions are made regarding lawyers' records. With this information, both lawyers and archivists can act accordingly when questions regarding the archives of lawyers arise.

The final conclusion pertains to appraisal for selection. Those records with enduring primary and secondary values which are generated by the activities within the function of maintaining a legal practice should be maintained in full, and those with short-term primary values should be destroyed as part of basic records management. Because of their documentation of the philosophy, culture and development of the legal profession, records resulting from the activities of the function of contributing to the profession should be retained in full. In terms of the records of the activities of providing legal services, a statistically-valid sample should be made of the case files, with a subjective sample conducted afterwards to capture files of obvious research interest missed in the initial sample.

In spite of the evidence that records of the activities of lawyers are not being preserved in archives, lawyers and archivists may be to simply agree to disagree about preserving any records of the legal profession, particularly case files. It is

difficult to change the culture of an entire profession, particularly one so strictly based in confidentiality. The profession keeps case files for a lengthy period based on a perceived primary value resulting from the fact that the limitation period for legal malpractice begins when the relevant facts are found. When files accumulate to overwhelming proportions, they are destroyed to preserve solicitor-client privilege. Actually transferring lawyers' fonds, including case files, to an archives and ultimately opening the records, even those a century old, might be beyond the capacity of the legal profession.

Even with this fact in mind, archivists must continue to promote the issue of the archives of lawyers and law firms. Given the importance of the legal system to the foundations of society, archivists must study the records of lawyers and determine, as custodians of society's documentary heritage, whether such records can be acquired, preserved and made available to future generations. By presenting these issues to any records creators, including lawyers, and forcing a debate about the fate of its documentary heritage, archivists have succeeded in their social role, no matter what the outcome.

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