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## **Bertha Wilson's Practice Years (1958-1975): Establishing a Research Practice and Founding a Research Department in Canada**

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# Bertha Wilson's Practice Years (195-1975): Establishing a Research Practice and Founding a Research Department in Canada

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## **BERTHA WILSON'S PRACTICE YEARS (1958-1975): ESTABLISHING A RESEARCH PRACTICE AND FOUNDING A RESEARCH DEPARTMENT IN CANADA**

**ANGELA FERNANDEZ & BEATRICE TICE\***

### **Introduction**

Bertha Wilson created the research department at Osler, Hoskin and Harcourt, the first of its kind in Canada. The department was founded on Wilson's own interests, and the force of her personality lies behind its existence. It was also, as she herself put it, "a function of chauvinism" in the sense that she took up the practice of law at a time when many clients and other lawyers were not comfortable with the idea of a woman lawyer. Behind-the-scenes research was a way to put Wilson's talents to work while still respecting conventional attitudes toward gender in a conservative profession in the 1960s. The research department, which continued after Wilson left Osler for the Court of Appeal in 1975, proved to be a model for similar departments at other large Toronto law firms and remains a key practice area at Osler today.

This paper explores Wilson's establishment of the department. In particular, it focuses on the research-related initiatives with which she was involved during her time at Osler, such as the law firm library and the information-retrieval systems for memoranda, opinion letters, and precedents. These are not functions that one would associate with a

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research department today. Knowledge-management specialization means that many of the projects that Wilson participated in would now have their own dedicated staff. However, the boundaries between roles and functions were blurry at best in Wilson's day. One of the aims of this paper is to capture this era and its gendered dimensions. We hope to provide a snap shot of some of the on-the-ground features of law firm practice at a particular time and place: a large Toronto law firm in the 1960s and early 1970s. We also aim to provide a description of how one extraordinary woman made her way in this environment. What we are providing here is by no means a typical tale – Osler was not a commonplace law practice setting, and Bertha Wilson was an exceptional jurist and an exceptional woman.

### **Articling at Osler: A Legal Researcher Emerges**

*“Whatever your assignment, little or least, your great maxim is: ‘Make yourself indispensable’”*

Bertha Wilson (Convocation Address 1984)<sup>1</sup>

In the mid-1950s there were very few women practicing law in Canada.<sup>2</sup> Wilson was confronted with this reality before she even became a law student at Dalhousie Law School, where the Dean dismissively questioned her interest in applying.<sup>3</sup> Wilson persisted and, having achieved top ten standing in her class in all three years of study, received a scholarship to do an LL.M. at Harvard Law School. Once again, she was discouraged by the Dean, who told her that it was foolhardy to attempt to be an academic:

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<sup>1</sup> Bertha Wilson, “Remarks made at Mount St. Vincent University Convocation upon acceptance of an Honorary Degree,” Halifax, Nova Scotia, May 11, 1984 in *Speeches Delivered by the Honorable Bertha Wilson, 1976-1991*, compiled by Janet Matyskiel & Louise Lévesque (Supreme Court of Canada, May 1992) 176 at 179.

<sup>2</sup> See Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Oxford: Hart, 2006) at 67-112.

<sup>3</sup> Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2001) at 38 [Anderson, *Judging Bertha Wilson*].

“There will never be women academics teaching in law schools, not in your day.”<sup>4</sup>

Wilson did not pursue the LL.M., but her interest in an academic approach to law persisted throughout her career and manifested itself in her intense interest in research.<sup>5</sup> After moving with her husband John to Toronto, she secured an articling position with Osler in 1958 – becoming their first female associate after she was called to the bar in 1959, and, on January 1, 1968, she became the first female partner in the law firm’s history.<sup>6</sup>

Osler’s articling offer to Wilson did not express a tidal wave of liberal social reform at the firm. Indeed, Allan Beattie – a senior lawyer to Wilson who arrived in 1951, was made a partner in 1955, and succeeded Harold Mockridge as head of the firm – recalled “an incredibly long and solemn debate as to whether a woman could really be suited to the practice of law.”<sup>7</sup> According to another close friend of Wilson’s at Osler, Stuart Thom, these were men to whom “law was a downtown business for the man, and the lawyer[s] they hired had certain qualities and connections and patterns of behaviour. Women just didn’t fit.”<sup>8</sup> Mockridge, then head of the firm and emphatically not a social reformer, shared this view.<sup>9</sup> He and other skeptical members of the firm required a demonstration not only of Wilson’s abilities as a lawyer, but also that she could fit into the male-dominated practice environment.

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<sup>4</sup> *Ibid.* at 48.

<sup>5</sup> It has been suggested that moving to Boston to do the LL.M. was not financially feasible and Wilson would not have wanted to leave John who was posted in Halifax. The couple moved to Toronto after John was offered a fund-raising position with the United Church there. Interview of Allan Beattie (3 October 2007).

<sup>6</sup> Curtis Cole, *Osler, Hoskin & Harcourt: Portrait of a Partnership* (Toronto: McGraw-Hill Ryerson, 1995) at 143.

<sup>7</sup> Sandra Gwyn, “Sense and Sensibility” *Saturday Night* (July 1985) at 17.

<sup>8</sup> Cole, *supra* note 6 at 123.

<sup>9</sup> *Ibid.*

The articling year was therefore a test year on many levels. Wilson herself certainly understood the importance of this probationary period. When it was made clear to her that her position at Osler was confined to the one articling year, Wilson replied with some spunk: “Well, I think that would be a mutually acceptable arrangement. I might not like it here either.”<sup>10</sup> She later noted that many women entering a man’s world underestimate just how important this proving stage is. “A lot of women, I think, are of the view that as soon as you get into a group, you can start trying to change things. I don’t think it works. I think you have to go through this process of proving yourself first.”<sup>11</sup> And prove herself she did. From her first assignment – “what is a bond?” – Wilson demonstrated her outstanding capacity to research, read, write, and, in Beattie’s words, to *think*.<sup>12</sup>

Wilson remembered “getting a number of research assignments like that during the first months at the firm, and slowly realizing that she could learn the context of the research by going to the filing department and pulling the file herself.”<sup>13</sup> Osler had a central filing system, in keeping with its philosophy that clients were firm clients and not the clients of individual lawyers. As Wilson’s biographer, Ellen Anderson, put it, “[t]he central storage meant that when presented with a research question Wilson could retrieve the file, discover the factual background to the research query, and discern the legal options open to the client and the pros and cons attaching to each.”<sup>14</sup> Thus, Wilson took steps to enhance the quality of her work while at the same time overcoming any discomfort that her clients or immediate superiors might have had working with her face-

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<sup>10</sup> *Ibid.*

<sup>11</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 127.

<sup>12</sup> Interview of Beattie, *supra* note 5.

<sup>13</sup> Cole, *supra* note 6 at 124.

<sup>14</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 54.

to-face. No one showed her how to access the files so as to increase the practical relevance of the advice she gave; she simply figured it out.<sup>15</sup>

It did not take long for the lawyers at Osler to realize they had something special in Wilson in terms of her aptitude for legal research and writing.<sup>16</sup> An initially skeptical Harold Mockridge grew to respect her. Justice Dennis Lane, who worked in the fledgling litigation department at Osler, recalled one telling incident. Mr. Mockridge (as everyone at the firm addressed him) gave Wilson an assignment that involved the interpretation of a will for a client. He handed her the will and sent her away to construct the argument for one side. She returned with her memo. He sent her off to research the issue again from the other side, which was actually the client's side. When she returned it, he was pleased and he wanted her to go to court to argue the case. However, Wilson demurred.<sup>17</sup>

If Mr. Mockridge was motivated to assist Wilson in her career development, she had a very different sense of what shape this was going to take. Wilson did not want to occupy the traditional lawyer roles of the barrister who goes to court or the solicitor who sees clients to gather the relevant facts. She had an enormous appetite for books and wanted to work with them. As Lane put it, it was the law that she loved – “she left the rest of us to fiddle with the facts.”<sup>18</sup> Anderson notes that “she preferred a minimum of client contact in her legal work, especially relishing her freedom from any of the social responsibility of rainmaking such as taking clients out to lunch ... [S]he was free [instead] to consider herself an academic lawyer.”<sup>19</sup> Lane believes that Mr. Mockridge came to understand and respect this choice as he was interested in the business

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<sup>15</sup> See Cole, *supra* note 6 at 124.

<sup>16</sup> Interview of Beattie, *supra* note 5.

<sup>17</sup> Interview of Dennis Lane (12 October 2007).

<sup>18</sup> *Ibid.*

<sup>19</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 64.

dimensions of law practice more than the traditional barrister or solicitor functions.<sup>20</sup> He supported Wilson's effort to carve out a niche practice structured around what she wanted to do. And in those days, it was his support that counted in the end.

Despite any reluctance to prepare herself for traditional law practice, within a year Bertha Wilson had made herself indispensable at Osler. Wilson recounted that, as her articling stint was nearing its end, one of the lawyers came to her with a research assignment that was expected to go on for months. "I said I think you'd better get somebody else – you do know that tomorrow is my last day. He said, 'What do you mean that tomorrow is your last day?' I said, 'I get my call to the bar tomorrow and that's when I leave.'" Horrified, the lawyer said "'Don't go anywhere, stay here,' and off he went." He returned to tell her that they all had taken it for granted that she was going to stay on. As Wilson put it, "I did stay on; I stayed on for seventeen years."<sup>21</sup>

### **Practice at Osler: Still Working to Make a Place of Her Own**

*"Next, let me deal with interpersonal relations – your responsibility to get along"*

Bertha Wilson (Convocation Address 1984)<sup>22</sup>

Wilson's own specialized practice focused on estates and trusts. However, she was not content merely to draw up wills. Wilson therefore let it be known that she was willing to work on whatever research problem anyone doing any kind of work in the firm might have. Lane reported that if a colleague took a problem to her, she would send back a memo that was clearly written and thoroughly researched. Lawyers could either work with her one-on-one, or they could send their request and wait to hear back.<sup>23</sup>

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<sup>20</sup> Interview of Lane, *supra* note 17.

<sup>21</sup> Cole, *supra* note 6 at 124-25.

<sup>22</sup> Matyskiel & Lévesque, *supra* note 1 at 179.

<sup>23</sup> Interview of Lane, *supra* note 17.

Moving among practice areas was not considered unusual in the 1950s and 60s. During this period, most lawyers, even at big firms like Osler, were generalists. As Lane put it, you became a labour lawyer if your client had labour problems.<sup>24</sup> While “the pace and scope” of a trend towards specialization like departmentalization “varied widely from firm to firm ... by the early 1970s certain trends were clearly visible at large [Canadian] law firms.”<sup>25</sup> Indeed, the 1971 *Income Tax Act* “appears to have been a turning point, marking the end of the all-rounder – the lawyer who was able to handle essentially any kind of case.” It was “[t]he final nail in the coffin of generalization.”<sup>26</sup>

Wilson was in her element in a generalist context. According to Lane, she earned a reputation for thorough research and soundness, putting the law together with whatever facts the client provided to create a persuasive package. She would, in essence, become an expert in whatever area of law was presented by the particular legal problem. The notion that this floating expertise could be its own kind of specialization lay at the heart of the idea for a research department. The department would consist of partners and partner-track associates who specialized in providing high-level, high-quality research on particularly complex legal problems requiring more extensive treatment than a lawyer working in their individual department would or could devote to them.

Any lawyer could send a request to the research department. It would be assigned to an associate or partner, who would perform the additional requested research. The nature of this assistance would run the gamut from help with the drafting of pleadings to

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<sup>24</sup> *Ibid.*

<sup>25</sup> Carol Wilton, “Introduction: Inside the Law – Canadian Law Firms in Historical Perspective” in Carol Wilton, ed., *Essays in the History of Canadian Law: Inside the Law – Canadian Law Firms in Historical Perspective*, vol. 7 (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History; 1996) 3 at 31.

<sup>26</sup> *Ibid.* at 30.

the production of written memoranda on points of law where more information was desired. The research lawyer might work directly with the client; but more often, he or she would work with the other Osler lawyers who had passed along the problem.<sup>27</sup>

As Wilson's reputation for sound argument and thorough research and analysis grew, her role gradually developed from that of a young lawyer assisting on matters to a seasoned expert advising her colleagues on the state of the law and its application to cases. She became, as Beattie put it, "a *lawyer's lawyer*."<sup>28</sup> Although it is difficult to pinpoint exactly when research became the main component of Wilson's practice, Maurice Coombs, Wilson's first junior colleague in the research department, figures that this happened sometime around 1962, approximately four years after she began articling at the firm.<sup>29</sup>

Lane recalls taking a problem to Wilson and watching her work. She would go to the library, select the books she wanted to use, return to her office, and line them up on her desk in the order in which she intended to treat them in the memo. Then, she would pick up the dictaphone, pause, open a book, read a passage, make a comment, and then open another book and read another passage. When transcribed, her memo would be in near-final form, typically requiring only minor edits. "Like a great athlete," Lane said, "she made it look easy." She was "a mountain of information about the law."<sup>30</sup>

For the most part, Wilson worked from behind the scenes through written memoranda.<sup>31</sup> Although she worked at arm's length, Wilson was regarded as an

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<sup>27</sup> Interview of John Layton (25 January 2008).

<sup>28</sup> Gwyn, *supra* note 7 at 17 [emphasis in the original].

<sup>29</sup> See Maurice Coombs, "Bertha Wilson: A Woman of the Law" (May 2007) Briefly Speaking/ En bref (newsletter of the Ontario branch of the Canadian Bar Association) at 1.

<sup>30</sup> Interview of Lane, *supra* note 17.

<sup>31</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 192.

approachable and collegial person. Lane recalls, for instance, that she had good relationships with the estates and trusts clients.<sup>32</sup> Beattie said he came to think of her as a “den mother” because she was so interested in people and had a way of talking to them about a wide range of personal and professional issues.<sup>33</sup> Coombs called this her “people thing,” which “involved working with young lawyers, encouraging them, guiding them and looking out for their interests in the partnership,” as well as “provid[ing] a sympathetic ear and wise advice to older partners struggling with the modernization of legal practice throughout the sixties and seventies.”<sup>34</sup>

By all accounts, hiring and retaining Bertha Wilson was one of the best risks Osler ever took. However, despite the fact that her colleagues deemed her indispensable to the firm, and despite their enormous respect for and reliance on Wilson’s judgment, she would wait nine years – three times as long as some lawyers at the time – before being made the first female partner in Osler’s history.

### **No Gender Discrimination?**

*“[Y]ou have a responsibility to be patient. Promotion will appear to be painfully slow [...] In fact you will begin to think that the powers that be have a vested interest in keeping you at the level you’re at simply because you are so good at assisting your superiors and making them look better than they really are!”*

Bertha Wilson (Convocation Address 1984)<sup>35</sup>

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<sup>32</sup> Interview of Lane, *supra* note 17.

<sup>33</sup> Interview of Beattie, *supra* note 5.

<sup>34</sup> Coombs, *supra* note 29 at 2.

<sup>35</sup> Matyskiel & Lévesque, *supra* note 1 at 180.

It was the impression of Wilson's biographer that Wilson was reluctant to acknowledge experiences of discrimination. Wilson said, "I really didn't see it that way. I didn't recognize discrimination even when I met it, probably."<sup>36</sup>

Wilson attributed her own delay in making partner at Osler to the unusual nature of her practice when compared with other lawyers at the firm who made partner in five years or less.<sup>37</sup> Former colleagues have emphasized the fact that partnerships were considered in three-year cycles; hence, depending on when a person came to the firm, missing one cycle could mean waiting for the next triennial consideration.<sup>38</sup> Each partner also had a veto in the decision-making process, so unanimity was required.<sup>39</sup> However, it is worth noting that Wilson herself wondered why she had to wait so long. When she asked, one senior colleague replied: "We never thought you would stay because you were married and you really had no reason to be working and we never saw you as a career person, looking ahead."<sup>40</sup> To some, the fact that she was married meant that she "did not 'really need to work' and might leave at any time."<sup>41</sup>

Wilson experienced many instances of sexism – both deliberate and unintended – throughout her legal career.<sup>42</sup> Her time at Osler was no exception. Indeed, one of the reasons she became a "lawyer's lawyer" was to avoid creating discomfort for clients who might feel uneasy working directly with a female lawyer. The research role "kept her

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<sup>36</sup> Ellen Anderson, *Bertha Wilson: Postmodern Judge in a Postmodern Time* (S.J.D. Thesis, University of Toronto Graduate Department in Law, 2000) at 399, n. 118 [Anderson, *Thesis*]. The thesis is cited only where a point is not included in the published book. Please note that the University of Toronto library copy of the thesis, as well as the National Library of Canada copy is incomplete in that it is missing the third volume.

<sup>37</sup> See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 58.

<sup>38</sup> Interview of Maurice Coombs (21 September 2007).

<sup>39</sup> See Anderson, *Thesis*, *supra* note 36 at 185, n. 26.

<sup>40</sup> *Ibid.* at 309, n. 132.

<sup>41</sup> *Ibid.* at 248.

<sup>42</sup> See *e.g.* Anderson, *Judging Bertha Wilson*, *supra* note 3 at 94-95, 156.

from having direct contact with traditional male clients who might not have complete confidence in a woman lawyer.”<sup>43</sup> Moreover, colleagues could choose to send her research requests without having face-to-face contact, and some might choose to send no requests. As laudable as the institution of the research department became, it began “as a function of chauvinism.”<sup>44</sup>

Wilson was always aware of the nervousness created by those like her who live between worlds – in her case, the traditional male and female spheres of work and family life of the 1950s and 60s. It was her policy to put people at ease (whatever their reason for feeling ill at ease) and do her best to fit in “beautifully.”<sup>45</sup> Faced with the problem of doing this at a large elite Toronto law firm, which she once described as run by “[g]entlemen of the old school,”<sup>46</sup> at a time when there was little reason to think that a female lawyer would be welcome there, Wilson responded with her usual practicality: she would simply work hard, demonstrate her value, and do her best, gender discrimination be damned. In reference to her time sitting with Wilson on the Supreme Court of Canada from 1987 to 1991, Justice Claire L’Heureux-Dubé described this strategy as “working three times harder than everyone else.”<sup>47</sup>

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<sup>43</sup> Cole, *supra* note 6 at 125.

<sup>44</sup> *Ibid.* Telephone conversation with Curtis Cole (13 September 2007) (remarking that this point came from Wilson).

<sup>45</sup> See e.g. Anderson, *Judging Bertha Wilson*, *supra* note 3 at 46.

<sup>46</sup> *Ibid.* at 57.

<sup>47</sup> Remarks made by Claire L’Heureux-Dubé, Women’s Legal Education and Action Fund (LEAF) Equality Day Celebration, Justice Bertha Wilson Fund Launch, Cocktail Reception (17 April 2008) [L’Heureux-Dubé Remarks]. For an empirical report of just how much work Wilson did during her time at the Supreme Court of Canada, specifically her high rate of writing when compared to the other judges, see Marie-Claire Belleau and Rebecca Johnson’s piece in this collection. See also Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2003) at 372 for a description of Wilson’s exasperation with the slow pace of work of most of her colleagues in the mid-1980s.

According to Anderson, Wilson “had no desire to assert herself as equal in the sense of being identical with the more prominent male lawyers.”<sup>48</sup> Allan Beattie, for instance, emphasized that Wilson was never on the law firm management committee and would never have wanted to be.<sup>49</sup> Instead, Wilson was, in Anderson’s words, “permitted to carve out the role she wanted, a different role. She was respected for her expertise in that role and built her own bailiwick within the firm.”<sup>50</sup> If this role appeared to be a subordinate one – the “brains behind the big names”<sup>51</sup> who operated as “a kind of resource person for everyone else”<sup>52</sup> – that was just fine. It was the type of work she liked to do and at which she excelled, and it was intensely appreciated by the individuals she worked with. Indeed, contemporaries from the time emphasize that there were few difficult files at the firm that she was *not* involved in. Picking up the phone to ask Wilson whether X or Y was sound advice that should be conveyed to a client was thought of as a sort of insurance policy given how good she was and how much her counsel was valued around the place.<sup>53</sup>

Wilson’s strengths and interests were a perfect match with the backroom role of a research lawyer. This complimented the role of the other lawyers at the firm who dealt directly with clients on transactions and did not have the time or inclination to take on intensive research, creating what was in many respects “a perfect marriage.”<sup>54</sup> Indeed, some of Wilson’s colleagues might have come to rely on her too much – making herself a little too indispensable for their good, and for her own. Wilson’s remark in the

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<sup>48</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 64-65

<sup>49</sup> Interview of Beattie, *supra* note 5.

<sup>50</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 65.

<sup>51</sup> *Ibid.* at 58.

<sup>52</sup> Gwyn, *supra* note 7 at 17.

<sup>53</sup> Telephone conversation with Tim Kennish relaying perspectives communicated to him by Edward Saunders and Purdy Crawford (11 July 2008).

<sup>54</sup> Interview of Barbara McGregor & Heather Grant (2 July 2008).

convocation address that “assist[ing ...] one’s superiors and making them look better than they really are” and the way that this could create “a vested interest in keeping you at the level”<sup>55</sup> seems to be a reference to her own delayed promotion, and a complaint about permanently inhabiting the role of help-mate.

Some of the “help-mate” projects that Wilson undertook probably came to her for gender-related reasons. For example, oversight of the law library fell to Wilson. Indeed, some who saw her operating in her behind-the-scenes role at Osler “took her for some kind of high-grade librarian.”<sup>56</sup> Wilson had actually acted as a law librarian from time to time when she was at Dalhousie law school.<sup>57</sup> As a devout user of the library, she would have been more interested than most in its operations.

Librarianship has been a female-dominated profession throughout the twentieth century.<sup>58</sup> One therefore wonders whether gender played a role in the fact that library-stewardship fell to Wilson. However, it was also standard practice for there to be a library committee and for one lawyer to be responsible for the law firm library.<sup>59</sup> From Allan Beattie’s perspective, “Bertha was the law firm library committee.”<sup>60</sup> She was the person who took an interest in its operations and who had the clout and credibility to make bottom-line recommendations about what was most needed.

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<sup>55</sup> Matyskiel & Lévesque, *supra* note 1 at 180.

<sup>56</sup> Gwyn, *supra* note 7 at 17.

<sup>57</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 39.

<sup>58</sup> See Katherine Phenix, “The Status of Women Librarians” (1987) 9:2 *Frontiers: A Journal of Women’s Studies* 36. See also A.R. Schiller, “Women in Librarianship” in M.J. Voight & M.H. Harris eds., *Advances in Librarianship* (Phoenix, Arizona: Oryz, 1974) 103 at 125.

<sup>59</sup> See Joan Circa, “Variety and Routine in Law Firm Librarianship” in *Selections from Continuing Education Programme on Developing and Using Law Libraries* (The Law Society of Upper Canada, Department of Continuing Education, February, 1971) 155 at 159; Bette Carmichael, “Organization and Equipment in the Law Firm Library” in the same collection 135 at 141. Carmichael was the Osler librarian during Wilson’s time.

<sup>60</sup> Telephone interview of Allan Beattie (24 September 2007).

Lane, who was at times on the library committee with Wilson, recalls that her secretary handled the logistics of acquisitions.<sup>61</sup> Prior to the 1960s and the rise of specialized roles for law firm administration, secretaries would have done the bulk of routine work, including filing, or lawyers handled it personally.<sup>62</sup> Wilson operated in a pre-specialized world in which either she or her secretary probably did whatever it was that was there to be done, big or small.

Wilson did not reject projects like law firm library management on the grounds that a woman lawyer might quite justifiably use today; namely, that it is important to avoid getting boxed into a “pink ghetto,” doing non-billable work that needs to be done and might be appreciated but which is not highly valued by the institution. It would have been hard for Wilson to think in these terms, if only because the very notion of a ghetto assumes there are others with whom one could be ghettoized and Wilson was the only woman lawyer at Osler for quite a few years.<sup>63</sup> One has the impression that Wilson was simply trying to find a way to put her skills to use on terms with which everyone, including herself, would be comfortable.

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<sup>61</sup> Interview of Lane, *supra* note 17.

<sup>62</sup> See George C. Cunningham & John C. Montaña, *The Lawyer's Guide to Records Management and Retention* (Chicago, Illinois: American Bar Association, 2006) at 8.

<sup>63</sup> The next woman to join the firm did so in 1966, Alicia Forgie, and she was made a partner five years later in 1971. Forgie practiced real estate, an area that was relatively “friendly” to female lawyers, according to Barbara McGregor. Email from Barbara McGregor to the authors (6 May 2008). Heather Grant (then Frawley), who started out her practice in real estate and asked after two and half years to be switched to the corporate department, joined the firm as an associate in 1970 and became a partner in 1976. She was the first female lawyer to become pregnant while at Osler, triggering the development of a policy on this – one month of paid leave for every year of work, which for her with her first child was four years or four months. This, in her words, “set the policy for King and Bay.” Interview of McGregor & Grant, *supra* note 54. The fourth female partner at the firm, Barbara McGregor, became an associate in 1974 and a partner in the real estate department in 1979. By 1981, there were sixteen women lawyers at the firm, five of whom were partners: Forgie, Grant (then Frawley), McGregor, along with Nancy Chaplick (who joined the firm in 1975 and was made a partner in 1980) and Jean Demarco (who joined the firm in 1976 and was made a partner in 1981). See Cole, *supra* note 6 at 155, 339 n. 21.

Even in 1960, however, carving out a comfort zone did not mean total surrender to the gender norms of the day. For instance, Wilson stood up for her need to be allowed to travel for work. There were concerns about the propriety of this, given her married status and the married status of the male lawyers with whom she would be traveling. Yet, Wilson insisted that she be permitted to travel, and she was allowed to do so.<sup>64</sup> Anderson referred to her “principled boldness” on this and other issues.<sup>65</sup>

By the 1990s, the Canadian Bar Association’s report on gender in the profession, of which Wilson was the chair, pointed to some of the problems that Wilson faced while at Osler. For instance, the report noted that in private practice, work was divided between “pink files” and “blue files,” with women lawyers assigned more of the former. Pink files “involve[d] less high profile matters, less client contact and correspondence, and reduced opportunities to develop legal skills and a client base.”<sup>66</sup> The excuse that clients would not want to work with a female lawyer was used.<sup>67</sup> Female lawyers felt that they were “steered into research or clerical work.”<sup>68</sup> “Even as partners, women report[ed] that they hit a glass ceiling,” with a lack of representation on powerful committees and overrepresentation on committees with less authority, like the library committee.<sup>69</sup> The kinds of things that Wilson would have been willing to accept in 1960 were no longer acceptable by 1990.

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<sup>64</sup> See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 62.

<sup>65</sup> See *ibid.* at 133.

<sup>66</sup> Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: The Canadian Bar Association, 1993) at 87.

<sup>67</sup> *Ibid.* at 88.

<sup>68</sup> *Ibid.* at 87.

<sup>69</sup> *Ibid.* at 94.

Consider the image reproduced below; the first page of a memorandum from Wilson to the Library Committee. Notice how she added her own “s” to “Mr.” to make a “Mrs.” for herself on one of the law firm’s standard-form memos.

OSLER, HOSKIN & HARCOURT  
INTER-OFFICE MEMORANDUM

Memorandum for Mr. Library Committee  
From Mr. S. Wilson Dated February 14, 1972  
Re: Information Retrieval File No. \_\_\_\_\_

While on my trip to Cincinnati, Ohio last week I took the opportunity to cross over to Dayton and visit the law firm of Smith and Schnacke to which I had

The date here is 1972. Wilson had been with the firm for fourteen years, and she was still required to make this alteration. Did she have her secretary add the “s” in every typed inter-office memo using this form?

Anderson noted that a theme in many of Wilson’s convocation addresses was the ability to tolerate “minor injustices” in the workplace. These should be “accepted with good humour,” Wilson counseled, and thought of as “so trivial as to be properly beneath notice.”<sup>70</sup> However, what would be considered major and minor has changed substantially over time. For instance, at the present time it is extremely difficult to imagine any woman lawyer in a law firm reacting as Wilson did to the suspicion that her married status indicated that she was not committed to her career. “Wilson laughingly said that she thought this answer [to the question of why she had to wait so long for

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<sup>70</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 58.

partnership] was ‘quite good’ [that she might leave any time, as she was a married woman who did not need to work] but it did not bother her particularly.”<sup>71</sup>

Wilson never identified as a feminist, despite a clear and keen interest in women’s issues.<sup>72</sup> Interestingly, she did not advocate for female lawyers at Osler nor did she act as a mentor in that respect. As Osler lawyer, Barbara McGregor, put it (based on the time she overlapped with Wilson):

My memory of Bertha during my articling year [1972-73] is that she was an icon – very much a role model. I would not have thought of her as a mentor – there were no such things at that time. Mentoring came later. She provided an example that it (succeeding as a lawyer in a large firm) could be done. She did not advocate for the female lawyers at Oslers – she just excelled at what she did. She broke the path.<sup>73</sup>

Wilson may not have seen herself as a feminist or felt uncomfortable carrying the label.

However, others at the firm associated her with the cause of women’s rights. Allan Beattie recalled one lunch-time event at a restaurant during which the Osler lawyers were seated next to a table of women who were having an office party celebration a little too loudly and rather too exuberantly. Wilson was teased by her colleagues, “Bertha, are those the women whose rights you are fighting so hard for?”<sup>74</sup>

The depth and breadth of the gender stereotyping that Wilson faced might be difficult for us to appreciate now. Allan Beattie emphasized that, to a man of Mr. Mockridge’s background and life experience, who had initially thought that women could not practice law, realizing what Wilson could do was the equivalent of seeing someone

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<sup>71</sup> Anderson, *Thesis*, *supra* note 36 at 309, n. 132.

<sup>72</sup> See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 136, 197.

<sup>73</sup> Email from McGregor, *supra* note 63.

<sup>74</sup> Interview of Beattie, *supra* note 5.

walk on water.<sup>75</sup> In McGregor's words, Wilson "broke the path," making it "less difficult for the women who followed, to carve a position for themselves."<sup>76</sup>

It is remarkable that the senior male lawyers at Osler were able to set aside whatever gender prejudices they had and let Wilson into their group. However, since she was providing a valuable service, one can see why they would have been motivated to do so. What is perhaps more remarkable is the way that Wilson leveraged credibility and social capital from the kind of activity that one might associate with the most undesirable aspects of law practice – the "clerkish scutwork" of the law – and made it an important and well-respected niche activity.<sup>77</sup> In a way, she was making lemonade from lemons. Wilson took her "difference" from the other, more prominent male partners, both in terms of what she liked to do and in terms what she and others were comfortable having her do given the times that they were all living in – and founded a unique kind of law practice. In turn, this practice gave rise to a unique phenomenon: the research department. The research department became a fixture at Osler and remains an important part of the firm today, which other large law firms copied.<sup>78</sup>

It is difficult to avoid the conclusion that the successful founding of the research department at Osler was largely due to the force of Wilson's personality: her interests, energy, credibility, and clout. However, we hesitate to say that it was all human agency and serendipity. Timing, for instance, probably also had some role to play.

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<sup>75</sup> *Ibid.*

<sup>76</sup> Email from McGregor, *supra* note 63.

<sup>77</sup> Gwyn, *supra* note 7 at 17.

<sup>78</sup> Other Canadian law firms with research lawyers today include Torys, Stikeman Elliott, Goodmans, Fasken Martineau, and Ogilvy Renault. This research is based on a search of law firm websites (the quality of which vary widely) and is, therefore, likely to be incomplete.

The bulk of Wilson's time at Osler has been described as a period of relative stability. In the post-war United States, until about the 1970s, "law firms [were] locked into long-term relations with major clients and handle[d] virtually all those clients' business." However, after about 1975, "corporate law practice in the United States ... entered a distinctly new phase" characterized by instability: among other things, much "legal work [went] in-house, and ... fragments of specialized work [were auctioned off] to many different outside firms," resulting in a new, highly competitive style of corporate practice.<sup>79</sup> While America began its "boom" of large law firms in the 1950s and 1960s, Canada was slower in this respect.<sup>80</sup> However, the post-1975 situation in Canada seems to have been quite similar to that of the United States albeit on a smaller scale.<sup>81</sup>

Wilson sought institutional support for her projects in a period that pre-dated the extremely rapid changes of the 1970s, which culminated in the intense specialization we know today. If an idea did not work out, long-term client relationships were not going to be endangered. However, if it met with success, then there was value added in the sense of improving client service and competitiveness. At the same time, the research department's role was premised on a growing trend towards that specialization. Good economic times meant that there was enough work to sustain divisions among lawyers, who did not all have to be cut from the same cloth, and a research practice helped bridge the gaps in knowledge and experience between those increasingly specialized lawyers.

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<sup>79</sup> Robert W. Gordon, "A Perspective from the United States" in Carol Wilton, ed., *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930*, vol. 4 (Toronto: Butterworths for The Osgoode Society for Legal History, 1990) 425 at 433-34.

<sup>80</sup> Wilton, *supra* note 25 at 30.

<sup>81</sup> See *ibid.* at 38; John Hagan & Fiona Kay, "Hierarchy in Practice: The Significance of Gender in Ontario Law Firms" in Carol Wilton, ed., *Essays in the History of Canadian Law: Inside the Law – Canadian Law Firms in Historical Perspective*, vol. 7 (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1996) 530 at 532, 541.

Thus, specialized research support stood on the cusp between the old, stable world and the new, unstable one. It was institutionalized in a calmer time, before records management itself became professionalized, economically rationalized, and specialized. It was in this particular context that Wilson leveraged her “difference” rather than denying it. In so doing, and quite by accident, in some cases, she forever changed the shape of Canadian law practice in a large firm.

### **Building a Research Practice: The Accidental Contributions**

*“Your responsibility [is] to be faithful in little things”*

Bertha Wilson (Convocation Address 1984)<sup>82</sup>

It is important to note that Wilson did not start out with an agenda to build a research department. According to Allan Beattie, the department grew out of her particular way of approaching the practice of law. Wilson was intensely practical in her approach to legal problems. In Beattie’s words, she was “practically oriented towards the practical.”<sup>83</sup> She took initiatives to improve the quality of her own practice wherever she saw the need; and she was willing to institute her systems on a firm-wide basis. Whether the initiative was taking on responsibility for the law library, or introducing a legislation service or a synopsis service for providing client information, Wilson appeared to be tireless.<sup>84</sup> These projects gravitated towards her and she towards them, although it is often difficult to tell exactly how much of her time she devoted to them and certainly her contributions to the firm went well beyond them. However, the other members of the partnership came to expect that Wilson would set these kinds of projects into motion and

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<sup>82</sup> Matyskiel & Lévesque, *supra* note 1 at 179.

<sup>83</sup> Interview of Beattie, *supra* note 5.

<sup>84</sup> See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 54-55, 71.

oversee them. At least some of these initiatives continued to be associated with the research department after Wilson's departure in 1975.

As early as 1970, Wilson was quoted in the journal of the Canadian Bar Association as saying: "What I would like to see ... is a system where, if I want a precedent I can just pick up the phone and describe what I want via certain key words and, if a document exists, it can be found and I can quickly get a copy, plus the research that may have gone into such a document."<sup>85</sup> In the 1972 memo, the letterhead of which is reproduced above, Wilson described a visit to a law firm in Dayton, Ohio to learn about the use of a computer for storing and retrieving "its own internal work product, i.e. its research memoranda, opinion letters and precedents." She noted this and compared it to "the think process" that the Osler Library Committee was engaged in.<sup>86</sup>

Lane recalls that the idea of using computers was on the Library Committee's agenda from about 1969 on.<sup>87</sup> "Of course we're all kicking around the idea of computers," Wilson was quoted as saying in 1970.<sup>88</sup> It is difficult to overstate just how new this technology was, although some flavour of this is captured by Wilson's description of the computer that her contact at a Cincinnati law firm was using: "[The] cathode ray tube terminal ... looks like a television set with a keyboard in front through which the lawyer can pose questions to and receive answers from the computer which appear on the television screen."<sup>89</sup> The first machines had no memory capacity. Coombs recalls the extreme anxiety that the new technology created for some of the Osler

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<sup>85</sup> L.F. Webster, "Filing: The Unsolved Problem" (February 1970) Can. Bar J. 28 at 32.

<sup>86</sup> Memorandum from Bertha Wilson to the law firm Library Committee (14 February 1972) at 2. Copy provided to the authors by Dennis Lane.

<sup>87</sup> Interview of Lane, *supra* note 17.

<sup>88</sup> Webster, *supra* note 85 at 30.

<sup>89</sup> Wilson Memorandum, *supra* note 86 at 1.

secretaries.<sup>90</sup> Wilson herself had sympathy for those, lawyers included, who had trouble making the transition to newer technologies.<sup>91</sup>

On her Ohio trip, Wilson received a demonstration on what the Ohio State Bar Association was doing with the computerization of Ohio statutes and case law. Encouraged by the great strides that Hugh Lawford was making with QUICKLAW and Canadian law, Wilson wrote: “I am now most anxious that Osler, Hoskin & Harcourt cooperate with Professor Lawford, the Director of the computer project being conducted at Queen’s University, by allowing a terminal to be installed in our office.”<sup>92</sup> Lane recalls a trip to an American Bar Association conference in Philadelphia where Lawford’s full-text retrievals “blew everyone’s mind.”<sup>93</sup> As the Canadian Bar Association Journal put it, it “[s]ounds as though Mrs. Wilson and Prof. Lawford should get together.”<sup>94</sup> They eventually did.<sup>95</sup>

The Dayton law firm Wilson visited, Smith and Schnacke, was computerizing its precedents. These consisted of thousands of forms for wills, inter vivos trusts, real estate documents, corporate financing documents, and the like.<sup>96</sup> However, that law firm decided that it was “much less costly” to handle the research memos and opinion letters

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<sup>90</sup> Interview of Coombs, *supra* note 38.

<sup>91</sup> See *e.g. Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at para. 32 (noting with sympathy that one of the problems the employer in the wrongful dismissal case had with plaintiff/employee/lawyer was his writing in “long-hand” as opposed to using “a dictating machine”). But see *Richardson v. Richardson*, [1987] 1 S.C.R. 857 (a spousal support case in which Wilson did not have much sympathy for the fact that Mrs. Richardson’s clerical skills – the employment she engaged in before her marriage and intermittently throughout the marriage – had become outdated as a result of computerization).

<sup>92</sup> Wilson Memorandum, *supra* note 86 at 5.

<sup>93</sup> Email from Dennis Lane to the authors (28 September 2007).

<sup>94</sup> Webster, *supra* note 85 at 32.

<sup>95</sup> Anderson, *Thesis*, *supra* note 36 at 137 (“Oslers was able to arrange to store its research index (client names expunged to ensure absolute confidentiality) on QuickLaw with, of course, the further safeguard of an Oslers-only password”).

<sup>96</sup> Wilson Memorandum, *supra* note 86 at 7.

with “a card index system.”<sup>97</sup> Likewise, Osler did not computerize either its precedents or the research memos and legal opinions during this period. As a technological matter, it was possible. Lane reported on a punch-card system he saw being used by lawyers at Aetna Life Insurance Company in Hartford, Connecticut, to store and retrieve legal memos using IBM’s KWIC (“Key Words in Context”) system.<sup>98</sup> Rather, as at Smith and Schancke, the decision was a matter of cost, compounded by the fact that Osler was told the technology would quickly become obsolete.<sup>99</sup>

A 1970 visit to White and Case in New York City showed Osler lawyers a perfectly acceptable non-computerized approach to precedents. Essentially, the system would be left to “run itself.” Senior lawyers in each department would be responsible for identifying “starter documents” and making sure that members in their practice groups added to these documents from time to time.<sup>100</sup> A more hands-on approach that used the research department and the library was taken with the card system for research memos. This type of manual system was also observed at White and Case, which used “a standard library-type card catalogue by subject with a brief description of the contents of each memo appearing on each card.”<sup>101</sup> “The memos themselves [were] bound in volumes by code number, roughly chronological, and the volumes [were] maintained in the library

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<sup>97</sup> *Ibid.* at 6.

<sup>98</sup> Dennis Lane, “An Approach to the Storage and Retrieval of Legal Research in a Large Law Firm” in *Selections from Continuing Education Programme on Developing and Using Law Libraries* (The Law Society of Upper Canada, Department of Continuing Education, February, 1971) 237 at 240.

<sup>99</sup> Interview of Lane, *supra* note 17; Diane Snell, “An Information Retrieval System – Why and How: Responses to Queries by the Canadian Association of Law Librarians Convention” (Saskatoon, Saskatchewan, 1983) at 4. Copies provided to the authors by Maurice Coombs and Dennis Lane.

<sup>100</sup> Memorandum from J.T. Kennish to Members of the Library Committee, re Proposed Commercial Precedent System (no date) at 6-7. Copy provided to the authors by Dennis Lane. It was not until the 1990s that the firm became focused on its system of precedents and their computerization. Cole *supra* note 6 at 242-43.

<sup>101</sup> Lane, *supra* note 98 at 242.

near the card catalogue.”<sup>102</sup> The indexing was done by one individual, and the “precedent index and storage system ... [was] maintained entirely separately from the Library and from the legal research system.”<sup>103</sup>

Wilson had a long practice of keeping research memoranda and re-using them when the opportunity presented itself. As she put it in 1970, “[i]t’s really criminal to have lawyers spending their time going over and over work that has already been done.”<sup>104</sup> This repetition not only created the risk of inconsistency that could potentially embarrass the firm, but also it was a waste. Wilson “knew that she could save time and provide a more efficient service to the other lawyers in the firm by establishing an information retrieval system so that the basic research product needed only adaptation and perhaps updating for the particular client situation.”<sup>105</sup> However, if the client paid less, the firm made less. Thus, this time-saving cut into the amount of revenue Wilson generated, which created some tension for Wilson at the firm and ultimately led to others determining the amount of her bills.<sup>106</sup>

Wilson wanted to add the memos that other lawyers in the firm were producing to her dataset, and to include a specific indication of whether a formal opinion letter had been sent out. The rendering of opinions was the area in which the potential to create embarrassing inconsistency, and to engage the firm’s liability, was at its highest. This information was also easy to collect through the law firm’s day books or “pinks”—copies on pink paper of all correspondence that left the firm, which were deposited in

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<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* at 243.

<sup>104</sup> Webster, *supra* note 85 at 32.

<sup>105</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 54.

<sup>106</sup> See *ibid.* at 60-61. Interview of Beattie, *supra* note 5. What Wilson wanted – actually charging for the time it took to do the work, whether that was short or long – was in keeping with current billing practices.

binders as they were sent out.<sup>107</sup> These binders were the equivalent of day books, a correspondence record of the day's events.<sup>108</sup> Indeed, the carbon sheet separated the letter from a green copy, a yellow copy, a pink copy, and a blue copy. Coombs recalls an occasion in which one of the clerks from the mailroom presented himself to Wilson, pointing out that the wrong colour copy had been sent for the daybook. Wilson took the sheet, wrote at the top "pink copy," and handed it back to him.<sup>109</sup>

In 1974, shortly before Wilson's departure for the Court of Appeal, Maurice Coombs and two articling students set to work creating a system for recording and retrieving Wilson's memos and those of other lawyers in the firm. It was Coombs's impression that Wilson was thinking about institutionalizing a kind of legacy to the law firm that would continue to exist after her own departure.<sup>110</sup>

Although the physical cards have not survived, Maurice Coombs kindly constructed the following mock-up from memory:

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<sup>107</sup> Snell, *supra* note 99 at 6.

<sup>108</sup> Email from Maurice Coombs to the authors (3 October 2007).

<sup>109</sup> Interview of Coombs, *supra* note 38.

<sup>110</sup> *Ibid.*

**Identifying Number for Memorandum or Letter**

(Assigned # consisting of 2 Digits [Year of Creation]/3 Digits [Number in a Physical Binder]/the letter "A" if it was an opinion letter)

**Key Word 1, Key Word 2, Key Word 3, Key Word 4, Key Word 5, Key Word 6, Key Word 7, Key Word 8, Key Word 9, Key Word 10, Key Word 11, Key Word 1, etc.**

**Author**

**Matter Identifiers**

**Synopsis of the matters discussed in the Memorandum or Letter**

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**List of Cases referred to in the Memorandum or Letter**

**List of Statutes Referred to in the Memorandum or Letter**

A separate card was then made for each of the following pieces of information: keywords, author, matter identifier, cases, and statutes. It was therefore possible to search the system's contents using any of these categories. Such cross-indexing was not a feature of the White and Case system.<sup>111</sup> In 1983 when the system contained approximately 7000 items, the proportion of research memos to opinion letters was roughly 7:3 in favour of memoranda.<sup>112</sup> Client's names were included on the original cards but were deleted when the information was sent to QuickLaw for the database.<sup>113</sup>

All of the cards were housed in a "rolodex contraption" with several trays stacked one over the other in a kind of pulley system. This was called an "Acme Visible

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<sup>111</sup> Lane, *supra* note 98 at 242.

<sup>112</sup> Snell, *supra* note 99 at 2.

<sup>113</sup> *Ibid.* at 8 ("Once an in-house computer system is acquired the client's name will be re-instated and we will have the best of all possible worlds").

Stratomatic” machine, quite a bit like the one from Acme Visible Records reproduced below.



The cards were organized into plastic trays that rotated independently on parallel tracks, rather like side-by-side ferris wheels. More than one person could stand at the machine and access the plastic trays in the different wheels. Apparently there was an issue about the noise created by the clacking of plastic trays and by the fact that more than one lawyer could use the machine at the same time, creating chit chat conditions disruptive to those sitting in the library reading room area.<sup>114</sup> The machine was housed in the library and unquestionably understood to be a part of its resources.

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<sup>114</sup> Interview of Coombs, *supra* note 38.

The actual memos and opinion letters were stored in “Accogrip” binders. A person using the system would search for what he or she was looking for, say by keyword (e.g. smoke easement), would find all the cards under that keyword, and could then pull the physical documents from the binders using the assigned numbers on each card. Physical copies of the memos tended to disappear as people took them away to use them and forget to return them. Hence, a master copy was kept to replace the gaps that would appear in the binders over time. By 1983, abstracts on the index cards were typed into a word processor and the documents themselves were transferred onto microfiche.<sup>115</sup> Indeed, many of Wilson’s memos are still accessible as scanned PDF documents on the current Osler system, and Osler lawyers report that they continue to pop up when doing routine searches on the system.<sup>116</sup>

Lawyers were supposed to deposit copies of their research work into the system for indexing and archiving. However, it was difficult to get people to remember to give their memos to the system. Users of the system tended to be contributors to it, particularly younger lawyers who were more comfortable with newer technologies.<sup>117</sup> Research lawyers were well-represented as both users and contributors. As one of the indexing lawyers, Diane Snell, put it in 1983, “[t]he research group’s work is ... our motherlode.”<sup>118</sup>

## **A Research Lawyer at the Supreme Court of Canada**

If one were to ask oneself in the abstract “Where is the best place for an academically-oriented lawyer to be in the Canadian legal system?” the last place one

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<sup>115</sup> See Snell, *supra* note 99 at 7-9.

<sup>116</sup> Comment made by Laura Fric, Osler presentation (26 June 2008).

<sup>117</sup> Interview of Coombs, *supra* note 38.

<sup>118</sup> Snell, *supra* note 99 at 5.

would choose is probably a big, corporate commercial law firm in downtown Toronto. A university, yes; an appellate court like the Ontario Court of Appeal, yes; the Supreme Court of Canada, most certainly, yes. But Osler, Hoskin and Harcourt?

Wilson did much innovative and important work in her judgments on both the Ontario Court of Appeal and Supreme Court of Canada, as many of the essays in this collection demonstrate. The research-intensive approach that she developed during her long Osler years must have affected the way that she approached the thinking, research, and writing of her judgments.<sup>119</sup> Wilson was quite philosophical by orientation, which made many of her judgments lucid, readable, and compelling.<sup>120</sup> Yet, Wilson had a difficult time in the environment that one would have expected to suit her best: the Supreme Court of Canada. In part, the difficulty she experienced joining the bench of the Supreme Court had to do with leaving Toronto after many happy years spent there.<sup>121</sup> It seems to have also been related to the way the Court ran at the time.

Wilson never felt comfortable with the informal consensus-building around judgments, which she saw as inappropriate lobbying.<sup>122</sup> Wilson, an individualist in the way that she saw many issues and in the way that she operated, thought that the consensus-oriented approach produced a “[c]alculated ambiguity.”<sup>123</sup> She also felt excluded by informal discussions between the other justices and was in favour of

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<sup>119</sup> See Mary Jane Mossman’s piece in this collection for a discussion of how Wilson’s academic approach played out in some of Wilson’s judgments during her time at the Ontario Court of Appeal and the Supreme Court of Canada.

<sup>120</sup> See *e.g.* *Perka v. The Queen*, [1984] 2 S.C.R. 232 (for a Wilson concurrence that wrestles with Kant and Hegel).

<sup>121</sup> See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 127.

<sup>122</sup> See *ibid.* at 162-64.

<sup>123</sup> *Ibid.* at 164 (Wilson thought it was “far better to have a range of judgments offering options, including a dissent and a diverging concurrence if necessary, as long as each judgment was written with crystal clarity”).

implementing “set procedures or a clear protocol”<sup>124</sup> to address issues like when judges should comment on the various positions that were emerging in the decision-making process (were they required to wait for a written draft of the majority opinion?) and how were those responses to be given (must they be in writing; and if so would the memo be made available to everyone?). Wilson’s own preference for an “open process” effectuated through memo-writing stemmed from her days at Osler, when she worked primarily through memos.<sup>125</sup>

Wilson’s direct, one-on-one, research-intensive and memo-oriented style flourished in a large law-firm setting, where meticulous solitary work was of the utmost importance, at least for the sort of practice she had. However, the memo-writing strategy that had worked so well in private practice ran into a wall at the Supreme Court. Indeed, it seemed to be the one place where the simple “work hard” approach did not do the trick. Perhaps this was because the Supreme Court culture included a level of give and take that Wilson had not been required to incorporate into her working style before. There also seemed to be an issue of a lack of support and goodwill. With respect to the memo-writing protocol, for instance, there were good reasons for not adopting a strict formal system.<sup>126</sup> The fact that Wilson felt she needed one to be properly included in the collective deliberation process is quite a dramatic complaint about the collegiality of the group at that time.<sup>127</sup>

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<sup>124</sup> *Ibid.* at 165.

<sup>125</sup> See *ibid.* at 192.

<sup>126</sup> See *ibid.* at 163-64 (arguments against a rigid procedure include not wanting to increase “the deluge of paper” and that the preservation of informal discussion is an important way to prevent positions from hardening in the decision-making process).

<sup>127</sup> *Ibid.* See also Sandra Martin, “Bertha Wilson, 83” *Globe and Mail* (30 April 2007) (noting that Wilson was “not fully accepted by the other members of the court”).

Wilson felt excluded by the more informal decision-making processes, many of which seemed to take place over sports-related activities. This placed a female judge “with arthritis who does not play golf or squash or tennis and does not ski or attend hockey games at something of a disadvantage.”<sup>128</sup> The problem may also have been the particular personalities on the Court at that time. In particular, despite a reputation as “the great dissenter,” Chief Justice Laskin had come to discourage dissent on the Court after 1979.<sup>129</sup> Laskin had not supported Wilson’s candidacy, fearing in part that she would disrupt the unanimity on the court and maintaining that there were more qualified male candidates.<sup>130</sup> His attitudes could not have made for happy working conditions, at least for the two years until Brian Dickson became Chief Justice in 1984. Wilson retired a full seven years early when Dickson did in 1990.<sup>131</sup>

The section of the Canadian Bar Association Report on judges, which Wilson oversaw and wrote, included many of things that Wilson personally experienced. When first appointed, many women judges “were not made to feel welcome, that in many cases they were told that they had been appointed simply because they were women and that

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<sup>128</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at 153. See also at 257.

<sup>129</sup> See Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2005) at 433.

<sup>130</sup> See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 154; Girard, *ibid.* at 529; Edward Goldenberg, *The Way it Works: Inside Ottawa* (Toronto: McClelland & Stewart, 2006) at 89 (quoted by Martin, *supra* note 127).

<sup>131</sup> Anderson, *Judging Bertha Wilson*, *supra* note 3 at xvi. See also at 325-26 (elaborating reasons for departure, some financial and some personal, including the fact that Dickson had retired five months earlier and “[c]hange seemed, if anything, less likely with Dickson gone”). See also Martin, *supra* note 127, quoting Madame Justice Rosalie Abella of the Supreme Court of Canada, calling Wilson and Dickson “the Fred and Ginger of the Charter.” L’Heureux-Dubé publicly reported that Dickson wanted Wilson to replace him as Chief Justice, but she declined for health reasons. Dickson used to say that Wilson taught him everything he knew about human rights and the *Charter*. L’Heureux-Dubé also confirmed that the decision-making was very much a male club, from which she and Wilson felt excluded. For instance, they would not be invited to lunches where the other male judges would be agreeing to the majority and strategizing about that. Wilson spoke up about this on one occasion during conference, which caused Dickson to turn bright red. He was not a part of that exclusion. Remarks made by L’Heureux-Dubé, *supra* note 47.

there were male candidates ‘out there’ who would have been better appointees.”<sup>132</sup> Many had left a “collegial environment” and found that “[t]hey now had to start from scratch proving themselves all over again to a fresh group of sceptics.”<sup>133</sup> Wilson reported the comment of one defensive judge stating “No woman can do my job!”<sup>134</sup> And she wrote that “many women judges feel a tremendous sense of alienation where they are the only one or one of a very small number on their court. They have no real sense of belonging and are unable to discuss their situation with their previous colleagues at the Bar.”<sup>135</sup>

There is some irony in the fact that the intense academic style of Wilson’s memo-writing found greater support at Osler than at the high level appellate courts where one might have thought her way of working would be most welcome.

## Conclusion

It has been noted that Canadian law firms have been remarkably consistent in their “stubborn resistance to such innovations as democratic methods of firm governance, aggressive programs of client development, meritocratic hiring practices, and the adoption of new technology.”<sup>136</sup> However, this started to change in the 1970s when the boom in capital markets led to the demise of the “old family compact” and “an aggressive, transaction-oriented meritocracy” replaced the traditional nepotism.<sup>137</sup>

Wilson played an important role in this at Osler, as it moved away from internal

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<sup>132</sup> *Touchstones for Change*, *supra* note 66 at 192.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.* at 193.

<sup>135</sup> *Ibid.* at 194. See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 346-51 (for a discussion of the controversy surrounding this section of the report – Chief Justice Antonio Lamer wanted to know who the judges were who had made the complaints and Wilson refused to disclose the information as she had elicited it personally with guarantees of confidentiality). This section of the report contains pointed criticism of the Canadian Judicial Council, which must have upset Lamer as its head. See *Touchstones for Change*, *supra* note 66 at 198. See also the piece by Rosemary Cairns Way and Brett Dawson in this collection.

<sup>136</sup> Wilton, *supra* note 25 at 5.

<sup>137</sup> Cole, *supra* note 6 at 207 (quoting Christopher Portner), 214 (an informal “anti-nepotism rule” was in place by the 1970s).

autocratic rule towards more transparent and consensus-oriented law firm governance, as well as enhanced client services like the synopsis and legislation services, and the research department itself. She herself was an example of a greater scope given to meritocracy, and, as we have seen, she advocated strongly for the adoption of new technologies.

However, positive change was accompanied by much that was negative, particularly for women in the profession, who thanks to Wilson's example would now be more welcome than they had been. For example, the new, more aggressive order would see the rise of billable hours as the way to measure workplace performance, a male-model of what constitutes a dedicated associate, and a frenetic style that women with young children find difficult to keep pace with. Wilson herself had no children and an exceptionally supportive spouse.<sup>138</sup> Her professional coping strategy, "working three times harder than everyone else," was not one that all women could follow. Also, after the 1970s, many women would not be satisfied being relegated to the less glamorous aspects of law practice, and they would not feel as Wilson did about operating quietly behind the scenes. Why should they be forced to make lemonade from lemons?

Wilson's Osler period is important from the point of view of legal culture in Canada, specifically on the history of the development of research procedures and protocols at Canadian law firms. It is also an important part of appreciating the legal life of Bertha Wilson and the complex role her gender played in that life. Among other things, Wilson's founding of the research department was evidence of how she broke into

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<sup>138</sup> See Anderson, *Judging Bertha Wilson*, *supra* note 3 at 404, n. 29 (calling no children "a matter of sad happenstance rather than choice"). See also at 47, 131, 199 (in terms of domestic labour, Wilson's husband, John, did shopping and cooking, and Wilson did the house cleaning up to the time of her Supreme Court of Canada appointment. John ran the household once they moved to Ottawa).

an exclusive, powerful, all-male institution and successfully implemented her particular way of working with the law even if it was not necessarily a template for success for all women in the profession. Her approach found support and she institutionalized it in a way that effected lasting change on the structures of large law firms in Canada. The founding of the research department should therefore be seen as one of her most successful law reform projects.

The story of the development of the research department embodies two of the most dramatic and admirable things that we have come to associate with Wilson: creative perseverance in the face of gender discrimination, and an interest in implementing lasting change in the Canadian legal system. Her initiatives were a success in what was in many respects a hostile environment in part due to timing, as we have seen. Wilson stood on the cusp of a new, more unstable and aggressive transaction-oriented world characterized by increased specialization, all of which was a good fit with the research function. This new more meritocratic world order could fold a Bertha Wilson comfortably into its cloak. Yet, the success of the research department was also a function of her personality: her pragmatic style, relentlessly stubborn approach to all matters, and, as she put it, her dedication to the “little things.”<sup>139</sup>

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<sup>139</sup> Matyskiel & Lévesque, *supra* note 1 at 179.